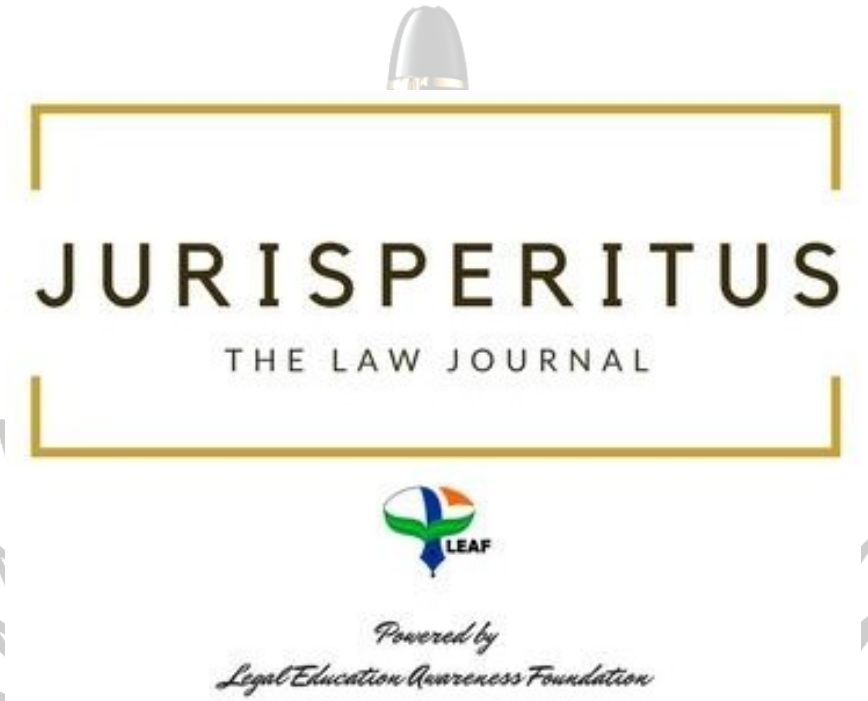


VOLUME 2 ISSUE IV

|| SEPTEMBER 2020 ||

Email:

editor@jurisperitus.co.in

Website:

www.jurisperitus.co.in

DISCLAIMER

EDITORIAL TEAM

Editor-in-Chief

ADV. SIDDHARTH DHAWAN
Core-Team Member || Legal Education Awareness Foundation
Phone Number + 91 9013078358
Email ID – editor@jurisperitus.co.in

Additional Editor -in-Chief

ADV. SOORAJ DEWAN
Founder || Legal Education Awareness Foundation
Phone Number + 91 9868629764
Email ID – soorajdewan@leaftoday.com

Editor

MR. RAM AVTAR
Senior General Manager || NEGD
Ministry of Electronics and Information Technology
Phone Number +91 9968285623
Email ID: r.dhawan@nic.in

SMT. BHARTHI KUKKAL
Principal || Kendriya Vidyalaya Sangathan, New Delhi
Ministry of Human Resource and Development
Phone Number + 91 9990822920
Email ID: kukkalbharthi@yahoo.com

MS. NIKHITA
Assistant Manager || Deloitte India
Phone Number +91 9654440728
Email ID: nidhawan@deloitte.com

MR. TAPAS BHARDWAJ
Member || Raindrops Foundation
Phone + 91 9958313047
Email ID: tapas08bhardwaj@gmail.com

ABOUT US

Jurisperitus: The Law Journal *is a non-annual journal incepted with an aim to provide a platform to the masses of our country and re-iterate the importance and multi-disciplinary approach of law.*

This journal is an initiative by Legal Education and Awareness Foundation, a registered Non-Governmental Organization, which aims at providing legal education and awareness to all parts of the country beyond any social and economic barriers.

We, at Jurisperitus believe in the principles of justice, morality and equity for all.

We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

INDEX

DEATH ROW PHENOMENON: REALITY BEHIND THE HIGH WALLS OF PRISON

-HARSHITA KAKKAR

ABSTRACT

In nations holding the death penalty, delay before execution is generally estimated in years. A significant reason for delay is the inmate's appeals to various councils. Unreasonable postponement, in any event, when brought about by the detainee, can frame the premise of human rights infringement. Under the lamentable states of death row, prisoners are breaking down mentally and physically. It has been more than two decades since the death row phenomenon entered the worldwide domain; there is still no recognition on what comprises the marvel. The non appearance of obvious lines leaves us uncertain of when death row detainment becomes unlawful. The aim of this paper is to bring into light how the death row phenomenon is getting rooted into the international human rights law and the consequences it has on the detainee's psychological and physical health. Also, this paper aims to establish delay as a ground for commutation of a sentence.

INTRODUCTION

Around half of the world population resides in countries that sustain capital punishment.[1] Capital punishment can be defined as when the government executes a person for committing capital offenses. These offenses vary around the world with every country having its own reasons to carry it out.

Currently, according to the report by Amnesty International 106 countries have abolished death penalty by the end of 2019 but the countries that still hold the practice can execute people for a variety of crimes which can be drug related offences, terrorism related acts, murder or changing ones religion.[2]

[1] Confronting capital punishment in Asia: human rights, politics and public opinion by roger hood and surya deva

[2] Amnesty international, death penalty, https://www.amnesty.org/en/what-we-do/death-penalty/

In countries retaining death penalty the delay prior to the execution is measured in years and can take up to decades.[3] The individuals convicted of capital offenses are isolated not only from the outside world but the prison community as well.

The treatment given to the detainees given capital punishment is a breach of human rights alongside the conditions they are kept in.[4] the idea of death row phenomenon conceptualizes this allegation. This idea can be depicted as the mental effect on the convicts under the shadow of execution that looms over them. A long time spent waiting for capital punishment under the effect of segregation and agonizing vulnerability of execution can result into disintegrating of detainee's mental and state of being, which can customarily prompt self-destructive propensities.

Death row marvel is remorseless, uncaring and debasing as it conflicts with the idea of human rights on the grounds that the conditions and disciplines that the detainees are exposed to makes the execution illegal as a result of their unforgiving and brutish nature. This marvel doesn't scrutinize the legitimateness of capital punishment yet it rather questions its tendency, conditions and the hour of defer that is conveys alongside it.

In recent times, with the advancement in the general public death penalty has scarcely been implemented and countless individuals who were prior exposed to death sentence have now been driven to life imprisonment yet it is the component of delay that causes them to go through years of waiting for their destiny to be chosen. Legitimate researchers, judges and therapists have bantered on the issue of death row phenomenon since the longest time. Because of the nonattendance of consistency there is an inquiry on what really comprises this phenomenon. It has left individuals dubious of when death row control becomes unlawful and in the event that it is conceivable to keep the death row detainees intellectually and physically stable without setting off the phenomenon.

The primary point of this paper is to show that the death row phenomenon is getting acknowledgement in worldwide law as an infringement of human rights and the mental and physical effects it has on the detainees; to bring into light if commutation of death sentence to life imprisonment on grounds of delay is satisfactory.

This paper is not concerned with the defend ability of capital punishment especially in the light that it is still legal yet it is restricted to the situation in the wake of condemning that is experienced by the detainees that are anticipating execution.

[3] The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts (Northeastern University Press, Boston, 1996)
[4] Soering v. United kingdom (1989)

DEFINITTION OF DEATH ROW PHENOMENON

There is no accord among researchers on the meaning of death row marvel it has started a few conversations which have distinguished two segments on which the phenomenon is commonly put together - the time went through with respect to death row by the detainees and the seriousness of the conditions that the detainees are presented to.[5]

A third part was included after research by numerous researchers - the mental impact that emerges from living waiting for capital punishment.[6] Creators like Amy Smith and David Sadoff gave it an independent significance and considered it as the death row syndrome.[7]

Sadoff had additionally underscored on the contrast between the death row phenomenon and death row syndrome. The death row disorder alludes to encountering mental impacts of the death row wonder, which thusly triggers the disorder.[8] Death row marvel was presented in the Soering case, 1989. In the succeeding years the terms death row wonder and death row disorder were utilized reciprocally. [9]

It was seen that the term death row syndrome was utilized instead of death row phenomenon and not at all like the outcome created by the death row marvel guarantees; the cases with the term death row disorder were not fruitful.

At present, the mental impacts have been perceived as the third part. Death row wonder can be inspected as the unforgiving, dehumanizing states of detainment; the period of time spent living under such conditions and its mental repercussion related with living waiting for capital punishment.

CONDITIONS OF DEATH ROW AND ITS DEBILITATING EFFECTS

It has been seen over some time that death row detainees are presented to harsh and slanderous conditions. Despite the fact that these conditions may be unmistakably starting from one jurisdiction to another but together these conditions can be summed up by high security,

[5] Human rights advocates, death row phenomenon violates human rights(2012) http://www.humanrightsadvocates.org/wp-content/uploads/2010/05/Death-Row-Phenomenon-2012.pdf
[6] Roger Hood and Carolyn Hoyle, The Death Penalty: A Worldwide Perspective (Oxford University Press, United Kingdom, 3rd ed, 2015) 203.
[7] Amy Smith, "Not 'Waiving' but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution" (2008) 17 Public Interest Law Journal
[8] David A. Sadoff, "International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon" (2008) 17 Tulane Journal of International and Comparative Law
[9] David Stewart, "The Torture Convention and The Reception of International Criminal Law within the United States" (1991) 15 Nova law Review; James M. Lenihant, "Soering's case: waiting for Godot - Cruel and Unusual Punishment?" (1992)

disconnection, and absence of assets, isolation, and absence of sanitation arrangements, physical and boisterous attacks.

All around Solitary confinement is one of the most widely recognized states of death row. Control of detainees in access of twenty two hours a day without important contact is known as solitary confinement. The mental impact caused by it can run much deeper than it can be characterized.

PSYCHOLOGICAL EFFECTS

Sharon Shalev concluded there are three fundamental factors that trigger the mental impact of isolation: social detachment, restricting movement and environmental input, and loss of authority over day by day life.[10] In her sourcebook on solitary confinement she detailed over the mental effects of solitary confinement which include:[11]

- Anxiety over impending death and panic attacks
- Social withdrawal; absence of emotions; clinical depression; lethargy
- Anger; rage; violence against others
- Cognitive disturbances; prominent memory slip
- Paranoia; schizophrenia
- Hallucinations; extreme touchiness to clamour and smell; derealisation

Studies have indicated that isolation can have genuine results on the neurological wellbeing. Detainees kept in isolation for quite a while have demonstrated profound and upsetting outcomes as a results of isolation for instance Robert King , a detainee kept in isolation for a long time shared his involvement with a meeting held by society for neuroscience in November 2018, he shared his experience of the progressions he saw in the manner his cerebrum worked, when he at last left his cell he saw that he experienced difficulty perceiving faces and different indications that indicated loss of ability to know east from west and increment for dread and uneasiness which is brought about by extraordinary action in the amygdala which happens in light of disconnection.[12]

PHYSICAL EFFECTS

[10] Sharon Shalev- A Sourcebook on Solitary Confinement (2008) http://solitaryconfinement.org/uploads/sourcebook_web.pdf

[11] Shalev, above n. 15

[12] https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement/

Numerous studies have shown that isolation doesn't just motivation mental scarring however it likewise has physical results which go past self destruction and self-harm. From health perspective these conditions can be called hazardous at it best.[13]

Studies led by neuroscientists have indicated that in outrageous instances of isolation the size of the hippocampus of the cerebrum diminishes, this mind area is identified with learning, memory, and spatial mindfulness, when the pressure of separation is supported it prompts loss of hippocampal pliancy, decline in the arrangement of new neurons which inevitably lead to failure in hippocampal function.[14]

As reported by King, the small cells that inmates are kept in are windowless and even though the inmates are entitled to one hour of physical activity daily they would sometimes get deprived because of the busy schedule of the prison which would lead to sensory deprivation contributing to health impairments, such as alterations in circadian rhythms.

Additionally, scientists have noticed that many diseases are amplified due to isolation and loneliness, including obesity, Alzheimer's, heart diseases, diabetes and even malignant growth.[15]

PROLONGED DELAY AND ITS REASONS

Prolonged delay refers to the time gap between the sentencing and the actual execution of the prisoner. Various nations occupy various measures of time to complete an execution for instance US takes somewhere in the range of 4 to 31 years to do an execution; detainees in Pakistan and India take 10-15 years on a normal, detainees in Nigeria have a normal hang time of 20 years for execution.

REASONS BEHIND PROLONGED DELAY

Prolonged delays are known to be case by three reasons:

- Delay caused by the flaw of the detainee
- Delay caused due to the prisoners legitimate appeal
- Delay brought about by the state

. The first reason for delay is the prisoner's unwillingness to accept his fate and even encourage delay even if it accounts for torture. These instincts for survival causes a prisoner to tolerate

[13] Older prisoners and the physical health effects of solitary confinement- Brie A. Williams
[14] Law and neuroscience- the case of solitary confinement –Jules Lobel and Huda Akil https://www.mitpressjournals.org/doi/pdf/10.1162/daed_a_00520
[15], "The Lethality of Loneliness" (2013) The New Republic- Judith Shulevitz https://newrepublic.com/article/113176/science-loneliness-how-isolation-can-kill-you

otherwise intolerable delays because it is a basic human instinct to live or struggle for life than deal with death.

The second purpose behind the postponement is mainly brought about by the expanded laws to safeguard an individual's right to appeal. Increase in the appeals to human rights tribunals, has prolonged the time to dispose of a case Prisoners initiate what seem to be ceaseless challenges to conviction and sentence. These requests are directed towards the domestic courts that are responsible towards the appeals and judicial review and constitutional litigation. When these fail the prisoners ask for pardon or commutation of sentence.[16]

The third cause of delay is easy to deal with because if the state is causing delay then it should be held responsible for it. The authorities of the state are increasingly wary towards their way to deal with execution. To keep away from obligation the authorities grant stay or send the case for additional consideration on the execution.

Globally a long period of detention has become a practice on death row. Due to an entire range of procedures prescribed by the international and domestic law it has become impossible to complete the process in an acceptable time frame.

DEATH ROW PHENOMENON IN INTERNATIONAL HUMAN RIGHTS LAW

In numerous pieces of the world capital punishment is considered as a human rights infringement Capital punishment prevents a person from claiming the most essential human right; it is known to abuse the most central standard of the human rights law-RIGHT TO LIFE.[17]

In addition to the violation of right to life other basic human rights are often breach as well. Capital punishment is disregarding the rule of non-segregation. The human rights law denies unfeeling, debasing, and obtuse treatment with the adjustment in time there has been an understanding over the way that the phenomenon penetrates this guideline of human rights law. Reviewing capital punishment from the human rights point of view highlights not just the effect of denying the entrance to the most essential rights yet in addition clarifies that the main answer for capital punishment is to forever stopped it. A human rights based technique doesn't help contradicting the precision, system, or reasonableness of an execution. It gives a definite standard, which is to express that death penalty isn't right!

[16] W. Schabas, the death penalty as cruel treatment and torture (1996)

[17] The death penalty is a human rights violation: an examination of death penalty in the U.S from a human rights perspective, centre for constitutional rights https://ccrjustice.org/files/CCR%20Death%20Penalty%20Factsheet.pdf

REASONS TO ABOLISH DEATH PENALTY

- **It does not deter a crime**- countries who execute usually cite the reason for death penalty as to deter people from committing the crime again. There is no proof that capital punishment is any more viable in lessening the crime than life imprisonment.
- **It is irreversible and slip-up can happen Execution is a conclusive, permanent discipline:** the threat of executing a fair individual can never be cleared out. In USA since 1973 numerous detainees have been executed and afterward discharged after they have been demonstrated guiltless others have been executed despite authentic inquiries concerning their fault.
- **It is biased**: The heaviness of capital punishment is disproportionally conveyed by those with people from less fortunate backgrounds or having a racial, ethnic or religious minority. This incorporates having restricted access to lawful portrayal, for instance, or being at more prominent drawback in their experience of the criminal justice system
- **It is utilized as a political device-** the decision specialists of certain nations use capital punishment to rebuff their political adversaries like Iran and Sudan.
- **Biased legal framework -** it was seen by and large that individuals were sentenced in out of line preliminaries, on the premise scanty lawful portrayal. In many countries capital punishments are forced as the obligatory discipline for specific offenses, implying that the judges can't think about the conditions of the crime or of the defendant before condemning.[18]

TORTURE AND INTERNATIONAL LAW

The Convention against Torture (CAT) defines torture as any act by which severe pain or suffering, physical or mental, inflicted on a person for such purpose as obtaining information or a confession from him or a third person , punishing him for an act he or another has committed or is suspected of committing , or intimidating or coercing him or a third party, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or the other person acting in an official capacity.[19]

The CAT Convention has identified some elements that qualify as an act of torture:

[18] Above n. 3

[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT Convention"), Article 1

- Pain and enduring must be dispensed purposefully on the person in question.[20]
- Involvement of open authorities or assimilated.[21]
- Any Explicit reason, for example, to acquire data, as discipline, or to scare, or under any conditions based on terrorizing or separation.[22]
- Nature of the demonstration, which includes both act and oversight that exact both agony and enduring, might be physical or mental.[23]

No individual ought to be presented to a coldblooded, uncaring, or debasing treatment or discipline. This kind of treatment is an absolute and non- derogatory right.[24] The forbiddance of coldblooded, heartless, or corrupting discipline is actualized in the UN framework through the human rights bodies like HRC, the panel against torment.

The privilege not to be liable to torment and heartless treatment is gotten from the various wellsprings of law like ICCPR, ECHR, or residential constitutions. Despite the fact that the laws are distinctive they bolster a similar idea to shield individual from undue and pointless torment.[25]

CONTRASTING APPROACHES TO THE DEATH ROW PHENOMENON

Various courts and councils have viewpoints to consider death row phenomenon as an infringement of the right to not be tormented. The idea was presented in the landmark Soering case. This case set principles for different courts to follow

In the case Soering had petitioned the European commission and the human rights court. Soering made a claim under Article 3, 6, 13 of the European convention for the protection of human rights and fundamental freedom. Soering's claim was ground breaking because he did not seek to claim that the death penalty was "inhumane or degrading treatment of punishment". Rather, he pursued the way that Article 3 would be damaged because of the new conditions of his case.

---

[20] Office of the United Nations High Commissioner for Human Rights, Interpretation of torture in the light of the practice and jurisprudence of international bodies (2011) https://repository.gchumanrights.org/bitstream/handle/20.500.11825/174/Hempel.pdf?sequence=1&isAllowed=y

[21] Above n. 21

[22] Above n.21

[23] Above n.21

[24] Universal Declaration of Human Rights, Article 5; Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva Convention Relative to the Treatment of Prisoners of War; ICCPR, Article 7; ECHR, Article 3.

[25] Bojosi, above n.21

The Soering case has not been intensely scrutinized on the point that the ECtHR's locale covers the nations which have all relinquished the utilization of the death penalty. The ECtHR was driven by a profound hostility to capital punishment.[26]

The Privy Committee acknowledged the death row marvel without precedent for the Pratt and Morgan case.[27] It permitted 'delay' to be the fundamental and the particular factor during its examination.[28] This methodology has been embraced by numerous nations, as it is considered as increasingly dynamic and comprehension.

Death row marvel banters on an assortment of issues, if delay in itself represents a human rights infringement or if any extra factors are essential. It is critical to comprehend the thought that court provides for every component of the wonder like postponement waiting for capital punishment, wellbeing impacts, and unforgiving conditions that the detainees are exposed to. This can additionally help in investigating whether a single component can be adequate to display infringement.

COMMUTATION OF DEATH PENALTY

Commutation of a death penalty is the process of substituting the sentence provided by a competent authority with a lesser or a lighter sentence. It is the governor or the president of a state that has the absolute authority to exercise their executive power for granting pardon after taking into consideration the reasons and circumstances that may not be fit for cognition before the court. The convicts can seek commutation of sentence on grounds of delay in the rejection of their mercy. In the case of M N Das,[29] it was held that 12 years waiting for capital punishment could be considered as unjustified deferral and a ground for the driving his capital punishment.

On January 21, 2014 in the case of Shatrughan Chauhan[30], the seat concluded that delay in execution can be the sole ground for replacement of capital punishments. For his situation the court managed twelve diverse writ petitions out of which one was a singular request recorded by the people association for just rights which approached to set rules for managing comparable sort of leniency petitions, another petition was to permit commutation exclusively on the ground of psychological sickness.

[26] Ibid.
[27] Pratt and Morgan v The Attorney General for Jamaica and another (Jamaica) [1993]
[28] Above n. 34
[29] Mahendra Nath Das v. Union of India, (2013) 6 SCC 253
[30] Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1

Inordinate delay in the decision to reject the mercy petition filed by the petitioner offended the principles of the constitution, as it lead to inhumane and degrading treatment. Also, courts are bound to support the right to a speedy trial, which means that they should commute the sentences that are delayed. Such delay in execution can be agonizing and can leave the petitioner mentally unstable.

DELAY- A GROUND FOR COMMUTATION

In the case of Triveniben,[31]a rule was put down that delay must be seen in light of all circumstances to constitute a ground for commutation of sentences. The court has also put restrictions in some case as they are supposed to be treated differently like in the case of Devendra Pal Bhullar, the said case was a terror case so, it could not be treated in the same way as others and it created an exception to the Triveniben rule. It was said that such a rule would not be applicable to cases where the individual was convicted under the terrorist and disruptive activities (prevention) Act, 1989 because cases involving terror activities were more susceptible to culpability than other offenses.

The court in such cases include the weight of verification the candidate to show that the psychological or physical disease was of such degree that it outfits capital punishment as savage, insensitive, and debasing, consequently, making it non-executable. For Bhullar's situation, his family documented a therapeutic request under the watchful eye of the Apex Court. Further, the court requested Bhullar be therapeutically analyzed to decide his state of mind. Thus, considering his clinical report and the announcement in Shatrughan Chauhan, the court drove his capital punishment into life detainment.

During the conclusion of the judgement in Shatrughan Chauhan's case, the court listed some guidelines for implementation in identical cases of the existing procedure:[32]

- Under Article 21, solitary confinement prior to rejection of mercy petition is unconstitutional
- The self imposed guidelines of the union government should be implemented uniformly without any delay
- Legal aid has to provided as a matter of right, and the nearest legal aid clinic, the prisoner and family should be informed after the rejection of the mercy petition
- A minimum 14 days notice should be provided to the convict before execution

[31] Triveniben v. State of Gujarat, (1989) 1 SCC 678
[32] Shatrughan chauhan v. Union of india, (2014) 3 SCC 1

- Regular mental health evaluation of death row convicts should be undertaken
- All documents pertaining to the case should be made available to the convict
- A meeting between the convict and family has to be ensured before the execution
- And, there should be compulsory post mortem after the execution.

The courts refuse to provide a specific time after which delay would be rendered necessary, and held that each case would be judged on its own terms. Thus, the court would be considered as a judging factor in order to decide if death penalty should be awarded in a case or not. The courts have interpreted Article 21's guarantee of the right to life includes treating all individuals with dignity. The judgement is a reminder of the fact that humanity is the foundation of the constitution, and regardless of the crime that has been committed, every human being has the right to be treated with dignity.

CONCLUSION

Studies in relation to the psychological and physical health of death row prisoners paint a ruthless picture of suffering. It emerges as an atmosphere where these individuals feel isolated, defenceless and futile in front of their fate that they are unable to alter. Basic human instinct tell us to fight for survival and cling onto the most minute opportunity of life and this hope is the reason for an individual to file appeals that go on for years even if it means enduring the torture that accompanies it.

Prolonged delays, repressive conditions of solitary confinement and torturous time spent awaiting one's death contradict the international standard prohibiting cruel, inhumane and degrading treatment. In order to prevent such torture, death row phenomenon has gained recognition. Even so, after gaining worldwide recognition there is a lack of clarity as to what actually constitutes as the death row phenomenon and when the detention becomes unacceptable because of the different approaches amongst courts.

The indispensible principle is that "a death row prisoner is sentenced to execution, not to lengthy periods of harsh treatment, followed by execution". It should not at any point be forgotten that prisoners are human beings and are entitled to respect and dignity regardless of the crime they have committed.

In conclusion, we can say that death row phenomenon constitutes to human rights violation. Such a doctrine has earned a position in any states legal system which uses capital punishment. The exact nature of the doctrine differs amongst courts but the postulation remains the same.

The state should not be allowed to keep the death row prisoners suffering for years due to their reasons. They should either do it immediately or not at all.

UCC: AN ANALYSIS ON THE HISTORY OF ARTICLE 44

- SHARAD AGNIHOTRI

ABSTRACT

India is a land of diversities. The major religions of India are Hinduism (majority religion), Islam (largest minority religion), Sikhism, Christianity, Buddhism, Jainism, Zoroastrianism, and Judaism. Even under so many active prevalent religions, every citizen of India has got a right to practice her or her own religion if he or she desires, that's the liberty given to everyone residing within the territory of India, under fundamental rights.

A very practical approach in sociology as that whenever there is a society, there will be conflicts, such is the human nature, conflicts are unavoidable, however, conflicts arise due to issues amongst people if we try and eliminate the issue some control could be brought between the haywire condition where conflicts of issues arise.

Article 44 'might' be that one remedy which could solve certain issues pertaining to conflicts happening in personal laws. Laws which have been passing on from centuries should be eliminated and struck off if they are not in consonance with the present society. In today's world of equality and liberty, old personal laws should not be dwelled into which primarily infringe women's rights and support patriarchy, until unless such laws are active and running the condition of any country no matter how progressive it becomes will never rise at a rapid rate, and India needs to rise to be self- sustainable looking at the population increase and many factors. In this paper, discussions upon the history of UCC has been done, along with the certain 'personal laws' which are hampering the very idea of equality, and the disadvantages and advantages relating to the uniform civil code. This research paper contains certain needs why UCC should be implemented and why it should not be there in India.

KEYWORDS: *UCC, personal laws, women's rights, equality, religion, changes in society.*

INTRODUCTION

India is a nation which comprises of many religions like Islam, Hinduism, Christianity, Sikhism, Jainism and many more, including all these religions under roof India is secular in

nature, the word *secular* means that there is no particular religion of the nation. India does not have a single monogamous religion for its people.

'Personal Laws' are one of the unique and sometimes oppressive components of the Indian legal system. They are laws which govern people belonging to a particular religion. They originate and owe their allegiance and continuance to religious practices and customs. These personal laws often end up being an amalgamation of discriminations and inequalities, still they continue to be in force.

Their existence might have been justified in the pre-constitutional era, but after the Constitution came into force their continuance in the light of constitutional mandate is totally illegal. The amount of discrimination they constitute within itself is a sham on the Indian Constitution and fraud, which advocates liberty and freedom as its tenets.

Article 25[33]and 26[34]of the Indian Constitution promises the right of Indian citizens to practice, profess, and propagate any religion they want.

In a country like India religion plays a crucial role, it becomes like a tool for people to function themselves daily, it imbibes a sense of responsibility and it has been continuing to do so for the past thousands of years. Religion was there so that there should be discipline present however one should not confuse with religion into law. Law is a kind of social order it is present there in the society to provide us with justice and a safe environment, religion is there to guide us through the way of life, if we follow it. Mixing both these objects would result in haywire as there shall be no equilibrium left to prevail and things would always lean on an end of the society.

In India different religions govern their people through their own law, which are called as *personal laws*, Hindus, Sikhs, Jains, and Buddhists are governed under Hindu Marriage Act of 1956, which govern the marriage, maintenance, and divorce respectively. Likewise, the Christians have their own particular law and Muslims have their own Islamic Law to govern them. All the personal laws are pretty utopian and peaceful no doubt about that, but there are always some shortcomings no matter how perfect tangible or intangible an object is.

The problem is that all personal laws belonging to all the various religious sects are different which tend to create all the more problems like inequality, for example, rights of the women are often suppressed under various personal laws, to tackle this problem of differences amongst

[33]**Freedom of conscience and free profession, practice and propagation of religion**-

(1) Subject to public order, morality, and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience, and the right to freely profess, practice and propagate religion.

[34]**Freedom to manage religious affairs, subject to public order, morality and health**

religions, Dr. B.R. Ambedkar since time immemorial had wanted a Uniform Code, the inspiration behind it was probably the Western cultures, where such a code prevailed much before it was introduced in India.

The Law Makers have always found an excuse to avoid legislating on 'personal laws' to bring them in consonance with the Constitution, for various reasons, additionally to this dystopia of judicial activism, the judiciary held that "personal laws cannot be challenged as being violative of the fundamental rights"

Because of huge assortments of and religion and social pluralism our nation is enriched with a Uniform Civil Code was deferred off by different individuals from the Constituent Assembly; discussing that usage of Uniform Civil Court will encroachment the privilege of opportunity of religion and option to oversee strict issue given under article 25 and 26 of the Constitution of India separately.

The Uniform Civil Code in this manner was left to be actualized by the administration later on and was included under Part - IV of the Constitution as one of theDirective Principles of State Policy[35]

PERSONAL LAWS

Every religious sect has got its own *personal law*. They are the laws which a person either chooses by conversion[36]or if a particular person irrespective of his sex is born into a family that professes that particular religion or not. However, Personal Laws have always been leaning upon patriarchy, the female society has always been considered as inferior to men since time immemorial. There was inequality in grounds of succession, inheritance. Women were the first to ask for the common civil code to avoid such irrational inequalities without any reasonable grounds.

Presence of different religions call for different varied personal laws for the Hindus, Muslims, Sikhs, Christians, Paris, Jews, for example maintenance laws[37] are different for Hindus and Muslims, because all their matters relating to birth, marriage, adoption, inheritance and, death is dealt on by the personal laws.

[35] DPSP are the rules which the state has to keep in consonance while making and enacting laws, they are enshrined under part IV of the Indian Constitution.

[36] Changing his or her religion by adopting a new religious order

[37] Section 125 of the Code of Criminal Procedure deals with maintenance laws in India, defining it and ordering the husband to pay maintenance to their wives, children, and parents if they are unable to maintain themselves

The personal laws in India are in compliance with the religion of the people. With numerous religions practiced there are different laws which govern them accordingly.

HISTORY OF PERSONAL LAWS IN INDIA

Indian society is the inheritor of three distinct legal systems, Hindu, Muslim, and British.[38] The individual laws of Hindus and Muslims discover their sources and authority in their antiquated writings. Since old time religion controlled each part of human life both individual and open. Religion was the directing power behind all issues including individual issues just as open like wrongdoing, proof, exchange and business. Religion resembled the turn which held the general public together.

The origination of personal laws also lies in different religions. Religion played a very important role in regulating the affairs of the people.

However, as time changed there were a lot of changes in these laws which were not in consonance with the present law, although many areas of Hindu and Muslim Law are still unaffected even after centuries have passed on.

A question may spur up as to why did the British, who ruled India for two centuries and gave us the Indian Penal Code of 1860, not promulgate a similar civil code, which was universal to all?

The answer lies in India's mindboggling cultural diversity, the British quickly discovered that the justice system they had inherited from the Mughals was quite efficient.

This system relied upon religious laws, mainly Hindu and Muslim, to settle family matters. Accordingly, the British undertook a massive project to translate Hindu and Muslim religious texts into English. These translations provided the bases on which judges delivered justice, all this was done upon their ease and comfort and the thing to really ponder on is whether our nation still relies on this ancient system of prehistoric India, has conservatism been this deeply taken birth in the womb of our legal system?

Furthermore, it would not be wrong to say that the British legal project thus was fundamentally conservative, invested in maintaining the existing social order so that their commercial interests were protected.

It was during India's patriot development, which had a particularly dynamic pushed, that the possibility of a UCC picked up energy as an autonomous India's proverb. The Constituent Assembly discussed the issue tattered, however the most extreme it could accomplish was to

[38] D.K. Srivastava, *Religious Freedom In India, p 213 (1982)*

list a UCC among the Directive Principles of State Policy. Since nothing in those mandate standards is justiciable, the issue has not pushed an inch ahead since.

India's pioneers were confronted with two potential courses forward after 1947: change and systematize existing individual laws, or, draft a model UCC to be discussed and sanctioned. They picked the first and the outcomes are before us. It was in Nehru's first bureau itself that the thought was proposed. Given the way that in spite of destroying Hindu-Muslim uproars a great many Muslims had liked to remain in Hindu-dominant part India, it was thought impulsive to mess with their own law and further compromise their feeling of personality. Both Gandhi and Nehru upheld this thought.

The subsequent example was the point at which the Rajiv Gandhi government passed the Muslim Women (Protection of Rights on Divorce) Act, 1986. Although Gandhi is reprimanded by both secularist and Right inclining powers, if deciphered in equitable terms, it was a dynamic move. The ongoing entry of the Muslim Women (Protection of Rights on Marriage) Act, 2019, signals the third occurrence.

PERSONAL LAWS IN HINDUISM

The basic principles of Hindu religion and law are found in the 'Vedas' or texts which are said to be divinely inspired.

Fundamental standards of Hindu law were drawn from Vedas and Puranas. Stories like Ramayana and Mahabharata and Bhagwat Gita were good origins. Manu was acknowledged as the primary lawgiver and Manu Smriti[39] as the principal law book. In antiquated India, rulers didn't meddle in the individual laws of the individuals. Nearby traditions and conventions were a piece of the legitimate frameworks.

In old Hindu society, Hindu sages were the pioneers of the general public and whatever rules they set down framed the premise on which the general public around then was shaped and it was passed down from age to age.

There were the *Shrutis* and *Smritis,* which formed the fundamentals of Hindu Law. It could be inferred that Hindu Law was based on individual morality.

[39] The code of Manu is divided into twelve chapters, eight of which state rules on various subjects of law relating to civil and criminal law. Other chapters deal with religious sacraments and prescribe moral rules

PERSONAL LAWS IN ISLAM

Muslim jurisprudence furnishes us with an example of complete unison of religion and law. In Islam, says James Bryce, 'Law is Religion and Religion is Law', both being content in the divine revelation.

The word Islam is derived from the Arabic root 'SLM', which means, peace, purity, obedience, and submission among other things. In the religious sense, the word Islam means submission to the will of God and obedience to his law. Only through submission to the will of **God** and by his obedience to **his law** can one attain peace and purity[40]*Qur'an* consists of very words of God revealed to Prophet Mohammad. The *Qur'an* is in the form of addresses which were revealed by God on various occasions. The Koran did set down basic standards of human conduct, but it did not provide with a detailed coded law.

Islamic Law from the very beginning had a well-defined line of demarcation between

- Islamic Public Law
- Islamic Private Law

Under this criminal law and public administration was covered under Public Law while marriage, succession, family relations were put under the second category of Private Law.

Sharia then became an integral part of the Islamic religion. Sharia comes from the Koran, which the Muslims believe to be the actual word of their god, *Allah.* Sharia also stems from Prophet Mohammad's teachings and interpretations of those teachings by certain Muslim legal scholars.

From that time, the Sharia has been continued to be reinterpreted and adapted to changing circumstances and new issues.

During Muslim rule, Muslims were governed by their own laws, they were usually bound by Koran and Islamic law.

BRITISH RULE

The British laid over their dominant hegemony throughout India in the year 1757, they completely altered the criminal law and paved way for their own system of governance, but they continued with the Muslim Pattern of Judicial Administration[41]

Later as time marched on, the British did not directly interfere in the personal laws of Hindus and Muslims, however, they considerably influenced the growth of these laws.

[40] Hammudah Adalati, *Islam in Focus,* p. *75 (*1975)
[41] MP Jain *Indian Legal History*

Before the advent of the British judicial system, the Hindu Law was developed by commentaries and digests written by Hindu jurists. It is they who interpreted the scriptural law. But with the growth of case laws, this source began to dry up in Hindu Law.

In Muslim Law, certain misleading decisions were given by the English judges. In the case of *Abul Fatah V.Rassomoyadhar Chaudhary*[42], the decision was contrary to the principles of Islamic Law related to Family Waqfs. This led to the establishment of the Mussalman Waqfs Validating Act 1913, to restore the status quo, clearly indicating the unhappiness of Muslim people, for the British in interfering with their law.

The other way English tried to introduce notions in Hindu, Muslim, personal laws by using the so-called concept of 'justice, equity, and good conscience'. This maxim was followed in English Law, in the course of time it also came to be associated and applicable in the Indian context as well.

Innovating Actshad the support of the Hindu community, but conservatives and orthodox Hindus weaved these innovations as encroaching upon their religious practices.

There were several factors responsible for the shift towards British policy of neutrality towards Hindu and Muslim Law, like their desire to remove antiquated practices from religion, improve the condition of women, and to achieve uniformity in the law.

An attempt was made to codify the personal laws by the Britishers during their last years. First Law Commission was appointed in 1834 but some religious enactments could be made around 1860s such as Marriage Dissolution Act,1866 and Indian Divorce Act,1869.

For Muslims on the suggestion of Sir Syed Ahmad Khan, Britishers enacted Kazis Act 1881 for appointing Kazis. Several other laws were also enforced.

The whole history of personal laws proves that they were influenced over the change of time to some extent and Britishers did introduce some changes but they left the personal laws untouched.

PRESENT SCENARIOS

Being a secular country India consists of people having constitutional rights to follow any religion they so forth desire. This gives rise to freedom to choose and practise their religion, which is a positive approach, and is a guaranteed fundamental right under Article 25 of the Constitution, it is one of the most complex of frameworks, to have so many stringent religions under one roof, and that is the beauty of the land of mysteries that it is indeed able to inculcate

[42] (1894) 22. IA, 76.

so many sects under its roof, which personally according to the author is a task, no land elsewhere can achieve.

There are various personal laws that lay down marriage laws in India:-

HINDU MARRIAGE ACT, 1955

Under the Hindu marriage laws, there are certain conditions that have to be complied with before marriage is valid in India:

- *The persons getting married must be unmarried and must not have a living spouse from their previous marriage.*
- *The legal age for a woman is 18 years and for a man is 21 years.*
- *The Sanity of mind is necessary for both the parties and they must be capable to give their consent to the marriage freely.*
- *The persons getting married must be mentally fit for the marriage i.e. they must not be suffering from any mental illness.*
- *Both the bride and groom should not be 'sapindas' of each other.*

SPECIAL MARRIAGE ACT, 1954

The special marriage laws are applicable to citizens of India irrespective of their religion, caste or culture. Under provisions of the Act, people from a different religion, caste or community are allowed to get married, provided certain conditions are met:

- *Marriage registration in India is compulsory to solemnize a marriage under this Act. A family lawyer can be hired to complete marriage registration in India.*
- *The age of both bride and groom must be 18 and 21 years respectively.*
- *Both of them must be of sound mind.*
- *Both the bride and groom cannot share common ancestors or be blood relatives. In accordance with the re are 37 relations forbidden, in which no wedding can be performed between them.*

THE INDIAN CHRISTIAN MARRIAGE ACT, 1872

As per the Act, the solemnization of the wedding takes place in the presence of priests, clergymen or ministers in a church and as per the defined regulations of Indian Christians

community. The conditions needed to be fulfilled for a valid marriage under Christian marriage laws are:

- *The age of bridegroom and bride should be 21 years and 18 years respectively.*
- *Both bride and groom must give their consent voluntarily and under no compulsion from anyone.*
- *Both the parties to the marriage should not have an existing partner from any former marriage at the time of marriage.*
- *Both parties to the marriage must be sane.*
- *The marriage is required to be performed before the presence of at least 2 trusted witnesses and before a registrar of marriage, who has the license and authority to register a marriage and issue a marriage certificate in India.*

MARRIAGE REGISTRATION IN INDIA

Marriage registration gives legal validity to the marriage of 2 persons. A marriage certificate also acts as legal proof of marriage in case of any dispute between the spouses in the future. A family lawyer can apply for marriage registration in the state where the spouses reside.

Here's a list of the various marriage and divorce laws in the country

- Indian Divorce Act, 1869
- The Convert's Marriage Dissolution Act, 1866.
- Kazi's Act, 1880
- The Child Marriage Restraint Act,1929
- Foreign Marriage Act, 1969
- The Muslim Women(Protection Off Divorce) Act, 1986
- The Parsi Marriage and Divorce Act, 1936
- Indian Succession Act, 1925.

Marriage in India is a sacred institution our country has acts covering all forms of marriages in India. UCC aims to establish a single law that would govern all the citizens without hurting their religious sentiments, and all other Acts and Laws governing marriage become void.

CODE OF CRIMINAL PROCEDURE

Section 125[43]Code of Criminal Procedure, 1973 imposes an obligation on the husband to maintain his wife, even if they are not living together or are divorced if however, she is not able to maintain herself.

This would be an example of a uniform law applicable to all, however as discussed many times wherever there exists so many diverse cultures problems are tend to arise, in this scenario regarding Muslim men following this provision.

In the much-debated case of Mohd. Ahmed Khan V. Shah Bano Begum[44] the apex court said that section 125 of the CrPC, 1973 is also applicable to the Muslims and that even a Muslim husband is liable to maintain his divorced wife after the iddat period. Due to political controversy, however, the parliament passed the Muslim Women (Protection Of Rights of Divorce) Act, 1986 to overrule the judgment of 1986.

This resulted in that Muslim men are not liable to maintain their divorced wives beyond the iddat period, unless however 'both' the spouses submit to the court at the appropriate time that they would prefer to be governed under the criminal procedure code.

The above condition imposed due to this Act is like having a provision that is equal for all but not exercising it for the sake of protection of personal law and not giving justice to a woman who is suffering under the given personal law.

However, the judiciary took the initiative to protect the interest of Muslim women and to safeguard their rights, especially divorced Muslim women to maintain an adequate standard of living and to a life of dignity. The Supreme Court in the case of *Daniel Latifi*[45] settles the law in favor of the divorced Muslim wife and vests her with a 'constitutional right' to livelihood through maintenance, which was earlier an issue in the above- mentioned case of Shah Bano.

Another case where a Hindu woman was put into a state of mental agony where her Hindu husband had converted his religion to Islam, thereby solemnizing his second marriage, as Islamic law recognizes second marriages this was the case of *Sarla Mudgal V. Union of India*[46]. The court in this instant case held that a Hindu marriage can only be dissolved under the grounds laid down in the Hindu Marriage Act, 1955. Conversion to Islam and marrying again won't dissolve the first marriage under the given act, and the second marriage was considered

[43]Order for maintenance of wives, children, and parents
[44] 1985 SCR 3 (844)
[45] Civil 868 of 1986
[46] AIR 1995 SC 153

void and unlawful and punishable under the offense of bigamy under section 494[47] of the Indian Penal Code, 1860.

Justice Kuldip Singh reiterated the need for the Parliament to frame a Uniform Civil Code, which would help the cause of national integration by removing contradictions based on ideologies because personal laws were clearly deteriorating the condition of women sector as evident in Sarla Mudgal's case.

Maintenance can be interpreted as a means to live a dignified life without having to compromise in the standard of living.

IMPORTANCE OF UCC

Uniform Civil Code has been discussed in brief in this paper, however, after going through all the other matter, the perpetual question lingers what is the importance of uniform civil code in India?

The most fundamental of all justifications is that if UCC is implemented in India it shall promote a spirit of nationalism rather than promoting a religion be it the majority religion or minority. Indian political system has turned into a dance of religious manifestos rather sustainable development, the focus is never on the growth of the economy but to fulfill certain religious needs and wants. Political Parties are not to be blamed entirely for this, because they make their manifestos according to the people. It's an understood principle that practicing one's religion might be an important part of India's democracy but let's not deviate from the real concern of progression.

The apex court emphasized that steps had to be initiated to enact a uniform civil code as envisaged under Article 44. Reviewing the various laws prevailing in the area of marriage in India, the Supreme Court in *Ms. Jorden Diengdeh V. SS Chopra*[48]

"The law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has come has come now for a complete reform of law of marriage and make uniform law applicable to all people irrespective of religion or caste…. We suggest that the time has come for intervention of the legislature in these matters to provide for a uniform code of marriage and divorce"

[47]Marrying again during lifetime of husband or wife.—Whoever, having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[48] AIR 1985 SC 934, 940 : (1985) 3 SCC 62.

In another case, *Mohd Ahmed Khan V. Shah Bano Begum*[49], the Supreme Court has ruled that a Muslim husband is liable to pay maintenance to the wife, beyond the Iddat Period. The court has regretted that the uniform code has remained a "dead letter" as there is "no evidence of any official activity for framing a common civil code for the country". The court has emphasised: " A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies".

The Court appreciates the difficulties involved in bringing persons of different faiths on a common platform, but, nevertheless, the court went on to state that " a beginning has to be made if the Constitution is to have any meaning".

In the absence of such code, and the inaction of the legislatures to reform any personal laws, the role of the law reformer has to be assumed by the Courts themselves, because "it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable".

In a public interest litigation[50] the Supreme Court was invited to declare certain aspects of Muslim Personal Law as void, example polygamy etc as being void under Article 14, and 15. But the court refused to do so saying that the issues raised were fit to be dealt with by the legislature and not the courts.

There is no general matrimonial law in India. In the instant case, the court ruled that the second marriage of a Hindu husband after his conversion to Islam would be a void marriage in terms of section 494, IPC there have been many such cases where Hindus have converted to Islam only to escape the consequence of bigamy. It was in this context that the Court pleaded for a Uniform Civil Code "for the protection of the oppressed and promotion of national unity and solidarity"[51]

People misinterpret the concept of Uniform Civil Code all the time, it won't limit the freedom of people to exercise their religion that is a fundamental right under article 25 and 26, which can never be infringed, but it means every person shall be treated the same. There are certain irregularities in personal laws a code which is uniform and equal for all shall strive to remove it.

Laws regarding family, inheritance, land, marriage shall be equal for all that should be equality Condition of women in India is deteriorating, mostly due to the presence of personal laws, our society is extremely patriarchal and misogynistic, by allowing religious rules to govern the personal life we are condemning women to subjugation and mistreatment. UCC would help to

[49] *supra*
[50] Ahemdabad Women Action Group V UOI, AIR 1997 SC 3614 : (1997) 3 SCC 573
[51] *Lily Thomas V. UOI (2000) 6 SCC 224*

change these old customs and practices giving a progressive result to the society, by giving equal rights to women in every aspect.

Vote Bank politics in India shall cease, if all religions are covered under the same laws, there shall be nothing much to offer to minorities in exchange of their vote, a prevailing uniform civil code's absence is detrimental to democracy which should change.

In a country where parties are standing on the basis of their propagandas and goals to be achieved, it sounds absurd even to a foreign person, if that particular propaganda is based on the personal religions, the debate about this is wide and it is even futile to write or mention about it, but it is also pertinent to be pondered that, if Article 44 comes into picture, many of the stringent laws which prove to be a barrier in setting a particular community free from its clutches must be exercised, the practises and customs were made in prehistoric times, time changes a lot of things if we allow them to change, but not budging from a particular custom or practice just because it is being followed since time immemorial is not plausible and rational, might as well would have changed nothing at all, but that would stop our evolutionary species from progression, and we would not be where we are today, doing the things we do, and almost a lot of things would not make sense in the present era, likewise we have to amend ourselves to changes, and we do that by amending the law that govern us, only then can the subjects can be truly free. If there's any law, which curtails our liberty and freedom and does not also violate someone else's liberty as well, it should be removed, because we as people of the society have to grow, and someone has rightly said, that *law changes with time.*

CRITICISM REGARDING UCC

Whenever a law or a policy is passed or introduced it does not always carry the burden of being utopian. India being the 2nd most populated country in the world with the largest democracy cannot satisfy the needs of all its subjects, that's not possible by any margin. That is why the concept of 'majority' is present in the Indian context. Article 44 which defines the code is a subject of Directive Principle of State Policy which is not binding or mandatorily enforceable on the government or the people. The major reason why UCC's enforceability is not so easy because it as said by many is a move against the secular nature of the state, or a move against secularism, the question that stays in front of us is whether the violation of personal laws is acceptable or not? A secular India is what our forefather promised when they framed the constitution of India. In S.R Bommai V. Union of India, Supreme court defined secularism as,

"The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. Secularism is part of the fundamental law and basic structure of the Indian political system."

What the court meant, was that secularism has to be adopted to establish social order and equality amongst people, but that is not possible, if a uniform civil code, is implemented violating the liberty to preach personal beliefs, and religious views[52]

The Muslim community vehemently opposes UCC saying that it would violate their personal laws gravely and would thus result in irreversible damage to their religion and the laws therein. The very idea of assimilating all the personal laws into a uniform code will infringe the constituents of the personal laws of the minorities.

CONCLUSION

The big question still in front of us is that is there a need for UCC?

If yes, then will people accept this change warmly or there is a chance of communal tension and more political involvement? Setting standards for UCC is the main problem, as to which law will prevail over the other? Not much progress has so far been made towards achieving the ideal of a uniform civil code, which still remains a distant dream. The only tangible step taken in this direction has been the codification and secularisation of Hindu Law. The codification of Muslim Law still remains a sensitive matter though enlightened Muslim opinions appears to favour such step[53]. It is necessary that law be divorced from religion. With the enactment a uniform civil code, secularism would be strengthened; much of the present day segregation between the various religious groups in the country might disappear, and if not completely vanish, certainly certain dogmas would come to an end, and India would emerge as a much more cohesive and integrated state.

It's clear that Uniform Civil Code is not violative of Articles 25 and 26 of the Constitution. If there is a chance of Uniform Civil Code being operative in India, it should be an entirely new and not a blend of personal laws, because there are certain chances for biases to arise. A code similar to the Special Marriage Act, 1954 can be introduced which does not lean upon or be biased towards any religion.

The much-debated code of uniformity does not hinder people's right to profess their religion which is guaranteed by the constitution of India.

[52]As a personal opinion of the author, if any custom or order is regressive and it is clearly failing the reasonable man's test under the diligent eyes of law, an effort should be made to modify it up to that extent where, its conservative and regressive views are amended.

[53]SEE SS Nigam, A plea for a uniform law of divorce, 5 JILI 47 (1963)

Nevertheless, the Court has continued to emphasize that a common civil code will help the cause of national integration by removing the contradictions based on ideologies[54] People should understand that religion and law are entirely two different concepts and personally as an individual and citizen of the world's largest democracy, I believe that there is a strong need for a uniform civil code to exist.

[54]John Vallamattom V. UOI, (2003) 6 SCC 611, at page 627 : AIR 2003 2902

CHILD ABUSE: A CRY THAT IS OFTEN LEFT UNHEARD

- NEHAL GUPTA & HARPREET KAUR

"There can be no keener revelation of a society's soul than the way in which it treats its children." ~Nelson Mandela

The initial years of a child's life are very crucial for his or her health and development, having a safe and loving home, and spending time with family is extremely valuable. Parenting may take different forms as per the environment of the home which may adversely affect the behaviour of a child. A child may need help and protection and opposing any sort of action when a child needs it the most is a common mistake parents often tend to make. The development of a child is not only dependent on the upbringing of the parent, but society also plays a much larger role in shaping and conditioning them. Society when comes out with its true colour it often torments the child. A child of any sex, religion, race, age, and socioeconomic background can be a victim of child abuse and neglect. Child abuse and neglect is any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse, or exploitation of a child. It is an act or failure to act which presents an imminent risk of serious harm to a child[55]

TYPES OF CHILD ABUSE:

While the consequences of child abuse remain the same, them being grave physical or emotional harm, it is necessary to address the different types of Child Abuse to not only understand their occurrence but to also derive a clear idea to distinguish its different types, enabling to extract and ponder upon possible solutions to the challenge at hand. The following types of abuse are generally found in an amalgamation than alone. A physically abused child, for instance, is many a time emotionally abused, and a sexually abused child also may be neglected.

- **Neglect:**

A kind of abuse that is dealt with by a lot of children is neglect that is child maltreatment which is an ongoing failure to meet a child's daily needs by the parent, guardian, or caregiver and it is considered to be the most common type of abuse. The main problem is an omission, of not doing something basic which is ought to be done resulting in severe harm in the long run. It

[55] U.S. Child Abuse Prevention and Treatment Act

could be physical, emotional, medical, or educational. It is important to note that living in poverty does not amount to neglect. It is often difficult to figure out if a child is going through such abuse. The following are the signs of neglect seen in a child; abuses alcohol and drugs, frequently absent from school, begs and steals money or food, is consistently dirty and has severe body odor, lacks needed medical care (including immunization) dental care, or glasses, lacks sufficient clothing according to the weather, states that there is no one at home to provide care. Signs of neglect by parents; seems apathetic or depressed, behaves irrationally or bizarrely, abuses alcohol and drugs, appears to be indifferent to the child.

- **Emotional Abuse:**

Child emotional abuse is often known as verbal abuse, psychological abuse or mental abuse is ongoing emotional mistreatment of a child. Also, it involves deliberately trying to scare, humiliate, isolate, or ignore a child. This prevents the child from growing as expected. Emotional abuse is particularly destroying a child's self-esteem and emotional wellbeing. Emotional abuse can have further long-lasting adverse psychiatric consequences than either physical abuse or sexual abuse. Emotional abuse consists of; threatening by perpetually shouting at a child, scapegoating, and blaming them, humiliating, or making the child a subject of jokes, making the child perform degrading acts. When a family is going through a rough patch, parents or caregivers find it hard to provide a loving and safe home for their children this can lead to relationship issues, mental health problems, addiction to alcohol and drugs, domestic abuse, and poverty. If a child is unconfident or lacks self-assurance, finds difficulty in handling their emotions and maintaining relationships, or is over demanding then these could be signs of emotional abuse. A child suffering from a mental injury can be as normal as any other person. It may, however, impair the cognitive abilities and adversely affect the personality development of the child. The change in behavior may be noticeable only by those who have some amount of intimate association with such a child[56].

- **Physical Abuse:**

Child physical abuse is actions or inactions, which result in actual or potential physical harm, that is within the control of or preventable by the parent, carer, or authorized person (such as a school teacher)[57]. Physical child abuse is the non-accidental infliction of physical damage to a child in the forms of bruises, lesions, and fractures that result from hitting, punching, kicking, choking, burning, throwing, stabbing, or otherwise harming a child irrespective of whether the

[56] Lubna Mehraj And Ors. vs Mehraj-Ud-Din Kanth on 8 October, 2003
[57] World Health Organisation (1999)

intent of the action was to cause hurt. The mere absence of marks on the victim does not specify that violence has not taken place[58]. It predominantly results in budding physical harm from hostility or an interaction that is within the control of a parent or a person in a position of influence or authority. Physical abuse is evident enough to notice by signs of unexplained bruises or cuts, withdrawal, or change in the psychological state of mind, fearful or shy behavior for being touched, seems afraid to go home.

- **Sexual Abuse:**

Child Sexual Abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society[59]. Rape, molestation, distribution, production, or possession of child pornography are the types of sexual abuse against children. Most sexual abuse (90%) is incest perpetrated by a family member or someone the child knows, strangers account for 10% of sexual abuse. Physical or bodily signs of child sexual abuse can include stomach aches, encopresis, enuresis, adverse reactions to yogurt or milk (due to resemblance to semen), or soreness in the genitals responding to children and young people's disclosures of abuse [60]. It is important to teach kids from a young age about good touch and bad touch. Conversations with people about rape/abuse and violence at homes/ schools/ workplaces must be initiated. Supportive and receptive behavior towards the victims, while they open up, is a must and they must be taught that being a victim was/ never will be their fault.

INDIA'S CONCERN WITH CHILD ABUSE:

19% of the Indian population comprises children, making it the country with the most population of children in the world. Naturally, because of the demography, it becomes the country's responsibility to provide a safe and sound space for children in this fast-moving society. That is why India has provided various rights to its children – fundamental and legal while preserving the significance of their security, care, and growth in its overall schemes, objectives, plans, and policies. Notwithstanding, all the actions taken concerning the children, their condition has not improved over time. In reality, children are the most exposed section of

[58] Gurcharan Singh vs State Of Haryana on 13 September, 1972

[59] World Health Organisation. Report of the consultation on child abuse prevention (WHO/HSC/PVI/99.1) Geneva (Switzerland): World Health Organisation, 1999.

[60] CFCA Practitioner Resource-- March 2015 Australian Government- Australian Institute of Family Studies (Jensen, 2005).

the society and this situation has not differed even after years of independence as we still get to witness labor, abuse, exploitation, and abandonment of children across India. If dug deeper, it can be found that the root cause of it is poverty and it is the most prevalent challenge in the atmosphere. 52.9% of child abuse victims were boys. In a survey of 160 men, 71% were marked as sexually Abused but the statistics of reported cases show much lower figures[61]. The reasons for such mishaps are toxic masculinity imposed by society and lack of awareness about sex education. For that reason, sexual education should be made mandatory in schools and curriculums should include such programmes in the primary sections as well. There are organisations that help and spread awareness about child welfare. CRY (Child Rights and You), Genesis, Katha, Uday, Goonj, Robin Hood Army, Butterflies, and Smile Foundation are some of the NGOs which are contributing to Child Rights in India through with people donate, volunteer, and spread awareness to the further cause.

THE INDIAN CONSTITUTION IN RELATION WITH CHILD RIGHTS:

The life cycle of a child revolves around its survival, development, protection, and participation, knowing your law can empower you to deal with any odd circumstances in a better way. The Constitution of India comprises several provisions for the protection and welfare of the children. It has encouraged the legislature to create special laws and policies to uphold the rights of the children. Article 14 states that every citizen including children is equal in the realm of law, Article 15 provides prohibition of discrimination it also provides special provision for women and children as they belong to weaker sections of the society and thus needs to be uplifted. Article 21 A speaks of free and compulsory education for children in the age group of 6 to 14 so that no one is left behind from their right to be educated. Article 23 forbids human trafficking and forced labor which is a major cause of child abuse, as in India one child disappears every eight minutes[62]. Article 24 outlaw's child labor and their employment in factories, mines, or other hazardous work environments if they are below the age of fourteen but allows child artist and family business. Directive principle of state policies also known as principles of Gandhism that relates to administration matters also includes delivering protection to children in the following articles. Article 39(e) guarantees that the health and strength of workers, men, and women, and the tender age of children are not abused.

[61] National Crime Records Bureau, India

[62] Report of the Ministry of Women and Child Welfare concerning India.

Whereas, article 39(f) ensures that children are provided with facilities and opportunities to develop in a healthy manner where they are free and are provided with a dignified environment, where their childhood and youth are protected against exploitation and moral and material abandonment. Article 45 says that the state has to certify early childhood care and education for all the children until they complete the age of six years. Besides these articles, there are other provisions provided in the constitution of India in which Article 51 A-(k) lays down a fundamental duty of the citizen which directs parents or guardians to provide opportunities for education for their child/ ward between the age of six and fourteen. Article 243 (g) reads along with schedule 11 provides for the institutionalization of childcare by seeking to entrust programs of women and child development to panchayat, with a bearing on the welfare of children.

LEGISLATIVE AND STATUTORY BACKING FOR CHILD RIGHTS IN INDIA:

Children's rights are defined in several ways, including an extensive spectrum of civil, economic, social, political, and cultural rights. Rights tend to be of two types, one that advocates for children as autonomous persons under the law and second which places a claim on society for protection from harm committed on children because of their dependency. These have been pigeon-holed as the right of empowerment and as the right to protection, they are: The Child Marriage Restraint Act of 1929, The Children (Pledging of Labour) Act of 1933, The Factories Act of 1948, The Apprentices Act of 1961, The Women's and Children's Institutions (Licensing) Act of 1956, The Mine's Amendment Act of 1983, The Child Labour (Prohibition and Regulation) Act of 1986, The Immoral Traffic (Prevention) Act of 1986, The Guardian and Wards Act of 1890, The Hindu Minority and Guardianship Act of 1956, The Hindu Adoption and Maintenance Act of 1956, The Orphanages and Other Charitable Homes (Supervision And Control) Act of 1960, The Probation of Offenders Act of 1958, The Reformatory Schools Act of 1897, The Young Person Harmful Publications Act of 1956, The Infant Milks Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution Act of 1992, The Prenatal Diagnostic Technique (Regulation, Prevention and Misuse) Act of 1994 ,The Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995, The Juvenile Justice Act of 2000[63], The Protection of Children from Sexual Offences Act, of 2012. There is no Central legislation in India barring corporal punishment in schools, different states have passed laws or made policies to ban it.

[63] India Country Report to the UN CRC, 1997

Currently, there is no statutory corporal punishment of children in Indian law due to which children have to bear the horrible outcomes at home as well as schools, a child showcases the future of any country's development and therefore the need arises to protect them and provide them a free space to grow.

POLICIES LAUNCHED FOR PROTECTION OF CHILDREN:

The State also inspects the welfare of children by effecting various policies and programmes and institutionalizing a few national and provincial level organizations and groups. The first child-centric programme launched by the government of India for the all-round development, care, and protection of children is the National Policy for Children 1974. It recognizes children as the supreme asset of the country and ensures that their rights as enshrined in the constitution and the UN Declaration of Rights. Special emphasis on equality in the sphere of educational opportunity for a child-centered approach in primary education was derived in National Policy on Education 1986. Another policy, National Policy on Child Labour 1987 is a proposal of the government to rigorously implement the provisions of the constitution concerning the prohibition of Child Labour and works in the direction of the furtherance of the situations of working children. One of the major policies taken by the government was the National Plan of Action for Children, 2005 which intends to deal with the various complications of a child's life. The working of this policy was on the prohibition of the abolition of female foeticide, child marriage, female infanticide, and upholding and securing the rights of children in difficult cases such as abuse, exploitation, and neglect. Child-line Services have been commenced by the government specifically after the Twelfth Five Year Plan to support children in case of crisis or in situations where they cannot obtain help from elsewhere. It is operated by Childline India Foundation, the mother organization for this arrangement in the country. Over the years, the Childline has taken over millions of calls, associated with issues of medical aid, a shelter for neglected or abandoned children, emotional guidance, and protection from abuse amongst others. National Institute of Public Cooperation and Child Development is the principal organization for the documentation and collection of research and initiatives related to women and child enhancement. It works in the regions of child protection, child-care support services, awareness counter to abuse and misuse, and the rights of children. The Twelfth Five Year Plan was launched in the year 2012 which focused on child development and guaranteeing higher sex ratio in the country. It was a major governmental step towards increasing the status and condition of children in India, especially the female child. 'Childline' is a platform bringing together the Ministry of Women & Child Development, the Government of India, Department

of Telecommunications, NGOs, and concerned individuals. A phone number *1098* provided hope for many children across India and is the country's first 24-hour, emergency phone, free service for children in need of aid and support.

INTERNATIONAL CONVENTIONS AND DECLARATIONS FOR CHILDREN:

A diagnosis on the legal protection of rights of the child in India in the viewpoint of the international move, requires a four-fold elucidation of the concept, expressly: i)-the constitutional protection ii)-the national policy for children iii)- the legislative framework iv)-the enforceability of international conventions through Indian courts. India has been involved in several international declarations that interest to the rights of the children. India in the year 1992 consented the United Nations Convention on the Rights of the Child (UN CRC). The Government of India admitted the Protocols to the UN CRC, tackling the engrossment of children in armed conflict and the sale of children, child pornography, and child prostitution in 2005. The International Conventions on Civil and Political Rights and Economic, Social and Cultural Rights were also signed by India, also it is a signatory to the Convention on the Rights of the Child (CRC) adopted by the UN General Assembly in 1989 proposing guidelines to be obeyed by all State parties in obtaining the greatest interest of the child and outlines the fundamental rights of children, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is also applicable to girls that are below 18 years of age and the SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution. Child labor laws also cover the means for India's commitment to fulfilling the International Labour Organizations (ILO) Convention No. 182 which prohibits hazardous work which is expected to endanger children's physical, mental or moral health. It aims at direct removal of the worst forms of child labor for children below 18 years.

SOCIO-ECONOMIC IMPACT:

The socio-economic impact of child abuse is considerably larger than it appears to be. Though one's childhood is considered to be a time of gaining knowledge, connection, and exploring, a large number of children in India run-down of such a childhood, due to their poor socio-economic situation. Most cases of incest are never reported due to the intense level of shame associated with this type of sexual abuse. Child labor is an imperative factor of abuse which emphasizes the petrifying outcomes of society. The Supreme Court in its verdict in M.C. Mehta

v. State of Tamil Nadu[64] directed that children should not be laboring in hazardous trades in factories for the manufacture of matchboxes and fireworks and should be taken for the well-being of such children as well as for refining the quality of their life. The economic influence of child abuse is often overlooked even though it transcends to a huge deficit in the growth of the financial system in the developing economies of Asia., India had 10.13 million child laborers, between the age of 5-14. Nevertheless, this problem is varied across India, with some states reporting a higher occurrence of child labor than others, examples being Uttar Pradesh, Bihar, Maharashtra, Rajasthan, and Madhya Pradesh - which collected constitute nearly 55% of the total population of working children in India[65]. Child abuse outcomes in insidiously affecting the child's education and work performance. This diminishes the child's efficiency as a human capital which is in turn disadvantageous for the development of the nation. Abused children mostly lean towards substance abuse because of persistent exposure to the vicious environment. It causes detriment to the individual, to the society, to the economy, and the nation as a whole. It is therefore crucial that noteworthy steps be taken in the direction of modifications and preventions in the present legal and social gear. Therefore, efforts should be made by the governments to strengthen the economic conditions of the families and the country as poverty is seen as one of the major causes of child abuse. As Justice Bhagwati has rightly quoted, "the child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into the maturity, into fullness on physical and vital energy and most breadth, depth and height of its emotional, intellectual and spiritual being"[66].

DEFAULTS IN THE SYSTEM WITH COMPARISON TO OTHER COUNTRIES:

The main issue lies in the people dealing with children that may be parent, guardian, caretaker, teacher, or society. The laws made get amended on appropriate occasions and will further be amended in the future according to the changes in society but what needs to be done is that people, in general, need to come together and act together with the laws. The laws on child abuse and protection as of now are appropriate and in accordance with the guidelines of all the international treaties that India is part of but a major loophole is in the implementation of the stated laws, in spite of having the most populous youth, India still lacks to provide its children security. The ranking of the world's countries with regard to the Rights of the Child is decided

[64] M.C. Mehta v. State of Tamil Nadu (1991) 1 SCC 283

[65] As per the data of 2011 Census

[66] Mr. Justice Bhagwati child basic rights.op. cit. p. 5

by the Realization of the Children's Rights Index. A rank of 1 signifies the best conditions, while the rank of 196 signifies the gravest offenses in which India lands a spot of 149.

Notwithstanding the laws, India still falls short in the ranking where other countries are enhancing and excelling at it. Something is absent from the system of the country, by observing the other countries, India can take this opportunity to continuously get better and provide a safe and secure place to the future where it can flourish and bring pride to its citizens. There are countries that are incomparably above in child-care due to which they have high levels of taxes. These countries also put stress on free healthcare for children and have a very smart public education system. Most western European countries such as Luxembourg, Belgium, Austria, Germany, and many more have a basic income going only to families with children known as the 'Universal Child Benefit', it is a very easy way to support such families as compared with the benefits provided in the rest of the world. According to this benefit also known as child allowances, this plans benefits, families, and children no matter if they work or not, and no matter if they spent the money on child-care, rent, or food. With the implementation of this scheme the absolute poverty drastically fell by more than half from 1999 to 2009. It was also concluded that benefit and the tax credit increased from 1997 to 2005 which in turn caused incomes for the bottom ten percent of the households to grow twenty percent. In the United Kingdom through Her Majesty's Revenue and Customs which administers child benefit, In Luxembourg, through the *Caisse pour l'avenir des enfants* (Children's Future Fund), In Australia, Child benefit payments are currently called Family Tax Benefit. Cash assistance can dramatically cut child poverty and malnutrition, whereas India has no such benefits with which the quality of life of a child gets ameliorated.

MEASURES TO BE TAKEN IF A CHILD OPENS UP ABOUT ABUSE:

Child abuse is a weighty issue that has assorted and long-lasting effects on the sufferer. Sometimes families who seem to have it all from the outside are burying a different tale behind locked doors. If you presume that a child is being abused call the police or child welfare group. After any trauma, the child should not be denied food, sleep, healthcare, or free time. If a child reveals abuse it is important to listen carefully to what they are saying. Let them know that they have done the right thing by speaking about it and it is not their fault. Make them believe that they would be taken seriously. The alleged abuser must not be confronted instead a report of what the child has told should be done as soon as possible. The guardian must not control and try to keep an open mind before disciplining a child when they uncover what has happened with them. It is essentially required to understand children and learn how they react in different

ages and have realistic expectations. Also, make the home a violence-free zone and avoid physical punishments at all costs. According to the situation, support groups must be encouraged. Prominence should also be made on mending the mental and emotional situation of the children victimized by abuse successively working towards their psychological development. Child abuse often repeats itself through generations, by doing what one can do to safeguard themselves today one can also be built a stronger safer road for the future.

CONCLUSION:

The existence of a single sign does not automatically mean that child maltreatment is taking place in the family. But a closer glance at the circumstance may be vindicated when these signals appear frequently or in combination. Institutions such as the National Commission for Protection of Child Rights should improve their reach and work towards ground level implementation of policies. The laws against child labor are not properly implemented. Child labor and child beggary are highly prevalent in India across states. Laws for developing educational institutions and for abolishing child labor should be strengthened and effectively executed. Grievance redressal systems should be installed in schools and colleges such as suggestions and complaints boxes for the speedy solution to the issues of children. Student clubs should be developed by the government across private and governmental schools to spread awareness against child abuse, about the policies of the government, and the POCSO Act 2012. Police and administrative bodies should be easily accessible to children and should develop mechanisms to conduct workshops for children at the local levels. Many children have spent a long time praying that someone would rescue them and not always people come up with a helping hand. Hence, children need to learn that they can be the hero of their own stories. It takes a lifetime to overcome child abuse and it starts with loving oneself first. Trauma is not a child's fault, but healing is a responsibility and yes that is unfair, but a child must always believe in himself. The hurt must be heeded before it can be healed.

"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace." ~ Kofi Annan

STATUTORY LICENSING UNDER THE INDIAN COPYRIGHT ACT, 1957 AND ONLINE BROADCASTING: A CRITICAL ANALYSIS

- ANKIT SINGH

ABSTRACT

Online music providers have become popular among masses. Entertainment served via internet is an efficient business model in current times. However, there are certain legal requirements that are needed to be met before online content providers communicate the content to the public online. Prior to 2012, voluntary licensing was a system through which any person could obtain any creative work from the owner for a fixed fee and communicate it to the public.

After 2012, Section 31D was added to the Copyright Act, 1957 which gives the right to broadcasting organizations to communicate any published literary work, musical work or sound recordings to the public after notifying the copyright owner in the prescribed manner. However, as far as legislative and judicial intents are concerned, online TV and radio broadcasters can avail the benefit of Section 31D.

In this article, the author has attempted to critically examine the scheme of statutory licensing given under Section 31D and various other aspects of the Indian Copyright Act, 1957 and to explore the possibility of inclusion of online broadcasters in the ambit of Section 31D.

Keywords: Broadcasting organization, Statutory license, Online streaming, Online broadcaster, Sound recording, Music

1. INTRODUCTION

In the contemporary era of media and internet entertainment, wide availability and accessibility of music is the demand of the people. However, it is well established that any musical work or sound recording belongs to the author (copyright owner) and cannot be communicated to public without his consent. Under the Copyright Act, 1957, such consent may either be obtained through assignment or voluntary license.

In 2012, the Indian Copyright Act underwent a substantial change. Section 31D was added to the Act which provides for statutory license in situations where a broadcasting organization is

interested in communicating, by way of broadcast or performance, an already published literary or musical work as well as sound recording. Therefore, if we talk about the ambit of Section 31D all broadcasting organizations operating legally are covered.

1.1.Operation of Section 31D

Following requirements need to be fulfilled for Section 31D to take effect:

(1) Prior notice in prescribed manner given by the broadcasting organization to the owner of the work;
(2) Notice must state the duration and territorial coverage of the broadcast;
(3) Payment of royalties by the broadcasting organization to the owner as per the rate decided by the Appellate Board;
(4) Separate rates are fixed for radio and television broadcasting;
(5) Names of authors and principal performers shall be announced with the broadcast except in cases where the work is being communicated by performance; and
(6) No fresh alterations (except in case of convenience or technical necessity) shall be made without owner's consent.

In addition to the above, Section 31D also requires the broadcasting organization to maintain records and book of accounts which shall be open to inspection by the owner of rights or his duly authorized agent.

2. APPLICABILITY OF SECTION 31D

A plain reading of sub-section (3) of Section 31D shows the following:

(i) Royalty shall be fixed as per the mode of broadcast;
(ii) Only two modes of broadcast are considered *i.e.* radio and television

It is evident that availability of statutory license to online broadcasters was not the original contemplation of the legislature.

The legislative intent is further substantiated by the words of HRD Minister while introducing Section 31D in 2012. He asserted that originally only radio broadcasters were contemplated to be in the ambit of Section 31D and the decision to include TV broadcasters came much later. There was no explicit mention of online broadcasters anywhere in his speech.

However, the exclusion of online broadcasting even when it was widely present when the said amendment was made to the Copyright Act, 1957 is extremely questionable. A combined reading of Section 31D(2) and Section 31D(3) even implies that exclusion of broadcasters other than television and radio may not have been the intention.

Lately, availability of statutory licenses to online broadcasting/streaming organizations has become a contentious issue. In the light of significant boom in the internet entertainment market Section 31D needs to be looked from a different perspective.

2.1.Classes of Work and Modes Covered under Section 31D

Section 31D only includes three categories of work within its ambit *i.e.* literary work, musical work and sound recording. It includes only two modes of communication of such works *i.e.* by way of broadcast and by way of performance.

Thus, a song (copyrighted by a recording studio, say HMV) appearing on a TV channel is an example. Such TV channel has to follow the procedure given under Section 31D in order to avail statutory license.

One important condition is that work being broadcast is already in the public domain. Only in that case will the statutory license take effect.

3. CASE OF STATUTORY LICENSING *VIS-A-VIS* ONLINE BROADCASTING

Around the world, online music streaming has emerged as a primary source of entertainment for ordinary people. It is also a booming business model. Therefore, legal operation of such online music streaming organizations within the territory of India has become an issue of concern because it has been observed by the Bombay High Court that statutory license under Section 31D doesn't apply to online broadcasters.[67]

[67] *Tips Industries Ltd. v. Wynk Music Ltd. & Another (2019)*

In this light, it is pertinent to note that back in 2016, the Department of Industrial Policy and Promotion (DIPP) had issued an office memorandum (OM) regarding the inclusion of online broadcasting in the ambit of statutory licensing under Section 31D. Since then, the legal development in this regard has been irregular.

3.1.Intersection of Section 2(dd), Section 2(ff) and Section 31D

According to Section 2(dd), 'broadcast' means communication to the public by the following means:

(a) Wireless diffusion in forms of signs, sounds or visual images; or
(b) By wire

According to Section 2(ff), 'communication to the public' means making any work or performance available for being seen or heard or otherwise enjoyed by the public either directly or by any means of display or diffusion other than by issuing physical copies. It also provides that communication may either happen simultaneously or at places and time chosen individually by the person making the communication. Further, it is immaterial whether the content communicated is seen or heard by any member of the public as long as it has been put through the channels of communication *i.e.* display or diffusion.

As per the Explanation attached to Section 2(ff), communication to the public also includes communication through satellite or cable or any other mode of simultaneous communication to more than one household or many residential rooms.

An examination of both these sections clearly indicates that the term 'broadcast' is much narrower in operation and that the term 'communication to the public' subsumes the term 'broadcast'.

It is clear that every communication is not broadcasting. By definition, broadcasting is only a class of communication that is done via signals for which appropriate transmission license is granted to a broadcasting organization and the same doesn't come under the purview of the Copyright Act, 1957. Those transmission rights are only granted in respect of radio and television.

Now, as we have already discussed that Section 31D only applies to broadcasting organizations. Therefore, at this point, it can fairly be contended that statutory license cannot extend to online broadcasting as held by the Bombay High Court in *Tips v. Wynk* through an interim order.

However, the current judgment must be looked at in a critical manner. Also, a different perspective is required keeping in mind the development of current times.

Today, entertainment industry is heavily based on audiences streaming creative content online. The very purpose of statutory licensing is to make creative works easily available to people while respecting the royalty rights of the author. The exclusion of online broadcasting from the scheme of statutory licensing is against the very purpose and concept of statutory licensing.

3.2.Inclusion of Online Broadcasters in the Scheme of Section 31D: An Ongoing Debate

A fresh perspective here may be that the use of only two modes of broadcast for the purpose of fixing royalties under Section 31D(3) doesn't necessarily exclude other modes. Online streaming of music, web television and communication of other musical works by online broadcasters has become extremely popular these days. To a large extent, the same has taken over radio and television broadcasts.

In the light of recent developments in entertainment industry, online broadcasters must be given a place under the statutory landscape of Section 31D.

Let us reconsider the definitions of 'broadcast' and 'communication to the public' provided under Sections 2(dd) and 2(ff) respectively:

(i) In Section 2(dd) the use of the term 'wireless diffusion' may be wide enough to include online broadcasting. The fact that broadcasting organizations in India obtain license for communication via TV and radio cannot be taken to preclude online broadcasters from communicating the works provided under Section 31D to the public via the internet.

(ii) It is contended by some people that online streaming doesn't come within the purview of 'communication to the public' because the choice is of the

audience rather than that of the communicator.[68] However, the same is a flawed reasoning because as long as the communication is simultaneous it is covered under Section 2(ff) and online meets this requirement. Therefore, exclusion of online streaming from the definition of 'communication to the public' and ambit of 'broadcast' does not hold ground.

The above arguments are substantiated and get weight by the recently released Copyright (Amendment) Rules, 2019 which aims to include online broadcasting in the scheme of Section 31D and Rule 29. Thus, the problem of interpretation is solved by looking at clear intentions of the legislature.

4. THE PERSPECTIVE OF RIGHTS: AUTHORS, RECORD LABELS AND BROADCASTERS

The 2012 Amendment was introduced with the very purpose of extending more benefits to the authors of creative works by way of royalties under statutory licensing. Prior to 2012, the voluntary licensing system was tedious and complex and still continues to be so. The system of statutory licensing is aimed at simplification of the process coupled with expansion of authors' rights which was not the case before.

In the Indian music/film industry where most of the marketing is undertaken by record labels the authors receive little or no benefits. There is a proven record that the mechanism of voluntary licensing is used by record labels in a way that is unfair to the authors.[69]

Introduction of the statutory licensing scheme aims at striking a fine balance between the rights authors and broadcasting organizations and authors through a transparent mechanism wherein record labels have no role to play. However, after the interlocutory judgment of the Bombay High in the *Wynk* case the debate has become more active.

Record labels of the Indian music industry contend that voluntary licensing is a more efficient system as compared to statutory licensing and after the draft Copyright Rule, 2019 were

[68] Visit https://spicyip.com/2019/09/tips-industries-v-wynk-music-a-case-of-statutory-mis-interpretation.html (last accessed on 22-12-20)
[69] Visit https://www.bananaip.com/ip-news-center/a-case-for-statutory-licensing-of-music-for-broadcasting/ (last accessed on 28-12-19)

notified which contemplate inclusion of online broadcasters in the statutory license regime the fears of these record labels have doubled.

Here, the central idea is that musical and literary works should be available to the public at reasonable prices not only through one but various channels. We currently have two channels of communication:

(1) Record labels obtaining voluntary license from the author (composer, lyricist, etc.) and marketing the work; and

(2) Broadcasting organizations obtaining statutory license under Section 31D and broadcasting it through either radio or television (as per the licenses granted to them under the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933)

The main contention, therefore, is to include online broadcasting in the scope of the second channel of communication.

4.1.Rights of Authors and Online Broadcasters/Streaming Services: Expanding the Scope of Section 31D

It is true that the role of record labels in the Indian music industry has always been a secondary one. They have always tried to extract undue benefits through the system of voluntary licensing. Statutory licensing is introduced to remedy this situation.

With the advent of online music streaming services, the role of record labels has diminished considerably. But, the interlocutory judgment in Wynk goes in the favour of record labels and against the general interest of the public.

The question is whether online streaming/broadcasting services can be considered to be on the same plane as that of radio broadcasters. Why not?

The only difference that can be drawn here is that in a radio broadcast the choice rests with the broadcaster while in online streaming the choice is with the audience. However, the same cannot be considered as a threshold to exclude online streaming from the definition of 'broadcast' because as discussed earlier simultaneous communication is sufficient.

Two years ago German regulators took an initiative to consider online streaming services same as traditional broadcasters[70] and the recent Copyright (Amendment) Rules, 2019 aim to achieve the same objective. It should also be considered that ambit of Section 31D is quite narrow and doesn't include dramatic works and cinematograph films. So, the main focus here is the online streaming of music and sound recordings.

It can fairly be argued that inclusion of online broadcasters in the scheme of Section 31D would interfere with the licensing right of traditional radio and TV broadcasters who, in addition to obtaining statutory license, also pay hefty fee for bandwidth license.

But, we also cannot ignore the rights of general public that deserve easy access to creative works of various authors. Thus, if an online broadcaster wishes to obtain statutory license and fair royalty is paid to the author then law should not act as an impediment especially when online entertainment has become extremely popular.

4.2.Maximizing the Interests of Copyright Owners and Public

The inclusion of online streaming in the ambit of Section 31D would help maximize the interests of copyright owners and public in the following ways:

(1) Public would be benefited at large as online broadcasting has a very wide reach and can be accessed easily;

(2) The issue of withholding of sound recordings by record labels to extract exorbitant royalty rates is somewhat fixed by the introduction of statutory license scheme and would be further resolved if online music providers are allowed within the ambit of Section 31D;

4.3.Online Broadcasting: Issue of Territorial Coverage, Downloading, Stream Ripping and Sale

[70] Visit https://in.pcmag.com/opinion/113877/streaming-vs-broadcasting-is-there-a-difference (last accessed on 02-01-20)

The language of Section 31D is clear about the fact that any broadcasting organization desirous of availing a statutory license has to notify the owner about the territorial coverage. When the same comes to online streaming situation becomes perplexing because online streamers do not have bandwidth license like those of radio and TV broadcasters which give them the right to operate within a defined territory. The consumer can access the broadcast on devices which are included in the Indian Wireless Telegraphy Act, 1933 and not internet-based devices such as computers and smartphones.

Therefore, a broadcasting organization, within the meaning of Section 31D, cannot communicate to the public content online. Broadcasting of content online is considered by some people to be on the same footing as someone uploading content without any license for the purpose of streaming, stream ripping and downloading. Also, if the online music providers make an option of sale available to their consumers Section 14 is attracted and the same cannot be considered to be a broadcast.[71] These issues make TV/radio broadcasting extremely different from online streaming and this is the main reason why Bombay High Court, in its interim judgment in Wynk, ruled against statutory licensing for online streaming.

Therefore, internet radio organizations and online music providers (eg. Wynk, Spotify, etc.) have to keep in mind that the content communicated by them over the internet is not subject to disposal by the consumer. Wide outreach of online resources has to be coupled with secure streaming that doesn't lead to piracy defeating the very purpose of inclusion of online broadcasters within the scheme of Section 31D.

5. CONCLUSION

It is concluded that the internal reading of Section 31D may lead to varying inferences. However, online broadcasters cannot be categorically excluded as the very language doesn't specify that. The legislative intent leans in the favour of making statutory license available to only licensed TV and radio broadcasters. But, in the booming era of internet and people listening music online the perspective needs to change. The recently released draft Copyright (Amendment) Rules, 2019 reflects that perspective.

[71] Visit https://spicyip.com/2019/05/breaking-bombay-high-court-rules-against-statutory-licensing-for-online-streaming-services.html (last accessed on 03-01-20)

Explicit inclusion of online broadcasters in the scheme of 31D can be debated. But, according to me, the statutory definition of terms 'broadcast' and 'communication to the public' can be liberally interpreted to include online broadcasters as 'broadcasting organization' is not explicitly defined in the Copyright Act, 1957.

Therefore, as discussed, availing online broadcasters of statutory license would be in the larger interest of the copyright owner and general public. However, certain issues like piracy and unauthorized downloading of online content have to be kept in check. Online content providers also need to understand that selling musical work and sound recordings through their stream is against the very nature of broadcast. They have to work for honest and fair dissemination of creative works to the public and in this endeavour they should receive maximum support from policy-makers and courts.

ROLE OF NGO'S IN ADVOCACY OF HUMAN RIGHTS

- JHARNA SAKSENA

ABSTRACT

Human rights are the basic rights which every human being inherits the moment one is conceived in the mother's womb. The question of violation of such inherent right itself is a great challenge for humanity. Every individual possesses and enjoys those rights without any criteria of his/her caste, creed, colour, religion, race, age, sex, place of birth, nationality etc. They are universal in nature. But its violation has not only become history but also rampant even today. This paper focuses on role of NGO's in advocacy of human rights. The National Human Rights Commission is like an ombudsman to oversee the effective protection of Human rights. Many organizations around the world dedicate their efforts to protecting human rights and ending human rights abuses. There are NGO's which can intervene at any point of time with any of the remedial measures in a positive way by counseling, educating the victims, emancipating and empowering them. India witnessed many cases initiated and handled by NGO's towards protection of human rights from grass-root level. They are very effective agents on human rights education and work as valuable channel for feedback. In this context activised, sensitized, dynamic and dedicated approach of some prominent NGO's is worthy of appreciation.

INTRODUCTION

"To deny people their human rights is to challenge their very humanity."

-Nelson Mandela

The Human Rights are those rights which are essential for the protection and maintenance of dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent. Every individual possesses and enjoys those rights without any criteria of his/her caste, creed, colour, religion, race, age, sex, place of birth, nationality etc. They are universal in nature. Since human rights are not created by any legislation, they resemble very much the natural rights.[72] The concept of human right is not a new phenomenon, 'Human Rights' is a twentieth century term but its notion is as old as humanity. It has through

[72] Dr. SK Kapoor, *International Law And Human Rights* 806 (19th ed, 2014)

various stages of development and has taken long time to become the concept of present day. These rights has place in all ancient societies though referred by different names, it includes civil rights, liberties and social cultural and economic rights. These rights are essential for all individual as these are consonant with the freedom and dignity and ultimately contribute to social welfare.

Protection of human rights is a necessity for the development and growth of an individual personality, which ultimately contributes in the development of the nation as a whole. It is an internationally recognized issue and various international instruments have been established for the protection of human rights. The concept of human rights is dynamic and adapts to the needs of the nation and its people. The ultimate purpose of the national as well as international law is to safeguards the human rights of the people.

In civil society, Non-Governmental Organizations (NGOs) have been playing a significant role in generating awareness about various issues of human rights and undertaking development activities for the amelioration and betterment of deprived sections of the society at both national and International level. NGO‟s are independent or autonomous bodies free from governmental control. Such organizations are led by the human rights activists or human rights defenders – that is, individuals who make a major commitment to, and openly take up, the defence and protection of human rights of others. Human rights defenders need not, however, be formally associated with an organization, they may be lawyers, journalists, writers, religious leaders, health workers, teachers or trade unionists; very frequently they are associated with broad based peoples organization of indigenous people. They are the individuals who champion the human rights of others, often at great personal risk to their own lives and safety. Human rights NGO's play an important role in upholding human rights, as envisaged under the United Nations Declarations of Human Rights and other human rights instruments. They put pressure on Government and compel them to enforce human rights of persons and be vigilant in order to prevent infringement of these rights.

HUMAN RIGHTS IN INDIA

The history of human rights covers thousands of years and draws upon religious, cultural, philosophical and legal developments throughout the recorded history. It seems that the concept of human rights is as old as the civilization. This is evident from the fact that almost at all stages of mankind there have been human rights documents in one form or the other in existence. Several ancient documents and later religious and philosophies included a variety of concepts that may be considered to be human rights.

Human Rights are also rooted in ancient thoughts and concepts of natural law and natural rights. A few Greek and Roman philosophers like Plato, Aristotle, Cicero, Sophocles, St. Thomas Aquinas etc propounded the concept of natural law and justice with a gentle touch of human rights.

India is the biggest democracy in the world. Being a democratic country one of the main objectives is the protection of the basic rights of the people. Government of India has given due consideration to the recognition and protection of human rights. The Constitution of India recognizes these rights of the people and shows deep concern towards them.

The Universal Declaration of Human Rights contains civil, political, economic, social and cultural rights. Constitution guarantees most of the human rights contained in Universal Declaration of Human Rights. Part III of the Constitution contains civil and political rights, whereas economic, social and cultural rights have been included in Part IV of the Constitution. All the statutes have to be in concurrence of the provisions of the Constitution.

The philosophy and objective of the Constitution of India is enshrined in the preamble which include the protection of the dignity of an individual. For the fulfillment of this objective Part III of the Constitution guarantees fundamental rights to people which are essential for the development of an individual personality, these rights include right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights and the right to constitutional remedies. It is the duty of Central as well as State Governments to provide adequate conditions to each individual to enjoy their human rights. The Constitution through Directive Principles of State Policy enshrined in the Part IV of the Constitution, ascertains the duties on the Government to work for the welfare of the people and protection of human rights of the people. These are guiding principles for the state to make policies regarding distributive justice, right to work, right to education, social security, just and humane conditions of work, for promotion of interest of weaker section, raise the standard of nutrition and standard of living and to improve public health, protection and improvement of environment and ecology, etc. so that each individual can enjoy rights to the fullest.

HUMAN RIGHTS AND NON-GOVERNMENTAL ORGANIZATIONS

The concept of Human rights in India too has been modelled upon the definition given in the Universal Declaration of Human Rights, 1948. Section 2 (d) of the Protection of Human Rights Act, 1993 lays down definition of Human Rights:

"Human rights mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

The U.N. Declaration on Human Rights as well as other Human Rights Covenants have influenced very much on the Constitution of India and various Indian Statutes which cannot be overlooked. Therefore, it may be said that the above mentioned definition of human rights forms a guiding light for human rights NGOs in India as it does for Human Rights NGOs at an international level.

Many organizations around the world dedicated their efforts to protecting human rights and ending human rights abuses. The development of international norms, institutions and procedures for the promotion and protection of human rights has gone hand in hand with the proliferation of Non-Governmental International Organizations working in the field of human rights. The Economic and Social Council of The United Nations by adopting a resolution on 27th February 1950 defined the nongovernmental organization as "any international organization which is not established by inter-governmental agreements".[73]

The World Conference on Human Rights recognizes the important role of Nongovernmental organization in the promotion of all human rights and in humanitarian activities at the national, regional and international levels. The NGO"s have been established in almost every country. There are human rights NGOs which are private associations and they denote significant resources to the promotion and protection of human rights. They are independent of both Government and all political groups which seek direct political power.

The human rights movement in India has progressed with the establishment of other Human Rights Non-Governmental Organizations fighting and promoting human rights at the grass-roots. For example, NGOs like Vigil India Movement, Citizen for Democracy, Prayas, Human Rights Wing, Foundation for Legal Aid Environment and Social Action, Peoples Union for Civil Liberties, The Indian Society for Human Rights for all, Equal Justice to Criminal and Victims, are some of the trustworthy and prominent NGOs. Their activities include publishing newsletter, research work, organizing Seminars, Conferences etc. Bandhua Mukti Morcha or Bonded Labour Liberation Front is a nongovernmental organisation in India working to end bonded labour. Based in New Delhi, it was founded in 1981 by Swami Agnivesh who continues as its chairman. Bonded labour was legally abolished in India in 1976 but it remains prevalent,

[73] Dr. H.O. Agarwal, *Human Rights* 211 (15th ed. 2008).

with weak enforcement of the law by state governments. Besides the pro-active commitments of some NGOs in protecting and promoting the human rights of the persons, there are some individuals like Hingorani(Advocate), Sheela Barse (Social Worker), Arun Shourie (Journalist), Upendra Baxi (Jurist), Ashok Kumar Johri, D.K. Basu, V.M. Tarkunde (justice), Dr. A.M. Singhvi, Rajinder Sachar, (Justice), etc., their work contributions in enforcing the human rights of poor masses in the society is highly appreciable and are of paramount importance.[74]

It is remarkable to note in the context of India that the positive role that the non-governmental organization (NGOs) can play in furthering the cause of human rights has been recognised both by the protection of Human Rights Act, 1993 and the National Human Rights Commission (NHRC). The Act, 1993, in Section 12(i) has enjoined upon the NHRC to encourage the efforts of the NGOs and institutions working in the field of human rights. The NHRC on its part has, in its very first report clearly spelt out the three areas in which NGOs could be its direct assistance to it, in its mission. Firstly, because of their grass roots contacts, NGOs can most effectively identify human rights violations, articulate them and seek redress from the Commission. The Commission expects the NGOs to play an active and positive role in bringing violations and complaints to its notice. Secondly, because, of the rapport the NGOs have with the public, they can be great assistance to the Commission by helping the Commission's investigating staff as well as undertake investigations of violations on behalf of the Commission. Thirdly, the NGO can undertake research and serious studies as specific problems and issues in view of their specialized knowledge.[75]

The Commission also encourages and utilizes the NGOs for organizing Seminars, training programmes and in spreading human rights awareness. To coordinate and canalize the efforts of NGOs working in the field of human rights and to make known their contribution to outside world, NHRC has compiled a National Register of NGOs working in Human Rights area. Human rights violations by the State and its organs have been articulated by a specialist group of NGOs known as 'Civil Liberties and Democratic Rights Group's.'

NGOs perform different functions depending upon the purposes for which they are established. Their performance of function also depends upon their resources, the geographical regions where they operate and the nature and number of the membership. Some of the functions, relating to human rights are as follow:-

---

[74] Dr. Bhanwar Lal Harsh, *Human Rights*, *Law in India* 268 (2008).

[75] '*Role Of Ngos And Nhrc In India As A Saviour Of Human Rights Of An Accused*' http://shodhganga.inflibnet.ac.in/bitstream/10603/40544/11/15_chapter6.pdf.

1. Collection of Information: NGO's collect information and analyse data with regard to conditions of jail, treatment for prisoners who are under trial, their duration etc by conducting a detailed survey and prepare a report on it.
2. Mobilization of public opinion: NGOs arrange seminars, workshops, conferences and meetings on different aspects of human rights to mobilize public opinion.
3. By providing direct service: NGO's may work directly with victims and assist in solving their problems. They often collaborate with advocacy groups to provide legal assistance before the government authorities and the court to ensure full protection to victim's rights.
4. Legal assistance: NGOs may take up the task of bringing cases before the Court of law where a right has been violated, and no action has been taken by the victim to secure the redress either because of the lack of resources or ignorance.

CASES INITIATED BY NGO'S IN INDIA ON HUMAN RIGHTS

In the Indian context, the present Non-Governmental Organizations movement towards human rights activism owes its origin to emergency era and inherently to some of the leading events such as increasing weakness in professional efficiency of the State apparatus and many of the democratic institutions. The emergency was a period characterized by the curtailment of civil liberties through amendments to the Constitution to clamp down on the right to enjoy the fundamental rights enshrined within it, the promulgation of ordinances that legitimized the government actions, such as arresting people on the pretext of preventive detention as well as the establishment of new intelligence outfits, such as the CBI and RAW, which assisted the government with its agenda. As a result of the severe repression of civil liberties by the government, several individuals and organizations came to the forefront, as champions of human rights.

NGOs work towards the release of prisoners by writing letters to prison officials, judges, and various government officers of the State. The Supreme Court and NHRC has taken action on several human rights violations complaints relating to accused person mainly reported by NGOs from different parts of the country. An accused person is also a human being and his fundamental human freedoms in all circumstances must be protected. The accused person has certain substantive rights in criminal investigatory process against legally unwarranted investigations as well as legally unwarranted arrest and pre-arrest illegal detentions and confinements.

The president of a famous NGO, a Citizen for Democracy" Mr. Kuldip Nayar, an eminent journalist, brought in to the notice of the Supreme Court through a letter that the seven TADA detainees lodged in the hospital in the State of Assam were handcuffed and tied with a long rope to check their movement. Security guards were also posted outside the hospital. The Court treated the letter as a petition under Article 32 of the Constitution and held that handcuffing and in addition tying with ropes of the patient-prisoners who are lodged in the hospital is inhuman and in violation of human rights guaranteed to an individual under international law and the law of the land.[76]

The Supreme Court expressed serious concern over the violation of the law laid down by that Court in *Prem Shankar Shukla's case*[77] against handcuffing of under trial or convicted prisoners by the police authorities. Handcuffing should be resorted to only when there is clear and present danger of escape breaking out the police control and for this there must be clear material, not merely an assumption.

In *Hussainara Khatoon v. Home Secretary State of Bihar*[78], a petition of writ of habeas corpus was filed by number of under trial, prisoners who were in jails in the State of Bihar for years awaiting their trial. The Supreme Court held that right to a speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution. Speedy trial is the essence of criminal justice.

In case of *Vishaka & Ors v. State Of Rajasthan & Others*[79] where, on behalf of a woman employee who was subjected to sexual abuse by her superior officer, a NGO (Vishaka) filed a petition to draw the attention of the Court, as to the atrocities committed on the women folk in workplaces. This case was a landmark decision towards the self empowerment of women. For the first time, Courts have decided based on an international instrument, when there was no law specifically in force in India, for matters relating to sexual harassment. The move was based on India's ratification of the international instrument, Convention on the Elimination of all forms of Discrimination Against Women.

CONCLUSION

NGOs play a significant, dynamic and tremendous role in imparting justice to thousands of poor, weak, suppressed, downtrodden and exploited people, especially the under trials,

[76] Citizen for Democracy v. State of Assam, (1995) 3SCC 743
[77] Prem Shankar Shukla v. Delhi Administration AIR 1980 SC 1535
[78] AIR 1979 SC 1360
[79] AIR 1997 SC 3011

prisoners or accused persons, through its activised, sensitised, dynamic and dedicated approach towards the protection of human rights of these persons and have emerged as a powerful protective shield of assistance in the field of legal battle to these needy persons. These voluntary organizations are providing justice to the under trial prisoners or accused persons through legal aid, by its strategic arms like public internet litigation, Lok Adalat, etc. NGO's have functioned as the conscience of the national public in the field of human right by taking prompt action to investigate the instances of human right violation by undertaking studies and publishing the observations.[80]

[80] Ms. Shubhalakshmi P, '*An Analysis On The Role Of Non-Governmental Organisations In Sensitizing And Protecting Human Rights In India*'http://ijlljs.in/wp-content/uploads/2017/04/Full_paper-Human_Rights-NGOs-word_97.pdf.

COMPOUNDING OF NON-COMPOUNDABLE OFFENCES: AN INSIGHT INTO THE CONFLICT BETWEEN SECTION 320 AND 482 OF THE CODE OF CRIMINAL PROCEDURE

- KUNWAR ABHIJEET & PRERNA MITRA

"A lean compromise is better than a fat lawsuit"

-George Herbert

INTRODUCTION

India is the hotbed for a variety of crimes, and the Indian criminal justice system seeks to punish these offences as per the Indian Penal Code, 1860 and a few special statutes. It is implicit that the nature of certain offences is such that when they are committed, they aren't just committed against the victim, but against the society at large. By the virtue of the fact that the State is responsible for the protection of its people, the State too gets involved in a criminal matter that are considered to be harmful to the entire society. However, there are certain offences on the commission of which the accused and the victim can try to reach a settlement outside the precincts of a courtroom, but allowing of such a settlement is extremely stringent under the criminal law. This settlement of dispute by both the parties and conclusion of the criminal case is known as "compounding of offence", which is entailed in Section 320 of the Code of Criminal Procedure, 1973, as the procedure of compounding an offence by the court. To understand the intricacy involved in this procedure we must first understand the meaning of the word 'compounding of offence' in the legal sense.

There is no explicit legal definition of "compounding of offence" in Indian laws. Though, in *Sudheer Kumar v. Manakkandi M.K Kunhiraman*, the court referred to the Black Law's dictionary to gather an understanding of these words. The Dictionary defines "compounding a crime as: The offence of either agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper the prosecution."[81] Further building on this definition, the Court opined that compounding cannot be equivalent to mere non prosecution of a complaint, but it is the compromise between the parties involved in accordance to law with regards to compoundable offences to end the proceedings which has to be informed to the court in turn.

[81] [2008 (1) KLJ 203]

The expiatory theory is the jurisprudential edifice of "compounding of offence". This theory essentially focuses on moral principles rather than legal concepts. The theory was prevalent even in the ancient times when the philosophers believed "that anyone who repents for his misdeeds or crimes, deserve to be forgiven and let off"[82]. In the modern world the practical enforcement of this theory is when the accused and complainant resolve their dispute outside the walls of a courtroom, whereby the victim forgives the accused, often in return of a reasonable amount of compensation, thus, avoiding the entire ordeal of undergoing a trial. The Indian courts have embraced modern criminology which is rooted in the ideals of corrective measures, as a result of this in cases where settlement between parties would lead to more good and would prevent further occurrence of such encounters between parties, the courts give "correctional objective of criminal law more weightage in contrast with deterrence philosophy."[83] Section 320 of CrPC also embodies this philosophy in a restrictive manner.

INSIGHT INTO SECTION 320

Section 320 of the CrPC (hereinafter referred to as 'the Act") delivers the procedure of compounding an offence by the court. We are well acquainted with the fact that the two parties involved in the compromise are the accused and the victim. It is imperative to understand that the offence can be compounded only by the person who has been injured as specified in column no. 3 of the aforementioned Section. Therefore, if complainant is not a person mentioned in column 3 of this Section then he is not allowed to compound the offence. This Section bifurcates the compoundable offences in two parts. The *first category* of offences mentioned in Section 320(1) can be compounded by the parties independently without the permission of the court. It may be compounded at any stage and even before the proceeding has been initiated. The only requirement under this category is that the party must inform the court about the compromise (sometimes even orally) and eventually the court records the compromise and the proceedings are then ended. The *second category* mentioned under Section 320(2) of the Act is where the offence is compoundable only with the permission of the court. Unlike the former category, the offences under the latter category can be compounded only after the court has taken cognizance of the matter. The court generally gives permission to compound those offences only after taking into consideration certain set of facts such as whether the crime is private in nature or not, the magnitude of seriousness of the crime, and most importantly

[82] Anand Bhusan, The Expiatory Theory of Punishment, Indian Legal Solution, 2019, https://indianlegalsolution.com/the-expiatory-theory-of-punishment/
[83] (2014) 6 SCC 466

whether the crime has a severe impact on the society or not. In addition to this, Sub-Section 9 categorically states that any offence that is not specifically mentioned in the section cannot be compounded.

CLASH BETWEEN PROVISIONS: SECTION 320 AND SECTION 482 OF THE CRPC

On a cursory reading of Section 320 of the CrPC one might emphatically conclude that only those offences explicitly categorized under the Section can be compounded. However, this conclusion is thwarted off the rails by Section 482 of the CrPC. Section 482 of the CrPC equips the High Courts with "inherent powers". Under this Section the High Courts are empowered to pass any order that help in achieving two main objectives, which are as follows- (a) prevent abuse of the process of any court, (b) to secure ends of justice.[84] The Hon'ble High Courts have time and against used this Section to quash the criminal proceedings in cases of non-compoundable offences.

This Section and its implementation by several High Courts have sowed the seeds of dichotomy. Where Section 320(9) expressly bars compounding of non-compoundable offences, Section 482 gives the High Courts the authority to invoke its "inherent powers" in compounding of non-compoundable offences. This dilemma was given a certain direction in the case of *Kulwinder Singh and Ors. Vs State of Punjab and Anr.*[85], where the Court observed that "No embargo, be it in the shape of Section 320(9) of the Cr.P.C., or any other such curtailment, can whittle down the power under Section 482 of the Cr.P.C." Section 482 is a 'notwithstanding' section which means it is a paramount provision, therefore, no other provision can bar the inherent power. This section is used to quash the criminal proceedings of non-compoundable offence if the parties have resolved their dispute and it will cause injustice to the accused to continue the proceedings where conviction seems to be remote. There is a wide difference between the power given to the criminal courts under Section 320 to compound the offence and quashing of criminal proceedings under Section 482 by the High court. It is so because under Section 320 the court exercises its power to compound the offence within the bounds of the Section, whereas, owing to the inherent powers under Section 482, the High Court can quash the proceedings or even an FIR of a non-compoundable offence based on material on record in order to meet the ends of justice.[86]

[84] Section 482, Universal's Criminal Manual, Lexis Nexis, Page no. 479
[85] 2007 (3) RCR (Criminal) 1052
[86] Gian Singh v State of Punjab [(2012) 10 SCC 303]

CEILING ON SECTION 482

Inherent powers under Section 482 bestows upon the High Courts a substantial amount of power to even quash the proceedings of a non-compoundable offence, but the question that riddles us now is whether there are any limits to this discretionary power with respect to compounding of non-compoundable offences. Section 320 of the CrPC enlists the offences which are compoundable, but Section 482 fails to specify anything in this regard. Realizing the quandary that the combined reading of these two provisions poses, the Supreme Court observed in a plethora of cases that when invoking the inherent powers in quashing of criminal proceedings the High Court should use its power sparingly. The main objective of Section 482 must be kept in mind while exercising inherent power i.e. prevent abuse of the process of any court or to secure ends of justice. Thus, the High Court must not quash the proceedings based on the settlement between the parties in those criminal cases in which the offence has a significantly adverse impact on the society.

Parbatbhai Aahir and Ors. vs. State of Gujarat and Ors[87]*,* is the case where the Supreme Court has expressly propounded that criminal proceedings which involves serious offences such as rape, murder and dacoity cannot be quashed under Section 482 of the CrPC despite of whether the victim or the victim's family have settled the dispute, but on the other hand, in the case of *Prashant Bharti v State of NCT*[88]*,* the Supreme Court has projected a slightly contrasting stance as compared to the previous judgment. This case involved the heinous offence of rape, but the Supreme Court quashed the proceedings because the victim had herself approached the court to quash the FIR and also there was no substantial evidence that could be presented against the accused. The Supreme Court have had tried to fix the ambiguity involved in quashing of FIR by furnishing guidelines for the same. The case of *State of M.P v Laxmi Narayan*[89]*,* aptly encapsulates the evolution of the Supreme Court's guidelines on the extent of High Courts' power in quashing the non-compoundable offences. The Hon'ble Supreme court expounded the following guidelines: -

a) The Court can quash the proceedings of non-compoundable offences which are slightly civil in nature, such as matters that specifically relate to matrimonial disputes or commercial disputes, wherein the parties have settled the matter among themselves.

[87] MANU/SC/1241/2017
[88] MANU/SC/0063/2013
[89] 2019 SCC Online SC 320

b) The inherent power should be confined when the matter at hand is a heinous offence, or involves commission of a serious offence of mental depravity such as offences of murder, rape, dacoity, attempt to murder etc.

c) The inherent power cannot be used when dealing with the offences that are covered under the special statues like Prevention of Corruption Act, Arms Act and offences committed by public servant while working in that capacity.

d) In addition to this, while quashing criminal proceedings of non-compoundable offence which are private in nature, the court must consider the antecedents of the accused, the conduct of the accused, whether the accused is absconding, how he managed to enter into a compromise with the complainant, etc.[90]

CONCLUSION

The very purpose of having a criminal justice mechanism at place is to ensure that the commission of crimes can be prevented in the society, which cascades into a sense of security in the minds of the members of the society. The judiciary plays a pivotal role in ensuring that in the event of a crime, no crime should go unpunished- the accused should be punished for the offence committed and justice should be meted out to the victim. Often the criminal justice system gets entangled in the mesh of punishing the accused severely, entirely forgetting about whether the trial has actually helped the victim. In certain criminal cases which aren't grave in nature such as murder, rape, etc., the parties are always better off if the accused and the victim can come to a settlement beyond the courtroom. However, every case differs from the other, therefore the High Court while compounding of non-compoundable offences should treat each and every case differently based on the surrounding circumstances in order to truly secure justice. Since there are not any provisions explicating the same, the High court has to apply its judicial mind in order to maintain a balance between granting security to the public and allowing settlement between parties to a criminal case so that they can continue living peacefully. The court should not entertain the petition for quashing of criminal proceedings based on settlement between the parties where the commission of a harrowing offence has left the society gripped in the shackles of fear. The rationale behind it being that if a person committing a grave offence is allowed to walk freely in the streets pursuant to a settlement

[90] Shreya Bansal, Guidelines By SC As To When Section 482 CrPC Be Invoked To Compound Non-Compoundable Offences, Law Street Journal, (2019) https://lawstreet.co/judiciary/guidelines-by-sc-when-sec-482-crpc-be-invoked-to-compound-non-compoundable-offences/

between him and the victim, it not just emboldens this person to commit more offences of this nature, but also goads others to commit such offences due to the sheer lack of deterrence in the society. The court while exercising its power under Section 482 to quash the proceedings must look into the matter very cautiously as there are high chances that the victim or his/her family could have been induced, threatened or tricked to enter into an agreement by the accused. While exercising its power the court should check whether the settlement has been entered voluntarily by the victim and also the victim must be given ample of time to retract from the agreement if he/she wishes to.

The Hon'ble Supreme Court often observed that court must not quash the proceedings in the serious offences such as rape, murder and dacoity, but looking at the current position where false cases of rape and other serious offences are filed repeatedly, the scope of Section 482 must be widened to provide expeditious justice to the accused. According to the Delhi Commission of Women (DCW) report, 53.2% of the rape cases filed between April 2013 to July 2014 were found false.[91] Therefore, the role of the High Courts to quash the proceedings becomes vital in such cases. The courts need to consider other materials on record along with the evidence of settlement between the parties. The stage of trial plays a crucial role in determining the quashing of proceedings, for example in a rape case where the parties have settled the matter (though it is not allowed[92]) before the evidence stage, it will not be possible for the Trial Court to convict the accused since the victim will not be furnishing any evidence against the accused. Therefore in these kinds of cases the High court must use its inherent power to quash the proceedings in order to prevent abuse of the process of court.

The High court should ascertain the reason of settlement and on inquiry if the court is fully satisfied by the settlement which has been reached by the parties, proceedings must be quashed. In addition to this, if court finds out that the criminal proceedings was initiated with ulterior motives and has now been settled by the victim outside the court then the victim/complainant must be punished with hefty fine along with quashing the proceedings for wasting the precious time of the court.

The main intention of the Legislature behind enacting Section 482 was to equip the High court with a positive weapon that provides justice to individuals when there is no express provision to achieve it. Hence, the court should adopt the 'mischief rule of interpretation'[93] which states

[91] *53.2 per cent rape cases filed between April 2013-July 2014 false, says DCW*, India Today, December 29, (2014), https://www.indiatoday.in/india/north/story/false-rape-cases-in-delhi-delhi-commission-of-women-233222-2014-12-29

[92] Id, at 9

[93] Heydon's Case (1584) 76 ER 637

that, first the problem that the statute was designed to remedy should be identified and then the construction which curbs that problem must be adopted. Hence the power under Section 482 should be exercised to wipe out the evil elements from the society so that people can live with a sense of security.

COGNATE OFFENCES: WHETHER MERE IRREGULARITY VITIATES THE TRIAL

- TUPAKULA NIKHIL

ABSTRACT:

Framing of Charges is one of the "*sine qua non"* stages of trial procedure. Chapter XVII deals with the framing of charges in a criminal trial. Sections 211 to 224 deal with the framing of charges. The general rule is that an accused is tried only for the offences charged. If the offences aren't charged then the accused cannot be tried for those offences. One of the anomalies is that of "Cognate Offences" i.e. if the offences belong to the category of cognate offences then albeit the minor offence is not charged yet one can be tried for the minor offence. The concept of cognate offences has been exclusive dealt under Section 222 of Criminal Procedure Code, 1973.

This Article elucidates the concepts of Cognate offences in relation to framing of charges. In addition, the concepts of Prejudice to accused and vitiation of trial are elucidated in a lucid way.

INTRODUCTION:

One of the important stages of the trial procedure is 'Framing of Charges.' The nuances pertaining to framing of Charges have been specifically dealt under Chapter XVII of the Criminal Procedure Code, 1973. This chapter elucidates the concept of charges in a lucid manner and with finesse.

The Magistrate or the Sessions Judge, as the case may be, is supposed to be very thorough with the Indian Penal code, 1860 and other pertinent Criminal Codes. It is due to the fact that the charges are framed with reference to the offences mentioned under the Indian Penal Code, 1860 and other pertinent codes. As a Magistrate or Sessions Judge, as the case may be, one shall frame the charges in consonance with the ingredients mentioned in the concerned section.

The reason for the eminence of charges in trial procedure is that, in general, an accused is tried only for the offences charged. He is given the opportunity to defend only for those charges. The substratum for framing the charges to is provide a reasonable opportunity to an accused to defend the charges, which are framed. This stage entwines the concepts of Principles of Natural Justice and Right to fair hearing. Fair hearing is an integral part of fair trial. Fair trial entails a fair opportunity to accused. In order to accomplish the fundamental right of fair trial, it is

"*sine qua non"* to apprise the charges to the accused beforehand. By providing the same, He not only gets the opportunity to discharge his liability or presumption, if mandated under the Indian Evidence Act, under Section 313 of Criminal Procedure code, 1973 or under any other provision but also can defend the charges.

Every concept is subject to an anomaly. "Cognate offences" form an exception to the general rule that an accused can only be tried for the offences charged. Cognate offences entail major and minor offences. If a major offence is charged then albeit minor offence isn't charged yet he can be convicted.

SECTION 222 OF CRIMINAL PROCEDURE CODE, 1973.

Section 222 of the Criminal procedure Code, 1973 deals with the cognate offences. It specifically deals with *offence charged includes the offence proved*. It can be considered as a general exception to the rule that 'a person can be convicted only for the charges for which he's tried.'

In terse, this section says that when an accused is charged with a major offence, he may be convicted for the concerned minor offence albeit he wasn't charged for the offence.

JURISPRUDENCE OF SECTION 222, CRPC:

Section 222 of Criminal Procedure Code, 1973 corresponds to Section 238 of the Old Code i.e. Criminal Procedure Code, 1898.

The differences between the old code and new code, in relation to Section 222 of Criminal Procedure Code, 1973 are that:

a. The numbers demarcated in the old code are different from that of new code;;
b. Section 238 of the old code *is narrower when compared* to that of section 222(4) of the new code.

The reasons were explained in the ***41ST LAW COMMISSION REPORT, 1969.*** It was prior to the enactment of the new code.

41ST LAW COMMISSION REPORT, 1969

In the law commission report, it was stated that the section 238(3) of the old code is incomplete as it does not refer to any other sections which require sanction i.e. Sections 195, 197, 197A.[94] It only mentions about the sanction or permission required under Sections 199 or 198. The Hon'ble supreme court time and again reminded the legislature to amend this section as this

[94] 41st Law Commission Report, 1969, Page 161(19-16)

section had been misused. Many judges started misusing this section. Since the requirement for prior sanction was only for two sections i.e. 198, 199 they were framing charges of major offences and convicting them for the minor offences albeit there was a prerequisite of permission for conviction under the minor offence. In order to stymie this, the 41st law commission report suggested to amend section 238(3) and replace it with the following:

"Nothing in this section shall be deemed to authorize a conviction of any minor offence where the condition requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."[95]

This particular thing has been adopted by the legislature and it was amended. The above-mentioned suggestion was accepted by the legislature and was incorporated under Section 222(4) in the New code i.e. in the year 1973.

Before analyzing the Section 222, it is trite and sine qua non to fathom the terms major/minor offences and Cognate offences.

A. MAJOR/MINOR OFFENCES:

The words like Major offence and Minor offence have not been defined in the code. This paves a trajectory for judicial interpretation and behoves judicial interpretation. Minor offence, as it appears prima facie, is a kind of offence wherein the effect or the gravity is less when compared to the gravity of major offence.

It's actual meaning shall be gleaned out from the concept of its origin and the circumstances under which it was enacted.

The word "minor offences", since has not been defined, shall be taken in their ordinary sense but not that of technical sense[96]. It means that we shall not base the measure only upon the punishment under the offence.

To the extant context, it is pertinent and sine qua non to mention the case of ***Makkhan And Others v. Emperor***[97]**.** In this case, the minor and major offences were described. It was stated in the case that there exist no precise definitions for the words "major offence and minor offence". As the words 'major' and 'minor' suggest, the offence depends upon the gravity of the committal. This gravity shall be determined not only on mere severity of the punishment but also on the ingredients in common.

For it to be called as a minor offence, the following are sine qua non:

---

[95] Supra 1.
[96] Queen Empress v. Sitanath Mandal, (1895) 22 Cal 1006.
[97] Makkhan and others v. Emperor, AIR 1945 All 81.

a. Severity of the punishment;
b. They must be COGNATE OFFENCES:
c. Commonality in the ingredients of the offence;
d. It shall not be entirely different from that of the offence charged (the reason being is that he is not given an opportunity to defend those charges or he is not given an opportunity to discharge his liability. Hence, if he's charged with those charges then it amounts to violation the principles of natural justice)
e. If that is the case then it shall be specifically charged. In the case of offence being distinct and was committed as a part of different transaction, it is imperative and sine qua non to either separately charge or separately tried.

In the case of ***Shamnsahed M. Mulatani v. State of Karnataka***[98]**,** it was held that the test of minor offence isn't based on mere prescribed punishment, which is less than that of major offence. The following factors shall be taken into consideration:

a. Lesser Punishment than the punishment prescribed for major offence;
b. They shall belong to the category of cognate offences;
c. The main ingredients shall be common;
d. The one punishable with lesser sentence, if all the above are satisfied, is a minor offence.

The illustration requires a mention here as it entrenches the above-mentioned concept:

"a) A is charged, under section 407 of the Indian Penal Code (45 of 1860), with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under section 406 of that Code in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under the said section 406."[99]

COGNATE OFFENCE:

The word "cognate" has its origin from the civil jurisprudence[100]. It is usually applied in Family law. Under the Hindu Succession Act, 1956 it has been defined in context of the Family Law. The same concept has been adopted in the criminal jurisprudence via several English cases[101]. The jurisprudence has its relevancy to the English law and can be found in civil jurisprudence.

[98] AIR 2001 SC 92)
[99] Criminal Procedure Code, Illustration (a) of s.222.
[100] Rafiq Ahmad @ Rafi v. State of UP, AIR 2011 SC 3114.
[101] R v. Coutts, 2006 UKHL 39.

Albeit the Criminal Procedure Code, 1973 does not define the word "cognate" yet several authors tried to interpret and define the word 'cognate'.

Section 3(c), Hindu Succession Act, 1956: this sub-section of Section 3 of Hindu Succession Act of 1956 defined "cognate" as "one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males." As stated earlier, this is defined in relation to Family law.

Encyclopedia Law Lexicon: it explained the word, in pertinence to the civil law, as "According to Hindu Law it is a class of heirs, descended or borrowed from the same earlier form."[102]

***Ram Briksh v. State*[103]:** It defined the word "Word "cognate" literally means "akin in nature"

Black's Law Dictionary[104]: defined the cognate offences as lesser offences, which are related to major offences due to the fact that they share several of the elements of greater offences and they belong to the same category or class.

As per ***P Ramanatha Aiyer's The Law Lexicon***[105], Cognate offence is an offence which is descended or borrowed from the same earlier form.

Hence, the following can be gleaned out from the above definitions:

a. For it to be a cognate offence, the lesser offence shall share several elements of greater offences and shall be akin to major offences;
b. They shall belong to the same class or category;

In the case of ***Rafiq Ahmad @ Rafi v. State of UP*[106],** it was held that:

'where the offences are cognate in nature, possessing the feature of commonality and if it is duly supported by the evidence on record then the courts can exercise its power and punish the accused but no prejudice shall be caused to him as an aftermath of conviction for cognate offences.'

In the case of ***Shamnsahed M. Mulatani v. State of Karnataka*[107],** it was held by the Hon'ble Supreme court that Sections 302 and 304B do not belong to the same category or cognate offences. They are different in their composition. It is because, if an accused is charged for an offence under Section 304B and the prosecution successfully establishes that she was subjected to cruelty or harassment in connection to demanding dowry then the court shall presume that

[102] Supra 8
[103] 1978 All Cri C 253.
[104] A. Garner Bryan, Black's Law Dictionary 3738 (8th ed., 2004)
[105] P Ramanatha Aiyer, The Law Lexicon 343 (2nd ed., 2002)
[106] AIR 2011 SC 3114.
[107] AIR 2001 SC 92.

he committed the offence under Section 304B unless he disproves the presumption by adducing sufficient evidence. There exists reverse burden on the accused to disprove the presumption. By charging the accused under Section 302, if he's convicted under Section 304B then it may pose grave prejudice or it may amount to failure of justice.

List of Cognate Offences:

Albeit the list is subjective in nature yet endeavour was done to mention several categories.

a. SECTIONS 396 AND 302 of Indian Penal Code, 1860 *('IPC')*

b. SECTIONS 396 AND 394 Of IPC;

c. SECTIONS 337 AND 307 Of IPC;

d. SECTIONS 420 AND 417 of IPC;

e. SECTIONS 364A AND 365 of IPC;

f. SECTIONS 325 AND 323 of IPC;

g. SECTIONS 382 AND 380 of IPC;

h. SECTIONS 387 AND 385 of IPC;

i. If a person is charged under Section 304 B and if "cruelty" is proved and sufficient chance was given to accused then he may be convicted under Section 498 A[108]

ETC.

SECTION 222(1) OF CRIMINAL PROCEDURE CODE, 1973

Section 222(1) of Criminal Procedure Code, 1973 is as follows:

"When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it."[109]

The Hon'ble High court of Karnataka, in the case of ***Baby Kumar Laias Janadhana v. State of Karnataka***[110]**,** held that whenever higher offences are committed by the accused and in the intermittent period, he hurls filthy and abusive language which has the tendency to provoke the victim to indulge in retaliatory acts then framing of charges under Section 504 is unwarranted. He may be convicted even without framing the charges.

[108] Dinesh Seth v. State (NCT of Delhi), 2008 AIR SCW 5639.
[109] Criminal Procedure Code, s.222(1)
[110] 2003 CriLJ 1425.

Under Section 222(1) of the Criminal Procedure Code, 1973 if a person is charged for the culpable homicide then he can be convicted even for grievous hurt albeit he wasn't charged with that offence.[111]

When two offences involve two different elements and they do not belong to the same class or category then if any prejudice has been caused to accused then the conviction under that section can be set aside

For it to be covered under Section 222 of Criminal Procedure Code, it shall be a cognate offence. The cognate offences, as explained earlier, means that they belong to one class or category and they shall bear some commonality in their ingredients. Apart from those, one of the punishments shall be less.

Hence, in terse, if a major offence is charged and albeit an accused may not be convicted under major section yet if the ingredients are similar and they belong to the same class or category then it amounts to a minor offence and since, while proving or discharging the major offence, minor offence's ingredients will be dealt, it is trite on part of the court to convict an accused for the minor offence. It is subject to "being prejudiced by the trial."

SECTION 222(2) OF CRIMINAL PROCEDURE CODE, 1973

Section 222(2) of Criminal Procedure Code, 1973 is as follows:

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it."[112]

The very purpose of criminal procedure is to underpin, espouse the delivery of justice. They need to further the cause of justice. They shouldn't stymie the way to achieve justice. If due notice was given to the accused via charge sheet and he was given an opportunity to defend the case then in those cases, he may be convicted under Section 221 of Criminal Procedure Code, 1973[113]

As stated earlier, charges are framed so as to give notice to the accused which may go up even for the minor offences[114]. This section may deal with additional facts which may reduce the

[111] Md Nabi, AIR 1934 Cal WN 782.
[112] Section 222(2), Criminal Procedure Code, 1973.
[113] K Prema S Rao and another v. Yadla Srinivasa Rao and another, AIR 2003 SC 11.
[114] Jagannath v. State, AIR 1956 All 655.

offence into a minor offence and does not hold good with the principle that the minor offences must always consist of fewer particulars than the major offence[115].

In the case of ***Abdul Rahiman***[116]**,** it was held that where a combination of only any of those particulars constitutes a full offence, the crime shall be referred to as a minor offence in section 238(1). We should not ignore the fact that Section 238, Sub-section (2), offers proof of relevant facts that restrict the violation to a minor offense, and it does not agree with the view that the minor offense will necessarily consist of less specifics than the main offense. The distinction between sections 222(1) and 222(2) were elucidated in a lucid manner.

Illustration 2 to Section 222 affirms the same. It is as follows:

"A is charged, under section 325 of the Indian Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of that Code".

PREJUDICE TO ACCUSED;

We have seen many instances where it was held that if it causes prejudice to accused then the court may vitiate the trial. The meaning of prejudice shall be fathomed. It is sine qua non to fathom the word "PREJUDICE" as it is connected to Section 222 of Criminal Procedure code.

In the case of ***Willie (William) Slaney v. State of Madhya Pradesh***[117]**,** while examining as to whether accused has been prejudiced or not, the Hon'ble Court noted that:

a. Procedural laws are there and designed to further the ends of justice but not to frustrate them. Procedural laws shall not be portrayed as an anomaly to justice. It's a hand-maid to substantial law and if used to derogate the purpose then it's anathema to the principles of the enacted law.
b. The object of this code is to ensure full and fair trial to the accused. Fair trail shall be provided to accused as 'an accused is presumed to be innocent until proven guilty'.
c. He shall be provided a reasonable opportunity, in consonance with the principles of natural justice;
d. He shall be explained the nature of offence;
e. Full and fair opportunity shall be given in order to defend himself;
f. Substantial compliance with the outward forms of law;
g. If all these conditions are satisfied then it can be held that he's isn't prejudiced.

[115] AIR 1936 B 193.
[116] Infra 29.
[117] 1955 SCR (2) 1140

Nevertheless, the court shall look into the facts of each case and determine 'whether the accused was gravely prejudiced or not'.

In the case of ***Harjit Singh v. State of Punjab***[118]**,** the following were gleaned pertaining to the concept of prejudice:

a. Pertaining to the misjoinder of charges, it was held that no prejudice shall be caused to the accused;
b. A conviction for lesser offence is allowed;
c. It shouldn't result in the failure of justice;
d. It should not be fatal.

Definitions:

***Black's Law Dictionary*:** it defines "prejudice" as following:

"1. Damage or detriment to one's legal rights or claims.

Legal prejudice. A condition that, if shown by a party, will usu. defeat the opposing party's action: esp. a condition that, if shown by the defendant, will defeat a plaintiff's motion to dismiss a case without prejudice. The defendant may show that dismissal will deprive the defendant of a substantive property right or preclude the defendant from raising a defense that will be unavailable or endangered in a second suit.

Undue prejudice. The harm resulting from a fact-trier's being exposed to evidence that is persuasive but inadmissible (such as evidence of prior criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned."[119]

In the case of ***Rafiq Ahmad v. State of UP***[120]**,** it was held that the following shall be looked into while deciding whether prejudice has been caused to accused or not:

a. The accused has right to remain silent during the examination under Section 313 of Criminal Procedure Code. The Demeanour will be noted by the Judge. Adverse inference may be drawn;
b. Right to fair trial;
c. Accused is innocent until proven guilty;
d. Prosecution shall prove beyond reasonable doubt.

The Hon'ble Supreme Court held that prejudice or failure of justice shall be examined with reference to the above aspects. In its generic sense, it cannot be applied. If accused can prove

[118] 2006 1 SCC 463
[119] A. Garner Bryan, Supra, 11.
[120] AIR 2011 SC 3114.

before the court that some prejudice happened to him and it, thereby defeated his rights under criminal jurisprudence then he can seek benefit from the court.

Hence, while considering whether prejudice has been caused to accused shall be based on the following factors:

a. Right to fair trial;
b. Accused is innocent until proven guilty;
c. Prosecution shall prove beyond reasonable doubt.
d. In cases where 113 A AND 113 B of Indian Evidence Act come into picture then, save as proving it beyond reasonable doubt, one may be convicted only upon discharge of presumption upon the accused

SECTION 222(3) OF CRIMINAL PROCEDURE CODE, 1973

Section 222(3) states the following:

"(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged."

For any offence, he may be convicted for its attempt albeit he isn't charged for that offence. It is due to the fact that it does not cause prejudice. If facts and circumstances prove that he attempted to commit the offence then he may be convicted. Sufficient notice exists for those activities.

When an offence of rape was alleged to be committed but the evidence portrays that he has attempted to commit then he may be convicted for that attempt albeit it wasn't specifically charged. This was stated in the case of ***State of Maharastra V. Rajendra Jawanmal Gandhi***[121]**.**

SECTION 222(4) OF CRIMINAL PROCEDURE CODE, 1973

Section 222(4) states the following:

(4) "Nothing in this section shall be deemed to authorize a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

If any prerequisite is required for any offence or any cognate offences for prosecution then it is bound that we shall take necessary

[121] AIR 1997 SC 3986.

The scope of Section 222(4) is wider when compared to that of Section 238 of the old law. Old law is very restrictive to only Section 198, 199. Whereas, under the new code, apart from sections 199, 198, other sections like 195, 196, 197 come under its ambit.

41ST LAW COMMISSION RECOMMENDED FOR ITS EXPANSION. It has been stated in infra.

DIFFERENCE BETWEEN COGNATE OFFENCES AND DISTINCT OFFENCES:

One may be obfuscated pertaining to the difference between cognate/major or minor offences and distinct offences. Before fathoming the difference, it is sine qua non to analyze the concept of Distinct offence.

DISTINCT OFFENCE:

Section 218 of Criminal Procedure Code, 1973 is as follows:

"Separate charges for distinct offences.

(1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately: Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.

(2) Nothing in sub- section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223.

Illustration A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt."[122]

It can be gleaned out that for every distinct offence, separate charge shall be created.

As per ***P Ramanatha Aiyer's The Law Lexicon***[123], **Distinct offence** is an offence which is entirely unconnected with a former offence charged.

In the case of ***Banwari Lal Jhunjhunwala and … v. Union of India and Another***[124]**,** it was held that "DISTINCT" means *"not Identical"*. It is different from the concepts of separate offence and each offence. Distinct offence stresses upon the c*haracteristics* while "separate" stresses upon the "*two things not being identical'*.

[122] Criminal Procedure Code, s.218.
[123] P Ramanatha Aiyer, supra, 12.
[124] 1963 AIR 1620.

If at all any interrelation or co-relation exits between two charges then it cannot be called as a distinct offence. Two offences can be called as distinct offences when they aren't related to each other in their characteristics. *There shall be no relation or connection between the various nefarious activities which give rise to the criminal liability*[125]

Hence, distinct offences are those:

a. Which aren't identical in nature;
b. which differ in characteristics;
c. which aren't committed as a part of same transaction;
d. where, no relation or connection exists between the offences;
e. and *whether offences are distinct or not shall depend on the facts and circumstances of each case.*

DIFFERENCE:

The difference between cognate offences and distinct offence are as follows:

1. Cognate offences form an integral part of the major offence whereas in order to constitute a distinct offence, the two offences shall not be interrelated to each other.
2. Under Section 222, albeit minor offence isn't charged yet accused can be convicted. Whereas, under Section 218, unless they aren't separately charged, accused cannot be convicted if prejudice is caused to him.
3. Cognate offences and separate offences are related. They form a part of the same transaction. The substratum of separate offences is 'same transaction'. To the contrary, distinct offences aren't a part of same transaction. They do not have any relation. They are distinct in nature and are non-identical.
4. In Cognate offences, minor offence shall be a part of major offence. Whereas, it isn't the case under distinct offence.
5. Cognate offences are those offences which belong to the same family or group. Whereas, for distinct offences, it need not be the case.

ILLUSTRATIONS:

[125] Chunnoo and others v. State, AIR 1954 All 795

1. A committed murder on Monday. On Tuesday, he committed dacoity with murder. Since, these two offences aren't connected and independent, they shall be tried separately. Hence, in this case, 302 and 396 are distinct offences.
2. Illustration to Section 218 is as follows:

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

3. A hurts B by inflicting several fist blows. In this case, albeit each fist blow is a separate offence yet they are tried under one head. They aren't distinct offences. They are separate offences as they are done as a part of same transaction.
4. A intends to commit cheating by siphoning off the entire money from the government by supplying low quality goods. He does it under three transactions. Albeit each transaction amounts to cheating yet it is tried under one head. They aren't distinct offences. They are committed with an intent to siphon off the entire money.

CONCLUSION:

1. The effect upon the trial procedure depends upon *whether prejudice or failure of justice has been caused to the accused but not on mere irregularity in procedure.*
2. Section 164 of Criminal procedure Code, 1973 states "*No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby"*[126]. this section portrays the intention of the legislature that mere irregularity cannot be ground for vitiation of trial.
3. In the case of ***Shivaji Sahebrao Bobade and another v. State of Maharstra***[127]**,** the Hon'ble Supreme Court held that non-framing of charges will not, per se, vitiate the trial. Each case shall be examined on merit and the courts shall bear in mind that an accused *must* be guilty of an offence but not 'may' be guilty of an offence. Hence, the minor offence shall be proved beyond reasonable doubt. Albeit one isn't charged of

[126] Criminal Procedure Code, s.464.
[127] AIR 1973 SC 2622.

minor offence yet if he has to be convicted for minor offence then the offence shall be proved beyond reasonable doubt.

4. In the case of ***Gurubachan Singh v. State of Punjab***[128]**,** it was held that in judging a question of prejudice, the court, with a broad vision, shall look into the substance but not mere technicalities. Their main concentration shall be on whether he had a fair trial or whether he knew what he was tried for or whether the main facts were explained to him fairly and due chance was given to him to defend his case. in case of prejudice, accused shall be given the benefit.

a. In the case of ***Willie Slaney v. State of Madhya Pradesh*** [129]**,** a question arose regarding whether an irregularity in proceeding (at any stage of trial) will vitiate the trial. The Hon'ble supreme court held that the procedural laws are those, which were designed to further the ends of justice but not to frustrate the ends of justice. If at all, an accused avail the principles of natural justice and if he clearly understands the nature of offences, clearly defends his case then mere mistakes or inconsequential errors will not vitiate the trial procedure.

5. Section 222 may vitiate the trial if the following aren't followed or are done against the following principles:
   a. When the minor offence creates presumption upon the accused i.e. UNDER 113 A AND 113 B OF INDIAN EVIDENCE ACT, then under 313 examination the accused shall be given an opportunity to discharge his presumption;
   b. Right to fair trial;
   c. Presumption of innocence until proved guilty;
   d. Minor offence shall be proved beyond reasonable doubt;
   e. No prejudice shall be caused by denying the above rights.
6. When a case is proved beyond reasonable doubt and if those evidences gain the confidence of the court then albeit presumption shall be discharged by accused yet if it isn't done, he may be convicted. In the case of ***Virendra Kumar v. State of UP***[130]**,** albeit accused wasn't charged under 306 yet incriminating evidences were produced by the prosecution. The evidences proved that he tortured her for bringing dowry. The court

[128] AIR 1957 SC 623.
[129] 1955 SCR (2) 1140.
[130] 2007 (1) Crimes 370 (SC).

held that, without any reference to Section 113A OF INDIAN EVIDENCE ACT, he may be convicted. In the interest of justice, courts can order or convict the accused.

7. Hence, the outcome of the trial depends on the following:
   A. No prejudice shall be caused to accused;
   B. As a part of conviction, no failure of justice shall happen;
   C. Courts shall remember that accused is innocent until proven guilty;
   D. The cognate offence shall be proved beyond reasonable doubt;
   E. Fair trial shall be given to him.

SOCIAL TRANSFORMATION THROUGH LAW

- ANIRUDH & VRINDA K.

INTRODUCTION

Social transformation refers to the change in the ideology of the group of people who shared same values and characteristics. In simpler terms social transformation can be understood as the "change in society". Law plays a very vital role in the positive transformation of the society. Firstly, it maintains the order and stability in the society. Secondly law changes itself with the changing dynamics of society. Law is an important tool of social control.

To understand the role of law in social transformation, it is pertinent to get familiar with the working of legal system in the light of political, social and economic perspective which are highlighted in the Constitution of India. Preamble of Constitution provides characteristics of an ideal society. The objectives stated in the preamble are to secure "justice, liberty, equity and promote fraternity to maintain unity and integrity of the nation."

It is this foresight in mind father and main architect of the Indian Constitution Dr. Bhima Rao Ambedkar inserted **Article 368** to the Constitution which provides that "Any part of the constitution may be amended by adopting appropriate procedure except destroying the basic structure of the constitution". It reflects the acceptance of the need of changing the law even the law of the land when situation warrants.

REMOVAL OF SLAVERY FROM SOCIETY

The first instance of social transformation through law was visible when **Indian Slavery Act** was passed in 1843 to remove slavery from India. It was declared as an offence under Section **371 of the Indian Penal Code 1860**. Similarly **Article 23 of Indian Constitution**, provides a fundamental right against human trafficking and force labour. Such provisions of law clearly shows the intent of law makers to remove slavery from society.

ABOLITION OF SATI

The other malpractice which was prevailing in the 19th Century was Sati. Sati means burning live widow along with the corpse of her husband. This practise could not be stopped by the society as it was considered as a great tradition and customary practise. Legislature took serious

steps by introducing a special law for the treatment of persons who abet sati and made it exemplary punishable up to death sentence under **Commission of Sati Act, 1987**

REMOVAL OF INEQAULITIES ON THE BASIS OF CASTESISM

A very strange legal structure was created in history of Indian society by various Smritis / Samhitas to enforce unjust, unfair and unreasonable social and religious practices of this land on caste lines. The sentences / punishments / penalties for the same offence or misconduct were different for Brahmins and Shudras and other strata of the Society based on caste-hierarchy**.** Independence in 1947 brought a new hope for millions of people in India who suffered unimaginable hardships and atrocities from the hierarchically higher people in society. Through Constitution of India, for the first time legal remedies for the wrongs committed against downtrodden people were made available to them in a perfect codified manner guaranteeing their honour and upliftment and at the same time providing for punishment to people who used to indulge in caste based discrimination and outrageous conduct, humiliating and degrading the so called low caste people of India.

Article 366 (24) and 366 (25) defined the terms "Schedule Castes" and "Schedule Tribes". **Article 17** of the Constitution of India, abolished the practise of untouchability and made it a punishable offence by introducing a legislation called "**The Untouchability (Offences) Act 1955**". Now title of this act has been amended and it is known as "**Protection of Civil Rights Act 1955**". To make more stringent change in the society, **"The Schedule Caste and the Schedule Tribe (Prevention of Atrocities) Act"** was passed in the year 1989. Both these Acts are now in force for the protection of the rights of Scheduled Castes and the Scheduled Tribes in India.

PROTECTING THE RIGHTS OF SENIOR CITIZENS IN SOCIETY

Senior citizens are considered as the guiding torch for any society. Wisdom and Experience of Senior Citizens are very essential for development of a society. Caring for the elderly qualifies as one of the most elemental roles a society must be held accountable for. While most developed countries have legislation and schemes in place to ensure that no senior citizens are deprived of their rights, a large part of the population of countries such as ours remain unaware of them owing to low literacy rates. While some of the most basic laws include the Elder law and the Maintenance and Welfare of Parents and Senior Citizens Act, there are other sections of the Indian constitution that safeguard the rights and interests of the elderly.

Provisions have been made in the Constitution of India to preserve the rights of those aged above 60. Since these articles are part of **Chapter IV of the Constitution** which corresponds to Directive Principles, they cannot be enforced by a court of law as stated in **Article 37**, however, they are the basis upon which any legislation is drafted. Article 41 of the Constitution secures the right of senior citizens to employment, education and public assistance. It also ensures that the state must uphold these rights in cases of disability, old age or sickness. Meanwhile, **Article 46** asserts that the educational and economic rights of the elderly must be protected by the state.

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, makes it a legal obligation for an heir/offspring to provide a monthly allowance to his/her parents (senior citizens) as maintenance

LEGAL SAFEGUARDS FOR CHILDREN

Offences involving children have always highlighted the dark side of our society. Young people are the foundation of any society. It is very important that right values and morals shall be inserted in their mind from young age. The practice of child marriage was vehemently seen in Indian society across various religious communities. Tough attempts were made by many reformers it turned futile until a law was enacted. In year 2006, **Prohibition of Child Marriage Act** was introduced which criminalised child marriage and imposed punishment of rigorous imprisonment up to 2 years or fine up to Rs. 2 lakhs or both.

It is said that *Education is the basic tool for the development of consciousness and reconstitution of society.* In 1992 the Honourable Supreme Court of India declared the right to free and compulsory education as a fundamental right in the ambit of 'Right to Life' under Art 21 of the constitution. In 2002 the Constitution was amended by inserting **Article 21A** to implement the right to free and compulsory education of every child aged between 6 – 14 years and inserted fundamental duties of parent and guardian. In 2010 **The Right of Children to Free and Compulsory Education Act 2009** was put in force with effect from 1st April to provide free and compulsory education from 1st to 8th standard to every child. Thus it can be seen that law protects the life of the children.

PUBLIC INTEREST LITIGATION AS TOOL OF SOCIAL TRANSFORMATION

Another instrumental tool of law used in social transformation is right to file Public Interest Litigation. PIL is an idea went for expanding the accessibility to equity and structures a piece of sacred law in India. Public-Interest Litigation in India is a legal contest fought judicially, to armour the public interest. It is introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party. It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court.

The seeds of this socially conductive concept were sown in India by Kapila Hingorani, when In December 1979, she filed a petition regarding the condition of the prisoners detained in the Bihar jail, whose suits were pending in the court. This petition was filed by the name of the prisoner, Husnara Khatoon, hence the petition came to be known as Husnara Khatoon Vs State of Bihar. In this case, the Supreme Court upheld that the prisoners should get benefit of free legal aid and fast hearing. Because of this case 40,000 prisoners, whose suits were pending in the court, were released from the jail.

OBSERVANCE OF PRECEDENT: SIGNIFICANCE IN JUDICIAL PROCESS IN THE COMMON LAW SYSTEM

- **SURABHI SARAWGI**

A coherent law calls for like cases to be treated alike, so the reliance on precedents is not an exceptional feature. What is exceptional is that such precedents become a source and bind future judges. The doctrine of binding precedent states that a rule in a relevant previous decision must be adhered to "because it is a previous decision and for no other reason."[131] This principle is only recognized under the common law system, in the name of the doctrine of *stare decisis* or binding precedent. Unlike the Roman law, which relies on a series of case for it to be a binding precedent, the English law lays emphasis on an individual case.[132] It has rather become habitual of the lawyers to understand the binding precedents under the English law of superior nature thus giving it authority. The Continental jurists foresee this theory of binding precedent as a component of weakness. It is believed by these jurists that legislation is a more effective way of law- making as it caters to the wishes of the people and the fact remains that judges do not have the *de-facto* law-making authority. These binding precedents meet one of the most basic needs of justice that is to provide uniformity, although the inflexible observance of the same negates the judicial process. The question arises can the doctrine of binding precedent put together stability, continuity and adaptability.

It is of utmost significance that the decisions made by the judges in way should be like a ticket of the railroad, which is limited to one day and one train.[133]If the judgments made by the judges are of any importance and can be put to practice, reasons should be given with respect to the judgment.

With the need for law to be certain, a more comprehensible common law, the idea of reporting of law and the hierarchy of courts, a way was paved for the doctrine of binding precedents, which necessitated the idea to give, coherent judgments with reasons that could be cited and mentioned and subsequently be followed by the lower courts. However, this doctrine of binding

[131]M. Radin, 'Case Law and *Stare Decisis:* Concerning *Priijudizienrecht*in *Amerika'* (1933) 33 Columbia Law Review 199, 200

[132] A. Goodhart, 'Precedent in English and Continental Law '(1934) 50 Law Quarterly Review 40,41

[133]*Smith V. Allwright* 321 US 644,669(1944) (Roberts J).

precedent is still not engrained in the statutes. The scope and application of the doctrine is still ascertained by the judges.

The rule of binding precedent was given owed respect; the judges iterated that this rule was an imperative basis to ascertain as to what law is and the application of the same. They said that this rule postulates a notch of certainty, which is of great significance for judicial process. However, it was also acknowledged that harsh and inflexible observance of this rule might become a cause of unfairness in a certain case, thereby impeding justice and hindering the growth of law. The Lordships thus insinuate to treat decisions taken in the former cases as normally binding, thus doing away with the rigidity, one can succumb to a decision whenever the need be.[134]

The broad-spectrum, that is the *ratio decidendi*, which is the binding part of a precedent, is only binding to the courts that are lower in the hierarchy of courts, than the court that gave the precedent. The idea is that the higher the authority of a court more the power to legislate. All the English courts are bound by the *ratio decidendi* of the House of Lords, excluding itself.[135] However before this exception, the house of Lords in the year 1898 laid that it was bound all the decisions of itself, even for the flawed ones.[136] Even though there was a possibility that such flawed decisions would lead to forthcoming cases of difficulty. Nonetheless, it was iterated that such" rare intervention with what once upon a time was abstract justness"[137] was acceptable as against the inconvenient idea " of the fact that there is no finality of decision and that each point being argued again and again, and making it difficult for people by reason of rather distinctive decisions.[138] " To ascertain the imperative that the House of Lords is bound by its own decision, using a house of Lord Precedent is only running in circles " was critiqued. [139]

Steadfast loyalty towards the hierarchy of courts was given more meaning than the individual cases. It was laid down in a country where there exists a system of court hierarchy; the judges of the Court of Appeal are bound by loyalty to accept the decision of the House of Lords and

---

[134] *Practice Statement (Judicial Precedent)* (1996) 1 WLR 1234
[135] *Miliangos v George Frank (Textiles) Ltd* (1976)AC 443
[136] *London Tramways v London County Council* (1898) AC 375
[137] ibid., 380 (Lord Halsbury)
[138] ibid
[139] D. MacCormick, 'Can Stare Decisis be abolished?'(1996) Juridical Review 196,196

cannot ignore the decision of the higher courts.[140] Lord Justice Lawton, giving the dissenting opinion, opined, "the duty was to apply the law as it is and not to restructure or change it".[141]

It may also be laid down here that just sheer finding by a judge that one of its previous decisions have been wrong is not enough to substantiate the departure from the decision.[142] The judges also convey the mammoth of averseness to overrule a decision made by them. It is also stated that the idea of certainty of law cannot be done away with only to exercise the right to depart from a former decision. Unless the former and those latter decisions correspond completely, uncertainty may arise as to which decision prevails.[143]

All the decisions of the House of Lords are binding on the Court of Appeal except on two instances. One being if a statement by House of Lords is not in *ratio*, the Court of Appeal can turn down the decision. And the second one being wherein, if two decisions of the House of Lords is not consistent, the Court of Appeal is free to choose which decision to follow.[144] Thus the Court of Appeal is not bound to follow a decision if it satisfied that the decision was made *per incuriam*[145]

In the House of Lords, Lord Diplock supposed, "a balance must be hit between the requisite for law being certain and circumvention of obstacles that cause hindrance to the growth of law." Nevertheless the standing was clearly to make law definite.

The ideals encouraged by the doctrine of binding precedents cannot be overlooked. It is utmost significance that law should be impartial and uniform, and the judicial precedents safeguard both. It tries to achieve fairness by reducing the discretion of judges. It stops unnecessary litigation, thus saving time and money both. The judicial precedents also establish experience, rather than logic, which is also a favorable thing. The doctrine further stimulates convenience, if one case is decided in a certain, conclusion can be reached thus making it predictable. It also reduces the amount of mistakes that judges would make, consequently boosting the confidence if the public in the judicial system of the country.

[140] *Cassell v Broome* (1972) AC 1027
[141] ibid., 430
[142] *Jones v Secretary of State for Social Services* (1972)1 AC944
[143] ibid., 995 (Lord Wilberforce)
[144] ibid
[145] *Young v Bristol Aeroplane Co.Ltd* (1944) KB 718

The point remains that the judges do not and never in the future also are going to bind them unbendingly. Many aspects while interpreting will influence the judges including his own idea of what justice is, what was the court composed of, how old the precedent is, the arguments that was made in the court of law and the magnitude to which it is suitable to cover the interpretations of the precedent.[146] It has to be understood that uniformity of law is essential however the price we are paying is very high. " Uniformity comes to an end in being good when it becomes uniformity of injustice." There is a probability that the judges would try to disguise their opinion in the façade of precedents. It also argued that just because something was good in the past does not necessarily mean that it serves right for the present. It is imperative to note that precedent leaves no scope for judicial trial and error. The judges become prisoners to past and a tyrant for the future, that are bound by these judicial precedents which are dead and these decisions will bind the judges in the future also.[147] The undertaking to look for a relevant judicial precedent from among the bulk quantity of cases is not a very simple thing. Thus encumber is on the lawyers to study the technical judgments involving complexity that are hundred's of years old. It may also happen that a bad decision or an erroneous decision by a court may continue to bind for many years only for the sake that it is a precedent. Thus it can be concluded that the doctrine of judicial precedent forces the judges to fuse the decisions of the present, to accrue the prudence of judicial antecedents of the past.

Hence the sustained application of the doctrine of binding precedent centers upon its flexibility to shifting tendencies and its power to provide justice with the objective to use preceding jurisdictive knowledge to contemporary jurisdictive problems.

[146]Goodhart, (n 16)

[147]ibid.

DEVELOPMENT OF SHAREHOLDER DEMOCRACY: AN INDIAN PERSPECTIVE

- VIRAL MARU

INTRODUCTION, EVOLUTION & IMPORTANCE OF SHAREHOLDER DEMOCRACY:

Shareholder democracy is the power of the shareholders exercisable by their voting rights concerned with the appointment of board of directors. During the mid nineteenth century, the concept related to power in a limited liability and Joint Stock Company was simple and successful. It was based on ownership. The shareholders, as owners appointed directors who were accountable to them. The principal of one share one vote was applicable back then. Eventually, things changed and directors started taking control and tried to overpower shareholders. Shareholder rights started being desecrated by the concentration of power in corporate boardrooms. In order to appoint the directors, a proper balance had to be sustained between the independent non executive members and the board members. But the chairman and CEO had considerable influence over the former part of the deciding panel due to which non competent directors were appointed and they themselves could choose their successors. In the United Kingdom the circumstance is more terrible. One share one vote still wins, it is the choice and discretion of the board that allows a name to make it to the voter's list. The main path for outsider candidates to get elected is through intermediaries encircled to the various investors at the proposer's cost. In today's corporate society which is solely and mostly driven by monetary aspects, most board arrangements are uncontested if they are taken after satisfying the pockets of those who object, leading to the directors maintaining their position, with the special benefits. The status of shareholder democracy in India is evolving gradually. The corporate vote based system examined in India is for the most part with reference to shareholder casting a votes to choose directors. Global as well has bigger organizations are to a great extent relying upon shareholders to grow their business. Hence, the executives can't seclude shareholders while taking any significant decision in organization. There is a dire need for shareholders to utilize their voices in corporate administration and to expand the horizons of their commitment in the board. The issue that needs to be addressed is the considerable portion of power with the executives that undermines the shareholders' privileges. This specific nature of rights that are bestowed upon the directors somehow disrupt the spirit of a voting based

culture as per the Companies Act, that any which ways needs an up-gradation.[148] So it is about imparting data to the shareholders and furthermore about the cooperation of shareholders in the organization. However, it doesn't imply that shareholders are a substitute to the administration, abolishing job of executives in organizations. In any case, disappointment of corporate administration makes executives reluctant in acting to shareholder's needs. This lays down a foundation for embodiment of checks and balances in a corporate vote based system where shareholders have such powers to scrutinize the administration. Organizations with a large number of shareholders should run in a majority rule system not a monarchical setup. Shareholders are a real and cardinal part of decision making in any organization. Shareholders can advance the corporate vote based system by making their choice and choose executives to deal with the issues of the organization. They can make commitment by communicating their perspectives in the issues of organization. Shareholders are one of the fundamental parts in the organization. They are hypothetically engaged to impact and even cause major corporate choice.

RELEVANCE OF SHAREHOLDER PROPOSALS IN SHAREHOLDER ACTIVISM:

A shareholder proposal is a proposal by a shareholder (who holds at least 1% shares in the company), to a public company suggesting the company to adopt a particular course of action. All shareholders want the suggestions in their proposals to be recognised. While some of these proposals are proposed by few specific investors and sponsors, on the other hand some are proposed by holders who have no or very little knowledge about the company, its goals, necessities etc. , Implementation of low cost proposals is value enhancing at times, but if some proposals of the latter kind are implemented, more cost is incurred which destroys shareholder value. The shareholders who collect basic and essential information before voting are the ones who weed out low quality proposals and benefit the company. Thus an informed shareholder base is crucial in order to take advantage of shareholder activism. Regardless of whether they get greater support, proposals are just advisory in nature. Proposals that are in line with the goals and not unnecessary, will in general be executed to a great extent for reputational reasons. The board every now and then talks about the steps that have to be taken to fulfil the shareholders' solicitations in the proposals. In this regard, proposals may produce huge costs when they are submitted dominatingly by clueless or clashed shareholders. Such concerns are

[148] Mallin, B. T. (n.d.). On Shareholder Democracy: what democracy?

accentuated by the fact that a large proportion of proposals are submitted by unions and small individual investors, which may be uninformed about the companies' needs. A small group of individual investors, often referred to as 'corporate gadflies', submit a disproportionate amount of proposals.[149] These individual sponsors do not acquire large stakes and are not particularly wealthy, but submit dozens of shareholder proposals every year, convinced that it is the right thing to do. Organizations are frequently contrasted with vote based systems in which a definitive expert rests with voters .Scope of well-working majority rules systems is that practically anybody can make proposals to change policies. The obligation of choosing proposals that are probably going to be profitable and to get rid of unnecessary ones lasts with the voters. In this way, majority rules systems work just to the degree to which voters are well-educated and select the correct directors and board members. Regardless of whether these proposals pass and are at last executed in a manner that can produce hurdles eventually relies upon different shareholders of a firm. In the event that these different shareholders gather data, unsafe proposals are scrapped off and minimal effort shareholder activism show its full advantages.

ROLE OF PROXY SYSTEM SHAREHOLDER DEMOCRACY:

One of the most deliberated issues under corporate governance and shareholder democracy is the proxy system which is a practical necessity of each firm. But shareholders are neither obliged to be represented by the proxy in the meeting nor are attending the meeting compulsory. So the shareholders, who do not wish to attend a meeting, need to sign a notice and submit it to the organisation. This is called the management proxy.[150] The Companies Act, 2013 doesn't allow the proxies to participate in the meetings by speaking but allows them to merely vote for the member or the number of members that doesn't exceed fifty. The method of 'postal ballot' was introduced in which a shareholder doesn't have to attending the meeting in person, but can caste his vote either by post or by electronic medium. This process was meant to contribute to the shareholder democracy as it increased convenience for shareholders. Not all businesses were free to use this system, it was based on the central government's discretion.

[149] Sridhar, I. (2015). Corporate Governance and Shareholder.

[150] (2005). *Sachar Committee Report.*

This ballot rule is procedural in nature. As per the Companies Rules 2014[151], the company is required to send a resolution that is explanatory so that shareholders can express their assent or dissent whatever they prefer. The shareholders are required to send their replies with proper reasons through post or electronic medium. All these attempts are made to develop shareholder democracy but can be inferred that participation in appointing members isn't proportionate to participating in the governance. The latter has a wider scope. By not mandating the attendance, on one hand the shareholders' convenience is taken care of but on the other hand their active involvement takes a back seat. Maybe the management deliberately wants the shareholders not to attend so that they do not have to cater to their doubts, clarifications and suggestions. Hence there is a wedge between nominal participation and active involvement. Usually the companies have geographically scattered shareholders so the proxy system becomes incidental. The system is mainly formed for those active shareholders who cannot get involved due to distance or other problems but this system still provides a superficial power not real power to the shareholders. The Sacchar Committee suggested that the proxies should be allowed to speak and actively participate because that is how the shareholder democracy will be actually benefited. The right to speak coupled with more meaningful participation might solve this problem.

SIGNIFICANCE OF ACKNOWLEDING MINORITY SHAREHOLDERS:

The relationship between a company and its shareholders is contractual in nature. Corporate governance forms the basis of this relationship. There are various documents like MOA and AOA are the core components of this relationship. The implication of the contractual relationship is that the profits earned will be shared with each shareholder, majority or minority holder according to their proportionate holding as shareholding rights are basically ownership rights. Hence the board members and the company on a whole have a duty and fiduciary relationship with each and every shareholder. [152]As for the rights of the shareholders, they are divided into two categories; first being the ownership right over profit and assets and second being the control rights i.e. rights to appoint members to the board. The control rights are

[151] Company Rules . (2014, April 1).

[152] Company Rules . (2014, April 1).

secondary hence not a priority for a company. The principle of shareholder democracy focuses on the rule of majority, but this doesn't imply that the majority can misuse their power to overshadow the minority. The replacement of Companies Act 1956 by Companies Act 2013 has proved to be a game changer in the feud between the majority and minority shareholders.[153] The new act safeguards the interests of minority shareholders in a more comprehensive way by giving a clearer picture. Section 151 of the Companies Act requires that all the listed companies shall disclose the number of directors that have been appointed by small shareholders. These shareholders are the ones who hold shares of a value less than 20,000 rupees. They are different from minority shareholders as minority shareholders are categorised under the specific head because of non availability of controlling power. But the small shareholders can also be a subpart of minority shareholders. [154]Section 149(8) in Schedule IV of the act provides a 'Code of Independent Directors' that says that independent directors shall work to promote the confidence of minority shareholders.

CHALLENGES TO SHAREHOLDER DEMOCRACY:

- Purchase of shares for investment purpose so shareholder themselves not interested in activism.
- Shareholders do not attend the meetings. They are unwilling to put in effort to know about the company, resources , policies etc.
- A bunch of the shareholders who have nominal knowledge, keep on submitting proposals in bulk that are redundant in nature. this makes the management form a stereotype on a whole, and their attitude towards the shareholders is affected.
- Non active shareholders demotivate the management and disturb the system of 'checks and balances' that might lead to abuse of power by directors.
- The management has a laid back attitude and it doesn't organise meetings properly.
- Improper functioning of the proxy system and its rigidity.

CONCLUSION:

[153] companies act . (2013). india .

[154] Companies Act, 2013. (n.d.). India .

It is essential to comprehend what people mean by 'democracy' as democracy is a fluid concept and subjective in nature. Corporate democracy is a Legitimating Principle not an Organising Principle. It is narrower than corporate governance. In the model of corporate governance, the job of the board isn't simply to go about as the operator of the shareholders to maximise their wealth, yet rather to deal with the governance and policy formation for all stakeholders of the firm to facilitate their endeavours and expand profitability. Corporate governance is additionally about support and commitment of shareholders in the governance of organization. This idea of corporate democracy is covered under statute.[155] Corporate governance isn't an economic concept with a monetary goal; it isn't limited to only financial aspects. The costs and benefits of shareholder democracy can be analysed through the monetary and the non monetary benefits incurred by the company on accepting and implementing the proposals of shareholders. It should be kept in mind by the shareholders that the suggestions they give and the provisions they want to introduce should be practical, feasible and in accordance with the goals of the company. The proxy system is a provision to boost up corporate governance as well as shareholder activism. The problem observed is that many shareholders themselves are unwilling to participate in the administration as a majority of India's population still buys shares for just investment purposes. What they fail to understand that being the owners, they don't just have a right but also a responsibility towards the administration of the company. Better administration will lead to better functioning and higher profits that will benefit everyone at large. The need for activism has arisen also because of the abuse and misuse of power by the directors and other board members happening these days. A system of 'checks and balances' needs to be established that ensures that the money invested reaps the proportional benefit.

[155] Vaibhav Sonule, P. (. (2017). The Eclipse of Corporate Democracy in India. *volume 6* .

TRADEMARK LAWS IN INDIA

- BHUMIKA MUCHAN

EVOLUTION OF TRADEMARK

Long back to barbarian times most of the people were not educated and also, they could not read and write as well, due to which symbols became a logical method for identification, what belonged to whom? Earlier markings were of animals so that farmers, landlords could get to know that who belongs to whom. Due to increase in commerce symbols became important for trade identification and started to serve for several uses. 'Potters mark' of Greek and Roman times appeared on vessels to point the origin, destination alongside the identification of the maker. The traditional Egyptian Artefacts embraced various symbols carved on structures supported religious and superstitious reasoning. The usage of stamps on bricks by the Roman brick maker for the aim of identification began as early because the 2nd Century BC.

One of the best samples of both ancient and modern trademark use was the Barber's pole which was to indicate the situation of business. Eventually, use of marks became a ground to prove ownership of products. As merchandising and trade picked up significantly during the 10th Century,' merchants mark' also mentioned as 'proprietary mark' was to prove ownership rights of products. Gradually as technological revolution sparked, guild system disintegrated into free business and thus establishing civil protection against those that replicated the mark of another.

WHAT IS TRADEMARK?

A trademark is any sign that individualises the products of a given enterprise and distinguishes them from goods of its competitors.[1] Marketing of a specific good or service by the producer is far happier as by trademark because recognition becomes easier and quality is assured. The owner of the mark can prevent the utilization of comparable or identical signs by competitors if such marks can cause confusion.[2] By this manner similar low-quality substitutes are going to be prevented from replacing good quality ones.

The Trademark Act, 1999 speaks about "well known trademark" as mark in relation to goods and services which has become so to the substantial segment which uses such goods or receive such services that the use of such mark in relation to other goods and services would likely be

to be taken as an indicating a connection in course of trade or rendering or services between those goods and services and a person using the mark in relation to the first mentioned goods and services .[3]

Section 2 (1) (zb) of The Trademark Act, 1999 says that a trademark must be a mark that incorporates a tool, heading, brand label, ticket, signature, word, letter, name, numeral, packaging or combination of colours or any combinations of the above attributes.

(2) It must be of the character of being represented graphically.

(3) It must serve the aim of distinguishing products of a manufacturer from another.

(4) Shape, colour combination and packaging could also be protected as trademarks.

(5) The usage or proposed usage should be in reference to any particular goods or services.

(6) It should be capable of projecting connection of a person/group of persons with manufacture of the products or provision of services.

(7) Protection could also be granted to a trademark through continuous usage or by registration under the Trade Marks Act, 1999.

(8) Protection of the Trademarks are connected to the goodwill of the enterprise at is gained with continuous usage. On the other hand, protection is often granted under the Act of 1999 for intended usage also.

NEED FOR THE LAW

The Trademark Act 1940 was the primary legislation on Trademarks in India. before this Act Trademark was governed by common Law. under the Indian Registration Act 1908, registering a trademark was gained by giving ownership declaration. The above said enactment was amended by Trade Marks Amendment Act 1943. Initially the Trademark registry was a neighbourhood of Patent and Trademark Office Database, which was later separated to constitute a separate trademark registry. Thereafter the Act was amended by the Trademarks Amendment Act 1946.

The Trademark Act 1940 was displaced by the Trade and Merchandise Act 1958. The Trade and Merchandise Act 1958 came into force on 25th November 1959. afterward few minor amendments were carried repealing and amending Act 1960.

The Trade and Merchandise Act, 1958 was revised by a replacement Trademark Act 1999. The new process of latest Trademark Act started with an intention to enhance the Trademark Act within the fast-developing economy. the most intention is to bring developments in trading and commercial practices, globalization of trade and industry. The new bill gone by both the homes

which was assented by the President and have become a replacement Act called Trademarks Act 1999.

The Trademark Act 1999 is governed by Trademark Rules 2002, it came into effect on 15th September of 2003.The Indian Trademark Act [4] is now fully compatible with International standards of TRIPS Agreement [5]

LAW IN INDIA

The need for trademark law India was sought in the year 19th century. Prior this there was no trademark law in India. Various problems like infringement, non-registration of trademark that were which were solved under Specific Relief Act,1877[6] and Indian Registration Act, 1908.To get rid of all such difficulties Indian Trademark law was came into existence in 1940. Demand for the protection of trademarks rose with the increase and growth in trade and commerce after the enforcement of this law in India.

Trademark law was displaced by Trademark and Merchandise Act, 1958[7] with the aim of better protection of trademark and inhibit misuse or fraudulent use of marks on merchandise. The act provides the registration of trademark so that owner of the trademark be the only sole legal operator for its exclusive use.

Later on, Trademark and Merchandise Act, 1958 was replaced by Trademark Act, 1999 by Government of India along with TRIPS [8] (Trade-related aspects of intellectual property rights) responsibility recommended by World Trade Organization.

Trademark Act,1999 gives Police Officers the right to arrest infringement of trademark cases. The Act provides punishments and penalties for the offenders. It also gives registration duration period and also registration of non-traditional trademark.

TYPES OF TRADEMARK

Service mark

A service mark is any symbol name, sign, device or word which is intentionally utilized in trade to acknowledge and differentiate the services of 1 provider from others. Service marks don't cover material goods but only the allocation of services. Service marks are utilized in day to day services:

Sponsorship

Hotel services

Entertainment services

Speed reading instruction

Management and investment

Housing development services

A service mark is predicted to play a critical role in promoting and selling a product or services. A product is indicated by its service mark, which product's service mark is additionally referred to as a trademark.

Collective mark

A collective mark is employed by employees and a collective group, or by members of a collaborative association, or the opposite group or organization to spot the source of products or services. A collective mark indicates a mark which is employed for goods and services and for the group of organizations with similar characteristics. The organization or group uses this mark for quite one that is acting during a group organization or legal entity for dividing the various goods or services. Two sorts of collective marks for distinguishing with other goods or services of comparable nature:

Collective mark indicates that the marketer, trader or person may be a part of the required group or organization. Example – CA may be a collective trademark which is employed by the Institute of the accountant.

Collective trademark and collective service mark are to indicate the origin or source of the merchandise.

A collective trademark is employed by the only members of a gaggle of a corporation but is registered as an entire group. Example- CA is that the title or mark which given to the member of Institute of an accountant. That collective mark could also be employed by the group of association. This was added to the Trademark Act, 1988.

Certification mark

It refers to a verification or confirmation of matter by granting insurance that act has been done along with judicial formality complied. A certification mark showcases several traits of products or services on the basis of which the mark is certified, and the same is defined under the Trademark Act, 1999.

Certification trade mark means a mark competent of identifying the products or services in reference to which it's utilized in the way of trade, which is certified by the owner of the mark in respect of source, body, mode of manufacturer of products or performances of assistance, quality, accuracy or other characteristics.

Those goods or services which not so certified and registrable intrinsically under this Act, in respect of these goods or services within the name because the proprietor of the certification

trade mark, of that person. Registration of certification mark is completed consistent with the Trademark Act, 1999. Requirements for registration is that the product must be competent to certify.

Trade dress

Trade dress may be a term that refers to features of the visual appearance of a product or design of a building or its packaging that denote the source of the merchandise to customers. it's a sort of property. Trade dress protection is implemented to guard consumers from packaging or appearance of products that framed to imitate other products.

ADVANTAGES OF TRADEMARK

The biggest advantage to a trademark is that there are not any statutory limitations for the lifetime of trademarks. Trademarks have a statutory life as long because the trademark owner maintains registration of the trademark, keeps the trademark in continued use, and enforces the trademark owner's rights.

Second, registration of a trademark at a trademark office is comparatively inexpensive and straightforward. The trademark owner has got to fill out a form and send a comparatively small registration fee.

Lastly, trademarks are unique therein one can use them to brand and make demand for otherwise uninteresting or commodity products, inducing a buyer to pay a pre-mium for something that would rather be purchased at less cost.[9]

DISADVANTAGES OF TRADEMARK

Trademarks represent a number of the most important brands within the world. However, like boxers and wrestlers, the larger there, the harder they fall. Trademarks can possess an interesting amount of volatility within the market. Markets and perceptions change on a whim, and such changes can impair value in dramatic ways.

Popular trademarks also are in danger for genericise, which occurs when the general public begins to associate a brand with common products of an equivalent utility. for instance, Xerox and Kleenex never began as common words. They began as branded products that ultimately the general public related to more general products. These brands lost value due to genericise.[10]

DESIGNATION OF TRADEMARK

Trademark is designated by:

™ (™ is employed for an unregistered trademark used for promoting or branding goods).

℠ (used for an unregistered service mark used for promoting or branding services).

R (letter R is surrounded by a circle and it is used for registered trademark).

OWNER OF TRADEMARK

Trademark gives protection to the owner by assuring them with the exclusive rights to use a trademark, to spot the products or services or permit others to use it in results of payment. it's a weapon for the registered proprietor to prevent the others from illegal use of the trademark. Under Section 28[11] the rights conferred by registration.

The owner of the trademark shall not have the proper to ban the utilization of the trademark for the products or services placed on the domestic market by himself, or together with his consent, except where essential changes on the products, or the deterioration of their characteristics, or the change of the character of the products or services have occurred after they need been placed on the market.[12]

REGISTRATION OF TRADEMARK [13]

Any person claiming to be the owner of the trademark or alleged to use the trademark by him in future for this he may apply in writing to the acceptable registrar during a prescribed manner. the appliance must contain the name of the products, mark and services, class of products and therefore the services during which it falls, name and address of the applicant and duration of use of the mark. Here the person means an association of firms, partnership firm, a company, trust, government or the central government.

Conditions of registration

The central government by mentioning within the official gazette appoint an individual to be referred to as the controller, general of patents, designs and trademark who shall be the registrar of the trademark. The central government may appoint other officers also if they think that they're appropriate, for the aim of discharging, under the superintendence and direction of the registrar, the registrar may authorize them to discharge.

The registrar has the facility to transfer or withdraw the cases by in writing with reasons mentioned. Under Section 6 of the Act, discussed the upkeep of a registered trademark. At head office particulars of registered trademarks and other prescribed essentials, except for notice of

the trust, shall be recorded. The copy is to be deposited at every branch office. It gives for the preservation of records in computer or diskettes or in the other electronic form.

ABSOLUTE GROUNDS FOR REFUSAL OF REGISTRATION

Absolute grounds for the refusal of registration is defined in Section 9 of the Act. The trademarks which may be lacking any distinctive characteristics or which consists exclusively of marks or signals, which may be utilized in trade to point the type, fine, quantity, supposed grounds, values, geographical origin. Time of production of products or rendering of the offerings or different characteristics of the products or offerings which consists solely of marks or indications which have come to be average within the present language. That marks aren't entitled to registration. Except it's confirmed that the mark has actually acquired a replacement character as a result of use before the date of application.

Trademark shall not be registered as trademarks if:

Its frauds the general public or causes confusion.

There is any interest hurt religious susceptibility.

There is an obscene or scandalous matter.

Its use is prohibited. It provides that if a mark contains exclusively of

(a) the form of products which form the character of products or,

(b) the form of excellent which is required to get a technical result or,

(c) the form of products which provides substantial value of products then it shall not be registered as trademark.

RELATIVE GROUNDS FOR REFUSAL OF REGISTRATION

Section 11 talks about non-registration of a mark:

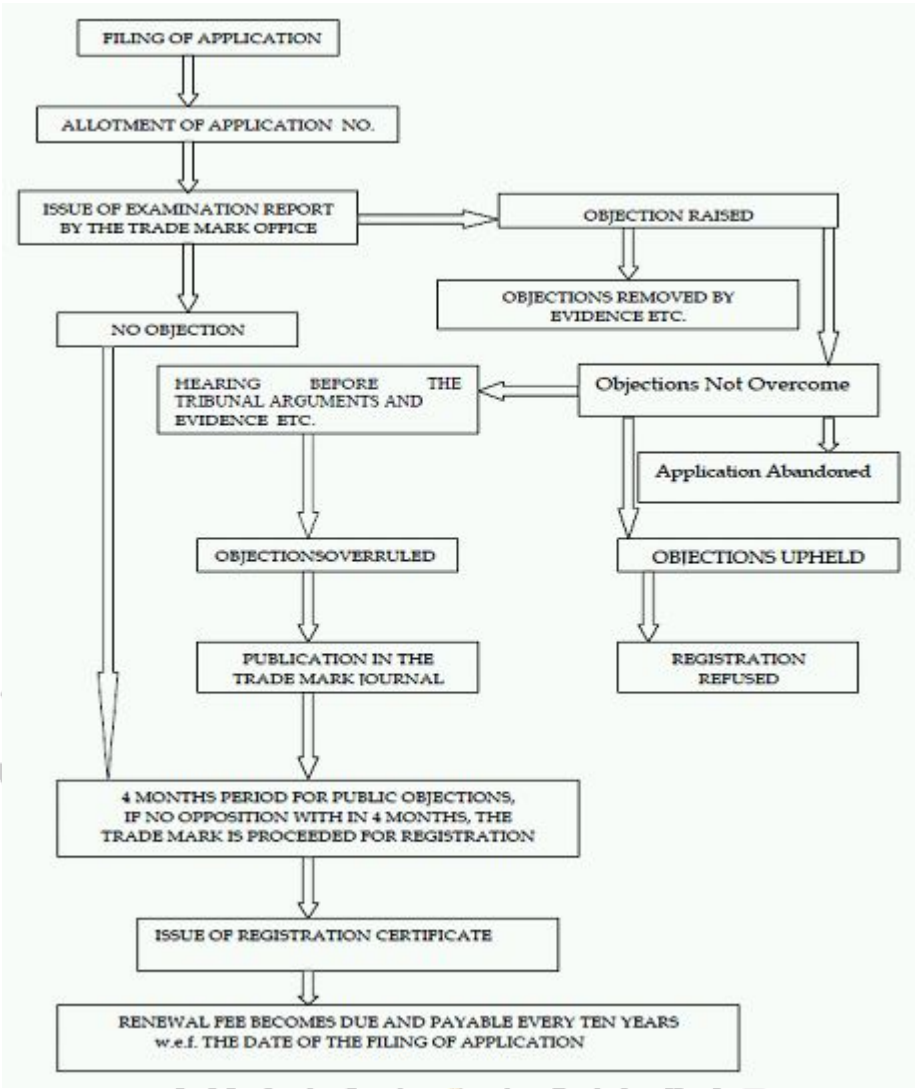
If the mark causes likelihood of confusion on a part of the general public i.e. likelihood of association with the sooner trademark;

If the mark is just like a well-known trademark in India and use of the later mark could also be detrimental to the distinctive character of the well-known trademark;

If the mark's use in India is susceptible to be prevented by law of passing off or copyright law;

The provision further envisages that where the products are of various description refusal won't be justified but registration could also be refused if the mark is probably going to be deceptive or cause confusion.

PROCEDURE AND DURATION OF REGISTRATION



EFFECT OF REGISTRATION

The registration of a trademark shall if valid give the prerogative to the registered proprietor to the utilization of trademarks in respect of products and services of which the trademark is registered, and also to get relief in respect of the infringement of the trademark.

INFRINGEMENT OF TRADEMARK

A registered trademark is infringed by an individual who not being a registered proprietor or an individual using by way of permitted use within the course of trade, a mark which is identical with or deceptively almost like the trademark in reference to goods or services in respect of which the trademark is registered. After infringement, the owner of the trademark can choose civil legal proceedings against a celebration who infringes the registered trademark. Basically, Trademark infringement means the unapproved use of a trademark on regarding products and

benefits during a way that's getting to cause confusion, difficult, about the trader or potentially benefits.

INFRINGEMENT OF TRADEMARK ON THE WEB

The expansion of the online is additionally resulting in an expansion of inappropriate trademark infringement allegations. Probably, a corporation will assert trademark infringement whenever it views one of its trademarks on a web page of a 3rd party for instance, a private who develops an internet site online that discusses her expertise with Microsoft software could use Microsoft's trademarks to consult exact merchandise without the fear of infringement. However, she mainly would not be competent to use the marks during this quite means on intent viewers of her internet website to feel that she is affiliated with Microsoft or that Microsoft is someway sponsoring her net website. The honour could simplest be analysed upon seeing how the marks are sincerely used on the online page. during this way, there's an infringement of trademark on the web.

NO ACTION FOR AN UNREGISTERED TRADEMARK

This is defined under Section 27 of Act that no infringement will roll in the hay reference to an unregistered trademark, but recognises the common law rights of the trademark owner to require action against a person for passing off goods because the goods of another person as services provided by another person or the remedies thereof.

CASE LAWS

1. The Supreme Court within the case of *Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories*[14], held that in an action for infringement the onus would get on the Plaintiff to determine that the trade mark employed by the defendant within the course of trade the products in respect of which his mark is registered, is deceptively similar.

2. The Bombay supreme court within the case of *Thomas Bear And Sons (India) v. Prayag Nurani*[15], held that in judging the probability of deception, the test isn't whether the ignorant the thoughtless, or the incautious purchaser is probably going to be misled, but we've to think about the typical purchaser buying with ordinary caution.

3. The Supreme Court's decision within the case of *James Chadwick & Bros. Ltd. v. The National Sewing Thread Co. Ltd.* [16], are often considered an important obiter dictum which aided in streamlining the interpretation of trademark infringement law in India. The Court within the case stated that in an action of alleged infringement of a registered trade mark, it's

first to be seen whether the impugned mark of the defendant which is similar to the plaintiff's registered mark. If the mark is found to be identical, no further question arises, and it's to be held that there was infringement.

4. *Hearst company Vs Dalal avenue communication Ltd.* [17] the courtroom held that a trademark is infringed when a personality within the course of trade makes use of a mark which is same with or deceptively almost like the trademark in terms of the products in respect of which the trademark is registered. Use of the mark by using such man or woman must be during a manner which is more likely to be taken as getting used as a trademark.

5. *Amritdhara Pharmacy Vs Satya Deo Gupta* [18] in this case for determining the connection in two words associated with an infringement action was stated by the Supreme Court that there must be taken two words which are deceptively similar. And judge them by their appearance and by their sound. There must be considered that the products to which they're to be utilised. There must be a consideration of the character and type of customer who would be likely to shop for those goods. In fact, it must be considered the encompassing circumstances and also must consider what's likely to occur if each of these trademarks is employed in common ways as a trademark for the products of the actual owners of the marks.

After considering all those circumstances, they came to the conclusion that there'll be confusion. this is often to mention that, not significantly that one man are going to be injured and therefore the other will gain the illegal benefit, but it for that there'll be a multitude within the mind of the general public which can cause confusion within the goods then there could also be the refusal of the registration.

PASSING OFF

Passing off is common legislation of tort, which may be to put effective for unregistered trademark rights. However, regulation of passing off prevents a person from misrepresentation of items and services. The inspiration for passing off has faced some changes within the duration of your time. within the beginning, it had been restrained to the representation of one person goods to a different. Later it had been elevated to business and non- trading activities. Therefore, it wants to be additionally accelerated to professions and non-trading movements. Today it's applied to several sorts of unfair trading and unfair competitors where the activity of one-person cause damage to a different person. the elemental question on this tort turns upon whether the defendant's conduct is like deceive or mislead the overall public to the confusion between the industry activities of the two.

In British Diabetic organization V Diabetic, both the parties are charitable societies. Their names are deceptively identical. The phrases 'association' and 'society' both should be considering that they need been similar in derivation and meaning and weren't completely varied in a similar way. The everlasting injunction was granted.

DIFFERENCE BETWEEN INFRINGEMENT AND PASSING OFF

In, *Kaviraj Pandit Durga Dutta Sharma Vs. Navaratnam Pharmaceutical laboratories* [19], the Apex court held that there are some differences between the two.

In, *American Home Products Corpn. Vs. Lupin Laboratories Ltd.* [20] the Court held that it's well-settled law that when regarding the infringement of a registered trademark.

1. Infringement is statutory body whereas passing off is a common law remedy.

2. Registration of trademark is required in infringement however in passing off it is a pre-requisite

3.In infringement prosecution under criminal remedies are easier while this is not the case in passing off.

4. Under infringement plaintiff is only required to establish that infringing mark is deceptively similar to the registered mark in respect of similar goods or services and no further proof is required afterwards as there is a presumption of confusion whereas in the case of passing off plaintiff is only required to establish deceptive similarity of two contesting mark but also require to prove deception or confusion among public and likelihood of the injury to plaintiff's goodwill.

In, *Info way Ltd. Vs Sifynet Solutions (P) Ltd.* [21] it had been held by the Court that to proceed action for passing off three elements are required to be established, which are as follows:

- In a trial for Passing off, because the expression passing off itself suggests, is to limit the defendant from passing off its goods or services to the general public which of the plaintiff's. it's a claim not only to preserve the status of the plaintiff but also to guard the general public. The defendant must have traded its goods or given its services during a manner which was deceived or would be likely to deceive the general public into thinking that the defendant's goods or services are the plaintiffs.
- That second element has got to that has got to be established by the plaintiff may be a misconception by the defendant to the general public and what has to be placed within the possibility of confusion within the minds of the general public that the products or services offered by the defendant are the products or the services of the plaintiff. In

assessing the likelihood of such confusion, the court must leave the 'imperfect recollection of an individual or ordinary memory'.

- The third element of a passing off action is loss either or likelihood of it.

CONCLUSION

Intellectual Property reflects the meaning that its subject body is that the product of the mind or the intellect. As it's the merchandise of a productive and artistic mind, it is often traded, purchased, given and reserved. All this will be done but there are issues related that to be dealt. Trademarks are vital aspects of property so, the protection of the trademark has become essential within the present day because, every generator of an honest or service will want his mark to vary, eye-catching and it should be easily distinguishable from others.

Designing a mark like this is often difficult and after this when infringing of the mark takes place it'll cause maximum difficulty to the producer. Capital Protection is extremely important and there should be a step towards Global property Order, if there's no IPR protection, it is often explained that inventive activity will terminate. the rationale for property protection is that it can arouse creativity and discovery and stop the exploitation of inventions.

Public policy here points at keeping a property system which promotes innovation through protection initiatives, while at an equivalent time assuring that this is often not at the worth of societal interests. during this meaning, the challenge for the planet property Organisation would be to incorporate public policy effects in applications administered with developing countries, like increasing awareness of flexibilities in existing international property treaties.

Intellectual Property isn't an unusual concept, in fact, it's an idea which is discussed in lifestyle whether a movie, book, plant variety, food item, cosmetics, electrical gadgets, software's etc. it's become an idea of pervasiveness in lifestyle. 26th April per annum is celebrated as World Property Day.

ENDNOTES

1. Introduction to Intellectual Property-theory and practice (Kluver law international 1999) pg. 184

2. Trade Related Aspects on Intellectual Property Rights (TRIPS) Article 16

3. P.K. Vasudeva WTO: implications to Indian Economy (Pearson Education,2005) pg. 169

4. http://www.bizandlegis.com/in/trademark/

5.http://en.wikipedia.org/wiki/Agreement_on_TradeRelated_Aspects_of_Intellectual_Property_Rights

6. http://legislative.gov.in/sites/default/files/Specific%20Relief%20Act%201963-47.pdf
7. http://www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_43_1_trade-marks-act.pdf
8. https://www.indianeconomy.net/splclassroom/what-is-trade-related-intellectual-property-rights-trips/
9. http://www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_43_1_trade-marks-act.pdf
10. https://www.bvresources.com/blogs/intellectual-property-news/2018/03/12/what-are- the-advantages-and-disadvantages-of-patents-copyrights-trademarks-and-trade-secrets
11. https://indiankanoon.org/doc/490592/
12 https://www.wto.org/english/thewto_e/acc_e/hrv_e/WTACCHRV57_LEG_11.pdf
13. https://thecompany.ninja/protection-registration-trademark/
14. ibid
15. (1940) 42 BOMLR 734
16. 1953 SCR 1028
17. https://indiankanoon.org/doc/1239409/
18. https://indiankanoon.org/doc/368264/
19. https://indiankanoon.org/doc/529384/
20. https://indiankanoon.org/doc/34315/
21. https://indiankanoon.org/doc/1630167/

STREET CHILDREN IN INDIA AND THEIR RIGHT TO EDUCATION

-NIYATHA RAJEEV

1. INTRODUCTION

"There can be no keener revelation of a society's soul than the way in which it treats its children."

— Nelson Mandela

The socio-legal issue revolving around Street Children in India is not a novel concept. They are being neglected and discriminated against as unwanted and useless human resources not even having an identity of their own.[156] The innocence of their childhood is not accepted by society. People stigmatize them as untouchables who are denied access to many public places. Most of them live in tents built on roadsides making them vulnerable to road accidents. Therefore, it is high time that we must take active participation to bring them to the midstream of the society by empowering them with education.

The most commonly accepted definition of street children is "any girl or boy who has not reached adulthood, for whom the street has become her or his habitual abode and/or sources of livelihood, and who is inadequately protected, supervised or directed by responsible adults" [157]

2. LACK OF REALIZATION MUST BE COVERED UP BY THE EFFECTIVE IMPLEMENTATION

The benefit of a right can be derived only when its existence is realized. Not every citizen in India is aware of their basic rights. However, if there is a lack of awareness to realize it, it is the role of the machineries of government to uphold their rights especially in case of vulnerable ones.

There are various provisions in our Constitution and other enactments upholding the right to education of disadvantaged children. 'Life' in Art.21 of the Indian Constitution does not mean

[156] Report on ' Abuses against street children- Human rights watch (https://www.hrw.org/reports/2006/drc0406/5.htm)

[157] Report of The United Nations High Commissioner for Human Rights on the protection and promotion of the rights of children working and/or living on the street, UN General Assembly, 11 January 2012.

mere animal existence but the right to live with dignity and encompasses the fullest development of a person.[158] Education is essential for the overall development of an individual. Therefore, it is not only theoretical knowledge to be imparted but quality education[159] and facilities for overall development such as physical, mental, intellectual and, emotional development is essential. Every child in India has the fundamental right to acquire free and compulsory education from the age of 6 to 14 years as envisaged under Art.21A of the constitution and under the 'Right of Children to Free and Compulsory Education Act, 2009'. However, the National Education Policy, 2020 has enhanced the age from 3 to 18 years thereby extending the scope of RTE Act. Also, Section 2(d) and 2(e) of the RTE Act describe a special reference to child belonging to disadvantage group and weaker section.[160] According to Art.243G, item 25 of Schedule 11, the respective local authorities should implement schemes for child development. When Art. 45, Art.39 (f), Art.41, and Art.46 casts a duty upon the state, while Art.51A(k) places duty upon the parents. But if the parents themselves are not in such a position, it is the role of the State to safeguard them (Parents patriae doctrine)[161].

3. CHILDREN UNDER INSTITUTIONAL CARE

According to the 2019 Survey released by the Ministry of Women and Child Development, 64364 children are under Institutional homes, 7317 children in Open shelters and 3002 children in specialized agencies in India.[162]

The Ministry of Women and Child Development has reported that as of 2019, there are 7466 institutions registered under the juvenile justice (Care and Protection of Children) Act, 2015.[163] The Act has classified child into Child in conflict with law and Child in need of care and protection. They are the children in need of care and protection in the first instance. And due to their compelling situations, they are forced to commit crimes. Sec. 53(ix) of JJ Act, 2015 lays down education and vocational training as a rehabilitation measure. Apart from institutions

---

[158] Mohini Jain V. State of Karnataka (1992 AIR 1858)

[159] The 2030 Sustainable Development Goals and the Pursuit of Quality Education for All: A Statement of Support from Education International and ASCD (http://www.ascd.org/ASCD/pdf/siteASCD/policy/ASCD-EI-Quality-Education-Statement.pdf)

[160] Society for Unaided Private Schools of Rajasthan v. Union of India (2012 6 SCC 1)

[161] Sudha Sandeep Devgirkr v. Union of India, Bombay HC , W.P.(C) No. 10835 of 2018

[162] "Survey and Data about street children in India" Press Information Bureau; Government of India; Ministry of Women and Child Development published on 18 JUL 2019, (https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579350)

[163] "Unregistered Child Care Institutions", Press Information Bureau;Government of India; Ministry of Women and Child Development, Published on 28 NOV 2019, (https://pib.gov.in/PressReleasePage.aspx?PRID=1593993#:~:text=2019%2C%20there%20are%207466%20institutions,the%20country%20as%20on%2019.06.)

established under the JJ Act, there are various institutions established under the "Orphanages and Other Charitable Institutions (Supervision and Control) Act of 1961. There is National Child Labour Project (NCLP) Scheme, to rehabilitate child labourers in the country. At present about 6000 special schools are functioning under the scheme.[164] It is to say that, to avoid stigmatization, the establishment of special schools imparting formal and informal education is an effective policy.

After rehabilitating them into respective shelter homes, the primary consideration should be to provide them with health care checkups and counseling programs. The WHO in its circular released on March 18, 2020, asked to provide at most mental health care to children during the Covid-19 Pandemic.[165]Whereas the most vulnerable ones being the non-institutionalized children still on the streets.

However, the children are being subjected to abuses within the institutions as latest reported in the 2020 Kanpur case where 5 children who tested positive for Covid-19 in a shelter home were found pregnant.[166]Therefore, providing them with lessons is not the end but facilities to work on it must be provided at their place of residence. Therefore, effective monitoring and regulatory measures must be enforced properly. Monthly based social auditing must be conducted by the Central and State governments to evaluate the functioning of these institutions as set forth under Sec. 36 of the JJ Act. Also, personal interviews with each child in the institution must be carried out to take into account their needs.

4. ASSYMETRY MUST BE COVERED UP BY INCLUSIVENESS

It has been observed that when data collection is done, street children are being left behind, as they are carried through household surveys.[167] According to the UNICEF's State of the World's Children 2012 report, "children living in around 49,000 slums in India are invisible."[168]

It is difficult to convince the kids and their parents as they believe that they will end up doing what their parents do, says the person who was awarded the title of "Mumbai Ke Asali Hero"

---

[164] Government of India, Ministry of Labour and Employment (https://labour.gov.in/childlabour/nclp)

[165]Mental health and psychosocial considerations during the COVID-19 outbreak, released by WHO on 18 March 2020 (https://www.who.int/docs/default-source/coronaviruse/mental-health-considerations.pdf?sfvrsn=6d3578af_2)

[166]Mohd Tarique, 'Kanpur Case Proves We Need to Do Better for Children in India's Shelter Homes', Published in The Wire, on Jun 26 2020, (https://thewire.in)

167 'Ensuring decision makers have the right information to make plans benefiting street children, Research published by Consortium for street children (https://www.streetchildren.org/our-work/research/)

[168] 'Rural poor in India better off than urban poor: UNICEF", published in Hindustan Times, On March 01, 2012

for his efforts to educate street children.[169] A story called 'The Lost Spring' written by Anees Jung portrays the story of Saheb-e-Alam, a rag picker.[170] The author makes a false promise to the boy on constructing a school and later regrets it. The street boy is not hurt because he is used to such false promises. Therefore, it is not loose leaf promises they need rather proper implementation of effective policies with immediate effect is necessary to gain their trust. And measures must be taken from the grass-root level itself to identify street children and provide them with education.

The new educational policy of 2020 has covered children from 3 years of age and also made it compulsory for the schools to provide children with vocational training and internships from 6th standard onwards with a view that by 2025, 50% of children within the country will get exposure to vocational training and leading to universalization of education by 2030. Every child in the country must be availed its benefits. It is only by empowering them with the education that their asymmetry in societal stratification can be covered up.

NGOs are playing an active role in rehabilitating them. NGOs like Childline India Foundation, Save The Children, Smile Foundation are some among them. However, it is the obligation of the respective local governmental authorities to trace the street children within their locality. Then, the preliminary step must be to identify their respective families. There are cases where children have run away from their home or were kidnapped or abducted, and ends up leading street life. If they are restored with their respective families, it must be ensured whether they will be in a position to access education and work upon their lessons at the place of their residence. If they are found vulnerable, they must be rehabilitated to the respective shelter center.[171] Orphaned street children must be provided with long term care and protection until they can stand to on their own.

5. CONCLUSION

During this pandemic, when we are adapting to the 'new normal' way of learning, many of the street children have not even reached the preliminary doorstep of education. Efforts should be taken to trace them and bring them to the midstream of the society, as we might be losing a 'Gem' who could change the world.

[169] Sanchari Pal, "This 24-Year-Old CA Chose Educating Street Kids over a High Paying Job!", published in The Better India, on 25-12-2015 (https://www.thebetterindia.com)

[170] 'Lost Spring : stories of stolen childhood', by Anees Jung Penguin Books, 2005

[171] 'Sharanabalyam' Project initiated by the Kerala Government aims at such a mechanism.

APPOINTMENT TO THE COLLEGIUM SYSTEM AND IT'S RECENT DEVELOPMENTS

- DEEPAK SINGHAL

ABSTRACT

The National Judicial Appointments Commission is a sacred body set up to guarantee straightforwardness in the strategy of arrangements of the judges of the Supreme Court and the High Courts. This was struck around the Supreme Court in 2015, saying that it tested the freedom of legal. The judgment brought back the collegium framework which in fact has no protected arrangement. The target of this examination is to break down the significance of a different body for arrangements of judges in our nation and why our legal club is as yet indeterminate on the method of arrangement of the judges. The examination depends on auxiliary sources which included online information, books, articles and diaries. The specialists have concentrated on the continuous vociferous discuss on NJAC and the Collegium System and the advantages of having a different body for the legal arrangements. Law making body, Executive and Judiciary are the three columns on which law based structure of India rests and the forces and elements of these organs plainly set down in the constitution. Be that as it may, the discussion holds on, particularly in the arrangement of judges between the official and legal. After the death of Constitution, there was a solid official say in the arrangement of judges. Later on legal deciphered the Established arrangements and built up the collegiums framework, which limits the official say in the arrangement of judges to the higher legal. With the disposal of the official part, the position of the legal reinforced. The present article talks about the Constitutional Provision, the part of official and legal translation all the while of arrangement of judges.

KEY WORDS: Collegium System, Judges, Judicial Appointments, NJAC, Supreme Court

INTRODUCTION-

As featured the procedure of arrangement of judges to the established courts (the High Courts and the Supreme Court) of India, is the aftereffect of battle between the political official and the legal for supremacy. This procedure is represented by Articles 124 and 217 of the Constitution, which accommodate the President (following up on the coupling counsel of the

Council of Ministers), to select judges "in interview with" the Chief Justice of India, and such different judges as he sees fit.

Following a time of serious political battle in the 80s between the legal and the official, in 1993 the Supreme Court translated Articles 124 and 217 in order to accord itself power in the matter of legal arrangements. The purposes behind this were: initially, that judges were the best put to judge the capacity of a potential judge, and second, that such supremacy would guarantee that there was no political obstruction all the while. The judgment brought about the making of the "Collegium", which involved the Chief Justice and the following two most senior judges. In the course of recent decades, the Collegium has frequently come in for sharp feedback for the absence of straightforwardness in its working, an absence of effectiveness, nepotism, absence of compelling faculty administration bringing about an expanding number of opening and the sheer discretion of a large number of its choices. The Collegium is responsible to nobody for its arrangements.

To address these imperfections, the Parliament corrected the Constitution a year ago to make the National Judicial Appointments Commission ("NJAC"). The NJAC included the Chief Justice and the following two senior most judges, the Union Minister of Law (as an agent of the political official) and two individuals from common society, whose recommendations with respect to arrangements would tie on the President. The change, and the associated National Judicial Appointments Commission Act, were passed in the two places of Parliament with close consistent help.

The making of the NJAC was seen by some as an endeavor for the benefit of the decision Government to meddle in the working of the legal, and tested under the watchful eye of the Supreme Court. In a decision split 4:1, the Amendment and Act were struck down on the ground that the formation of the NJAC abused the standard of autonomy of the legal since the legal individuals are not in a reasonable lion's share. Further, it was held that the "two part veto" (where any two individuals from the 6 part NJAC could veto an arrangement) would empower prominent people to abrogate an arrangement every one of the judges had settled upon. The Court held that it was a judicially perceived rule that supremacy of the supposition of the Judiciary is basic for an autonomous legal, and in this manner the unimportant nearness of the official was a danger to the freedom of the legal.

The judgment continues on a profound question of the official and common society. It is defective on the grounds that it conflates the possibility of an autonomous legal with one that is free from official investment in the arrangement procedure. To achieve this conclusion in

view of the presumption that the legal is the sole defender of protected esteems to the outright prohibition to of the other two organs of the state, is profoundly tricky.

While autonomy from the political official is surely a piece of guaranteeing an autonomous legal, political obstruction isn't the sole danger to the flexibility and freedom of judges. Judges, bury alia, must be free from the impact of intense corporate houses, of individuals from the bar and the impact of the profession interests of their own friends and relatives. The judgment does not adequately recognize the way that in a majority rules system, the control of law is fundamental and that judges can't be exempt from the laws that apply to everyone else. In baldly striking down the Amendment and the Act, without adequately captivating with the likelihood of perusing down the arrangements so as to make them workable inside the Constitutional system, the judgment seems childish and self-serving.

The legislature and the Supreme Court are endeavoring to resolve their disparities over the new rules for choosing high court judges, chiefly finished charged inclusion of any competitor in against national exercises that the court needs to be put on record while the Center needs it to be viewed as just orally by the collegium. As first detailed by ET, the pinnacle court had in May 2016 come back to the administration the overhauled Memorandum of Procedure (MoP) for choosing high court judges.

The trouble with putting such confirmation on record is that if regardless of delivering the proof and influencing it to some portion of the official record the applicant is cleared for judgeship, it will convey a terrible name to the establishment (legal)," a senior government official conscious of the improvement told ET on state of namelessness.

Alternately, the authority stated, if the applicant is dismissed on the premise of the proof outfitted by the administration, the confirmation will sully the hopeful's authentic record until the end of time. In light of a legitimate concern for the organization and the hopeful, it is judicious that such proof be verbally imparted to the collegium," the authority said. The Supreme Court is, notwithstanding, of the view that any "implicating material" delivered by the legislature against an applicant ought to be put on record.

Another bone of dispute between the legislature and the summit court, authorities stated, identifies with the "abrogating open intrigue" proviso. Should a hopeful whose record has been faultless and respectability irrefutable however has friends and relatives who are observed to

be close partners of hostile to nationals or against social components be chosen (for judgeship). Such occurrences raise the correlated issue of superseding open intrigue," said another senior government official. "We completely regard the freedom of legal however in the meantime we wish to have a target choice system and thorough screening process for competitors."

While restoring the amended MoP in May a year ago, the Supreme Court had underlined that specific conditions were not in agreement with the precepts of autonomous working of legal. The administration and the legal need to consent to the last draft before the MoP can be executed.

Prior, in October 2015, a five part seat of the pinnacle court had struck down the National Judicial Appointments Commission after over a year-long standoff with the legislature over the constitution of the body. Putting aside NJAC, a proposed contrasting option to the collegium framework, the SC had requested that the Modi government set up an updated MoP in counsel with the Chief Justice of India.

While setting up the draft MoP, the administration chose to keep arrangement of best judges out of the domain of the Right to Information Act.

OVERVIEW-

The historical backdrop of the procedure of arrangement of judges to the sacred courts (the High Courts and the Supreme Court) of India, is the aftereffect of battle between the political official and the legal for power. This procedure is administered by Articles 124 and 217 of the Constitution, which accommodate the President (following up on the coupling counsel of the Council of Ministers), to choose judges "in conference with" the Chief Justice of India, and such different judges as he sees fit.

Following a time of extraordinary political battle in the 80s between the legal and the official, in 1993 the Supreme Court translated Articles 124 and 217 to accord itself power in the matter of legal arrangements. The explanations behind this were: initially, that judges were the best set to judge the capacity of a potential judge, and second, that such power would guarantee that there was no political obstruction all the while. The judgment brought about the production of the "Collegium", which contained the Chief Justice and the following two most senior judges. In the course of recent decades, the Collegium has regularly come in for sharp feedback for the absence of straightforwardness in its working, an absence of productivity, nepotism, absence of powerful faculty administration bringing about an expanding number of opportunities and

the sheer intervention of a considerable lot of its choices. The Collegium is responsible to nobody for its arrangements.

To address these blemishes, the Parliament corrected the Constitution a year ago to make the National Judicial Appointments Commission ("NJAC"). The NJAC included the Chief Justice and the following two senior most judges, the Union Minister of Law (as an agent of the political official) and two individuals from common society, whose proposals with respect to arrangements would tie on the President. The revision, and the associated National Judicial Appointments Commission Act, were passed in the two places of Parliament with close consistent help.

The formation of the NJAC was seen by some as an endeavor for the decision Government to meddle in the working of the legal, and tested under the watchful eye of the Supreme Court. In a decision split 4:1, the Amendment and Act were struck down on the ground that the production of the NJAC disregarded the guideline of freedom of the legal since the legal individuals are not in a reasonable dominant part. Further, it was held that the "two part veto" (where any two individuals from the 6 part NJAC could veto an arrangement) would empower prominent people to supersede an arrangement every one of the judges had settled upon. The Court held that it was a judicially perceived rule that supremacy of the supposition of the Judiciary is basic for an autonomous legal, and in this way the negligible nearness of the official was a danger to the autonomy of the legal.

The judgment continues on a profound doubt of the official and common society. It is defective in light of the fact that it conflates the possibility of an autonomous legal with one that is free from official support in the arrangement procedure. To achieve this conclusion in light of the suspicion that the legal is the sole defender of sacred esteems to the outright avoidance to of the other two organs of the state, is profoundly dangerous.

While autonomy from the political official is surely a piece of guaranteeing an autonomous legal, political impedance isn't the sole danger to the flexibility and freedom of judges. Judges, entomb alia, must be free from the impact of effective corporate houses, of individuals from the bar and the impact of the vocation interests of their own friends and relatives. The judgment does not adequately recognize the way that in a vote based system, the lead of law is indispensable and that judges can't be exempt from the rules that everyone else follows. In baldly striking down the Amendment and the Act, without adequately captivating with the likelihood of perusing down the arrangements keeping in mind the end goal to make them workable inside the Constitutional system, the judgment seems silly and self-serving.

IMPROVING COLLEGIUM:

Following its judgment, the court, conceding that the current collegium framework had genuine imperfections, called for proposals to enhance it. Reactions came in thick and quick. The court allowed the administration to figure MoP. While allowing the administration to figure a reexamined MoP, the court was mindful so as to specify the focuses that should have been tended to, specifically qualification criteria, measures for straightforwardness, foundation of a Secretariat, and a protests component. It additionally determined that this MoP was for the dedicated usage of its choices in the prior cases. In any case, the Court raised worries over a few issues in the draft Memorandum of Procedure (MoP) put together by the legislature. The Supreme Court had asked the administration to re-consider these provisions**.**

FRAMEWORK OF COLLEGIUM:

Tolerating applications for arrangements as High Court judges ought to be taken after. This is followed in the U.K. also, can be received in India as well.

There must be full and finish divulgence of connections and affiliations of candidates to sitting and resigned judges.

Least qualification criteria for thought should be set down, incorporating appearances in essential cases.

Parliament ought to likewise institute changes to give a uniform retirement age to judges of the Supreme Court and the High Courts, with the goal that the present routine with regards to a portion of the judges trying to be in the great books of the current or imminent individuals from collegiums in the Supreme Court is evaded.

This will likewise forestall the contention of desire in light of rank for arrangement as judges of the Supreme Court.

The retirement age might be raised consistently to 70 with a condition that no judge resigning at 70 should be named as an individual from any Tribunal.

The continuation as a judge after the age of 65 ought to be liable to being found 'not unfit' by the Permanent Commissions.

A base residency of two years ought to be given to the Chief Justice of India and the Chief Justice of High Courts.

No judge who is over 68 years ought to be made a Chief Justice.

Court administration ought not be vested with Judicial Officers but rather appointed to prepared directors.

All the three organs of the state ought to likewise introspect with reference to why there has been no or deficient portrayal in the higher legal from among ladies.

CONCLUSION:

As indicated by the Supreme Court, the principle reason in the matter of why the NJAC show got rejected was on the grounds that it did not stick to the Basic Structure Doctrine of the Constitution and it was a danger to the autonomy of the legal. The total thought that could be settled on out of the choice was with the end goal that most of the seat has an attitude of reasoning that the power of the legal shaped a piece of the substance of the Constitution and it was not to be messed with. The fundamental structure has different key focuses as have been found from the judgment of Kesavananda Bharti v. Union of India28 however nothing of solid importance has been laid out in any of the judgments that discussions about supremacy of the legal as the fundamental structure. The dominant part choice held the Second Judges judgment to be legitimate which inferred about the power of legal. The mind boggling circumstance emerges in light of the contention between the official and the legal where the official has confidence in having its offer in the basic leadership identified with the arrangements however the legal does not need any obstruction of any sort. The political conditions can't be disregarded at the season of the judgment. The BJP drove Coalition government NDA had started the way toward having an adjustment in the way judges were delegated. In 2015, the NJAC method again came into spotlight and the legal considered this to be a route for the administration to meddle in the untouched field. The legal in any capacity did not welcome this interruption, consequently pronounced NJAC illegal, leaving no more extent of verbal confrontation at introduce. The legal felt that the Collegium framework came with its offer of downsides and recommendations have been asked and given however the genuine trial of the circumstance is whether this might prompt any advancement or not. Just time would tell regardless of whether the NJAC was an instrument of political interruption or a veritable component to avert the shades of malice of the collegium framework.

COPYRIGHT ON COVER VERSION

- HARPREET MAKKAD, SHAURYA ABROL & VARUN SACHDEVA

ABSTRACT

This paper is a marked challenge to shed some light on the notion of the authenticity of popular music through a comparison and contrast of the practice of recording cover versions in the music industry in India.

Still , cover versions enjoy completely different social status and likewise receive different responses in two places. In India, the cover version has been severely criticized as an act of plagiarism or copycatting and thus carries negative connotations. But still, cover recording is an accepted practice within the industry. This article argues that the different status of cover versions in India has much to do with the respective local musical traditions. Most importantly with a notion of music authenticity which believes there is a pure Indian music and cover versions therefore are not regarded as "authentic" Indian pop music. In short, the contrast between the status of the cover versions and local response in India provide a unique opportunity.

WHAT IS COVER VERSION: -

Humming the latest song in our style has been the trend in India since long talented Indians won't mind to give their blend to the music let's see is it legal to do that can we claim our right on own blended version we created out of the latest song.

Everyone tries to sing a new song in one own style, giving our way to a song does it becomes our own.

A cover version is a remake of a song, cover song, revival, or simply cover, like a new performance or recording done by someone other than the original artist or composer of a previously recorded song.

It basically refers to a song which is previously recorded and released by someone other than the original composer.

The new recording of a song is similar to the original song with some different arrangements, different style, pauses at different places in song in other words it refers to give a song some makeover.

A copyright provides the owner with the exclusive right to a particular work for a limited duration of time. For a work to be "copyrightable," it must be original and fixed in tangible form, such as a sound recording recorded (affixed to) on a CD or a literary work printed on paper. There are many copyrightable works; some include original literary works, dramatic works, choreography, musical works, audio-visual works and other graphic artistic works. Some of these include poetry, novels, movies, songs, computer software, dance choreography, fine art, comics, sculptural works, and architectural works. A copyright does not protect any of the song titles, band names, or slogans. This simply means that an artist cannot copyright their band name or their song titles. whereas an individual may apply for trademark protection in a particular artist, band or song name.

HOW COVER VERSION OF A SONG IS DIFFERENT FROM THE ORIGINAL?

An original song is the first recorded version or first released song, regardless of who sung it or for whom it was written, it is quite beside the point , the only thing which matters is the first recorded version which gets released that will be considered as the original version of the song.

A cover song is the re-recording of the original song (the first recorded version of the song). When a anyone re-records the original song, you may get a licence from the publisher and if he grants the mechanical license then the person is permitted to use the song.

The original owner of the song will have full rights over the cover version and the person making the cover version will have to give credit to the original songwriters , so that they get the royalty payment which is given to the proper people who may or may not be the songwriters and original singers.

Once the mechanical license is permitted, then you may change the song or lyrics according to you. You will make money by the sale of that song from the way you perform, or the way you arrange the song but for each sale of your song, royalties will have to be paid.

In short, the easiest way to understand the meaning of the cover version is that when you use original words, or melody of the original song then that would be considered as the cover version.

WHAT DOES COPYRIGHT ON MUSIC ALBUMS INCLUDE?

In every song there are two copyrights involved.
First one is the copyright in the song i.e. the 'musical composition' which includes musical notes, chords, lyrics, rhythm, harmonies etc. The second one is in the 'sound recording' itself.

The unsigned writer who writes and performs the song and even record it himself then he will own both the 'musical composition' and 'sound recording'.
But in general, and most of the times it includes separate individuals who get both of the rights, like Music publishers who owns the musical work copyright and Record companies who owns the sound recording copyrights.

The time when an original song is made it gets all the essentials of getting a copyright protection i.e. when a song is written down on a sheet and gets recorded, a copyright is created. But to avail the copyright protection the song must be the original version.

COPYRIGHT LAWS FOR MUSIC: -

Songs are artistic works that are protected by copyright law. To copyright songs or copyright music, composers are needed to only record their compositions in some tangible way that includes on paper, film, tape or digital media. The copyright doesn't have to be registered and the work doesn't have to include a copyright symbol. That means that any song that's been recorded (or once was) is protected by copyright.

A Copyright in a musical composition is basically held by its creators who are known to be the composers and the lyricists, but songwriters typically transfer their copyrights to a music publisher who will help promote their song, administer royalty payment and administer the copyright.

Copyright on song gives its owners a group of rights that includes the right to publicly perform the track, to make a copied work based on the song, to replicate the song, to issue copies, and to publicly present the song.

All songs published in 1922 or prior are in the public domain, sense that they are no longer protected by copyright and can be cast-off by anyone. Therefore, for all other songs, you just can't legally perform or distribute them on YouTube without obtaining a license.

COVER SONG LICENSING: -

As soon as musical work has been published, anyone can record a cover version of the song by obtaining a mechanical license. A song or music is "published" once copies or recordings are distributed in the public domain for sale or rent. A live performance in front of public is not publication.

The song's copyright holder must give you a mechanical license if you pay a royalty fee based on valued revenue from your cover song. You can get a mechanical license through the Harry Fox Agency.

The mechanical license only shelters the audio portion of your YouTube cover. To post the video along with the song, you'll require a synchronization license, also known as "sync", license. we must negotiate a sync license with the copyright owner. While copyright owners must grant mechanical licenses, they are not required to give you a sync license, nor is there is any set fee for the license.

It is appreciable that many music publishers have already made agreements with YouTube that allow their songs to be used in exchange for a portion of the advertisement revenue generated on YouTube also if there is already an agreement in place for the song you want to use by contacting the music publisher directly.

LICENSING SCENARIO IN OTHER COUNTRIES:

In international recordings China shadows the procedure stated in Berne Convention. Here is no need of any license in making of a domestic broadcasting on television and radio. but then in commercial broadcasting there is required and for that broadcaster has to give an undertaking of the payment of royalty to the respective owner.

Under the Australian Copyright Act, Section 109 states the right of broadcasting of a sound recording that the broadcaster is supposed to give an undertaking of the payment of the royalty to the owner or the copyright tribunal to govern the dispute in the event. Whereas, In Japan the

sum of compensation is controlled by the Director General of the CCA (Cultural Affair Agency). There is Exemption for Non-Profit communication of works which was made public.

STATUTORY LICENSING AND COMPULSORY LICENSING IN U.K:-

Under United States Copyright law there is not division seen between the statutory licensing and compulsory licensing. Both are used as interchangeable terms. The term compulsory licensing is the formation of congress and the tolls of royalty is set by the government. An international dimension has been added to the Copyright law of the US, when it is attached it strings to the Berne Convention in 1989. A number of various compulsory licensing provisions are there in US copyright law. To relish the copyrighted work, one need to notice and pay royalty and if it's not possible to find the real owner then applies to the copyright office. Three copyright royalty judges are there to set the royalty in US also exact copying is not acceptable, protection is the only given way of expressing the idea.

COPYRIGHT PROTECTION IN UNITED STATES: -

Under the copyright act, section 102(a)(2) deals with the copyright protection given to the "musical works" which includes original compositions and original arrangements. This copyright protection given under this section gives the owner an exclusive right to make copies, sell, distribute, perform or even can display it publicly. It is upon the owner of the copyright that he wants to give that exclusive right to other person or not and once the musical composition is published in US, then after that others are authorized to make the subsequent sound recordings of that composition, which comes under the compulsory licensing under copyright law.

DRAWBACKS OF USING COVER SONG WITHOUT A LICENSE: -

The cost of posting a cover song without a music license depends on the copyright holder. Some copyright holders don't mind YouTube covers as they increase a song's exposure and may introduce a new audience to the songwriter's or original performers of music. If songs are posted by fans, a band isn't likely to risk estranging them by taking down their videos. Other copyright owners object to unlicensed use of their work.

A few years ago, Prince famously had YouTube remove a video that showed a toddler dancing to one of his songs. If a copyright owner objects, YouTube may remove your video, or it may

negotiate a deal for the copyright owner to obtain revenue from advertisements that appear on YouTube. If YouTube removes the video for copyright matters, it will also place a strike against your YouTube channel. After multiple strikes, YouTube will delete your channel, along with the videos, subscribers, likes, views and comments. If you've worked hard to cultivate your channel, this can be devastating.

YouTube cover songs are fun and can bid great exposure for up-coming musicians. But before you post a cover song, it's important to understand the licenses you'll need to do it legally.

THE COPYRIGHT AMENDMENT BILL 2012: -

It brought about the following changes, which make it grimmer to produce cover versions:

1) Time period after which a cover version can be made has been increased from 2 to 5 years.
2) Obligation of same medium as the novel. So, if the original is on a cassette, the cover version cannot be released on a CD.
3) Now Payment to be made in advance, and for a minimum of 50000 copies. It can be lowered down by the Copyright Board having regard to unpopular vernaculars.
4) Prior it was prohibited to delude the public (i.e., pretend the cover was the original, or endorsed by the original artists), now cover versions are not allowed to "contain the name or depict of any musician of an earlier sound recording of the same work or any cinematograph film in which such sound recording remained incorporated".
5) Wholly cover versions must specifically outline that they are cover versions.
6) No modifications are allowed from the original song, and all alteration is qualified as 'alteration in the literary or musical work'.
7) No imaginative covers in which the lyrics are altered or in which the music is reworked are allowed without the consent of the copyright holders. Only note-for-note and word-for-word covers are given allowance in this.
8) Alterations were acceptable only if they were "reasonably necessary for the adaptation of the work" and now they are only acceptable if it is "technically necessary for the purpose of making of the sound recording".

THE COPYRIGHT ACT SIMILARLY CONTAINS PROVISIONS FOR STATUTORY LICENSING FOR COVER VERSIONS UNDER SECTION 31C.

Section 31C reads as follows:

SECTION 31C: STATUTORY LICENCE FOR COVER VERSIONS

(1) Any person who is desirous of making a cover version, being a sound recording in respect of any literary, dramatic or musical work, where sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work, may do so subject to the provisions of this section:

Provided that such sound recordings shall be in the same medium as the last recording, unless the medium of the last recording is no longer in current commercial use.

(2) The person who is making the sound recordings shall give prior notice of his intention to make the sound recordings in the manner as may be prescribed, and provide in advance copies of all covers or labels with which the sound recordings are to be sold, and pay in advance, to the owner of rights in each work royalties in respect of all copies to be made by him, at the rate fixed by the Copyright Board in this behalf:

Provided that such sound recordings shall not be sold or issued in any form of packaging or with any cover or label which is likely to mislead or confuse the public as to their identity, and in particular shall not contain the name or depict in any way any performer of an earlier sound recording of the same work or any cinematograph film in which such sound recording was incorporated and, further, shall state on the cover that it is a cover version made under this section.

(3) Person making such sound recordings shall not make any alteration in the literary or musical work which has not been made previously by or with the consent of the owner of rights, or which is not technically necessary for the purpose of making the sound recordings:

Provided that such sound recordings shall not be made until the expiration of five calendar years after the end of the year in which the first sound recordings of the work were made.

(4) One royalty in respect of such sound recordings shall be paid for a minimum of fifty thousand copies of each work during each calendar year in which copies of it are made:

Provided that the Copyright Board may, by general order, fix a lower minimum in respect of works in a particular language or dialect having regard to the potential circulation of such works.

(5) The person making such sound recordings shall maintain such registers and books of account in respect thereof, including full details of existing stock as may be prescribed and shall allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such sound recording:

Provided that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this section, the Copyright Board is, prima facie, satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty.

The person creating the version recording is also required to share the copies of all covers or labels with which the sound recording shall be sold. This provides the original owner a chance to ensure that proper credits are provided to the owner and to further ensure that the labels distinguish the version recording from the original work. He shall also be required to pay in advance the royalty at the rate fixed by the Copyright Board. The provision also imposes an obligation on the creator of the version recording to pay a minimum royalty for 50,000 copies of the work during each calendar year.

GRAMOPHONE CO. OF INDIA VS SUPER CASSETTE INDUSTRIES LTD.[172]

This was the first landmark case on version recording where the plaintiff had produced audio recordings (version recording) titled Hum Apke Hain Kaun under alleged to have been assigned to it by owner Rajshri productions Pvt Ltd. Their grievance was that the defendants also had launched the audio cassette under the same name "Hum Apke Hain Kaun' which was similar to that of plaintiff.

the most important aspect of the case was the meaning of the phrase "records recording that work' under section 52(i)(j).

[172] https://www.managingip.com/article/b1kblzzmw11462/copyright-cover-versions-and-the-muddle

The Hon'ble court held that the phrase refers to such records only in which sounds embodied and the word records is not related to printed or written records, but it is combination of melody and harmony .the court held that alternate title must be given with BOLD letters that such record is not the original sound track .

Gramophone Co. of India Ltd Vs Mars Recording Pvt Ltd.[173]

This was the case where Hon'ble Supreme Court of India explicitly gave its opinion on "version recordings' it was held version recordings are the fresh recordings, which are made using a new set of musicians and could be made only in conformity with section 52 (1)(j) of the copyright act.

Super Cassette Industries Ltd. Vs Bathla cassette India (p) Ltd[174]

This was the landmark case where the issue for the the question of copyrightability of version recordings came up for the consideration before the court of law.

plaintiff moved the application for induction alleging that the defendant had infringed the plaintiff sounds recordings, which itself was the version recording of an original music sound track of song 'Chalo Dilwar Chalo' from the film "Pakeezah" with minor and insignificant variations .

The principle was laid down that copying from an already copied work would not be infringement. It was held that version recording made under section 52(1)(j) is incapable of acquiring any independent right as the recording is an adaption of an original recording and it lacks originality .

REMIX :-

When a song or any album is mixed with such different music and recorded in a new style it is known as REMIX of the original.

whenever there is a new REMIX to an original the author of REMIX is bound to obtain a license from the owner of the original work.

there are no specific provisions under the act which provide for license for the REMIX.

In today trend of increasing REMIX versions of the old classic songs with the new music the needs for copyright protection as been increasing by the owners of the original song.

[173] https://www.managingip.com/article/b1kblzzmw11462/copyright-cover-versions-and-the-muddle
[174] https://www.managingip.com/article/b1kblzzmw11462/copyright-cover-versions-and-the-muddle

John Fogerty vs John Fogerty[175]

One of the strangest cases in music was one that Creedence Clearwater Revival's John Fogerty found himself defending in 1984, when he stood accused of self-plagiarism by his old record label.

Creedence parted ways with their label Fantasy Inc. in 1972, and Fogerty finally returned to the limelight in 1984 with The Old Man Down the Road – the first single from his comeback album Centerfield, on Warner Bros.

Having relinquished copy and publishing rights of his old Creedence songs to Fantasy, the record label alleged he'd copied his own 'swamp-rock' hit Run Through the Jungle with the same chorus, just with different lyrics.

Fogerty ultimately won that battle. He brought his guitar to the witness stand and played excerpts from both songs to persuade the court that his 'swamp-rock' style can make different compositions sound similar, but that the two were distinct compositions.

IS MAKING COVER VERSION OF SONG LEGAL?

Whenever there a composer comes up with a new song or an album it once it is made available to public or in other words as soon as the song of a composer is published , after that anyone can record a cover version of that song by giving that song his or her own style only thing one need to is one must shall obtain a mechanical license.

Any song is considered to be published when the copies of the recordings are made and are distributed amongst the public for rent and sale.

The copyright owner of that original song has the authority to give mechanical license to any person who wants to make a cover version of that song but it comes with a condition that the mechanical license will be granted but he will have to pay royalty fee based on that estimated revenue of that cover song to the original owner.

The mechanical license just covers the audio portion of the song and not the video because for that another license has to be granted i.e. sync license.

[175] John Fogerty vs John Fogerty

So the next time we go out to club or disc to enjoy the latest music or show our moves on the cover version take note that how important is to take the legal ownership of the cover version or think who is the real owner of the song we are enjoying the fullest .let's make sure to give the credit of the beautiful creation to its real owner and also appreciate the talent people have around us.

CONCEPTUALIZING THE SOCIO-ECONOMIC STATUS OF INDIA WITH REGARD TO CHILD LABOUR AND RIGHT TO EDUCATION

- KHULOOS AZIZ CHAWLA

ABSTRACT

Children in Indian society have always been a topic less spoken or discussed. The reason behind this can be traced back to it's socio-cultural background of the country, where as, in the world children are taken as the greatest gift to humanity. Childhood is an essential stage of human development as it contributes the potential to the future of any society. Children who are brought up in an environment which is beneficial to their conceptual, physical and social development will go on to be responsible and productive part of the society. Therefore, every society relates its future to the present status of its children. Child labour is recognized as the worst form of abuse and exploitation of children. The fundamental rights of an individual as to survival, education, protection and development are grossly violated by child labour. The root cause of child labour is extreme poverty which forces the parents to employ their children for some extra money for daily living and support their families. This paper attempts to summaries and examine how child labor is recognized as the worst form of abuse and exploitation of children which adds different meaning to the word child and also give a brief overview of the magnitude of the issue from an Indian perspective. An attempt has been made to study the government policy along with its documents and listed down the actions as proposed and implemented by Indian government. Some suggestions which are mentioned here are collected from various academicians and also from the policy and plan documents about the way of eradicating the problems, are summarized in the paper. In the end there is an outline of the plan and strategies as identified are also given with author's suggestions. The paper identifies that there are a lot of policy plans which have been worked but there is an urgent need for a social movement for this issue to really get addressed and resolved because it is not possible to justify child labour under any circumstances.

INTRODUCTION:

Child labour is a term which refers to a crime where children are forced to work from a very early age. It is like expecting kids to perform responsibilities like working and fending for themselves and their families. There are certain policies which have put restrictions and

limitations on children working like the Convention on rights of child (CRC) urges all the governments to take effective measures for its eradication. Child labour is pervasive problem in developing countries like Africa and Asia which account for over 90% of total child employment. The International Labour Organization (ILO) estimates that number of working children are about 250 million in the developing countries, of whom at least 120 million are working full time, whereas of these working children 61% are in Asia, 32% in Africa and 7% in Latin America. The average age for a child to be appropriate to work is considered fifteen years and more. Children falling below this age limit are not allowed to indulge in any type of work forcefully. It is so because child labour takes away the opportunity of having a normal childhood, a proper education, and physical and mental well-being. In some countries, it is illegal but still, it's a far way from being completely eradicated.

Child Labour happens due to a number of reasons, such as some of the reasons may be common in some countries, there are some reasons which are specific in particular areas and regions. Mostly it happens in countries that have poverty and unemployment. When the families do not have enough earning, they put their children to work so they can have enough money to survive. Similarly, if the adults of the family are unemployed, the younger ones have to work in their place to earn living for the family. Secondly, when people do not have access to the education, they ultimately put their children to work. The uneducated only care about a short-term result that is why they put their children to work so they can survive their present. Moreover, the money-saving motive of various small industries is a major cause of child labour. They hire children because they pay them with the lesser amount for the same work as an adult, as a result child work for more durations than adults and also at fewer wages, so they prefer children. Also, they can easily influence and manipulate them. They only see their profit, and this is why they engage their children in factories for hazardous work.

Status of Child Labour in India: It is estimated that India has the largest number of child laborer in the world. According to the Census of 2001, there were 1.27 crore economically active children in the age-group of 5-14 years whereas, the number was 1.13 crore during 1991 (Population Census). In 2011 the national census of India found the total no. of child laborer, aged 5–14, to be at 1.10 crore, and the total to be 25 crore in that age group. The child labour problem is not unique to India; worldwide, about 21.7 crore children work, many full-time.[1] One must take a note, that policy level in India has all along followed a proactive rate in

addressing the problem of child labour and has stood up with regard to constitutional, statutory and developmental measures that are required to eliminate child labour. Despite all the proactive legislations, policies and judicial prouncements, the problem of child labour persists as a challenge to the country. Though, the magnitude of child labour in India has been witnessing an immense decline in the last two decades, both in terms of magnitude and workforce participation rates.

PROVISIONS FOR CHILD LABOUR IN INDIA:

Constitutional Provisions:

The **Constitution of India** has relevant provisions to secure compulsory and universal primary education. Labour Commissions and Committees have seen into the problems of child labour and made extensive recommendations for the benefit of children and the country. Constitution of India contains provisions for survival, development and protection of children; these are mainly included in **Part III and Part IV** of the Constitution, i.e., fundamental rights and directive principles of state policy. India follows pro-active policy towards tackling child labour problem. The concern for children in general and child labour in particular is reflected through the Articles of the Constitution of India. In **Article 23**, it prohibits traffic in human being and begar and other similar forms of forced labour. Under **Article 24** it has laid down that "no child under the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment". **Article 39(e) and (f)** requires the State and secure that the tender age of children are not abused and to ensure that they are not forced by economic necessity to enter avocations unsuited in their age or strength. Those children are given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. **Article 45** provides, for free and compulsory education for all children until they complete the age of 14 years. **Article 51A(k)** makes it a fundamental duty of the parent or Guardian to provide opportunities for education to the child or ward between the age of 6 and 14 years. **Article 21-A** recognizes that the Right to Education as fundamental right and it mandates that, the state shall provide free and compulsory education to all children of age of six to fourteen years in such manner as the state may, by law, determine.[2]

INDIAN STATUTORY PROVISIONS:

The **Child Labour Prohibition and Regulation Act, 1986**, which provides us with its main objective as to address the social concern and prohibit the engagement of children who have not completed 14th year of age in certain employments and to regulate the conditions of work of children has been prohibited in occupations relating to

- transport of passengers, goods or mails by railways
- bidi making
- carpet weaving
- manufacturing of matches, explosives and fire
- soap manufacture
- wool cleaning
- building and construction industry.

The Government has also prohibited employment of children in the following occupations or processes:

- Abattoirs/Slaughterhouses
- hazardous processes and dangerous operations as notified
- printing, as defined,
- cashew and cashew descaling and processing
- soldering processes in electronic industry.

The Act prohibits employment of child in about 13 occupations and about 51 processes.

The provisions relating to the penalties for any employer for not binding to the laws of the Child Labour (Prohibition & Regulation) Act, 1986 are:

- For employing any child in contravention of the provisions of the Act – imprisonment for not less than 3 months extending to 1 year or with fine not less than Rs. 10000 extending to Rs. 20000, or both.
- For second offence of like nature - imprisonment for not less than 6 months which may extend to 2 years.
- Failure to maintain a register - simple imprisonment which may extend to 1 month or with fine which may extend to Rs. 10000, or both.[3]

LABOUR LAWS IN INDIA WHICH INCLUDES THE PROVISION FOR THE EMPLOYMENT OF A YOUNG PERSON:

The Factories Act 1948 prohibits employment of a child below 14 years in any factory. To safeguard the health of young persons of above 14 years of age and below 18 years, and for their safety, the Act provides places a few other restrictions on their employment and that no child shall be permitted to work between 7 p.m. and 8 a.m. and shall not be permitted to work overtime. No child shall work for more than 3 hours before he or she has an interval of an hour which has been spread over as fixed at six hours. Such person cannot work in more than one establishment on any day and a weekly holiday is allowed. The Act also provides health and safety measures for the children. Section 13 of the Act describes to provide child workers facilities of drinking water, latrines and urinals, cleanliness, disposal of wastes and effluents, ventilation and temperature, etc. should be provided by the employer. The measures for safety from dust and fume, artificial humidification, fencing of machinery etc., which also need to be provided by the employer and the employer is required to notify the Factory Inspectors in case he engages a child for employment. The production of certificate of age is also required under the rules of the Act. According to Section 22 of the Act it means that no young person can be shall be allowed to clean, lubricate or adjust any part of machine which thereof would expose the young person to risk of injury from any moving part either of that machine or of any adjacent machinery , and Section 23 of the Act defines that no young person is allowed to be employable on dangerous machines. Lastly, Section 27 of the Act prohibits employment of children in any part of a factory for pressing cotton in which a cotton-opener is at work.

The Maintenance of Register means that Every occupier shall maintain in respect of children employed or permitted to work in any establishment, a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any such establishment, showing –

1. The name and date of birth of every child so employed or permitted to work
2. Hours and periods of work of any such child and the intervals of rest to which he is entitled
3. The nature of work of any such child
4. Such other particulars as may be prescribed.

In ***M.C. Mehta v. State of Tamil Nadu,*** it was held that children can be employed in the process of packing, but the packing should be done in an area away from the place of manufacture to avoid exposure to accident. The minimum wages for child labour should be fixed. The tender hands of the young workers are more suited to sorting out the manufactured product and processing it for the purpose of packing.[4]

In ***Walker T.Ltd. v. Martindale***, the court held that, prohibition is absolute and not restricted to employment in one of the manufacturing process. Thus a child employed as a sweeper to clean up the floor of a factory is also in contravention of provisions of Factory Act, even though he is not employed in any of the manufacturing process.[5]

Section 68, provides that non-adult workers have to carry tokens. The children who are of 14 years but those are below 18 years can be allowed to work in any factory if the child concerned has been given certificate of fitness by a certifying surgeon and the said certificate is in the custody of the manager of the factory and the child so employed carries a token with him while he is at work in which a reference of such certificate has been made.

Section 69 deals with the manner in which the fitness certificate is issued and the procedure to be followed by a certifying surgeon in case the certificate is to be issued, renewed or revoked. Under this Act, there is a provision for a weekly day of rest, every child worker who has worked for a period of 240 days or more in a factory during a calendar year is entitled during the subsequent year for leave with wages at the rate of one day for every 15 days of work as against every 20 days in the case of a child worker.

The Minimum Wages Act, 1948 : According to the Judgment of the Supreme Court, an industry or industrial establishment does not have the right to exist if it cannot guarantee payment of the minimum wage. However, the following 5 norms recommended by the Indian Labour Conference in its 15th session held at Nainital in 1957 are kept in view by the appropriate government for fixation and revision of minimum wages:

(1) Three consumption units for one earner
(2) Minimum food requirement of 2700 calories per average Indian adult
(3) Clothing requirements of 72 yards per annum per family
(4) Rent corresponding to the minimum area provided for under the governments Industrial Housing scheme
(5) Fuel, lighting and other miscellaneous items of expenditure to constitute 20 percent of the total minimum wage.

The Supreme Court of India in its Judgment in the case of ***Reftakes Brett and Co. v. others,*** held that the children's education; medical requirement; minimum recreation; provision for old age; and marriage, should be added to the norms and criteria already recommended by Indian

Labour Conference. The Act defines a child as a person below 15 years. It provides for minimum wages for children and apprentices. It also has provision regarding hours of work and physical fitness. Under this Act, adult means a person who has completed the age of 18 years and adolescent means a person who has completed the age of 14 years but less than 18 years.[6]

THE IMPORTANCE OF EDUCATION IN CONTEXT WITH THE RIGHT TO EDUCATION:

Education develops the human personality and makes a person more civilised and better. A right to education is indispensable right in the interpretation of a development as a human rights. This right to development is also considered as basic human right. Education of children is an important right of every child. Education is critical for economic and social development moreover, it is crucial for building human capabilities and for opening opportunities. It also leads to better health care, smaller family norms, greater community and political participation, less income inequality and a greater reduction of absolute poverty.

The abolition of child labour must be preceded by the introduction of compulsory education, since compulsory education and child labour laws are interlinked. **Article 24** of the Constitution bars employment of child below the age of 14 years, **Article 45** is supplementary to **Article 24** for if the child is not to be employed below the age of 14 years he must be kept occupied in some educational institution. Now **Article 45** is amended. But my stand is that the children who are at the age of 14 years should also not be able to treated as a young person, instead they should also be treated as child and this should extend till 18 years, so that the child could complete his whole supplementary and elementary education and be capable of doing good in his or her life after being educated.

It could be seen that several international documents have recognized the right to education as a human right. The process of moulding the right to education as a fundamental right was triggered off by ***Mohini Jain's case*** and subsequently strengthened by ***Unni Krishna's case*** which ruled that right to education is a fundamental right that flows from the Right to life in **Article 21** of the Constitution. Every child or citizen has a right to free education up to the age of 14 years thereafter the right would be subject to the limits of the economic capacity of the state. This decision was upheld and confirmed by the **11 Judge constitutional bench of the Supreme Court in *TMA Pai Foundation v. Union of India***. In the year 2002, the Indian

Constitution through its **86th Amendment Act**, has made **"Right to Education a Fundamental Right"**.[7] The State is obliged to duty bound to provide free and compulsory education to all children of age 6-14 years in such manner as the state may by law determine. It was also provided that, it is the fundamental duty of a parent or guardian to provide opportunities for education to his child between the age of 6 to 14 years. In pursuance of this development in the field of education recognizing it as fundamental right, the Parliament has enacted the Right of Children to Free and Compulsory Education Act, 2009 which provides for free and compulsory education to all the children of the age of 6 to 14 years. Chief components of the enactment were:

(i) Adding Article 21-A in Part III (Fundamental Right)

(ii) Modifying Article 45

(iii) Adding a new clause (k) under Article 51-A (Fundamental Duties) making the parent or guardian responsible for providing opportunities for education to their children between 6 and 14 years.

In ***P.A. Inamdar v. State of Maharashtra, Supreme Court*** observed that; Education is "Continued growth of personality, steady development of character, and the qualitative improvement of life. A trained mind has the capacity to draw spiritual nourishment from every experience, be it defeat or victory, sorrow or joy. Education is training the mind and not stuffing the brain".[8]

CHILD WELLBEING: THE NEED FOR PARADIGM SHIFT.

Swamy Vivekananda has quoted "We want that education by which character is formed, strength of mind is increased, the intellect is expanded, and by which one can stand on one's own feet". "The end and aim of all education, all training should be man-making. The end and aim of the training is to make the man grow. The training by which the current and expression of will are brought under control and become fruitful is called education.

A child should get an education to increase the knowledge that develops one's mind and creates social awareness amongst them, children gain better decision-making skills, competency in work and thus become a better person. Today, most of the jobs require candidates who are qualified and educated, if a person is not educated then the person does not get a good job and ends up being a labourer or jobless. Every society in this world has individuals from different economic sector. Those who are from poor economic background may not be able to support education for their children so they have no option left but to send their children for labour

work to support their lives. The governments globally have accepted the fact that child labour is a crime and it is the right of children to get educated. To solve these crucial issues, government should provide free education thus supporting poor families and preventing the child labour. Accordingly the government schools are not efficient as the private schools which usually compete each other and focus on delivering highest quality possible results to sustain their business in their competitive world. For these reasons, private schools deliver much better quality in their service than a government schools who are usually remain protected from the competition.

"The term 'Knowledge Society', 'Information Society' and 'Learning Society' have now become familiar expressions in the educational parlance, communicating emerging global trends with far-reaching implications for growth and development of any society. These are not to be seen as mere cliché or fade but words that are pregnant with unimaginable potentialities. Information revolution, information technologies and knowledge industries, constitute important dimensions of an information society and contribute effectively to the growth of a knowledge society".

BENEFITS OF FREE EDUCATION FOR ALL:

Education is important to maintain a better standard of life. Free education will ensure that all people are given the basic qualification to enhance the quality of their life.

Some people do not get the opportunity to focus on their studies or some do not even get the opportunity. This is mainly because of the huge amount of fees levied on them. There are people who find it very difficult to go for higher studies due to the lack of money. To prevent this from happening, it is essential to ensure that free education is being given to all. Thus, they will be able to focus on their studies better and ignore all the other distractions.

Free education ensures that equal opportunities are given to all, regardless of their economic status. Through this type of education can ensure that children with talent and good grasping power are given opportunities to develop their ideas and work towards the betterment of the country.

Everyone has a dream job or a role model whom they look up to, in order to get inspired by their role models and achieve their dream job, education is very important. It is because of the huge payment demanded by the various institutions that some people get forced to forget about their dreams. Free education will assure people that they are free to dream higher. They will be given all the means to achieve their dreams with such a system of education.

Everybody dreams for a corruption-free country. Corruption is one of the major problems faced by almost all the countries. In order to reduce this problem, we need educated and well-experienced people. Free education helps to carve out better and responsible individuals who will help in the growth of the country.

WHAT NEEDS TO BE DONE:

The right to education act has improved a lot, it has made the situation of our country better. It provides education up to upper primary level, but it needs to make it free for all.

It earlier provided no detention policy that is no child up to class 9th cannot be declared fail, but now they have taken it back and reduced it up to 4th standard.

Minority Religious Schools in which children get enrolled by get deprived of actual education and are only consented to religious knowledge should be settled under the right to education act.

Earlier, this act used only extended till whole India but kept differentiated from Jammu and Kashmir, which now extended to that region as well after the abolition of Article 370.

Lastly, the government should make policies and rules to make the education, infrastructure and even tuition fees or books free for all so that more and more children are educated. As more and more children will be attracted and enrolled, they should also get the business of private schools eliminated so that the educational sector is no more looked up as the business sector. This will only be possible when the government schools will be as good as the private ones, in terms of teaching, practical knowledge and infrastructure.

CONCLUSION:

Education is a choice for some, while for others, school isn't an option. Kids all around India can go to school, earn a degree in college, and even get a job. For most of the kids, education is not an option for them. They cannot go to school due to conflict, disaster, living conditions, some reasons are due to an illness, helping with the family, moving around too much due to financial instability and work. Another aspect which prevents the kids from equal educational opportunities is that they lack of resources to afford the schooling. All kids deserve equal educational opportunities no matter what gender, race, religion, they belong to hence the education is an important aspect of living and a valuable asset from which no one should be deprived off. The Indian dream is what makes our country great. Our country has done many things to prove that we are great. But, where are some parts we fall through the cracks? A place we fall through the cracks is in the education aspect of our country. Here, we come across

numerous children who are away from the educational institutions because it has become really expensive and they do not even have a penny to eat, then how can they afford the luxurious education? Therefore, I would like to highlight my views on the fact that India should make the education free for all with respect to the Right to Education and now it's implementation in Jammu and Kashmir and abolish the Child Labour.

Education has become a business nowadays as we have discussed above. The right to education of a child depends on the race and wealth of his or her parents, by providing educational facilities only to those children who are financially well off, we are, in fact, denying the basic rights of an individual; right to education which is for all. Education is one of the basic fundamental rights of a person, that is why many developed countries provide free primary and secondary education to all its citizens; which now our country Indian should also strictly implement, by eliminating private school's education business.

Without education, it becomes very difficult for a person to survive in the current world as it is the basic need of an hour. Though it is mostly theoretical knowledge, but proper education helps people a lot in carving out a bright future as it helps to implement it in the practical world along with broadening of mindsets. Also, it is very essential for a person to have access to education to attain all the necessary skills to get the dream job which he or she wishes for.

Our country also needs educated and skilled people to enhance its economic status. This will be possible only if all are educated. Well-educated people will be able to attain higher jobs in the future thus by getting more money in the country, the higher the education rate more the income and maintaining the direct relation with higher economy. They will later become good taxpayers which will be helpful to enhance the economic status of the country.

Poverty and unemployment are some of the major reasons which impede the growth of many countries like India which is still a developing one. To eliminate these problems, we have to create a better educational opportunities for children here. This will happen only if free education is given to everyone irrespective of their caste, gender, and race.

REDRESSAL MECHANISM UNDER THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT 2016: OUSTER OF THE ARBITRATION TRIBUNAL?

- **PRADYUM CHAUDHARY**

I. INTRODUCTION

The recently passed Real Estate (Regulation and Development) Act, 2o16[176] ('REA') has been welcomed by frustrated consumers, whose money has been stuck in real estate projects for years without any clear indication of the date of completion or handing over of possession. Unlike other countries,[177] the real estate sector in India was largely unregulated,[178] which led builders, construction contractors, real estate project developers ('builders')[179] to take unfair advantage of consumers. There were several incidents of fraud — land not being owned by builders, misrepresentation with respect to licenses and approvals from authorities, etc.[180]on account of this, several home-buyers in India faced immense frustration, arguments with builders, massive delay in delivery of possession and years of litigation at some stage while purchasing property.[181]

Before the enactment of the REA, many buyers received some respite from consumer forums under the Consumer Protection Act, 1986 ('CoPRA'). Despite this, builders delayed the litigation for years.[182] In other cases, builders had included arbitration clauses in their standard form agreements, effectively leaving the buyers remediless, either due to the costs of arbitration, or due to a complete lack of understanding of arbitration.[183]

---

[176]The Real Estate (Regulation and Development) Act, 2o16.
[177]Axel Boersch-Supan, *Housing Market Regulations and Housing Market Performance in the United States*, *Germany and Japan* in *Social Protection* v. *Economic Flexibility*: is There a Trade-off? 119, 119-156 (2oo8).
[178]*C.f.* The Maharashtra Housing (Regulation and Development) Act, 2o12 (Maharashtra is an exception to this).
[179]The Real Estate (Regulation and Development) Act, 2o16, §2(zk) (this provision defines a "promoter").
[180]The Economic Times, *Top 6 Real Estate Scams and How Home Buyers Can Avoid Them*, April 5, 2o1o, available at http://economictimes.indiatimes.com/wealth/personal-finance-news/top-6-real-estate-scams-and-how-home-buyers-can-avoid-them/articleshow/4693o255.cms (Last visited on January 13, 2o17).
[181]*Id*.
[182]E.T. Realty, *Homebuyers Can Now Move NCDRC Directly Against a Builder*, october 13, 2o16, available at http://realty.economictimes.indiatimes.com/news/regulatory/homebuyers-can-now-move-ncdrc-directly-against-a-builder/54823235 (Last visited on January 13, 2o17).
[183]Ben Giaretta, *Changing the Arbitration Law in India*, September 1, 2o15, available at https://www.ashurst.com/en/news-and-insights/legal-updates/changing-the-arbitration-law-in-india/ (Last visited on February 14, 2o17).

The Government of India, observing the unscrupulous extortion of buyers, passed the REA with three primary objectives: *first*, regulation and promotion of the real estate sector; *second*, protection of consumer interest in the real estate sector; and *third*, establishment of an adjudicating mechanism for speedy dispute redressal.[184] Thus, apart from regulation, the primary objective of the REA is to secure the rights of buyers and to provide them with a speedy dispute redressal. In furtherance of this objective, the REA has established two forums, i.e., the Real Estate Regulation Authority[185] ('RERA') and the Adjudicating officer[186] ('Ao'). Real estate agreements, more often than not, also contain arbitration clauses providing for all disputes to be referred to arbitration.[187] Given the presence of these clauses in most agreements, a conflict arises with respect to the method of dispute resolution which should be followed. The choice is between the mechanism under the REA and that laid down in the Arbitration and Conciliation Act, 1996 ('Arbitration Act'). This is because §71 of the REA clearly provides for compensation payable to the buyer, which is to be determined by an Ao. In the presence of specific provisions providing for a statutory remedy, what will happen if there is an arbitration clause in the agreement? Since the REA also applies to projects still under construction, it becomes particularly relevant to examine the validity of arbitration clauses in builder-buyer agreements.[188]

II. PROTECTING THE BUYERS

The REA comes as a saviour for innocent buyers, who more often than not, invest their life savings into real estate.[189] Before the enactment of the Act, the relationship between buyers

[184]The Real Estate (Regulation and Development) Act, 2016 (as contained in the preamble).
[185]*Id*., §2o.
[186]*Id*., §§2(a), 71.
[187]Hindustan Times, *Compensation Clause in Builder-Buyer Agreement is Unfair, one-Sided*, July 18, 2o15, available at http://zeus.firm.in/wp-content/uploads/Compensation-clause-in-builder-buyer-agreement-is-unfair-one-sided.pdf (Last visited on February 14, 2o17); The Chambers of Law, *Do Not Fall Prey toone-Sided Builder Agreements*, May 13, 2o13, available at http://www.tcl-india.net/node/19 (Last visited on February 14, 2o17); Hindustan Times, *Legal Remedies*, September 1o, 2o16, available at http://www.pressreader.com/india/hindustan-times-chandigarh-estates/2o16o91o/281565175213414 (Last visited on February 14, 2o17). The Real Estate (Regulation and Development) Act, 2o16 (as contained in the preamble).
[188]*Id*., Proviso to §3(1).
[189]The Economic Times, *Consumer Activism: Buoyed by Social Media and Pro-Consumer Courts, Homebuyers Take on Errant Builders*, october 22, 2o14, available at http://economictimes.indiatimes.com/wealth/personal-finance-news/consumer-activism-buoyed-by-social-media-and-pro-consumer-courts-homebuyers-take-on-errant-builders/articleshow/449o3267.cms (Last visited on February 14, 2o17).

and their builders was governed only by agreements signed between them[190] and therefore, all kinds of people entered the real estate sector without any prior experience or proof of financial capability to execute the projects.[191] Further, there were no guidelines or qualification requirements of any kind for an individual to become a builder. This lack of monitoring was thoroughly exploited by builders. Builders devised various schemes to take the hard-earned money of consumers without complying with the agreed terms. They did not complete the projects in time,or used the money for other existing projects.

In order to fill this regulatory lacuna, the REA contains several provisions, some of which are extremely stringent, and completely reverse the unequal bargaining power in favour of the buyer. Each real estate project[192] now needs to be registered with the RERA right from the stage of marketing,[193] except projects where the area of land to be developed does not exceed 5oo sq. meters or eight apartments.[194] It is pertinent to note that the projects that have already started but not yet received anoccupancy certificate are also required to be registered under the Act.[195]

At the time of registration, the REA, in addition to requiring provision of proformas of the agreements, also requires the builder to file an affidavit clearly mentioning the time period within which the builder undertakes to complete the project.[196] The affidavit also needs to contain an undertaking that seventy percent of the amount realised for the real estate project from the buyers, from time to time, would be deposited in a separate bank account. This is to cover the cost of acquiring the land and construction, and can thus only be used for these purposes.[197]

[190]MalathiIyengar, *Real Estate (Regulation and Development) Bill — What's in it for Home Buyers?*, April 2o, 2o15, available at http://emicalculator.net/real-estate-regulation-and-development-bill-whats-in-it-for-home-buyers/ (Last visited on February 14, 2o17).
[191]LalitWadhwani, *Passage of Real Estate Bill: Blessing for Both, Home Buyers & Developers*, March 29, 2o16, available at http://www.freepressjournal.in/mumbai/passage-of-real-estate-bill-blessing-for-both-home-buyers-developers/813487 (Last visited on January 13, 2o17).
[192]The Real Estate (Regulation and Development) Act, 2o16, §2(zn) (this provision defines a "real estate project" as: "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.").
[193]*Id*., §3(1).
[194]*Id*., §3(2).
[195]*Id*., §3(1).
[196]*Id*., §4(2)(l)(C).
[197]*Id*., §4(2)(l)(D).

Additionally, for the first time, the REA gives statutory recognition to the concept of class action suits by recognising the *locus standi* of an association of buyers or any voluntary consumer association registered under any law.[198] Until recently, this was recognised only by the National Consumer Redressal Commission for consumer disputes under the CoPRA.[199] Prior to this, consumers had to file separate complaints for a common grievance against the same builder, such as poor quality of construction or delay in possession.[200]

The REA also sets up various compliance and reporting requirements. *Inter alia*, the REA requires updates at frequent intervals and requires such updates to be published on the website of the RERA.[201]one of the most important highlights of the REA is that it brings within its ambit real estate agents,[202] which were hitherto completely unregulated and exempt from any form of legal liability. Real estate agents or 'brokers' now have to register with the RERA before they can facilitate the sale or purchase of any property,[203] and they also have to quote their registration number every time they facilitate a transaction.[204] The REA mandates the brokers to maintain and preserve books of accounts, records and documents,[205] besides listing activities which amount to unfair trade practices.[206]

III. REDRESSAL

one of the key objectives of enacting the REA was to create a specialised body to provide for speedy dispute redressal.[207] This is because consumer forums, though sensitive to the rights of the consumers, still suffered from the delays of litigation in India.[208] The builders exploited this to their advantage and adopted a policy of tiring out the consumer in the hope of paying a

[198] *Id*., Explanation to §31(1).
[199] *Ambrish Kumar Shukla* v. *Ferrous Infrastructure (P) Ltd.*, 2o16 SCC onLine NCDRC 1117.
[200] Raheja Vedanta, *Invite All Flat Buyers to Join the Case Through Public Notices — Consumer Forum*, october 1, 2o15, available at http://www.thelogicalbuyer.com/blog/invite-all-flat-buyers-to-join-the-case-through-public-notices-consumer-forum/ (Last visited on February 14, 2o17).
[201] The Real Estate (Regulation and Development) Act, 2o16, §11(1).
[202] *Id*., §2(zm) (this provision defines a "real estate agent" as:""real estate agent" means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called.").
[203] *Id*., §9(1).
[204] *Id*., §9(5).
[205] *Id*., §1o(b).
[206] *Id*., §1o(c).
[207] The Real Estate (Regulation and Development) Act, 2o16 (as contained in the preamble).
[208] *Supra* note 5.

meagre settlement, or frustrating the consumer to a point where the consumer withdraws the legal claim.[209] The buyers would have to initially approach the district forum, then the state forum, and finally the national forum, which not only caused delay, but also made the process lengthy, cumbersome and economically burdensome for the buyers.[210] To aggravate the malady, most builders, especially those considered to be big conglomerates, hired specialised legal counsels to draft lop-sided contracts and as a matter of practice, included arbitration clauses to deter buyers from litigation.[211]

To remedy this practice, the REA establishes a dedicated body for real estate disputes, i.e., the RERA.[212]The REA also provides for strict timelines, such as sixty days for the disposal of appeals by the Appellate Tribunal,[213] which ensures speedy redressal and reduces the delay faced before the consumer forums. The functions of the RERA are not restricted to adjudication; they also include regulation, monitoring and promotion of the real estate sector.[214]Curiously, the REA also provides for an Ao for the purpose of adjudging the compensation under §§12, 14, 18 and 19.[215]Thus, the REA, in effect, creates two separate forums for the redressal and enforcement of buyers' rights, i.e., the RERA and the Ao, wherein the RERA can be approached for filing a complaint with respect to the violations of the REA, and the Ao can be approached for compensation.[216]

For instance, the builder has to provide an undertaking at the time of registration with respect to the date of handing over of possession.[217] In the event the builder fails to hand over possession on the date promised, the buyer can claim the possession of the apartment[218] and compensation for delay.[219] Apart from these remedies in the nature of restitution, the builder is

[209]India Today, *The Long, Expensive Road to Justice*, April 27, 2o16, available at http://indiatoday.intoday.in/story/judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice/1/652784.html (Last visited on February 14, 2o17).
[210]Consumer Protection Act, 1986, §§11, 15, 17, 19, 21, 23.
[211]The Chambers of Law, *Do Not Fall Prey toone-Sided Builder Agreements*, May 13, 2o13, available at http://www.tcl-india.net/node/19 (Last visited on January 13, 2o17).
[212]The Real Estate (Regulation and Development) Act, 2o16.
[213]*Id*., §44(5).
[214]*Id*., §11.
[215]*Id*., §71(1).
[216]*Id*., §31(1) (provides that:
[217]*Id*., §4(2)(l)(C).
[218]*Id*., §19(3) (provides that:"The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.").
[219]*Id*., §71.

also liable to bepenalised under §61 of the REA[220] for contravention of the provisions of §4. Therefore, the cause of action on which the buyer will seek redressal would be a single cause of action, i.e., the delay in handing over of possession. However, the complaint can be filed before the RERA for violation of the undertaking given under §4, as well as before the Ao under §71 for violation of §§18 and 19. It makes little sense to file two complaints for the same cause of action, that too before two separate forums. From the perspective of the buyer, it would be more beneficial to file the complaint before the Ao and seek compensation, than to file a complaint before the RERA and only seek the imposition of a penalty on the builder. This creates an absurd position of law as there is no provision providing for transfer of complaints or joint-hearings before the RERA and the Ao.

Another key aspect of the redressal mechanism under the REA is that it does not oust the jurisdiction of consumer forums. The proviso to §71 states that the buyer may withdraw a litigation pending before a consumer forum and file a complaint before the Ao for compensation.[221] In order to ensure speedy redressal, there should have been a provision for transfer of existing complaints to the Ao, instead of making buyers withdraw the existing proceedings and file fresh claims before the Ao.

IV. ARBITRABILITY OF DISPUTES

The Arbitration Act does not define, clarify or state in specific terms the kind of disputes that are amenable to arbitration. The bar toarbitrability is contained in §34(2)(b) and §48(2) of the Arbitration Act which provide, *inter alia*, that an award can be challenged if the subject matter of the dispute is not arbitrable. Generally, every dispute, which is civil and commercial in nature, whether arising out of a contract or otherwise, is in principle arbitrable.[222] This is subject to the valid existence of a valid arbitration agreement, provided the jurisdiction of the Tribunal is not excluded.[223]

---

[220] *Id*., §61 (provides that:"If any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent of the estimated cost of the real estate project as determined by the Authority.").

[221] *Id*., Proviso to §71(1) (provides that:"Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.").

[222] *Booz Allen and Hamilton, Inc.* v. *SBI Home Finance Ltd.*, (2o11) 5 SCC 532, 35.

[223] *Id*., 29.

In *Booz Allen & Hamilton, Inc.* v. *SBI Home Finance Ltd.*[224], ('Booz Allen') the Supreme Court of India ('SC') outlined the following test for the 'arbitrability' of a dispute:

(a) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts)?

(b) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.

(c) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal."[225]

A. THE TEST OF NATURE OFRIGHTS

The first and foremost test to determine arbitrabilityof a dispute is whether the dispute is capable of being adjudicated and settled by a Tribunal. In Booz Allen[226], the SC distinguished between rights *in rem* and rights *in personam*, and held that rights *in personam* are arbitrable and rights *in rem* are not. The distinction between a right *in rem* and a right *in personam* is that a right *in rem* is available against the world at large and a right *in personam* is available only against particular persons .[227] It should be noted that the Court also held that this distinction is not rigid or inflexible, and subordinate rights *in personam* arising from rights *in rem* are considered to be arbitrable.[228]

The Court took the view that certain categories of proceedings are reserved by the legislature exclusively for public forums as a matter of a public policy and some categories, which are not exclusively reserved, may, by necessary implication, be excluded from the purview of private

[224] *Id.*
[225] *Id.*, 21.
[226] *Id.*
[227] P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 235 (12th ed., 2oo9) (states:"My right to the peaceable occupation of my farm is in rem, for all the world is a under a duty towards me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive the rent from him is in personam.").
[228] *Booz Allen and Hamilton, Inc.* v. *SBI Home Finance Ltd.*, (2o11) 5 SCC 532, 41.

forums.[229] For example, a mortgage suit is to be decided by a Court, as the provision of the Transfer of Property Act, 1882 and order 34 of the Code of Civil Procedure, 19o8, impliedly bar adjudication by a Tribunal.[230] The Court thus outlined six categories of disputes which are not arbitrable:

"first, disputes relating to rights and liabilities which give rise toor arise out of criminal offences, second, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody, third, guardianship matters, fourth, insolvency and winding up matters, fifth, testamentary matters (grant of probate, letters of administration and succession certificate) and sixth eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."[231]

In *Haryana Telecom Ltd.* v. *Sterlite Industries (India) Ltd.*[232] , the SC further held that a winding up petition is not for money and the power toorder winding up of a company, which is specifically conferred on the Court, emanates from the Companies Act. Hence, the winding up of a company cannot be subject to arbitration [*Id.*] . Similarly, the grant of probate is a judgment *in rem* and beyond the jurisdiction of the Tribunal.[233] In *N. Radhakrishnan* v. *Maestro Engineers*[234], the Court held that issues related to misappropriation of funds and malpractices arising out of a partnership dispute should not be referred to arbitration and should be tried in a court of law.

Conversely, the SC has held that matters related to specific performance of a sale falls within contractual rights and in order to curtail litigation in regular courts, the performance of contracts concerning immovable property is not hit by the test of arbitrability under the Arbitration Act.[235]

B. THE TEST OF RELIEF SOUGHT

Taking an alternative approach, the Bombay High Court in *Rakesh Malhotra* v. *Rajinder Kumar Malhotra* ('Rakesh')[236]held that since the arbitrator could not grant the relief of

[229] *Id*., 35.
[230] *Id*., 48.
[231] *Id*.
[232] *Haryana Telecom Ltd.* v. *Sterlite Industries (India) Ltd.*, (1999) 5 SCC 688.
[233] *ChiranjilalShrilal Goenka* v. *Jasjit Singh*, (1993) 2 SCC 5o7.
[234] *N. Radhakrishnan* v. *Maestro Engineers*, (2o1o) 1 SCC 72.
[235] *olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan*, (1999) 5 SCC 651; *Keventer Agro Ltd.* v. *Seegram Co. Ltd.*, APo No. 499 of 1997 and CS No.592 of 1997, decided on 27-1-1998 (Cal) (Unreported).
[236] *Rakesh Malhotra* v. *Rajinder Kumar Malhotra*, 2o14 SCC onLine Bom 1146.

regulating the affairs of the company, the same could not be the subject matter of arbitration. Similarly, in *Eros International Media Ltd.* v. *Telemax Links India (P) Ltd.*[237] , the Bombay High Court took the view that the contractual rights relating to copyright fall within the scope of arbitration. Thus, the Bombay High Court, in essence, developed the test of arbitrabilityon the basis of the relief sought by the parties and not the distinction in the nature of their legal rights.[238]

The most important decision on arbitrabilityof disputes is *Natraj Studios (P) Ltd.* v. *Navrang Studios* ('Natraj Studios')[239], wherein the presence of a statutory remedy and a specific body having been established by law, parties should not be allowed to contract out of the statute. A three-judge bench of the SC held that a dispute between a landlord and a tenant regulated by the Bombay Rent Act was not arbitrable and would fall within the exclusive domain of the Small Causes Court at Mumbai. The rationale for this view was that the legislature had conferred exclusive jurisdiction on certain courts in pursuance of social objectives.[240] Furthermore, the Court held that public policy requires that parties be disallowed to contract out of a statute or a specific legislative mandate[241]. Therefore, if the jurisdiction of the Civil Courts is excluded and exclusive jurisdiction is granted to a specific court or tribunal as a matter of public policy, then such a dispute would not be capable of resolution by arbitration.[242]

However, in *HDFC Bank Ltd.* v. *Satpal Singh Bakshi* ('HDFC Bank')[243], a full bench of the Delhi High Court came to the conclusion that parties are free to choose their own forum for dispute resolution despite the creation of specialised tribunals. It should be noted that the reasons for coming to this conclusion were not to favour arbitration, but to uphold an alternate form of dispute resolution. The Court held that matters pending before the Civil Court can even be referred to *lok adalats*, mediation, conciliation, etc., and hence, despite the creation of a specialised tribunal, the parties were free to submit their disputes to arbitration.[244]

---

[237] *Eros International Media Ltd.* v. *Telemax Links India (P) Ltd.*, 2016 SCC onLine Bom 2179.
[238] ArthadKurlekar, *A False Start — Uncertainty in the Determination of Arbitrability in India*, June 16, 2016, available at http://kluwerarbitrationblog.com/2016/06/16/a-false-start-uncertainty-in-the-determination-of-arbitrability-in-india/?_ga=1.183326437.2138946090.1480056927 (Last visited on January 13, 2017).
[239] *Natraj Studios (P) Ltd.* v. *Navrang Studios*, (1981) 1 SCC 523 : (1981) 2 SCR 466.
[240] *Id*., 21.
[241] *Id*.
[242] *A. Ayyasamy* v. *A. Paramasivam*, (2016) 10 SCC 386 : (2016) 5 Arb LR 326 (SC), 32.
[243] *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC onLine Del 4815.
[244] *Id.* (the Court held, "While courts are State machinery discharging sovereign function of judicial decision making, various alternate methods for resolving the disputes have also been evolved over a period of time. one of the oldest among these is the arbitration.").

C. APPLYING THE TESTS TO DISPUTES UNDER THE REA

Following the dictum of the SC in Booz Allen, the rights with respect to the violation of the provisions of the REA would be considered as rights *in rem* as the violation by the builder would affect all buyers and not just an individual. Moreover, the violation would fall within the realm of regulation and monitoring of the real estate sector and hence will affect the public at large. on the other hand, the claim for compensation under §§12, 14, 18 and 19 read with §71 of the REA would fall within the realm of rights *in personam*. Thus, for violations of the REA, there can be no arbitration, but for compensation claims, there can be arbitration.

Thus, the test of the nature of rights and that of the relief sought are inconclusive to determine whether disputes under the REA can be referred to arbitration. The only test which aids and furthers the intention of the REA is the test of social objective and public policy as outlined in Natraj Studios.[245] Since the REA has been specifically enacted to address the delay in litigation and to provide for speedy redressal, ousting the jurisdiction of the RERA and Ao in favour of the Tribunal would in effect nullify the purpose of the REA. The reason for this is that arbitration would not only be expensive for the consumers, but would also deprive the consumers of the protection granted by the REA with respect to the refund of money, interest and other such protections. Further, the objective of regulation and monitoring of the real estate sector will get diluted if complaints and grievances of buyers do not reach, and are not dealt with, by the RERA but are instead forwarded to the Tribunal.

V. THE EFFECT OF THE ARBITRATON & CONCILIATION (AMENDMENT) ACT, 2015

In order to determine the validity of arbitration clauses *vis-à-vis* the REA, one of the key considerations has to be the consent of the parties to submit their dispute to the Tribunal, since arbitration is a creature of consent.[246] More often than not, builder-buyer agreements are not negotiated contracts and contain unreasonable standard terms, heavily favouring the builder.[247]

[245] *Natraj Studios (P) Ltd.* v. *Navrang Studios*, (1981) 1 SCC 523 : (1981) 2 SCR 466.
[246] ALAN REDFERN& MARTIN J. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (4th ed., 2oo4).
[247] *LIC* v. *Consumer Education and Research Centre*, (1995) 5 SCC 482.

Most of such agreements are standard form agreements, pre-drafted, where the buyers just sign the agreement, without having much of a chance to read the agreement or seek legal advice.[248] In this scenario, can it be considered that the parties actually intended to and agreed that their disputes are to be resolved by arbitration?

It is pertinent to note that the aforesaid decisions on arbitrability were passed before the amendment to the Arbitration Act[249], and post the amendment, the language of §8(1) states that "notwithstanding any judgment, decree or order of the Supreme Court or any Court", a judicial authority is bound to refer the parties to arbitration unless the authority finds that *prima facie* no valid arbitration agreement exists.[250] It is also important to note that the language of §8 of the Arbitration Act is peremptory in nature and it is obligatory for the court to refer the parties to arbitration.[251] Thus, the position of law, post the amendment, is that all matters, if arbitrable, have to be referred to arbitration.[252] In october, 2o16, the SC in *A. Ayyasamy* v. *A. Paramasivam*[253], took the view that Article 8 of the UNCITRAL Model Law ('Model Law') only enables the "Court" to decline the reference to arbitration, whereas §8 of the Arbitration Act made a departure from the Model Law and used a very expensive expression of "judicial authorities" instead of the word "Court"[254]. Hence, the presence of an arbitration clause in the agreement would necessarily trigger the mandate of §8 of the Arbitration Act and the parties would have to approach the Tribunal. However, there is no clarity on what is arbitrable and the Court accepts that it is necessary to have laws that state what matters are non-arbitrable, as the Civil Court has powers to set aside an award on the ground that the subject matter of the dispute could not have been settled by arbitration.[255]

VI. OUSTER OF THE ARBITRATION TRIBUNAL

[248] *Superintendence Co.of India (P) Ltd.* v. *KrishanMurgai*, (1981) 2 SCC 246 : (198o) 3 SCR 1278.
[249] The Arbitration and Conciliation Act, 1996.
[250] *Id*., §8(1) (provides that:"A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exist.").
[251] *P. AnandGajapathiRaju* v. *P.V.G. Raju*, (2ooo) 4 SCC 539.
[252] *Sundaram Finance Ltd.* v. *T. Thankam*, (2o15) 14 SCC 444 : AIR 2o15 SC 13o3; *Magma Leasing & Finance Ltd.* v. *Potluri Madhavilata*, (2oo9) 1o SCC 1o3.
[253] *A. Ayyasamy* v. *A. Paramasivam*, (2o16) 1o SCC 386 : (2o16) 5 Arb LR 326 (SC).
[254] *Id*.
[255] *Id*.

It is most relevant to note that §88 of the REA states that the REA shall be in addition to, and not in derogation of, any other law. A plain reading of the provision leans in the favour of ouster of arbitration, or arbitration being an alternative remedy optional to the parties[256]. on the other hand, §89 of the REA states: "The provision of this Act shall have effect, notwithstanding anything inconsistent contained in any other law for the time being in force." Therefore, §89 of the REA clearly has anoverriding effect. Thus, both the sections, on a plain reading, suggest that the provisions of the REA would prevail over the Arbitration Act. However, this literal interpretation directly conflicts with §8(1) of the Arbitration Act which mandates the reference of every dispute to the Tribunal, when there is an arbitration clause. Thus, there appears to be a direct conflict between two statutes, i.e., the REA and the Arbitration Act, as to which will prevail in case of real estate disputes. Whenever there is a conflict of such nature, the only way to resolve it is to resort to the principles of statutory interpretation.

First, the REA is a social welfare legislation as it seeks to protect the consumers at large. Hence, following the view of the SC in Natraj Studios, when exclusive jurisdiction has been conferred on the RERA and Ao, the jurisdiction of the Tribunal should be excluded as a matter of public policy[257]. Even if a literal interpretation is applied, §89 of the REA clearly provides that the REA overrides other legislations and hence the Arbitration Act can only be applied as long as it is not inconsistent with the REA.[258]

Second, it has been held time and again that in case of a conflict between two statutes, a specific legislation should override a general legislation. This is based on the Latin maxim *generaliaspecialibus non derogant*, i.e., general law yields to special law, should they operate in the same field on the same subject[259]. In this case, the REA has been enacted specifically to regulate the real estate sector and provides for speedy dispute redressal and hence, arbitration clauses should be held invalid and the mandate of §8(1) of the Arbitration Act should consequently be subject to the provisions of the REA.

[256] *Skypak Couriers Ltd.* v. *Tata Chemicals Ltd.*, (2ooo) 5 SCC 294; *National Seeds Corpn. Ltd.* v. *M. Madhusudhan Reddy*, (2o12) 2 SCC 5o6.
[257] *Hindustan Lever Ltd.* v. *Ashok Vishnu Kate*, (1995) 6 SCC 326.
[258] *Govt. of A.P.* v. *Road Rollers owners Welfare Assn.*, (2oo4) 6 SCC 21o.
[259] *CTo* v. *Binani Cement Ltd.*, (2o14) 8 SCC 319 : (2o14) 3 SCR 1.

Third, taking a purposive interpretation, the costs associated with arbitration are relatively high and the process of arbitration is not understood by most buyers[260]. Since speedy redressalof disputes is one of the key objectives behind enacting the REA, the freedom toopt for an alternative redressal mechanism, as held in HDFC Bank[261], would nullify the effect of the REA and bring buyers back at the mercy of the builder. Further, the costs to be paid by a buyer for redressal under the REA are low[262], and the buyer is at liberty to appear before the authorities[263] . If the parties are referred to arbitration, the costs for the buyers would rise substantially, and it would only serve as a deterrent for buyers to pursue litigate against builders, which was the situation prevailing before the enactment of the REA. Since an interpretation nullifying the effect of any legislation should always be avoided[264], therefore, the RERA or Ao should not stay the proceedings in favour of arbitration, as the REA provides for a cheap and speedy redressal mechanism.[265]

Fourth, the REA provides for strict timelines, such as the refund of money within forty-five days[266] , and interest above the bank rate[267] , which will help buyers immensely. Such relief cannot be granted by the Tribunal as a standard applicable across all consumers as it will always be subject to the facts of each case and the discretion of the Tribunal, whereas such reliefs have been given statutory recognition, applicable to all cases, irrespective of the subjective facts of the case.

VII. CONCLUSION

The REA is much needed, and is a welcome step towards the protection of the buyers, who were hitherto at the mercy of lop-sided agreements, and lengthy and cumbersome litigation for enforcement of their rights. Providing for regulation, promotion and monitoring, the REA brings transparency which will lead to a reduction in real estate frauds, and offers statutory recognition to the rights of buyers which were earlier not included in builder-buyer agreements as buyers were not in a position to freely negotiate such agreements.

[260]Giaretta, *supra* note 8.
[261]*HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2o12 SCC onLine Del 4815.
[262]Chandigarh Real Estate (Regulation and Development) (General) Rules, 2o16, Rules 34, 35 (provide that INR 1,ooo/- is required for complaints to be filed).
[263]The Real Estate (Regulation and Development) Act, 2o16, §56.
[264]*Workmen* v. *Indian Standards Institution*, (1975) 2 SCC 847 : (1976) 1 LLJ 33 (SC), at 39.
[265]*Fair Air Engineers (P) Ltd.* v. *N.K. Modi*, (1996) 6 SCC 385 : AIR 1997 SC 533.
[266]Chandigarh Real Estate (Regulation and Development) (General) Rules, 2o16, Rule 16.
[267]*Id*., Rule 15.

The requirement of registration of builders, and especially of real estate agents, would add credibility to builders and increase the confidence of buyers in the real estate sector. Furthermore, the establishment of the RERA and the AO would provide a huge relief to innocent buyers who would earlier invest their life-savings into real estate projects and then run from pillar to post for getting possession or refund of their money. Several statutory thresholds with respect to the amount of money that can be received, verification of title and blocking of seventy-five percent of capital would further the completion of projects in time and prevent siphoning off of consumer money. This would also deter builders from starting projects without the necessary capital and capability to execute them.

IMPACT OF GOODS & SERVICES TAX ON TAXATION LAW

- AMBUJ MISHRA

ABSTRACT

GST is an indirect tax which can be imposed on all taxable goods and services which comes under it and is not imposed on those goods which fall out of its ambit. There are certain goods on which GST is cannot be imposed. Alcohol which can be consumed by humans, electricity, and custom duty is part of the list of exempted goods and services list. Even the petroleum products like crude oil, natural gases, diesel, petrol and aviation turbine fuel are also a part of the exempted goods and services list unless and until their inclusion is announced by the GST Council. GST came into force from 1 July 2017. Before GST, the taxation system had multiple taxes on the same product but after GST the taxation system has been simplified and is aligned with a robust IT system creating a user-friendly tax administration system.

KEYWORDS:- GST, indirect tax, taxation system, economy.

INTRODUCTION

Goods & Services Tax is an Indirect Tax which came as the replacement for many sorts of Indirect Taxes. The Goods & Services Tax also called GST is based on a principle of 'one nation one tax.' The GST Bill after a long tussle was finally passed by the Parliament on 29th March 2017 and came into effect on 1st July 2017. GST was introduced by amending the Constitution for the 101st time. GST has been adopted by around 160 countries in the world.

GST is such a concept which is vast in nature but has a capability to simplify the giant tax structure and supports one country's economy to grow efficiently. GST is a comprehensive Tax which is levied on goods and services like manufacturing of goods, sales and on consumption goods as well as services on a national level.[268] Under the system of GST, the tax paid by the consumer is the final tax and there is no other tax on tax paid on inputs which goes to the manufacturer of goods.

[268] Shefali Dani, *Impact of Goods and Services Tax (GST) on Indian Economy,* BUSINESS AND ECONOMICS JOURNAL (June 3, 2019, 12:15 PM), https://www.omicsonline.org/open-access/a-research-paper-on-an-impact-of-goods-and-service-tax-gst-on-indianeconomy-2151-6219-1000264.php?aid=82626

According to the definition of GST, GST is a comprehensive, multi-stage, destination-based tax which is imposed on every value added. In simple words, GST is a tax which is levied on the supply of goods and services in India. Under the GST Law the tax which is imposed, on any goods or services, is on every point of sale. If the sale is taking place between two or more state i.e. intra-state then Central GST and State GST will be charged and if the sale is within the state i.e. inter-state then only the Integrated GST is charged.

GST is a consumption based tax and destination principle. Consumption-based as it is collected from the source or origin of consumption and destination principle because the traders or producers do not have to take its burden as it's not their responsibility to collect the taxes. So GST is a comprehensive indirect tax which is levied on manufacture, sale, and consumption of goods and services at the national level.[269]

FEATURES OF GOODS AND SERVICES TAX

REALM OF GST

GST is an indirect tax which can be imposed on all taxable goods and services which comes under it and is not imposed on those goods which fall out of its ambit. There are certain goods on which GST is cannot be imposed. Alcohol which can be consumed by humans, electricity, and custom duty is part of the list of exempted goods and services list. Even the petroleum products like crude oil, natural gases, diesel, petrol and aviation turbine fuel are also a part of the exempted goods and services list unless and until their inclusion is announced by the GST Council. Even though the alcohol meant for human consumption is exempted Tabaco products are included in the list of items over which GST is applicable. On Tabaco products, GST is chargeable along with central excise tax.

IMPOSITION AND COLLECTION OF GOODS AND SERVICES TAX

The law making the power of taxation on goods and services lies in the hands of Union and State Governments. While drafting any taxation law, either by Union Government or State Government, both the Governments has to keep in mind that they don't overrule each other i.e. any rule or law made by Union on GST shall not overrule a State GST rule or law. The law of

[269] CA Vishal Raheja, *What is GST? Goods And Services Tax Explained With Benefits*, TAXMANN (May 15, 2019, 05:15 PM), https://www.taxmann.com/blogpost/2000000048/what-is-gst-goods-and-services-tax-explained-with-benefits.aspx

GST has two components CGST and SGST which is collected by Central Government and State Government respectively. Under the GST regime, there is also another component called IGST which is levied on goods and services when the trading is taking place between two states. IGST also includes imports and the tax is collected by the Central Government and is then distributed to imported states later keeping in mind that GST is a destination based tax. The proportion in which the GST will be distributed between the Central government and State Government will be decided through the recommendations given by the GST Council.

GOODS AND SERVICES TAX COUNCIL

The Goods and Services Tax Council was set up on the recommendation of President and is supposed to be chaired by the Finance Minister of the country. The composition of the GST Council shall have two-thirds representation from the side of States and one-third representation from the side of Central. The Council shall constitute the Minister who is in charge of revenue and the Minister who is in charge of finance or taxation or any such field which is nominated by the State Governments. The decision given by the Council shall sustain only if it is given in the presence of the required quorum i.e. 50% of the total members and is passed with the three-fourths majority votes of the total votes cast.

The Goods and Services Tax Council can also act as a Dispute Redressal Authority if any dispute arises. The Council can also make certain recommendations on the following aspects:

- Taxes, surcharge, cess of central and states which will be integrated into GST
- Goods and services which may be exempted from GST
- Interstate commerce – IGST- the proportion of distribution between state and center
- Registration threshold limit for GST
- GST floor rates
- Special rates during calamities
- Provision with respect to special category states especially northeast states.[270]

ADDITIONAL TAX OF 1%

[270] Monika Sehrawat, *GST In India: A Key Tax Reform,* INTERNATIONAL JOURNAL OF RESEARCH-GRANTHAALAYAH, (June 3, 2019, 02:05 PM), http://granthaalayah.com/Articles/Vol3Iss12/15_IJRG15_C12_76.pdf

Under the regime of GST Law, an additional tax of 1% is levied on the interstate taxable supply of any goods and services. This additional tax of 1% is levied by Central Government directly on the State which is doing the export i.e. origin state. This tax is directly imposed on origin state as GST is supposed to be a destination tax. The additional tax of 1% is to be charged for a period of two years. The time period can further be extended for a longer time as recommended by the GST Council.

COMPENSATION TO STATES

GST implementation has caused losses to the revenue generation by States to overcome the loss suffered by the States the Central Government will pay them compensation for the losses incurred. The amount of compensation to be paid shall be on the recommendation of the GST Council. The maximum period decided for the Central Government to pay compensation to the States is five years after the completion of this period State will have to manage from the revenue generated by them.

IMPACT OF GST ON TAX STRUCTURE

The taxation policies adopted by any country plays an important role in progress and development. It has a direct impact on the country's economy with regard to efficiency and equity. Taxation policy adopted shall be a good one as the income distribution depends on it. Also, the revenue collected from the tax will lead to benefit the country's infrastructure policies, defense policies, country's exports, public security and general amenities to the public.

The taxation system in India before GST encompassed of 25 different types of taxes at three levels- Central, state and local. The Central government used to collect taxes in the form of excise duty, central sales tax, and customs duty. The state used to collect taxes like VAT, Octroi, entertainment tax and purchase tax.

The major change that GST regime has brought in with it is that it has clubbed lot many such indirect taxes into one this will help in mitigating the double taxation, cascading, the multiplicity of taxes, classification issues, taxable event, and etc., and leading to a common national market.[271] The taxation system of India from multiple numbers of indirect taxes applicability has come down to three types of indirect taxes i.e. CGST, SGST, and

[271] *Supra* note 2

IGST. However, the Central Sales Tax is still chargeable for Inter-state purchase of certain Non-GST goods, mentioned below, at a concessional rate of 2%, by issue and utilization of c-Form

(i) Petroleum crude;

(ii) High-speed diesel;

(iii) Motor spirit (commonly known as petrol);

(iv) Natural gas;

(v) Aviation turbine fuel; and

(vi) Alcoholic liquor for human consumption. in respect of the following transactions only:

- Resale
- Use in manufacturing or processing
- Use in the telecommunication network or in mining or in the generation or distribution of electricity or any other power[272]

IMPACT OF GST ON TAX INCIDENCE

- E-commerce- Before the GST regime came into force the previous indirect tax regime has a non-uniform structure for VAT across the state this has led to VAT arbitrage. This structure will come to an end under the GST regime. Also, under GST the credit of service tax and credit of VAT is restricted only cross credit utilization is allowed because this reduces the cost of supplies.
- Consumer goods- the previous tax rate of consumer goods used to vary in between 25% to 27% under the old indirect tax system. The current tax rate of goods has come down to somewhere in between 18% to 20%. This reduction in the tax rate is the result of the elimination of multiple indirect taxes.
- Banking- the banking services have become costlier with the inception of GST law. As the tax rates have increased from 14.5% to somewhere in between 18% to 20%. The financially weaker section and consumers' investment pattern are affected because of this increase as the interest on loan rate and trading on securities has come under the purview of GST.

[272] *What is GST in India? Goods & Services Tax Law Explained,* CLEARTAX (May 15, 2019, 05:15 PM), https://cleartax.in/s/gst-law-goods-and-services-tax

- Telecom- the telecom services under GST has also seen the rise as the tax rate under GST has risen from 15% to around 18% to 20%. This will cause an increase in mobile calls charges and in any other services related to telecoms like internet access and messaging services.
- Automobile- the automobile sector saw a decrease in the tax rate from in between 25% to 40% to somewhere in between 18% to 20% which has significantly impacted the prices of final products.
- Real estate- the tax collection under this sector before GST enforcement was highly dependent on indirect taxes of stamp duty, VAT and service tax but since the GST regime came into force the VAT and service tax has been eliminated. This reduces the tax burden on the purchaser and seller.

IMPACT OF GST ON TAX COMPLIANCE

GST came into force from 1 July 2017. Before GST, the taxation system had multiple taxes on the same product but after GST the taxation system has been simplified and is aligned with a robust IT system creating a user-friendly tax administration system. This new method makes tax compliance transparent and encourages taxpayers to comply within different sectors

- Telecom Sector- in order to comply with the perspective of GST regime the telecom sector had to adopt state wise registration than centralized registration. This has also increased their cost of compliance.
- E-commerce- the GST has brought in the proviso of tax collection at source for the e-commerce operators regarding the goods sold by them through their online portals. This proviso had significantly increased the tax compliance burden on the industry.
- Banking- the tax compliance burden under this sector had seen a shift from the centralized compliances to the decentralization of compliances to different states.
- Automobile- before the implication of GST regime there were multiple taxes, like excise duty, VAT/CST, entry tax, octroi, imposed on automobiles. After GST compliance burden in this sector has reduced as GST has subsumed all the above mention taxes.

IMPACT OF GST ON TAX PAYMENT

GST Law introduction in India is considered as a significant step in the reformation of the taxation system of India. The tax payment system under the GST regime is divided into three types which are CGST, SGST, and IGST. CGST and SGST are paid when the supply of goods is intra-state i.e. between two or more different states and IGST is paid when the supply of goods is inter-state i.e. within the boundaries on the state.

The tax is supposed to be paid either at the time when payment for the goods or services is received or issuance of an invoice in the same regard is received or at the time when the supply of goods and services is completed. The GST which is to be paid can either is paid by debiting the credit ledger or in cash by debiting the cash ledger which is maintained on a common portal and the taxpayer had made a payment on a monthly basis.

Impact of GST on Business:-

GST increased the compliance requirements for the Micro, Small, and Medium Enterprises (MSME) sector or financial services providers like non-banking finance corporations (NBFCs), the benefits of the tax reform will be particularly substantial for the sector in the long term.

One such development with the tax reform that will deliver not only long-term but also short-term benefits is that the GST system operates based on a strong technological foundation. Here are some of the key benefits of the tax system for the business ecosystem:

GST has eliminated the cascading effect of tax

The Goods and Services Tax brings all indirect taxes under a single ambit as a comprehensive tax structure. This means the cascading effect of taxes, or the 'tax on tax' effect, which was a huge burden to businesses in the previous regime, will no longer be a problem.

The threshold for registrations are higher

Previously, in the Value Added Tax (VAT) structure in most states, businesses having a turnover upwards of Rs 5 lakh incurred VAT. This limit also varied from one state to the other, while service providers having a turnover of less than Rs 10 lakh were exempt from paying service tax.

However, under the GST regime, the threshold is higher, with small traders and service providers with a turnover of less than Rs 20 lakh being exempt other than some North Eastern States.

Small businesses benefitting from composition scheme

Under the GST, smaller trading concerns and service providers with a turnover of upto 1.5 crore can benefit from the Composition Scheme, wherein taxpayers with lower liabilities can avoid complex processes and pay GST on a fixed turnover rate.

Online procedures have made compliance simpler

The entire process of registering for GST to filing returns has been shifted online, making it extremely simple and efficient. This has particularly been advantageous to SMEs and smaller startups, which no longer need to spend a huge amount of time, money, and effort to acquire licenses or register for multiple taxes such as VAT or excise duty.

Further, the previous indirect tax system had no provision for SMEs to avail credit on the value-added tax paid on capital goods, the cost of which was borne by the company. However, under the GST regime, SMEs, smaller NBFCs, and various other entities dealing in goods and services can avail credit on input tax paid on the supply of goods as well as services.

Impact of GST on NBFCs in India

During the previous indirect tax regime, lending services facilitated by NBFCs were largely exempted from the purview of indirect taxes. There were only a few services on which a centralized service tax was levied, irrespective of where in India the services were rendered from. This has changed with the implementation of the GST regime since NBFCs are required to register their business in each state where they offer these taxable services. Some of the changes that NBFCs have seen with GST include:

- Under the previous regime, NBFCs were liable to pay 15 percent tax on certain services rendered, which following the implementation of GST has risen to 18 percent.
- Before GST, NBFCs could register their business centrally. However, with GST, they need to register in each state where they are present.
- If NBFCs engage in the inter-state supply of services between same entity branches, they will attract IGST.
- The number of GST returns to be filed are 25 for each state, and 61 returns in case of ISD and TDS provision are applicable.

Further, the implementation of GST has also increased the billing and compliance requirements, and now necessitates additional documentary evidence as well as monthly compliances for multiple locations, as compared to the indirect tax regime. However, with the GST governance framework incorporating information technology (IT) systems for

compliance and filing returns, NBFCs can ensure smoother workflows and quicker reporting by automating the filing process.

On the other hand, GST will also significantly impact the evaluation processes, since service tax was assessed by the regulating authorities in the state where the company's branch was registered. Additionally, each registered branch of the NBFC had to validate its position for the charge-ability in the respective state and provide a reason for utilising the input tax credit in various states.

It is anticipated the GST could potentially transform the Indian economy, allowing businesses and corporations in the country to augment their overall efficiencies. Furthermore, a unified domestic market will create far greater opportunities for businesses in terms of their ability to expand anywhere in the country. At the same time, it will also provide them with the benefit of lesser production costs, thereby boosting their profitability in the long terms.

CONCLUSION

Goods and Services Tax is a comprehensive, multi-stage, destination-based tax which is imposed on every value added. In simple words, GST is a tax which is levied on the supply of goods and services in India. It replaced India's old multiple indirect taxation system. GST regime in India was brought in to maintain a transparent and corruption-free taxation system. GST is has been adopted by around 160 countries. When GST was adopted by India one of the major concerns was whether India will also be a victim of the rise in inflation rate like other countries who follow a single tax regime. But India proved to be the exception of the rise in inflation trend. Implementation of GST in India did not hike its inflation rate.

Due to the falling apart environment of the Indian economy, it is a mere need of time for implementation of Goods and Services Tax in India. The consumption and production of goods and services are increasing day by day and due to which the taxes under the older regime was increasing too and the whole taxation system was getting more and more complex. With GST there will be one nation one tax and the complexity which was being faced under the older regime be eliminated.

GST implementation has proved itself to be the necessary change required in the taxation system. With the GST regime in action, the hidden taxes system is also abolished and the rate of taxes for many goods and services has come down. GST law is a user-friendly taxation system which aims at providing a transparent taxation system. Implementation of GST has

allowed India to negotiate its terms and conditions in a better manner while dealing in international trade forums. GST has aimed at increasing the taxpayer's numbers in the country which under the old regime were tax evaders.

There is no doubt that the implementation of the GST law will provide India with a world-class taxation system by providing different treatments to the manufacturing sector and service sector. GST has affected many sectors in the economy by the way of taxation, in some sectors, the taxation rate has raised and, in some sectors, the rate of tax is dropped. Overall GST is considered to be a positive move which has evaded the complexities in the taxation system of India.

RIGHTS OF TRANSGENDERS IN INDIA

- C. AMRIDHA VARSHINI & B. ADITYA KRISHNAN

ABSTRACT

Although there are a lot of media exposure to transgender individuals, they remain the most marginalized citizens in our world. People do not realize the precise definition of transgenders and the various forms of transgenders. What makes them do this kind of act is still a surprise for the people. But there is no search for this issue; the wonder ends there. Transgenders have to undergo surgery to transform themselves because they won't feel satisfied or comfortable with the body they already have. Their act of transforming is voluntary not mandatory. They strive desperately to blend into our culture. However, our community tends to discriminate against them. There are only a few areas in our world that transgender individuals have their own groups to defend and embrace. So, they're forced to move to that specific place to lead a normal life. Our Government of India has taken a measure to stop this injustice by passing The Transgender Persons (Protection of Rights) Act, 2019. Yet, the trans people themselves are not completely satisfied by this gesture. That is because they believe that the enforcement of the Act could have been more supportive to them. They want the Act to be clarified more explicitly about incentives, quotas and punishments for offenders. Now let us have a look on the relation between what a transgender need for leading a normal life and what steps our government has done to help them.

INTRODUCTION

Gender is derived from a Latin word which means kind or race. We all know our gender when we were born but there are people facing hurdles in their life to prove their gender. We call them as transgenders. Our recent census says that 487 thousand transgenders are living in India.[273] They have existed since the human race started just like us. Only after a long struggle, they are being recognized as the "third gender" in our country. Mostly, these people are disowned by their families for revealing their original identity. Importantly, they are deprived of educational establishments, employments, opportunities, healthcare, proper accommodation and a lot more. People think that being a transgender is a choice but that's not true. Because they experience psychological trauma. Due to this situation, they cannot just hide their identity

[273] Number of transgender people in India in 2011, by state, STATISTA, (January 2016), https://www.statista.com/statistics/705970/india-number-of-transgender-people-by-state/

and live. And our society make their lives worse by mocking and insulting them. Even today, if a transgender walk in a road they are being gazed as if a criminal is walking. People gaze at them of the fact that unlike men or women, they experience a lack of consistency between their sex and gender. In fact, they are the persons to whom we should take care of and guide them in a proper way instead they are struggling to prove us that they too deserve all the basic rights that we enjoy. They are prone to being cast out, tricked into sex trade, repeatedly embarrassed and constantly ignored. Majority of the people never attempted to understand their feelings. This disregard should change. People should be aware of transgenders feelings and difficulties faced by them. And also accept the fact that it is the right of every person to select their own gender. This can be done only by spreading awareness and giving them legal protection. We should make people realize that if the transgenders were provided with the same amount of freedom, education and other basic resources they can also achieve in any kind of jobs. Generally, they are referred as poor and are blamed for failing to approach the court of law. We cannot blame them for this situation because our society didn't welcome them properly by providing them with all resources to have such basic knowledge to approach the court. And of course, in recent days, we can see transgenders achieving more but they are in a minimal countable level. Transgenders who have succeeded would have experienced a lot of struggles than us. They go through a lot than us. We can't say that our government is totally ignorant of their problem but the question is that have they cared enough? In this paper the rights of the transgenders are explained. The need of the hour is transgender's empowerment.

WHO IS A TRANSGENDER?

Transgenders are the ones who have a gender identity which differs from their sex assigned at birth. Transgenders are now officially recognized as the third gender in the society. These are the people who have different opinions in sex due to hormonal changes. Rather than accepting the gender and choosing the sex assigned by nature, they tend to change themselves according to their own interests. Each and every citizen in this country has their own rights to change anything personally as per their wish. Choosing their gender is a major part of their personal rights. Transgenders are not only the people who changes their sex or gender or identity. There are several other types of people who comes under this transgender flow chart. Some sources believe that there are 112 genders in these community including male and

female[274]. People must understand the fact and keep in mind that sex and gender are not the same thing. Some of the other main genders are

- **Bigender: '**Bigender' or 'Double gender' people experience both the identities either simultaneously or varying between the two.
- **Cross dresser:** Crossdressers are no one but heterosexual men who like to dress up in women's clothes.
- **Drag queens and kings:** Drag queens and drag kings are men, women and transgender people who perform masculinity, femininity or in between characteristics which differs from their original identity.
- **Intersex:** Intersex is a general term to represent a person who is born with a reproductive anatomy which doesn't fix in the boxes of both male and female.
- **Agender:** Agender is a term which means 'without gender'. These people prefer not having any gender identity.
- **Cisgender:** Cisgenders are the ones whose personal identity corresponds to their birth sex.
- **Hermaphrodites:** These are the people who are born with both the male and female reproductive organs.
- **Transsexuals:** Transsexuals are the one who emotionally or psychologically feels that they belong to the opposite sex.
- **Transmen:** Transmen are usually females according to birth, later transitioned to male gender
- **Transwomen:** Transwomen are males according to birth, later transitioned to female gender.

These genders may sound exactly the same for people who belong to the regular gender, but deep down there are various minor similarities. People can't relate each and every difference and keep it on their mind. Thus, it came up with a wholesome term called 'Transgenders'. Any gender other than male and female can be addressed as transgender to avoid confusions. Transgender is an umbrella term which connects every other gender and accepted as the third gender. The other minor genders are represented or addressed under the common term 'transgenders'.

[274] *How many genders are there in 2020?* DUDE ASKS, https://dudeasks.com/how-many-genders-are-there-in-2020/

TRANSFORMATION OF TRANSGENDERS:

- **Male to female:**

1. **Implanting breasts:**

As far as men are concerned, they have a flat chest. They should make their chest region to appear bigger. In order to achieve their transformation, they undergo a surgery of breasts implantation.

2. **Removal of the male reproductive system:**

If the men demand complete transformation, they will be willing to change even their reproductive parts. As some are either satisfied with implanting the breasts alone or fear the risk of changing the reproductive organs, they don't do this process. Initially, the willing people undergoes surgery as **penectomy, orchidectomy** to get rid of their private parts.

3. **Adapting to the female reproductive system:**

By the following of the abovesaid surgeries, the transgenders likely to adapt to the female reproductive system irrespective of the cost. The clit may be obtained from a minor part from the extracted penis. There are two major surgeries to adapt themselves to the female reproductive organ. They are

a. **Vaginoplasty:** Vaginoplasty is the surgery done to construct or reconstruct the vagina. It contains the major female genital parts vagina as well as the vulva. The clit will also be attached as well for the sake of orgasms during sexual needs. The risk in this surgery is the patient has to dilate for a period up to 10 days and it will be painful.

b. **Vulvoplasty:** Vulvoplasty is the surgery done for the construction of the external genitalia vulva only. Most of the transgenders prefer vulvoplasty over vaginoplasty just to avoid the dilation and other vagina related burdens such as menstruation, pregnancy and other infections. The clit is attached here as well to satisfy the sexual orgasms. As the basic needs such as excretion and sexual satisfaction is done in vulvoplasty, people don't prefer other painful or risky methods.

- **Female to male:**

1. **Removal of breasts:**

Female breasts consist of nothing but excessive fat. They have got to get rid of the excessive fat in order to transform into complete men. Surgery is the only feasible way to achieve it.

2. **Adapting to the male reproductive system:**

Usually there are two methods to transform their reproductive organs.

a. **Phalloplasty:** It is generally the surgery done for the construction or reconstruction of the penis. They might also undergo penile implant surgery for the help of erection and miserections by pressing either of the scrotums which is used to treat erectile dysfunctional disorder.

b. **Neopines:** Neopines is nothing but the formation of an artificial penis just by enlarging the clit which is present default in a woman's vagina. However, it doesn't appear like a normal penis but it is sufficient enough to satisfy the basic needs such as excretion and orgasms. Although ejaculation of sperms is not possible as the natural reproductive system is collapsed and complicated.

The above said methods are the basic surgeries that is required for a complete or partial transition. It is not mandatory that they must transform their sex physically. Mere change of gender is more than enough to be accepted as a transgender in the society. Not everyone will be ready to transform themselves. The level of risk and the shortage of money plays as a barricade in this transformation process. Although, some of them are ready to accept it and has the guts to adapt themselves no matter what happens in their life. Transgender females are more common than the transgender men. The satisfactory rate as well as the percentage after surgery is higher than the unsatisfied people. Of the respondents, 75 percent felt a strong enhancement of general life satisfaction after the gender confirmation surgery, and 67 percent were satisfied with their outer appearance as a woman.[275] More than 80 percent also perceived themselves as

[275] Alessandra Potenza, *Gender confirmation surgery improves transgender people's lives, research confirms*, THE VERGE, https://www.theverge.com/2018/3/22/17144814/gender-confirmation-surgery-quality-of-life-transgender-people-dysphoria

women, while 16 percent saw themselves as "rather female." And 76.2 percent said they could have orgasms[276].

ROLE OF TRANSGENDERS IN INDIA:

Transgenders are the people who are considered as left outs in the society's mind. They are not ready to accept them as one among them. This may lead to severe mental depression if the person is an introvert. The first official transgender woman for having sex reassignment surgery is Miss. Christine Jorgensen. Being a transgender is not easy as people think. The worst part is to face the discriminations for being a transgender. One must definitely have the guts to change their gender and face the society. Not only discriminations, but also depressions, stress, isolation, body shaming and even sexual harassments hits them hard. As they have to safeguard themselves, they are shifting themselves to a place where they do not get the feel of left out. At the same time, they must feel homely in their surroundings. No one in our society is ready to give the love and affection towards them. Thus, they have to make a very hard decision in their life i.e. (Shifting themselves from their own place) due to the pressure of our society. Apparently, transgenders have their own association in some places in our country for any kind of assistance regarding medical or fund related exclusively for their own kind. They have decided to make this decision because of being fed up by the society. They came up with this idea because they found something that no one will help them. Instead they have got to help themselves in order to save them. Even if people try to help them, most of it will be for publicity. If it's not publicity, then it will be done for pitying them. They think that being a transgender is a disorder or disability. These types of criticisms bring them nothing but embarrassment.

As to hide from all these embarrassments as well as criticisms and to make them feel homely, there is a transgender community named 'Jogti' in North India in order to care of them. Transgenders from various states all over the country seeks them for aid. As the basic rights are restricted in their society where they belong, they find a place somewhere where they get this homely feel. In our day to day life, the law doesn't provide them the right to marriage as well as the right to adopt a child. Keeping the child's future in mind and in order to stop the

[276] Alessandra Potenza, *Gender confirmation surgery improves transgender people's lives, research confirms*, THE VERGE, https://www.theverge.com/2018/3/22/17144814/gender-confirmation-surgery-quality-of-life-transgender-people-dysphoria

transfer of the embarrassment from the transgenders to the child, the court of law is firm at its decision. Though the court of law is justifiable and makes sense, they must justify for something else too. It is none other than that providing the opportunity of jobs. As these transgenders are getting rejected in every schools, colleges, industries, institutions etc., just because for revealing their identity, the court of law can make job opportunities for them and make their life less miserable. The worst part is that they are not even allowed to directly serve our military. This makes us think, are they even ignored to be the citizens of our country? Due to the lack of job opportunities, most of the transgenders are turning to either beggars or sex workers. There is no end for a man's lust in this world. Sadly, these are the only two opportunities for transgenders to take advantage of. Some people unwillingly do it for the sake of food and living. Some consider these as a shame and explores finding a decent job where they can fit in without any embarrassments. Despite the short platforms opened for them, some went towards it and achieved in their respective fields. Laxmi Narayan Tripathi is a transgender rights activist as well as a Bharatanatyam dancer who fought her life so hard demanding the rightful needs for transgenders. Following her, there are enormous number of successful transgenders in our country such as Padmini Prakash, Prithika Yashini, Dr. Manabi Bandopadhyay etc., who has registered their names strongly in their respective fields.

INDIAN LAW

The Indian Parliament for the welfare of transgenders introduced The Transgender Persons (Protection of Rights) Act, 2019 preceding to The Transgender Persons (Protection of Rights) Bill after a long protest by transgender people, lawyers and activists. There are totally 23 sections in this Act. Now let's have a look on few important sections in this Act.

- According to Section 2(k) of the Act, transgenders ae defined as, a person to whom their identity has mismatched with their gender declared when they were born. People who are transmen, transwomen, intersex variations, genderqueer and who have the same identity as kinner, hijra, aravani and jogta are included. The performance of any surgery or therapy is not required to be identified as transmen or transwomen.
- Section 3 of the Act says that no person can discriminate transgenders by denying, discontinuing, treating them unfairly or terminating in educational establishments or services, employment, healthcare service, access to goods, accommodation, service, etc. that the general public have access to, right of movement, right to reside, rent, etc.,

opportunity to stand for a public or private office and in a Government or private establishment under whose custody a transgender person may be.

- Section 4 of the Act gives transgenders the right to have self-perceived gender identity.
- Section 5 of the Act explains that to get a certificate of identity a transgender can make an application to the District Magistrate with prescribed documents. And if the transgender is a minor, a parent or guardian should make that application.
- After the District Magistrate completes the procedure, according to Section 6, a certificate will be given to transgenders which shall be recorded in all the official documents.
- Section 7 of the Act says that, a trans person who undergoes a surgery can make an application to the Medical Superintendent or Chief Medical Officer along with the gender identity certificate. If the person has already undergone the surgery can seek the help of District Magistrate for a revised certificate. If the respected officials are satisfied the certificate will be produced. And most importantly, the person who have received the gender identity certificate or the revised certificate can officially change their first name.
- Government should take steps to ensure the involvement of transgenders in the society, according to Section 8. They may introduce new schemes and programs to protect their interests. They should also rescue, protect and rehabilitate those transgenders who are in need of help.
- Section 9, 10 and 11 gives the right to transgenders that they cannot be discriminated in any establishment regarding their promotion, recruitment and other such issues. Every establishment should provide such facilities to the transgenders and recommends every establishment to appoint a person to deal with the issues of transgenders.
- Section 12 remarks that, every transgender child has the right to live with their parents. They have the right to be treated without any discrimination. If any parents have difficulty in raising their transgender child then they could approach a competent court which may direct them to a suitable rehabilitation center.
- Section 13 orders every educational institution to treat transgender children without any discrimination and provide not only education but also opportunities for sports and other extra-curricular activities.
- Regarding the medical safety of the transgenders, Section 15 asks the appropriate government to set up Ser-surveillance centers and provide facilities for every surgery.

The government should ensure that every transgender have the access for any type of medical issues.

- Section 16 directs the Central Government to form a National Council for transgender persons to exercise their powers and perform their functions according to this Act.
- Section 17 explains the functions of the Nation Council. The National Council may suggest ay schemes, policies, programs and legislation to the Central Government. They may review and evaluate the schemes implemented and give their reviews to improve it. They have the important duty to redress the grievances of the transgender persons.
- If any person compels any transgender persons into illegal bonded labor, obstructs any basic right of the transgenders, forces a transgender to leave the house or village or any place of residence, harms or endangers the life of a transgender physically, mentally, sexually, verbally or emotionally then they will be punished under Section 18 of the Act, in which the person committed the wrongful act against a transgender will be punished with an imprisonment from six months to two years and with fine. These are the provisions that every person other than transgenders should also be aware of.

RESPONSE TO THE ACT

The Transgender Persons (Protection of Rights) Bill, 2018 and The Transgender Persons (Protection of Rights) Act, 2019 were vastly criticized by the lawyers, activists and even transgenders. Even the day those passed was referred as the "Black Day" and as "Gender justice murder Day" by the transgenders. They found more ambiguity and betrayal in the provisions in the Act.

- The definition of family mentioned in Section 2(c) of the Act was derived from the previous Acts of our constitution which failed to mention the chosen family. Majority of the transgenders lives only with the family which chose them because their biological family failed to support them. For the benefit of majority of the transgenders it is worth to include the chosen family within the ambit of the definition.
- The Act brings all the intersex people into the definition of transgenders. All intersex people are not transgenders. This Act should increase the scope of the intersex people or else it may lead to misinterpretation in medicalization of identities and expressions.

- When a person wants to modify his or her chosen gender to male or female, the Transgender Persons Act reverts to outdated interpretation, imposing the requirement for a Sex Reassignment Surgery (SRS) to adjust his or her gender status to his or her desired male or female gender. In turn the District Magistrate will determine the legitimacy of the SRS.
- This Act allows the transgender persons to change their first name only thus prohibiting one from modifying one's last name is the primary way caste system and hierarchy maintain their ossified existence.
- This Act has a provision for recue, protection and rehabilitation. But the transgenders are not happy by seeing this provision. They feel that they already have a strong community which already run a shelter home for them. More than a rehabilitation center, they need tremendous protection from the people who harass them due to their biological and psychological difference.
- According to this Act, a complaint officer should be appointed in every establishment but we cannot visualize its implementation anywhere. This because of the ambiguity in the provision which didn't answer the questions such as how should the officer be appointed, what are the qualifications, exact functions to be performed, etc.
- Section 12(3) of the Act, says that a transgender person can move to the rehabilitation center only if the competent court approves to do so. Most of the transgenders wishes to move out of the family because of the discrimination. This provision restricts the movement of the transgenders and to have a chosen family.
- There is no organized protocol to guide the medical community to give proper health care to the transgenders. The only Act for transgenders lacking proper medical protocol is terrifying.
- Section 18 of the Act mentions about criminalizing the persons who harms, injures, entices or any other means of sexual torture like rape to the transgenders. The Indian Penal Code gives punishment, with an imprisonment of 7 years in case of rape. From this, we can clearly understand that the bodily integrity of the transgenders is considered less than that of a women or men. The punishment given to the criminals is fragile and so that they could misuse the law by turning their urge towards the transgenders. Thus, the imprisonment period for people who outranges the modesty of a transgender must be considered as equal as the imprisonment of people who outranges the modesty of a woman.

- This Act guides the education institution and other establishments to recognize transgenders and provide opportunity but failed to mention about the reservations to be made for them.
- This Act has referred about the discrimination but fails to explain the exact punishment for discriminating the trans persons.
- Another major concern of the transgenders is that the Act fails to mention about the enforcing authorities, remedial measures in term of compensation for the survivors and exact punishments against the violators.

These are the major drawbacks found in The Transgender Persons (Protection of Rights) Act, 2019.

CONCLUSION

Transgenders are the people who still feels inconvenient to lead a normal life not because of their fault but because of the bullies against them. People has the right to choose whatever they want. Maturity is accepting the decision of a grown-up adult. As there are enormous amount of genders present in today's world, instead of addressing and bullying everyone under a common term 'transgender', people must learn to respect every common's feelings. Some of them just adapt their gender and leave the sex as it is whereas some of them changes their sex too by undergoing various major surgeries for the sake of complete satisfaction. A person does not simply do a lifetime changeover if he/she is really not interested in it. They risk their life, burry their dignity and spend a lot of money to be themselves. In addition to that, they tend to leave their respective homes to get used to their lifestyle. Although the court of law introduced various new schemes for the guidance of transgenders, they must allow some things which every other common man can has. No talented people who has the right to claim the job should get rejected just because of their gender. There are no such acts exclusively for men and women. From this, we can clearly see the embarrassment they're going through. Things might get better if the transgenders Act justifies what they actually deserve. This paper concludes by stressing that instead of providing welfare funds and sympathising for them by giving a feel of disabled, they must be given the right to acquire the basic needs which every other common person has. It would be courteous if we didn't consider them as left outs and give a strange vibe towards them, and let them live a peaceful life like every other well-being.

MARTIN LUTHER KING'S LETTER FROM BIRMINGHAM JAIL: ANALYSING QUESTIONS OF RACE, INEQUALITY AND JUSTICE THROUGH VARIOUS JURISPRUDENTIAL SCHOOLS OF THOUGHT

- CHINTAN BHARDWAJ

'Letter from Birmingham Jail' is a 1963 open letter written by Dr. Martin Luther King, Jr. as a response to the backlash faced by the non-violent demonstrations against segregation that a number of coloured individuals participated in including Dr. King, and for which they were subsequently arrested. It is a remarkable attempt in capturing the elements of religion, politics, and the relation between the two that come into play in the dynamics of segregation; specifically, on the basis of colour and race. Dr. King defends the idea and practice of a non-violent protest aimed at achieving what he believes to be justice, further continuing to pen down what exactly falls under his notion of the same. He raises quite a few issues while describing the dismal treatment the black community was being subjected to, and interestingly also addresses the legal sphere and its application and its potential as a tool to serve as a harbinger of equality; for he relies on the founding principle of the school of Natural Law—'lex iniusta non est lex', that is, an unjust law is no law at all.[277] This paper seeks to further establish the ideological and philosophical backing that can be derived from the schools of legal thought for Dr. King's ideals of justice and anti-racism, and a brief look at some of them will be followed to achieve this. It would be to state that notions of equality and just treatment exist in most if not all age-old legal theories, and therefore the practice of racism is highly unfounded not only in the contemporary world but since these theories have existed.

The events immediately preceding and directly causing the birthing of the letter pan out in this way: Birmingham, as Dr. King suggested, was regarded as the most segregation-friendly city in the United States at the time, and its civilians witnessed various forms of racism and a blatant exercise of white supremacy. The shops inside the city continued to hang racist and offensive signs, even after attempts were made for their removal, and for which the appointed leaders of the city approved however, failed to see the operation through. The brutality suffered by the

[277] Thomas Aquinas, *Summa Theologiae* I-II, q. 96, a. 4, c.

coloured at the hands of the police was at an all-time high, and their homes and places of worship were continuous targets of bombings, which, mostly remained unsolved. Arising from such cruel and unjust practices, was the will of the black community to take the matter in their hands; albeit peacefully; instead of waiting around for the political and economic leaders of the city to fulfill their duties as representatives of the people they served. So, essentially non-violent demonstrations were resorted to. Predictably, it faced considerable opposition, and this letter specifically aims to act as a direct reply to one of the many pieces of literature sought to condemn the black community for its actions, it being an article written by eight clergymen entitled 'A Call for Unity'[278], which directed them to have been more patient in their endeavours and that disruption and direct action could not result in good, even if their very right to life and dignity was being compromised at the behest of the majority white population.

A number of principles given by an array of political, social, and legal thinkers alike that have become an indispensable part of law and its application across the world suggest the fallacies of racism, a number of which have been used by Dr. King himself in his writing.

To begin with the jurisprudential influences of this letter, it would seem appropriate to highlight the direct quote from St. Augustine on the status of unjust laws(that is, none) as rightfully applied here, followed by Natural Law theorist Acquinas' take on what envisages a just law; that which uplifts the human personality. The author tries to highlight the distinction between a just and unjust law, and how segregation can never fall under the former category, for it is responsible in sabotaging the perception of one's personality, and giving a false sense of inferiority. Also, he even applied the pedigree of laws as offered by Acquinas that constitute the human society; the hierarchy being dominated by the eternal law which is characterized by God's will itself, followed by natural law, divine law, and lastly, human law.[279] Human law is the creation of a human being's reasoning, and therefore, may very well be disposed to flaw stemming from various vices. Racism and laws advocating it can safely be assumed to be one of them, as any law based on arbitrary grounds of discrimination and resulting in imposition of authority or as a means to establish supremacy of a particular group over the other expose the human vices of greed and pride, and therefore are bad law.

[278] 'A Call for Unity', Birmingham Press, (April 12, 1963)

[279] Raymond Wacks, 'Philosophy of Law: A Very Short Introduction' Oxford University Press (2006)

Legal Positivism has been well-known to advocate the status of the State as the ultimate Sovereign, and that it demands obedience from its subjects; whether they follow it out of obligation, fear of sanction, or out of habit. Two of the positivist thinkers have known to bring forth this notion, Austin and Bentham, who have posited that no human being or any other body shall be placed above the Political Sovereign. The State is the ultimate source of authority. However, both of them converge on the point that the State shall also be accountable to those residing in it, and must only lay down laws that are for the benefit of them, and cannot be to elevate its power or position.[280] The intention behind any law must solely be the upliftment of the State's subjects. As a testament to this belief, both the theorists have laid down a mechanism in case the State fails to fulfill this criterion in maintaining its legitimacy, that is, revolution. Austin, being an authoritarian, still believed that the common man must have a tool to question the Sovereign, and the phenomenon of Civil War would be the embodiment of the same. Following from this chain of thought, Dr. King is correct in thinking that engaging in protests as a means to question the unjust laws of the State is completely justifiable, and perhaps one of the only ways to achieve moral justice for his kind, when the State was showing its clear intent of continuing to work against the very people it served to protect based on highly questionable grounds.

The author on multiple occasions mentions 'civil rights' and the struggle his people have undergone to rightfully gain them. He states how after a continuous struggle for a long three hundred and forty years have the blacks managed to secure some rights for themselves, and he deems them to be 'God-given'. Indeed, his belief in the existence of natural and God-given rights which each individual is ensured on birth is also what various theories of Natural Law have contended. In fact, the provision of a revolution as mentioned above is possible under Natural Law as well, its main driving force being the infringement of an individual's natural rights by the State. It is highly useful to note here that, the 1776 Declaration of Independence upon which United States of America itself was founded when the British Colonial rule over it came to an end, addresses the natural rights of all Americans including the right to "life, liberty and the pursuit of happiness" and in its very own words states that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights."[281] With the recognition of not just civil rights guaranteed by the Creator,

[280] Ibid
[281] Declaration of Independence (US 1776)

but the existence of the principle of Equality in enforcing them, it is clear that by asking for his God-given rights, Dr. King is simply conforming to what has been timelessly put down by men since civilization began, the entitlement of certain rights that transcend even the State.

During the course of his letter, another recurring theme that Dr. King is fixated upon is the ideal of justice. In the very beginning, he firmly states that the reason for his presence in Birmingham is simply due to the presence of injustice. Subsequently, he also states that the very existence of any non-violent protest can only be created if four steps have been completed; the first being the determination of injustice—from which the need for the protest would arise. In a later argument he also mentions the white moderate and his preference of peace over justice. From these statements, it is fairly simple to establish his interpretation of the concept of justice. The black community had been a subject to various forms of injustices countless number of times, and it is safe to assume that not just for Dr. King, but for any individual, the idea of bombing a person's house or the Church he worships in is a grave attempt at destroying any and every notion that would constitute justice. For Dr. King, having suffered an age of segregation and having been subject to such practices; with a continued renewal where life and dignity is completely disregarded is a concrete form of injustice. Further, being labelled an extremist is no problem for him as he cites some great men that the World has seen, as examples of individuals having given up their moderate form of thinking, would readily indulge in practices that could be deemed as 'extreme', if justice could be achieved by the same. Dr. King sought to achieve the same. He condemned moderation if it was at the cost of justice, and prioritized it over peace; one should think rightfully so, as that very peace would be at the cost of an individual's right to life. A useful perspective that can be taken into context here is John Rawls' theory of justice. Essentially, he laid down two principles of justice which were derived from his hypothetical scenario of a Social Contract and the resultant distribution of goods in the society. The first principle emphasized on the importance of an individual's liberty and the society's function in maximizing it, and that it only be restricted on the ground that it would be infringing upon another's liberty. The second principle addressed the issue of inequalities in law, which could be either social or economic, could only be deemed legitimate if they would result in the benefit of those who were worse off than others.[282] In essence, for Rawls, justice is a combination of liberty and equality. On a brief examination of the two opinions on justice,

[282] John Rawls, A Theory of Justice (1971)

it is clear that they are in accordance with each other. Dr. King longs for equality, and the absence of which has resulted in the injustice his people has suffered. Furthermore, it is the freedom that is being curtailed through the presence of such inequalities, where the very freedom to reside and worship has been taken at the cost of the same.

The morality or lack thereof of such a State is to be questioned here. Whilst dealing with the issue of unjust laws, Dr. King makes yet another valid argument stemming from the principles of Natural Law, and that is, the backing each law should be able to find in the notions of morality. He equates an unjust law to an immoral law, and tries to establish that the law enforcing segregation falls under this category and also equates it with sin. He concludes that such law or ordinance that is morally unsound is to be done away with. Dr. King resorts to the judicial take on segregation and gives precedence to it over the legislature, based on the fact that the 1954 Supreme Court judgment that ruled against segregation was what induced and applied morals and therefore, was to be obeyed over the immoral laws the State was advocating. It can be said that Austin might have accorded to this, as he too believed that judicial discretion and interpretation in any Common Law country is to be the primary responsibility of the Courts. Although he favoured the authority of the Sovereign over the Judiciary, he did deem Judges to be experts in law, and therefore, it is safe to assume that where the State is clearly failing to partake in the common good of not just the majority community but of all its subjects, precedence may be lauded to that organ which interprets the law in a way that it regains its moral backing.

An aspect of Legal Realism can also be seen to be present here, as whatever it theorises is based on 'law in action'. Realists strive to find practical solutions to problems in law and believe in empirical observations. Karl Llewellyn, a well-known realist put down the concept of 'group prejudice' whilst addressing the question of racism and how legal realism were to solve it. He blames the hostile behaviour to certain groups by other groups, and in this case to blacks, on the lack of unity amongst the Americans.[283] Dr. King, too, can be seen to be aversive of groups as opposed to individuals, as he believes that, "Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups are more immoral than individuals." According to Llewellyn, it is through social and cultural

[283] 'Legal Realism and the Race Question: Some Realism about Realism on Race Relations', *Harvard Law Review* Vol. 108, No. 7 (May, 1995)

education that the practice of prejudice to race can be done away with, and also where 'Us-groups' are taught to be replaced with 'Total Team Unity.'[284]

Finally, one might also be able to capture the presence of another jurisprudential concept that Dr. King in his letter unknowingly addresses; it being Legal Individualism. This principle upholds the status of civil liberties, and further enforces autonomy of an individual over himself.[285] Although Dr. King strives for the liberties of the black community as a group and recognizes them as the same, it is clear that he believes in securing the rights for each member of the group separately, and does not believe that anyone should be compromised in his venture of justice. Deriving its roots from Liberalism, Individualism believes in placing the interests of the individual over the State's, and therefore, cannot be withheld for the will of the State, especially if it cannot be justified on any reasonable grounds. Further, this principle is the path to self-realization and embracing oneself for anyone who believes in it; however, if he were to be subject to laws that would degrade his sense of self and give him a feeling of inferiority as pointed out by Dr. King, that law is in direct contravention to this principle.

In conclusion, it is apparent through viewing segregation by various lens of jurisprudence, that it does not only frustrate principles of morality and the ideals under it, it also results in a scenario wherein the State is associated with unfaithfulness, and its subjects are forced to disobey; for nothing can override principles of liberty, equality, and, justice. As Dr. King found it apt to begin with having quoted St. Augustine, it would call to end with his words as well, "What are States without justice, but robber bands enlarged?"

[284] Ibid
[285] Ellen Meiksins Wood, 'Mind and Politics: An Approach to the Meaning of Liberal and Socialist Individualism' University of California Press. (1972)

REGIONAL TRADE AGREEMENTS (RTAS) AND ITS IMPACT ON INDIAN AND WORLD TRADE

- KSHITIJ SINHA

The world trading system has witnessed an increasing number of regional trade initiatives in recent times. The basic need for such initiatives is to liberalize trade among the members by granting tariff concessions for, or eliminations of selected products. Regional trade initiatives can be of various types, depending on their degree of integration:

(a) The first tier arrangement is the Preferential Trade Agreements (PTAs), where trading partners grant partial tariff reductions to each other;

(b) The second tier is the Free Trade Agreement/area (FTA), in which members eliminate all tariffs among themselves, but with each member retaining its own tariff rates on imports from non-members;

(c) The third tier is that the members of a Customs Union (CU) set a common level of tariffs vis-à-vis nonmembers;

(d) The fourth tier is considered as Common Market, which also allows free movement of factors of production;

(e) The fifth tier is the Economic Union, which involves integrating national economic policies and adopting a common currency.

The World Trade Organization (WTO) uses the umbrella term of RTA for all such initiatives. The welfare effects of RTAs are traditionally ascertained using trade creation or trade diversion analyses (Viner, 1950). However, theoretical and empirical research has not been able to provide a clear answer as to whether RTAs are necessarily welfare-augmenting (more trade-creating than trade diverting). Meade (1955), Lipsey (1970) and Summers (1991) showed instances of trade-creating RTAs whereas Grossman and Helpman (1995) and Bhagwati and Panagariya (1996) provided examples of trade-diverting RTAs. Opinions are also divided among economists as to whether RTAs are “building blocks” or “stumbling blocks” with respect to multilateral trade liberalization under WTO. This essential question that was posed first in Bhagwati (1991). As Baldwin (1997) noted, the debate on RTAs may be divided between the Larry Summers school (Summers, 1991) and the Jagadish Bhagwati school (Bhagwati and Krueger 1995); the former school looks at regional (i.e., discriminatory) liberalization and sees only liberalization, whereas the latter school sees only discrimination.

RTAs are the current reality of the global trading with all but two members of WTO (Mauritania and Mongolia) being engaged in at least one regional integration initiative. Keeping this recent march of regionalism as its backdrop, this study deals with the essential question: "Are the RTAs of use to traders?" The article is made in the context of the Indian experience in regionalism.

In the past decade, India's trade policy is shifting towards regionalism with the signing of numerous RTAs. Currently, thirteen RTAs are in force and at least eight more are under negotiation. A very important question that arises here is whether such RTAs have ultimately been of use to Indian traders and also about its impact in world trade. In order to evaluate the usefulness of an RTA to traders, percentage ratios (like utilization, product-coverage and utility ratios) are generally calculated (Inama 2003; and Candau, Fontagne and Jean, 2004). The usage of these ratios has been enhanced by United Nations Conference on Trade and Development (UNCTAD) assessment of the use of Generalized Scheme of Preferences (GSP) tariff preferences by developing countries. However, the deficiency of data in official trade statistics on India's preferential trade limited the use of this methodology in this study. Few authors have conducted a firm-level study on the use of RTAs (Takahashi and Urata, 2010; and Kawai and Wignaraja 2010). However, since firm-specific surveys are outside the scope of this paper, an alternate route has been used in finding the utility of RTAs to the traders. Using available official trade statistics, this article first compares aggregate trade trends with trends in trade of preferential items for each RTA; the gap between the two gives an idea of the importance of preferences in trading with the RTA partners.

Regional Trade Agreement (RTA) can be defined as a treaty between two or more countries that provides a definite set of rules of trade for all signatories. Some of the examples of regional trade agreements include the North American Free Trade Agreement (NAFTA), Central American-Dominican Republic Free Trade Agreement (CAFTA-DR), the European Union (EU) and Asia-Pacific Economic Cooperation (APEC). It is a key fixture in international trade relations. In past years, RTAs have not only increased in number but also in depth and complexity. The members of World Trade Organization(WTO) and the Secretariat work to gather information and foster discussions on RTAs to enhance transparency and to increase understanding of their impact on the wider multilateral trading system. Regional trade agreements (RTAs) can have positive as well as negative effects on trade depending on their design and implementation. Therefore, the policy context in which an RTA is designed and

implemented is crucial. Agreements designed to complement a general program of economic reform have been most effective in raising trade. When RTAs tends to be fruitless, it is often because of the lack of a coherent program of reform. For a RTA itself, the most essential ingredient for success is low trade barriers with all global partners. Most-favored-nation (MFN; i.e., nondiscriminatory) liberalization, which creates more trade, is the fastest and most efficient way to increase intra-regional trade. Apart from these, the agreements that minimize excluded products expand the scope for positive net benefits through competition and trade creation.

The benefits of regional trade agreements are as follows:

1. **Increased Economic Growth:** Due to regional trade agreements, the trade will be easy with the signatory countries with low tariffs which will, therefore, increase the economic growth.
2. **More Dynamic Business Climate:** Usually, the businesses were protected before the agreement. These local industries are risked at becoming stagnant and non-competitive on the global market. With the protection removed, they will have the motivation to become true global competitors.
3. **Lower Government Spending:** Many governments provide subsidy to local industry segments. After the trade agreement, the subsidies can be removed and those funds can be put to better use.
4. **Foreign Direct Investment:** Investors will flock to the country. This will add capital to expand local industries and boost domestic businesses. It also brings in U.S. dollars to many formerly isolated countries.
5. **Expertise:** Global operating companies have more expertise than domestic companies to develop local resources which is especially true in the case of mining, oil drilling and manufacturing. Free trade agreements provide access to the global operating companies to these business opportunities. When the multinational companies become partner with local firms to develop the resources, they train them on the best practices. Thus, it gives local companies access to these new methods.
6. **Technology Transfer:** Local companies usually receive access to the latest technologies from their multinational partners. As local economies grow, so do job opportunities. Multi-national companies provide job training to local employee.

The disadvantages of regional trade agreements are as follows:

1. **Increased Job Outsourcing:** By reducing tariffs on imports, it allows companies to expand to other countries. Without tariffs, imports from other countries cost less. For example, it was difficult for U.S. companies in those same industries to compete, so they reduced their workforce. Many U.S. manufacturing industries did, in fact, lay off the workers as a result of North American Free Trade Agreement(NAFTA). The biggest criticism of NAFTA is that it diverted jobs to Mexico.
2. **Theft of Intellectual Property:** Many developing nations don't have appropriate laws to protect patents, inventions, and new processes. The laws which they have aren't always strictly enforced. As a result, the ideas of the corporations are often stolen. They must then compete with lower-priced domestic knock-offs.
3. **Crowd out Domestic Industries:** Many rising businesses are traditional economies that rely on farming for most of the employment. These small family businesses cannot compete with subsidized agri-businesses in the developed countries. Due to this, they often lose their farms and therefore, look for work in the cities. This aggravates unemployment, crime and poverty.
4. **Poor Working Conditions:** Multi-national companies usually outsource jobs to the rising market countries without adequate labor protections due to which, women and children are often subjected to grueling factory jobs in sub-standard conditions.
5. **Degradation of Natural Resources:** Emerging market nations often don't have appropriate environmental protections and laws relating to environmental protection. Due to free trade there is depletion of timber, minerals, and other natural resources. Deforestation and strip-mining reduce the jungles and fields that ultimately lead to wastelands.
6. **Destruction of Native Cultures:** As the development is moving towards isolated areas, indigenous cultures can be destroyed. Local peoples are uprooted. Many people suffer disease and death when their resources are polluted.
7. **Reduced Tax Revenue:** Many smaller countries or developing nations struggle to replace revenue lost from import tariffs and fees.

Seshadri was the first person who traced the evolution of Indian RTAs, from limited scope and sometimes non-reciprocal PTAs with developing countries (such as the PTA with Nepal) to comprehensive and reciprocal arrangements with developing countries (e.g., the FTA with Sri Lanka) and then to the recent RTAs that India has negotiated with developed countries (e.g., European Union members). The first RTA that India entered was in 1975 when the

Government signed the Bangkok Agreement. The cumulative notifications of RTAs and the number of physical RTAs in force have increased sharply after 1992. Based on the classification of North-North (NN), North-South (NS) and South-South (SS) varieties of existing RTAs, the World Trade Organization (WTO) RTA database reveals that almost 50 percent of the RTA in force including WTO-Plus provisions are SS variety, i.e., signed between developing countries. What is more interesting is that many developing countries are members of more than one RTA, which has led a major question that why do countries contract RTAs? The usual economic argument is to expand intra-RTA trade. The General Agreement on Tariffs and Trade (GATT) article XXIV permits regional trade arrangements which can be considered as a preparation for global trade expansion. If the argument is true, the trade volume between member countries should be increased.

As an emerging economy, India has embraced regionalism by viewing it as a building block for trade liberalization. Prior to the year 2000, India had focused on South Asian countries mainly by signing bilateral FTAs, for instance with Sri Lanka at 1998, and strengthening the movement of South Asian Association for Regional Cooperation (SAARC) countries towards a South Asian Free Trade Agreement (SAFTA). India's political objectives were clear when it approved Afghanistan to join the SAARC at 2003 resisting its domestic opposition (Pant 2010). After around the year 2000, India's focus has moved towards forging Comprehensive Economic Cooperation Agreements (CECAs) with Singapore (2005), Free Trade Agreements(FTA) with ASEAN (2009) and Japan (2011). Similar to other developing country, India has been scrambling to forge RTAs and other deeper forms of economic cooperation agreements to protect itself from exclusion in its key markets. Data reveals that India's trade to European Union(EU) and NAFTA has been reduced from 28.3 percent to 13.5 percent and from 18.1 percent to 7.2 percent respectively during the period of 2000~2014.

Though the World Trade Organization (WTO) is facing mounting attack from the Trump-led US administration, there is a necessity for India to negotiate regional trade agreements with peer countries to boost exports, and to insulate India's trade from any kind of uncertainties that may arise from global trading system. However, a Mint analysis of trade agreements recommends that India has often failed to gain from such agreements. This explains why Indian policymakers have become cautious about pursuing new trade agreements in recent years.

The growth of regional trade agreements (RTAs) are globally coincided with the end of the Uruguay round of WTO talks in the mid-1990s and their growth has been explained as a result

of slow progress in multi-lateral negotiations. Here RTAs inculcate both preferential trade agreements and free trade agreements (FTAs). The WTO describes RTAs as "reciprocal trade agreements between two or more partners".

While some policymakers and economists see RTAs as building-blocks to a multilateral trading system, RTAs also face criticism for being detrimental to the spirit of multilateral free trade as countries that are not the members of a regional agreement find themselves at a disadvantage. This has led countries to seek counter agreements from time to time to try and level the playing field. For example, India's signing a free trade agreement with South Korea in 2009 encouraged Japan to seek a similar agreement with India. The reason behind this was that the FTA with South Korea would have endangered Japan's Nippon Steel Corp. This FTA would have also allowed South Korean makers of steel plates to export to India without tariffs while Nippon would still have to pay a 5% tariff. Eventually, India's FTA with South Korea came into existence in 2010, while with Japan it came into existence in 2011. The lack of enthusiasm for RTAs in India seems to be driven by its past experience. India's existing agreements with South Korea, Japan and the Association of South East Asian Nations (ASEAN) are often deemed to have benefited the partner countries at India's expense. The import-export ratio with these countries depreciated in the years following the implementation and execution of the trade agreements. Even as partner countries have benefited, Indian exports to these regions have remained lackluster.

To understand the impact of RTAs, it is important to recognize that they are intrinsically different from both multilateral liberalization (under the aegis of the WTO) and unilateral liberalization. In both of these cases, countries lower their trade barriers on all sources of imports of the goods by exactly the same extent. In contrast, under a RTA, the tariffs are reduced on imports from the other members of the agreement, but they need not change tariffs on imports from non-members. As a result, RTAs imply both trade liberalization and trade discrimination. Whereas there is a near-consensus among economists that the former is desirable, that is not true for the latter. Trade liberalization within a trading alliance tends to be advantageous when it promotes a shift of resources from inefficient domestic suppliers to more efficient producers within the region. Economists call this phenomenon as 'trade creation'. Conversely, a trading alliance is likely to be disadvantageous if it generates a shift of resources from efficient external producers to inefficient producers within the region. This is a consequence of trade discrimination; which economists call as 'trade diversion'. In principle,

either trade creation or trade diversion can persuade within an RTA. There are some theoretical arguments that support the primacy of each effect under similar circumstances. Thus, in the end, the effect which dominates is an empirical matter. Unfortunately, assessing trade creation and trade diversion is not an easy task. It requires knowledge about what would have happened to trade if there were no trade agreement? As this is unknown, assumptions must be made. A variety of approaches have been employed. While results inevitably differs depending on the methodology, time period, the trading bloc in question and the level of aggregation in the data. At least two general messages ascend from the large set of studies investigating trade creation and trade diversion in RTAs around the world.

RTAs are an increasingly important component of the global trade environment. Indeed, it is estimated that between 50 and 60 per cent of global trade now benefits from regional preferences. Usually developing countries are the active participants in the formation of RTAs and an increasing number of these are being formed on a North-South basis.

RTAs also include free trade areas and customs unions(CU). RTAs have become more complex and comprehensive with time, both in terms of their sectoral and instrument coverage. Often limited to trade in manufacturing sector in the past, RTAs increasingly include coverage of agricultural trade as well as services. RTAs also give a deeper integration than simply the removal of tariff barriers on intra-area trade or, in the case of CUs, the harmonization of external tariffs. RTAs have addressed issues of regulatory coordination, investment, intellectual property, competition policy, government procurement, and labor and environmental standards.

There are varying viewpoints on the desirability and on the appropriate design of regional integration, especially involving developing countries. Further, the earlier records of such arrangement, again especially among developing countries, have been disappointing. Since the growing tendency of the developing countries to enter into RTAs both with each other and with industrialized countries, it is pertinent to ask what impact this might have on international trade. The rising interest in regionalism at a time when tariff barriers are being reduced and less important in world trade despite well-known peaks in agriculture and textiles is a paradox. Another major question arises here is why do countries go through the trouble of constructing comprehensive institutional arrangements to remove tariff barriers between themselves when empirical analyses suggest that the static welfare profits from regional integration are

comparatively modest. There are multiple answers to this question. One of the answers is that the primary objective for regional integration may not be primarily economic but largely political and security ones. Another answer is that the rise in domestic regulation has elevated the importance of non-tariff and 'behind the border' barriers in segmenting markets. Regional integration permits countries that are frustrated at the slow progress of multilateral negotiations on these issues to move ahead faster with a group of like-minded partners. A third argument depends upon the dynamics of regional integration arrangements: that as more nations enter into such arrangements, the costs of remaining outside in terms of the trade diversion effects increases. Also, the fact that the regional integration is happening in a low-tariff environment contributes to the sustainability of RTAs because it decreases the potential for trade diversion costs and adverse re-distributional transfers arising from regional integration.

The earlier experience of developing countries with regional integration schemes has not been a happy one. The reasons for this can be understood with the help of the simple theory of customs unions. Preferential trade arrangements increase both trade creation and trade diversion effects as well as transfers between the member countries. The layout of regional trade agreements among developing countries during past has tended to maximize the costs of trade diversion (because of high external tariffs) and also encouraged regressive transfers from poorer to better-off members of such arrangements.

Recently, more favorable assessment of regional integration arrangements involving developing countries is based on the following considerations.

- Regionalism would lead to net trade creation if it is coupled with a significant degree of trade liberalization and where emphasis is put on reducing cost-creating trade barriers which simply waste resources.
- Regional economic integration may be a pre-condition which is in the favor of integrating developing countries into the world economy by minimizing the costs of market fragmentation.

It is seen more likely that North-South RTAs have resulted in gains to developing countries as compared to South-South RTAs, on the grounds that they minimize trade diversion costs and maximize the gains from policy credibility. A closer look on these arguments, however, implies

that the assumptions on which they are based may not always stand up. Positive economic outcomes will rely on the deliberate layout of these agreements, and cannot simply be assumed.

The rising tendency of RTAs also includes aspects of policy integration which also poses a challenge for developing countries. Although these characteristics are most common in RTAs that involve high-income countries, a rising number of North-South agreements now have broad integration objectives. The discontinuance of non-tariff barriers which act to segment markets can be potentially beneficial, but whether this turns out to be the case in practice will depend on the nature of the policy integration. The equivalent set of regulations and standards is not optimal in all countries. Differences in standards may be justified on efficiency grounds. To illustrate, environmental standards tend to be higher in high-income economies because of the high value placed by the public on environmental improvements in these countries. Lower standards may be apt in other countries in order to evade the diversion of resources away from policies with a greater potential to improve citizen's welfare. Harmonizing standards in these situations would levy additional costs on developing countries. The costs incurred by developing countries in harmonizing inappropriate policy regulations may exceed the benefits of encouraging greater market access. In recent years, India's top exports, worldwide, have been in gems and jewelry, petroleum products, machinery (both electrical and non-electrical), vehicles, iron and steel and their products. Many of the items under these headings do not receive preferences under the RTAs. So it is no surprise that these items, even though appearing on the negative list of the RTAs, account for a larger proportion of total exports under the RTAs. At the same time, most of India's RTA partners have received preferential benefits for those items that are of export interest to them, e.g., spices from Sri Lanka, dried fruit and nuts from Afghanistan, copper ore and concentrates from Chile and electrical equipment from Thailand. Further, research in this area will help to overcome the limitations of this study. A primary survey could be carried out at the Indian Customs in order to collect exact data on preferential trade with RTA partners. In addition, a primary survey of exporters and importers may help in pin-pointing operational problems with RTAs and thus reveal the reason for the low level of usage. The impact of RTAs on end-user industries can be explored through industry-specific case studies. There should be a comparative study of India's RTAs with other RTAs which will be of enormous significance from both research and policy perspectives.

DEVELOPMENT OF RIGHTS OF LGBT COMMUNITY

- KUMAR SAMEER

1.1 INTRODUCTION

"Openness may not completely disarm prejudice, but its good place to start."

By: Jason Collins, first gay athelete in U.S pro sports.

LGBTQ stands for Lesbians, Gay, Bisexuals, Transgender and Queer or Questioning. It is also commonly known as "Rainbow Community" or the "Rainbow Community".

There are various categories under the community that can be defined as:

- Lesbians- They are female homosexuals: who feel attracted towards other female.
- Gay- It is often used to describe male homosexuals.
- Bisexuals- It is a romantic and sexual attraction towards both the male and females.
- Transgender- It is an "umbrela term" used for the people whose gender identity differs from what is typically associated with the sex they were assigned at birth.
- Queer- It is a term used for "sexual and gender minorities" that are not heterosexual or cisgender. It was originally used pejoratively against those with same sex desire.

1.2 HISTORICAL BACKGROUND

Before the 19th century the ideology of same sex relationship didn't exist. Such character among men and women did not totally develop or were hidden behind the shackles of the society. The jurisprudence of homosexuality owes its existence to 20th century.

In today's world gay regularly deal with men who are pulled into men, it was generally utilized as an expansive term that incorporated the aggregate of the advanced LGBTQ introduce. For example, during 1970, activist Sylvia Rivera and Marsha P. Johnson regularly talked about rights or gay power in reference to their freedom as road rulers of shading (whom today we would assume to be transgender). They established the association STAR (Street Transvestite Action Revolutionaries) as an approach to sort out destitute trans-road youth. "STAR was for the road gay individuals, the road vagrants and anyone that required assistance around them" Rivera said.

Until the 1990's, gay was regularly used to imply to whole range of sexual and sex minorities. This term finished with the ascent of indiscriminate, transgender, and strange developments,

bringing forth the four letters LGBT instate, which was viewed as more comprehensive than extensively alluding to the network essentially as gay. These 90's developments were extraordinary and associated by the basic topic of addressing and investigating character pairs, for example, gay/straight, Man/lady, and sex and sexuality standards all the more comprehensively. They additionally verbalized a feeling of personality that was evolving.

Activists like Kate Bornstein, Holly Boswell, Leslie Feinberg, and Riki Wilchins made an effort to make an alliance of people who did not fit perfectly into sex doubles, or who resisted sex standards and desires, especially following the 1993 strike and killing of trans-man Brandon Teena in Humboldt, Nebraska. Transgender were usually people who could not stand perfectly with the societal norms and standards they were the ones who made the difference. As already understood by the psychological conditions of society our society is not one that accepts people who challenge the norms, customs and the introduction of the whole new community was not acceptable to our society and the ideology itself could not pass the test of the society. Now after the 19th century with the bordering approach of the society the transgender thought its time that society would understand and respect them. Evidently, it did not happen.

There neither currently nor has there ever been, an accord on ways to deal with activism inside the LGBTQ people group, including the legislative issue of language. LGBTQ individuals are as various and differed as some other gathering. What joins us is a mutual encounter of being sex and sexual minorities, however the particularities of that experience contrast from individual. The fact of the matter isn't to position a few variants of instate as wrong and other as right. Or it may be to support basic reasoning around language as a vehicle of social change, and to perceive that individuals don't need to concede to everything to work collectively. Language generally unites us but not separate us. We Ought to must not reject others for utilizing phrasing we may not concur for adopting an alternate strategy. We should, contemplate the words we use and on off chance that they are really filling their planned need, or making extra issues.

The LGBTQ initialize isn't only an irregular gathering of letters that speak to characters; rather, these letters are history exemplified. They recount the narrative of the advanced LGBTQ Rights Movement, advising us that our triumphs have been bound to happen, and have not been effectively won. The Trump period appears there is much work to do, and LGBTQ Americans still don't have full government balance.

1.3 LGBT RIGHTS IN UNITED KINGDOM - A SHORT HISTORY

England had not accepted the community it can be clear with the introduction of The Buggery Act which specifically targeted the transgender as whole. It happened when sodomy was completely disregarded in England; it was even made a punishable offence (death sentence). Gradually the death penalty was removed with 10 year punishment by the virtue of the person act.

The criminal law amendment act 1885 made any male homosexual act illegal even if it was done in private space. The letter communicating terms of friendship between two men were required to bring an arraignment hearing. The Act was later known as the Blackmailer's Act. Although all these enactments were gender biased no one ever talked about female homosexuality.

During the post war period the transgender people came to end up the bald-faced. In 1946 Michael Dillon wrote a book named 'Self- A Study In Endocrinology'. This book depicted as a life account of transgender man to experience phalloplasty medical procedure at the primary stage. This book also gave example of Laura to Michael changes and medical procedure attempted by specialist Sir Harold Gillis. Dillon said that 'where the psyche can't be made to fit the body, the body ought to be made fit'.

In May 1951 Roberta Cowell, a previous World War II Spitfire pilot, turned into the primary transgender ladies to experience angioplasty medical procedure in the UK. Cowbell proceeded with her vocation as a hustling driver and distributed her collection of memoirs in 1954.

In the meantime, a critical ascent in captures and arraignments of gay men were made after World War II. Many were from high position and held positions inside government and national foundations, for instance, Alan Turing, the cryptographer whose work expected an unequivocal activity in the breaking of the Enigma code. This expansion in indictments raised doubt about the lawful framework set up for managing gay acts.

The Departmental Committee on Homosexual Offenses and Prostitution submitted its report in 1957 popularly known as the Wolfe cave Report. It was approved because of proof that homosexuality couldn't authentically be viewed as an ailment and planned to realize change in the present law by making recommendations to the Government.

It took 10 years for the UK Administration to understand the facts of the Wolfe den report's proposals on the Sexual Offence Act, 1967. Many other countries followed the same pattern for 10 years. This Act also spoke about the equity to trans-genders. In 1996, the Beaumont society was set up to give data to overall population and the instructions were given on medicinal and legitimate calling of 'transvestism 'and also empowered investigation for more

understanding. This organization is presently the biggest and longest running care group for transgender and their families in UK.

With the rise of the Stonewall Uproars in New York in June 1969 over the protection of the LGBT people group by the police the UK Gay Freedom Front was established (GLF) in 1970. It battled for the privileges of LGBT individuals, encouraging them to scrutinize the standard foundations in UK society which prompted their mistreatment and challenged the solidarity with other mistreated gatherings and sorted out the absolute first Pride walks in 1972 which is presently a yearly occasion. Although the GLF was banned in 1973 but it was replaced by Campaign for Homosexual Equality.

The fight for sexual equality was not coming to an end. Section 28 of the local Government Act 1988, was introduced by the conservative Government under Margaret Thatcher. This Act banned local authorities from promoting homosexuality and also prohibited councils from funding educational materials and projects which promote homosexuality. The legislations also banned the discussion of LGBT issues and also stopped people getting any support. Section 28 was repealed in 2003, and the Prime Minister David Cameron apologized for the legislation of 1988 to the LGBT Community.

In 2004 another Act was passed the Civil Partnership Act 2004, It allowed the same-sex couples to legally enter into binding partnerships, similar to marriage. The subsequent Marriages (Same-Sex Couples) Act 2013 also came into existence; It allowed same-sex couples in England and Wales to marry; Scotland followed suit with the Marriage and Civil Partnership (Scotland) Act 2014 which allowed to marry same sex couples in the Scotland. Northern Ireland is the only country in the UK which does not permitted the same sex marriage.

The Gender Recognition Act 2004, which became effective on 4 April 2005, gave transgender individuals legitimate acknowledgement of their sex, this act permitted the trans sexual orientation to gain another birth testament despite sex alternative are as yet constrained to male and female. The LGBT people group keeps on battling for correspondence and social acknowledgement for quite a while.

1.4 GAY RIGHTS MOVEMENT

1.4.1 Gay Rights Previous to the 20th Century:

Religious alerts against sexual relations between same sex individuals (particularly men) since quite a while prior destroyed such lead, yet most real codes in Europe were peaceful in regards

to the matter of homosexuality. The legitimate systems of various overwhelmingly Muslim countries brought Islamic law (Shariah) in a wide extent of settings, and various sexual or semi sexual acts including same-sex closeness were censured in those countries with genuine disciplines, including execution.

Beginning in the sixteenth century, authorities in England began to arrange gay direct as criminal instead of simply degenerate. Amid the 1530s, in the midst of the standard of Henry VIII, Britain passed the Buggery Demonstration, which made sexual relations between men a criminal offense meriting demise. In England homosexuality remained a capital offense meriting hanging until 1861. Following two decades, in 1885, Parliament passed a modification upheld by Henry Du Pr 'Labouchere, which made the offense of net revoltingness for same-sex male sexual relations, enabling any sort of sexual lead between men to be arraigned (lesbian sexual relations they were inconceivable by male lawmakers were not expose to the law). In like manner, in Germany in the mid1870s, when the nation was coordinating the common codes of different divergent kingdoms, the last German reformatory code included Passage 175, which condemned same sex male relations with discipline including jail and lost social liberties.

1.5 THE BEGINNING OF THE GAY RIGHTS MOVEMENT

Prior as far as possible of the nineteenth century there were least developments for gay rights. Undoubtedly in 1890's lyric two loves, Lord Alfred (Bosie) Douglas, Oscar wile's darling, proclaimed homosexuality is the devotion that challenges not talk its name. Gay people were given voice in 1897 with the establishing of the scientific-humanitarian committee (Wissenchaft humanitares committee,WHK) in Berlin.

Their first movement was an appeal to require the annulment of paragraph175 of the Imperial Penal Code (submitted 1898, 1922, and 1925). The board of trustees distributed liberation writing, supported arouses, and battled for lawful change all through Germany, just like in Netherlands and Austria. Its originator was Magnus Hirschfield, who in 1919 opened the institute for sexual science "*Institute for sexual wissenchaft",* which forseen by decades other logical focuses, for example, the Kinsey Institute For Research in sex, Gender and reproduction in the United States that had practical experience in sex examination. He also supported the World League of Sexual Reform, which was set up in 1928 at a meeting in Copenhagen. In spite of paragraph 175 and the disappointment of the WHK to win its annulment, gay people encountered a specific measures of opportunity in Germany, especially the Weimar time frame between the finish of world war land the Nazi seizure of intensity. In numerous bigger German

urban communities, gay nightlife moved toward becoming endured, and the quantity of gay productions expanded, without a doubt as per few historians, the quantity of gay bars and periodicals in Berlin during the 1920's surpassed that in New York City six decades later. Adolf Hitler's seizure of intensity finished this generally liberal period. He requested the revitalized requirements of paragraph 175, and on may 6, 1933, German competitors assaulted and stripped Hirschfield's files and consumed the establishments materials in an open square.

Outside Germany, different associations were additionally made. For instance, in 1914 the British society for the study of sex psychology was established by Edward Carpenter and Havelock Ellis for both limited time and instructive purposes, and in the United States in 1924 Henry Gerber, a foreigner from Germany established the society for human rights, which was sanctioned by the province of Illinois.

In spite of the arrangement of such gatherings, political action by gay people was commonly not entirely noticeable. Without doubt, gays were regularly bugged by the police wherever they congregated. World War II and its outcomes started to change that. The war conveyed numerous youngsters to urban communities and conveyed perceivability to the gay network. In the United States this is the most prominent perceivability which came from the legislation and the police. Government employees were regularly terminated, the military endeavored to cleanse its position of gay troopers and police possibly attacks the gay bars and captured their demographic. There were noteworthy political movements also, pointed in enormous measure at decriminalizing homosexuality.

1.6 INTRODUCTION TO THE LGBTQ IN THE UNITED STATES

LGBTQ history is an umbrella term that catches the tales of solidarity and battle of assorted people, societies, and networks that have been considered non regularizing. It is the account of developments for equity; of snapshots of triumph and disaster that individuals we currently comprehend as LGBTQ have confronted and regularly keeps on looking in our day by day lives and requests for the privilege to live, love, and flourish. In the cutting edge time, sexual and sex personality and articulation have been fundamental to Americans understandings of themselves, even as they have been formed by and molded more extensive structures and demeanors toward race, ethnicity, class, sex, capacity, and country. Significant organizations, governments, courts, houses of worship, and the restorative calling, have filled in as referees, building regularizing and freak sexualities and giving criteria to characterizing the range inside each. In this manner, the investigation of LGBTQ history is the investigation of social, social,

and legitimate governmental issues in the United States and who and what is viewed as a major aspect of the national story. The National Park Service LGBTQ Heritage Initiative is a demonstration of how America's view of who is viewed as a major aspect of the country has moved throughout the years.

LGBTQ history is an activity in comeback and recovery. Doing and telling this history includes discovering hints of LGBTQ individualism writing (letters, journals, books, famous print culture, court and police record), visual material (craftsmanship, open display), oral stories and customs and the assembled condition (structures, parks, homes as gathering place, house of worship). Investigating the spaces and the places that LGBTQ individuals may have involved, frequented, or went through requires removal posing new inquiries of traditional well spring of data. In the mean time we shouldn't assume that such follows are covered up, and look additionally to the dynamically unmistakable notices disregarded by a few and expelled by other people who have gone before. As a history specialist named, George Chauncey, said that why nobody had ever talked about the dynamically noticeable gay world which he found in late nineteenth century and the mid twentieth century. Until as of late nobody had researched on it. A solid need remains today to proceed to search for such gay world in the universe which explicit sexual and gendered networks, frameworks, implications, talks and substances they contained. In this procedure of seeing and unearthing, we should keep in assumption that LGBTQ individuals have been obvious and freely acknowledged as of late. We can't outline our history in a distorted story of development from restraint to freedom.

Along these lines, exhuming LGBTQ history implies giving close consideration and revealing the frequently contrasting and not actually noticeable markers that individuals have abandoned. As one may expect, those with the best approach to assets and training have generally left the most bottomless literary records. The challenges in finding records or hints of the sexualities of non-white individuals clarify that while investigating the connections among sex and sexuality are basic, consideration regarding the connections between sexuality, race, class, and ethnicity are similarly if not more essential. Discovering hints of LGBTQ history among gatherings that have not approached training and different assets requires both innovativeness and the eagerness to look to what may be viewed as offbeat sources.

1.7 HISTORY OF LGBT COMMUNITY UNDER ANCIENT INDIAN ORIGIN

Hetero Acts is the main socially adequate sexual articulation that depends basically on more extensive contact and progressively basic connections among guys and females in the public

eyes. The family is advanced as the early substantial social unite. In spite of the fact that gay people existed even in antiquated India, they never achieved social endorsement in any segment of the Indian populace.

Early Buddhist and Hindu period shrouded in old messages, for example, Manusmriti, Arthashastra, and Kama sutra allude to same sex fascination and conduct. The Buddhist custom, demonstrated in *"the column caverns of Karle (50-75 CE)"*. Indicates two uncovered breasted ladies grasping one another. In spite of the fact that gay people existed even in antiquated India, they never achieved social endorsement in any segment of the Indian populace. In Hindu sacred writings, for instances, Bhagiratha is conceived from the association of two ladies. Shikhandi in Mahabharata and Ardhanarishwar have additionally depicted. Ayappa (*double gendered god*) is loved by hijras. A few depiction in the Khajuraho and sun Temple of Konaraka portray same sex conduct including, "shared fellatio and orgiastic scenes". Parsuraman found that, 3% of the gay people earned their livings as artists or potentially sex labors. It is additionally revealed that in this examination a large portion of men were between the ages of 21 and 30 and took both dynamic and uninvolved jobs in unprotected butt centric and oral intercourse. Almost there is no thought regarding the present routine of the male and female homosexuality in India. Homosexuality is gradually picking up acknowledgement, to a limited extent because of the endeavors of a couple of composed gathering in metro urban communities which are associated with the global groups of gay. An ordinary voice of one association, and of its gay individuals, is distributed in Bombay, titled "Bombay Dost", or "Bombay Friend".

It is highly interesting to note cross-gender and cross-gender behavior in the epics of Mahabharata and Ramayana. Arjuna in the gesture of Birhannala fought with Kaurava on behalf of Prince Uttara -Arriving in front of the Kauravas, he got down, prayed to God, removed the conch bangles from his hands, and put on leather gauntlets. He then tied a cloth on his flowing hair, stood facing the east, meditated on his armor, got into the chariot and gloried in the familiar feel of his famous Gandiva bow. In the ensuing battle, he defeated Kauravas.

The Hijra an Urdu word for eunuchs are the most remarkable instances of the sex difference in India. Hijra, who live transcendently in the bigger urban areas, has a place with a Hindu station of guy who dresses as females. Their religious job is to execute as mechanism for female goddess, subsequently their job at wedding. More often, they leave their families in their teenager's years to join grown up Hijras in large cities. Some of them conclude their sexual

orientation status by emasculation. Their societal job and methods for making an occupation, includes giving amusements at weddings and different celebrations and excluded on continually hoping to be paid. They may likewise take part in sexual action with men for cash to fulfill their own sexual wants.

1.8 HISTORY OF LGBT COMMUNITY ACCORDING TO JOHN BOSWELL PAGE

There has been a gigantic overflowing of research on lesbian, gay and indiscriminate history, just as the more up to date eccentric investigations, in the previous fifteen years. But the field is flooded with contentions, debates, it must be stated, which advance our insight on all fronts. The focal inquiries raised location the nature and probability of a background marked by homosexuality. A few researchers state that homosexuality as a discrete character is a cutting edge western development despite the fact that the dates proposed by these researchers fluctuate impressively. Others contend that there have dependably been gay people with some mindfulness, however even they would recognize that the huge, very unmistakable and open gay and lesbian network: of the previous couple of decennium is advancement ever.

For the individuals who contend that gays and lesbians are another creation, the main gay and lesbian history that can truly merit the name is the historical backdrop of the cutting edge political and social development. By and by, in any case, even the individuals who contend along these lines acknowledge that gay action in the past was broad anyway imagined at the time and that this past is important to present day lesbians and gays. A relationship might be made here with national chronicles: there was no English country before the late medieval times the possibility of country is itself a late advancement but then the historical backdrop of both Roman Britannia and Anglo Saxon and prior medieval England is genuinely considered as adding to the historical backdrop of the cutting edge English country. Similarly, the lives and exercises of the individuals who were explicitly dynamic, or pulled in to, individuals from a similar sex, just as the demeanors of others towards them may reasonably be said to establish a background marked by enthusiasm to present day lesbians, gays and bisexuals.

In any case, what makes up "present day lesbian, gay and promiscuous hereafter LGBT personality? Plainly sexuality comprehensively comprehended as sexual action and understandings of such action has a vital influence. The historical backdrop of sexuality, and particularly gay movement, is a subject for LGBT history. Some without a doubt would look to restrict LGBT history to a background marked by sexual movement. It doesn't appear to be precise, in any case, to limit present day understandings of LGBT personalities to sex. There are, and have been, social orders in which same sex sexual action has been far reaching yet has

had practically zero enthusiastic noteworthiness as with some advanced jail homosexuality. Be that as it may, an inclination for, or introduction to, gay action is just piece of current LGBT characters. Similarly, as imperative is an accentuation on enthusiastic contact and organization with someone else of a similar sex called homo affectionalism by creator Paul Hardman". Social overviews of current lesbians and gays in couples demonstrate this obviously: the connections keep on being sincerely integral to members regardless of whether sexual movement following various years winds up insignificant or nonexistent. Then again, in present day European and American social orders candidly extraordinary same sex connections now and again called fellowship previously have restricted, assuming any, open job. It isn't phenomenal for individuals to guarantee that they have several companions, an outlandish articulation if companion somehow happened to have its criticalness in antiquated and medieval European talks. There is consequently some motivation to guarantee the historical backdrop of fellowship is of unique enthusiasm to present day LGBTs, who safeguard with their subcultures a custom of extraordinary enthusiastic same sex companionship, both with sexual accomplices and with others.

Traditional history has sought to understand past and present societies with **categories of analysis** such as *politics*, *thought*, *economics*, and, at least since Karl Marx, *class*. In the past twenty or so years other categories of analysis, not considered important in the past, have appeared as significant to many historians. Perhaps the most important of these is *gender*. To these historians ***Gender* is the cultural meaning given to the rather limited *facts* of biology**. One aspect of' *gender analysis* 'consists in looking at how men and women, masculinity and femininity, are understood in a society and at how such understandings play out in people's lives. Another, even newer, aspect of gender analysis looks at issues of sexual behavior and sexuality.

John Boswell in his study book *Christianity, Social Tolerance and Homosexuality* (1980) gave a theory that "Gay people have always and everywhere existed, this has not been widely accepted by scholars. Since 1980 a very specific approach is given to the sexuality of homosexuals, has come to be accepted by the majority of historians working in the field." The model now is this:

Gay practices owe its reality in 1700s. it essentially has two examples , one depends on age-conflicting sexual predominance, a more established man (not in every case particularly more seasoned incidentally) will take a traditionally "male" job in a sexual association with a more youthful male, however won't, in doing such, be viewed as any not quite the same as other "male" men by large society. The second is the regular example depends on sex offensive

sexual predominance, this implies in various social orders there were natural guys who lived as non guys for the duration of their lives and these individuals can likewise be the sexual accomplices of male men without the men losing their status. The Native Americans Berdache is the most celebrated case of broad marvel.

Around 1700, in Western Europe a change took place. A subculture of delicate men emerged in real urban communities, men who identified themselves as various; the word "molly" was utilized in London and different words somewhere else. In spite of the fact that they were set up to have intercourse with the male men these mollies were additionally arranged to engage in sexual relation with one another. A few students of history have called it's a rise of third gender.

Since a third sexual orientation isn't the model of present day homosexuality in the west, there has been issue of when the cutting edge gay developed. Numerous essayists have contended that the medicalization of homosexuality in the late nineteenth century brought about the making of another animal- the cutting edge gay, what recognizes homo and heteros from prior models of sexuality is that they are in exacting restriction to one another and are characterized not by sex job or sexual direction. Unquestionably, in Germany in the late nineteenth and mid twentieth century there were unmistakable idea of homosexuality and a political development dependent on it.

A major recent readjustment of this theory, resulting from the work of George Chauncey in his recent' *Gay New York'*. Chauncey has called into question the last part of the traditional formulation. He argues that elite terminology and labels (also known as medicalization) had no immediate effect on the mass of working class New Yorkers (with the suggestion that this was probably true elsewhere.) That although there were, eventually, some self-identified queers, until as late 1940 it was common for working-class men to have male role sex with other men fairies without in any way feeling that they were "homosexual". What happened around 1940, the Chauncey-amended model says is that, first, more and more of the mass of the population began to identify as heterosexual and see any homosexual behavior as transgressive; and secondly among self-identified queers a shift in desired sexual partner took place. Previously queers had tended to prefer male men but now queers began to prefer other queers as sexual partners.

It was this emergence of a social identity of homosexual which enabled lesbian and gay people to come together, recognize each other, and begin a social movement for legal, political and social equality.

1.9 CONCLUSION

Homosexuality is mostly a taboo subject in Indian civil society and for the government. Section 377 of the Indian Penal Code 1860 makes sex with persons of the same gender punishable by law. On 2 July 2009, in Naz Foundation v. Govt. of NCT of Delhi, the Delhi High Court (WP(C) No.7455/2001) held that provision to be unconstitutional with respect to sex between consenting adults, but the Supreme Court of India overturned that ruling on 11 December 2013, stating that the Court was instead deferring to Indian legislators to provide the sought-after clarity.

Homophobia is common in India public dialog of homosexuality in India has been restrained by the way that sexuality in any structure is once in a while talked about transparently. Lately be that as it may, frames of mind towards homosexuality have moved marginally. Lately, be that as it may, frames of mind towards homosexuality have moved marginally. Specifically, there has been more delineation and talks of homosexuality in the India news media and in bollywood. A few associations including the Naz Foundation, The National AIDS Control Organization, Law Commission of India and the planning commission of India have communicated support for decriminalizing homosexuality in India and ousted for resilience and social fairness for lesbian, gay, transgender individuals. India is among nations with a component of a third sexual orientation. However mental, physical, enthusiastic and financial brutality against LGBT people group in India wins. Lacking help from their family, society or police, numerous gay are being exploited but people doesn't repot about these wrongdoings.

Religion is thought of pioneer that makes conventions and traditions in the general public. While homosexuality has not been explicitly referenced in the religious compositions crucial to Hinduism, the greatest religion in India, Hinduism has taken different positions, extending from positive to unbiased or hostile. Apparatus Veda, one of the four accepted consecrated writings of Hinduism says "Vikriti Eyam Prakriti" .a few researcher accept gay or transsexual component of human life.

Homosexuality has been a predominant over the Indian subcontinent from the beginning of the time.

A CRITICAL LEGAL ANALYSIS OF HUMAN ORGAN THEFT & TRANSPLANTATION LAWS IN INDIA

- SHEIKH SULTAN AADIL HUQUE & MAHWESH BULAND

INTRODUCTION

Section 378 of Indian Penal Code, 1860 define the offence of theft. It says that whoever, with the intention of taking dishonestly any movable property out of the possession of any person without the consent of that person, moves that property in order to such taking, is said to commit theft." The property that as long is attached to the earth, it is not a movable property and is, therefore, not the subject of theft; but as soon as it is severed from the earth, it becomes capable of being the subject of theft."

Human body, whether living or dead, is not a movable property within the meaning of section 22 of the Code. Stealing a dead body thus does not make the accused guilty of theft. But where a human body has been preserved as a mummy, or where any part of it has been preserved with some purpose, like for research etc., or where a human body or skeleton is being used as an article, for research or teaching etc., stealing the same would amount to theft." In India For stopping theft of human organ and illegal organ transplant, the Government of India had come up with certain laws in 1994 that made organ sale a crime. The Human Organs Transplant Act, 1994 laid down certain rules and regulations that were to be followed while conducting organ transplant."According to Organ Transplant Laws, no money exchange between the donor and the recipient was allowed. According to the 1994 Act, the unrelated donor had to file an affidavit in the court of a magistrate stating that the organ is being donated out of affection. Later, the donor had to undergo a few tests before the transplant. The Authorization Committee checked all the supplied documents."As per the Indian Law, sale of organs was banned. Thus, no foreigner could get a local donor. In case of money exchange, the offender had to pay heavy penalty. Close relatives of the recipient like siblings, parents, children and spouse could donate the organ without clearance from the government. However, they were required to appear before the authorization committee for clearance and approval."

CAN A CORPSE BE A SUBJECT MATTER OF THE OFFENCE OF THEFT?

The general rule is that there cannot be offence of theft for taking away a dead corpse. This was the holding in one of the rarest case on this issue – in Emperor v. Ramadhin[286]. The reasoning given by court was that human bodies cannot be owned and that's why human corpse cannot be thus qualified as a property.[287] This is the reason why human corpses, which are in the form of anatomical specimen, such as those found in museums and owned by them (mummies), are personal property and stealing of such human corpses would amount to theft under Sections 378 and 379 of IPC. Similarly, stealing of buried human corpses from burial grounds would amount to theft under Section 297 of IPC because the same are property of executors (owners in this case) of deceased who bury these."[288]

HUMAN ORGANS TRANSPLANT LAWS IN INDIA :

The term organ transplant alludes to the transplantation of an organ starting with one body then onto the next. The individual who gets the organ is the beneficiary and one gives' identity called the contributor. This method is embraced for the substitution of the harmed organ in the body of the beneficiary with the working organ from the body of the giver. The organ benefactor can be a perished or alive. Organ Transplantation is considered to a shelter for the restorative business as this technique can help in sparing existences of individuals who might bite the dust as a result of their broken organ. It is critical that before this procedure is directed a few related laws ought to be kept into thought. Restorative India Tourism offers to give you online data on Human Organ Transplant Laws in India, India.

A portion of the organs that are basically given are kidney, Liver, heart, lung, pancreas, little inside and once in a while skin alongside alternate things. In the prior circumstances illicit organ trafficking is a noteworthy issue in light of degenerate and wasteful medicinal services framework. For halting illicit organ transplant, the Government of India had concocted certain laws in 1994 that made organ deal a wrongdoing. The Human Organs Transplant Act, 1994 set out specific guidelines and controls that should have been taken after while leading organ transplant.

[286] All 1902 25. ; See also Ma Kin & Ors. v.U. Ba and Ors, AIR 1930 Rangoon 143a.
[287] A property has to be of a status of being able to be owned so as to qualify to be a 'corporeal property' – which qualifies a property to be moveable in character as per Section 22 of IPC that defines 'moveable property'.
[288] P.S.A. Pillai, Criminal Law, (2012).

As indicated by Organ Transplant Laws, no cash trade between the contributor and the beneficiary was permitted. As per the 1994 Act, the disconnected contributor needed to record an oath in the court of a justice expressing that the organ is being given out of fondness. Afterward, the benefactor needed to experience a couple of tests before the transplant. The Authorization Committee checked all the provided archives.

According to the Indian Law, offer of organs was restricted. Along these lines, no outsider could get a nearby giver. If there should arise an occurrence of cash trade, the wrongdoer needed to pay substantial punishment. Close relatives of the beneficiary like kin, guardians, youngsters and life partner could give the organ without leeway from the legislature. Be that as it may, they were required to show up before the approval council for freedom and endorsement.

Aim of Transplantation of Human Organs Act, 1994:

The Government passed an act in 1994 to rationalize organ donations and transplants in the country. The main aims of the act:

- Regulating removal, storage and transplantation of human organs for therapeutic purposes.
- Accepting brain death and making it possible to use these patients as potential organ donors.
- Preventing commercial dealings of organs.
- After this deal, the concept of brain death was legalized for the first time in India.

The Transplantation of Human Organs (Amendment) Bill, 2009

The Bill passed in 2009, made certain changes and alterations in the previous laws. This Amendment Bill offers regulation of the transplantation of human tissue along with organ transplant. It was made necessary that the medical staff looking after the patient to put forward a request to the relatives of the brain dead person form donation of organs. It was necessary that every organ donation case should go to the Authorisation Committee first.

Highlights:

- The bill made amendments in the Transplantation of Human Organs Act, 1994.
- Along with human organs, the Bill also regularized the transplantation of tissues of the human body.

- The act permitted donations from living persons who are near relatives. This act also added grandparents and grandchildren to the list of "near relative".
- The doctor had to inform the patient or his relatives about the possibility of organ donation and made sure that they given their consent to it.
- If the organ of the donor and the recipient does not match medically, the bill gave a permission to swap organs with another pair of such a person.
- The bill made an increase in the penalty for illegal removal of human organs and for receiving or making payment for a human organ.

KEY ISSUES AND ANALYSIS

- The bill became strict in curbing commercial human organ trade but made organ availability easier for transplantation for needy patients.
- The donor as well as the recipient would get penalized in case there is any involvement of money in the transplant.
- If organ donor is not a "near relative", he required prior permission from the State Authorisation Committee.
- The bill offered for the establishment of Advisory Committees.

THE TRANSPLANTATION OF HUMAN ORGANS (AMENDMENT) BILL,2013:

The state health department, a few months back, came- up with a composite set of guidelines for dealing with with deceitful practices and for countering illegal organ transplant. Now along with an authorization committee, there will be a 'Verification Committee' as well in every block for the verification of the details that are offered by the donor and recipient. It will also look after all the other legalities of the matter of organ transplant.

IS IPC PREVAILING OVER TRANSPLANTATION OF HUMAN ORGANS ACT?

The Supreme Court, while managing Section 41 IPC on account of Kaushalya Rani v. Gopal Singh,[289] has watched that the articulation 'general law' and 'exceptional law' are relative terms and alluded to a specific subject managed by particular act with the goal that it isn't conceivable sensibly to mark any arrangement of laws as being general laws or unique law. the court knows that the articulation 'extraordinary law' characterized in Section 41 IPC can't be interpreted as

[289] AIR 1964 SC 260.

meaning any sanctioning which makes new offenses not made culpable under the Indian Penal Code."

In the event that an offense is secured by both the arrangements to be specific one of IPC and Special Act, the inquiry may manifest as to which establishment the guilty party would be managed under. In perspective of the rule 'geberalia specialibus non deropgant' general things don't disparage from uncommon. Unique Acts are not canceled by general Acts unless there be some express reference to the past enactment or an important irregularity in the two Acts standing together, which keeps the most extreme from bing connected. At the point when there is strife between a particular arrangement and the general arrangement, particular arrangement beats the general arrangement. The general arrangement apply to just such cases which are not represented by the unique arrangements. The govern applies to determine clashes between various arrangements in various statutes as likewise in a similar statute, a man can't be rebuffed under the both the Penal Code and a unique law for a similar offense, and commonly the sentence ought to be under the uncommon Act. This is, in any case, restricted to situations where the offenses are incidental or for all intents and purposes so.[290]

Along these lines, where a demonstration was an offense under a unique law and offense could be rebuffed under that extraordinary law, the general law would not have any significant bearing and this was the guideline set down in Section 5 of IPC. On account of IPC or Transplantation of Human Organs Act which law will win, the Supreme Court on account of Jeewan Kumar Raut v. CBI held that:[291]

"FIR uncovered not just commision of an offense under Transplantation of Human Organs Act, 1994 (TOHO) yet additionally under IPC, if a unique statute sets down methods, the ones set down under the general statutes should not be taken after. TOHO being an uncommon Act and the issue identifying with managing offenses thereunder having been directed by reason of the arrangements thereof, there can't be any way of uncertainty at all that the same might beat the arrangements of the Code." [292]There are many cases in which it was chosen that Transplantation of Human Organ Act will beat IPC.

[290] Kirpalsingh Pratapsingh Ori v. Balvinder Kaur Hardipsingh Lobana,2004 CrLJ 3786 (Guj).
[291] J.K. Cotton Mills v. State of U.P. AIR 1961 SC 1170
[292] Harlow v. Minister of Transport, (1951) 2 KB 98

LAWS RELATED TO ORGAN DONATION IN INDIA:

The primary legislation related to organ donation and transplantation in India, Transplantation of Human Organs Act[293], was passed in 1994 and is aimed at regulation of removal, storage and transplantation of human organs for therapeutic purposes and for prevention of commercial dealings in human organs.

In India, matters related to health are governed by each state. The Act was initiated at the request of Maharashtra, Himachal Pradesh and Goa (who therefore adopted it by default) and was subsequently adopted by all states except Andhra Pradesh and Jammu &Kashmir. Despite a regulatory framework, cases of commercial dealings in human organs were reported in the media. An amendment to the act was proposed by the states of Goa, Himachal Pradesh and West Bengal in 2009 to address inadequacies in the efficacy, relevance and impact of the Act. The amendment to the Act was passed by the parliament in 2011, and the rules were notified in 2014. The same is adopted by the proposing states and union territories by default and may be adopted by other states by passing a resolution[294]."

The main provisions of the Act (including the amendments and rules of 2014) are as follows:

- Brain death identified as a form of death. Process and criteria for brain death certification defined (Form 10)
- Allows transplantation of human organs and tissues from living donors and cadavers (after cardiac or brain death)
- Regulatory and advisory bodies for monitoring transplantation activity and their constitution defined.

(i) Appropriate Authority (AA): inspects and grants registration to hospitals for transplantation enforces required standards for hospitals, conducts regular inspections to examine the quality of transplantations. It may conduct investigations into complaints regarding breach of provisions of the Act, and has the powers of a civil court to summon any person, request documents and issue search warrants.

(ii) Advisory Committee: consisting of experts in the domain who shall advise the appropriate authority.

[293] Transplantation of Human Organs Act 1994. Gazette of India 1995 Feb 4:

[294] NCBI Website(Available at :www.ncbi.nlm.nih.gov,last visited on 25th August , 2020)

(iii) Authorization Committee (AC): regulates living donor transplantation by reviewing each case to ensure that the living donor is not exploited for monetary considerations and to prevent commercial dealings in transplantation. Proceedings to be video recorded and decisions notified within 24 hours. Appeals against their decision may be made to the state or central government.

(iv) Medical board (Brain Death Committee): Panel of doctors responsible for brain death certification. In case of non-availability of neurologist or neurosurgeon, any surgeon, physician, anaesthetist or intensivist, nominated by medical administrator in-charge of the hospital may certify brain death.

- Living donors are classified as either a near relative or a non-related donor.

(i) A near-relative (spouse, children, grandchildren, siblings, parents and grandparents) needs permission of the doctor in-charge of the transplant center to donate his organ.

(ii) A non-related donor needs permission of an Authorization Committee established by the state to donate his organs.

- Swap Transplantation: When a near relative living donor is medically incompatible with the recipient, the pair is permitted to do a swap transplant with another related unmatched donor/recipient pair.
- Authorization for organ donation after brain death

(i) May be given before death by the person himself/herself or

(ii) By the person in legal possession of the body. A doctor shall ask the patient or relative of every person admitted to the ICU whether any prior authorization had been made. If not, the patient or his near relative should be made aware of the option to authorize such donation.

(iii) Authorization process for organ or tissue donation from unclaimed bodies outlined.

- Organ retrieval permitted from any hospital with ICU facility once registered with the appropriate authority. Any hospital having Intensive Care Unit (ICU) facilities along with manpower, infrastructure and equipment as required to diagnose and maintain the brain-stem dead person and to retrieve and transport organs and tissues including the facility for their temporary storage, can register as a retrieval center.
- Cost of donor management, retrieval, transportation and preservation to be borne by the recipient, institution, government, NGO or society, and not by the donor family.
- Procedure for organ donation in medico-legal cases defined to avoid jeopardizing determination of the cause of death and delay in retrieval of organs.

- Manpower and Facilities required for registration of a hospital as a transplant center outlined.
- Infrastructure, equipment requirements and guidelines and standard operating procedures for tissue banks outlined.
- Qualifications of transplant surgeons, cornea and tissue retrieval technicians defined.
- Appointment of transplant coordinators (with defined qualifications) made mandatory in all transplant centers.
- Non-governmental organisations, registered societies and trusts working in the field of organ or tissue removal, storage or transplantation will require registration.
- The central government to establish a National Human Organs and Tissues Removal and Storage Network i.e. NOTTO (National Organ & Tissue Transplant Organisation), ROTTO (Regional Organ & Tissue Transplant Organisation) and SOTTO (State Organ & Tissue Transplant Organisation). Manner of establishing National or Regional or State Human Organs and Tissues Removal and Storage Networks and their functions clearly stated.
- The central government shall maintain a registry of the donors and recipients of human organs and tissues.
- Penalties for removal of organ without authority, making or receiving payment for supplying human organs or contravening any other provisions of the Act have been made very stringent in order to serve as a deterrent for such activities.

UNDERSTANDING OF HUMAN TRANSPLANTATION ACT 1994:

As per the Act, the random benefactor needs to record an affirmation in the Court of a Magistrate expressing that the organ is being given out of love, after which the giver needs to experience various tests previously the real transplant happens. The Authorisation Committee set up for the reason guarantees that every one of the archives required under the Act have been provided. It prohibited organ deals, in this manner, no nonnative can get a neighborhood giver." The Committee is required to hold an enquiry and if after such an enquiry it is confirmed that the candidates have followed the prerequisites of the Act and the Rules, it can allow the candidates endorsement for the expulsion and transplantation of the human organs concerned. On the off chance that actually, after enquiry and in the wake of giving a chance to the candidates of being heard, the Authorisation Committee is of the view that the candidates have

not followed the prerequisites of the Act and the Rules, the application for endorsement might be rejected for motivations to be recorded in composing."

FAILURE OF THE TRANSPLANTATION OF HUMAN ORGANS ACT, 1994

The law bombed pitiably in accomplishing the objective on two checks. Right off the bat, it didn't enroll much achievement which is obvious principally from the kidney tricks detailed in the years 2002, 2003 and 2004 through its happy certainty being the main lucrative human organ available unlawfully from live contributors. Various cases of kidney exchange were featured by the media from the States of Kerala, Karnataka, Tamil Nadu and Punjab. The story is pretty much the same without fail. The giver is baited by guarantee of an attractive money related reward once in a while went with an extra guarantee of an occupation." By and large the whole unlawful exchange stays unfamiliar yet for the rare events where the installment guaranteed by the organ touts to the giver is unfulfilled, bringing about an open clamor by the contributor who frantically looks for redressal. Consequently, the trafficking in kidneys is essentially from a destitution stricken contributor to a rich or in some cases not so rich but rather edgy beneficiary. In the whole plot, the broker is the greatest guilty party however he ordinarily escapes unscathed. "

Furthermore, the 1994 Act did nothing to guarantee that healing facilities would make conventions for recovering the full scope of retrievable organs that could be given by people in general and transplanted to spare lives. The outcome was a market-driven lucrative concentrate on the main organ that could be given by experience contributor's viz. kidneys . The arrangement of the Uniform Anatomical Gift Act of the USA which enacts in detail on the part of clinics in organ recovery from bodies appears to have been totally neglected by the lawmakers."

THERE IS NO PROPERTY IN A CORPSE:

"Once a body has experienced a procedure or other use of human expertise, for example, stuffing or treating, it appears it can be the subject of property in the customary way; henceforth it is presented that transformation will lie for a skeleton or dead body utilized for research or display, and the same goes for parts of, and substances created by, a living individual."

Dobson And Another V. North Tyneside Health Authority And Another

The area judge allowed the second litigant's application to strike out the case against p it, holding that there was no property in a body and no obligation on a clinic to save parts of a body inconclusively after an investigation had been finished up. That although a body or part

of a body which had undergone a process or other application of human skill, such as stuffing or embalming, might constitute property, the lawful removal and preservation of a brain in the course of a post mortem did not transform it into an item to which the plaintiffs had a right of possession; that the legal obligation of a doctor under rule 9 of the Coroners Rules 1984 to make provision for the preservation of material which in his opinion bore upon the cause of death did not continue after the cause of death had been determined by the coroner and the time for challenge of that decision had passed; and that, accordingly, the plaintiffs could not show a right to possession or ownership of the brain or that anything done by the second defendant was wrongful and, therefore, the claim was unsustainable."

He described that question as whether it remains established law that there is no property in a dead body or part of a dead body so that personal representatives of a deceased cannot maintain a cause of action in respect of human tissue

"at the point when a man has by the lawful exercise of work or ability so managed a human body or part of a human body in his lawful ownership that it has obtained a few properties separating it from a negligible cadaver anticipating internment, he gets a privilege to hold ownership of it, at any rate as against any individual not qualified for have it conveyed to him with the end goal of entombment. The case includes two generous inquiry i.e. regardless of whether body is a property and on the off chance that it is a property who has possessory rights on it. Unquestionably it has been replied by two imperative standards saying if there is a nearby kith to the expired and if cadaver hasn't been made into a significant property then body can be considered as a property though in like manner speech it isn't a property.

IP ISSUES IN CLOUD COMPUTING

- DIOTIMA ROY & ARANYA NATH

ABSTRACT

Cloud computing is an emerging area of computer science & technology as computer resources are connected via the internet. Cloud computing is used as storing and accessing data and programs over the Internet instead of your computer's hard drive. Cloud in technology means the set of hardware, networks, storage, services, and interfaces that combine to deliver aspects of computing as a service. There are major software tools like Amazon, Yahoo, Google is developing cloud computing solutions, providing cloud services on demand. Moreover, cloud computing enables in gaining access to a massive range of programs without the need for having a license, purchasing, installing, or downloading any of those packages. now with the advent of era cloud computing services contain additionally some dangers regarding privacy, the security of facts, and a shortage of interoperability between cloud systems. the patent approach of software agencies brought about "patent struggle" and "patent palms race" endangering the system of standardization in the software enterprise, particularly in cloud computing. Intellectual Property (IP) rules and a court docket ruling in patent litigation are likely to have an extensive effect on the development of the cloud computing enterprise and cloud services.

KEYWORDS

Cloud computing, IPR, Technology, Computer Data, privacy, cloud service provider, cloud security

INTRODUCTION

This article states an analysis of cloud computing services and also provides an evaluation of blessings & dangers by means of providing critical materials and traits of cloud computing in this technological field. the main objective is to carry out a concise literature assessment on this newsletter to briefly summarize the principle definitions and theoretical views on cloud computing and additionally the primary blessings and dangers of cloud computing offerings; the second one objective is to recognize a extra tricky and particularized evaluation regarding one relevant issue related to cloud computing services: the impact of intellectual property law

specially courtroom ruling in patent and copyright cases.A more detailed summary of the article is the following:

a) Define the concept of cloud computing, pointing the main features.

b) Advantages & disadvantages of cloud computing

c) Challenges faced as a security and privacy of data also intellectual property issues

d) Patent infringement analyses

CLOUD COMPUTING DEFINITION & CHARACTERISTICS

"Cloud computing[295]," is a metaphor term so to define properly cloud computing refers to cloud shape which determines the internet connectivity via diagrams that describe the hardware & software infrastructure which means running all the virtual computing resources in a single bandwidth of the network. Therefore by seeing the definition we can assess the characteristics of cloud computing firstly the broad network accessibility, rapid work process, scalability, elastic in nature[296] so by the analogical structure of computing model, it can be stated that it is used for computing and storing data. From this perspective in the cloud computing model, there are additional problems that arise like the security of information, legal and contractual issues. Now I'll discuss cloud computing services, there are three types of cloud computing services available[297]

1) Infrastructure as a service (IaaS) is a cloud computing model where virtualized infrastructure is offered to and managed for, businesses by external cloud providers.

2) Platform as a service (PaaS) delivers computing resources, both cloud software and hardware infrastructure components like middleware and operating systems, required to develop and test applications.

3) Software as a service (SaaS) is a kind of cloud service provider that delivers the entire software suite as a pay-per-use model.

[295] For example, the European Commission in its Communication (n 24) refers to cloud computing as 'Internet-based computing whereby software, shared resources and information are on remote servers ("in the cloud")', and see UK Information Commissioner's Office, Personal information online code of practice (2010), 29, 'The use of cloud computing, or 'internet-based computing', involves an organization using services – for example, data storage – provided through the internet'.

[296]GORAN NOVKOVIC,Five characteristics of cloud computing (August 11, 2017) https://www.controleng.com/articles/five-characteristics-of-cloud-computing

[297]TRIANZ,The revolution that is cloud computing (March 9, 2018) https://www.trianz.com/insights/revolution-that-is-cloud-computing

Cloud Computing has three types of cloud deployments categorized based on an organization's ability[298]

1) Public Cloud: Public cloud, in general, is SaaS services offered to users over the internet. It is beneficial for the users in which the service provider bears the expenses of bandwidth and infrastructure.

2) Private Cloud: Private cloud is used by large organizations to build and manage their own data centers for specific business and IT needs/ operations

3) Hybrid cloud: It is the combination of a private and public cloud, providing for more flexibility to businesses while having control over critical operations and assets, coupled with improved flexibility and cost-efficiency.

CLOUD COMPUTING SERVICES: CHALLENGES AND RISKS[299]

1) Privacy and data security: Data security issue is the primary situation still now as it changed into mentioned in the year 2018 that 77% of respondents stated within the referred survey. Securitization of information became the primary, and legitimate, problem from the start of the cloud computing era: we are not able to see the precise place wherein our information is saved or being processed. This will increase the cloud computing dangers which can get up at some point in the implementation of control of the cloud. Headlines highlighting records breaches, compromised credentials, and broken authentication, hacked interfaces, and APIs, account hijacking haven't helped alleviate issues.

2) Cost management and containment: cloud computing threats listing entails prices. For the most part cloud computing can save businesses money. Inside the cloud, an employer can easily ramp up its processing skills without making big investments in new hardware.

3) Lack of resources: One of the major problems faced by companies is a lack of expertise. Companies are increases more workloads in the cloud while cloud technologies becoming advance rapidly. As a result, companies are having a tough time keeping up with the tools.

4) Governance/Control: Proper IT governance should ensure IT assets which are used according to agreed-upon policies and procedures; ensure that these assets are properly controlled and maintained

---

[298] TRIANZ,The revolution that is cloud computing (March 9, 2018) https://www.trianz.com/insights/revolution-that-is-cloud-computing

[299] Sandra Durcevic, 10 Cloud Computing Risks & Challenges Businesses Are Facing In These Days, Business Intelligence, (January 10, 2019) https://www.datapine.com/blog/cloud-computing-risks-and-challenges/

5) Compliance: One of the major risks of cloud computing is an issue for anyone using backup services or cloud storage.

6) Migration: Cloud computing industry challenges in recent years concentrate on migration. That is a procedure of transferring software to a cloud consequently shifting a new application is a sincere technique, about moving an existing application to cloud surroundings, many cloud challenges arise.

IP ISSUES IN CLOUD COMPUTING

Online platforms provide intermediaries under the IT Act to upload & share files, materials, exchanging the ideas for specified assets. Now IP comes whether confidential or data, expressions of ideas are protected by trade secrets or copyright, signs, and branding logos are (protected by copyright and trademarks), and the computing databases and innovation of software structure are protected by copyright or patent. As intellectual property rights are territorial rights in nature so it is required to give attention as it is a major concern. Therefore it is difficult to determine whether there is an infringement or not.

CLOUD COMPUTING LEGISLATION UNDER IT ACT AND IPR RIGHTS

Privacy of data is the main issue in today's technology, no legislation is there to protect except IT Amendment Act 2008 and the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011 can protect personal data and regulate privacy issues of cloud computing or any other technology. With the advancement of technology private sectors takes a large amount of personal data where there is no such law to protect them, like medical records, sexual orientation, passwords, biometric information. Now IP issues arise concerning copyright, trademark, or patent law. A customer using a PaaS or SaaS cloud environment mus know about the IP questions that can take place about data processing such as the required cloud software licenses or third-party IP rights. Now in concerning a patent, various conflicting issues are arises that led to cloud digital providers develop new systems to protect them against infringement of their intellectual property.[300]

[300] Mohammed Naseer Khan Challenges of IP protection in the era of cloud computing (December,23,2015) https://www.slideshare.net/naseer9848/challenges-of-ip-protection-in-era-of-cloud-computing?from_action=save

JUDICIAL IMPLEMENTATIONS OF CLOUD COMPUTING[301]

1. Cross border & transfer of data

The foremost fundamental concerns faced by an organization while migrating to cloud services is with respect to the security and privacy of its data. The global nature of cloud architecture has lot of diversities in legal mechanisms & their application, even in some cases the absence thereof raises the pertinent questions with respect to the effective transmission and storage of data in cloud services.

2. Lawful Interception

Regulators and enforcement of laws for investigation purposes seek access to information stored on the cloud. Much of the additional enrichment of such requests depends on the location of the provider and the authority and bargaining power enjoyed by local enforcement. For instances in case of encrypted data, the Government/ law enforcement agency can either seek access to the encryption key or in the alternative force a service provider to build invulnerability in their programming code (known as a 'back door') that allows government authorities to access the information—regardless of encryption—on demand.

3. Data Privacy Laws

Under the IT Act, 2000 members of a corporate entity have the data of the sensitive in nature where the main obligation is that to maintain a privacy policy and make available to the provider such privacy policy on its website.

CONCLUSION

Cloud computing offerings play an increasingly important position inside the software industry and offerings marketplace. given their plain benefits like easy accessibility to data, affordability outsourced it management, lower costs, and many others. despite numerous blessings, fundamental hazards are privateness and the safety of statistics within the cloud and lack of interoperability between cloud systems. the hassle of standardization in software program businesses arises because of patent wars intellectual assets-law and a court docket ruling in patent litigation should effect negatively the method of standardization in cloud computing. moreover, the patent arm race causes difficulty related to hindering innovation

[301] Krishnayan Sen and Ankit JainCloud Computing – Legal and Policy Perspectives, legally India (Monday, 24 July 2017 12:50) https://www.legallyindia.com/home/cloud-computing-legal-and-policy-perspectives-20170724-8678

DEVELOPMENT OF ARBITRAL LAWS IN INDIA

- VALLABHA GULATI

ABSTRACT

Human clashes are inescapable in everyday life. disputes are similarly unavoidable. It is hard to envision a human culture without irreconcilable circumstance. Disputes must be settled at least conceivable cost both regarding cash and time. With the goal that additional time and more assets are saved for valuable interests.

For resolution of disputes there is a legitimate legal framework in each human culture. Each injured individual should go to courts for his redressal. Be that as it may, over the period official courtrooms have become overcrowded. Hence, started the quest for options in contrast to ordinary court framework. the need was to locate another option, which won't be stalled by costs and postponements.

Arbitration, as a method for settling disputes, has been utilized everywhere throughout the world for a considerable period of time. It was structured at first as a procedure whereby individuals decided their own commercial disputes. Parties can consent to the procedure. also, an authority can be designated who has explicit information in a given specialized territory. Arbitration may in this manner be viewed as 'the' option in litigation, in which the parties achieve a legally binding adjudication in accordance with law.[302]

the object of arbitration is to obtain the reasonable goals of disputes by an unbiased tribunal immediately or cost. The parties ought to be allowed to decide how their disputes are settled subject just to safeguards the public interest and intervention by the courts ought to be confined.

INTRODUCTION

"Discourage litigation. persuade your neighbors to compromise whenever you can. point out to them how the nominal winner is often a real loser- in fees, expenses and waste of time. as a peacemaker the lawyer has a superior opportunity of being a good man. there will be still business enough"

-Abraham Lincoln

PRE- BRITISH ERA

One can see that since crude time, the activity of question settling has been done either by legitimate individuals like lords, sovereigns, inborn boss, or the Community Council like the town panchayats or the strict people like Qazi's, Panchayats were the most seasoned party of

[302] https://www.hg.org/arbitration-definition.html

Arbitration in India and its choices were held in high regard and were of restricting nature, properly acknowledged and regarded by both the parties to the contest.

ARBITRATION UNDER BRITISH RULE

As such the British chiefs of India saw the challenge settlement wilfully as significant for its central purposes of energy of decision, ease of technique and efficiency.

The lawful law relating to assertion in every practical sense had been started by Bengal rule 1816 and Bombay Regulation 1827. "The regular system code was refreshed in 1908. The law relating to arbitration was moved to the second schedule close to the completion of that Code. The phenomenal warning party coordinated by Sir Erle Richards conveyed believe that the assertion law would be encoded in an alternate code. In any case, the desire could be fulfilled after 32 years with the endorsing of the Arbitration Act. 1940. It fundamentally oversaw nearby arbitral courts."

Nevertheless, in respect of arbitration understanding entered outside India and Foreign distinctions, an exceptional law dealing with the arrangement of recording remote distinctions, their affirmation and prerequisites was requested looking like "Arbitration [Protocol and Convention] Act 1937. Furthermore, the Foreign Awards Act 1961 was passed to merge the New York show 1958 in the metropolitan law of India." These Acts were essentially planned to oversee award made in various countries on the equivalent reason.

The speed of logical turns of events and mechanical progressions has broken the obstructions of limits of countries and has brought about financial and social advancement of human race. Awareness about rights and obligations has brought case storm in the customary courts. In this manner, the requirement for mediation was a need.

The Arbitration Act 1940 failed wretchedly to stay up with changing world situation. The assertion procedures as opposed to getting option in contrast to legal party and to take the weight of essentially business questions turned into an extra weight on the legal courts itself.

After the finish of World War II another period started to show up. Provincial sections were dislodged by recently rising countries in bigger pieces of the globe and an all-inclusive universal network built up a mind-boggling system of connections between its individuals. The sanction of the United Nations laid accentuation on the monetary component of worldwide life, and worldwide reliance turned into a recognize highlight of the new way of thinking. Existing business paths saw a more prominent volume of merchandise moving and new diverts opened in industry and exchange.

The Indian Arbitration Act 1940 which was so far the guideline enactment on arbitration in India was instituted during a period when British principle had seriously reduced the development of India's outer business and viewed Indian exchange as a subordinate of the British monetary framework. "The law was formed in old style shape, with opportunity to the courts to practice a considerable oversight over the courts of arbitral procedure and with genuinely wide intensity of legal executive to meddle with the arbitral awards."

The courts were at that point troubled by the heaviness of expanding accumulation and observations world over proposed a more prominent utilization of elective frameworks of dispute resolution , particularly in the issues of plugs questions.

The expanding development of worldwide business has given another centrality to the component of time. In the ethos of vacillations and changes the whole world has moved for rapid goals of business debates.

LAW BASED ON UNCITRAL MODEL LAW

In 1985 in UN Commission on International Trade Law embraced UNCITRAL Model Law in International Commercial Arbitration.

The Arbitration and Conciliation Act 1996 has revoked the Arbitration Act 1940, the Arbitration [Protocol and Convention] Act 1937 and the Foreign Awards [Recognition and Enforcement] Act 1961, solidified and revised the law identifying with residential assertion, universal business discretion and authorizations of global business arbitration and requirement of remote arbitral awards and furthermore characterizes the law identifying with mollification, accommodating issues associated therewith and episodes thereto based on the Model Law on the International Commercial Arbitration.

The new Act has introduced an entirely new set up for redressal of questions through assertion along these lines executing the two essential points of amplification of party self-governance and minimization of legal mediation.

DISPUTES AFFECTING THE CIVIL RIGHTS

Any kind of dispute affecting civil rights in which only damages may be claimed may be referred to arbitration.[303]

Questions of law. An unadulterated inquiry of law might be indicated to an assertion; and where such an inquiry is explicitly indicated, his award won't be put aside only upon the ground

[303] Russel on Arbitration, 19th Ed., page 24.

that his choice isn't right. On the off chance that the subject of law isn't explicitly eluded, at that point blunder of law might be a ground for dispatching or putting aside an award, if the mistake shows up on the substance of the award.

The above was the English Common Law. "The law in India has been the same. Be that as it may, change was presented by the English Arbitration Act 1979. Section 1(1) of that Act has removed the force and purview of the High Court in England to save or transmit an award on the ground of blunder of certainty or law on the substance of the award. Rather, a restricted cure by method for bid on any inquiry of law emerging out of an arbitral award to the High Court has been given." It is presented that with the authorization of the Arbitration and Conciliation Act 1996 in India and considering the language of section 34 thereof, blunder of law without more will never again be a ground for putting aside an arbitral award; and arrangement for reduction of an arbitral award having likewise been overlooked in the Act, the subject of transmitting the arbitral award for re-examination on the ground of mistake of law showing up on the essence of the arbitral award, would not emerge anymore.

Future use of property. Inquiries regarding the future utilization of property by the parties have frequently been submitted to the choice of judges, who may with advantage be given powers in this regard past those controlled by court.[304]

Outline: An authority was offered forces to set out a way which was to be delighted in by one party over the terrains of another.

Making contract for the parties. **"**A court can't make an agreement between the parties. When all is said in done, its forces would seem to end with understanding of the agreement. Yet, an authority, if so enabled, may make an agreement for the parties. Since a judge can be given such powers as the parties wish, he can be approved to make another agreement occasions their agreements will be added to or changed to fit the conditions at that point existing, planning in this way to make a coupling commitment, despite the fact that they are reluctant or unfit to decide exactly what the particulars of the new or altered understanding will be."

MATTERS OF CRIMINAL NATURE

In considering whether a criminal matter or proceeding may be referred to arbitration, regard must be had to whether the matter or proceeding is one which the policy of the law would not

[304] Allenby v. Proudlock (1835) 4 Dowl. P.C.C 54 cited by Russell at page 26.

permit to be compromised. If not, then it would not be capable of being removed from the ordinary tribunals of the land.[305]

But where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced. The same rule has been adopted in India.[306]

Where the consideration for reference to arbitration was dropping of criminal proceedings in respect of a non-compoundable offence, it was held that reference was invalid and the award illegal and inoperative. It is unlikely that it would be expressly stated in the arbitration agreement that a part its consideration is an agreement to settle criminal proceedings. It is enough for the defendants to give evidence from which an inference might necessarily arise that consideration of the arbitration agreement was unlawful.

To pronounce an arbitration agreement to be invalid as an attempt to stifle criminal prosecution, it must be established that withdrawal of the criminal case was the consideration as distinguished from motive for the agreement.

A criminal complaint as such cannot be referred to arbitration. Proceedings under section 145, Cr.P.C. The matter in proceedings under section 145, Cr.P.C. cannot properly be referred to arbitration.

Section 145, Cr.P.C. directs the magistrate to receive evidence himself and on a consideration of such evidence to decide the question of actual possession. But if parties had privately referred the dispute to arbitration and the award of the arbitrators had been accepted by both the parties, the magistrate would have a ground for proceeding under sub-section (5) of section 145 of Cr.P.C. Award can be used to drop proceedings under section 145, Cr.P.C. but not to declare possession of any party.

Arbitrators have no power to decide on the point of actual possession. They can only submit a report and the magistrate would then be bound to take that report into consideration before passing an order under section 145, Cr.P.C.[307]

By consent of parties the proceedings under section 145, Cr.P.C. were referred to arbitration. Before the magistrate passed the final order in the case, a petition was made by one of the parties objecting to the award and requesting that the dispute may be decided after taking

[305] Natraj Studiios (P) Ltd. v. Navrang Studieons AIR 1981 SC 537.
[306] *Tekchand* v. *Hajras Rai Arjan Das* AIR 1929 Lah 564.
[307] Rex Optical Co. v. Kanwal Industries Corpt. 1997 (2) Arb LR 160 (Del HC).

evidence according to law.[308] The magistrate however accepted the award and passed an order in accordance therewith. It was held that the order of the magistrate was not one contemplated by section 145 and was not supportable in law. If the magistrate had passed an order either declaring himself satisfied that there was no longer a danger of breach of the peace or had treated the award itself as evidence, his order could have been supported, but as there was an objection asking that evidence should be received and dispute determined according to law, it became his duty to receive such evidence as might be produced, unless he decided to drop proceedings.

ARBITRATION PROCEDURE UNDER ARBITRATION AND CONCILIATION ACT, 1996

DISPUTE

The presence of arbitral question is a condition point of reference for exercise of intensity by the judge. "Dispute" signifies the issue in debate, and not the conflict or controversy over it. The articulation will incorporate debates of law just as of actuality. The question may identify with a demonstration of commission or exclusion, for instance, retaining an authentication to which an individual is qualified or refusal for register an exchange of offers.

Where the risk is as of now clear yet the party subject is declining to settle up, that isn't a "contest". It is a simple default. It is legitimately significant.

Whatever be the kind of question, the issue in the contest must be of common nature. Matters of criminal nature can't be indicated to mediation. *In Booz Allen and Hamilton Inc v. SBI Home Finance Ltd and Ors*[309]., the Hon'ble Supreme Court of India held that by and large and customarily all debates identifying with directly in persona are viewed as agreeable to mediation and all questions identifying with directly in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration.

ARBITRATION AGREEMENT

Section 2(1)(b) and section 7 of the Arbitration and Conciliation Act, 1996 refer to arbitration agreement. Section 2(1)(b) merely refers to Section 7. Section 2(1)(b) does not give a definition of the arbitration agreement but provides that “arbitration agreement” means an agreement

[308] Tekchand v. Hajras Rai Arjan Das AIR 1929 Lah 564.
[309] (2011) 5 SCC 532.

referred to in Section 7 of the Act. Section 7 of the Act provides meaning, contents and essential ingredients of the arbitration agreement.

The following are the main essential ingredients of a valid arbitration agreement:

a. There should be a valid and binding agreement,
b. There should be an 'animus arbitrandi'
c. The agreement must be in respect of present or future disputes.
d. Aim to elude the question to assertion and to be limited by the choice of the judge.
e. Consent to allude to their debates to a private council for settling and eagerness to be limited by the choice of such court."
f. Not a dispute arising from and founded on an illegal transaction.
g. The agreement must be in writing

COMPOSITION OF ARBITRAL TRIBUNAL

The arbitral court is the animal of an understanding. It is available to the parties to give upon it such powers and recommend such method for it to follow, as they think fit, insofar as they are not restricted to law. The understanding must be in similarity with the law. The arbitral court should likewise act and make its award as per the general tradition that must be adhered to and the understanding.[310] Section 28 says that where the spot of mediation is arranged in India, the contest must be chosen as per the considerable law for the present in power in India. The council can withdraw from it just under an express understanding between the parties in which case the question might be concluded by equity and reasonableness or what is acceptable as per value and heart and not just fundamentally as indicated by specialized legitimate prerequisites.

NUMBER OF ARBITRATORS

Section 10 of the Act accommodates the quantity of mediators that can be delegated. On the off chance that the parties need more than one referee, they should explicitly so give in the understanding; in any case the reference is to be to a sole authority named with the assent of the parties. Where the contrary party declined to give assent considerably after the subsequent notification, the court would get the force on the utilization of other party to designate an authority.

[310] Secretay, Irrigation Department, Govt of Orissa v. G.C. Roy[(1992) 1 SCC 508].

The parties are allowed to decide the quantity of authorities. Section 10(1) likewise includes that such number will not be a significantly number. Where the parties don't decide the number, an assumption of law emerges that arbitral council will comprise of a sole referee.

In *Narayan Prasad Lohia & Others v. Nikunj Kumar Lohia & Others*[311], the Court saw that even as an issue of open arrangement it can't be said that Section 10 necessarily block the arrangement of a much number of mediators. Where the parties' consent is in too much number of authorities and the synthesis of the arbitral court or the mediation technique are as per the understanding of the parties, they can't be permitted to reside the award in the event that it isn't exactly as they would prefer. The arrangement contained in section 10 that the quantity of authorities will not be a considerably number is a derivable arrangement. In this way, any understanding which grants parties to delegate a significantly number of judges would not be in opposition to the arrangement of section 10 and such an understanding would not be invalid and void.

APPOINTMENT OF ARBITRATORS

Section 11 of the Arbitration and Conciliation Act, 1996 arrangements with the arrangement of Arbitrator. According to sub-section (1) of Section 11 an individual any nationality might be designated as authority (except if in any case concurred by the parties). The parties can concur with respect to the nationality of a referee in their understanding. Section 11(2) of the Act further gives that parties are allowed to consent to any technique for designating referee. On the off chance that the parties have concurred on a specific strategy for delegating the authority or judges as considered by the section 11 (2), at that point the question between the parties must be chosen as per the said system.

APPOINTMENT PROCEDURE UNDER ARBITRATION AGREEMENT.

a. Section 11(6) of the Act gives that where the arrangement method hosts been concurred between the parties and a party has neglected to act in wording if the understanding, for example,
b. A party neglects to go about as required under the arrangement system concurred between the parties; or
c. The parties, or the two delegated mediators, neglect to arrive at an understanding expected of them under that technique; or

[311] AIR 2002 SC 1139.

d. An individual, including an organization, neglects to play out any capacity endowed to him or it under that method,

At that point any party to the understanding may demand the Supreme Court or High Court or any individual or organization assigned by such Court to take the fundamental measures, except if the concession to the arrangement strategy gives different intends to make sure about the arrangement.

Conduct of Arbitral Proceedings

EQUALITY TREATMENT

Sec. 18 of the Act positions a twofold obligation on the Arbitral Tribunal: -

a. It must be free and fair-minded and should dispense equivalent treatment to each party.
b. It must give each party full chance to introduce its case Sec. 23 and 23 accommodate giving of such chance.

TIME, PLACE AND HEARING

Sec.20 (1) gives the parties the opportunity to fix by understanding where the assertion procedures will be held. Where there is no such understanding the spot of understanding will be fixed by the Arbitration Tribunal. In doing so the conditions of the case including the accommodation of the parties must be thought of.

Regardless of whether the spot of assertion has been fixed under sub Sec. (1) by understanding of parties or under sub-sec. (2) by the Arbitral Tribunal, the Tribunal may meet at some other spot it thinks about fitting-

a. For counsel of individuals,
b. For hearing observers or specialists,
c. For hearing the parties, or
d. For examining the records, merchandise or other property.

Section 19 gives the guidelines of methodology to be followed during the arbitration procedures. Sub-sec (1) gives that the Code of Civil Procedure, 1908 and the Evidence Act, 1872 are not official on the discretion procedures.

It is no uncertainty genuine that the referee is commonly liberated from chains of descriptive word law, yet that doesn't make him liberated from the major standards of equity. The fundamental rule is by all accounts that where there has been an open door stood to the other side to get a favourable position with the referee over the other, either by absence of notice or by the nonattendance of opposite side and there is even a slim Chance that the bit of leeway so

got may have unwittingly affected the psyche of the discretion, the procedures are vitiated by the break of the standards of common equity.

PROCEDURE

It is available to the parties to set somewhere around understanding, the methodology to be followed in the mediation procedures. Such system must not be in opposition to any arrangement of Part-I, for example, "the methodology set down in sections 23, 23 and 25, managing the announcement of guarantee and guard, hearing and composed procedures and outcomes of default by a party."

In the event that there is no understanding between the parties with regards to the strategy to be followed in the arbitration procedures, the arbitral court can follow any technique, which it thinks about suitable.

COMMENCEMENT

The arbitral proceedings commence as soon as a request is made by one party to the other referring the dispute to arbitration. "The determination of the date of commencement of arbitral proceedings is for the purpose of limitation. It is open to the parties by agreement to determine the date of commencement of proceedings. In the absence of such an agreement section 21 provides that such date shall be the date on which a request is received by one party from the other to make a reference of the dispute to arbitration."

LANGUAGE

Section 22 states that "the language of the proceedings is to be indicated by the parties under their agreement, failing which the Arbitral Tribunal will determine the language of its proceedings. The language so selected is to apply to any written statement of a party, any hearing and any arbitral award, decision and any communication by the Tribunal. The Tribunal may order that documents filed before it shall be translated into that language."

PROCLAMATION OF CLAIM AND DEFENCE

Sections 23 to 27 set out the technique to be followed in mediation procedures. The case and resistance host to be documented by the parties inside the time settled upon by the parties or fixed by the Arbitral Tribunal.

Without such understanding the petitioner needs to state –

a. The realities supporting the case,

b. The focuses at issue, and
c. The help or cure looked for

A mediator ought to get counter-guarantees as a piece of the pleadings of the parties and consider in choosing the question on its benefits. Alongside their announcements of guarantee and guard the parties may present every single pertinent archive. They may likewise add references to the records and other proof, which would be submitted later.

APPOINTMENT OF EXPERTS BY TRIBUNAL

According to sec.26, subject to "any agreement between the parties the tribunal may appoint one or more experts for a report on some specific issues which have to be determined. The Tribunal can ask the parties to give to the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection. The expert may have to be permitted participation in the proceedings to enable the parties to put questions to him and to produce other witnesses to testify on the points in issue."

DEFAULT OF A PARTY

Section 25 gives that if a party neglects to present the announcement of his case as per the arrangement of section 23(1) the arbitral court will end the procedures.

It enables the Tribunal to proceed with the procedures and to give its award where a party neglects to show up at an oral hearing, or neglects to create narrative proof.

The standards administering the referee's entitlement to continue ex-parte are:

a. If involved with an assertion understanding neglects to show up at one of the sittings, the authority can't or if nothing else, should not to continue ex-parte against him at that sitting.
b. Where non-appearance was coincidental or easygoing, the mediator ought to customarily continue in the normal way, fixing another date of hearing and anticipating the future conduct of the defaulting party.
c. If then again, apparently the defaulting party has absented himself for crushing the object of the reference the judge should give a notification that he planned at determined time and spot to continue with the reference and if the party concerned didn't go to he would continue in his nonattendance.
d. But if in the wake of making such authoritative arrangement giving such a notification the referee didn't in fact continue ex parte on the day fixed, yet fixed another ensuing

date, he was unable to continue ex parte on such resulting date, except if he gave a comparative notification in regard of that date also, and

e. If he gave a comparative notification and the party concerned didn't show up, an award made ex parte would be all together. Be that as it may, in the event that he didn't issue such a notification on the second event yet in any case continued ex parte, the award would be at risk to be put aside despite a notification authoritative hearing having been given in regard of the prior date, subject to the condition that preference was caused to the party against whom the ex parte request was made.

Mediator's activity should be in due consistence with the idea of normal equity. In case of there being any such infringement, courts should not to spare a moment to strike down an activity of the judge and put aside the award whenever made.

In Juggilal Kamlapat v. General Fiber Dealers Ltd, the Calcutta High Court set out the procedural standard to be trailed by the mediators; if a party neglects to show up, the judge should customarily to fix another date of hearing and anticipate the future conduct of the defaulting party, and give the party notice that if doesn't show up, he would continue ex parte against him. In the event that in the wake of having given such a notification the referee doesn't continue ex parte on the suspended date, and fixes another date, he can't continue ex parte on that date, except if comparative notification has been given in regard of that date also.

There is no arrangement in the 1996 Act requiring the referee to pull out of conclusion of hearings to the parties. Be that as it may, legal professions and reasonable play necessitate that the parties ought to be educated regarding the conclusion of the procedures. The courts have held that such a notification ought to be given in order to empower the parties to lead any extra proof on the off chance that they so want.

FORM AND CONTENTS OF ARBITRAL AWARD

Section 31(1) of the current Arbitration and Conciliation Act, 1996 explicitly necessitates that an arbitral award will be made recorded as a hard copy and will be marked by the individuals from the Arbitral Tribunal. On the off chance that the Arbitral Tribunal comprises of more than one referee it will be adequate if most of the individuals from the Tribunal sign it gave reasons are given to the discarded marks.

Sec. 31(3) gives that an Arbitral Tribunal must state purposes behind its award aside from –

a. When the parties have concurred that no reasons be given or
b. When the award is on concurred standing under sec.30

Therefore, a contemplated grant is necessary except if excluded by the parties.

Sub-sec. (5) requires the Arbitral Tribunal after it has made its award to give a marked duplicate to each party.

REQUIREMENTS OF VALID AWARD

At the finish of the meeting, the Tribunal passes its judgment and it is known as the award. There is no assumption that only in light of the fact that an award had been made. It is a substantial award it hosts to be demonstrated by the party who sues upon it that it was made by the referees inside the provisions of their position 15 a legitimate award needs to fulfil the accompanying prerequisites:

a. Must comply with accommodation – The referee ought to adjust to the provisions of the understanding under which he is delegated and should work. He has no position to referee what isn't submitted to him.
b. Must be sure – The award must be sure in its usable points of interest. For instance, there must be assurance with regards to the party who needs to perform, who needs to get the instalment, the time and method of instalment, the sum payable.
c. Must be reliable and not unclear – An award might be set as far as choices. An award guided the party to do one of the two things. One of the choices was dubious and unimaginable; however, the other was sure and conceivable. The award was held to be substantial and authoritative. The award ought to be steady in the entirety of its terms. A conflicting award is as awful as a dubious one.
d. Must be finished and last – The authority ought to at long last discard the issue before him and not leave it a mostly.

ATTRIBUTES OF FORENSIC ODONTOLOGY: THE TOOL MARKS OF ORAL CAVITY

- MANISHA DANSANA

1. INTRODUCTION

People can lie through their teeth, but their teeth cannot lie.

- John Furness

Forensic odontology or Forensic dentistry is the most common study dealing with dental evidence which is used in legal matters. This branch of study deals with medico-legal applications in crime related investigations in the legal field.[312] Bite marks are the most controversial issue which are caused during biting any object or people. This is done by the action of teeth and other oral structures which play a crucial role in identifying the suspects in cases like rape, homicide, child abuse and many more. They are helpful in ascertaining the culprits since the alignment of teeth is peculiar to the person involved. They also aid in identifying unknown bodies by dental records and to estimate the age of that individual from teeth.

The core objective of further investigation is to discover the identification of the person involved in the crime and to give the correct interpretation of facts. The sole purpose of doing such identification is just to give the correct interpretation of facts. Even a single piece of evidence has the ability to become a vital piece of information.[313] Truth is exposed by taking tooth under consideration for evidence. Forensic odontology can be utilized to its fullest or maximum potential when the law enforcement agencies and dental professionals go hand in hand. It is based on meticulous knowledge of anatomy of teeth and jaws, their radiograph, photographic study, molecular methods, rugoscopy, cheiloscopy, pathophysiology and other dental abnormalities.[314]

A forensic odontologist helps in providing a reliable analysis by taking into consideration the quality of bite mark. He gives a valuable contribution to identification methods in forensic

[312] Harmeet Kaur and P.K. Chattopadhyay, *Identification from Bite Marks A Study of Fifty Individuals* (1993) available at https://www.jstor.org/stable/41919735

[313] Steven Weigler, *Bite Mark Evidence: Forensic Odontology and the Law* (1992) The Journal of Law-Medicine, 2(2), 303-324, available at https://heinonline.org/HOL/License

[314] G. H. Sperber, *Forensic Odontology* (1978), available at https://heinonline.org/HOL/License

odontology.[315] As it is well recognised that teeth are the toughest human body part which survive even after the destruction that caused a severe damage or harm to various body parts. A number of recent trends were found in conventional forensic methods that will provide an insight into those current and recent concepts used in this arena. Forensic odontology essays an easy task in identifying individual and establishing evidences when other sources fail. This depends on distinctive feature of dentition and the knowledge of teeth and other ancillary structures which will provide accurate and correct outputs when methods and techniques are employed correctly.

This article is all about the utilization of Forensic odontology to its fullest when both law enforcement agencies and dental professionals go together simultaneously. It attempts to create the awareness among the people in relation to expanding role of Forensic odontology at an increasingly alarming rate.[316] The moral responsibility is upon the dental professionals for familiarising and imparting knowledge to law professionals and police personnel regarding the highest potential use of this unique field.[317]

2. FORENSIC ODONTOLOGY AND ITS PRESENT SCENARIO IN INDIA

Forensic odontology is one such field that is still nascent in India. Due to lack of knowledge the investigators are not sure on how to deal with bite mark related cases. Mere photographs are not sufficient rather than proper details and measurements are required. The sensitive marks are lost by the time complaint is made to police. Not just in criminal cases but also in civil cases, this branch has a role, for instance, ascertaining the athlete's age as to whether they can claim benefits of being senior citizen.

2.1 LACK OF IMPLEMENTATION OF FORENSIC DENTISTRY

Dearth of knowledge has created the need of awareness in the society in the three major arenas like lawyers, doctors and police authorities. They are still unaware of the scope and utility of Forensic Odontology. They should be properly oriented to make the fullest benefits of this branch of Forensic. There are many cases which do not use forensic odontology in investigation. Even the dentists of our country have a low knowledge related to the

[315] Harald Lampe & Klaus Roetzscher, *Forensic Odontology: Age Determination from Adult Human Teeth*, available at https://heinonline.org/HOL/License.
[316] Paul C. Giannelli, *Bite Mark Evidence* (2007), available at https://www.jstor.org/stable/23673564
[317] Paul Roger Fulton, *Forensic Odontology—An Overview* (1984), available at http://www.jstor.org/stable/26295490.

implementation of forensic dentistry. The Traditional legal course doesn't cover the concept of Forensic dentistry. Therefore this latest scientific concept can be covered now through internships and practical knowledge which would equip the lawyers to handle the case efficiently. Cops are able to deal with the case as this field is quite new and emerging, about which police personnel has no clue as they are still stick to old method of investigation.

2.2 PRESENT SCENARIO IN INDIA

The medical legal fraternity in India should take the responsibility of bringing light to the forensic dentistry and should realize their role in the investigation of criminal cases. India is still miles behind in this branch of forensic science both theoretically and practically. But currently, the Dental Council of India has formulated a rule of making Forensic odontology as a compulsory subject for all the dental aspirants.[318] In our country, the dentists involved in such investigation have a lack of knowledge and hence they are involved less in such investigation. This is due to dearth of experience, less exposure and insufficient training. The scarcity of skilled and qualified dental manpower in India must be updated and encouraged in order to develop this branch of forensic science in India. The Indian Association of Forensic Odontology and Indo Pacific Academy of Forensic Odontology have signed a pact and registered themselves by coming forward and working towards the promotion of this field of Forensic science.[319]

3. SCIENCE OF FORENSIC ODONTOLOGY

Forensic odontology can be used for the following purposes[320] like:

a) **Estimation of age** – In order to know the age of an individual, it is a concern in forming the individuality of a person as a development of dentition followed by a continuous progressive sequence of teeth beginning from four months until the emergence of third molar. There are several guides that help in estimating the age like increase thickness in dentinal, formation of pulp stones, pulp chamber and reduced cell population. With the advancement in age, the deposition of dentin occurs hence lowering the measurement of pulp cavity, considered as an age estimation guideline.

[318] http://www.dciindia.org/dciregulation_20 06/pages/BDS_Course_Regulation.html
[319] Balachander N Et., *Evolution of forensic odontology: An overview* (2015) J Pharm Bioallied Sci. 2015;7(Suppl 1):S176–80
[320] Jayalakshmi Kumaraswamy, *Truth from Untruth: Dental Pulp and Its Role in Forensic Odontology – A Retrospective Review,* available at http://www.ijofo.org

b) **Sex determination and DNA** – The most accepted methodology for identifying the gender of the person is done by DNA molecular analysis. Pulp is considered as the best source for DNA extraction. The Y region of the chromosome (XY) of the gene gathered from the DNA of the pulp can be used for determining the gender in such samples of forensics. Similarly the chromosome (XX) helps in determining the gender saying it is in females and (XY) chromosome in males.

c) **Blood group determination** – The blood group antigens which are present in the pulp help in determining the blood group. These antigens are used in the analysis of forensic related cases.

d) **Identification in mass disasters** – In mass disasters like floods, cyclones, droughts, earthquakes, tsunamis, epidemic and terrorist attacks, any kind of abuse, bite mark analysis, injuries and natural death Forensic odontology play a major role. Even in dead and decomposed bodies' identification, the forensic dentistry play a crucial role like drowned persons and victims of motor vehicles accidents.

3.1 APPLICATION OF FORENSIC ODONTOLODY

The four major areas of interest are as follows:

a) **Dental identification of the unknown Body:** The dental records and X-rays are compared to that of a corpse or unidentifiable remaining of human for the purpose of identification.

b) **Trauma and the Oral Injuries:** The oral injuries are interpreted with the legal norms and then it is applied to the legal matters.

c) **Dental misconduct and negligence:** The treatment of a patient done by a dentist is at first analysed and then the reports are presented in the form of findings before the court of law.[321]

d) **Comparison of Bite Mark:** The bite marks which are found on a victim are compared with the dental impressions that are made during the criminal suspects or investigation.

3.2 IMPORTANCE OF FORENSIC DENTISTRY

a) Maintenance and management of the dental records –

[321] Vol 2, Steven Weigler, *Bite Mark Evidence: Forensic Odontology and the Law* (1992) The Journal of Law-Medicine, 2(2), 303-324, available at https://heinonline.org/HOL/License.

The dental records build a foundation of the dental details of the patient. This reduces the malpractice and negligence of litigation. This information is used to compare with that of the findings in an unknown person.

b) Identification of human remains –

The ante-mortem dental records are compared with the post-mortem dental records in both individual cases and mass disaster cases. The dental information consists of missing teeth, prosthesis, dental caries and pathological lesions. But if ante-mortem records are not there then DNA profiling method shall be used by extracting DNA in order to identify the person. Even the denture serves as a good piece of evidence in the identification of the person.[322]

c) Assessing the sex of skeleton remains –

The sex is determined by DNA analysis. This is done by associating the morphological changes of pelvis and skull. Bones are evaluated when only skeletal remains are available; they are evaluated on the basis of morphology of the bone.

d) Collection and analysis of marks which are patterned –

- Lip print analysis: It is unique for every individual. This type of recording is useful in forensic investigation dealing with identification of humans on the basis of traces of lip. Such recording of lip prints are called cheiloscopy.
- Bite marks: This mark helps in linking the dentition of the suspect with a bite mark. While biting pressure is caused forming indentations which enables the investigating officer to connect the suspect to the crime.

4. EVIDENTIARY VALUE OF FORENSIC ODONTOLOGY

4.1 ADMISSIBILITY OF BITE MARKS EVIDENCE

In every federal and military case, the evidences of bite marks have been held admissible. Such evidences of bite marks must be established by the person who is an expertise in the forensic dentistry. Such evidences must go through the test of validity unlike other scientific evidences. In *Doyle v. State*[323], bite marks were established into evidence and was the first case to be recorded in the United States of America. In the aforesaid case, the bite mark on the impression of cheese piece was made on the mixture of plaster of Paris. Later that impression was

[322] Nikhil Raj, *Forensic Odontology- "Dentist as Third Eye"* (2016) available at http://www.ijofo.org
[323] Doyle v. State , 263 S.W.2d at 779

compared with the suspect. In *People v. Johnson,*[324] it was verified that the victim has bite marks on her breasts which were that of the defendant caused by his teeth. In this case the admissibility of such bite marks were never questioned during the proceeding. Another case, *People v. Marx*[325]deals with the issue of admissibility of bite marks evidence. It is found that the defendant has imposed the biting mark on the nose of the victim. In *People v. Milone*[326], the court observed that there was no unanimity in the reliability of the scientific testimony on the issue of the infliction of bite mark made by defendant which is found on the victim.

4.2 EVIDENTIARY VALUE

There are many cases where the bite mark evidences have been given weight. But there are circumstances where the bite marks are not given much weight as evidence. In *Litiker v. State*[327], other evidences like blood found on the wristwatch was that of defendant, The same blood sample was also found on the flower vase present in victim's house and the towel found in defendant's room was the same which was used to set fire. The ample of other circumstantial evidences out-weigh the bite mark evidence. This lowers the weight of bite mark evidence. In *Jackson v. State*[328]the prosecution fully relied upon bite mark and hair for their evidence. Forensic Odontologist testified that the bite mark found on the cloth of victim is that of the dentition of defendant. He further stated that the evidence is inconsistent; hence defendant was acquitted only on the basis of that bite mark.

4.3 ROLE OF FORENSIC ODONTOLOGY IN INDIAN CASES

There are some cases which are well-known for having these bite marks as part of the witness on the body of victim which helped the medical practitioners as well as forensic team in investigating the entire case. The following cases will give a clear idea about the role of this vital piece of evidence in solving the criminal matter.

1. **Delhi gang rape case, popularly known as Nirbhaya case (2012-2013)**

The investigating team found bite marks on body of the victim. It is one such case that shook the entire nation with such heinous activity of the culprits. A renowned forensic dentist was called to verify the evidences produced in this brutal case.[329] The bite mark seen in the

[324] People v. Johnson, 289 N.E.2d at 722 (1972)
[325] People v. Marx, 126 Cal. Rptr. at 350
[326] People v. Milone, 356 N.E.2d at 1350 (Ill. App. Ct. 1976)
[327] Litiker v. State, 784 S.W.2d 739 (Tex. Crim. App. 1990)
[328] Jackson v. State, 511 So.2d 1047 (Fla. Dis. CL App. 1987)
[329] Venkataramana Vannala Et., *Forensic odontology in India Key milestones and missed opportunities* (2017), available at https://www.researchgate.net/publication/317660940

photograph of the victim is compared with the dimension of dentition of the accused. It is proved that two out of six accused have the same dentition.

2. **Sheena Bora murder case**

The scientific experts involved in this case found that the body of Sheena Bora was identified from the skull and teeth of the dead body that was buried three years back then and the dental records which were gathered by the police personnel. Teeth are the last thing to be destroyed in the human body. The bones and skull played a major role in determining the DNA by the Forensic dentists. This helped the investigating officers to come to a conclusion that skeleton discovered after three years was that of Sheena and that she was murdered by her parents.

3. **Former Prime Minister Rajiv Gandhi assassination case (1991)**

The Forensic odontology was indeed proved to be of great help when the remains of his dead body were identified by his dentition. The Dentition unlike fingerprints has their own individuality in every aspect. Even after the remains of his decomposed and charred body, the ante mortem dental records and radiographs are useful in identifying the suspect and help in unravelling the truth and solving such high profile delicate cases. It is not easy to gather evidence after the damage is made to body but hard substances like skull and other bone related structures help in such cases.[330]

4. **Perumbavoor case**

In this case, a Dalit woman was brutally raped and then she was murdered mercilessly at Perumbavoor. The police personnel took the help of Forensic Odontologist by using various modern scientific methods to identify the assailant. There were a couple of bite marks on victim's shoulder. The measurement of one bite mark is 6 cm below the shoulder and another bite mark is around 12 cm from the root of neck. The dentition and the structure of the teeth helped in identifying the accused. There was a gap of more than three millimetres between the front row teeth.[331]

5. **Mumbai 26/11 terror attack case**

[330]https://timesofindia.indiatimes.com/city/chennai/forensics-doyen-helped-piece-together-rajiv-gandhi bombing-case/articleshow/59555430.cms

[331]https://www.thehindu.com/news/cities/Kochi/perumbavoor-case-police-turn-to-forensic odontology/article8593036.ece

In this case, the only survivor, Mohammad Ajaml Kasab was questioned whether he was a juvenile or not. It is not an easy task to know about someone's age. So the help of Forensic Odontology was taken to determine the age of Kasab. The court ordered the Radiologist to examine Kasab and determine his age. It was found that he was not a juvenile. It is possible to impersonate body but it is impossible to damage dental records.[332]

5. CONCLUSION

This article is all about the application of Forensic odontology to its maximum extent when both law enforcement agencies and dental professionals work together simultaneously in solving serious as well as heinous crimes. The moral responsibility is upon the dental professionals for familiarising and imparting knowledge to law professionals and police personnel regarding the highest potential use of this unique field.[333] This provides a sufficient finding that bite marks form an important role by the usage of latest technologies and methods in identifying and recognising the alleged accused of the crime committed by him. In India there are a very few Forensic Odontologists who are trained, qualified and have gained experience from foreign countries. Their qualification, experience, skills and knowledge were acknowledged by the Government of our Country. Human identification without complete post-mortem valuation can lead to delayed identification and denotes an infringement of human rights as well as international humanitarian Law. It is also found that in few instances, Forensic Dentistry has been used to its fullest, therefore it can be rightly concluded that this field of Forensic Science will make an impact in the future if importance is given upon this arena.

5.1 FINDINGS & SUGGESTIONS

- Forensic odontology is an emerging field, thereby an attempt should be made to make this a compulsory subject in the curriculum of the dental students during their academic tenure.
- India being a developing nation is lagging behind in this field of Forensic Dentistry so efforts shall be made to bring development in this.
- Delicate, complicated and high profile cases can be solved at ease when the forensic experience comes to the aid of legal regulations.

[332] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5210108/
[333] Paul Roger Fulton, *Forensic Odontology—An Overview* (1984), available at https://www.jstor.org/stable/26295490.

INTERNATIONAL ARBITRATION AND ICSID

- NIHARIKA SHARMA & ESHAN APRAMEYA CHATURVEDI

ABSTRACT

In this post-modern world, it is delightful to understand and see the rapid and blooming growth of economics and how individuals contribute to this development regardless of 'cross-border' or extra territorial transactions being necessary rather than optional. Also, it is of significant importance to understand that not all agreements and contracts between commercial organizations operating across borders or commercial organizations and states that they invest in are executed swiftly. Some transactions between entities get baleful and thus, give rise to a dispute which cannot or may not be adjudicated by the domestic laws of a state because of the transaction being extra territorial in nature. Overseeing situations like this, international agreements and contracts set out a dispute resolution clause which, authorizes the parties in the agreements to submit their dispute to an arbitration tribunal.

In this article, we shall discuss various types and relevant forums for those specific types of arbitration such as commercial arbitration and investment arbitration, the International Chamber of Commerce (ICC) and the International Center for Settlement of Investment Disputes (ICSID). A detailed analysis of how investment by individuals in foreign sates are protected, an overall operational mechanism of international investment arbitration which respect to ICSID shall be discussed. Also, this article will have a special emphasis on a grey area issue in the world of investment arbitration which is the denunciation of the ICSID convention by states, using brief case studies.

At the end, the article will also provide with the recent developments in the International Arbitration which has evolved over the period of several years: through some landmark awards passed by various International Arbitral tribunals and theories laid down by some perspicacious scholars.

INTRODUCTION

In today's world, investor-state dispute settlement (ISDS) has become the most common and controversial aspect of International trade and investment litigation. International Law through International Centre for the Settlement of Investment Disputes (ICSID) or The United Nations

Commission on International Trade Law (UNCITRAL) and various other forums allows an investor to sue a host state for violations of bilateral investment treaties (BITs) or trade and investment agreements.[334]

Arbitration is an alternative to litigation. It is primarily used to resolve disputes arising from commercial contracts, especially contracts with an international element.[335]

By entering into an agreement which usually contains a clause for dispute settlement by arbitration, an independent arbitrator, or a panel of three arbitrators (the tribunal), is appointed to hear the dispute and to produce a ruling (the award) on the merits of the dispute.[336]

Arbitration on national as well as international level is emerging as the most preferred form of dispute resolution method. Filing a suit in a domestic/national court is often dubious to investors from different nations who are neither aware nor willing to abide by the domestic laws of the host state. When opted for arbitration, if successful the investor may get an award enforced for monetary compensation, acquisition of property or for specific performance.

The aim of this article is to develop a conceptual framework for the International investment laws with special concentration on International arbitration and to study the constant evolution of the principles in investment laws with the help of the awards passed by various arbitral tribunal till the date. It examines what kind of dispute settlement is optimal based upon a given rationale and the kind of substantive norms that would be well-matched to that rationale. Here, it is also addressed how ICSID convention provides with the guidelines for arbitral proceedings and how it allows its signatory nations to denounce it whenever they desire.

I. Arbitration: An ultimate dispute resolution method

Whenever two or more parties are involved in a dispute, it is preferable that they get to discuss the matter and to arrive at a peaceful solution which will facilitate a useful future relationship.

[334] The treaty norms most frequently invoked in these disputes are the requirement of full market value compensation for expropriation, fair and equitable treatment (which has been interpreted to mean most narrowly protection from extreme egregious or shocking conduct of the state and most expansively the entitlement of the investor to a stable transparent legal and regulatory framework), and national treatment and most-favoured nation (MFN) treatment) (non-discrimination with respect to nationality). These norms are present in almost all the treaty instruments that provide for investor protection even though the wording differs from treaty to treaty as do the exceptions or limitations clauses. Sometimes these agreements also contain a so-called "umbrella clause", which may elevate breach of a contract between the investor and the host state, or of certain other kinds of commitments by the host state, into a breach of the treaty. What effect such "umbrella clauses" have has been the subject of highly inconsistent rulings among different arbitral tribunals

[335] Introduction to arbitration, 330 UNTS 38; 7 ILM 1046 (1968).

[336] UNCTAD Dispute settlement, International centre for settlement of investment disputes, 2.2 Selecting the appropriate forum

Even if they are not interested in a future relationship or trade it is always beneficial for both the sides to wind up everything without bearing or causing damage to one another. Arbitration provides with a fair chance to negotiate, discuss and arrive at a justifiable conclusion.

There is no official definition of arbitration in International or most of the national laws. For example, Article II, paragraph 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, generally known as the New York Convention, provides "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration …."[337] Though, the convention still does not define what arbitration is.

Nevertheless, some content has been given to the term by Secretariat[338], its principle characteristics are:

- arbitration is a mechanism for the settlement of disputes;
- arbitration is consensual;
- arbitration is a private procedure;
- arbitration leads to a final and binding determination of the rights and obligations of the parties.

HOW IS IT DIFFERENT FROM OTHER METHODS OF DISPUTE RESOLUTION?

Arbitration shares some of the traits of litigation and mediation but has features which are distinct from both. Similar to litigation, the award made by the tribunal in an arbitration is binding on the parties.[339] However, unlike going to court, the process is usually less formal and is confidential. Although mediation is informal, it requires both parties to reach an agreed settlement rather than having a decision imposed on them; this means that, subject to an award being challenged in court, there is greater finality to the arbitration process.[340]

ORGANIZATIONS THAT RUN ARBITRATION AROUND THE WORLD

There are several well-established forums that administer international arbitrations. Each organization has its separate set of rules and regulations which must be followed strictly by the parties approaching. Some well-known International arbitration institutions include International Chamber of Commerce (ICC), the London Court of International Arbitration

[337] United nations conference on trade and development, Dispute settlement 5.1 International Commercial Arbitration, pg. 8

[338] Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216, paras. 15-18, 17; Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, A/CN.9/207, paras. 29-30.

[339] An introduction to international arbitration: a guide from Stephenson Harwood LLP

[340] An introduction to international arbitration: a guide from Stephenson Harwood LLP, pg. 4

(LCIA) and the Singapore International Arbitration Centre (SIAC). Other administering bodies which are mainly concerned with dispute resolution related to international trade and investment are International Centre for the Settlement of Investment Disputes (ICSID). The United Nations Commission on International Trade Law (UNCITRAL) rules helps in establishing ad hoc arbitration proceedings.

WHY SHOULD ONE OPT FOR ARBITRATION OVER OTHER DISPUTE RESOLUTION MECHANISMS?

This is not a criticism of litigation or any mechanism for resolving disputes, rather there are some advantages of arbitration which must not be overlooked while deciding which forum to go for. While making an investment in a competitive market, the strategies and procedures followed by an investor is often preferred to be kept as secret. So, when a dispute arises between an investor and the state the proceedings and the decision given is expected to remain confidential. An award passed by arbitral tribunal is **confidential** (unless the parties agree otherwise). It is binding only on the parties to the dispute. Whenever a dispute arises one or more parties have already suffered losses and spending more amount of money and time in litigation would not be a great idea. Arbitration can be a **quicker** and **cheaper** way, especially for smaller and mid-sized cases.[341] The procedure is **flexible** and can be altered to suit the specific circumstances of each case. There is a wide range of **arbitrators with diverse qualifications**. For the matters involving technical complexity, parties can select arbitrators of their own choice as per the **relevant experience** or background to hear the dispute, rather than having to rely on a judge (or jury) who will likely have no or very little relevant technical knowledge/ experience. When approaching an International arbitration institution, **corruption and/or inefficiency** of national courts can be **avoided**. For international disputes, it can prevent different countries' laws coming into conflict by settling on one governing law and one set of rules at the outset. The arbitration can also be held in a pre-determined neutral venue, reducing the possibility of 'forum shopping' delaying the proceedings and removing accusations of deliberate or cultural bias in the outcome.[342]

[341] **INTERNATIONAL COMMERCIAL MEDIATION:**
A SUPPLEMENT TO INTERNATIONAL ARBITRATION
Ricardo J. Cata, Esq. – Mediator
Upchurch, Watson, White & Max

[342] Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216, paras. 15-18, 17; Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, A/CN.9/207, paras. 29-30.

I. Historical overview of International Law and Investor Protection[343]

International Law was first used as the investor protection tool in 19th century and early 20th century for using customary law of diplomatic protection of aliens primarily against states in global South.[344] Minimum standards of treatment was asserted and protection against expropriation was sometimes enforced by gunboat diplomacy or threat.[345] The capital-exporting countries' demands for special protection of investment in International Law was challenged as reflected in the Calvo Doctrine, the doctrine holds that the obligation of International law to protect the foreign investor must be limited to *non-discrimination* only.

By 1920s, the use of force as a means of enforcing diplomatic protection was off the table. Nevertheless, in case of United States, political diplomatic power was still in use for next few decades. However, at the same time the notions of an autonomous customary international law through arbitration commissions and various international legal practices were still heated up. The United States spread its idea for inclusion of investor's protection in international law.[346]

On 14 October 1966 the ICSID was created under the Convention on the Settlement of Investment Disputes between States and nationals of other states to depoliticize the ongoing conflicts between states and investors through arbitration.[347] It is one of the five organizations that make up the World Bank Group.[348] ICSID allowed the parties to the dispute freely to choose the legal norms to which they would agree by entering into a contract.

By the time of 1980s and 1990s the number of BITs raised dramatically out of which the great percentage included compensation for expropriation, Fair and Equitable Treatment (FET) and National Treatment. Entering into a BIT was considered to be a good idea to increase multinational investments as it provided protection to foreign investors against political risks. Around the beginning of 21st century, the instances of claims and awards under BIT and multilateral based ISDS multiplied. As of June 30, 2015, ICSID had 159 signatory States, and 151 Contracting States had ratified the Convention. Arbitration has emerged as the easiest and

[343] This overview draws considerably from Andrew Newcombe & Lluis Paradell, Chapter 1, Historical Development of Investment Treaty Law in LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009) and M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press 3d ed. 2010).

[344] International Investment Law and Arbitration: A Conceptual Framework, Robert Howse, p 12

[345] CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (University of California Press 1985)

[346] International Investment Law and Arbitration: A Conceptual Framework, Robert Howse, p 13

[347] IBRAHIM SHIHATA, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA (ICSID 1993).

[348] ICSID, **background information on the international centre for settlement of investment disputes (icsid), pg 2**

the most convenient forum to settle disputes between state and investors in a peaceful and unbiased manner.

CONCEPTUAL FRAMEWORK OF FOREIGN INVESTMENT LAW

International Investment Law is a set of rules and regulation which regulates the flow of foreign investment from one state to another and the same protects the interest of investors and economy of developing states. Foreign investment law has its origin in international law concerning the protection of aliens, a legal regime which is based on international human rights and the public international law principles such as fairness, equity, justice and non-discrimination which are incorporated in many BITs.[349]

I. ICSID arbitration

ICSID was established by the Convention for Settlement of Investment Disputes between states and nationals of other states (the Washington Convention) in 1965. The treaty was formulated by the World Bank and ICSID is headquartered at the World Bank's principal offices in Washington, DC.[350] The primary purpose behind the establishment of ICSID is to provide and facilitate conciliation and arbitration of international investment disputes. ICSID does not decide the cases, the independent arbitrators and conciliators appointed to each case hear the evidence and determine the outcome of the dispute. ICSID is deeply connected with the World Bank, in fact it is one of the five organizations that make up the World Bank Group. ICSID Administrative Council is the governing body of ICSID, each member state has one seat and one vote.

ICSID has two sets of procedural rules that may govern the initiation and conduct of proceedings under its auspices. These are: (i) the ICSID Convention, Regulations and Rules; and (ii) the ICSID Additional Facility Rules. ICSID also administers investment cases under other rules such as the UNCITRAL rules.[351] The ICSID caseload has increased multiple times from the past 15 years. Roughly 44% of ICSID cases are settled or discontinued before a final ruling is made.[352] In addition, where tribunals made final awards, they partially or fully upheld the investors' claims in roughly 46% of the cases to date. Article 25 of the ICSID Convention

[349] 4 Surya P Subedi, International Investment Law Reconciling Policy & Principle, (Ed, 2nd, Hart Publishing, Oxford and Portland Oregon, 2012), at 8

[350] ICSID, **BACKGROUND INFORMATION ON THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), pg. 1**

[351] ICSID, **BACKGROUND INFORMATION ON THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), pg. 3**

[352] **OUTCOMES IN DISPUTES DECIDED BY ARBITRAL TRIBUNALS IN ICSID CONVENTION AND ADDITIONAL FACILITY CASES (TO JUNE 30, 2015)**

allows the states to consent for ICSID arbitration.[353] It is not obligatory to approach ICSID arbitration if any dispute arises and both the parties to the dispute are signatories of the ICSID convention.[354] The last paragraph of the preamble to the ICSID Convention provides the following:

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Rather, the Convention provides them with an option to agree on arbitration. Arbitration becomes binding only upon the written consent of the parties to arbitration either in an investment agreement or otherwise.[355]

II. Jurisdiction of International Arbitral Tribunals

Jurisdiction of International Arbitral tribunals can be invoked under various circumstances and some of them are discussed below with the help of some landmark cases and awards:

A. Interpretation of Jurisdictional Undertakings

The interpretation of BITs and other treaties between the state and investors has always been a reason of conflict, discussion and debate. The UNCITRAL in *Grand River v. USA*[356] and *HICEE v. Slovak Republic*[357] centrally discussed interpretive approaches applicable to jurisdictional undertakings.[358] The issue in both cases concerned the relevance of extraneous evidence, other rules of international law in *Grand River* and unilateral explanatory materials in *HICEE* for the interpretation of a BIT.

The Tribunal in *Grand River v. USA* addressed the manner in which other rules of international law must be taken into account when construing the North American Free Trade Agreement's (NAFTA) jurisdictional provisions.[359] It was asserted by the claimants that customary

[353] Art. 25, ICSID cinvention
[354] http://www.worldbank.org/icsid
[355] ICSID Convention, preamble
[356] Grand River Enterprises Six Nations Ltd and Others v. United States of America, Award, UNCITRAL, *award* (January 12, 2011) (Fali Nariman (President), James Anaya (Claimant appointment), John Crook (Respondent appointment)) [hereinaft er *Grand River*].
[357] ***HICEE*** B.V. ***v***. The ***Slovak Republic***, Partial Award. 23 May 2011. ***HICEE*** B.V. ***v***. The ***Slovak Republic***, UNCITRAL, PCA Case No. 2009-11. Partial Award.
[358] Each remaining pair of dissenting and majority opinion bring to the fore diff erent approaches to interpretation of jurisdictional undertakings. Because these diff erences are driven in part by a diff erent conception of jurisdiction *ratione personae* and *ratione materiae* , these decisions will be discussed in diff erent sections below. Th e decision in *Brandes v. Venezuela* also addresses an issue of interpretation. Th is issue is related to burdens and standards of proof on jurisdiction and will be discussed in that section below.
[359] Grand River v. USA

international law regarding indigenous right had to be taken into account when construing NAFTA, relying on Article 31(3)(c) of the Vienna Convention on the Law of Treaties. [360]

The tribunal agreed on their obligation to take into account other rules of International Law in respect of the Vienna Convention's rules governing treaty interpretation and relied on a source of law also sanctioned by Article 31(3) of the Vienna Convention on the Law of Treaties, the subsequent agreement on interpretation of Article 1105 and subsequent practice between the NAFTA parties.[361]

In *HICEE v. Slovak Republic*, the tribunal was asked to determine the weight that should be accorded to a unilateral interpretive statement regarding a BIT that had been authored by the investor state. The provision to be interpreted was regarding the term 'investments' which shall comprise every kind of asset invested either directly or through an investor of a third state.[362] The opposite party challenged this claim, however the tribunal with majority opinion held that the construction of the Article in question was relevant could not apply it without recourse to subsidiary means of interpretation because text, context and object and purpose equally supported the readings proposed by the parties. [363] this set a guideline for future disputes that a unilateral note by a party is not mentioned as a supplementary means of interpretation in the Vienna Convention but it must be taken into account. In this case, the dissent submitted that the majority should have concluded the issue solely on the basis of a textual interpretation of

[360] Grand River, *op. cit.* , at 69–71. Th e relevant provision of the Vienna Convention on the Law of Treaties states that "Th ere shall be taken into account together with the context: [. . .] any relevant rules of international law applicable
in relations between the parties." Th e United States of America is a signatory, but not a party to the Vienna Convention on the Law of Treaties. See Status of the Vienna Convention on the Law of Treaties, available at http://
treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&la
ng=en (last visited June 14, 2012). Th e United States Department of State did not argue that it was not bound by art. 31(3) of the Vienna Convention, and the Tribunal should be understood to have applied the Convention as customary international law. For a recent discussion of the interplay between indigenous rights and international investment law in the natural resources context, see Valentina S. Vadi, "When cultures collide: Foreign direct investment,
natural resources, and indigenous heritage in international investment law," 42 *Columbia Human Rights Law Review* 797–889, 866 (2011) (criticizing that while "Customary rules of treaty interpretation, as refl ected in the Vienna Convention on the Law of Treaties, require systemic interpretation and reference to the 'relevant rules of international law applicable in the relations between the parties'," arbitral "tribunals, however, have oft en adopted a reductionist or minimalist vision of the arbitral mandate"). Vadi concludes that the "unwillingness of arbitral tribunals to apply law external to investment law refl ects their lack of consideration of broader political and social concerns and may weaken the wider eff ectiveness (and perceived legitimacy) of investor-state arbitration." *Id.* at 867

[361] Vienna Convention on the Law of Treaties (1969), art. 31.(3)(a)–31.(3)(b), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited June 7, 2012).

[362] HICEE, *op. cit.* , at 34.

[363] Id. at 116

the BIT. The same issue has made appearance in other treaty disputes[364] and Th e *HICEE* Tribunal effectively distinguishes these merits-based issues and injects new life into the relevance of reasoned unilateral positions taken by the home state concerning the jurisdictional scope of BITs.

B. Jurisdiction Ratione Personae

The main issues raised by arbitral decisions in 2011 in relation to jurisdiction *ratione personae* concern the establishment of qualifying nationality for juridical persons. The tribunal in *Alps Finance v. Slovak Republic* dismissed the claims made by the claimants that merely its presence in Switzerland was sufficient for treaty purposes. Whereas the BIT required that Swiss juridical persons both have a seat in Switzerland and conduct of real economic activity in Switzerland[365] and the claimants failed to proof the same. Th e Tribunal further stated that it would have required further evidence of real economic activities beyond proof of a seat because of the cumulative requirements in the BIT that the investor have both its seat in the home state *and* conduct real economic activities in the home state. The same was considered by the tribunal for further consideration of investment matters.

C. Jurisdiction Ratione Materiae

(1) The existence of a qualifying investment

The existence of a qualifying investment for purposes of international investment arbitration has been a key jurisdictional hurdle nearly from the inception of modern investment arbitrations.[366] Requirements to be fulfilled for qualifying as an investment are provided in various forms at different instances. The perquisites can be observed in a Bilateral Investment Treaties, multilateral investment treaties or ICSID convention. Also, the concept of investment has evolved furiously over the past few decades. Here are some examples of qualifications for a transaction to become an investment:

i. Treaty standards

---

[364] Example: Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, *award* (September 18, 2007), at 382–86. (Professor Francisco Orrego Vicu n a (President), Th e Hon. Marc Lalonde (Claimant's appointment), Dr. Sandra Morelli Rico (Respondent's appointment))

[365] Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the promotion and reciprocal protection of investments, art. I(1)(b), October 5, 1990, [hereinaft er Swiss-Slovak BIT], available at http://unctad.org/sections/dite/iia/docs/bits/slovakia_switzerland.PDF (last visited June 7, 2012).

[366] See, e.g., Pierre Lalive, "Th e fi rst 'World Bank' arbitration (Holiday Inns v. Morocco)—some legal problems,"
51(1) *British Yearbook on International Law* 123–62 (1980) (discussing in section VI the nature of "investments" as they were considered in the fi rst ICSID arbitration).

Meaning of an investment is often provided in BITs. BIT clearly states whether and how investments needed to comply with host state law.[367] It provides with the conditions about when and which assets will be covered under the definition of investment.[368] Good faith is a very common criteria given under various treaty provisions[369] because the bad faith by the investor goes immediately to the validity of the substantive legal relationship.[370]

In conclusion, the last decade has led to decisions on the meaning of investments that appear to be

in disagreement with whether the *Salini* -factors (discussed in next section) should be considered when interpreting definitions

of investment in a BIT.[371]

ii. The ICSID Convention

Whether the definition of "investment" used in the ICSID Convention potentially limits the jurisdiction *ratione materiae* of ICSID tribunals, even when the definition in the underlying instrument of consent has been satisfied, has long been an issue of debate.[372] The most important decision regarding various aspects of investment especially its meaning in context

[367] Malicorp Ltd v. Th e Arab Republic of Egypt, ICSID Case No. ARB/08/18, *award* (January 31, 2011) (Professor Pierre Tercier (President); Professor Luiz Olavo Baptista (Claimant appointment); Pierre-Yves Tschanz (Respondent appointment)) [hereinaft er *Malicorp*];
Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneft egaz Company v. Th e Government of Mongolia, Ad hoc/UNCITRAL, *award on jurisdiction and liability* (April 28, 2011) (Claims made: FET, national treatment, MFN) [hereinaft er *Paushok*]

[368] Alps Finance, *op. cit.;* White Industries Australia Ltd. v. Republic of India, UNCITRAL, *fi nal award* (November 30, 2011) (Judge
Charles Brower (Claimant's appointment), Christopher Lau SC (Respondent's appointment), J. William Rowley QC (Chairman)) [hereinaft er *White Industries*].

[369] *Malicop*

[370] Malicorp, *op. cit.* , at 115; Phoenix Action, *op. cit.* , at 113 ("In the instant case, no question of violation of a national principle of good faith or of international public policy related with corruption or deceitful conduct is at stake. Th e Tribunal is concerned here with the *international principle of good faith as applied to the international arbitration mechanism of ICSID* . Th e Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.")(emphasis in original).

[371] KarlPsauvant….. pg. 58

[372] For a recent discussion of the draft ing history of the defi nition of investment in the ICSID Convention, see Julian Davis Mortenson, "Th e meaning of "investment": ICSID's travaux and the domain of international investment
law," 51(1) *Harvard International Law Journal* 257–318 (2010), p. 289 (submitting that the current version of art. 25(1) of the ICSID Convention was premised upon the United Kingdom proposal of December 8, 1964 which contemplated "wide-open jurisdiction for ICSID as the baseline starting point, and explicit opt-outs that states could use to limit ICSID jurisdiction on an individual basis").

of the ICSID convention was the majority opinion and dissent in *Abaclat et al. v. Argentina.*[373] Argentina objected that the claimants' interest in the sovereign bonds were not investments because the claimants had failed to make any contribution to Argentina for a duration involving a risk contributing to the economic development of Argentina, invoking the *Salini* test.[374] Argentina further objected that in this case, the financial instruments were also not made in its territory but were New York instrument, subject to a New York dispute resolution clause.[375] The objections were rejected by the majority giving the reason that the *Salini* test is not applicable in that case and the issue whether an investment was made or not was to be governed by the instrument of consent, the Italy-Argentina BIT.[376] Th e majority explained that application of the *Salini* test in this instance would impermissibly constrain access to arbitration in a manner inconsistent with the aim of the ICSID Convention. [377] On the other hand, The dissent explains that investment in the context of the ICSID Convention was intended to refer to project investment, or foreign direct investment, not financial investments as evidenced by other World Bank constitutive documents.[378] It established that because "the alleged investment is totally free-standing and unhinged, without any anchorage, however remote, into an underlying economic project, enterprise or activity in the territory of the host State,"[379] there was an "absence of a 'protected investment'." [380]

Th e *GEA Group* decision does not rely upon a hard distinction between the meaning of the term investment in the ICSID Convention and most BITs, noting instead that the term "'investment'

per se is often considered as having an objective meaning in itself."[381] ICSID convention has laid several guidelines in this regard with the cases rising every now and then. Some awards serve as the basic guidelines for several years without a disruption until a new award comes and overrule the same.

(2) Jurisdiction over counterclaims

[373] ***Abaclat*** and Others ***v***. ***Argentine*** Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others ***v***. The ***Argentine*** Republic)
[374] Abaclat at 341 (i)
[375] Abaclat at 341 (ii)
[376] Abaclat a 365-366
[377] Abaclat at 364
[378] *I d.* , at 42.
[379] Id. at 118
[380] Id. at 119
[381] GEA Group, *op. cit.* , at 141 (stating that the arbitration proceedings had been commenced on "27 June 2001" and that the bankruptcy proceedings had been commenced "in 2002").

The ICSID tribunal struggled for many years over the issue whether it has jurisdiction over the counterclaims of host state to an investor's BIT claims. Till date there is no substantial precedent answering this question, Tribunal in *Spyridon Roussalis v. Romania* dealt with the similar issue and rather resolving the claims asserted by Romania, it held that it lacked jurisdiction of Romania's counterclaims because the claimants had not consented to arbitration of such counterclaims. [382] Article 25 of ICSID convention required that the consent instrument for both parties must specifically incorporate the claims asserted, including counterclaims.[383]

D. Jurisdiction by means of Most-Favoured-Nations Clauses

This is another way of invoking the jurisdiction of ICSID tribunal in international investment disputes. The Cases against Argentina continue to generate decisions on the invocation of the most-favored-nations clause in the jurisdictional phase.[384] The tribunal in *Impregilo v. Argentina*[385] and *Hochtief v. Argentina*[386] both permitted an investor to invoke the most-favoured-nation clause to overcome jurisdictional obstacles.

E. Merits

i. Expropriation

Customary international law has long afforded states the authority to expropriate foreign investments, as long as the expropriation: (i) is for a public purpose; (ii) is non-discriminatory; (iii) complies with due process principles; and (iv) provides the investor with prompt, adequate, and effective compensation.[387] Expropriation can be direct i.e. state engaging in outright seizure of foreign-owned facilities or mandating an obligatory transfer of title and indirect i.e. state's action that tantamount to expropriation or is equivalent to expropriation.[388] The arbitral decision in *S.D. Meyers v. Canada*[389] provides a clear analysis of the definition of "measures tantamount to expropriation." The infrequent holding by tribunals of indirect expropriation lies

[382] Spyridon Roussalis, *op. cit.* , at 872.
[383] Article 25 ICSID convention
[384] Laird,Sabahi, Sourgens, Haque, in *Yearbook on International Investment Law and Policy* 2008/2009, *op. cit* ., pp. 120–22.
[385] in *Impregilo v. Argentina*
[386] *Hochtief v. Argentina*
[387] L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I know it When I See It, or Caveat Investor*, 13 ASIA PAC. L. REV. 79, 81 (2005).
[388] Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award of the Tribunal (Dec. 16, 2002), 7 ICISD Rep. 341, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC587_En&caseId=C175.
[389] S.D. Myers, Inc. v. Government of Canada, UNCITRAL/NAFTA, First Partial Award, ¶ 285 (Nov. 13, 2000), 40 I.L.M. 1408, *available at* http://italaw.com/documents/PartialAward_Myers_000.pdf ("The primary meaning of the word 'tantamount' given by the Oxford English Dictionary is 'equivalent.' Both words require a tribunal to look at the substance of what has occurred and not only the form.").

largely with the degree of the deprivation that has been required by tribunals. Th e question has been posed as to whether a loss of some investment value (but not all), as opposed to a complete destruction of value, would be sufficient to result in an indirect expropriation.[390] In particular, it has been held that an indirect expropriation must result in a "substantial deprivation" of the value of the investment.[391]

There have been n number of instances when investors have approached the ICSID arbitral tribunal with issue of expropriation of their investment. It provides with a stable ground for jurisdiction of ICSID tribunal.

ii. Fair and Equitable Treatment Standards

The FET standard protects investors against serious instances of arbitrary, discriminatory or abusive conduct by host states. It does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily. So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States.[392]

Almost every BIT contains some minimum standards which must be observed by the host states while taking any measure which will affect the investment made in their country. And when a state fails to comply with these standards, the investment is adversely affected and Arbitral tribunals takes this issue under the purview of their jurisdiction to resolve.

DENUNCIATION OF THE ICSID CONVENTION.

The International Center for Settlement of Investment Dispute[393] was initially ratified by 20 countries and entered into force on October 14, 1966. The convention now stands ratified by the 154 contracting states[394]. In this postmodern world, the convention's objective is to protect the best interest of the foreign investors, to settle disputes of investors who invest in foreign states *i.e disputes* between sates and nationals of other contracting states.

During the melt down of the Alternative Bolivariana para la América Latina El Caribe (ALBA), Bolivia on the 2nd of may 2007 became the first state to submit their notice of denunciation to

[390] As described by the Impregilo Tribunal, *op. cit.* , at 270:
[. . .] there are borderline cases where restrictions on the use of property go so far as to leave the investor with only a nominal property right. Th is could in appropriate cases be regarded as indirect expropriation. Th ere are other situations in which successive measures are taken to deprive the investor of his rights to administer his property and where at some point the investor may be considered, as a combined eff ect of several acts, to have been deprived of the property (so-called creeping expropriation).
[391] Grand River, *op. cit.* , at 147
[392] Schill, 2009, p. 263
[393] ICSID or the convention.
[394]https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx. Official ICSID page.

the depository with accordance to the Article 71 of the convention[395] followed by Ecuador and Venezuela.

The denunciation by the above mention sates presented and seemed to continue a new expression of hostility towards

international investment arbitration, and various types of investment protection treaties that were entered into sates for the promotion of protection of investments made by foreign investors. The whole outset posed a threat to the investment environment.

THE RIGHT OF DENUNCIATION AND RELEVANT PROVISIONS OF THE CONVENTION AND POST DENUNCIATION CONSEQUENCES.

The Vienna Convention on law of treaties under article 54 provides that " the termination of a treaty or the withdrawal of a party may take place by; (a) in conformity with the provisions of the treaty; or (b) at any time, by the consent of all the parties after the consultancy with contracting sates and organization. Also, Article 56[396] sheds light upon the scenario where there is absence of a denunciation, termination or withdrawal provision and expressly states "a treaty is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal or (b) a right to denounce or withdraw may be implied by the nature of the treaty."

The ICSID convention itself is well equip and have two dedicated provisions for the denunciation or the withdrawal of a party from the convention. Article 71 of the convention is the provisions of the convention which allows or grants the parties of the convention a right to denounce or withdraw from it. It provides that "Any contracting sate may withdraw from the convention by a written notice to the depository[397] of the convention. The denunciation shall take effect six months after the receipt of such notice."

All three denouncing states *i.e Bolivia, Ecuador and Venezuela* had submitted their notice to denounce the convention to the depository of the convention in accordance with Article 71 of the convention and very soon the focal point of discussion did not remain confined to if a state can denounce the convention or not but rater, what are the consequence of denunciation of the convention by the sates, will the convention fail to provide protection to foreign investors and investment as par its objectives of enforcement, will investor have to face a hostile environment to invest on foreign lands. Also, another critical question that was to be addressed was if the

[395] ICSID news release of May 16, 2007 "Bolivia submits a notice under Art 71 of the ICSID Convention."
[396] Article 56(1) of VCLT.
[397] Article 73 of the convention.

denouncing party ceases exist as a party to the convention on the very same day the notice is submitted to the depository or will the state only be considered to be an alien party to the convention after the six months period set forth under Article 71 of the convention.

The tribunal in Blue Bank v. Venezuela[398] relied upon the opinion of Prof. Emmanuel Gaillard who stated that after a state has given a notice of denunciation and such notice has taken into effect it ceases to be a party to the ICSID convention. Though the tribunal in the case did not recognize its jurisdiction to adjudge the dispute, it made it very clear that the denouncing state did remain a party to the convention at the time the claimants sent in their request to arbitrate the dispute just a few days prior to the laps of the six period after the submission of the notice to denounce the convention.

After the six months period comes to an end, the party ceases to be a contracting sate to the convention and therefor no longer has any right that the center provides and is also no liable for any responsibilities of the center. Also, it was ascertained by various scholars that's the six months period set forth under the article is for the denouncing state to surrender all their rights and immunities of the center and also to render all pending liabilities against the center and other investors which includes going through with the enforcement of pending awards by various other ICSID tribunals.it was also opined on the same basis, the party cannot be bound by new obligations of the center.

However, one very significant question which still remains unanswered is about what happens to the existing obligations of the denouncing states. This very same problem of a denouncing party's existing obligation was foreseen by the drafter of the ICSID convention and that is why the wise drafters apprehended this problem and inculcated Article 72 of the convention which dealt to wrap a situation wherein a denouncing state or any of its sub divisions or agencies, has consented to the jurisdiction of the center prior to the notice of denunciation. Article 72 narrates:

"Notice by a contracting state pursuant to article 70 and 71 shall not affect the rights or obligations under this Convention of that state or of any of its constituent subdivisions or agencies or any national of that contracting sate arising out of consent to the jurisdiction of the center given by one of them before such notice was received by the depository."

The article very clearly narrates that pursuant to this provision, the withdrawal of a state from the ICSID does not affect its obligation under the convention if it has given consent to the jurisdiction of the center before it gave its notice to denounce the convention. This provision

[398] Blue Bank v. Venezuela

ensures that states that are party to the convention do not unilaterally frustrate the effectiveness of existing rights and obligations by withdrawing from the convention and is entirely in conformity with the customary rule of international law. Article 70(1) of the Convention on law of Treaties narrates that until and unless a treaty otherwise provides or parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present convention: (a) releases the party from any obligation further to perform the treaty; (b) does not affect any rights, obligations or legal situations of parties created through the exclusion of the treaty prior to its termination."

Since the only right and obligation of the denouncing party post their denunciation is their consent for the jurisdiction of the center, this obligation and any other right in relation to this obligation, in ways mean that the derogation contained in Article 72 maintains its status as a contracting party. The whole narrative of "consent to the jurisdiction of the center" is thus at the heart of this derogatory regime.

RECENT DEVELOPMENTS IN INTERNATIONAL ARBITRATION AND CONCLUSION.

To have a command over every process of evolution and even the slightest changes in laws, procedures or to be well read upon what and how is happing in the profession is one key practice to be a successful, the following are a set of short and quick review of the recent developments in investment law and arbitration:

- *Phoenix action v. Czech Republic* laid down meaning of investment going beyond the *Salini* guidelines as the contribution of money, for sufficient duration, bearing risk and have contributed to the economy of the host state. The assets must be invested in accordance with the laws of the host state and the investment must be bona fide.
- Application of FAA § 10 Literally: the court rejected the ability of parties to expand scope of judicial review by agreement.
- English Arbitration Act 1996: permits appeal on points of law by agreement of the parties or order of the court
- Israeli Arbitration Act reportedly now permits parties to elect private or public review.
- CPR Rules: structure for review by arbitral appellate panel.
- FAA § § 10 & 11 provide exclusive grounds for vacating arbitral award.
- "Manifest disregard" is no longer viable as an independent, non- textual ground for vacatur.

- More than 80% of documents and data now exist only in electronic format: If there is to be disclosure, electronic disclosure is unavoidable.
- ABA/AAA Revised Code of Ethics for Arbitrators (2004).

In a world in which anyone can have access to any kind of information or connect to any part of the world within few clicks or just by touching on screens, International arbitration law has come a long way from its inception and is continuing to evolve with every passing day. This article provided with an outline of emergence of arbitration as a huge and the most preferred dispute resolution method and its relation with investment laws on an international scale.

ADDICTED OFFENDERS – REHABILITATION AND CHALLENGES UNDER THE CRIMINAL JUSTICE SYSTEM

- PRANAY GOLCHHA

ABSTRACT

Addiction to drugs is not something that is a foreign concept to the people of India. Our social fabric has been stretched thin and made weak by the threats of this menace. It, more often than not, doesn't stop at addiction itself but goes beyond it. Habit, if left unchecked and uncontrolled, directly contributes to the occurrence of crime in a region and poses an extreme danger to both the addicts and the people around them.

So, more significant quantities of the same drug are required to enter a state of intoxication and stimulation. When the addict can't get the drug through money, he/she will beg, borrow, steal, or even kill for another dose. This is the primitive, fundamental basis of addiction, and is how drug addiction compels a person to commit crimes.

The relationship between Alcoholism and crime is complicated because behind in every crime, drugs and Alcoholism is the prominent role to increase in most cases. There are various quite different sorts of correlation between Alcoholism, Illegal drug use, and other kinds of crime. Some of these connections recommend that the drug use itself causes or explains the crime; others suggest that involvement in different types of crime helps to explain the drug use.

INTRODUCTION

Addiction to drugs is not something that is a foreign concept to the people of India. Our social fabric has been stretched thin and made weak by the threats of this menace, and it, more often than not, doesn't stop at addiction itself but goes beyond it.[399] Habit, if left unchecked and uncontrolled, directly contributes to the occurrence of crime in a region and poses an extreme danger to both the addicts and the people around them.

Drugs are also called *narcotics,* a word of Greek origin – *narcotics* – which alludes to a state of laziness or lethargy. The Kind of Drugs and Sedatives are as follows -

i) Stimulants,

ii) Hallucinogens,

iii) Synthetic narcotics, and

[399] S. V. Joga Rao, *Drug Addiction: Penal Policy,* 34 JOURNAL OF THE INDIAN LAW INSTITUTE 275, 279-280 (1992).

iv) Custom-made/Designer drugs.[400]

Although the immediate effect of a drug upon ingestion is the stimulation or relaxation of the body and psyche, the long-term effects are always dangerous and make the user dependent on that specific drug after repeated and prolonged use. Different kinds of narcotics, as stated above, have varying effects on the user, but all of these are regulated, controlled, or prohibited by the Narcotic Drugs and Psychotropic Substances Act, 1985.

The act defines various forms of narcotics, some of which are commonly used and known, for example – *cannabis (hemp),* and its derivatives, *poppy, opium,* its derivatives, etc.; it also defines *medicinal cannabis* and differentiates between manufactured drugs and narcotic drugs, while covering other aspects of narcotics-related substances.[401]

As to the adverse effects and spread of these drugs amongst the Indian population, a combined report published by both the United Nations Office on Drugs and Crime and the Indian Ministry of Social Justice and Empowerment stated that approximately 62.5 million people are addicted to alcohol, 8.75 million to cannabis, and 0.6 million to sedatives. Major narcotics prevalent are cannabis, opium, and heroin.[402]

It is this dependence on narcotics and other intoxicating substances that pushes addicts to exhaust whatever avenues available to continue consuming that substance. Immunity develops by the body to the effects of the drug over time. So, more significant quantities of the same drug are required to enter a state of intoxication and stimulation. When the addict can't get the drug through money, he/she will beg, borrow, steal, or even kill for another dose. This is the primitive, fundamental basis of addiction, and is how drug addiction compels a person to commit crimes. Their rehabilitation is imperative since punishment is not always the answer to cure their addiction. But some challenges are to be dealt with when trying to give these addicts a new lease of life, and the results are not always desirable.

The issue of drug addiction, combined with the threat of crime, is a pressing issue which can only be dealt with if the spread and use of narcotics are truly well-regulated and controlled, or to use a better term, supervised. The NDPS Act, 1985, provides definitions, as well as punishments, for the use and consumption of regulated and prohibited substances. But that is all well and good when it comes to the letter of the law. The implementation of the same in spirit is another herculean task entirely. The lawful authorities are often lax in their supervision

[400] B. R. SHARMA, FORENSIC SCIENCE IN CRIMINAL INVESTIGATION & TRIALS 953-54 (5th ed., Universal Law Publishing, 2018).
[401] *Ibid.*
[402] Sanjay Kumar, *India has widespread drug problem, report says,* NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC443486/ (last visited on January 17, 2020).

in this regard and are to blame for the inconsistencies and breaches of the law. They often themselves partake in such violations.

Furthermore, the concept of rehabilitation of drug addicts is relatively new in India, and there are not many places where addicts can safely and surely recover from their malaise. That, and the existence of social stigma, which ostracizes such individuals from society, thus further pushing them down a never-ending cycle of deterioration and decay. Then there is the question of those who are imprisoned, and who never get a chance at rehabilitation. Here, the judiciary must intervene and set precedents which decrease the stigma attached to addicts who wish to recover from their preferences.

DRUG ADDICTION AND ITS RELATION TO CRIME

Colonel R.N. Chopra, throughout the study in this matter, pointed out that India's drug addiction has existed on a more extensive scale than in any other country in the world except China. However, little is known regarding the problem. Although substance use is harmful in-and-of-itself due to the acute and chronic health effects experienced by drinkers and drug users, it is also problematic because of its apparent impact on criminal behavior.

There is general agreement that substance use often accompanies interpersonal violence. However, beyond that point, there is little agreement that substance use can (or cannot) be thought of as a cause of violent crime. For some, the fact that drinking and drug use is a cause of violence is self-evident. Others are much warier of describing the relationship between substance use and power as causal. This disagreement is mostly a function of different conceptions of causality.

The rate of crime in India is very high. The relationship between Alcoholism and crime is complicated because behind in every crime, drugs and Alcoholism is the central role in increasing in most cases. There are various quite different sorts of correlation between Alcoholism, Illegal drug use, and other kinds of crime. Some of these connections recommend that the drug use itself causes or explains the crime; others suggest that involvement in different types of crime helps to explain the drug use. The most frequently recurring connections indicate that drug use and crime are both linked to other underlying financial and subsocial components.

The connection between substance misuse and brutal wrongdoing is also seen as a reason for the criminals, who are supporters of the situational crime prevention approach. Their emphasis

on "proximate" causes that are capable of crime prevention uses substances. Still, in a possible situation, it is used to differentiate between types of crimes, which can then be the focus of the problem solutions is. In this sense, violence related to alcohol becomes a special kind of crime, against which the policies and practices of prevention can be employed.

There are more stringent views about the use of the substance and most other scholars of crime, which is considered to be a cause of the latter for the latter. Given that it has been well established that the use of the substance is neither an essential reason for crime (because there is a crime in the absence of the use of the crime substance) nor the adequate cause of the crime (because of drugs and alcohol Widely used without criminal behavior), their research is guided by the idea of a possible cause instead, in which the issue is whether substance use increases the probability of crime.

REHABILITATION POSSIBILITIES

'De-dependence' focuses are the pillar of medication treatment conveyance. As indicated by the NDPS Act, these focuses might be set up by the focal or state governments or willful associations. Directly, administrations for drug reliance are accessible through:

1. Government emergency clinics that give inpatient and outpatient care, generally detoxification. According to official insights, drug treatment is accessible in 122 government medical clinics the nation over. The focal government has, as of late, declared designs to open 'drug treatment centers' at whatever clinics and offer narcotic replacement treatment.
2. NGOs, which get awards from the Ministry of Social Justice and Empowerment (MOSJE) and their state partners (Departments of Social Welfare) to run incorporated restoration places to make "addicts drug-free, wrongdoing free and profitably utilized. " *346 such NGO centers were being funded in 2013-14.*
3. Psychiatric hospitals or nursing homes, operating privately, under license by the *Mental Health Act, 1987*[403]. These institutions offer a range of psychiatric services besides drug dependence treatment.
4. Private 'de-addiction' centers operate without registration or license.

[403]The Mental Health Act, 1987 provides for the establishment of special institutions for 'persons addicted to alcohol and other drugs that cause behavioural changes'. The Act and the Rules framed thereunder lay down an onerous system of licensing of private institutions that offer such treatment.

What is pertinent to note is that the importance of drug addicts to be rehabilitated rather than arrested and kept in prisons was even recognized by the United Nations Office on Drugs and Crime when it released a *guide on the rehabilitation of drug addicts*[404].

SUBSTANCE ABUSE TREATMENT IN CRIMINAL JUSTICE SYSTEM

Jail conditions are inalienably coercive,[405] and uncommon protections have been created to guarantee that detainees can pick openly whether to partake in biomedical exploration unafraid of the outcome. Past simple equipoise, clinical preliminaries must be planned so the inquiry is suitable for the detainee member paying little heed to the allocated investigation gathering. Inside these imperatives, it is essential to lead an exploration to help improve substance misuse treatment and to aid the fruitful progress of the substance victimizer to the network[406]. To encourage research here, the National Institute on Drug Abuse made the Criminal Justice Drug Abuse Treatment Studies research helpful, an organization of restorative offices connected with treatment research focuses and network treatment programs. Sedative agonist meds utilized for the treatment of heroin enslavement, for example, methadone and buprenorphine, are underused in remedial populaces.[407]

Naltrexone, a sedative rival, was created to treat heroin enslavement yet additionally has been affirmed for treating liquor addiction. Naltrexone is probably going to be more satisfactory in the criminal equity setting than agonist prescriptions. Be that as it may, the helpless consistency with naltrexone has restricted its utilization in the treatment of heroin habit. The ongoing advancement of an enduring terminal plan for naltrexone hinders this impediment, and a multisite clinical preliminary is at present assessing its viability in heroin-dependent probationers. Another zone of exploration proposed to decrease independent offenders is the improvement of immunizations against cocaine, methamphetamine, or heroin[408].

ACCESS TO ESSENTIAL MEDICINES

[404] Drug Abuse Treatment and Rehabilitation – A Practical planning and Implementation Guide by the United Nations Office on Drugs and Crime.

[405] Gostin LO. Biomedical research involving prisoners: ethical values and legal regulation. JAMA. 2007;297(7):737–740

[406] Wexler HK, Fletcher BW. National Criminal Justice Drug Abuse Treatment Studies (CJ-DATS) overview. Prison J. 2007;87(1):9–24.

[407] Comer SD, Collins ED, Kleber HD, Nuwayser ES, Kerrigan JH, Fischman MW. Depot naltrexone: long-lasting antagonism of the effects of heroin in humans. Psychopharmacology (Berl) 2002;159(4):351–360.

[408] Comer SD, Sullivan MA, Yu E, et al. Injectable, sustained-release naltrexone for the treatment of opioid dependence: a randomized, placebo-controlled trial. Arch Gen Psychiatry. 2006;63(2):210–218.

The NDPS Act permits the clinical utilization of opiate drugs and psychotropic substances. However, morphine and different narcotics were inaccessible to patients because of exacting arrangements and punishments. As of not long ago, rules for ownership and utilization of morphine and other clinical drugs were encircled by state governments, which implied that clinical suppliers needed to acquire different licenses from numerous organizations[409]. Accessibility didn't improve even after the focal government proposed a disentangled method for developing morphine in 1998.

Palliative consideration bunches addressed how India delivered and provided morphine to the created world while patients back home had no entrance. The issue was at last tended to through administrative revisions in 2014, which killed cumbersome state licenses for essential opiate prescriptions and take into account uniform guidelines.

UNEVEN CO-ORDINATION AMONGST GOVERNMENT AGENCIES

Medication strategy organization is partitioned among focal and state governments as well as among services and offices at a similar level. The circulation of subjects between the inside and state has just been talked about in the paper. The division among services and offices is portrayed in the First Schedule under the Government of India (Allocation of Business) Rules, 1961, which outlines the extent of work of every organization[410] .

The usage of medication strategy has some of the time seen a befuddling cover and, now and again, a renouncement of obligation. Punjab compensation a 'war on medications' Drug use and reliance is high in the northern Indian province of Punjab. 'Uncommon drives' were dispatched against individuals who use drugs, who were either captured or compelled to take affirmation in 'de-habit' focuses. While the specialists have reported designs to extend treatment and restoration offices, strategy choices which approach drug use as a wellbeing as opposed to a criminal issue, (for example, expanding the accessibility of mischief decrease measures and the decriminalization of medication use)were not considered[411].

In actuality, hurt decrease specialists, especially specialists who recommend and administer OST in private facilities have been undermined with legitimate authorizations. This exhibits the indistinguishable idea of medication strategy – while the law grasps hurt decrease, drug implementation offices keep on surrendering it. With the organization of the NDPS Act, 1985

[409]http://www.hrw.org/news/2009/10/28/indiaprovide-access-pain-treatment.
[410]http://cabsec.nic.in/showpdf. php?type=allocation_first_shedule_abr10_3&special.
[411]http://timesofindia. indiatimes.com/india/Why-mandatory-deathpenalty-be-not-abolished-Supreme-Court-asks-govt/ articleshow/17446507.cms.

just as with issues identifying with the worldwide shows on opiate drugs, psychotropic substances and antecedent synthetic compounds, aside from those oversaw by the Ministry of Home Affairs[412].

LACK OF CONSULTATION IN POLICYMAKING

The absence of strategy co-appointment is aggravated by the non-utilization of consultative instruments gave in the NDPS Act and the NDPS Consultative Committee Rules, 1988 (the Committee Rules). The NDPS Act permits the focal government to build up a 20-part NDPS Consultative Committee (the Committee) as an approach warning body with an expansive order[413].

The Committee Rules permit the Committee to survey the NDPS Act and Rules, exhort the legislature on strategy matters, and consider some other issue mentioned by the administration. The Committee may set up an exceptional report on any subject of significance for the administration's thought. The Committee may assign explicit strategy matters to sub-panels, including sub-boards of trustees that audit strategy implementation and treatment, restoration, social reintegration and other associated issues. The Committee can draw upon specialists and common society agents to survey and recommend changes in almost all regions of medication strategy. Unfortunately, these arrangements have not yet been summoned [414].

SUGGESTION ON THE ISSUE

Focuses for thought in light of the approach difficulties delineated over, the accompanying change prospects are proposed to the legislature of India for thought [415]:

• Review the brutal and unbalanced condemning structure under the NDPS Act, and eliminate the criminalization of medication use and burden of capital punishment for drugs offenses

• Ensure that the legitimate arrangements on drug treatment are satisfactorily applied in a manner that empowers individuals who use medications to get to prove based treatment administrations without the danger of reformatory endorses, for example, criminal indictment and detainment

[412]Chakrapani, V. (2012), Access to comprehensive package of services for injecting drug users and their female sex partners: Identification and ranking of barriers in North-East India (UNODC, ROSA), p. 36.
[413]http://pib.nic.in/release/release.asp?relid=40414.
[414]United Nations Office on Drugs and Crime (2013), Rolling out of opioid substitution treatment (OST) in Tihar prisons, India: Scientific report.
[415]http://reformdrugpolicy.com/wp-content/ uploads/2011/10/Drug-Policy-in-India-CompoundingHarm.pdf.

• Adopt and implement least quality guidelines to guarantee that the treatment programs are deductively demonstrated and regard the basic freedoms of individuals subject to drugs

• Expand admittance to opiate and psychotropic drugs important for treating a scope of ailments, with viable shields against illegal preoccupation

• Improve co-appointment between government divisions with an unmistakable dispatch for each state organization on creating and actualizing approaches and works on identifying with drugs

• Consult with common society gatherings, including delegates of individuals who use drugs, clinical experts, scholastics and patient gatherings work in drugs issues in drug strategy plan

• Establish standard information assortment on drug use, reliance and related wellbeing suggestions, for example, HIV and viral hepatitis pervasiveness among individuals who infuse drugs.

• Apply hurt decrease standards to sedate approach definition with the target of diminishing the damages related with drugs, rather than being guided by the unachievable objective of making a 'without drug' society.

CHALLENGES TO REHABILITATION

Notwithstanding the legitimate obligation on the administration to make rules for the foundation and guideline of treatment focuses, neither the local nor state governments have encircled such standards. Thus, an enormous number of unapproved 'de-fixation' focuses have multiplied to take advantage of the edginess of individuals who use drugs and their families. Rather than clinical consideration, 'disciplines' are dispensed to patients, incurring extreme torment and, now and again, causing passing.

These episodes have become exposed from the whole way across India, showing that current standards around least quality standards of care64 are not being followed. A legitimate intercession in 2009[416] prompted the proclamation of NDPS Rules for treatment offices in Haryana[417] and Punjab[418], which bury Alia require all medication treatment and restoration offices to get a permit and be dependent upon review.

The Rules unequivocally uphold intentional entrance into treatment and accommodate conclusion and, sometimes, criminal activity against focuses that work without a permit or

[416]Talwinder Pal Singh v. State of Punjab, Crl. Misc. No. M- 26374 of 2008 before the Punjab and Haryana High Court.

[417]Haryana De-addiction Centres Rules, 2010.

[418]Punjab Substance Use Disorder Treatment, Counselling and Rehabilitation Centres Rules, 2011.

where common liberties are disregarded. Nonetheless, as has been featured by India Today – "Notwithstanding the foundation of legal standards, individuals who use drugs keep on being confined automatically and experience viciousness, mercilessness, and a large group of other fundamental freedoms infringement in such focuses. However, as has been highlighted by India Today –"*Despite the institution of statutory rules, people who use drugs continue to be detained involuntarily and experience violence, brutality and a host of other human rights violations in such centers.*

The biggest problem, as can be clearly understood, is the lack of proper treatment facilities. As per the official report released by the government of India in 2019 –

"Among those people with alcohol and drug dependence who attempt to quit, just about a fourth report is receiving any help. A tiny minority accesses treatment in the formal, organized sector. Indeed, 'admission to a de-addiction center' (which is mistakenly regarded as the primary modality of treatment of substance use disorders in India) is received by a minuscule proportion of the affected population. The most common type of facility where patients receive treatment is the government general hospital; neither the program by the MoSJE (support to NGOs for establishing Integrated Rehabilitation Services for Addicts – IRCAs) nor the Drug DeAddiction program of the Ministry of Health and Family Welfare (support to government hospitals for establishing de-addiction centers) can cater to the vast demand of treatment."[419]

CONCLUSION

The connection between sub drug dependence, additionally called substance use issue, is a sickness that influences an individual's cerebrum and conduct and prompts powerlessness to control the utilization of a lawful or unlawful medication or drug. Illicit drug use can begin with test utilization of a recreational medication in social circumstances, and, for specific individuals, the medication use turns out to be more successive. For other people, especially with narcotics, chronic drug use starts with a presentation to supported remedies or tolerating medications from a buddy or relative who has been suggested the medication. The risk of subjugation and how brisk you become subordinate fluctuates by the drug.

A couple of meds, for instance, opiate painkillers, have a higher peril and cause oppression more quickly than others. As time goes on, you may require more significant segments of the prescription to get high. After a short time, you may need medicine to feel good. As your drug

[419] Magnitude of Substance Use in India, 2019 by the Ministry of Social Justice and Empowerment, Government of India in Collaboration with National Drug Dependence Treatment Centre and All India Institute of Medical Sciences (AIIMS), New Delhi.

use builds, you may find that it's undeniably hard to abandon the medication. Endeavors to stop drug use may cause severe yearnings and cause you to feel genuinely sick (withdrawal indications). You may need support from your doctor, family, friends, uphold gatherings, or a composed treatment program to conquer your chronic drug use and stay drug-freelance misuse and brutal wrongdoing.

When it comes to rehabilitation of drug addicts and offenders, though the same is actively promulgated by the United Nations and by the various provisions in the law, the fact of the matter remains that a profound revolution is required in the monitoring of the treatment process of drug offenders by government authorities. The biggest fallacy for drug addicts and offenders in India is that while the proper treatment mechanism for drug addicts is known, it is rarely practiced in most private drug addict rehabilitation homes, particularly those working at low rates. The addict is treated little more than a heinous criminal resulting in low success rates for dropping addiction. Though a mass scale curtails this practice through compulsory medical licensing, it is still a widespread problem concerning the rehabilitation of drug addicts in India.

RESERVATION IN INDIA: AN ANALYSIS IN LIGHT OF RAWLSIAN PRINCIPLES OF JUSTICE

- ARUSHI GUPTA

INTRODUCTION

Affirmative action in India is primarily based on an individual's caste and it stems from article 15(4) of the Constitution of India.[420] It provides for reservations in educational institutions based on an individual's caste, and broadly poses two problems: (1) Poverty-stricken individuals who belong to the middle-class category, but do not fall within the caste pre-requisites, earn no benefits under reservation; and (2) The individuals falling under the 'Creamy Layer'[421] often misuse their caste status to reap the benefits of reservation in India. To put it simply, benefits of reservation are hardly reaching the lower strata of the society, thereby making the rich-richer and the poor-poorer.

The aim of this paper is to examine such bigoted reservation policies of India through John Rawls' principles of Justice as Fairness and depict how caste-based reservation has failed to coordinate with its primary objectives. The aforementioned shall be materialized in the paper with the help of Indian Case laws which shall support the fact that the prevalent caste-based policies go against John Rawls' First and Second Principle. Conclusively, by a deeper analysis of Rawls' theories, the paper shall focus on proposing an alternative method of enacting economic-based reservations in India.

BRIEF DESCRIPTION OF RAWLS' CONCEPTS

John Rawls' theory of Justice as Fairness[422] aims to set out the arrangements of social and political institutions in a liberal society with the help of two key elements, *'original position'* and '*veil of ignorance'* ("***veil***").[423] *Original position* is a fictional situation where individuals choose principles of justice through a fair and impartial viewpoint, behind a hypothetical covering, i.e., *veil*, and every person has a right of liberty and equality.[424] In Rawls' opinion if any pre-existing knowledge relating to caste, class, gender, etc., of a rational and self-interested

[420] INDIA CONST. art 15, cl. 4.
[421] A term introduced by the *Sattanathan Committee*, 1971 (shall be discussed further below).
[422] JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press 1999).
[423] Hristina Runcheva, *John Rawls: Justice as Fairness behind the Veil of Ignorance*, 4 I.P. L. REV. 1, 4 (2013).
[424] Jean Hampton, *Contracts and Choices: Does Rawls Have a Social Contract Theory?,* 77 J.P. 315, 317 (1980).

individual is taken away, which does happen under the *veil*, then this individual shall treat everyone equally.[425]

However, behind the *veil*, two principles are to be followed in absolute terms to attain equality- (1) The First Principle ("**FP**") asserts that each individual has equal basic rights and liberties.[426] It ensures freedom of speech, association, liberty, accessibility, etc., to all citizens,[427] for equality before the law, when the surrounding circumstances are normal.[428] (2) The Second Principle ("**SP**") relates to social and economic inequalities, and can further be divided into two sub-parts- (i) *Fair equality of opportunity* principle: those with similar talents must have similar opportunities; (ii) *Difference* principle: benefits must be distributed equally amongst all the citizens, except where an unequal distribution would benefit the least-advantaged section of the society.[429]

ANALYSIS: APPLYING RAWLS' THEORY TO CASTE-BASED RESERVATION

If seen from Rawls' hypothesis of the *veil*, an individual who is looking at the society from a free and equal stance would opt for a reservation system because *"in all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed"*[430] The Supreme Court of India ("**SC**") recognised the essence of this theory in as early as 1963 in the *Balaji case,*[431] wherein it held that social-class could not be the sole criterion for reservations because *"backwardness, social and educational, is ultimately and primarily due to poverty."*[432] This would connote that those who are at the lower end of the caste hierarchy, such as the Scheduled Caste **("SCs")**, Scheduled Tribe **("STs")** and Other Backward Classes **("OBCs")**, should not be given unequal opportunities due to their social status, but instead be given opportunities based on their abilities or lack of monetary means. It often happens that those belonging to the SCs and General category perform at par with each other, as not all SCs lack the resources to educate themselves or their kin,[433] and this implies that the caste-based system is not fulfilling its' original impetus any longer.

[425] Runcheva, *supra* note 4, at 4-5.
[426] Robert F. Ladenson, *Rawls' Principle of Equal Liberty*, 28 I.J.P.A.T. 49, 49 (1975).
[427] A.K. Upadhyay, *Rawlsian Concept of Two Principles of Justice*, 54 I.J.P.S. 388, 389 (1993).
[428] LEIF WENAR, JOHN RAWLS (Edward N. Zalta ed., Stanford Encyclopaedia of Philosophy 2017).
[429] PHILIPPE VAN PARIJS, DIFFERENCE PRINCIPLES 3 (Cambridge University Press 2001).
[430] JOHN RAWLS, JUSTICE AS FAIRNESS A RESTATEMENT 44 (Erin I. Kelly ed., Harvard University Press 2001).
[431] M. R. Balaji And ors. v State of Mysore, (1963) A.I.R. 649 (hereinafter '*Balaji Case'*).
[432] *Id.* at 135.
[433]Thomas E. Weisskopf, *Impact of Reservation on Admissions to Higher Education in India*, 39 E.P.W 4339, 4342 (2004).

It must be observed that in no case under Rawls' *veil* would a rational person not choose a system of reservation as there are equal chances of him belonging or not belonging to that specific bracket after the *veil* is lifted.[434] So, it is likely that a method of positive discrimination is supported, even though it might *prima facie* seem that according to the FP an individual might not chose a system of reservation due to reservation's nature of condoning unequal rights. However, economic instability is apparent to those behind the *veil,* hence due to the lack of standard finances and common lifestyles in India,[435] reservation demanded by the law would be in line with the liberty principle, i.e., FP. The only difference is that individuals behind the *veil* shall accept a system of income-based reservations instead of a caste-based system.

The *Mandal commission case*[436] upheld the *Balaji Case,*[437] and developed the concept of 'creamy layer', which helped in shifting away from an exclusively caste-based reservation system. This 'layer' is a group of educationally and economically advanced individuals, with an annual income above Rs. 8 lakhs,[438] who are still marginalized in terms of their social status because they belong to the SCs, STs or OBCs category.[439] Irrespective of the advent of such income-based demarcation, caste-based segregation that was condoned in the earlier case of *N. M. Thomas*[440] prevails in India substantially, and the creamy layer class does not fail to take advantage of such policies.

In educational institutes, 49.5% of seats are allowed to be reserved for students who belong to the subordinate castes,[441] and the General category could argue that this goes against the *Fair equality of opportunity* principle under the SP, especially considering the fact that individuals who were once left behind due to their caste are now at par with the General category individuals. The origination of one's class would be considered an arbitrary factor under the SP, and would disallow the use of caste system to provide unequal positive opportunities, especially for educational purposes.[442] However, in a country such as India where 21.92% of the population lies below the poverty line[443] and the average household income is Rs 1,13,222/-

[434] Donald N. Schroeder, *John Rawls and Contract Theory*, 56 I.J. 338, 345 (1973).
[435] WENAR, *supra* note 9.
[436] Indra Sawhney v Union of India, (1993) A.I.R. S.C. 477 (hereinafter '*Indra Sawhney case'*).
[437] Balaji Case, *supra* note 12.
[438] A. K. MANGOTRA, REPORT ON INCOME CRITERIA FOR CREAMY LAYER (2015).
[439] *Id*.
[440] State of Kerala & Anr v N. M. Thomas, (1976) A.I.R. 490.
[441] PRESS INFORMATION BUREAU GOVERNMENT OF INDIA, RESERVATION POLICY (Ministry of Personnel, Public Grievances & Pensions 2019).
[442] WENAR, *supra* note 9.
[443] DATA-BOOK COMPILED FOR USE OF PLANNING COMMISSION (Planning Commission of India 2014).

annually,[444] it might appear to be a fair solution to promote those disadvantaged members of the society based on their monetary insufficiencies rather than their subordination in caste. This would also stop the Creamy Layer of the society from taking undue advantages of their caste, and according to the *fair equality of opportunity* principle, if they really do deserve a chance because of their motivation or endowment for the spot in contention, they shall not be at any disadvantage.

The main idea behind reservation is, *"to do social and economic justice",*[445] so, it must be noted that there are certain groups of people in the General category who cannot afford basic living conditions, and at the same time cannot avail the benefits of the caste-based reservation. The *Difference* principle is important to discuss at this point since it holds for greatest benefits to be provided to the most disadvantaged individuals of the society.[446] The recent stance of the SC in the *Jarnail Singh case*[447] has taken a step in the right direction and the applicability of the *difference* principle can be observed because while the economic parameters for Creamy Layer were only applicable to OBCs earlier, this case upheld that they shall also be applicable to SCs/STs. The SC held that affluent members of any subordinate castes should not be allowed to avail the benefits of those that are genuinely deserving and the most downtrodden. Further, echoing the thoughts of Justice Nariman, *"the whole object of reservation is to see that backward classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class, bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were."*[448]

Conclusively, with Rawls' principles, the least economically stable shall also be able to grasp the opportunities of reservation and avoid advancement of those that are born with a silver spoon in their mouth. So, someone born with a better financial status would not simply be better off in trying to secure a place at an expensive educational institution because they have the means, and simultaneously those without the financial means shall not be stripped of, at the very least, the opportunity of attaining a place at the same educational institution. The only criteria anymore would be a person's ability and endowment, and as long as two people have

[444] NITIN KUMAR BHARTI, WEALTH INEQUALITY, CLASS AND CASTE IN INDIA 1961-2012 (Paris School of Economics 2018).
[445] Balaji Case, *supra* note 12, at 135.
[446] RAWLS, *supra* note 11, at 42-43.
[447] Jarnail Singh v Lachhmi Narain Gupta, (2018) 10 S.C.C. 396.
[448] *Id*, at 15.

the same ability, financial requirement shall be provided to the economically subordinate individual under Rawls' Justice as Fairness.

CONCLUSION

The concept of economic parameters for reservations were rejected by the Mandal Commission,[449] and subsequently by the SC in the *Indra Sawhney* case,[450] and the reality of caste-based reservation remains. The aim of reservations is to reduce inequalities, yet India's method has failed to do so despite the SC's order to keep the Creamy Layer out of the reservation system. Hence, the result of applying Rawls' two principles to the reservation system in India shall be two-fold: Firstly, the *fair equality of opportunity* principle, which takes precedence over the *difference principle*,[451] entails that caste-based reservation is not applicable due to the unfair opportunity to every individual behind the *veil* since social class is an arbitrary factor and the ability of an individual to perform based on other factors would be more relevant.[452] Secondly, the *difference principle* would give further direction to the former principle and would hold that economic segregation would be a more relevant consideration in an economy such as India's, where average household income is Rs. 9,435/-, per month.[453] The most financially disadvantaged individuals in India are the ones who actually require a system of reservation that, as seen above, Rawls would have ideally proposed.

A step may have been taken in the right direction in India wherein the Parliament in 2019 passed a bill which provides for 10% reservations to the economically weaker sections of the society in governmental jobs and educational institutions.[454] However, a key point to be noted here is that the 10% quota is being withdrawn from the General category and not the 50% (approx.) reservation that is already being provided to the SCs, STs and OBCs.[455] This recurring increase in the reservation percentage and decrease in seats for the General category may ultimately be adding to the problem of reservation instead of eradicating it. However, due to the fresh nature of this amendment, one might not be sure of its repercussions on India's financially weaker sections just yet.

[449] B. P. MANDAL, BACKWARD CLASSES COMMISSION (1980).
[450] Indra Sawhney case, *supra* note 17.
[451] Emily Hartz & Carsten Fogh Nielsen, *From conditions of equality to demands of justice: equal freedom, motivation and justification in Hobbes, Rousseau and Rawls*, 18 C.R.I.S.P.P. 7, 18 (2015).
[452] WENAR, *supra* note 9.
[453] BHARTI, *supra* note 25.
[454] The Constitution (Amendment) Act, 2019, No. 103, Acts of Parliament, 2019 (India).
[455] *Id.*

ANALYSING THE DECISION OF THE COMPETITION COMMISSION OF INDIA IN THE TYRE AND CEMENT CARTEL CASE

- ARCHIT UNIYAL

The 2 landmark cases regarding cartel jurisprudence in India are the All India Tyre Dealers Federation vs Tyre Manufacturers[456] and the Builders Association of India vs Cement Manufacturers Association[457] better known as the Tyre cartel case and the Cement Cartel case respectively. These 2 are considered to be landmark because the manner in which CCI used circumstantial evidence created a problematic jurisprudence. The 2 cases are very similar in facts but also unusually contrasting to each other and the parallelism factor plus the market structure plays a big role in both. I will be comparing the facts of both the cases parallelly and analysing the issues in with respect to Section 3(3) of the Indian Competition Act, 2002(Act). Section 3(3) of the Act talk about enterprises that deal in similar kind of goods or services and enter into an agreement while they are at the same stage of production. Also known as Horizontal agreements these include cartels. Such agreements are presumed to result in collusive or bid rigging and hence are in violation of the provisions in the Act. Such agreements are termed anti-competitive as the enterprises/cartel start controlling or affecting the production/supply of goods and services, prices of goods and services

FACTS AND ANALYSIS:

1) Since the time that cement manufactures consolidated in 2001/02, it has been claimed that the cement industry operates in an oligopolistic market through anti-competitive collusion. Unsuccessful efforts have been made since the 1989 (when the cement industry was de-controlled) to hold all of the manufactures liable under the Monopolistic and Restrictive Trade Practice (MRTP) Act, 1969 for collusive price setting. In the cements cartel case,[458] the Builders Association of India (BAI) accused the Cement Manufacturers Association (CMA) for fixing the prices of the cement and also limiting its production and supply.

[456] All India Tyre Dealers' Federation v. Tyre Manufacturers, (2012) S.C.C OnLine CCI 65.
[457] Builders Association of India v. Cement Manufacturers Association, (2012) S.C.C OnLine CCI 43.
[458] *Id.*

In the tyre cartel case,[459] there was an allegation against the domestic tyre industry by the AITDF, that they were indulging in anti-competitive activities. The tyre manufacturers were alleged to be the perfect example of carrying out price and trade malpractices against the interest of the users as these major tyre manufactures were taking the excise duty illegally. This has a direct bearing on the state exchequer as it affects their revenue. Moreover, it wasn't the first time the tyre manufactures were coming under the scanner of the Monopolies and Restrictive Trade Practices Commission (MRTPC) as an order of cease and desist had been passed in 1974 against their restrictive trade practices/ the cartelization by the domestic industry. Their acts within the tyre industry have led to the creation of a creamy layer. By price rigging and strangulation of production and supplies these few tyre manufactures have occupied a top position in this marginalized community and have even exploited Tata Motors, who are big manufactures of vehicles.

2) In the cements case in 2012 the DG suspected on the fact that there was regular meeting being held which the members of the CMA attended had something to do with the rise in cement prices as they were moving in the same direction and also in the same manner. This led to CCI imposing a hefty fine of 6,300 crore Rs. on the concerned parties.[460]

In the tyre case, after analysing various economic factors the DG concluded that a cartel existed amongst these manufacturers and ATMA. He came to a conclusion that the Tyre manufacturers and ATMA were in violation of the provisions of the CCI as they were acting in concert to distort the domestic tyre market.[461]

3) In the Tyre cartel case concluded that due to the fact that the market structure in which the tyre manufacturing companies operated was oligopolistic, all of them sold homogenous products, and there was no easy entry/exit, the manufactures cannot be said to be involved in cartelization under Section 3(3) of the Act.[462]

[459] supra note 16.
[460] supra note 17.
[461] supra note 16.
[462] supra note 17.

In stark contrast, in the Cements cartel case that the CMA which was an umbrella organisation under which several cement manufacturers were indulging in cartelization were held to be guilty under Section 3(3) of the Act.[463]

4) On one hand the CCI said that there existed a parallelism amongst the cement manufacturers on the basis of similar figures of under-utilisation and production, parties after consulting each other having same prices. Another thing to notice was the dispatch parallelism which was one of the main reasons in the judgement in the cement cartel case. The pattern of changes in dispatches of cement from 2009 to 2010 by the top companies were very similar.[464] But on the other hand, where the facts were similar, the CCI claimed that the tyre manufactures can't be held guilty as, between the parties there was an absence of similar specific patterns.[465] One reason why CCI had such different opinion in both the cases can be attributed to the fact that there existed an open-door policy in India which restricted the tyre manufactures from anti-competitive pricing conduct, whereas the cement manufactures couldn't be inferred to guilty for holding a meeting regarding price fixing.

5) The cases are controversial for reason that the CCI failed to establish a certain threshold regarding cartelization. Just the fact the companies change their prices in the same way, the fact they these companies could have changed their price because of the supply and demand forces in the market was not appreciated by the CCI. In a market where homogeneous products are sold, this is a very basic characteristic that a seller responds to the prices depending on how the other players in the market react. Circumstantial evidence like communication between companies doesn't exactly provide the substance and it only proves that they met. When it comes to a third-party trade association, the same applies as providing pricing information is not a substantial circumstantial evidence. However, the CCI in the cements case held such communications to be sufficient irrespective of the fact that it was pretty evident that all of the cement

[463] supra note 16.
[464] supra note 17.
[465] supra note 16.

manufactures were consistently working according to their self-interest.[466] The market structure, which was oligopolistic in this case was completely disregarded, but the same characteristic was enough justification for CCI in the tyre case to hold that the reason for identical pricing was in fact due to the market's oligopolistic characteristic.[467] What is weirder on part of CCI is that when a similar case[468] in facts as cements cartels case came up, the CCI didn't even order the DG for investigation and discarded the case on the fact the glass bottle manufactures were operating in a market where homogenous products were being sold.

The Supreme Court of India in the case Rajasthan Cylinders and Containers Ltd. v. Union of India[469] held that "parallel pricing alone is not sufficient for a finding of bid rigging and that market conditions can be responsible for such parallel behaviour."[470]

6) When it comes to cartelization Indian law is similar to the laws in various other jurisdictions like the United States and European Union which has a settled law that in order to prove a claim for cartelisation between parties, price parallelism is not enough and the "plus factors" also need to be proved in order for one to be held guilty under Section 3(3) of the Act.

The analysis of the plus factors was certainly better with tyre cartel and was certainly applicable in the tyre cartel. In the tyre cartel the CCI were on the fence as there were two factors for cartel and two factors against it. The fact remains that in the tyre cartel case there weren't enough plus factors indicating collusion to the extent that they were indicating in the cement cartel case.[471]

CONCLUSION:

As established the issue that both the cases have in common is that of Price Parallelism. The CCI as evident from the facts of the case took in consideration the plus factors as well for analysis. The idea of using the rule of reason in US could act as a very good suggestion for

[466] supra note 17.
[467] supra note 16.
[468] All India Distillers' Association v. Haidyn Glass Gujarat Ltd, (2010) S.C.C OnLine CCI 17.
[469] Rajasthan Cylinders and Containers Limited v. Union of India, (2018) S.C.C OnLine SC 1718.
[470] *Id.*
[471] supra note 16.

Indian law regarding to the presumption for cartels. The presumption doesn't give a conclusive proof that a cartel exists but only makes up a prima facie case. Collusion needs to be proved in a creative way as in most of the cases that deal with cartel, there is an absence of direct evidence.

In the absence of direct evidence, as in most cases dealing with cartels, collusion is required to be proved in more creative ways. Talking about the cement and tyre cases, it could be inferred that the parties, in order to raise prices were acting in concert. But the lack of an explicit agreement, relying on circumstantial evidence, and completely discarding that fact that the firms could be acting in a similar way due to the natural conditions in the market, selling similar/homogeneous products, casts a doubt on how the CCI will deal with cartels in the future who operate without an explicit agreement.

RIGHT TO PRIVACY IN THIS ERA OF PAPARAZZI

- NIKITA DAS

ABSTRACT

The media in Indian jurisdiction is referred to as the fourth estate of democracy, the legislature, judiciary and the executive being the other three. It has also been guaranteed a freedom of press under the aegis of freedom of speech and expression by the Indian constitution to ensure that it retains its independence and presents the absolute truth about the injustice and wrong doing prevailing in the society for people to mould their opinion and stand up against such prejudice. Moreover, media or the so-called paparazzi is expected to function within the boundaries of the rules and statutes created by the other three estates of democracy. This is suggestive of the fact that nothing is above the principle of "rule of law". Unfortunately, in this era of commercialisation and competition, media seems to have transgressed the bars of ethical journalism for their commercial interests and political agenda in the guise of the fundamental right guaranteed to them. This has resulted in encroachment of the right to privacy of individual which is also expressly guaranteed by the Indian constitution to the citizens very recently due to upsurge of intrusion of their privacy by the government by using algorithms and digital technologies. Right to privacy is an inevitable human right that cannot be ignored by the state or any individual regardless of any circumstances. Moreover, the lack of accountability and transparency by the media would prove to be dangerous and may also lead to a situation of anarchy in a nation. Although, we understand that freedom of press is certainly an essential part of the freedom of speech and expression and is an critical requisite of a democratic arrangement, it cannot be allowed to transgress the restrictions put on them and cannot ignore to draw a line in the sand in the name of freedom of press and encroach upon the fundamental human right- right to privacy and also grip the freedom to contempt of court. This paper is an effort to analyse the need of media contribution and playing a vital role in establishing the justice and fairness in the Indian society.

INTRODUCTION

In this era, there is a tremendous upsurge in the amalgamation of both information and entertainment principles, which are driven by the burgeoning of different modes of communication in the form of both conventional media, such as print, radio, television, and film, and the newly innovated technology, the internet. There is no doubt that the revolution in

the media industry have been a proved to be boon to the general public in India. In fact, the judiciary has also profited from the courageous media and taken suo moto cognizance of various matters depending on the news reports and media coverage of violations caused to human rights in India. While individuals appreciate the convenience of media and being kept apprised of ongoing events, they also realise that media pries into every corner of their social lives, thereby hampering the individual's "right to privacy" and causing the needless revelation of personal information to the eyes of masses giving rise to a conflict of interest. Preservation of individual rights is of utmost importance in a democracy; yet continuation of that democracy demands a press which provides necessary information upon which to base balanced self-rule. Therefore, reconciliation of the freedom of media and the right to privacy has evolved tentatively in such atmosphere. This, conflict, also requires an establishment of checks and balances so that a reasonable equilibrium may be achieved.

Meanwhile, the right to privacy has become firmly recognized in almost all geographies across the globe. Governments have understood the importance of emotional disturbance produced by unnecessary intervention into one's peace of mind. India has been a party to the United Nations Declaration on Human Rights (UDHR), 1948 even before its independence. In 1950, India declared itself to be a fully democratic nation, having accepted most of the basic values of the UDHR. Indian government realised the necessity of the press and its influence on the people of India. Press had played a very significant and prolific role in the independence drive. Such was the impact of the print media that it rattled the Britishers, as it gave a representation of a strong India, though the reality was a fragmented India ruled by princely rulers and masses in deep poverty. The framers of our Constitution knew the massive power bestowed on the press; therefore, they established the Freedom of Speech and Expression in Article 19(1) (a) of the Indian Constitution[472] inspired by Article 19 of the UDHR[473]. However, in the thought process of the architects of Indian Constitution it never came to light, about the consequences of an unrestrained freedom of press.

Although Article 19(1) (a) does not explicitly mention freedom of press, the Supreme Court in *Romesh Thaper v. State of Madras*[474], stated that "freedom of speech and expression" includes in its ambit the "freedom of press". Post this, originated the first amendment of the Constitution in 1951, which amended Article 19(2). The new Article 19(2) provided 'Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making

[472] The Constitution of India, art. 19(1)
[473] Universal Declaration of Human Rights
[474] AIR 1950 SCR 594

any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.[475]' This amendment further extends the ambit of freedom of press under the Indian Constitution. In fact, media is known as the fourth estate of the constitution and a watchdog of the democracy expecting it to address the injustice prevailing in the society and exposing them to knowledge of the public hoping for rectification. However, it is also accepted that too much interference of this watchdog can be a matter of concern for individual as that would result in encroachment of their right to privacy which is recognized under Article 21 of the Indian constitution recently in the year 2019. Hence, it is expected that the fourth estate of this democracy acknowledges that privacy of individuals is respected and duty of media coverage is combined with the responsibility to protect the right to live with liberty and privacy provided to individuals by the Indian constitution. This paper will outline the concept of the freedom of press and also discuss on the conflict of such freedom with the basic human right-right to privacy. Furthermore, it will focus on the right of individuals with privacy in case of prejudiced media coverage along with the checks and balances that needs to be in place by the government to create a perfect balance between the two fundamental rights in question.

FREEDOM OF PRESS

One of the important fundamental rights recognised under the Indian Constitution is the "freedom of speech and expression which is guaranteed under article 19(1) of the constitution[476]. It is a principle that identifies the freedom of individual or a community to put forth their opinions and ideas without any unnecessary fear or hindrance. It was taken from the article 19 of the Universal Declaration of Human Rights and is also recognised in International human rights law in the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the UDHR states that "everyone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of

[475] The Constitution of India, art. 19(2)

[476] Supra 1, art. 19(1)

his choice"[477]. The version of Article 19 in the ICCPR later amends this by stating that the exercise of these rights carries "special duties and responsibilities" and may "therefore be subject to certain restrictions" when necessary "for respect of the rights or reputation of others" or for the protection of national security or of public order (order public), or of public health or morals".[478]

Freedom of press on the other hand is recognised as vital part of the freedom of speech and expression and therefore, jurists have recognised it as a fundamental right under the ambit of freedom of speech and expression to protect the media from unlawful restriction and to give them a right to disseminate the truth and injustice prevailing in the society for people to view and form opinions and for courts to apprise themselves and take necessary cognizance as and when it is required. This vital role played by the print and electronic media both is known to be a key instrument for understanding and evaluation of the social order.

However, as no right is absolute and unrestricted, article 19(2) of the Indian constitution talks about the restrictions put on the freedom of expression. Article 19(2) states that "nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."[479] This above statement interestingly doesn't include privacy as a criterion to restrict freedom of press which is concern for the public at the moment considering the increase of the aggressive form of journalism in India. Although both rights in question cannot be equally balanced on a yardstick, government seems to have chosen to prejudice the privacy of individuals to deal with such a situation of conflict. In fact, media has always relied on freedom of speech and expression as a valid excuse to breach the individual's fundamental right of privacy by disclosing lurid personal details of people especially public personalities to the general public regardless of its necessity. In addition, freedom of press needs to be read along with the Right to information Act (RTI). The Indian law has made some exceptions to the rule of privacy in the interest of the public, especially, following to the enactment of the RTI Act. The RTI Act, makes an exemption under section 8 (1) (j), which exempts disclosure of any personal data to

[477] Supra 2, art. 19 (1)

[478] International Covenant on Civil and Political Rights, art. 19

[479] Supra 4, art.19 (2)

the world which is not connected to any public activity or of public interest or which would cause an unjustified intrusion of privacy of an individual[480]. What constitutes an unjustified invasion of privacy is not well-defined. However, judges have taken an optimistic position on what constitutes privacy in different settings of the society.

Right to Privacy

Considering that the term "privacy" has very lately got its inception in this digital world, it is difficult to be understood in a theoretical sense. Conceptually, the right to privacy is an essential factor to ensure protection to an individual's dignity and to the society in general. Privacy is in itself a very wide term which includes privacy from various sources like privacy from press, unnecessary government and private bodies interference. In a democracy, it should solely be the individual who should have the right to decide about exposure of their personal details to the world. The journalists or the so-called press, who regardless of any ethics and decency and for their vested interests make the affairs of individual's life public. India, at present, does not have a codified law protecting privacy; the right to privacy is a deemed right under the Indian Constitution.

In *PUCL v. UOI*[481], which is popularly known as the wire-tapping case, the question before the court was whether wire-tapping was an infringement of a citizen's right to privacy. The court held that an infringement on the right to privacy would depend on the facts and circumstances of a case. It observed that, "telephone conversation is an integral part of a man's personal life. Right to privacy would undoubtedly include telephone-conversation in the privacy of one's household or workplace. Thus, the encroachment of individual's privacy by telephone-tapping would, attract Article 21 of the Constitution of India unless it is reasonably permitted under the procedure established by law." It further observed that the right to privacy also attracts Article 19 of the Indian constitution because 'when a person is having a conversation on telephone, he is exercising his right to freedom of speech and expression. The court, hence, has construed that the right to privacy is not an unqualified right, but a restricted right which needs to be considered on a case to case basis. It is the exceptions to the right to privacy, like 'public interest', that are the focus of this research paper.

PRIVACY UNDER THE CONSTITUTION OF INDIA

[480] The Right to Information Act, 2005, s. 8 (1)(j)
[481] AIR 1997 SC 568

Under the Indian constitution, Article 21 is a comprehensive provision i.e., "No person shall be deprived of his life or personal liberty except according to procedure established by law."[482]The said provision has under its aegis included the right to privacy. It is now recognised as a fundamental right by the apex court of India. Moreover, the right to privacy has to be understood in the context of two fundamental rights: the right to freedom under Article 19 and the right to life under Article 21 of the Constitution. Although, right to privacy in India was recognised recently by the Supreme court in *Justice K. S. Puttaswamy v. Union of India*[483], it was originally recognised as a fundamental right under the aegis of right to freedom of speech and expression. In the case of *Kharak Singh v. the State of U.P*, the Supreme Court of India recognized that people of India had a fundamental right to privacy which was part of the right to life and liberty in Article 21 in addition to the right to freedom of speech and expression given under Article 19(1)(a) of the Indian constitution. This clearly implies that the relationship between the freedom of speech and expression and the right to privacy can coexist and augment instead of being prejudicial to each other. In fact, it is established by the recent judgement of *Justice K. S. Puttaswamy v. Union of India* that privacy is a necessary condition for the meaningful exercise of other guaranteed freedoms.

PRIVACY UNDER PERSONAL DATA PROTECTION BILL, 2019

Although, India does not have a codified law in force yet, the Personal Data Protection Bill (herein referred to as the "PDPB") is soon expected to become India's privacy law after receiving a green signal from the Parliament. The PDPB Bill is an almost mirror image of the Europe's General Data Protection Regulation (commonly known as the "GDPR"). It has, under the article 36 identified provisions regarding protection of personal data from media coverage. It states that "The provisions of Chapter II except section 4, Chapters III to V, Chapter VI except section 24, and Chapter VII shall not apply where (e) processing of personal data is necessary for or relevant to a journalistic purpose, by any person and is in compliance with any code of ethics issued by the Press Council of India, or by any media self-regulatory organisation." Journalistic Purposes has been defined as any activity means any activity intended towards the dissemination through print, electronic or any other media of factual reports, analysis, opinions, views or documentaries regarding (i) news, recent or current events; or (ii) any other information which the data fiduciary believes the public, or any significantly

[482] The Constitution of India, art. 21

[483] 2017 10 S.C.C 1

discernible class of the public, to have an interest in[484]. Given that India is yet to pass the PDP Bill, it will be interesting to see how the experts deal with the upsurge of media intervention and if they decide to restrict or modify the provision dealing with the processing of personal data of the individuals in the PDB Bill.

PRIVACY UNDER THE COMMON LAW OF TORT

Under the Common law, a private action for damages for unlawful invasion of privacy is maintainable. The printer and publisher of a tabloid, periodical or book are liable for damages if they circulate any material regarding the personal life of a national which includes his family, marital status, reproduction, parenting, child-bearing or schooling without his or her express consent. Nonetheless, it is imperilled by the following exceptions: 1. When the book or periodical is based on records available on public forum, including any court records- because the right to privacy no longer exists once a material becomes available in the public domain. 2. When the wrongful publication relates to the acts which are crucial to release of the official duties of a government official. - Unless the publication is proved to be untrue or motivated by hatred or thoughtless disregard for reality. Sometimes, when the privacy deed is protected under the tort of defamation, it is inadequate to protect the person's privacy. There is a fundamental difference between defamation and the exposure of public revelation of awkward private realities. Truth is an unqualified defence to the former, but not to the later. This difference is crucial. This is the reason behind need of specific law protecting privacy of individual.

CONFLICT BETWEEN FREEDOM OF PRESS AND RIGHT TO PRIVACY

When considering the conflict between freedom of media to disseminate information and the right to privacy, there has always been a fundamental question about the relative weight of privacy versus public interest. Although, India currently does not have a codified law on the right to privacy, it has acquired constitutional recognition leading to drafting of the Personal Data Protection Bill (PDPB) in 2019. One of the questions to mull over is whether the PDPB, which is soon to come into force as India's privacy law, includes a provision to safeguard the individuals from privacy encroachment by the media. The answer to the question is unfortunately in negative, as PDPB, under its article 36(e)[485] has allowed exemptions for

[484] The Personal Data Protection Bill, 2019, s. 36
[485] Supra note 6, s. 36

processing personal data for journalistic purposes provided they are in compliance with code of ethics issued by Press Council of India (PCI) or any media self-regulatory authority. Journalists have been given the liberty to distribute views, opinions regarding any information that they (acting as data fiduciary) consider masses to have an interest in.

Article 36(e) certainly gives an impression that the government needed to put in more thought while exempting journalists from the responsibility to protect privacy under the PDPB. In fact, they have completely been heedless to such privacy violation by the media. Firstly, the obligation on data fiduciary to decide on the information that they deem masses to have an interest in does not create a perfect balance between the fundamental rights in question and seems to be quite discretionary. Media outlets should have the responsibility to show 'what is in public interest' rather than presentation of 'what the public is interested in'. Secondly, PDPB doesn't mandate any standards of necessity and proportionality to be met by journalists before infringing the right to privacy. Besides, it is highly unlikely that media trials shall be conducted as per any code of ethics considering media reportage and ethics rarely go hand-in-hand in this current period of yellow journalism prevailing in the nation at the moment in time.

MEDIA TRIALS

At this precise moment, India is hashing over the current trending phrase "media trial". Media trial is a popular expression referring to the media becoming the judge, jury and the executioner and pronouncing its own verdict even before the court passes its judgement. Although media trials have been conducted in the past, the recent death of a famous Indian movie artist, burgeoned this prejudicial media coverage leading to a conflict with the fundamental human right - right to privacy.

Over the past few months, electronic media channels have been conducting parallel investigations in the form of unrestrained 'media trial' and broadcasting the unfortunate episode like a soap opera to an extent where several unnecessary sting operations, lurid details about the late actor's medical history, doctor's prescriptions, bank account details with transactions and more prominently, numerous private chats of all individuals, photographs and videos regardless of its relevance to the investigation are all put under the public glare. This aggressive and tendentious journalism has not only resulted in the violation of privacy rights of the individuals but also flouted the doctrine of 'innocent until proven guilty'.

This makes us all ponder if the media has been given an exceptional right by the Indian constitution to intrude into the privacy of individuals in the name of 'freedom of press'. In what follows, we will contemplate trials by the media, the so-called India's fourth estate of

democracy, vis-à-vis the right to privacy, including any checks and balances on it by the rule of law.

Is media trial even constitutional?

Courts in India haven't explicitly declared media trial as unconstitutional; however, there has been a lot of criticism on this practice of media where it acts both as the accuser and the judge crushing the fundamental right to privacy of every individual tagged to a case with complete impunity. The so-called 'watchdog of democracy' follows these practices in the guise of exercising 'freedom of press' which is provided by Indian constitution under the aegis of the fundamental right, 'Freedom of Speech and Expression'. It is believed by experts that this freedom allows media to intervene and help people build opinions and views on various issues of national interest; however, too much intervention is also a matter of concern. Therefore, article 19(1)(2) of the Indian constitution has contoured this right of media by listing grounds of restrictions upon the freedom of speech and expression as no freedom in this constitution is absolute and unfettered. Having said that, as discussed above, privacy is not counted among the reasonable restrictions to the right to freedom of speech and expression. In addition, there is no specific legislation in India which directly protects right to privacy against excessive publicity by press including media trial which leaves individuals with no specific right against such intrusive media trial.

Any checks and balances?

Since at present, there is no codified law Media trials in general and in this particular sensational case is certainly tantamount to "contempt of court" which is also prescribed by the Indian constitution and the Contempt of Courts Act, 1971. The Contempt of Court Act defines contempt by stating that "No publication, which is calculated to poison the minds of jurors, intimidate witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt.[486]" From a practical perspective, these checks on the media outlets are seldom paid attention to and in fact, it has been a far-flung practice of media to overlook the obligation of drawing a line in the sand when reporting sensational news.

The Press Council of India which has no jurisdiction on electronic media has issued an advisory[487] maintaining that media should not conduct their own parallel trial or forecast the decision to avoid pressure during investigation and trial. The independent regulatory

[486] The Contempt of Courts Act, 1971, art. 2

[487] Media Advisory, *available at*: http://presscouncil.nic.in/WriteReadData/Pdf/FinalMediaadvisoryPR.pdf (last visited on September, 11, 2020)

association, News Broadcasters Association (NBA) has enumerated detailed guidelines on areas where media needs to self-regulate. Unfortunately, in all these years of prejudiced media coverage, these watchdogs and their guidelines have not been taken seriously by those running the show.

CONCLUSION

Even though privacy is considered as a human right, its struggle with the freedom of speech and expression is seen from the perspective of privacy as a legal safeguard. The reason for this is because right to privacy is guaranteed to the citizens from the state actions instead of private actions by individuals. The obligations are put mostly on the states to protect individuals from unnecessary intrusions of privacy. The obligations put on individuals on safeguarding each other's privacy is very limited or none at all. The need to protect the privacy rights also arises when the said human rights restricts the freedom of expression in some way or the other. The balance between the privacy right and freedom to press needs to be assessed on the basis of demand of reasonable public interest. It is being noticed that the extra-intrusive media outlets, which is a creation of political agenda and the need to present sensational coverage to attract the public so as to increase their commercial interests, has resulted in intrusion of 'right to privacy' by crossing the boundaries of the liberty given to them. This implies that the obligation to protect the right to privacy of individuals from the prejudicial media coverage is the need of the hour. In addition, government needs to maintain an equilibrium between the freedom of press and the right to privacy. Government should be responsible to ensure checks on the extend of use of the freedom of media and should maintain a balance when the media omits to draw the thin line between the private rights and public interest. With great power great responsibility, and thus, the fundamental right to freedom of speech and expression under article 19(1) (a) of the constitution of India corresponds with the responsibility not to violate the law considering that if journalistic institutions are left unchecked, it will lead to conflict of rights and ultimately anarchy. Therefore, media outlets while exercising their right to press under the aegis of right to freedom of speech and expression, should ensure fundamental right to dignity and privacy of the individual guaranteed under Article 21 of the Indian constitution. Media without an iota of doubt, forms the backbone of a democratic society and does assist in administering of justice; however, irresponsible media reportage without ethical and social responsibility is detrimental to the society. Both electronic and print media es expected to function ethically and need to understand the relevance of privacy and should not be categorised as newsflash. The basic human right, the right to privacy of an individual regardless

of their position in a court case cannot be put at stake for news channels to serve their own selfish interests. It is evident that in the absence any proper regulation by the government, media should not be given carte blanche in the investigations process. They should not be allowed to exercise the fundamental right of free speech and expression to transgress bounds of prudence. Moreover, the exceptions granted for journalistic purposes without any adequate government guidelines is not only antagonistic for democracy but the consequences of not being accountable for the actions are even more detrimental to the social order. It is evident that a need for proper regulation of media houses by the government has arisen as right to privacy is certainly inevitable.

SOCIO-ECONOMIC INSTITUTION OF WAQF IN INDIA: A LEGAL ANALYSIS

- RISHIKA AGARWAL

ABSTRACT

This paper is going to talk about a very prominent socio-economic institution called the waqf. The trajectory and evolution of waqf laws will be traced. The maladministration and mismanagement of waqf properties, as a consequence to excessive government intervention in the form of statutory provisions and regulations will be addressed. The inherent characteristics of waqfs will be critically analyzed and the implications of having such inflexible characteristics in the present day will be explored. All such arguments and analysis will be supported by case laws so as to get a deeper understanding of waqfs in the present political, social and economic environment of India.

INTRODUCTION

It is imperative to understand firstly, what waqfs are. The Waqf Act of 1954 defines Waqfs as, "*the permanent dedication by a person professing the Islam, of any movable or immovable property for any purpose recognized by Muslim Law as religious, pious or charitable."*[488] It is essentially a religious endowment, a form of inalienable charitable giving. It is a permanent dedication of property to God, with the intention that the usufruct of the property may be utilized for a religious, pious or charitable purpose.[489] The word is derived from the word '*waqafa'*, whose literal translation is to stop, immobilize or standstill[490]. In the past, it has been argued that the purpose of waqfs were to reduce inequality in wealth, as waqfs provide public goods and services such as education, healthcare, financial and even food for the poor, thus helping the government to reduce their spending and expenditure. The endower of the waqf is called *waqif* and the manager or the trustee is called *mutawalli*.[491] The main objective of creating a waqf must ultimately be a religious or pious one, and it must benefit only a person belonging to the Muslim community. In the case that the beneficiary is a non-Muslim, he must be an indigent. In *The Karnataka Board of Wakfs v Mohamed Nazeer Ahmed*[492], the dedication

[488] The Waqf Act 1954
[489] Saxena, Poonam Pradhan. "Gifts." *Family Law Lectures*
[490] Budiman, Mochammad Arif. "The signifance of Waqf for economic development". *SSRN*. 2, No. 1, (2014).
[491] Faizi, Amir Afaque Ahmad. "Waqf and its Historical Development in India." *Waqf Record Management in India*
[492] *The Karnataka Board of Wakfs v Mohamed Nazeer Ahmed,* AIR 1982 Kant 309

of a house by a Muslim for use of all travelers and for Khairat, irrespective of their religion and financial status was held to be an invalid waqf. A waqf made under coercion, undue influence or malice is considered to be invalid.

TYPES OF WAQFS

Waqfs can broadly be categories as either Public or Private Waqfs. A more nuanced distinction of waqfs would be into three kinds, namely, Waqfs by user, Mashrut-Ul-Khidmat and Waqf-ul-Aulad. Waqfs by user are the type of waqf property that had been consistently used for religious or pious purposes, and the waqif of the same has allowed the unintended continuation of such practices, example being Mosque or a Madrasah[493]. Mashrut-ul-Khidmat is a Waqf for the benefit of the Muslim community and is a type of public waqf and finally, Waqf-al Aulad or Waqf for progeny, is a private Waqf given or created for the benefit of the creator's family or his children.[494]

WHO CAN CREATE A WAQF?

A person is competent to create a waqf or to be a waqif, when the person has achieved the age of majority and has a sound mind, sufficient enough to have a good understanding of what he is doing.[495] The competency of a person to contract in India has similar judging criteria. For a person to have the right to declare a property as waqf, he must have absolute right of the property in the first place and his right must not be contingent. It is also the case that a waqif must be in good health while making the dedication, as if he has an illness, which will result in death, he will not be able to dedicate more than one third of his property or estate without the implied or expressed consent of his heirs.[496] It is also possible for non-Muslims to create waqfs, as was upheld in the case of *Moti Shah v Abdul Ghaffar Khan*.[497] A non-Muslim waqif must profess Islam, that is, he must believe and respect the principles of Islam, and he must prove that his intentions behind making the dedication is lawful according to the Islamic doctrines. Although, a non-Muslim has no competency to create a private waqf. In the case of *Fatime Bibi v The Advocate General,* a revocation of a waqf-ul-aulad by a Sunni lady was held to be invalid[498]. The reasoning used was that a competent waqif cannot revoke his dedication, once

[493] Faizi, Amir Afaque Ahmad. "Waqf and its Historical Development in India." *Waqf Record Management in India*
[494] Faizi, Amir Afaque Ahmad. "Waqf management in India." *Waqf Record Management in India*
[495] *Mirza Fida Rasool v. Yakub Beg,* AIR 1925 pc 101
[496] *Bibi Jinjira v Mohd. Fakirujllah,* (1921) 49 cal 477
[497] *Moti Shah v Abdul Ghaffar Khan,* AIR 1956, Nag. 38
[498] *Mirza Fida Rasool v Yakoot Beg,* AIR 1925 PC 101

made. It was, although held by the Calcutta High Court in the case of *Delroos Bano Begum v Nawab Asghar Ali,* that if a *pardanashin* makes a dedication of waqf, then the test to judge her competency to make a valid waqf would be different and more critical[499]. In this case, the pardanashin women was unable to read or write, and was very ignorant and naïve, and she claimed that she did not know the meaning of the deed which was executed by her. The court believed the women and revoked the waqf property, for the benefit of the exploited *pardanashin* woman.

TRAJECTORY OF STATUTORY CONTROL OVER WAQFS

India has introduced a plethora of statutory regulations on the institution of waqf starting from 1810. In the 1894, Privy Council in their infamous judgement of *Abul Fate Mohomad Ishah v Russomy dhur Chowdhury*[500], held that all waqfs should be made public and should not remain in the private hands. They declared private waqfs to be invalid, as they said that Waqf-ul-aulad went against the sacred, pious, charitable and religious objectives of waqfs, and were a tool to aggrandize family wealth. The courts in this case relied on a faulty interpretation of the Islamic doctrines and completely overlooked the fact that charity is not just restricted to strangers in Islam, but giving property to one's wife, children and their descendants is also considered charity. In 1913, the Mussalman Waqf Validating Act was passed, which restored the private ownership of waqfs, although the act did not have a retrospective effect and all private endowments before 1913 were still considered invalid. With the passing of this act, it also became the prerogative of the *Mutawallis* to administer and manage the waqf properties. After 1920, several central and state legislations were passed which made the registration of waqfs with Government agencies like the Waqf boards mandatory. It is important to note that in the British era, with the fall of Mughal empire, the British took over the control of Qazis, who before their rule, managed waqfs and the British also suspended the special nature of waqfs.[501] Thus, began with the advent of British, the process of maladministration of waqf properties in India, and their gradual deterioration. The Zamindari Abolition Act 1952 also gave a massive blow to the condition of waqfs in India, as under this act a majority of waqf and khanqah lands were seized. It is bizarre that after Independence, the management of waqfs didn't go back to the Islamic institutions, as was anticipated by Muslims, but rather by the 1954 Waqf Act, the

[499] *Delroos Bano Begam v Nawab Asghar Ali*, 15 Beng. L.R.167
[500] *Abul Fate Mohomad Ishah v Russomy dhur Chowdhury*, 1894/5, 22 LR IAR 76
[501] Faizi, Amir Afaque Ahmad. "Waqf and its Historical Development in India." *Waqf Record Management in India*

state took complete and prime authority to manage and administer the waqf institutions in India. This, on hindsight, shows how the majoritarian views and interests were forced and encroached upon the minorities in India after partition. The state regulations imposed on these properties are counter-productive as they lack an in-depth understanding of the objective and purpose of this institution, and the need for it be administered according to the Shariah laws. Such excessive state intervention has led to the corruption, manipulation and use of waqf properties as political tools. Instead of benefiting the under-privileged and poor sections of the Muslim community, waqfs have now lost their economic relevance and efficiency because of the rampant malfunctions and corruption which have infiltrated the system. The administrators under the current, waqf boards established under the various statutes lack the kind of religious and sincere spirit to manage the waqfs efficiently. Thus, this counterproductive Act of 1954 had to be amended several times in 1959, 1964, 1969, 1984, 1995 and finally in 2013. It is evident even in modern India that a large population of the Muslim community is in a destitute state and that they have been ghettoised. It is therefore important in the present ages to make waqfs efficient enough to aid these under-privileged sections of the society.

ESSENTIALS OF A VALID WAQF

Irrevocability

Irrevocability means the restriction on the waqif, or the manager of the waqf to revoke his donation at any time. A waqf is effected and binding, the minute declaration is made by the donor.[502] The delivery of possession to the beneficiary is not a mandate for the waqf to be binding. The exception to this is when waqf is made by will and on death-bed.[503]

Perpetuity

This principle means that the waqf can't be constrained by time and hence, it can't be temporary in nature. Once an asset is dedicated as waqf, it remains waqf forever. [504] It is not necessary that the donor must specifically announce that the donation is permanent, it can also be implied by the use of technical terms and words, example being, if the term waqf itself is used, then the dedication is presumed to be, for all matters of law a permanent dedication.[505]

Inalienability

[502] *Abdul Sattar v Advocate General of Bombay,* (1932) 35 Bom. L.R. 18
[503] *Abdeally Hyderbhai v Advocate General of Bombay*, (1946), 48 Bom. L.R. 631
[504] Budiman, Mochammad Arif. "The signifance of Waqf for economic development". *SSRN*. 2, No. 1, (2014).
[505] *Syed Ahmad v Julaiha Bibi,* (1947), Mad 480

This characteristic of the waqf follows that once a valid waqf is effected in the name of the beneficiary, then the subject matter of the waqf passes out of the ownership of the waqif. Thus, it curtails the power of the waqif, the mutawalli or either of their heirs to alienate or transfer the waqf property.

IMPACT OF THE ESSENTIAL CHARACTERISTICS OF WAQF

It is now important to critically analyze these inherent and core characteristics of a waqf and the economic and social ramifications of their inflexible application. The two main characteristics of a waqf, perpetuity and inalienability are considered to have manifold negative effects in the development of waqf property.[506] The negative effect of irrevocability is, however limited to a large extent only to the waqif, because in the case that he is in need of financial help, he cannot revoke the property he donated as waqf and then benefit from it.[507] Although, in the case that a waqf property is not being utilized properly, it is still not possible for the waqif to revoke his gift and then put the property to a more efficient and productive use. Thus, because of this, the waqf property remains underutilized, not benefiting anyone.

The entire purpose of waqfs are defeated in such scenarios. The concept of perpetuity, has an inherent flaw of non-liquidity of assets, which has led to widespread underdevelopment of these properties.[508] The development of waqf properties is a challenge because even after the donation is made, there is no guaranty that the donee will have enough money to maintain the waqf property. Even if the property is hugely undermaintained and unproductive, the administrator does not have the option to sell the property.[509] Since there is a bar on temporal waqfs, the waqifs can't even choose to donate property for a short span of time.

If properties were allowed to be donated for short spans too, it would encourage more people to donate their properties, thus creating more charitable revenue. The effect of inalienability is also similar to the effect of perpetuity. Inalienability bars an administrator from selling, mortgaging, gifting or alienating the property in any way.[510] Thus it halts the property from

[506] Sabit, Mohammad Tahir and Hamid, Abdul, "Obstacles of the current concept of waqf to the development of waqf properties and the recommended alternative", *Research Gate*
[507] Ibid
[508] Ibid
[509] Anas al-Zarqa, "al-Wasail al-Hadithah litamwil wa al-Istithmar," in Idara wa Tathmir Mumtalakat al-Awqaf, Jeddah: IDB, 1994, pp. 184, 185.
[510] S. Ather Husaini & S. Khalid Rashid, 1973:113

being developed freely and transacted, even if the waqf property is not being utilized for the benefit of the intended beneficiaries due to lack of funds and other shortcomings.

A study of different Islamic law texts shows that these allegedly inherent characteristics (perpetuity, inalienability and irrevocability) of a waqf, are in fact not absolute. There exist various discrepancies in various schools of classical thought (a study of these discrepancies is beyond the scope of this paper) regarding their mandatory nature, and therefore a redefinition based on a new interpretation is possible and needed[511]. There is a need not just of real property to be donated, but also labor as well as ample amount of cash to maintain waqfs. Waqfs will be better managed if the public too contributes to waqf in terms of cash.

It is also interesting to mention that waqfs defy the prevalent notion of profit making. In the present-day capitalistic economic environment, waqfs represent a noble institution, with the sole motive of providing charity and religious endowments.

CONCLUSION

Even with all the problems associated with waqfs currently, the boons from waqfs, especially in India cannot be overlooked and undermined. The phenomenal performances of some waqfs in India deserve mention in terms of their performance in creating revenue and providing social service. In terms of revenue, amongst the best performing waqfs in India, an excellent example is the Hajee Attar Hussain Wafq in Bengaluru, and in terms of social service the contribution of Hzt. Halima Maternity and General Hospital, Malerkotla in Punjab which is directly managed by Punjab Wakf Board deserves mention. It can't be said that in the present day waqfs are irrelevant because they are not efficient and managed properly.

The correct approach to follow is to firstly, amend the existing waqf laws by giving the Islamic institutions the main power to administer waqfs, while the role of the state can be reduced to ensuring the efficiency and transparency in the system. Secondly, the essential elements of a waqf need to be amended and made more flexible in their application so as to make the institution more efficient and economically productive.

All these amendments to the present system must be done keeping in mind the best interests of the Muslim community, especially in the present political scenario. Waqfs are a very important part of the religious beliefs of the Muslim population, and the State should refrain from

[511] Anas al-Zarqa, "al Wasail al-Hadithah", p. 184.

encroaching arbitrarily in their administration. Waqf properties form a large part of India, and therefore they represent a lot of latent potential. If their full potential is realised, by making democratic amendments, waqfs have the ability to uplift the miserable economic condition of the Muslim minorities and other indigent population of the country, while also lessening the burden on the State.

UNHCR: INADEQUACY AMID THE SURGE IN REFUGEE CRISIS

- SAGNIK SENGUPTA & AKSHITI KUMAR

ABSTRACT

The United Nations High Commissioner for Refugees (UNHCR) was established after the Second World War in 1950 for the purpose of helping the European people who were displaced throughout the continent due to the War. They were suppose to disband after three years but due to another conflict which arose in Hungary due to the revolution in 1956 and it was realised that the organisation was needed and that refugee crises can arise in the future. The organisation largely depends on the 1951 Refugee Convention, which focuses on status of refugees, and its 1967 Protocols, but it's also a party to several other regional refugee laws and regulations.

In recent years, the world has seen a steep surge in refugee crises all around the world. The world has seen the increase in political and sectarian disputes, terrorism, unstable government and civil wars. Millions of people are forced to flee their countries due to such factors and this is where the UNHCR comes into force. The principle aim of the UNHCR is to help such individuals. Refugee crises like in Syria, Afghanistan, Somalia, Sudan and Myanmar have really stretched the resources of the UNHCR and have exposed a number of constraints. With some States implementing legislations which goes against the 1951 Convention, UNHCR has been unable to do anything. Along with this, there have been allegations of corruption in some offices of the organisation. The financial dependency of the UNHCR on States who are unwilling to help refugees have also been a problem for the organisation.

This paper focuses on the history of the UNHCR, the conventions and standards which are followed by the organisation, the International Refugee Law and Standards, the surge in the refugee crises throughout the world, the constraints of the UNHCR and its failures along with the solution to the refugee crises with the help of UNHCR.

RESEARCH METHODOLOGY

Regarding methodological approaches, the present study can be classified as a descriptive study.

Aim

- To study the history of UNHCR.
- To analyse the conventions and standards it follows.

- To study the International Refugee Law and Standards.
- To analyse the surge in refugee crises.
- To critically analyse the constraints of the UNHCR.
- To study the failures of the UNHCR.
- To find the solution to the problem of refugee crises.

RESEARCH DESIGN

Regarding research design approach, the present study can be classified as a Descriptive research design study.

INTRODUCTION

The United Nation High Commissioner for Refugees (UNHCR) is an organisation which was created in 1950. The organisation was created due to the death and destruction which came about in the Second World War and due to which thousands of people had to flee their homes and settle or temporarily stay in unknown lands. Such people were displaced and needed to be returned to their country. Thus, after the World War 2 there were tonnes of European refugees and this organisation was formed to help the victims of the World War who had fled their lands and homes due to the destruction caused during the War. The UNHCR was initially put together for just three years to help the European people who were displaced throughout the continent and after those three years they were supposed to disband. It won a noble price in 1954 for the amazing work they it did in Europe but in 1956 another crisis broke through due to the Hungarian Revolution where almost 200,000 had to flee to the neighbouring country of Austria. This uprising of the crisis was the starting point of the organisation to shape the way of how it would have to stay and work for refugees in the future.[512]

The rules and protocols of the UNHCR are based on The 1951 Refugee Convention and its 1967 Protocol. These two documents solely constitute the basic laws and regulations of the UNHCR. These documents together give UNHCR its constitution and mention various definitions such as the definition of "refugees", the various protocols to be followed, their legal framework, the rights of the refugees, rules to assist States to help refugees and rules of accession.[513] Their sole objective is to help people who had to flee their country or has been

[512] Anonymous, *History of UNHCR,* UNHCR The UN Refugee Agency, https://www.unhcr.org/en-in/history-of-unhcr.html.
[513] UNHCR The UN Refugee Agency – The 1951 Convention Relating To The Status Of Refugees And Its 1967 Protocols.

forcefully displaced due to persecution. The UNHCR's core principle is that no person should be returned to their country where they might lose their freedom or may be killed. It is also stated that the States shall assist the organisation to help such refugees but the question arises is that whether the UNHCR is complying with these rules and following their objectives.

In recent years, due to ongoing disputes all around the world, millions of people have been forcefully removed from their homes and countries. Some are displaced within their own country while thousands are displaced outside their country. There has been a serious increase in refugees in the recent years. Due to huge conflicts and warfare going on in more than one place, the number of people to fall victim to such brutal conflicts and seek refuge has increased tremendously. The UNHCR, although made for the purpose of protecting such refugees has not been able to keep up. This is both due to the failure and corruption in the organisation and financial constraints. On top of that, many States in recent years have shown their undesirability to refugees and have implemented statues which go against the 1951 Refugee Convention. With such surge in the refugee crisis, the UNHCR has been unable to keep up and millions of people around the world have lost hope in the organisation.

THE INTERNATIONAL REFUGEE LAW AND STANDARDS

The United Nations High Commissioner for Refugees is the guardian of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocols. These two documents together solely comprise the base for international refugee law with 149 States partied to either one of them or both. The 1951 Convention states the definition of "refugees" and other various definitions. It also answers the question as to who are refugees and how "refugee" is different from other terms such as "migrant". This Convention lays down all the rules following the refugees as in their rights and obligations. It also establishes the principle of "non-refoulement" which basically states that refugees should not be forcefully returned to their countries where they might be subjected to persecution. This principle is mentioned in Article 33 of the Convention on the Status of Refugees and is also stated in various regional refugee laws.[514]

On the other hand, the 1967 Protocol which though integrated with 1951 Convention but independent of it removes the geographical limit which was set by the 1951 Convention. If the States accede to the 1967 Protocols it automatically agrees to apply the core components of the 1951 Convention which is from Article 2-34 to all refugees without any constraints of time and

[514] Tilman Rodenhauser, *The principle of non-refoulement in the migration context: 5 key points* (Mar. 30, 2018), ReliefWeb, https://reliefweb.int/report/world/principle-non-refoulement-migration-context-5-key-points.

place. At present, out of the 149 States, many States have acceded to both the Protocols and the Convention but some States have acceded to either one of them.[515]

Other laws which have to be followed by such organisations as the United Nations High Commissioner for Refugees are the regional refugee laws. The 1951 Convention and 1967 Protocols stated the definitions of various terms, rules and protocols but from a very broad perspective. The rules and regulations are given for refugees but in a very wide environment. Thus, for regional specifications, countries in different parts of the world have developed various regional laws and standards that goes with the 1951 Convention and 1967 Protocols.

- The OAU Refugee Convention which was a document formed to help the African refugees who were forcefully displaced throughout the continent due to the liberations wars and the fight against Apartheid. Their primary concern was to help people who had to flee their countries due to struggle against colonialism. It borrows the definitions of terms like "refugees" from the 1951 Convention along with a number of other rules and regulations and also expanded such definition to meet the requirements of the continent of Africa.[516]
- The Cartagena Declaration on Refugees was a document created in 1984 in Colombia to tackle the refugee situation in Central America. This Declaration also states the 1951 Convention and the 1967 Protocols as the centre of the refugee laws. It also states the principle of "non-refoulement" which is mentioned in Article 3 of the 1951 Convention. It has widened the definition for refugees to fit the need of Latin America. Although this declaration is not a binding document, most Central and South American countries have adopted the definitions mentioned in the Declaration and incorporated them in their legislations. Such countries include Argentina, Brazil, Mexico, Paraguay and many more combining a total of 14 States.[517]
- The Arab Convention on Refugees 2017 adopted many definitions from the 1951 Convention and broadened its scope as suitable to the Middle East. The convention was adopted by the Member States of the League of Arab States.

[515] UNHCR The UN Refugee Agency – A guide to international refugee protection and building state asylum systems.

[516] J.O Moses Okello, *The 1969 OAU Convention and the continuing challenge for the African Union*, Forced Migration Review, https://www.fmreview.org/faith/okello.

[517] Liliana Lyra Jubilut, Marcia Vera Espinoza and Gabriela Mezzanotti, *The Cartagena Declaration at 35 and Refugee Protection in Latin America* (Nov. 22, 2019), https://www.e-ir.info/2019/11/22/the-cartagena-declaration-at-35-and-refugee-protection-in-latin-america/.

- The Bangkok Principles on the status and treatment of refugees 1966 is another document which is an example of regional refugee law. It is non-binding but was adopted by Asian and African countries in 2001 when the principles were revised. It borrows the definition of refugees from the OAU Convention.[518]
- Europe is a bit complex as there are many documents which have to be referred to for refugee laws and courts play an important role too. The Dublin III Regulation states the criteria which determine which member of the European Union has the responsibility to examine an asylum application. The Charter of Fundamental Rights which was adopted by the European Union in 2007 also contains provisions which are related to right to asylum and protection from removal, extradition or expulsion to a grave risk of being subject to persecution and other inhuman punishment. The Court of Justice of the European Union and the European Court of Human Rights have extensive jurisdiction over such affairs with regards to refugees and have set precedent along the way and such courts have a notable influence on the development of international refugee laws.[519]

SURGE IN REFUGEE CRISIS: CONSTRAINTS OF UNHCR

Over the past few years, the Earth has witnessed a massive shift of humanity unlike anything seen in history. At present almost 80 million people worldwide are displaced from their homes. Approximately 26 million people were forced to leave their own countries, leaving behind their lands and becoming refugees, which is more than one-third of the total world's displaced population. Over half of those 26 million come from just five countries: South Sudan, Myanmar, Afghanistan, Somalia, and Syria. Other than this, citizens around the globe are being displaced at an alarming level but are not getting classified as "refugees". For example, the 3.6 million Venezuelans who have been forced to live outside the country have not been classified as refugees.[520]

The five largest refugee crises in the world at present:

i) Syria: Since the beginning of the Syrian Civil War on 15th March 2011, citizens have suffered a lot from the brutal conflict which has killed hundreds of thousands

[518] Nafees Ahmad, *Options for Protecting Refugees in South Asia*, HARVARD INTERNATIONAL LAW JOURNAL, https://harvardilj.org/2019/09/options-for-protecting-refugees-in-south-asia/.
[519] UNHCR The UN Refugee Agency – A guide to international refugee protection and building state asylum systems.
[520] Anonymous, *The World's 5 Biggest Refugee Crises*(Jul. 02, 2020), *Mercy Corps*, https://www.mercycorps.org/blog/worlds-5-biggest-refugee-crises.

of people all over the country, ripped the country apart and overturned decades of living standards. The Syrian Refugee Crisis is, at present, in its 10th year and is the most significant refugee and migration crisis today. More than 5.6 million Syrians have been forced to flee the country and are now refugees. Approximately 6.2 million people are displaced within the country. 12 million people in Syria at present are in need of humanitarian assistance and almost half the victims affected by the Syrian Civil War are children. The country's primary institutions are broken and schools, utilities, hospitals, water and sanitation systems are damaged or destroyed. The Civil War evolved into a Sectarian Crisis with religious groups fighting each other affecting the entire nation and is also heavily influenced by international interventions. Recently, almost a million people in northwest Syria have been forced to move due to the conflict since December 1st, 2019. The attacks moving further north in Idlib will result in the citizens moving towards a small area close to the border with Turkey, which is already hosting hundreds of thousands of Syrian refugees.[521]

ii) Afghanistan: The Afghanistan Refugee Crisis started forty years ago when the citizens began fleeing, from the violence which erupted in the country due to the Communist led Taraki and Amin government, to seek refuge across nearby borders. The number of people fleeing the country and getting displaced started increasing after the Soviet invasion in 1979. More than 4 million Afghan refugees fled to Pakistan by the end of 1980. The number of refugees kept increasing in the coming years. With years of unemployment, political instability, terrorist attacks and insecurity, citizens have been forced to migrate from Afghanistan and now the number of Afghan refugees stands at almost 2.7 million. Most Afghan refugees are hosted in Pakistan, Iran and some in Europe. In 2017, The United Nation estimated that almost 1100 people per day were forced to displace due to violence in that year alone.[522]

iii) South Sudan: South Sudan is a recently established country which was formed after a deadly civil war in 2011. Unfortunately, only 2 years later, another civil war broke

[521] Kathryn Reid, *Syrian refugee crisis: Facts, FAQs, and how to help* (Mar. 15, 2020), https://www.worldvision.org/refugees-news-stories/syrian-refugee-crisis-facts#:~:text=Now%20in%20its%2010th%20year,in%20Syria%20need%20humanitarian%20assistance.

[522] Anonymous, *Afghanistan's refugees: forty years of dispossession* (Jun. 20, 2019), Amnesty International, https://www.amnesty.org/en/latest/news/2019/06/afghanistan-refugees-forty-years/#:~:text=Forty%20years%20ago%2C%20Afghans%20began,on%20Christmas%20Eve%20in%201979.

out in the new country. It led to a complex and brutal situation of armed conflict, economic decline, food shortage and wide spread disease. Almost 2.3 million South Sudanese people have fled to nearby countries to seek refuge. Over 1.9 million people have been forcibly displaced within the country itself. It is the most significant refugee crisis in the African continent and the third largest refugee crisis in the world. The conflict has taken thousands of lives and left people unable to meet the most basic needs. The majority of South Sudanese refugees live in neighbouring countries such as Sudan, Kenya, Democratic Republic of Congo, Ethiopia and Uganda. This crisis is one of the worst present humanitarian crises as the ongoing warfare, drought and flooding continue to worsen.[523]

iv) Myanmar: In August 2017, Myanmar's army started a deadly and brutal crackdown on Rohingya Muslims. Rohingya Muslims are the largest Muslim community in Myanmar with majority living in the Rakhine state. The crisis started when on August 25, 2017, Rohingya Arsa militants attacked more than 30 police posts. The national army with local Buddhists mobs responded by setting alight their villages and assaulting and brutishly killing innocent civilians. Almost 7000 Rohingya Muslims including over 700 children who were under the age of five were killed by the mob and Myanmar's army. The national army also raped and abused Rohingya women and girls. Approximately 288 villages were burnt either totally or partly in northern Rakhine state since August 2017. The Rohingya Muslims have been denied citizenship and were also excluded them from the 2014 census by the government of Myanmar which is a predominant Buddhist country. Basically refusing to recognise them as people. Even before the last few years, many Rohingyas were forced to flee the country due to communal violence or to escape abuses by security forces. Presently, with over half a million Rohingya Muslims still living in Myanmar in the northern Rakhine province, UN Investigators have said that there is still a great threat of communal killings, forced displacement, rapes and gang rapes, torture, and other severe violations of human rights. A massive number of refugees have fled to Bangladesh for survival.[524]

[523] Anonymous, *South Sudan Refugee Crisis Explained* (May. 01, 2019), https://www.unrefugees.org/news/south-sudan-refugee-crisis-explained/.
[524] Anonymous, *Myanmar Rohingya: What you need to know about the crisis* (Jan. 23, 2020), BBC News, https://www.bbc.com/news/world-asia-41566561.

v) Somalia: The Somalia refugee crisis started back in 1991 when the state collapsed and from then ceaseless violence and displacement of citizens has continued. Somalia was itself a host country for many refugees during and after the Ethiopian border war. The large number of refugees in some ways resulted in the collapse of the entire State during 1990s. Between 2007 to 2012, fighting escalated and the drought conditions worsened which resulted in wide spread famines, diseases and other emergency conditions.[525] Due to more than two decades of the ongoing conflict with wide spread famine and drought in the nation, approximately 1 million refugees have been forced to flee the country and live in destitute refugee camps in Yemen and in the Horn of Africa. Almost 2.5 million Somalis have been displaced within the country. In 2020, 1.2 million people were estimated to have acute food shortage. The number will increase in the coming months due to swarm of desert locusts which infests farmland in East Africa and the Horn of Africa.[526]

Apart from the five largest refugee crises in the world at present, there has been a surge in new refugee emergencies all over the planet. Some of the emergencies arose in Nigeria, Venezuela, Yemen and also the Central American Region. The existing crises all around the world have not been resolved. Large number of exiled people still cannot find their way back home and are stuck in refugee camps. With so many crises going unresolved, the global refugee population has increased to more than 25 million which is the highest number of refugees ever recorded in history of mankind.

Failing to resolve global refugee issues in the recent years with new emergencies arising all over the world, the United Nations High Commissioner for Refugees has been stretched to its limits. The major problem with the UNHCR is their funding. The funding of the United Nations High Commissioner for Refugees comes from various states. This number has not been able to keep up with the rising refuges crises all around the world. In April 2018, the UNHCR said that they only received 2.3 billion US dollars out of the 8.2 billion US dollars which is actually needed for this organisation to operate properly annually.

UNHCR is gradually losing the support of one of its major partners, the United States of America. Since Donald Trump became the president, the Trump administration has drastically

[525] Laura Hammond - History, Overview, Trends and Issues in Major Somali Refugee Displacements in the Near Region (Djibouti, Ethiopia, Kenya, Uganda and Yemen/Vol. 13.

[526] Mercy Corps, *The world's 5 biggest refugee crises* (Jul. 02, 2020), https://www.mercycorps.org/blog/worlds-5-biggest-refugee-crises.

reduced the number of refugees the USA admits through its resettlement program. The number of refugees admitted during the Obama administration was 110,000 annually which has now been reduced to 45,000 refugees and will be reduced further. The Trump administration has limited interest in the refugee crises and might also reduce their funding to the UNHCR. The United States have already slashed their funding to the UNRWA, which is an agency that looks after Palestinian refugees. Almost 40% of UNHCR's funding comes from the U.S so even a slight reduction would affect the agency extremely.

The next alternative sources of funding for the organisation are the members of the European Union. But the European Union's top priority is to stop the arrival of refugees from nearby countries and also halt asylum seekers from Turkey, Libya and Morocco. Several European governments want to seal Europe's borders so that refugees cannot get inside and has also shown little to no hesitation in violating international refugee laws. The E.U also funds the Libyan Coast Guards to intercept and return refugee boats. These people are kept in detention centres where according to Amnesty International; they are at risk of torture, forced labour and other grave violations of human rights. The United Nations High Commissioner for Refugees has been silent about the actions of the European Union, although it violates the basic principle of refugee protection.

The UNHCR has a relative autonomy as 90% of its funding comes from various states. Its governing board consists entirely of states. Thus, it can only operate in a country after an agreement with the Government. The government can also limit the scope of operation of the UNHCR as well as its partners. In countries like Syria, Sudan, Ethiopia and Pakistan, the United Nations High Commissioner for Refugees has to work with their governments even if the government's ulterior motives differ from that of the agency.[527]

FAILURES OF UNHCR

There have been a number of instances where the United Nations High Commissioner for Refugees has failed to fulfil its mandate. The early instances can be stated at the end of the Cold War. Western nations changed their refugee policies. They no longer supported hosting refugees and also turned away Asylum Seekers who fled from the Communist Regimes in Eastern Europe.[528] During 1981 to 1994, Haitian and Cuban refugee boats were systematically

[527] Jeff Crisp, *As the World Abandons Refugees, UNHCR's Constraints are Exposed* (Sep. 13, 2018), News Deeply, https://www.newsdeeply.com/refugees/community/2018/09/13/as-the-world-abandons-refugees-unhcrs-constraints-are-exposed.

[528] United Nations High Commissioner for Refugees, *The State of World Refugees 1993,* Penguin, New York.

sent back to their respective countries by the US Coast Guard. Their claims to asylum were not even assessed by the United States of America. Without proper assessment to the claims of the asylum seekers, sending them back to their countries is a gross violation of the 1951 Convention. [529] Such instances not only show how ineffective the UNHCR is but also that the Governments have the real power and can turn a blind eye to gross violation of human rights happening all around the world.

Due to the pressures on the institution of asylum in North America and Europe, the UNHCR had to change the definition of "refugees" so that these countries could limit the amount of refugees they host. In 1995, the European Union interior ministers and justice decided that only people who were being persecuted by a State could be called as "refugees". This new definition basically does not grant refugee status to people who are victims of extremist movements and to people of a virtually disintegrated nation. Therefore, under this definition, Somalis and Liberians who had to flee their countries because of conflict between warlords could not be classified as refugees even though their nation was virtually disintegrated.[530]

Even after this, the United Nation High Commissioner for Refugees has not intervened on behalf of the refugees. This shows a clear sign of failure of UNHCR. Even though the United Nations High Commissioner for Refugees is empowered by the United Nations General Assembly with a binding authority to evoke government adherence, for the protection of refugees, there are still no formal provisions for enforcement of such.[531]

In 2018, a spree of investigations exposed corruption in the United Nations High Commissioner for Refugee agency in Khartoum and also exposed rampant negligence by the staff in Cairo. As allegations mounted, the UNHCR launched an investigation through its independent investigation office into UNHCR's operations in Sudan. The refugees in Sudan welcomed this news but for a short time. The office sent mails to potential witnesses that their statements could be shared and shown to the accused. This stopped the witnesses and the refugees from coming forward as they feared reprisals. Moreover, there were reports of Sudanese officials threatening witnesses from speaking out with arrests or being killed.

In July, 2018, when many Sudanese refugees in Egypt tried to call the UNHCR's helpline number after Egyptian Intelligence Officers threatened them with deportation, the number was not operational. It was reported that neither the officials nor the refugees knew about this

[529] Loescher, *Beyond Charity – International cooperation and the global refugee crisis 1993,* Oxford University Press, New York.
[530] Jean, *World in Crisis: the politics of survival at the end of the 20th century 1997,* Routledge, London 42-57.
[531] Pitterman, *Refugees and world politics 1985,* Praeger, New York: 43-81.

change. Neither any new helpline number was provided. It was also reported that the UNHCR staff in Cairo had no coordination with the UNHCR staff in Sudan. It meant that even if anyone was deported it would be almost impossible to find out.[532] These allegations should make UNHCR prioritise protecting refugees instead of coordinating with state and secret agencies that have their own agendas.

In 2020, there were reports that dozens of people had to leave the European Union funded UN refugee agency centre in Tripoli due to harsh conditions in the agency centre. Refugees were reportedly using smugglers to cross the sea to Italy. It was reported that the refugee centre in Tripoli was overcrowded and refugees were kept in inhumane conditions. One of the rescued victims stated that the rooms were very small and that almost 50 refugees were kept in such rooms with just a bucket for a toilet. Food and water were not sufficient and also that some refugees were even tortured.[533]

Moreover, the UNHCR camp in Libya has been heavily criticised for agreeing with European Union migration policy. The European Union funds the Libyan Coast Guard to intercept refugee boats, trying to escape to Europe. Upon forcefully returning to Libya, detainees are subjected to indefinite lock up in various UNHCR centres. They are also subjected to wide range of human rights abuses which includes sexual violence, torture and deprivation of food, water and medical care.[534]

CONCLUSION

In the last decade the total number of refugees has almost doubled due to increase in various disputes around the globe. In recent years, the refugee population has taken a steep surge and now consists of almost 26 million people who had to flee their countries. Refugee crises are increasing every month and the numbers of refugees actually getting the help they need are decreasing. Some examples might be in the continent of Africa where various countries are facing refugee crises all together. Almost all countries in the continent of Africa got their freedom from colonialism in the 20th century and from then the refugee crises of various countries have continued without a break. Some recent crises are the Burundi Refugee Crisis where most people have fled to nearby countries of Rwanda, Kenya and Democratic Republic

[532] Mat Nashed, *The UN refugee agency is failing to protect refugees in Sudan and Egypt* (Sep. 7, 2018), https://english.alaraby.co.uk/english/comment/2018/9/7/the-unhcr-is-failing-to-protect-refugees.
[533] Rana Jawad, *Migrant crisis: Self-immolation exposes UN failures in Libya* (Jul. 31, 2019), https://www.bbc.com/news/world-africa-49154959.
[534] Sally Hayden, *They don't help': refugees condemn UN over failures that drove them to sea* (Jan. 09, 2020), https://www.theguardian.com/global-development/2020/jan/09/they-dont-help-refugees-condemn-un-over-failures-that-drove-them-to-sea.

of Congo. The Eritrea Refugee Crisis which is happening in a small East African country where almost 12% of the country's population had to flee their country due to political instability. Apart from these, in the country of Central African Republic many people had to seek refuge due to sectarian violence.[535]

Apart from the several refugee crises all over the world, the five biggest refugee crises, some of which haven't been resolved for decades, hasn't shown any signs of getting better. The refugees' crises in Syria, Afghanistan, Somalia has not gotten any better. The number of refugees of Somalia and Afghanistan are not getting any less for decades because of terrorism and unstable government with various disputes happening inside the countries. On top of these, the recent refugee crisis in Myanmar was the final nail in the coffin for the United Nations High Commissioner for Refugees (UNHCR).

In recent years, the UNHCR has been stretched to its limit by the sudden surge in the number of refugees and crises all over the world due to increase in disputes. That has exposed so many constraints of the UNHCR, one among them being their financial dependence on States who are unwilling to give. States have also brought legislations which go against the idea of helping refugees. The corruption in the UNHCR offices and their inadequate employees in some offices have resulted in refugees suffering more. Nobody can know when the world will have no disputes in the future so at present, the authorities should look more into the refugee crises and should comply with organisations such as the UNHCR. UNHCR should stop supporting States when they impose legislation going against the 1951 Convention and corruption at all levels should be kept in check for the better working of the organization to help the refugees. Only with the help of both the States and organizations such as the UNHCR can the refugee crises all around the world could come to an end. Although the UNHCR has had a lot of successes throughout the years, their failures have also been greatly noticeable.

[535] Abir Abdullah, *THE 10 REFUGEE CRISES TO FOLLOW IN 2020* (Jan. 08, 2020), https://www.concernusa.org/story/largest-refugee-crises/.

INTRODUCTION TO BANK MERGERS & MERGER OF BANKS IN 2020

- PUSHPESH SRIVASTAVA

ABSTRACT

This paper talks about the importance of merger from a bank's perspective. It is imperative to be aware that the banking mechanism in India awarded with innumerable exceptional accomplishments. The method of manufacturing Indian banks more solid and Stronger plays an indispensable role in the areas of banking by way of reducing the expense and manufacturing of revenues. The Banking system in India acknowledged for its extensive blend. Through bank mergers they share their resources with one another a limit the expense brought about and moves with full dedication to work towards the development and extension of their activities. Yet the most critical mission is to examine is that why we need mergers in Indian financial areas? Through various ranges of exploration and examination that have been carried out in previous shows that the banks are merged for its development prospect. This article likewise discovers about the latest merger of banks in the year of 2020 and an advantage associated with it. This comprises a case recognized as SBI and its associates, ICICI Bank Merger case. This article additionally offers with bank merger, break down the intentions of merger in India financial industry, especially in the banks. The banks have been positively affected by the event of merger, emphatically influenced by the occasion of a merger and its impact on monetary performance. The discoveries recommend that somewhat merger has been effective in Indian financial division. The investigations led additionally reason that post merger there are positive changes in regard of all financial boundaries. The Government and Policy producers ought not advance merger among solid and frail banks as an approach to advance the enthusiasm of the customer of powerless bank.

INTRODUCTION

Banking sector is one of the quickest growing areas in the creating economies like India. Merger is mentioned as one of the most useful device for boosting economic system of India and it has witnessed growth after liberalization generation and banking is one of them. Merger in banking zone has supplied evidences that it is the useful device for survival of vulnerable banks by way of merging into larger bank. It is found that small and neighborhood banks face subject in bearing the effect of global economic system therefore they want guide and it is one

of the reasons for merger. some non-public banks used mergers as a strategic device for expanding their horizons. There is massive doable in rural markets of India which is not but explored with the aid of the fundamental banks. Therefore ICICI Bank ltd. has used mergers as their enlargement approach in rural market. They are profitable in making their presence in rural India. It strengthens their networks across geographical boundary improves customer base and market share.

Bank merger can be defined as an agreement whereby two existing banks are merged into one new bank. A scenario in which two existing banks combine all their assets and liabilities with an aim to turn out to be one bank. The types of mergers and the reasons for mergers are different. Bank mergers are usually conducted to amplify bank reach and it provides an opportunity for banks to develop its overall functioning and to enter into a new section or acquire shares in the market. Banks merger is an intentional conduct of banks on the same terms to form a new entity. In this process two or more banks do not live or operate separately but often decide to merge into a new under a new name, and they are legally recognized.

HISTORY

According to the Indian banking archives, the foundations of Indian banks were laid after the 18th century, when attempts were made in 1786 and 1790. Bank merger have been initiated in India through the recommendations of Narasimham committee II. [536]Performance of Indian banks were improved in the year if 2008-2009(global crises)[537]Since 1935, RBI is responsible for banking system in India.

The three banks merged in 1921 to form the Imperial Bank of India, which later introduced as State Bank of India. The influence of globalization on Indian banks has led to modifications in regulation and composition. With the changing environment various strategies have been implemented in this sector in order to stay productive and reach the top of the world. One such proposed action in the consolidation procedure is mergers. In the year of 1969, 14 private banks were nationalized by the government and the banks has made 46 mergers to eradicate the weakness. This has proven to be a very successful approach for underperforming banks. 6 private banks were nationalized in 1980.

On 15 June, 2016 the Union cabinet gave acceptance on the merger of 5 branches of SBI with the main holding, as banking system in India moves towards the process of consolidation. State

[536] click here
[537] click here

Bank of India merged with others branch would see the total operation balance sheet at a huge amount I.e. Rs. 37 trillion, introducing it as one of the top 50 banks in the entire world.

Boards of Directors in October 2000 of ICICI Bank and ICICI gave their consent for merger of ICICI & it's 2 entirely owned retail finance subsidiaries, In the month of April 2002 , The Reserve Bank Of India approved the merger. 13 mergers held between public and private banks (pre-nationalization period (1969-1991)). 21 merger took place in the era of post-liberalization(1991-2015). In April 2019, Vijaya Bank and Dena Bank were merged into Bank of Baroda.

NEED OF MERGERS IN BANKING INDUSTRY OF INDIA

According to research most previous mergers did not have specific parameters to support these observations but were in favor of weak banks. The lending capability of the Public Sector Banks will make bigger and their stability would also be strong. These huge banks would additionally be able to compete globally and increase their operational effectively via decreasing their value of lending. The merger would help in higher management of banking capital. The merger will reduce the fee of banking operation and ultimately lead to better NPA and better risk management. Larger Bank has successfully overcome international competition. Merger will help in enhancing the professional requirements. The decisions on the need for high credit can be made immediately. It will be easier for a bank to maintain and improve its identity as a larger bank. After the merger, the benefits of the merger are widespread and they have the most new customers. Expand its business capabilities, retain long-term market share, and retain opportunities for technology upgrades. This is very beneficial for the economy as a whole. This provides a higher level of efficiency for trading companies as well as banking operations recommended for businesses. Standard risk minimization is achieved through mergers , which is always appropriate from a business point of view. This will help increase profitability and improve modern living spaces.

It provides higher efficiency ratio for commercial enterprise operations as well as banking operations which is recommended for the economy. Chances of survival of underperforming banks will increase as a result customer believe stays intact which is imperative for the economy. The weaker banks gets merged into more suitable one and gets the gain of giant scale operations.The targets of monetary inclusion and broadening the geographical reach of banking can be completed better with the merger of giant public quarter banks and leveraging on their expertise.With the large scale know-how handy in each and every sphere of banking operation,

the scale of inefficiency which is more in case of small banks, will be minimized. Larger dimension of the Bank will help the merged banks to provide greater products.

ING VYSYA WITH KOTAK MAHINDRA BANK [538]

Kotak Mahindra limited began their journey in the year of 1985 as Non -Banking Financial Company and it obtained its license for banking in the year of 2003 and turned into the first NBFC to be changed into a bank. ING Vysya was from the start formed in Banglore as Vysya Bank Limited. ING Group after acquiring the crucial shares hold by Vysya Bank in the year of 2002 got an identity as ING Vysya and listed in 1st bank to be obtained by a foreign Institute .The merger of ING Vysya with Kotak Mahindra bank , owned and controlled by Dutch multinational company India discovered it's 4th largest private bank. Through the help of this merger Kotak got an opportunity to expand its all the activities related to banking , and also grant an authority to excel with other foreign banks. Mergers also provide for appropriate capital foundation to encourage investment in huge projects by banks in favour of economic growth of our country. Because of this merger Kotak branches reached 47% and began to rise, as a result it has spread its geographical presence.

Some disadvantages are also associated with merger. Bank employees faced difficulties due to changes in working environment. Two banks mostly have different salary structure. Near about 1/3rd employee's pay structure of ING Vysya falls under Indian Bank Association, Many employees were worried about the pay structure and the salary they would received. There were some employee in a fear about losing job position of zonal head, regional manager, sales head, etc. [539]

DISADVANTAGE OF BANK MERGER.

The leading drawback is compliance and possibility of risk. Banks merged together carry different logics & culture. There is a difference in types of risk involved which leads towards the negative scenario and adversely impact on the profit margin of the banks merged. Another drawback is associated with the perspective of bank as they only consider merging on papers often ignore culture & people involved into account because of which bank mergers fail ultimately. It would be tough to deal with problems related to human resource few large inter-

[538] click here
[539] click here

linked banks can expose the broader economy to greater monetary risks . The identification of banks operating at small scale won't be that much important.

MERGER OF BANKS IN THE YEAR OF 2020.

As per the recent merger, Clients or consumers & depositors are treated as clients & depositors of the banks in which these banks have been merged with effect from 1 April 2020.

- OBC (Oriental Bank of Commerce) and UBI (United Bank of India) will be merged into PNB (Punjab National Bank). After the merger, these lead to formation of a structure of the 2nd largest public sector bank in the country, after SBI (State Bank of India).
- Indian Bank merged with Allahabad Bank. Competitiveness at global level would increase.
- Union Bank of India merged with Andhra Bank and Corporation Bank. Union Bank of India total business amount to Rs. 14.59 lac crore and number of total branches is 9,609.
- Syndicate Bank merged into Canara Bank, ranked as 4th largest public sector lender. Operations cost would reduce due to overlaps in network . As they share work culture almost similar that would lead towards a smooth transition.
- Because of the merger, there are 12 PSUs including 6 banks which are merged and 6 independent public sector banks.
- 6 merged banks - SBI, PNB, Bank of Baroda, Indian Bank, Canara Bank, Union Bank of India.
- 6 independent banks - Uco Bank, Indian Overseas Bank, Bank of India, Bank of Maharashtra, Punjab and Sind Bank, Central Bank of India.

Mergers are always in the interest of bank along with it's customer and economy .Whenever a banks merged, Anchor bank & amalgamating banks merged with former bank. Anchor bank customer must not likely to face lots of changes.

The leading legislation to control Private banks and different connected banking corporations is the Banking Regulation Act guided by section 44A of the Act . Beneath this provision, a theme of such integration is needed to be approved by a two-third majority of shareholders of every merging banks. [540] Companies Act might not have a lot to mention related to the concept

[540] Banking Regulation Act 1949("BR Act"),

of entire bank mergers (exception are those included under chapter XV) Any merger planned between a bank or a firm not involved in any banking activities , need the approval of the High Court, afterwards RBI as commanded under the Companies Act, 1956. [541]

Central Government Is competent as per Section 237 of the Companies Act to pass an order for compulsory amalgamation and central Government could use such powers only after discussion with the RBI. [542]

Compulsory amalgamation are persuade by RBI to secure :

1. Public interest.
2. Interest of the customers of a distressed bank.
3. To manage banking companies.
4. Interest of banking structure.

CONCLUSION

Bank mergers regulate by the Reserve Bank of India as it has exercises its power to work in the favor of customer. Numerous steps are taken by Government at frequent intervals for betterment of banking industry and our country. It is observed that results of the steps taken by Government sometimes brings a positive change immediately and in some cases after a certain gap. Whatever is the results we are getting through bank merger is always considered as a issue to debate and it's fate depends on its future outcome.

In Indian rural markets there is immense potential, which is yet ignored by the major banks. ICICI Bank Ltd. achieve their proposed plan of expansion in rural market by using the mergers. In rural India their presence are still exists.

Factors affecting future mergers in banking sector also includes all those challenges for free and quick liquidity, exchangeability, and demand for banks involved in large type of investments. It is very vital for the Government to seek more attention towards this along with policy makers to be more attentive, watchful at the time of encouraging bank mergers as a way to secure an excellent economy for our country.

[541] Companies Act ,2013
[542] Companies Act, 2013

THE APPLICABILITY OF THE CODE OF CIVIL PROCEDURE TO WRIT PROCEEDINGS

- RICHA BORTHAKUR

INTRODUCTION

The legal system in most parts of the world has been divided into two distinct parts, the substantive law and its procedural counterpart. In India, criminal cases are governed by the Code of Criminal Procedure while civil cases are governed by the Civil Procedure Code. Yet, a writ petition, particularly those under the provision of article 226[543] of the Indian Constitution have been expressly excluded under section 141[544] of the code of civil procedure. Although the apex court as well as multiple high courts have proclaimed that the code of civil procedure has no applicability in writ petitions, it has been seen in a variety of cases wherein although the code of civil procedure does not apply as is, its principles, most certainly do. The most common out of these principles is that of *Res Judicata*, yet principles relating to pleadings, discovery and so on also have an impact on how writ proceedings take place. This paper first looks into the provisions of section 141 of the Code of Civil Procedure following which it analyses the principle of res judicata in writ proceedings. Finally, it looks into a number of cases to demonstrate how the principles of the Code of Civil Procedure have been used in a variety of forms.

WRIT PETITIONS AND SECTION 141 OF THE CPC

In 1976, an explanation was inserted to section 141 of the Civil Procedure Code in an attempt to resolve judicial controversy with regard to the applicability of the provisions of the code to the setting aside of *ex parte* proceedings or dismissals for default, under the provisions of order 9, rule 9, of the Code of Civil Procedure, and subsequently, the applicability of the code and its specific provisions to writ proceedings which fall under the ambit of article 226. The present jurisprudence provides that although writ proceedings are not proceedings as per the meaning and its corresponding explanation of section 141, and are thus, not governed by the code, it does not exclude the power of the high court from invoking sections of the code of civil procedure while exercising its extraordinary jurisdiction under article 226 of the constitution[545].

[543] The Constitution of India, 1950
[544] The Code of Civil Procedure, 1908
[545] M.R. Mallick, 'Mitra's Civil Procedure Code', Eastern Law House, Kolkata, 4th edition, 2002.pp-244

The intention behind this move is to ensure that decisions and proceedings for writ petitions are not only in conformity with already existing principles of the code of civil procedure but more importantly, conform with the rules of equity and natural justice. For example, a writ petition which is dismissed for default may be restored if a reasonable cause for the same can be shown[546].

The most persuasive reason for the insertion of the explanation to section 141 is that when the high court exercises jurisdiction of an extraordinary nature under the ambit of article 226 of the Constitution, the immediate objective is to a secure a speedy and efficacious remedy to the individual whose legal and constitutional right has been infringed. The Code of Civil Procedure, consists of elaborate and technical rules, which, if applied to writ proceedings, the very aim and purpose would most likely be defeated. A number of conflicting judgements and precedents were set around the 1970s in light of which, the parliament, through the amending act of 1976, introduced an explanation, as it stands today which says that 'proceedings' in section 141 of the code does not include any proceedings under article 226 and thereby, statutorily, recognising the views expressed by some of the high courts.

With the total exclusion of the proceedings under article 226 of the Constitution from the purview of the section 141 of the code, there is no question of making applicable the procedure of the code "as far as it can be made applicable to the proceedings under article 141". If, in spite of it, the provisions of the code are made applicable to the proceedings under article 226 of the constitution, it would be repugnant to the extraordinary powers of the High Court thereunder[547]. A number of considerations have come up before the courts on a fact by fact basis. The supreme court, for example while dealing with an appeal to a writ petition under article 226 has not completely excluded the possibility of allowing oral applications to be made in writ proceedings. They observed that the practice of entertaining oral applications and subsequently, issuing interim orders by any court in matter without any affidavit as a prima facie proof of the allegation, and furthermore, without any record being kept before the court could lead to serious abuses of the powers and processes of the court. Although, if some grossly iniquitous act is about to be perpetrated and any delay would result in the fait accompli of a monstrosity, urgent oral application could be permitted to be filed later[548].

[546] Hans Raj v. State of Himachal Pradesh AIR 1978 HP 63
[547] Hon'ble Secretary and Correspondent Badruka college of Commerce and Arts v. State of Andhra Pradesh
[548] Samarias Trading Co. v. S Samuel (1984) 4 SCC 666

RES JUDICATA

The principle of Res Judicata which initially had its origin in equity principles of justice, is embodied in the code of civil procedure in section 11. This principle of finality ensures that once a dispute or an issue has been decided upon by a competent court, the same cause, as a matter of policy cannot be reagitated in the court, between the same two parties on the same grounds. The objective behind such a policy is simple, it minimises litigation along with which, it also prevents continuous harassment to the defendant.

Through its use of the mantra, 'code of civil procedure doesn't apply but its principles do', the judiciary has used principles of code of civil procedure as and when it sees fit. One of such principles is that of Res Judicata. In the case of *Daryo v State of UP*[549],

Petitioners were tenants of plots of land and owing to communal disturbances in the region, were forced to leave the region. Upon return, they realised that the respondents had unlawfully possessed the plots of land. A suit for ejectment was filed under the U.P Tenancy Act in the process of which the trial court passed a decree in the favour of the petitioners. The board of revenue, however, allowed a second appeal by the respondents in accordance with the U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 1953.

The petitioners, in response then proceeded to file a writ petition in the Allahabad High Court seeking a writ of certiorari. Upon dismissal, they then approached the supreme court under article 32. The respondents here argued that the rejection of the petition by the high would be a bar on the current suit being tried in the supreme court due to the principle of Res Judicata. The court said that '*there seems to be no reason why the rules of res judicata should be treated as inadmissible or irrelevant in dealing with the petitions file under article 32 of the constitution".* The same rule, should logically then also apply to high courts. This was held in a number of cases including *Indir Nagar Residents 'Benefit Society vs Government of Tamil Nadu*[550], *Ad hoc Committee of Mangal Kodalia Menaka Debi Sat Sangha Vidyamandir vs State of West Bengal*[551] and *Mohinder Singh Ahlawat vs Director Social Welfare Deptt., Haryana*[552], among others.

CASE LAWS

[549] Daryao And Others vs The State of U. P 1961 AIR 1457

[550] *Indir Nagar Residents 'Benefit Society vs Government of Tamil Nadu* (1996) 1 MLJ 650

[551] *Ad hoc Committee of Mangal Kodalia Menaka Debi Sat Sangha Vidyamandir vs State of West Bengal* (2000) 2 SLR 399 (CAL)

[552] *Mohinder Singh Ahlawat vs Director Social Welfare Deptt., Haryana* (1995) 7 SLR 472 (P&H)

A number of cases have used the principles that the code of civil procedure embodies in order to adjudicate on writ proceedings. In the case of *M.J. Exporters vs Union of India*[553], the appellant had, in their writ petitions, challenged the interest raised by the respondent government department. The high court had rejected the prayer of the appellant by only giving them a partial relief. In a second writ petition, the council for the appellant had not made any submission with regard to whether the interest in payable but instead argued on the date from which the interest is to be paid. The Supreme Court of India, under its civil appellate jurisdiction said that the principles of code of civil procedure, in this case, Constructive Res Judicata, which is laid down under Order 23 Rule 1[554] of the Code of Civil Procedure. Since the principles of the Code of Civil Procedure are applicable to writ proceedings, the decision of the first judgement would apply as constructive res judicata to the second one, since in the former judgement, the issue was raised and abandoned. The appeal was thereby dismissed. The Rajasthan High court also came to a similar conclusion in the case of *Roshan Lal vs State of Rajasthan*[555] wherein the petitioner was estopped by the application of principles of constructive res judicata due to public policy considerations.

In the case of *Diptymal and others vs State of Haryana*[556] and Others, the state of Haryana, through the provisions of section for of the land acquision act, sought to acquire land in the region of the Ballabgarh and Jharsantly districts of Faridabad in order to develop it as an industrial area. The petitioners had filed a civil writ petition to challenge the acquisition which was disposed of by directing the state to release the constructed area by as it existed at the time of issuance of notification under section 4 of the act. Another petition was filed by the petitioners, seeking to challenge the acquisition by the government relying upon the provisions of section 24(2) of the 2013 act. The court said that the relief sought for in the second petition was available to the petitioners in the first petition as well. Thus, the claim now sought was barred according to the principles enshrined in Order 2 Rule 2[557] of Code of Civil Procedure. Thus, the petition was dismissed.

In the case of *Ruposhree Ganguli vs State of West Bengal and others*[558], the petitioner was appointed in the Harishchandrapur Junior High School within the district of Malda. Since the

[553] *M.J. Exporters vs Union of India* 2006 (3) BomCR 815
[554] Code of Civil Procedure, 1908
[555] *Roshan Lal vs State of Rajasthan*
[556] *Diptymal and others vs State of Haryana* 2017 SCC OnLine P&H 1192
[557] Code of Civil Procedure, 1908
[558] *Ruposhree Ganguli vs State of West Bengal and others* 2018 SCC OnLine Cal 670

petitioner had no B. Ed degree, she had submitted an application to the Vidyasagar Tearcher's training college, and post depositing her fee for the first semester, she continued her training under this college. The grievance arose when before the examination of the first semester, the candidate's registration was declined on the plea that the petitioner did not fulfil the criteria of having 50% marks in a graduate course, as prescribed by the NCTE. The petitioners argued that any such grievance should have been raised by the college before admission in the course. The petitioners, however, did not make the NCTE a party to the writ proceedings and this was taken up by the council representing the university, who accordingly, questioned the maintainability of the suit. The Calcutta High Court said that although the provisions of the Code of Civil Procedure are not applied readily in adjudication of writ petitions, the principles of Code of Civil Procedure *mutatis mutandis* are applicable as far as would be practicable. Taking inspiration from the Code of Civil Procedure, the court said that among the respondents and parties, some are necessary parties, and some are proper parties. In the absence of a necessary party, the matter cannot be adjudicated, meaning thereby, the proceeding must suffer for not adding the necessary party. However, for non-joinder of proper parties, the proceeding may not suffer. As per the facts of the present case, although the university is guided by NCTE rules which are place before the court, and the matter is under adjudication, the question of addition of NCTE as a party to the proceeding, who might have been a proper party with a remote chance was held to be immaterial. Thus, non-addition of NCTE as a party in the current proceeding shall not have an impact on the current writ petition particularly since no relief has been sought for against NCTE.

A similar rationale was made out in the case of *Kajal Roy vs State of West Bengal*[559] where the applicant was the co-accused in a criminal case and wanted to be added as a party respondent in a writ petition which alleged perfunctory investigation by the police in relation to a case where the applicant is one of the accused. With regard to the provisions of code of civil procedure, the court, concurring with other similar judgements, held that although the entirety of the provisions of the code of civil procedure does not apply to writ proceedings, its principles do. Accordingly, a party may come to the court of writ jurisdiction and seek addition as a party in a pending writ petition, provided that the party satisfies the court that he is a necessary party or a proper party or both, only then will they be entitled to be added as a party and heard. Merely because the facts of a case are related to a police complaint on police inaction does not

[559] *Kajal Roy vs State of West Bengal* 2019 SCC OnLine Cal 1005

alter the fact that it is a writ petition wherein code of civil procedure principles are bound to be attracted. Since the present writ petition consists of a number of allegations against the applicant, the applicant is entitled to contest those allegations which can only be done if the applicant is had a party to the proceedings. The writ petitioner is a *Dominus litis* and can choose the person against whom he wants to litigate. Further, the rights of a writ petitioner, the court says, is subject to the provisions of Order I, Rule 10[560].

In the case of *Utpal Sharma vs Akshay Pant*[561], six mandamus appeals were taken up together. The writ petition filed in the form of a Public Interest litigation, was praying for a writ of quo warranto. The petitioners were challenging the appointment of one, Dr Utpal Sharma as the principal of Dr. B.R. Ambedkar Institute of Technology, Port Blair. The petitioner's claim was that Mr Sharma had produced fake certificates to be appointed to the said post and thus, had no authority to continue. With reference to the code of civil procedure, the court held that the observations that the certificate were fraudulent could not have been arrived at in a prima facie manner, in the absence of any detailed enquiry particularly, at the premature stage of entertaining the writ petition, in the initial hearing. They said the principles enshrined in Order VI Rule 4 of the Code of Civil Procedure with specific reference to the furnishing of particulars as to the nature of the alleged fraud was not complied with in the present writ petition. No unambiguous proof was furnished to prove that fraud was being practiced neither any motive for the respondent to be practicing such fraud. The court claimed that the three previous orders were suffering from 'palpable infirmities, bordering on perversities. The appeals were allowed.

In the case of *Ganju Rajwar vs Union of India*[562], where a review petition was being heard, the learned council for the petitioner sought to argue on the case on merits. Review, the court said is permissible on the grounds as enshrined in Order XLVII of the code of civil procedure and thus, its principles are followed in writ proceedings. The court said that according to this provision, re-argument on merits in not permissible in review jurisdiction. Since no new documents or facts have been discovered which could not be discovered earlier despite due diligence exercised by the petitioners and the petitioners have not been able to show any error apparent on the face of the record, the argument does not hold. The court, with regard to this issue said that the grounds for review had not been made out, in accordance with the Code of Civil Procedure.

[560] Code of Civil Procedure, 1908
[561] *Utpal Sharma vs Akshay Pant* 2018 SCC OnLine Cal 15362
[562] *Ganju Rajwar vs Union of India* 2018 SCC OnLine Jhar 452

In the case of *Neela Devi Rai vs State of West Bengal*[563], the question of whether the heirs of a deceased government employee can maintain legal action against an order of dismissal was considered. The high court held that principles analogous to Order XXII Rule 4 of the code of civil procedure will be applicable and accordingly, a writ application is maintainable by the heirs of a deceased employee of the government.

Some cases, however, have held otherwise. In the case of *Harsh Vardhan Lodha vs Institute of Chartered Accountatnts of India*[564], the court held that principles flowing from code of civil procedure provisions cannot control, regulate or exercise the writ powers of the high courts. They said that there exists no invariable rule which says that a writ court must be bound by the shackles of procedural laws which governs each and every case, even when the writ rules are silent.

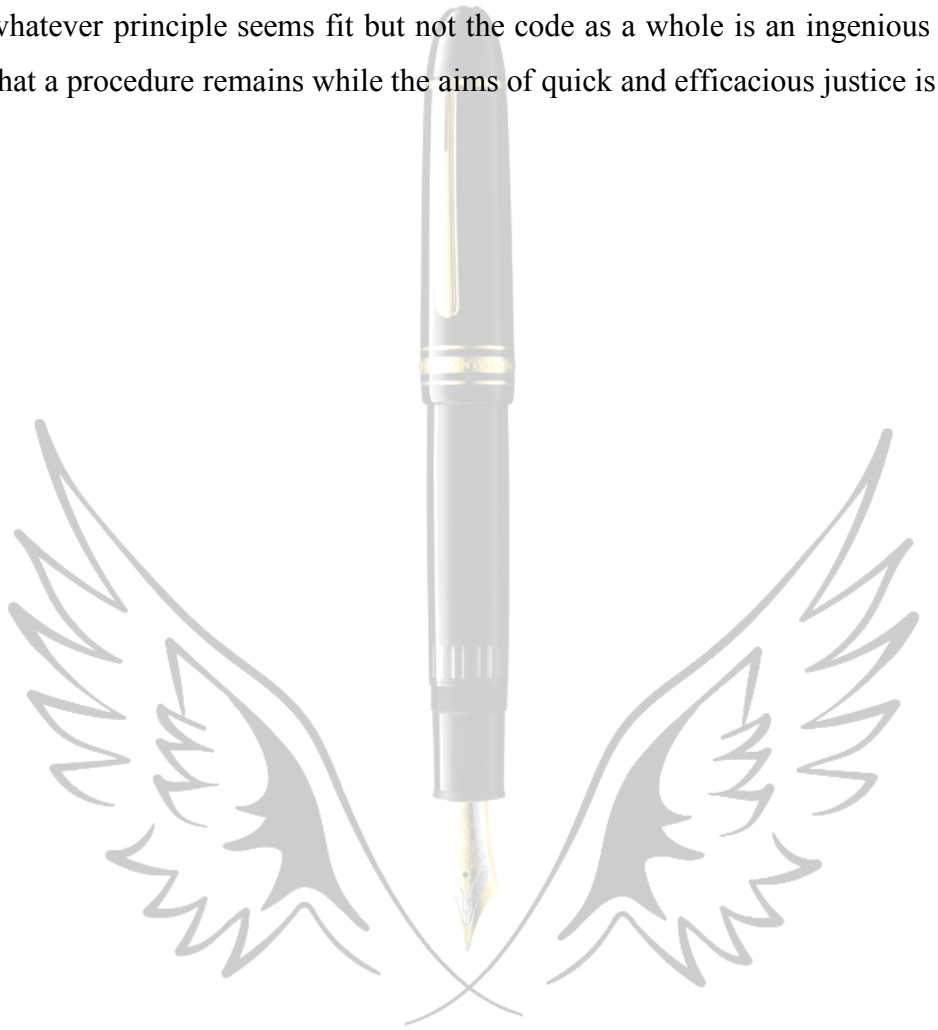
In the case of *J K Synthetics Ltd vs Labour Court Kota and Anr*[565], Perusal of Para 4 reveals that an application was filed in terms of Order 41 Rule 19 of the Code of Civil Procedure read with Section 151. Therein, restoration application was dismissed without considering argument and due to decision of appeal on merit. If provisions of Order 41 Rule 17 and 19 are looked into, appeal has to be heard in the presence of parties for its decision on merit, but it is not a mandate for a writ petition. It is settled law that procedural law of Code of Civil Procedure is not strictly applicable to the writ jurisdiction. Under the provisions of Code of Civil Procedure, the appeal should not be decided on merit, if party is not present. However, no such mandate exists for writ jurisdiction or under High Court Rules. In the instant case, appeal has not been dismissed on merit, but a writ petition

CONCLUSION

Courts across jurisdictions have held that although the provisions of the Civil Procedure Code do not directly apply to writ proceedings, its principles, be it with regard to res judicata, pleadings, or discovery have been used time and again by both high courts as well as the supreme courts. The explanation of section 141 of the code has made it clear that the code does not apply to writ proceedings under article 226 of the constitution. It is, however, curious to note that this explanation was added to a section on miscellaneous proceedings and not under the primary jurisdiction provision of section 9 of the Civil Procedure Code. In general,

[563] *Neela Devi Rai vs State of West Bengal* 1993 SCC OnLine Cal 244
[564] *Harsh Vardhan Lodha vs Institute of Chartered Accountatnts of India* (2009) 3 CHN 549
[565] *J K Synthetics Ltd vs Labour Court Kota and Anr* (2007) 2 RLW 1270

however, it can be observed that high courts across the country are not only governed by the principles of the Civil Procedure Code during adjudication and reasoning, but the high court rules are explicitly based on the provisions of the Code of Civil Procedure. This compromise of using whatever principle seems fit but not the code as a whole is an ingenious method of ensuring that a procedure remains while the aims of quick and efficacious justice is achieved.



BILATERAL INVESTMENT TREATIES: A THREAT TO INTERNAL SOVEREIGNTY?

-PRISHA SINHA

(I) INTRODUCTION

The gradual development of industrialisation in nations, accompanied with foreign trade and globalisation, played an essential role in genesis of Foreign Direct Investment (FDI).

Organisation for Economic Co-operation and Development (OECD) , an international economic organisation, created in 1961 to encourage the growth of world trade along with the International Monetary Fund, an institution founded to initiate monetary cooperation on international matters, have given a collated definition of FDI as *"an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate)"* [566]

In accordance with the 2007 World Investment Report, , explained that FDI has three essential components[567]: -

(a) Equity Capital, which are the shares purchased by a foreign investor, from an entity of another nation.

(b) Reinvested Earnings, are the investors share of earnings that constitute as retained profits which can be reinvested.

(c) Intra-company loans or intra-company debt transactions which may be either short- or long-term borrowing of funds between direct investors (parent enterprises) and such other affiliate enterprises.

1990's marks an important period, in the growth of FDI as a practice, as it was the phase where various domestic obstacles had been done away with via a wave of regulatory reform and privatisation, all over the world. Countries like China and India, that wanted build a nation upon self-sufficiency also changed their economic policy toward a more liberalised approach to foreign intervention in the domestic market.

[566] Detailed Benchmark Definition of Foreign Direct Investment, Third edition (Organisation for Economic Co-operation and Development,1996), and Balance of Payments Manual, fifth edition (International Monetary Fund, 1993)

[567] World Investment Report 2007: Transnational Corporations, Extractive Industries and Development, United Nations, United Nations Conference On Trade and Development

Foreign Direct Investment(FDI) plays an essential role in the development of a nation, it helps diversify the market structure and helps build strong inter-state relations. It has been an integral feature of the global economy and its development.

FDI has an especially interesting role to play when it comes to developing nations, However, it is often considered as a rather sensitive subject within political discussion, for the reason that the initial phase of foreign direct investment in developing nations was conducted only depending upon the availability and access to natural resources within a nation, so the nation investing kept in consideration their own scope for profit making, which often lead to exploitative conditions of trade enforced by the *"developed nation",* acting as an investor, upon the *"under- developed or developing"* nations, which was detrimental to the economic welfare of that nation.

Agreements in the form of foreign treaties and covenants, play an essential role in safeguarding the interest of the parties involved in such transactions and also create binding conditions upon the nations, which can be negotiated to create a balance in such financial agreements.

Treaties are regarded as one of the most essential source of Public International Law, The Vienna Convention on the Law of Treaties defines a 'treaty' as *"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"* [568]. The International principles that govern Investment Treaties are formulated by the institution OECD, they aim to establish norms based upon international consensus and certain principles for policies governing the transfer of capital in Cross Border Transactions, international investment, and the business conduct.

These rules are laid down in legally binding instruments, the most significant instruments for International Investment are,

(a) ***OECD Codes of Liberalisation[569]:*** The Code has created a balanced structure of guidelines and policies for countries to eliminate restrictions or barriers on the movement of capital, while providing flexibility to deal with situations of economic

[568]United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf [accessed 15 September 2020]

[569] Decision of the Council Adopting the Code of Liberalisation of Capital Movements, OECD, Dec 12th, 1961, available at: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0002 [accessed 12 September 2020]

and financial instability. Code of Liberalisation of Capital Movements which is also known as the *the 'Code of Liberalisation of Current Invisible Operations'* came into existence in 1961 by the OECD. This was at a period when several member countries, were in the process of economic re-strengthening and development, this was also the time when the international movement of capital faced many obstacles.

(b) ***Declaration on International Investment and Multinational Enterprises***[570]***:*** It was adopted on 21st June, 1976, it seeks to create a receptive and transparent space for international investment, it also strives to incentivize the active involvement of multinational enterprises can make to economic and social progress. It has been subscribed by All 37 OECD countries, and 13 non-OECD countries, it has 4 essential components:

(i) *Guidelines for Multinational Enterprises*

(ii) *National Treatment*: A voluntary undertaking by signatory countries, treatment no less favourable than that accorded in like situations to domestic enterprises

(iii) *Conflicting requirements*: minimise the imposition of conflicting requirements on multinational enterprises.

(iv) *International investment incentives and disincentives*.

(c) Policy Framework for Investment[571]***:*** The goal of the Policy is to encourage private investment that can create steady economic development and sustainable growth, supplementing to the economic and social welfare of individuals around the globe. Formed in 2006, the PFI was updated in 2015 to include suggestions from various users at national and regional levels, as well as to incorporate developments in the global economic landscape.

The OECD provides an open forum for treaty negotiators and experts from OECD and non-OECD nations, where they collaborate to encourage mutual understanding of core treaty

[570] Declaration on International Investment and Multinational Enterprises, OECD, Jun 21st , 1976, available at: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144 [accessed 12 September 2020]

[571] Policy Framework for Investment, 2015 Edition, OECD, 11th September 2015, available at: https://read.oecd-ilibrary.org/finance-and-investment/policy-framework-for-investment-2015-edition_9789264208667-en#page1 [accessed 13 September 2020]

provisions and newly emerging legal concerns and to improve outcomes of international investment treaties for governments and investors.

(II) DISPUTE RESOLUTION AND BILATERAL INVESTMENT TREATY

The UNCTAD Investment Policy Framework is utilised by several policymakers while constructing national investment policies and while negotiating investment treaties. It acts as a base for ability development on investment policies, and has also been a medium for agreement in international disagreements on investment issues, For example, In UNCTAD's World Investment Forums, IIA Conferences and other intergovernmental meetings.

An International Investment Agreement, commonly known as *"bilateral investment treaty ("BIT")* when used in a bilateral context, or "*investment guarantee agreement ("IGA")* enhances investment activities between signatory nations and lays down the criterion for protection of investments made in one country by investors from the other country.

An IIA contains obligations on the host State, which may include:

- Treating foreign investors as favourably as domestic investors or foreign investors from other countries; foreign investors are entitled to the better of national treatment or most favoured nation (MFN) treatment, subject only to certain limited and specifically described exceptions listed in annexes or protocols to the treaties.

- Treating foreign investors fairly and equitably, as well as giving them protection and full protection and security for investments, and promise not to engage in “arbitrary” or “discriminatory” decision making.

- Establishing clear limits on the expropriation of investments and entitle foreign investors to seek compensation. Expropriation can occur only in accordance with international law standards—that is, for a public purpose, in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate, and effective compensation. “Expropriation” isn't limited to physical takings, and may include a good range of measures that deprive the investor of the value of its investment.

- Allowing foreign investors right to transfer capital into and out of the host country without delay using a market rate of exchange. This covers all transfers associated with

an investment, including interest, proceeds from liquidation, repatriated profits and infusions of additional financial resources after the initial investment has been made. Ensuring the proper to transfer funds creates a predictable environment guided by economic process

- BITs often give foreign investors the right to engage the top managerial personnel of their choice, regardless of nationality.

- Allowing foreign investors to submit investment disputes to international arbitration

Bilateral Investment Treaties, like most agreements contain a clause dedicated for dispute resolution in case of possible conflicts. Conflicts between Entities involved in different nations, can lead to various complications when there's a breach in the above obligations, However, it gets trickier since there are not only foreign entities involved but also their nations, to avoid Inter-state conflict, quick and amicable resolution is essential in maintaining peace.

Investor-state dispute settlement system (ISDS), is an evolving phenomenon that has become crucial within International Investment Agreements, its structure has grown based upon a number of investment or such subject related treaties, along with various International Conventions (International Centre for the Settlement of Investment Disputes Convention) and Rules (United Nationals Commission on International Trade Law Rules)

ISDS provisions form an important element to investment treaties, as they provide a forum for investors to bring conflicts regarding the treaty's substantive provisions. According to a study conducted by the OECD upon Dispute settlement provisions in international investment agreements[572], in 2012, 93% of the treaties contain language on ISDS and 96% of the treaties in the sixteen hundred sample treaties studied contain such provisions, including almost all of the recently concluded treaties. ISDS provisions are vital in laying down the institutions to which investors can come for such dispute resolution and for remedy under the treaty, in most cases it is either domestic judicial proceedings, or international arbitration.

There are three notable categories of treaties that provide for investor state dispute settlement systems, the first kind are the "early" treaties that provide access to domestic courts, and only to bring claims arising under the expropriation clause. The ISDS language is then contained within the expropriation clause itself. The second category, that emerged in the 1990's, mention

[572] Dispute Settlement Provisions In International Investment Agreements: A Large Sample Survey, Organisation for Economic Co-Operation And Development Investment Division, Directorate For Financial And Enterprise Affairs Paris, France

international arbitration as a medium to settle disputes exclusively. The third category of treaties, provide the investor with a choice between either of the two, However, ISDS through international arbitration has become a frequent practice in investment treaties – only 108 treaties[573] out of the sixteen hundred sampled do not provide for international arbitration.

International arbitration, with regard to investment treaties, usually takes place at ICSID, between the Nation investing and the Host country, it is an affiliate of the World Bank. ICSID specialises in arbitration and conciliation for investment disputes based on the Convention on Settlement of Investment Disputes between States and Nationals of Other States which was formed in Washington in 1965 (known as "the ICSID Convention").

ICSID, however, does not qualify as the only institution for investors to file a lawsuit against the host country with regard to BIT's because it may provide other alternatives to investors, including ad hoc arbitration or arbitration based on the International Chambers of Commerce (ICC).

However, investors usually prefer ICSID because the manner of implementing an arbitral award, in accordance with the ICSID Convention is superior and easier in comparison to the provision for implementation of arbitral awards according to the ICC and other international arbitrations. But, in recent times, investors have started to refer to other institutions for arbitration, that provide an option to review arbitral awards and generally have a more confidential process. According to some studies conducted by the United Nations Conference on Trade and Development (UNCTAD) state that almost one third (1/3) of arbitration are not carried out by ICSID

The ICSID verdict may be effected as a domestic court's decision of a country from a signatory country to the ICSID Convention. The ICSID Convention bars domestic courts, to object or make legal remedies or appeal against the ICSID decision, but there are options and means available to make repairs, changes or cancellations of ICSID decisions internally for legitimate reasons.

All ICSID decisions can be implemented only in accordance with the ICSID Convention and other international arbitral awards, for example-the ICC, are carried out on the basis of *the United Nations Convention on Recognition and Enforcement of the Foreign Arbitral Awards* which was signed on June 10, 1958, and is also known as the "New York Convention". According to this Convention, domestic/local courts can only reject the execution of arbitral

[573] Id. Para 16, p. 9

awards for certain reasons. In addition, ICSID is the only international arbitration institution that publishes registration or registration of arbitration claims against a country.

(III) BILATERAL INVESTMENT TREATIES: IN INDIA

India from the very day it won independence, had accepted the significance of foreign trade and investment, this idea has changed and evolved over time owing to the ever-changing economic circumstances within the nation. India has entered into a wide variety of Bilateral Investment Treaties (BITs) and also Free Trade Agreements (FTAs) which also contain a chapter on investment protection, with about a hundred countries, out of which only thirteen are still under discussion or deliberation. [574] India has entered into BITs with almost all major European countries like France, Germany, Italy, Netherlands, Belgium, Denmark, Poland, Switzerland, Sweden. It has also signed BIT's with developing nations such as Argentina, Mexico etc. as well as with least developed countries (LDCs) like Bangladesh, Sudan, Mozambique

Development and acceptance toward BIT's in India has evolved in three different phases, starting post-independence, when India had an approach which was open to the idea of accepting and participating in foreign business, however this was done with an emphasis on import substitution and developing indigenous industries.

This receptive attitude toward foreign trade ended in 1970s when there was a wilful transformation toward a protectionist and inward-looking economic nation but this lead to low economic growth and India had to adopt limited liberalization and de-regulation. A severe balance of payment crisis forced India to alter its approach and interaction with the global economy, altogether. The Liberalisation, Privatisation and Globalisation Policies adopted, set the groundwork for international treaties for foreign trade and investment.

India began her international investment venture with United Kingdom in 1994[575], with a goal to create more opportunities for foreign investment in India. India's first BIT was developed on the Model Treaty of a developed nation - where the scale of balance tipped more toward the protection of foreign investment rather than internationally recognized regulatory powers of the State.

[574] List of India's BITs, Ministry of Finance, Bilateral Investment and Promotion Agreement (BIPA), available at: https://dea.gov.in/bipa [accessed 15 August, 2020]

[575] Bilateral Investment Treaties (BITs)/Agreements, U.K. – Ind, March 14, 1994, available at: https://dea.gov.in/sites/default/files/United%20Kingdom.pdf [accessed 16 August, 2020]

The global market is a dynamic phenomenon, principles governing foreign trade are constantly changing, which require nations to have an adaptable format when it comes to international commercial treaties. The India-UK BIT has been used as a base template for India to negotiate further BITs. In fact, the Indian Model BIT of 2003 took inspiration from the India-UK BIT. The remote government involvement in updating and including new principles into their model treaty, resulted in a long period of stagnant development of BIT's with India, this was in turn because of the limited involvement of the nation with ISDS, *" It has been found that until countries are hit by BIT claims, it may be difficult for the country concerned to fully appreciate the cost of the BIT"* [576]

In this period, although nine BIT cases were brought against India, they all pertained to just one project, the Dabhol power project, However, none of these suits lead to an ISDS award. Dabhol Power Company, which was a joint venture corporation, of Enron Corporation, General Electric Corporation and Bechtel Enterprises. In the early part of the 1990's, it was created to produce electrical energy in Maharashtra, and so DPC entered into an agreement with the Maharashtra State Electricity Board (MSEB), an Indian public sector enterprise to be the only purchaser of power generated by DPC. However, MSEB cancelled the contract due to alleged irregularities, political opposition and high cost of power charged by DPC, due to which DPC lost a customer.

This adversely affected its investment[577], DPC initiated arbitration proceedings. However, Indian courts granted anti-arbitration injunctions against it. Thereafter, GE and Bechtel invoked the India-Mauritius BIT through their subsidiaries in Mauritius and challenged measures adopted by India as constituting expropriation.

The White Industries Case[578], formed the watershed in the Indian Investment regime, as it resulted in a lot backlash from the Indian government, White Industries award was criticised in the Indian Parliament as *"an attack on the sovereignty of the Indian Judiciary."*[579]

---

[576] POULSEN, LAUGE N. SKOVGAARD, and EMMA AISBETT. "WHEN THE CLAIM HITS: Bilateral Investment Treaties and Bounded Rational Learning." World Politics, vol. 65, no. 2, 2013, available at: www.jstor.org/stable/42002208 [accessed 16 August, 2020]

[577] KUNDRA, P (2008), "Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons", Vanderbilt Journal of Transnational Law.

[578] White Industries Australia Ltd v India, Final award, IIC 529 (2011), 30th November 2011, Arbitration, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/378/white-industries-v-india [accessed 16 August, 2020]

[579] Statement by P. Rajeeve, Member of Parliament (India), Transcript of the Proceedings of the Rajyasabha (22 May 2012) available at: http://164.100.47.5/newdebate/225/22052012/Fullday.pdf. [accessed 18 August, 2020]

In a contractual dispute with Coal India, an Indian public sector company, White Industries an Australian mining company, sought implementation of an arbitral award before the Delhi High Court. Concurrently, Coal India approached the Calcutta High Court to have the award set aside, and the request was granted.

In 2010, the Australian Company, thanks to frustration over inordinate delays in enforcement of the award, took the interest arbitration and contended that India has violated the India-Australia BIT. White Industries argued that the delay violated the provisions on fair and equitable treatment (FET), expropriation, MFN treatment, and free transfer of funds.

The tribunal dismissed White Industries allegations associated with violation of FET, expropriation and free transfer of funds. However, the tribunal in its verdict declared that India violated the MFN provision of the India-Australia BIT, and awarded White Industries 4 million Australian dollars , following which variety of foreign corporations slapped ISDS notices against India challenging a good array of regulatory measures

Ministry of Commerce in India, prepared a discussion paper in 2011 entitled *"International Investment Agreements Between India and Other Countries,"*, This happened to be the same year that India lost the BIT case to White Industries. The Indian government acknowledged, in the discussion paper, that Indian BITs were not well-drafted because they contained broad and vague provisions that could be subjected to wide interpretations by ISDS tribunals. India's 2014 statement during UNCTAD'S World Investment Forum declared that the FET and MFN provisions in Indian BITs were vague.

The review process which was started in 2012 resulted in three outcomes:

(1) The adoption of the Model Bilateral Investment Treaty on January 14, 2016. This adoption was conducted only after the circulation of a draft version[580] of the Model BIT in March 2015 for comments, criticism and suggestions. The draft Model BIT received significant amount of attention including a full report[581] from the Law Commission of India.

[580] Draft Model Text for the Indian Bilateral Investment Treaty, Govt. of India, available at: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

[581] Analysis of the Draft Model Indian Bilateral Investment (August 2015), Government of India, Law Commission of India, Report No 260, available at: http://lawcommissionofindia.nic.in/reports/Report260.pdf. [accessed 18 August, 2020]

(2) Followed by the, the adoption of the 2016 Model BIT, India then proceeded to issue termination notices various countries, with an objective of negotiating new BITs based on the 2016 Model BIT.

(3) India also sought to issue joint interpretative statements, along with twenty-five of its BIT partner countries, to create a resolution for what India described as uncertainties and ambiguities that may arise regarding interpretation and application of the standards contained, in India's BIT's.

The India Model BIT, 2016 was the consequence of India's significantly changed position towards investment treaty disputes. It is comprising of 38 detailed articles divided into 7 chapters, It can be considered as a revolutionary departure from generally structured BIT's.

The 2003 Model BIT of India constituted of extensive substantive provisions which gave precedence to the investment opportunity over the State's regulatory authority. The 2016 India Model BIT, in comparison is drastically different in form, structure and content and accords increased latitude to regulatory powers of the State.

OVERVIEW OF FEATURES OF THE MODEL BIT, 2016[582]:

1) ***Preamble:*** The Draft BIT contained only a provision with "promotion" as an objective, the lack of "protection" was one of the central cause for criticism of the Draft BIT and so, the 2016 Model, was also inclusive of "Protection". This was a positive step for foreign investors and the Indian investors who are investing outside India. Thus, "promotion" and "protection", considered to be the two cornerstones of a BIT, are now reflected in the Model BIT.

2) ***Definition of Investment:*** The definition for investment in the Model BIT has moved away from a wide asset-based definition of investment to an enterprise-based approach, where an enterprise is taken together with its assets. This was done with the objective to reduce the scope for investment protection, which shall result in a low number of BIT claims that can be brought against India. In the 2016 Model BIT, investment means an enterprise that has been constituted, organised, and operated in good faith by an investor in accordance with the domestic laws of the country.

[582] Draft Model Text for the Indian Bilateral Investment Treaty, 2016, Govt. of India, available at: https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf

3) ***Most Favoured Nation (MFN):*** India in its 2016 Model of BIT, took the stand that the MFN provision was a tool in the hands of foreign investors to take one-sided substantive and procedural provisions. This practice disturbs the various strategic, diplomatic, and political reasons behind negotiating bilateral treaties. This is considered as very bold move on India's part, However, this also undermines the protection foreign investors are entitled to and exposes them to uncertainty.

4) ***Fair and Equitable Treatment (FET):*** The 2016 Model BIT does not contain an FET provision, India decided not to include a provision on FET because ISDS tribunals often provide a wide interpretation. Instead, the Model BIT contains a provision entitled '*Treatment of Investments'.*

"Article 3.1 prohibits a country from subjecting foreign investments to measures that constitute a violation of customary international law 'through': (a) denial of justice, which covers both judicial and administrative proceedings; (b) fundamental breach of due process; (c) targeted discrimination on manifestly unjustified grounds such as gender, race or religious belief (d) manifestly abusive treatment such as coercion, duress, and harassment. "[583]

5) ***Expropriation:*** The 2016 Indian Model BIT covers both Direct expropriation which involves forcible taking by Government of tangible / intangible property of investors and Indirect expropriation, which is discreet form of taking, where the title to the investment remains unaffected. It provides that direct expropriation would lead to formal transfer of title or complete seizure, while Indirect expropriation could occur if there's any substantial or permanent deprivation to the investor of what constitutes as the basic or essential attributes of a property in its investment- right to use, enjoy and dispose the investment without formal transfer of title or outright seizure.

6) Investor-State Dispute Settlement: In the 2016 Model BIT, India has conditioned its consent to ISDS by requiring that a foreign investor should first exhaust local remedies at least for a period of five years before commencing international arbitration. The rule

[583] Id. p.7

related to 'exhaustion of local remedies' is a longstanding rule of customary international law.

The five years under the Model BIT are to be counted from the date when the foreign investor first acquires "knowledge of the measure in question and therefore the resulting loss or damage to the investment" or when the investor should have first acquired such knowledge. the opposite major factor with reference to exhaustion of local remedies is that the foreign investor shall submit the dispute to the local court within one year from the date on which the investor acquired the knowledge or should have acquired the knowledge about the measure.

(IV) CONCLUSION

Supremacy of a Domestic Regulatory Authority Vs. Protection of Foreign Investors

Bilateral investment treaties have developed to be a remarkable recent innovation in international law today.[584] Foreign Direct Investment, via Investment Treaties plays an essential role for developing nations. A study was conducted by the OECD, upon the Overview of Foreign Direct Investment For Development Maximising Benefits, Minimising Costs, [585] it highlighted various beneficial aspects of Foreign Direct Investment in a particular Nation.

- The main trade-related benefit of FDI for developing countries lies in its long-term contribution to integrating the host economy more closely into the world economy in a process likely to include higher imports as well as exports

- Economic literature identifies technology transfers as perhaps the most important channel through which foreign corporate presence may produce positive externalities in the host developing economy.

- The major impact of FDI on human capital in developing countries appears to be indirect, occurring not principally through the efforts of MNEs, but rather from government policies seeking to draw in FDI via enhanced human capital. Once individuals are employed by MNE subsidiaries, their human capital could also be enhanced further through training and on-the-job learning.

[584] Jason W. Yackee, Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties, 33 Brook. J. Int'l L. (2008). Available at: https://brooklynworks.brooklaw.edu/bjil/vol33/iss2/13

[585] OECD (2002), Foreign Direct Investment for Development: Maximising benefits, minimising costs, OECD Publishing, Paris, https://doi.org/10.1787/9789264199286-en.

- The presence of foreign enterprises may greatly assist economic development by spurring domestic competition and thereby leading eventually to higher productivity, lower prices and more efficient resource allocation.

- FDI has the potential significantly to spur enterprise development in host countries. The direct impact on the targeted enterprise includes the achievement of synergies within the acquiring MNE, efforts to boost efficiency and reduce costs within the targeted enterprise, and the development of new activities

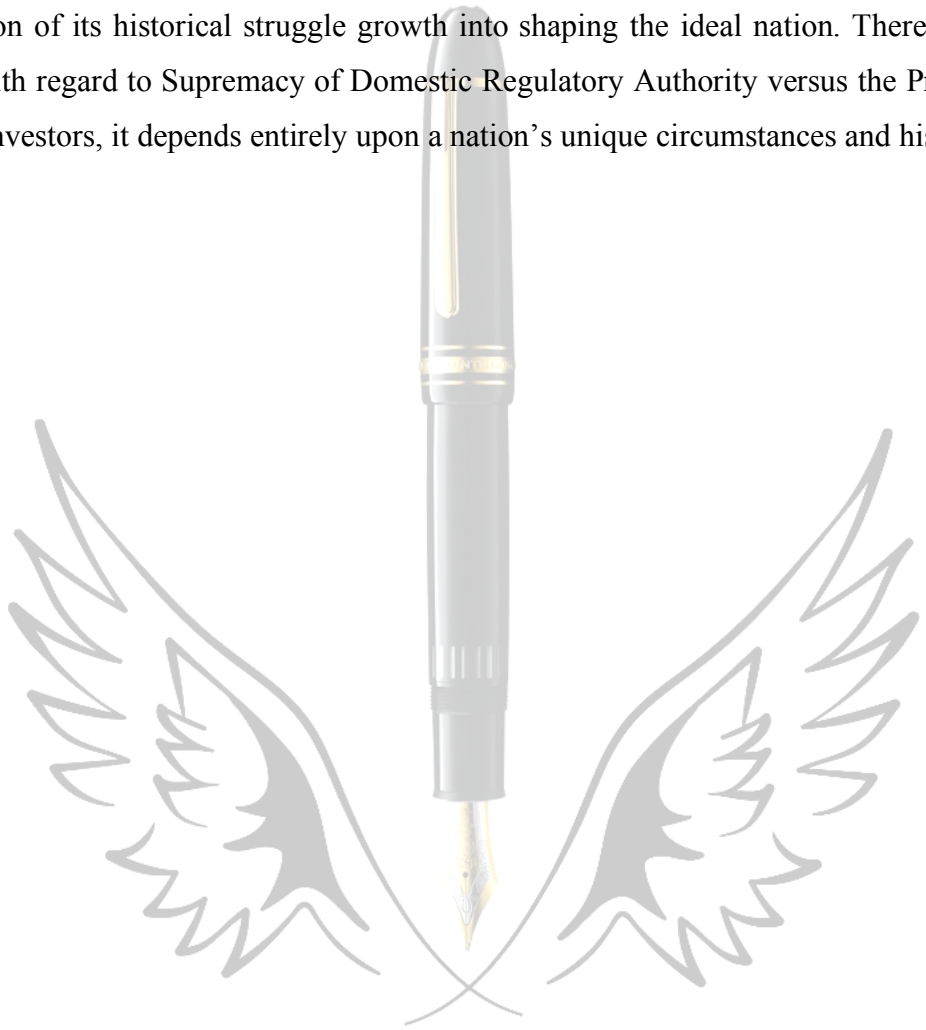
Although FDI, is an important instrument in increased global interactivity, it has its own risks when it comes to the internal or domestic affairs of host nations. The White Industries Case, formed a moment of epiphany for India, with regard to how unregulated foreign intervention in a nation, can lead to catastrophic results. The case raised a very important question, *Do the right of foreign investors supersede the regulatory authority and power of the Host nation?* India with its 2016 Model Treaty, answered this question by putting sovereign interests over foreign interests.

For Countries such as India, which was a colony for 190 years, sovereignty and national integrity are supreme. *But was this the right choice?* Foreign Trade and Investment's role in a nation cannot be replaced, alienating a nation to protect its sovereignty is detrimental, this creates a need for balance. *But how can this balance exist?*

International Institutions such as the IMF and the World Bank have been held accountable for acting as facilitators, contributing significant to the large number of Financial Treaties all over the world. For example, IMF and the World Banks has incessantly promoted economic liberalization and privatisation policies within nations, often with the argument that this would increase inflows of foreign investment, In fact the World Bank in its Articles of Agreement, states one of its central objectives as encouraging the growth of foreign private investment.[586] These institution play an essential role in providing assistance to developing or under-developed nations, this also puts them in a position of power and control, to determine economic fate of these nations. *Does this qualify as coercion?*

[586] Articles of Agreement of the International Bank for Reconstruction and Development, Art. 1.(ii), Jul 1,1944, available at: http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf , [accessed 18 August, 2020]

India answered all these questions by removing ambiguities, which extinguished the possibility of abuse or exploitation of poorly drafted treaties. The Model BIT, 2016 reflects India's foreign policy which in turn is determined in accordance with India's national ideology, which is a culmination of its historical struggle growth into shaping the ideal nation. There is no right answer with regard to Supremacy of Domestic Regulatory Authority versus the Protection of Foreign Investors, it depends entirely upon a nation's unique circumstances and history.



UNVEILING SOCIO-LEGAL ASPECTS OF RAPE

- KOKUL M. C & VIJAYALAKSHMI. R

ABSTRACT

Basically, there are multitudinous views that exist in the field of allied crimes and rape. The studies in relation to these crimes are scattered in nature and they require a comprehensive integration to reach deeper into the areas of causes and also consequences of rape. In Indian context, the occurrence of rape involves a socio-cultural perspective as well. The article attempts to revolve around the rape laws in India. Taking into consideration section 375 and 376 of the Indian Penal Code, various other aspects in relation to this have been discussed. The article attempts to move around in the details of rape law- in the aspects of theoretical view as well as in the aspect of practicality. Suggestion of changes in the existing rape laws which are in use, unveiling the loopholes in the laws relating to rape are being addressed. Further, there are other major terms in the field of rape laws such as "consent", "conduct of victim" which are still a matter of confusion and discussion for the Judiciary.

KEYWORDS: rape, section 375 and 376 of IPC, secondary victimization, criminal law amendment bill,

INTRODUCTION:

Women are considered to have the traits of the divine. Whenever the decency of women has been subjected to peril, it has given rise to revolutionary moments in the world history. Rape is basically one of the major depravities against women which not only affects the person who is involved in it but also the family members of the victim and the society as a whole. The word rape derives its antecedent from the Latin word "Supere" which means "to snatch, to grab, to carry off". Rape has been defined as "the unlawful carnal knowledge of a woman by a man forcibly by a man against her will"[587] Basically, in India chasteness is considered to be an important factor for marriage and hence a large number of rape cases go unrecorded. In India rape is 4th common scandal against women. Reports show that in majority of cases the person arraigned of rape is already known to the victim. It has been found by the studies that have been conducted that there lies a strong and also a persistent connectivity with rape myth

[587] Black law's Dictionary 631 (6th edition, 1990).

acceptance and victim blaming. This paper attempts to list out the various psychological and circumstantial reasons that influence and leads to rape.

RAPE:

Penetration is the important aspect in the concept of rape. Penetration to constitute sexual intercourse is necessary for the offence of rape. "It is not necessary to prove the completion of sexual intercourse by the emission of seed; intercourse is deemed complete upon proof of penetration only. The slightest degree of penetration is enough. If penetration cannot be satisfactorily proved, then the defendant may be convicted of attempted rape, and if the intent is not proved, he may be convicted of incident assault."[588] In Indian law section 375 of the Indian Penal code deals with the concept of rape. However, the definition given under this section is predominantly criticized for not having included other forms of psychological sexual assault in the scope explained. Rape doesn't affect the physical and mental health of the victim but it also has a huge impact on the society as well.

CATEGORISATION:

Based on various situations and happenings associated with the occurrence of rape, rape has been classified into

- Acquaintance rape
- Stranger rape
- Gang rape
- Statutory rape
- Spousal rape

EVOLUTION OF RAPE LAWS IN INDIA:

Rape was included in our legal structure by the enactment of the Indian Penal code of 1860, which defined rape as sex without consent or with consent but the consent is obtained by some coercive forces such as fear of death or pretences. It also defined "statutory rape" as sex with a female who is below the age of 16.

CRIMINAL LAW AMENDMENT,1983:

[588] Halsbury's Law of England 653 (5th Edition, 2005).

On March 26, 1972 a young girl named Mathura who was between the age of 14 – 16 was allegedly raped by 2 policemen (**Tukaram v. State of Maharashtra**)[589]. When the case had been referred to the Supreme Court it acquitted the two policemen stating that during the incident the victim didn't raise any alarm in-order to get help from her relatives who were just outside the police station and there were no signs of injuries, so that it implicitly means the victim had consented to the sexual intercourse. Thus, the court pronounced that the act of the policemen didn't amount to rape. But soon the judgment of the Apex Court faced serious agitations from different parts of the society, which eventually lead to serious reforms in rape laws. Firstly, introduction of section 114(A) to the Indian Evidence Act, thereby emphasizing that if the rape victim says that she didn't give consent to the sexual intercourse, then the court shall presume that she didn't give her consent to the incident unless and until the contrary is proved beyond a reasonable doubt. Secondly, the addition of sections 376-A, 376-B, 376-C, and 376-D into I.P.C. which made custodial rape a punishable offense. In addition to this, the amendment prohibited the publication of the identity of the victim as it has negative impact on the girl's future.

INDIAN EVIDENCE ACT AMENDMENT,2002:

In many rape cases, the defence lawyer tried to degrade the veracity of the victim's testimony by questioning about her past sexual experiences, eventually framing the victim as of 'immoral character'. Section 154 (4) of the Indian Evidence Act had allowed the defence lawyer to frame such questions that could degrade the victim's character. To avoid these kinds of discrepancies during the cross-examination of the victim of rape, Section 154 (4) of the Indian Evidence Act has been repealed in 2002.

PROTECTION OF CHILDREN FROM SEXUAL OFFENSES (POSCO) ACT, 2002:

Before the enactment of the POCSO act in 2002, sexual abuse cases against children were also prosecuted under Section 354 and Section 375 of the Indian Penal Code. But since these legislations couldn't ensure the children's safety due to a myriad of practical reasons the government felt the need for a separate piece of legislation for handling offenses against children, as a result of which POCSO Act was enacted by the Parliament. This act safeguards the children from several offenses such as penetrative and non-penetrative sexual assault, sexual harassment, and child pornography. This act also mandates the person who knows

[589]Tukaram v. State of Maharashtra, (1979) 2 S.C.C. 143 [2].

information about such kind of offenses against children to file a complaint otherwise he may be also imprisoned for a term of six months. The most important feature of this act is that it is gender-neutral and also ensures the children's protection as soon as the complaint has been lodged.

CRIMINAL LAW AMENDMENT ACT, 2013:

In 2012, a paramedical student was gang-raped by 6 men in a moving bus. This heinous incident attracted international coverage and protest in major cities of the country. Therefore, the government was forced to appoint a committee headed by a former judge of the Supreme Court, J.S. Verma to prepare a report that includes all the possible reforms needed for the existing rape laws. Based on the suggestions of the committee, new offenses have been included in the Indian Penal Code such as acid attack (sec-326), sexual harassment (sec-354 A), action against women with intent to disrobe her (sec-354 B), Voyeurism (sec-354 C), and Stalking (sec-354 D). Also, the act enhances the definition of rape which now also includes oral sex, insertion of any other body parts or objects into a woman's urethra, anus, or vagina.

CRIMINAL LAW (AMENDMENT) ORDINANCE, 2018:

Criminal Law Amendment 2018 has been enacted as an outcry of two incidents, one is the rape and murder of a minor girl in Kathua district in Jammu and Kashmir and another one is the rape of a woman in Unnao district in Uttar Pradesh which was alleged to be committed by a minister of the ruling party. The raison d'être of this amendment act is to enhance the quantum of punishment for the perpetrators of the crime of rape. According to the new provision, the minimum imprisonment for the rape of girls below the age of 12 is 20 years and it may even extend to death penalty and in case if the victim is between the age of 12-16, then the offender is punished with the minimum sentence of 20 years and a maximum sentence of life imprisonment. But in both the cases, if it is a gang-rape then the punishment varies from life imprisonment to death penalty depending upon the gravity of the offense. Also, in rape cases where the girl's age ranges between 16-18, the minimum punishment is enhanced from 7 years to 10 years. Some of the other salient features of this act are the investigation of these rape cases should be completed within a period of 2 months and also ensures speedy trial by reducing the discharge time of these cases in fast track courts from 1 year to 6 months.

PROPOSED CRIMINAL LAW AMENDMENT BILL,2019:

The Criminal Law Amendment Bill, 2019 which was introduced in the Rajya Sabha aims to make the crime of rape a gender-neutral offence. After the Supreme Court judgement in the famous case of ***Navtej Johar* v. *Union of India,***[590] *the bill aims to replace the words such as "men" and "women" with gender-neutral words such "any person" and/or "other person". The bill also attempts to insert a new phrase unwelcomed threat of actionable nature". The main aim to this amendment was because, the Supreme court of India held consensual sex between two individuals to be legal, regardless of the sex. When such a situation arises, it becomes a necessary to hold non-consensual sex between two individuals of the same sex to be rape, rather than it being an unnatural criminal offence. The proposed bill aims at including the meaning of the term "modesty". Modesty is to be defined as any trait that attaches to the individual's personality with respect to the common belief that has been held by the community in the matter of integrity, in any man, women or transgender.*

AN OBNOXIOUS EXCEPTION: -

Although the judiciary tries its best to keep abreast of the changing demands of the society, it failed miserably by not criminalizing marital rape. India is one of the thirty-six countries that still have not criminalized marital rape.[591] The exceptional clause to section 375 clearly states that if a man has non-consensual sexual intercourse with his wife and the latter is not being under the age of 18, then it does not amount to rape. This particular clause clearly violates Art.14 of the Constitution as here the classification between married women above 18 years of age and the rest of the women has no rational nexus. Furthermore, it is also against the principle laid down in the case of **Suchita Srivastava & Anr v. Chandigarh Administration,**[592] in which it has been said that the right to make decisions regarding sexual activity is intrinsic to Art.21 of the Constitution. The main reason behind not criminalizing marital rape is that it would affect the sanctity of marriage but at any point in time consent to marriage should not be construed as consent to sexual intercourse. As a matter of fact, marital rape is crueller than ordinary rape as in most of the cases the victim is tied to the perpetrator both financially and emotionally. Recently in the case of **Independent thoughts v. Union of India,**[593] the apex court enhanced the age limit in the second exceptional clause to section 375 of IPC from 15 years to 18 years as it was convinced that 18 years would be the appropriate minimum age for

[590] Navtej Johar v. Union of India, A.I.R. 2018 S.C. 4321.
[591] Marital Rape in India: 36 countries where marital rape is not a crime, India Today, Mar. 12, 2016.
[592] Suchita Srivastava & Anr v. Chandigarh Administration**,** (2009) 14 S.C.C. 989.
[593] Independent thoughts v. Union of India**,** (2013) 382 S.C.C. (2017).

consenting to sexual activities irrespective of their marital status. This clear-sighted judgment can be considered as a half a battle won against male chauvinism but to establish an egalitarian society for women it is imperative to criminalize marital rape.

WHERE HAVE WE AS A SOCIETY GONE WRONG:

There is an old saying "***Prevention is better than cure",*** in accordance to that more than punishing the perpetrators of this horrific crime, it is significant to prevent such kind of incidents from happening. We as a society believe that the act of providing severe punishments to the rapist will act as a deterrent to the crime of rape. But the truth is in order to resolve this problem, a relationship should exist between the legislation and the perception of the society. Rape culture is pervasive. It is the social environment that allows sexual violence to be normalized and justified, fueled by the persistent gender inequalities and attitudes about gender and sexuality. It's embedded in the way we think, speak, and move in the world. While the contexts may differ, rape culture is always rooted in patriarchal beliefs, power, and control. Naming it is the first step in dismantling rape culture.[594]

ABOLITION OF RAPE MYTHS:

The notion of rape stretches beyond sexual harassment, it is the culmination of noxious practices in society. Our society has always shown its strong condemnation towards rape but through words and customary behaviour, violence against women is trivialized, which leads us towards a harmful society of rape culture. To change the perspective of the society towards the root causes of rape, it is significant to revamp the ideas of masculinity which create an illusion that authority over women is a natural right. These kinds of gendered stereotypes had been quoted even by the Supreme Court in its judgment. In the case of **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,*[595]*** it was stated that a woman of Indian society will always be reluctant to report the cases of sexual harassment against her in the fear of being ostracized by her loved ones and the society as it feels that the conduct of the victim is also a reason for this kind of incident to happen. So, to reduce sexual violence against women, it is essential to counter the belief that men have an inherent entitlement over women, and also it is irrelevant to have an attitude that accuses a victim of her dress, sobriety, and her way of living.

[594] 16 ways you can stand against rape culture, UN Women- Headquarters, (Nov 18, 2019), https://medium.com/@UN_Women/16-ways-you-can-stand-against-rape-culture-88bf12638f12.
[595] Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 A.I.R. 753.

SECONDARY VICTIMIZATION:

Secondary victimization means blaming the rape victims itself for the crime to happen. It is usually done by the social service providers. For example, blaming the victim for her dressing style. This kind of pre-judicial, stigmatized kind of approach towards rape and rape victims is known as rape myths. Usually secondary victimization is the embodiment of rape myths. During the treatment of rape victims, if the service providers disregard the needs of the victims then it could replicate the same traumatic experience that was experienced by the victims during the tragedy. This could also lead to a circumstance where victims start to feel violated or even re-raped, thus shattering the psychological state of the victims. To reduce these kinds of problems in Indian society, we must incorporate various special procedures that facilitate easy access to the justice system for the victims simultaneously helping them to stabilize themselves through physical, mental, and monetary means. Some of the well-established procedures followed by countries like the U.S, the United Kingdom, and the other European countries are as follows.

Status in the United Kingdom and other European countries:

The U.K. has ensured some special care for the victims by introducing special provisions in the "The code of practice for victim of crime" thereby the victims can easily avail the practical support needed by her and also the most interesting factor is that these victims are assigned with a Victim Ombudsman/Commissioner who takes care of the victims based on their needs during and after the trial proceedings.

In Europe, the government assured the victims with an active status in the criminal proceedings thereby the victims won't act as mere witnesses instead they may assist in the criminal proceedings for the search of truth and therefore the probability of justice achieved by the victims increases.

Status in the United States of America:

The United States government has enacted a separate piece of legislation known as "The Victims' Rights and Restitution Act" which bestows the victims with the basic rights needed to re-stabilize themselves and also to ensure financial stability for the victims, the U.S. government has established the "Crime Victims Fund".

VICTIM CONDUCT AND THE PER VAGINA TEST:

One of the important questions that has been put before the Judiciary constantly is with regards to the conduct and moral values of the victim. Whether and how the consent should be interfered when the victim happens to be a girl of easy virtue has been a constant question that is been placed. It was held in the case of **State of Maharashtra v. Madhukar Narayan Mardikar,**[596] even a girl of easy virtue is entitled to protection of law and just because of the nature her evidences can't be thrown overboard. The famous case of **Tukaram v. State of Maharashtra,**[597] explicitly explained the negative sides of the "finger-tests". In this particular case, the girl had no injury, and the vagina accepted two fingers easily. Therefore, it was indicated that the girl was used to sexual intercourse. This case threw light on various problems. Such problems include issue of consent, burden of proof, the sexual history of the victim. The effect of this was that, every defence would easily question the virtue of the girl. The "finger-tests" practice was critically a degrading practice. The per vagina test traumatises the victim, not only that it gives the defence to easily get away with the case. The per vagina test is one of the most inhumane and derogatory practices that must be done away with.

SEX EDUCATION:

Comprehensive sex education can also be called as ***Anti-rape education***. The United Nations Population Fund (UNFPA) emphasizes the need for comprehensive sexual education as many people lack the knowledge about their sexual and reproductive health, "leaving them vulnerable to coercion, sexually transmitted infections, and unintended pregnancy.[598] But as a contrast to it, "only 16% of the information adolescents receive about sexual assault comes from their parents or schools".[599] Nowadays, the popular media exerts an adverse influence on the children regarding the notions of sexual behaviors, and in addition to that, sex education is also not preparing the students to ignore the unwanted stereotypes about gender and counteract to it. Normalizing sexual conversation is also essential as it could act as a major deterrent to the surge in rape cases. It is essential that "sex education needs to address media, peer and cultural influences on sexual behavior and decisions and promote an idea of sexual responsibility that includes respect for oneself and an emphasis on consensual non-exploitative

[596]State of Maharashtra v. Madhukar Narayan Mardikar**,** A.I.R. 1991 S.C. 207.
[597] Supra Note 3.
[598] "About Us." UNFPA: United Nations Population Fund. (January 25, 2015), http://www.unfpa.org/about-us.
[599] Katz-Schiavone, Stacey; Levenson, Jill; and Alissa Ackerman. "Myths and Facts About Sexual Violence: Public Perceptions and Implications for Prevention." Journal of Criminal Justice and Popular Culture 15 (2008): 291–311.

sexual activity".[600] This kind of sexual education will help students to comprehend why silence or non-verbal behavior cannot be construed as a sign for consent. So, it is the need of the hour that we need to introduce compulsory comprehensive sexual education in our curriculum which act as a preventive measure in the pursuit to curb sexual violence against women.

CONCLUSION:

Law, as known to everyone, is closely connected and also inter-related to mankind. As man evolves in his lifestyle, it also becomes necessary for law to get evolved and go through a lot of amendments to be in trend with the current situation that prevails in the society. The same applies to laws relating to rape as well. Though, rape laws have been subjected to various amendment to be in touch with the current trend, there are yet various other changes that have to been done. Apart from laws and amendments, the society has to take steps to tackle with the situation. Despite the various steps taken by the legislature, precautionary actions must be taken to prevent such a situation. It must also be taken into serious consideration that the procedure of law so established must always be in the best interest of the victims and must not deter the victim in any way to seek justice.

[600] Anderson, Michelle, "Sex Education and Rape" (2010). *CUNY Academic Works.* https://academicworks.cuny.edu/cl_pubs/171

THE LEGALITY OF THE BOMBAY STOCK EXCHANGE AND ITS BYE-LAWS: V.V. RUIA VS. S. DALMIA[601]

-SURAJ T.N.

From being started under a Banyan Tree in the 1850s to becoming the world's 10th largest stock exchange[602], the BSE, formerly known as the Bombay Stock Exchange Ltd., has certainly come a very long way. Not only is it a hub for trading securities, but it is also a matter of pride to the nation. Being touted as Asia's oldest and fastest stock exchange, it has over 5000 listed companies[603], making it well respected across the world. It has also played a major role in engaging the middle-class with financial markets, and has always played a role in balancing the interests of companies as well as investors. At the moment, its presence and role are of paramount importance.

However, the Bombay Stock Exchange has not been free from legal hurdles. One of its biggest legal hurdles was a case that was before the Bombay High Court in 1966. The presiding judge was Justice Mody. In this case, one of the parties contended that the Bombay Stock Exchange (hereinafter referred to as the BSE) happened to be an illegal association. What makes the case even more intriguing is that the BSE did not even do anything wrong. It was not even a party to the case until the court had to issue a notice to the BSE to represent itself, as its legality was brought into question by one of the parties.

The name of this peculiar case is V.V. Ruia Vs. S. Dalmia and this paper analyses and tries to look into the intricacies of the case.

FACTS

It all started in 1960, when the petitioner, who was a broker in the Bombay Stock Exchange, was appointed by the respondent to effect the transaction of shares and securities. The petitioner was to carry on such activities for the years 1960 and 1961. Initially, there was no friction between the parties. However, in May 1960, the petitioner accused the respondent of not paying him a sum of Rs. 36,46,875. The respondent stated that the reason for non-payment was that the petitioner did not follow the respondent's instructions.

[601] AIR 1968 Bom 347, (1968) 70 BOMLR 20.
[602] https://www.world-exchanges.org/our-work/statistics..
[603] https://www.goodreturns.in/personal-finance/investment/2014/09/6-amazing-facts-on-the-bombay-stock-exchange-or-bse/articlecontent-pf2179-307382.html.

Back then, the Rules, Bye-laws, and Regulations of the BSE (hereinafter collectively referred to as Bye-laws) stated that disputes of this kind could be referred to arbitration. The Bye-laws, particularly Bye-law 250, also stated that if one party referred the matter to arbitration, but the other party failed to appoint an arbitrator, then the Governing Board or the President of the BSE could appoint an arbitrator for the other party after serving them with a notice. Based on this, the petitioner appointed an arbitrator and informed the Governing Board, which issued a notice to the respondent to appoint an arbitrator. However, the respondent stated that there was no arbitration agreement between the parties and that the petitioner did not have any right to ask the respondent to appoint an arbitrator.

Owing to this, the petitioner filed a Petition under the Arbitration Act for determining the validity of the arbitration agreement between the two parties.

CONTENTIONS RAISED

The rationale behind giving the contentions a separate and distinct part in this analysis is because the contentions of the respondent were such that the BSE had to be dragged to the court and defend itself. In the author's opinion, the contentions of the respondent are what make the case unique.

The respondent conceded to most of the contentions of the petitioner, including the contention that an arbitration agreement did exist between the two parties. However, the respondent stated that the arbitration agreement between the two parties was no valid. For this, the respondent put forth three primary contentions:-

i. The BSE was an illegal association by virtue of Section 11(2) of the Companies Act 1956, which makes any rules, Bye-laws, and Regulations passed by it, void and illegal;
ii. The bye-law that states that the Governing Board could appoint an arbitrator for the other party happened to be in violation of Section 9(b) of the Arbitration Act, 1940; and
iii. Since the Bye-laws weren't published in the Gazette of India or the Gazette of Bombay (where the stock exchange was situated), they were in violation of Section 9(4) of the Securities Contracts (Regulation) Act 1956, which makes them invalid.

At this point, it is important to note that the BSE passed its Bye-laws on 9th April 1957. It then filed an application of recognition to the central government. Back then, many stock exchanges were not recognized by the central government. Therefore, in order to get recognized, the BSE filed an application and forwarded its Bye-laws along with it (as was the mandate under Section 3(2) of the Securities Contracts (Regulation) Act, 1956). On 6th August 1957, the central government intimated the BSE that it was willing to give recognition to it. So, on 31st August

1957, the BSE decided to bring its Bye-laws into effect, and later on that very day, the government published that the BSE got recognized.

With regards to the first contention, the respondent submitted that Section 11(2) laid down 4 criteria which had to be satisfied in order to be deemed as an illegal association:-

i. More than 20 members (for the purpose of carrying on any business that has for its object the acquisition of gain);
ii. Such an association of 20 or more members must not be registered;
iii. The business carried on must not be a banking business; and
iv. Must be for the gain of itself or for its members

The counsel on behalf of the respondent submitted that the BSE satisfied all the criteria. According to the counsel, it had more than 20 members (including brokers), it was not registered under the Companies Act 1956, and most importantly, it was carrying on a business. To buttress this argument, the counsel submitted that the BSE constructed and maintained buildings, acquired property, maintained safety deposits and charged for them, maintained a clearing house (for which the BSE charged a fee under Rules 116 and 188). On top of that, it was also argued that it charged annual fees (under Rule 68), Subscription fees (under Rule 68) and entrance fees (Rule 32). According to the respondent, these activities did show that the BSE was carrying on a business for its benefit. The respondent also submitted that even the BSE's object clause (under Rule 4) mentioned all these activities.

The counsel on behalf of the BSE acknowledged that the BSE did satisfy the first two criteria, but countered the other claims by stating that the main objective of the BSE was to maintain the integrity of the market and to regulate and control transactions. According to the BSE, it also sought to make it easier for the brokers to be able to take part in the working of the stock exchange. Therefore, it was submitted that the other functions happened to be ancillary to the main purpose, which makes it an entity that doesn't carry on business.

For the second contention, it was argued that Section 9(b) of the Arbitration Act stated that if one party didn't appoint an arbitrator and the other party did appoint one, then the arbitrator so appointed could act as the sole arbitrator. Taking inference from this, it was argued that the Bye-law, which gave the Governing Board the power to appoint an arbitrator if one party failed to do so, was in direct violation of Section 9. Since it happened to be in violation of Section 9, the respondent submitted that the bye-law was void. What is to be noted, is that the section has the words "unless a different intention is expressed in the agreement". This means that if any other intention appeared from the contract, then the section would not apply at all. The respondent stated that the words meant that Contracts must expressly state that Section 9(b)

will not apply, and since the Contract between the petitioner and respondent didn't have such a clause, then only Section 9(b) will apply, which would trump the Bye-laws.

As for the final contention, it was stated that Section 9(4) of the Securities Contracts (Regulation) Act, 1956 made it mandatory that any Bye-laws issued by a stock exchange had to be published in the Gazette of India and in the gazette of the state where the stock exchange was situated. The Bye-laws were not published in the gazettes. Therefore, it was asserted that the Bye-laws were invalid due to their non-publication.

THE JUDGMENT

The Bombay High Court rejected all the arguments of the respondent. The court held that the arbitration agreement was valid. The court made it very emphatic that the BSE was legal and so were its Bye-laws. The court rejected the first argument that the BSE was an illegal association on the ground that the BSE's main aim was to protect the stock market and to make it easy for brokers, which makes the other activities ancillary and incidental to the main purpose. It held that property was acquired by the BSE, so that the brokers taking part in the day-to-day activities of the stock exchange were able to reach the premises on time. It held that it would amount to business only if buildings were bought and sold. For safe deposits, it held that they were maintained so that brokers could store transfer forms. For clearing houses, it was held that using a bank as a clearing house would not only be inconvenient, but costly. Therefore, to reduce costs, the BSE maintained its own clearing house. For the part of charging fees, the court pointed that fees had to be charged for maintaining everything. The court closed this issue by stating that there was no clause in any of the rules which stated that any profits arising from these activities were to be shared to the members of the stock exchange. On all these grounds, the court held that the BSE was not an illegal association, which made the Bye-laws valid.

For the contention based on Section 9(b) of the arbitration Act 1940, the court held that Section 9 included the words "unless a different intention is expressed in the agreement". The court rejected the argument which said that the words would apply only if contracts expressly stated that Section 9(b) of the Arbitration Act, 1940 will not apply. The court held that if such an interpretation was to be taken, then it would lead to an absurd situation where both the parties are conscious that one might fail to appoint an arbitrator, but choose not to use it, which might frustrate the arbitration agreement. Therefore, the court held that the words "unless a different intention is expressed in the agreement" will clearly apply in this case and that a different intention was there in the Contract between the parties.

The court also rejected the last contention of the respondent. The court stated that Section 9(4) used the words "recognised stock exchange" and not "stock exchange". As aforementioned, the BSE's Bye-laws came into effect on 31/8/1957 and only after that, did the BSE get recognised. Therefore, at the time of the Bye-laws coming into effect, the BSE was an unrecognised stock exchange. Using this, the court ruled that the BSE was not required to meet the requirements of Section 9, as the section was applicable only to recognised stock exchanges. On this ground, it declared the Bye-laws as "Pre-recognition Bye-laws". After coming to such a conclusion, the next question was whether they had to be published in the gazette. To answer this question, the court referred to Section 3(2) of the act, which made it compulsory for stock exchanges that were filing an application for recognition to accompany the said application with a copy of its Bye-laws. Then, the court dragged attention to Section 4(3), which mandated that the recognition of a stock exchange had to be published in the gazette. The court argued that the recognition of a stock exchange had to be published in the gazettes (under Section 4(3)), but it nowhere mentioned that even the Bye-laws had to be published along with the recognition. On this ground, the court held that even though the Bye-laws were not published in the gazettes, they were valid, as they weren't even required to be published. This ruling was fiercely challenged by the respondent on the ground that if the legislature wanted to leave out Pre-recognition Bye-laws, then it would have stated it expressly. Unfortunately for the respondent, the court rejected the argument by stating that since the language was unambiguous, there was no need to interpret the section as the respondent urged. Therefore, the court held that there was no conflict between the Bye-laws and section 9.

To summarise it, the Bombay High Court held that the arbitration agreement was valid because:-

i. The BSE was a legal association, making its Bye-laws valid and legal;
ii. The Bye-law which gave the Governing Board the power to appoint an arbitrator was not in violation of Section 9 of the Arbitration Act, 1940; and
iii. The Bye-laws were only Pre-recognition Bye-laws. Since they were pre-recognition Bye-laws, they were not required to meet the stipulations of Section 9 of the Securities Contracts (Regulation) Act, 1956, and neither was there a legislative mandate to publish the Bye-laws in the gazettes.

Since the court held so, it held that the arbitration agreement was perfectly valid by virtue of the Bye-laws, Rules and Regulations of the Bombay Stock Exchange. It also ordered the respondent to bear the costs of the BSE as it was unnecessarily dragged to the court by the respondent's "naïve" arguments.

ANALYSIS AND CONCLUSION

This is a landmark judgment when it comes to deciding whether a stock exchange is a legal association or not. As aforementioned, the arguments raised by the counsel on behalf of the respondent is what makes the case very unique. Even though the initial dispute was of private nature, the matter became one with far-reaching consequences when it reached the court. Had the court accepted the contentions of the respondent, it would have resulted in chaos and confusion in the stock market.

However, one thing that must be made very clear is that the learned judge did not rule in favor of the petitioner primarily because of the consequences that would have arisen, had he ruled otherwise. From a perusal of the reasons given by the learned judge for each of his findings, one can clearly understand that the learned judge had strong legal backing for each of them. In the author's opinion, the judgment is very well reasoned and is right in law

Firstly, the court was right to reject the argument that the BSE was an illegal association. It rightly pointed out that even though it did have more than 20 members and was not registered under the companies act, neither did it carry on any business, nor was it functioning for the gain of its members (two conditions that are as important as the first two conditions). The judgment rightly points out that the BSE's activities of acquiring property, owning buildings, maintaining lockers and a clearing house were only ancillary and incidental to its main function, which was to work for the benefit of the brokers and investors involved. It also rightly held that it would amount to carrying on business only if buildings and property were bought and sold. Even the Madras High Court has accepted this view in Commissioner of Income Tax V. Madras Stock Exchange[604]. And by imposing costs on the respondent, the court sets a major precedent. As a matter of fact, the judgment has been cited in other cases to try and convince the court that unreasonable arguments must be penalized with costs[605].

The court was again on point when it held that there was no conflict between the Bye-law that gave the Governing Board the power to appoint an arbitrator, and Section 9 of the Arbitration Act, 1940. The court interpreted the section in the right manner and was able to see right through the deficiency in the arguments of the respondent.

The ruling that an unrecognized stock exchange wasn't covered under Section 9 and that Pre-recognition Bye-laws need not be published in the official gazette has been accepted by the

[604] 1976 105 ITR 546 Mad.

[605] See Akhileshwar Upadhyay v. Magadh Stock Exchange Association and Ors., 1991 (2) PLJR 404.

Supreme Court in Mahesh Ratilal Shah V. Union of India and Others[606]. The fact that the Supreme Court has accepted the ruling is a testament to its correctness. The court has carefully read Sections 3(2) and 4(3) together, and has come to the right conclusion. As a matter of fact, the respondent tried to repel this reasoning in a fierce manner by referring to other sections of the act. However, the court stood firm and ruled accordingly.

The court also made it very clear that if a provision did not provide for a particular thing (no matter how prudent it may seem to be), then the provision had to be construed as it is, and not by trying to proceed with the notion that what has not been provided for, does exist in the provision. The court used this approach really well to rule that Section 9 of the Securities Contracts (Regulation) Act, 1956 did not extend to unrecognized stock exchanges.

Since the court rejected all the contentions of the respondent, it rightly declared that the arbitration agreement existed between the parties by virtue of Bye-laws, Rules and Regulations.

This case clearly shows how one party tried to prevail over the other by dragging another party into the dispute. However, it was the law and the fairness of the single learned judge that stood the tallest and made the difference, just like it should.

606 [2010] INSC 56.

CONTEMPT OF COURT IN INDIA: A COMPREHENSIVE ANALYSIS

- PRABHAT TYAGI

ABSTRACT

"If we desire respect for the law, we must first make the law respectable."

- Louis D. Brandeis

The role of judiciary in our country is and had been imperative in providing fair and impartial justice to its citizens. Since it is the protector and guardian of rule of law in the country hence it needs to be made sure that it must be shielded from all types of threats and attacks that may deteriorate its smooth and effective administration of justice. Contempt of court is any act which challenges or disrespects the integrity, dignity and authority of the court or judicial tribunals. The special powers of contempt is given to the court to maintain and preserve its dignity and to keep a check on the unjust attacks which tries to impair its justice administration efficacy.

This research article would provide an overview of the law of contempt in India and address the questions concerning the cases where the authority of the courts has been questioned. It also would find the relevance of facts stated in the cases of contempt of court.

KEYWORDS: Judiciary, Contempt, Justice, Dignity, Authority, Court.

INTRODUCTION

The word contempt itself implies to a state of being despised, to be disrespected and dishonoured. The law of contempt has been made in order to preserve the dignity and integrity of the courts and to keep the administration of justice proper and smooth. To keep the trust and faith of the people intact in the judiciary and to maintain the effective administration of the justice, the power to punish for its disrespect and contempt is being vested to the authority of the court and its judges against any such conduct which tarnishes and disregards the image and authority of the court. Under Articles 125 and 215 of the Indian Constitution the Supreme Court and the High Courts are empowered to punish for contempt. In Indian law the contempt of court is divided into two sub categories which are civil contempt and criminal contempt.

CONTEMPT OF COURT DEFINED –

Any act which tends to disrespects or disregard the administration of the law and the authorities rendering its service, such as courts and tribunals, is considered to be as contempt of court or contempt.

The contempt is defined in the Contempt of Courts Act,1971 as;

- **Civil contempt**[607] – means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court.
- **Criminal contempt**[608] – means "the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

HISTORIC OVERVIEW

In India, the concept of contempt of court has been borrowed from English law. Under the rule of the British, the three presidency town's High Courts of Calcutta, Bombay and Madras were vested with the power to punish for contempt under the Indian High Courts Act of 1861.

The Contempt of Court Act, 1926[609] was the first statute in India concerning the law of contempt which was applicable to the whole of British India, including the princely states of Rajasthan, Hyderabad, Saurashtra and Mysore etc. Section 2 of the Act explains the jurisdiction, the High Courts have the power to punish for contempt of themselves and conferred on the High Court the power to punish for contempt of its subordinate courts.

The Act of 1926 was later on amended in 1937 in order to simplify and ascertain the limits of punishment provided for all the courts. The Act of 1926 was repealed and replaced by the Contempt of Courts Act, 1952, in which jurisdiction of the High Court was defined which was

[607] Section 2(b) of the Contempt of Courts Act, 1971.
[608] Section 2(c) of the Contempt of Courts Act, 1971.
[609] Chauhanjmu, The Historical Perspective Of The Contempt Of Courts In India, legal Service India, http://www.legalserviceindia.com/legal/article-2815-the-historical-perspective-of-the-contempt-of-courts-in-india.html.

not there in the earlier Act of 1926. Post-Independence, on April 1, 1960[610], a Bill was introduced in the Lok Sabha to amend the existing law of contempt of court which was undefined and unsatisfactory.

Government decided to scrutinize the law and study the bill for which they appointed a special committee named Sanyal Committee[611] which was under the charge of Shri H.N. Sanyal (Additional Solicitor General of India) in 1963, the report submitted by the committee defined the limited powers of certain courts in punishing for contempt of courts and specified by mentioning criminal contempt. The recommendation of the Committee was accepted by the Government post consultation with all the States, Union Territory Administrations, and other stakeholders. The bill was finally examined by the Joint Select Committee of the Houses of Parliament, which advised few changes in the Bill, regarding the period of limitation for going for contempt proceedings. Upon having all the deliberations The Contempt of Courts Act, 1971 (70 of 1971) gets enacted and replaced the prior Act of 1952.

CONTEMPT IN FOREIGN JURISDICTIONS

United States of America

In USA the contempt is divided into direct or indirect Contempt. Direct contempt is the act of contempt committed in the presence of a judge, whereas the indirect contempt occurs outside the presence of the court. In *Bridges v. California*[612], Justice Hugo Black observed that public opinion could not be pressed in the effuse of Contempt of Court. It asserted that the dignity of the Court will not be respected and honoured if free discussions about the Court were restricted on the pretext of discharging its functions and preserving its duty.

United Kingdom

[610] Karan Dinesh Singh Rawat, Know the History of Contempt of Court in India, ABC Live, (July 20, 2019), https://abclive.in/history-of-contempt-of-court-in-india/.

[611] P K Chatterjee, Transparancy versus Contempt of Court, Vol XLV, No 50, (2007), https://www.mainstreamweekly.net/article461.html#:~:text=The%20Sanyal%20Committee%20was%20of,error%20or%20vice%20has%20disappeared.

[612] John R. Vile, Bridges v. California (1941), THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/244/bridges-v-california#:~:text=In%20Bridges%20v.%20California%2C%20314,judicial%20proceedings%20in%20pending%20cases.

In UK the contempt law is partly set on case law or common law and partly codified by the Contempt of Court Act, 1981, and is considered to be a strict liable offence. The contempt is divided into civil and criminal[613];

The criminal contempt is done under given conditions;

- Contempt "in the face of the court" (means it took place within the courtroom or relates to a case currently before that court and not exactly seen by the judge);
- Disobedience of a court order; and
- Breaches of undertakings to the court.

Civil contempt is committed upon;

- Failure to attend court despite serving of summons requiring attendance.
- Failure to comply with court's order. A copy of the order is duly served to the person concerned and if the person breaches the order then he will be subjected to the proceedings against him and can be sent to prison.

Earlier there was no conviction for the offence of scandalizing the court in England since 1993. However, it was until 1765 the act was not considered to be an offence for which conviction would have happen. In *King v. Almon* in 1765, Almon faced a judicial trial for libel against a judge. Justice Wilmort in this case held Almon liable for the offence of libel and from there on scandalizing a court is being considered a form of contempt of court.

LANDMARK JUDGEMENTS

- **Balasubramaniyam vs. P. Janakaraju & Anr. (2004)[614]**

In this case, the wilful breach of an undertaking is considered to be a civil contempt. The High Court of Karnataka observed that the orders of courts have to abide by unless it is set aside in an appeal or revision. Enumerating on the principles relating to the contempt law, court stated that the wilful breach of an undertaking given to a Court amounts to a civil contempt. It is required that the formal undertakings given to a Court with the intention of obtaining any benefit should not be breached wilfully. It was further stated that once the litigants give an undertaking to a court then they must comply with it under any circumstances. The breach of

[613] Wikipedia, Contempt of Court, https://en.wikipedia.org/wiki/Contempt_of_court#England_and_Wales.
[614] 2004 (5) Kar. LJ 338

an undertaking by the litigants given to a court is a serious matter and will have to be dealt with utmost sincerity and seriousness.

- **Justice C.S. Karnan vs. The Supreme Court of India (2017)[615]**

In this case, justice C.S karnan, a High Court judge was held guilty for the contempt of court and was sentenced to a six months imprisonment by the Apex court. In Feb 2017, he wrote a letter to PM N. Modi wherein he accused twenty judges of the higher judiciary for corruption without providing any firm evidence against them. A seven-judge bench of the Supreme Court held him guilty of contempt of court and judicial process and an order of arrest was given forthwith.

- **Supreme Court Bar Association vs. Union of India & Anr. (1998)[616]**

In this case, the court held an advocate guilty of committing criminal contempt for having interfered with and obstructing the due course of justice by threatening and disregarding the court by using insulting and intimidating language. Supreme Court exercising their power to punish for its contempt under Article 129 and 142 suspended the advocate from practising for three years.

The Apex court remarked that no act of parliament can curtail the jurisdiction of the court of record to punish for its contempt. The Supreme Court under Article 129 and 142 of the Constitution of India, is vested with the right to punish those guilty of contempt of Court. The High Courts under Article 215 of the Constitution are also vested with the power to punish contemners for the offence to contempt of court.

- **PN Dua vs. Shiv Shankar and others (1988)[617]**

In this case, the Supreme Court held that mere criticism of the court does not gives rise to the contempt of court. The court observed that in a state of free expression and display of ideas and thoughts, criticism about judiciary or its judges should be welcomed, provided that such criticism in any way shall not hamper or deteriorate the effective administration of justice. For such act, the courts should reach out to the powers vested in them as judges to reprimand the person for the contempt.

---

[615] Justice C.S. Karnan vs The Honourable Supreme Court Of ... on 23 August, 2017, Indiankanoon, https://indiankanoon.org/doc/9561866/.

[616] (1998) 4 SCC 409

[617] 1988 AIR 1208

- **Re: Arundhati Roy vs Unknown (2002)[618]**

In this case, Arundhati Roy a writer was punished for contempt of court because of an article written by her named 'The Greater Common Good' in which she had expressed her critical views on Supreme Court's judgement in Narmada Bachao Andolan and which was also published in an eminent magazine. The Supreme Court held that the article written by her amounts to misrepresentation of the process of justice and thus amounts to the offence of criminal contempt of court. The court sentenced her to one day imprisonment along with a fine of Rs.2000. To this the court asserted that freedom of speech and expression is subject to restrictions provided by law, such act of contempt jeopardizes the dignity and integrity of the judiciary and also lessens the faith and confidence of the people in it.

CONCLUSION

In a democracy where people are entitled to a right of freedom of speech and expression, wherein they can put their ideas and thoughts in public and against any public or private organisation, there comes a responsibility to them to exercise that right in a fair and correct way and must not abuse the right by criticising anyone falsely, maliciously and without having fair ground on which they do so. One must take care that his representation of expression and ideas should not deteriorate and impair the dignity, integrity and image of the thing that he is criticising upon, be it government or the judicial system. As per section 5 of the Contempt of Courts Act, 1971, it is given that fair criticism of a judicial act would not amount to contempt and thus a person would not be held guilty for publishing any such comment which is fair and is based on the merits of the case that has been decided earlier. Provided that the person should keep in mind that the criticism he is making must be fair and is not filled with false accusations that would be considered as misuse of the power of criticism and right of expression which is granted to them by the constitution of our country.

The judiciary is there for the welfare of the public and works with an aim of rendering a fair and equitable justice to all irrespective of their appearance or background. For it to work efficiently it must not be interfered with the unnecessary and false criticisms and comments which in turn becomes a hurdle in the administration of the justice and not only put the wrongdoer at risk but also seizes away the chance of someone awaiting to get justice. The criticisms done in good faith and on the merits of the case are welcomed and must be promoted

[618] 2002 AIR (SCW) 1210

as it allows the people, who are not a part of the judiciary, to keep a check on the exercise of power by the judiciary. Blindly believing everything that comes from any source or the judiciary as well without due consideration, is not expected by the prudent and vigilant citizens. Having a right also induces a responsibility on the citizen of the country to exercise it correctly and in a right manner as prescribed by law, thus it becomes our duty to maintain and respect the dignity of the judiciary, courts and lastly the law of the land.

MOB LYNCHING IN INDIA

- SHUBHAM SHARMA & AMAN BANKA

"It may be true that the law cannot make a man love me, but it can stop him from lynching me, and I think that's pretty important."

-Martin Luther King Jr.

INTRODUCTION

"Mob lynching is giving punishment to a person without any legal authority for any offense. This can be done by hanging or by beating. Mob Lynching is by a group of people of some community."

Lynching by a mob is a punishment that was served in past. It was usually associated with the united states towards Blacks. Lynching acquired with violence against black in the nineteenth century. Lynching began in the 1880s and became Frequent in South America until the 1930s. Between this period, an estimated Number 2400 black men, women and children were killed by a mob.

It was used as a discipline mechanism against slaves who tries to escape from their owners. Sometimes, whites who openly opposed slavery were the victims of lynching by mobs. But as a ray of hope for blacks came the 14th Amendment which bequeathed them with U.S citizenship.

From the towering number of reasons blacks were Lynched by mobs during this period; gambling, quarrelling, arguing with a white man, attempting to vote, unruly remarks, demanding respect, and acting suspiciously were just handful of them. They were not even given a chance to have a fair trial.

Lynching is a type of non-justifiable homicidal hanging. It is difficult for a single assailant to carry it out. Lynching is an extrajudicial execution carried out by a mob by Rub-Out without a fair trial. They fall under the Specie of organised hate crimes.

Nowadays it has got an ampler meaning to clutch the innocents and that includes acts of violence by a mob against an innocent person or a group of people whom they suspect of having actualized an act which the group of people do not approve. In this process, they take the parity scale of lady justice in their own hands and do not pay heed to a need for a fair trial to be conducted. But to introspect our Indian Society, all the dirt of the past has found it's away in New society. Nowadays Mobs can be flued by the hatred and disagreement of views toward Religion, Race or belief.

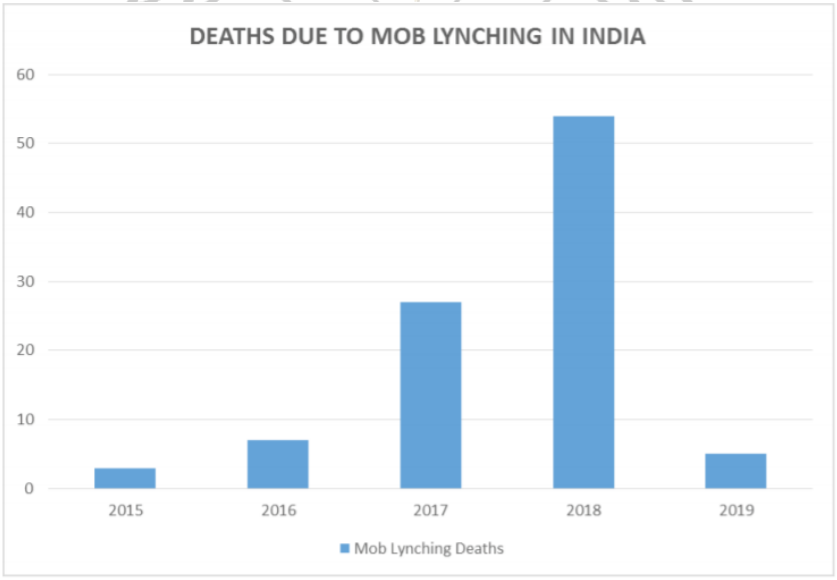
STATISTICS

Cases Related to Mob lynching have increased tremendously since 2010 and is growing exponentially in certain parts of India

Causes of Mob Lynching in INDIA

1. Rise of cow vigilante
2. The silence of the political class
3. Rumours of child-lifters
4. For personal enmity
5. In cases of sexual violence

Minorities and Poor strata of society are the Primary targets followed by Dalits and Foreigners. Muslims were targeted 55%, Dalits 8%, Hindus 14%, Sikhs 5%, Christians 6%, and African Americans



Cow vigilantism is the biggest Benefactor of mob lynching in India and is flued up by different ideology of Majority and Minorities (Muslims & Dalits)

Year	Incidents	Victims	Death	Major assaults	Minor injuries	Gender	
						M	F
2012	1	2	0	0	2	100%	
2013	2	1	0	0	1	N/A	N/A
2014	3	11	0	11	0	100%	
2015	13	49	11	34	4	95%	5%
2016	30	67	9	40	18	75%	14%
2017	43	108	13	64	31	85%	9%
2018	31	57	13	17	27	93%	3%
2019	10	45	4	14	27	88%	13%

MIND BEHIND LYNCHING

In a book Scapegoat written by Rene' Girard, a French Sociologist there is a suitable progression which shows us the Brain behind Mob lynch.

He defines "By collective persecutions I mean acts of violence committed directly by a mob of murderers such as the persecution of the Jews during the Black Death"

1. Stereotyping
2. Accusation,
3. Selection of Victim

In the first stage, the society laments about the loss of cultural values and highlights a concern about losing old system of society and associating it to proliferation during the time of some actual troubles in the society E.g. Epidemic, some natural calamity (flood, earthquake, famine etc).

In the second stage, they accuse members or blame illogically based on rumours and lies and then grief over the loss of values and losing grip on their culture. In the words of Girard, "After all, human relations disintegrate in the process and the subjects of those relations cannot be utterly innocent of this phenomenon. But rather than blame themselves, people inevitably blame either society as a whole, which costs them nothing, or other people who seem

particularly harmful for easily identifiable reasons". So, in this second stage of accusation, heinous crimes, sexual transgression and blasphemy/desecration are brought forward as the main blame against the selected culprits.

In the final stage the victims are chosen who belong to a weak level of society from every sense of world E.g. Religion, Ethnicity, Poor, Females hence, individuals or many of them are punished by the mobs representing the majority in every sense of the word. In his remarks, "Ultimately, the persecutors always convince themselves that a small number of people, or even a single individual, despite his relative weakness, is extremely harmful to the whole of society."

The role of rumours in mob induced violence is unsurprisingly high. Nearly, every mob lynching has a rumour serving as the 'fact'. The mob relies on the rumour for their brutal action. Members already believe in the guilt of the victim. They are acting out of this belief. As such, a rumour is just a calling for the action they are supposed to commit. One Indian report understands it, "More than half (52 per cent) of these attacks were based on rumours, specifically, false allegations targeted against a particular person based on their identity…"
There are many instances in India where culprits and Accused in Mob lynching are celebrated of the wonderful act done and some political groups parties and most shockingly Policemen protector of people ceremonialize These criminals, which shows a mentality that has set as upon some people in the majority.

LEGAL PREDILECTION

As mentioned above there is a Some legal backing to these Mobs and some are even active members and leaders of political groups. Police personnel sometimes regard them as helping hand as a voluntary group.
It is an arduous task to identify the primary cause and face of Mob, Punishment for mob Lynching is not Distinct. It all depends on the facts of the case. For example, if a mob commits murder then it will fall under 302 of the IPC. Murder with any Construct whether by a lone killer or a seething mob will fall under section 302 of IPC.
Section 302,304,307,323,325,34,141,149,147,120B these sections are majorly responsible for punishment in Mob lynching

In India, there is no specific sought-after legislation that deals with the monstrous problem of mob lynching. Mob Lynching is a serious crime and should not be taken lightly. The government should take steps to stop the communal dispute that arises because of rumours and faint education. But the home minister was not able to explain what steps the government is taking to ensure the security of citizens but a new law is introduced to stop mob lynching by the government.

In the USA a bill was introduced by Senator Wagner and Morse that bill examined the details of lynching and gave certain directions but the main point to be stressed upon was Clause 5 which said "The right to be free from lynching accrues by virtue of national citizenship in addition to any similar right which may exist because of state citizenship or presence within a state. Section 4 of the bill sets out comprehensive definitions of a lynch mob and lynching.
It should be noted that an appreciable extension of the terms beyond the usual connotations has been authorized.

Thus a lynching may consist of any violence or attempt to commit violence against any person or his property because of his race, creed, colour, national origin, ancestry, language or religion, or the exercise by violence against person or property of any power of punishment over any citizen or other person because of his actual or suspected connection with a crime, for the purpose or with the result of preventing the legal arrest, trial or punishment of such person. For such acts to constitute a lynching. however, they must be committed by a lynch mob which must consist of two or more persons.

Sections 5 and 6 define the crimes punishable under the act. Section 5 makes it punishable for any person, official or private, to instigate, aid or commit a lynching. Section 6 makes it punishable for an officer of a state or subdivision, charged with a duty or possessing a power to act, to fail willfully or negligently to protect a lynch victim in his custody, prevent the lynching or apprehend and prosecute the lynchers. Section 8 provides a civil remedy for the lynch victim or his next of kin against the governmental subdivision in which the lynching occurred or from which the victim was abducted before the lynching."

Section 6 of the act is also a very important content to look at "which declares punishable the negligent or willful failure of a state officer to prevent a lynching, protect the victim in his custody or apprehend and prosecute the lynchers. This support, it appears, will depend upon

the acceptance by the Supreme Court of the proposition that mere state inaction may constitute a deprivation of due process or equal protection". This can play a vital role in punishing the personnel who celebrate these mobs

In the case of Straurder v. West Virginia. The Court held that while the words of these clauses were merely prohibitive, they carry by necessary implication a positive right to the equal protection of the laws and the protections inherent in the concept of due process. Correlative to this right must be the duty imposed on those wielding the police power of the state to exercise it diligently and without discrimination for the protection of all persons.

While the local police power remains in the possession of the state, it is qualified by the constitutional mandate that it be so exercised that all persons, without regard to race, creed, or colour, may equally enjoy its benefit. It would seem that this duty imposed on the local officers may be as effectively breached when they do nothing as when they act affirmatively in derogation of duty. In two inferior federal courts, the proposition that state inaction may come within the prohibitions of the due process and equal protection clauses has been dearly asserted

SOME CASES OF MOB LYNCHING IN INDIA

On October 9, 2015, Udhampur truck attack: Based on some baseless rumour of cow being transported to be slaughtered and some Hindu extremists attacked a truck and were bombarded by petrol bombs that eventually lead to the death of the driver

In March 2016 Two Muslim traders were going for a yearly fest in Animal fair but due were killed and hanged.

On April 5, 2017, an innocent man Abbas returning home after buying bulls but met was shot by the Gau Rakshaks.

On April 1, 2017, more than 15 people transporting cows were attacked and Pehlu khan was killed in that action

On May 21, 2017, One person was beaten to death by a mob over the disputed land.

In September 2019, a man was lynched by a mob in the state of West Bengal. The mob reportedly believed that he was a child abductor. This was the second case of mob lynching in West Bengal since the state passed an anti-lynching bill.

Anybody can be lynched; this can be concluded from a very recent case in Palghar mob lynching up where two sadhus were lynched where there was a rumour that they were kidnappers and it was flued by WhatsApp rumour. As pf now 155 people are arrested.

This all turn of events shows that Mob lynching is becoming a new deadly phenomenon that is required to be controlled with specific laws.

ANTI-LYNCHING LEGISLATION (INDIA)

Bill was passed in Rajasthan which has one of the highest numbers of mob lynching cases and gave a Quantified way to punish people in lynching. It provides for life imprisonment and a fine of between Rs 1 and 5 lakhs for those convicted in cases where mob lynching led to the victim's death. In cases where the victim suffers grievous injuries, the Bill prescribes up to ten years of imprisonment and fines between Rs 25,000 and Rs 3,00,000.

However, the Centre felt existing laws were enough to tackle the problem of lynching and felt that enforcement and execution by executive bodies is the loose end and state is unlikely to pass a separate legislation regarding the issue.

But main issue to be highlighted is The National Crime Records Bureau (NCRB) does not maintain data with respect to mob lynching. Because of ignoring and overlooking these issue the problem increases and innocent Souls are massacred .

On July 17, 2018, the Supreme Court (SC) in the PIL petition Tehseen Poonawalla v. Union of India issued guidelines to state governments on tackling the increased incidents of mob lynching in the country. In this case, the apex Court had directed state governments to follow a three-pronged approach to lynching incidents by executing preventive, remedial and punitive measures. Several others including Dalit leader, Martin Macwan were petitioners in the case.

As preventive measures, the Court recommended that, in each district, State Governments designate a senior police officer as Nodal Officer and DSP rank officers as assistants to the Nodal Officer. Together, these officers would constitute a special task force that procures intelligence reports about the people who are likely to commit such crimes or who are involved in spreading hate speeches, provocative statements and fake news. The Nodal Officer would hold at least monthly meetings with relevant authorities to take steps so as to prevent instances of dissemination of offensive material that incite such offences through social media, etc.

As remedial measures, if it comes to the notice of the local police that an incident of lynching or mob violence has taken place, the jurisdictional police station shall immediately lodge an FIR.

The Station House Officer of the police station would intimate the Nodal Officer in the district who, in turn, would personally monitor the investigation and ensure that there is no further harassment of the family members of the victim(s).

Specifically, the Court held in 2018 directed that:

1. The state governments shall designate a senior police officer in each district for taking measures to prevent incidents of mob violence and lynching.
2. The state governments shall immediately identify districts, sub-divisions and villages where instances of lynching and mob violence have been reported in the recent past.
3. The nodal officers shall bring to the notice of the DGP any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence related issues.
4. It shall be the duty of every police officer to cause a mob to disperse, which, in his opinion, has a tendency to cause violence in the disguise of vigilantism or otherwise
5. Central and the state governments should broadcast on radio and television and other media platforms including the official websites that lynching and mob violence shall invite serious consequence.
6. Curb and stop dissemination of irresponsible and explosive messages, videos and other materials on various social media platforms. Register FIR under relevant provisions of law against persons who disseminate such messages.
7. Ensure that there is no further harassment of the family members of the victims.
8. State governments shall prepare a lynching/mob violence victim compensation scheme.
9. Cases of lynching and mob violence shall be specifically tried by designated court/fast track courts earmarked for that purpose in each district. The trial shall preferably be concluded within six months.
10. To set a stern example in cases of mob violence and lynching, the trial court must ordinarily award maximum sentence upon conviction of the accused person.
11. If it is found that a police officer or an officer of the district administration has failed to fulfil his duty, it will be considered as an act of deliberate negligence.

CONCLUSION

Such as there is no existence of good crime and bad crime, similarly there is no existence of good mob lynching and bad mob lynching. The crowd is of general perception that if judiciary and police administration cannot provide them justice, they should own it by themselves even

the person has committed the minor offence such as theft. This clearly shows that people in country have lost their trust on law and order.

According to my suggestion, instead of introducing various sub sections in the bare acts of the country, this national offence should be dealt in the existing sections, and the current administration should focus more on reviving the lost trust and faith of the people on this judiciary and police system.

Moreover not only WhatsApp, but also other social sites should be under the supervision regularly, so that such fake messages and video can be stopped from being circulated at such a vast social platform. Investigation of such cases should be done without politicization of the issues, which will be more helpful.

COMMERCIAL SURROGACY AND PROSPECTS FOR REGULATION IN INDIA

- PAUL ABRAHAM

ABSTRACT

'Surrogate motherhood has been the subject of much philosophical and political dispute over the years' - Thomas Frank

In this era of modern technology and advancements, Indian had become a leader in the field of Commercial Transnational Surrogacy. Low costs, modern technology was some of the factors that allowed India to attain such a position. However, such development failed to take account of the exploitation that women were facing in the Surrogate process. It is seen that the entire Surrogacy process was controlled by the fertility clinics who had a higher influence over the entire contract keeping in mind the poor economic conditions of the women. In The early era of the 2000's Government also had quite relaxed policies on Surrogacy which paved way further exploitation.

It was in view of such exploitation that the Government had introduced the Surrogacy amendment bill 2018 which proposed to ban Commercial Surrogacy. However, such a ban could be viewed as the government's last resort to prevent exploitation without ever implementing means for regulating Commercial Surrogacy. This article by citing examples of modern Contract laws and cases of regulation in countries such as that of Cyprus, Portugal and Greece shows how the common problems regarding Commercial Surrogacy could be tackled. Further by showing by showing consequences of such a ban on Commercial Surrogacy, it also aims to prove why regulation would prove better than an approach of deterrence in the long run.

STATEMENT OF PROBLEM

The 2018 bill on Surrogacy has proposed to plan a ban on commercial surrogacy however such a ban would result in the loss of livelihood to a large number of women who are engaged in surrogacy for their livelihood. This presents a conflict between the means of livelihood of the women and the hardships that women encounter owing to commercial surrogacy set ups in India.

CLAIM STATEMENT

Commercial surrogacy has been often looked down upon however its regulation holds certain benefits for both the commissioning parents and the surrogate mothers.

RESEARCH QUESTION

1. Whether the Surrogacy Bill 2018 has provided an amicable solution to the problem of surrogacy?

INTRODUCTION

Until the late years of the 2000's era it was seen that Indian was well know destination for commercial Surrogacy. Over the span of the last two decades, the Transnational Surrogacy Industry in India has thrived owing to reproductive tourists who sought the advantages of low cost, lax regulation, modern medical equipment.[619] Reproductive tourism, a part of medical tourism can be defined as tourism where the contracting parents travel to another country in order to exercise their personal reproductive choices through specific forms of treatments[620].Numerical data has estimated that around 25 thousand children have been born through Indian Surrogate women primarily for contracting parents from High Income nations[621]

The legal status of Surrogacy differs in the various countries in the international forum. this difference has been seen to be a challenge to the internationally recognised ethics and regulations[622] . It is now internationally recognised that the harms arising from surrogate agreements can be tackled better through regulation rather than that of abolition[623]. However, it is seen that after. However after more than a decade of legalising commercial surrogacy, Indian Ministry of Health and Family Welfare passed the Assisted Reproductive Technology

[619] Chang, M. (2009), Womb for rent: India's commercial surrogacy, Harvard International Review, 31, 11–12
[620] Ferraretti, Anna & Pennings, Guido & Gianaroli, Luca & Natali, Francesca & Magli, M.Cristina. (2010). Cross-border reproductive care: A phenomenon expressing the controversial aspects of reproductive technologies. Reproductive biomedicine online. 20. 261-6. 10.1016/j.rbmo.2009.11.009.
[621] Shetty, P. (2012). India's unregulated surrogacy industry. Lancet, 380, 1633–1634
[622] Crockin, S. L. (2013). Growing families in a shrinking world: Legal and ethical challenges in cross-border surrogacy. Reproductive Bio-Medicine Online, 27, page733–741
[623] Ekberg, M. E. (2014). Ethical, legal and social issues to consider when designing a surrogacy law. Journal of Law and Medicine, 21, 728–738, Wilkinson, S. (2016). Exploitation in international paid arrangements. Journal of Applied Philosophy, 33, 125–145.

(Regulation) Bill of 2014 which made it illegal for Indian women to become Surrogate mothers for foreign contracting parents. This Bill was further strengthened by the Surrogacy Bill of 2019 which was passed by the Lok Sabha recently. The direct outcome of this bill would be that it would affect the medical tourism industry however a more direct outcome would be however borne by the Surrogate mothers. Further it may also lead to harmful/ unwanted surrogate agreements which may place such contracting mothers at higher risks

BRIEF HISTORY OF LEGISLATIONS

India had first commercialised commercial surrogacy in the year 2002 following which it has turned around to become an industry that is worth around US$2.3 billion a year[624] towards the latter part of the 2000's as mentioned earlier low cost, abundance of surrogate mothers and modernized technology had allowed the industry to grow. Since the 1990's the Government had encouraged reproductive tourism as means to increase the Gross Domestic Product. This is seen evident in the form of subsidies given to clinics conducting the Surrogate procedures.[625]The only form of regulation that existed was the 126 pages long guidelines which was given by the ICMR regarding ART (Assisted Reproductive Techniques) in 2005 however this too was unbinding. This meant that the power to determine ART procedures were largely in the hands of the Clinics who adopted their own procedures often neglecting the safety and health of the Surrogates[626]

The Assisted Reproductive technique Bill was drafted in the year 2008 which came as a response to injustices that were faced by the Surrogate mothers. This Bill was redrafted in the 2010 and 2014 but was never passed by the Parliament. Another Bill was passed in the year 2016 which was redrafted and was passed by the Lok Sabha in the year 2019. This bill aims to curb the injustices done to women by banning Commercial Surrogacy.

PERSISTENCE OF SURROGACY

Until recently the Indian Government did not pass any bills that aimed to abolish commercial surrogacy. this meant that commercial surrogacy was largely in the hand of the clinics. However, there are various implications to be considered owing to the ban .one such

[624]Shetty, P. (2012). India's unregulated surrogacy industry. Lancet, 380, 1633–1634.
[625] Deckha, M. (2015). Situating Canada's commercial surrogacy ban in a transnational context: A postcolonial feminist call for legalization and public funding. McGill Law Journal, 61, 31–86.
[626] Bailey, A. (2009). Reconceiving surrogacy. Gender Matters, 14, 1–2

implication is that of the whole Transnational Surrogate process going under-ground[627] since they cannot find better alternatives in their own countries, this may induce them to resort to cross-border transaction regarding the same. Further the availability of low-cost transaction cost transaction cost may also act as an aggravating factor towards such underground procedures.[628]This would result in a regime of unregulated Surrogacy which might have more adverse consequences for the prospective Surrogate mothers than before. Hence the inevitability of the underground Surrogate agreements in view of the prohibition of commercial Surrogacy allows a consideration that Regulation would prove to be better in the long run.

FRAMEWORKS SURROUNDING SURROGACY

While considering the Ethical and moral frameworks that revolve around the transnational Surrogacy process it can be seen that the Moral Frameworks used is not incidental but rather inherently and systematically present. An observation can be made which there are predominantly two major frameworks claimed by Surrogacy agencies i.e. Surrogacy frees and empowers women and that Surrogacy and Surrogacy furthers reproductive rights of the women. Two of these claims shall be discussed as below

1. Surrogacy as mean for empowering women

The primary contention in this aspect is that surrogacy allows the women to earn an approximate of 3 to 4 time of what they would have annually. The low scale of payment earned by the Surrogate mother as compared to that of other first world countries cannot be argued here since the money so earned can be used to negotiate a potentially powerful position for herself within the family and remove notions of gift exchange involved in altruistic, non-commercial Surrogacy[629]

2. Surrogacy furthers reproductive rights

Reproductive rights cover the various policies that expand the individual reproductive decision making including the choice of spouse in marriage, determining the number, space between children and means to exercise voluntary choice in reproduction. Scholars have linked reproductive rights to basic human rights since children are seen as an indicator of an

[627] Wilkinson, S. (2016). Exploitation in international paid arrangements. Journal of Applied Philosophy, 33, 125–145
[628] Ibid
[629] ibid

individual's access to adulthood and financial security in resource poor countries. Thus, the lack of access in cases of infertility is considered as a violation of human rights[630].In this context surrogacy can be seen as expanding the horizons in circumstance where such access becomes expensive. This can be particularly true in the Indian scenario where the Commercial Surrogacy is inexpensive.

EXPLOITATIVE ASPECT OF COMMERCIAL SURROGACY

As are aware that Commercial Surrogacy is exploitative of women in general, there are three particular aspects which must be fulfilled in order to be seen as exploitative. These are listed and explained as below

1. Taking advantage of vulnerability

Vulnerability has been defined as being exposed to increased risk of harm or having a decreased ability to protect oneself from harm relative to some norm[631].With respect to the Commercial Surrogacy in India, it is seen that the Vulnerability is situational. The Indian Surrogate mothers are exposed to circumstances in which they cannot guarantee for themselves a favourable situation. Further poverty acts as an aggravating factor fuelling their demand for more money. As a result, these women are forced to agree to become Surrogate mothers for renumeration and health care which are often mediocre since the fertility had a large control in the whole Surrogate process.

2. Defective Consent

A second key component of exploitation is consent. Defective consent has been defined by many but not all the Scholars as an integral part of exploitation. According to Section 13 of the Indian Contract Act two or more persons are said to be in consent when there is consensus ad idem i.e. meeting of minds, they agree to the same things in their minds. Further according to Section 14, Consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake. The moot point here is that Surrogate mother's contract

[630] Deech, Ruth. 2003. Reproductive tourism in Europe: Infertility and human rights. Global Governance 9:425-32

[631] Ballantyne, Wendy Rogers, Catriona Mackenzie and Susan Dodds, 2012, 'Why Bioethics Needs a Concept of Vulnerability' International Journal of Feminist Approaches to Bioethics 11, 11

to arrangements where the children are to be delivered according to guidelines and rules set out by the clinics themselves. As a result, they have no bargaining chips with them to make changes to arrangements and they have to adhere to terms of contract without having whole knowledge of the ramification of such an agreement. Further coercion from their spouses to increase the family income in view of their poverty also acts as a coercing factor. Hence the Surrogate mothers take a decision without having clear consent.

3. Unfair Distribution of Benefits

This aspect relates to parity in the amount the fertility clinics earn and the amount that is actually paid to the Surrogate mothers. Owing to their illiteracy and poor living conditions, the Surrogate mothers aren't aware of such distinction.[632] To them the amount that is offered for their services is nearly three to four times of their annual income. Further even if they are aware, as mentioned in the explanation above they have no means and knowledge to get redressal in such issues.

MODERN CONTRACT LAWS AND SURROGACY

Surrogacy has been outright rejected by many countries as being outright exploitative, it is seen in some countries such as that of USA and that of U.K that the Surrogacy has changed status as to a widely accepted social practice. Surrogacy as practice has certain intrinsic and inherent problems. These problems are discussed below and possible solutions to the same are also provided

1. Unequal power of Contracting Party

The fundamental fear that troubles scholars while legalising Surrogacy agreements is conceptualizing a free market in so sensitive a field as bringing a child in to the world. The monetary compensation that is involved in such a process may tempt the women to agree to such contracts for Surrogate motherhood even if it goes against their best interests. Further it is seen that in the ambit of the fertility industry often the buying party is economically superior

[632] Majumdar, Anindita (2018) *Conceptualizing Surrogacy as Work-Labour: Domestic Labour in Commercial Gestational Surrogacy in India.* Journal of South Asian Development. ISSN 0973-1741

to the selling party. This parity in the bargaining power (owing to economic status) will wrongfully influence the mother since she will be tempted greatly, thus compromising her informed consent and free will[633]

A possible solution to this is found within the modern model of Contract Laws. The traditional Contract Laws focuses on implementation of the fundamental principles of
Contract whereas the modern model minimizes the problem of inequality by various doctrines such as that of good faith, disclosure obligations, unconscionability and fairness. In addition to this there are various other factors that may exempt parties to a contract from their contractual obligations like that of frustration of contact, public policy etc.

2. Change of Heart

This problem relates to inability of Surrogate mother to adhere to the terms of the Contract owing to the emotional conditions that develop owing to the long term of the contract that exist between the parties. The Surrogate mothers contract looking for means to earn easy and quick money without having given focus on the eventual emotional status that they are going to experience.
The Surrogate mother in circumstances of change of heart must not exempted fully is supported by the argument of various scholars that she controls the most important aspect i.e. information regarding her ability to become a Surrogate and she should control her own emotions or otherwise must not consent to such contracts.[634]Other scholars argue that in case Contractual obligation are not complied with the Surrogate mother must compensate the commissioning parents for their losses[635]

3. The problem of Changed Circumstances

In addition to the above intrinsic problems there also lies a third more acute problem. This problem relates to inability to execute contracts in view of changed circumstances. Usually this

[633] Malina Coleman, Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction, 17 CARDOZO L. REV. 497, 524 n. 154 (1996)
[634] Marjorie M. Shultz, (1990) Reproductive Technology and the Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 WIS. L. REV. 297, 349–52
[635] Cook, R., Sclater, S.D., & Kaganas, F. (2003). Introduction. In R. Cook, S.D. Sclater & F. Kaganas (Eds.). *Surrogate Motherhood: International Perspectives* (pp. 1–20). London: Hart Publishing.

may arise from a plethora of factors including death of a close relative, death of biological child etc. The problem becomes even more concerning when it revolves around sensitive issue such as that of Surrogate Contracts where capacity to predict such unexpected scenarios are slim. The changed circumstances in these cases must justify the inability to fulfil the contractual obligation.

SURROGACY AND POVERTY

The earlier bills on Surrogacy have been criticised on the basis that they have failed to take account of the fact that women consent to such agreements in light of unequal circumstances of poverty, patriarchal exploitation within the family and casteism. As mentioned in the explanation above the poverty remains a major factor that causes women to be vulnerable to exploitative agreements[636]. Thus, Surrogacy and poverty remain linked to each other. The more poverty struck a family is; more remains the possibility of accepting exploitative agreements.

SURROGATE MOTHER'S PERCEPTION OF THE BAN OF COMMERCIAL SURROGACY

The Surrogate mother's perception of the ban of Commercial Surrogacy is very different because such a ban causes a loss of livelihood for them leading them to plunge further into poverty[637].Most Surrogate mothers were able to save money for their children's education and construct concrete houses with the money they earn from Surrogacy[638]. This ban was the Indian Government's method to cope with exploitative aspect of Commercial Surrogacy without considering alternative forms of employment for such Surrogate Mothers. Thus, a sudden change would severely impair the lives of such women dependant on Commercial Surrogacy for their livelihood. The lack of agency is perceived to be the fundamental cause of their exploitation which could be mitigated so as to ensure fairness to these Surrogate mothers[639]

[636] Nair, S. S. and Kalarivayil, R. (2018) 'Has India's Surrogacy Bill Failed Women Who Become Surrogates?', *ANTYAJAA: Indian Journal of Women and Social Change*, 3(1), pp. 1–11.
[637] Huber, S., Karandikar, S. and Gezinski, L. (2018) 'Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy', *Affilia*, 33(1), pp. 69–84.
[638] Ibid
[639] Ibid

REGULATORY MECHANISMS FOR SURROGACY IN CYRUS, GREECE AND PORTUGAL

The fundamental reason for the ban on Commercial Surrogacy across the world is with regard to the protection of the women. It is seen that there lies a co-relation between Commercial Surrogacy and the exploitation of women. Such a co-relation has led to the banning of Commercial Surrogacy in various countries such as Thailand and India. A comprehensive law on the matter can however include safeguard in order to ensure the protection of the women. These types of regulation are seen in countries such as Cyprus, Portugal and Greece whose novel features are mentioned below

1. Eligibility Criteria

The women must in sound physical and mental conditions to be able to bear a child as a surrogate. The fulfilment of such conditions is taken care of by medical experts on a case to case basis in all three jurisdictions. Further, the Greek Code of Ethics of the Medically Assisted Reproduction which is legally binding provides that the women must bear a child at least once and not more than two caesareans to be eligible. This is done to ensure that the women are in adequate health and to better understand the agreement that she enters into owing to her previous experiences. The Greece laws restrict the age of the Surrogate between 25 and 45 whereas the Portuguese and the Cyprus do not limit the same. The marital status of the women is not relevant in all these jurisdictions however in order to maintain the peace and tranquillity within the family, consent of the spouse is required.

2. The Surrogacy Agreement

The Surrogacy agreement normally lies between the commissioning parents and that of the Mother. In these jurisdictions special rules are places which have to be followed. In Portuguese and Cyprus laws, Surrogacy agreements are only concluded after a competent body has given consent to such an agreement. The parties in such a can specify to a greater extent the terms of such an agreement. It is seen that the contracts cannot contain terms that excessively restrict the rights and freedoms of the individual Surrogate mother.The agreement despite being binding in all three jurisdictions cannot force the surrogate to perform medical procedures that go against their will.

3. Authorisation by a Competent Body

A common element found in all three of these jurisdictions are that the consent of competent body must be present for the agreement to be valid In Greece it is seen that the intending parents must apply for a court order which the judge must comply if the necessary law are complied with. Portugal on the other hand requires the commissioning parent must get permission of the National Council for Medically Assisted Reproduction which decides the same with the assistance of Portuguese Association of Doctors. The National Council plays an active role even after authorisation, it watches over the complete procedure.

CONCLUSION

Commercial Surrogacy as of 2019 is banned in India which was seen as the governments last measure to prevent the exploitation of the Surrogates. This ban however was imposed without any other economic opportunities for such women who relied on Surrogacy for their livelihoods. It is also seen that absence of agency in order to determine better contracts is the fundamental cause for their exploitation[640]. This could be resolved with better government intervention and more rigorous legal mechanisms such as in the case of Portugal, Cyprus and Greece as mention in the article. Further it could also prevent an underground market from being formed which would put the Surrogates into more danger. The impracticability of Altruistic Surrogacy[641] also pushes us to consider that regulation of Commercial Surrogacy would prove to be more fruitful in the long run. The Hence, we can conclude that the 2018 Bill on Surrogacy has failed to create an amicable solution for Commercial Surrogacy.

[640] Huber, S., Karandikar, S. and Gezinski, L. (2018) 'Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy', *Affilia*, 33(1), pp. 69–84.

[641] Zervogianni,.E, (2019) Lessons Drawn from the Regulation of Surrogacy in Greece, Cyprus, and Portugal, or a Plea for the Regulation of Commercial Gestational Surrogacy, *International Journal of Law, Policy and the Family*, Volume 33, Issue 2, Pages 160–180

EDWARD SNOWDEN WHISTLEBLOW & CORRESPONDING CYBER LAW

- HARDIL BATRA

ABSTRACT

Edward Snowden is an American National who was a top contractor who had a misconception of the affairs of the American Intelligence community during his initial working days at the National Security Agency. He believed that the agency he was working for, held high regards to the basic human rights of the citizens of America and moreover all citizens of different nations around the globe. This belief was soon overturned and Snowden realised the mammoth amount of data that is being assembled to track all forms of Digital communication. Edward Snowden then decides to leak the classified information out in the public domain and attracts criminal charges, and becomes a fugitive from the law however he gets the status of a hero in the eyes of the whole world. This paper showcases the highlights of the classified data that was leaked by Edward Snowden and tries to enlighten the reader about the infringements of the basic human rights done by the same.

INTRODUCTION

The National Security Agency/Central Security Service (NSA/CSS) leads the U.S. Government in cryptology that encompasses both signals intelligence (SIGINT) and information assurance (now referred to as cybersecurity) products and services, and enables computer network operations (CNO) in order to gain a decision advantage for the Nation and their allies under all circumstances.[642]

In 2013, Snowden's disclosures proved that the N.S.A. had been conducting surveillance on the entire U.S. population, by way of a series of top-secret programs staggering in their scale and intrusiveness, including the bulk collection of telephone records in the form of metadata that was acquired from telecommunications companies.

The scale of Snowden's heist was also staggering. The N.S.A. claims that he stole 1.7 million classified documents. Snowden disputes this number, but, even if the actual number is quite a lot smaller, it's likely that he stole more documents than he was able to read.

[642] https://www.nsa.gov/about/mission-values

Snowden is a controversial figure, and whistle-blowing, which is how Snowden describes what he did, is a contentious subject, especially when it concerns intelligence operations. Much of the controversy, in Snowden's case, divides along what can appear to be merely a matter of opinion: Is he a patriot or a traitor? Obama's Justice Department charged him with treasonous federal crimes under the 1917 Espionage Act.[643]

Snowden's defenders view these charges as wrongheaded; his critics suggest that he ought to face trial, even though, since the material he stole was classified, any proceeding would be partly closed to the public, a condition that, as a rule, makes a fair trial awfully unlikely. People who consider Snowden a patriot argue that exposing the N.S.A.'s mass-surveillance program was both a public service and an act of heroism.

People who consider Snowden a traitor argue that his disclosures set U.S. counterterrorism efforts back by years, and endangered American intelligence agents and their sources all over the world. Some also point to the circumstances of his flight and exile: because Snowden first sought refuge in Hong Kong and has been granted temporary asylum in Russia (due to expire in 2020), it has been variously alleged, without proof, that he did not act alone, that he shared American military secrets with China, and that he's a dupe of Putin. Snowden denies these accusations.[644]

THE INCEPTION

Edward Snowden, wasn't like any other random American and was the finest of his class and a brilliant mind. He aspired to serve his nation by joining the Army but due to physical injury and an inherent epilepsy he could no longer serve on the battle ground. He however decided to fulfil his goal of serving the nation by joining the NSA and being the torch bearer in saving the United Nations from Cyber Attack.

The first posting of Snowden was in Geneva where he was working with the intelligence to protect the backend from cyber atomic attack and developing a defence software. During this time he was first exposed to highly classified information which came to him as a complete shock as he went on to discover more and more undiscovered truths about the national intelligence agency. He learnt about the Xkeyscore Software in this special Operation.

XKeyscore

[643] Jill Lepore, The Newyorker Times, *Edward Snowden and the Rise of Whistle-Blower Culture,* September 16, 2019

[644] Jill Lepore, The Newyorker Times, *Edward Snowden and the Rise of Whistle-Blower Culture*, September 16, 2019

One of the National Security Agency's most powerful tools of mass surveillance makes tracking someone's Internet usage as easy as entering an email address, and provides no built-in technology to prevent abuse. The Intercept published 48 top-secret and other classified documents about XKEYSCORE dated up to 2013, which shed new light on the breadth, depth and functionality of this critical spy system — one of the largest releases yet of documents provided by NSA whistle blower Edward Snowden.

The NSA's XKEYSCORE program, first revealed by The Guardian, sweeps up countless people's Internet searches, emails, documents, usernames and passwords, and other private communications. XKEYSCORE is fed a constant flow of Internet traffic from fiber optic cables that make up the backbone of the world's communication network, among other sources, for processing. As of 2008, the surveillance system boasted approximately 150 field sites in the United States, Mexico, Brazil, United Kingdom, Spain, Russia, Nigeria, Somalia, Pakistan, Japan, Australia, as well as many other countries, consisting of over 700 servers.[645]
These servers store "full-take data" at the collection sites — meaning that they captured all of the traffic collected — and, as of 2009, stored content for 3 to 5 days and metadata for 30 to 45 days. NSA documents indicate that tens of billions of records are stored in its database.[646]
"It is a fully distributed processing and query system that runs on machines around the world," an NSA briefing on XKEYSCORE says. "At field sites, XKEYSCORE can run on multiple computers that gives it the ability to scale in both processing power and storage."[647]
Post this discovery Snowden was in a complete state of shock to know the depth of data that was being tracked. Once a data was being traced to a person, the user was able to know almost everything about that person including their live videos and conversations through unauthorised access. This lead to the creation of a gigantic amount of Meta Data.

META DATA

Metadata summarizes basic information about data, making finding & working with particular instances of data easier. Metadata is a shorthand representation of the data to which they refer. If we use analogies, we can think of metadata as references to data. Think about the last time

[645] Morgan Marquis-Boire, Glenn Greenwald, Micah Lee*, XKEYSCORE-NSA's Google for Worlds Private Communications*, The Intercept, July 1 2015,
[646] Ibid
[647] Ibid

you searched Google. That search started with the metadata you had in your mind about something you wanted to find. You may have begun with a word, phrase, meme, place name, slang or something else. The possibilities for describing things seems endless. Certainly, metadata schema can be simple or complex, but they all have some things in common. The use of meta data in day to day lives is quite important as to correctly link the subject matter along with the tag required, however the problem that arose with Snowden's expedition was that this data was not authorized and neither did the world have any clue of such a highly effective unlawful network. Jumping from one person's search to another person led to this huge tracking system. Say you're tracking a person from Beirut and he calls say 10 people, so now you also track these 10 people and these 10 persons would have contacted another 10, and within a few hops you realise that The NSA is tracking around 2.5 million of data that too only with a few hops. The aggregate amount of information being tracked without consent is unimaginable.

PROJECT EPIC SHELTER

The next special operation Snowden was sent on was in Hong Kong where he was initially sent to develop a defence mechanism software against the terrorists and cyber phishers and malwares. However, he soon realised that his task on board was to hack the data of the entire Hong Kong Population and also plant sleeper cell software in the entire city which had the ability to shut the city down with one click. This was only supposed to be a backup software for catastrophic site failure in case the relations between the nations take a sour route but this soon turned into a go to software and was tailored in the major leader countries of the world. This software was given the name of Project Epic Shelter.

FOREIGN INTELLIGENCE SURVEILLANCE ACT

The whole act of tracking data was justified by the top most authorities in the name of the Foreign Intelligence Surveillance Act, which permits the Government Officials to obtain a secret directive in order to maintain the effectiveness of quick action.

The Foreign Intelligence Surveillance Court was established in 1978 when Congress enacted the Foreign Intelligence Surveillance Act (FISA). Pursuant to FISA, the Court entertains applications submitted by the United States Government for approval of electronic surveillance, physical search, and other investigative actions for foreign intelligence purposes. Most of the Court's work is conducted ex parte as required by statute, and due to the need to protect classified national security information.[648]

The Foreign Intelligence Surveillance Court has been under fire since one of its classified orders was leaked by a former National Security Agency analyst. Detractors have focused on the fact that nearly all the warrant applications brought before its judges have been approved.

A striking feature of proceedings at the Foreign Intelligence Surveillance Court (FISC) is that the executive always wins. Between 1979 and 2012, the first thirty-three years of the FISC's existence, federal agencies submitted 33,900 ex parte requests to the court.[649] The fact that ex parte proceedings are lopsided in a broad range of contexts—and that there are good reasons to expect them to be lopsided has several implications for the current debate over the FISC. First, it gives us reason to be skeptical of other explanations for why the FISC approves so many requests.

Is the U.S. Foreign Intelligence Surveillance Court (FISC or FISA Court) an overly secretive body that serves as a rubber stamp? The court has also been criticized for a lack of technical

[648] https://www.fisc.uscourts.gov/

[649] Evan Perez, Secret Court's Oversight Gets Scrutiny, WALL ST. J. (June 9, 2013, 7:11 PM ET),

expertise necessary to make decisions about surveillance programs. This calls into question the court's ability to oversee surveillance programs.[650]

DATA PRIVACY LAW

USA

In the United States, at the federal level, the power to enforce data protection regulations and protect data privacy belongs to the U.S. Federal Trade Commission (FTC), which has a broad level of authority. However, there is no federal data privacy law or central data protection authority tasked with ensuring compliance. Instead, most regulation is at the state level, so state attorneys general play a key role in enforcement. These state-level regulations often have overlapping or incompatible provisions. For example, all 50 U.S. states have adopted data breach notification laws, but there are differences in the definition of personal data and even in what constitutes a data breach. Much the same is true with data privacy laws.[651]

In the absence of a federal mandate, at least 25 states have decided to step up. The well-known California Consumer Privacy Act (CCPA) created a wave of at least 9 similar regulations in Maryland, Nevada, Massachusetts, Rhode Island and other states. This paper has summarized the key provisions of the data privacy laws by state for California and New York. These states are actively developing and amending their data privacy legislation, and detailing the similarities and differences in their approaches will help illuminate the complexity of privacy protection.[652]

California Consumer Privacy Act (CCPA)

The CCPA incorporates the core principles of the data protection and data privacy requirements in the General Data Protection Regulation (GDPR), the far-reaching privacy protection law enacted by the European Union.[653] This California law governs the collection, sale and disclosure of the personal information of California residents. The CCPA applies to the activity of businesses, service providers that serve businesses, and third parties (which can be individuals or organizations).

---

[650] Clara Fritts and Scott F. Mann, *Fact Sheet: The Foreign Intelligence Surveillance Court February 27, 2014*

[651] Ryan Brooks, *U.S. Privacy Laws: State-Level Approaches to Privacy Protection*, July 3,2020.

[652] Ibid

[653] https://oag.ca.gov/privacy

The law currently requires businesses to extend the rights provided by the CCPA to their employees. However, there is a pending bill that would amend that law to exclude employees from the definition of "consumer." When a business receives an inquiry about the information collected and stored about an individual, it must verify that the person making the request is actually who they claim to be before responding.

The law gives companies 30 days to "cure" violations. Failure to address a violation leads to a civil penalty of up to US$7,500 for each intentional violation and US$2,500 for each unintentional violation.[654]

This being said the law still does not extend to government agencies or Non-Profit organisations.

New York Consumer Privacy Act (NYPA)

The NYPA applies to "legal entities that conduct business in New York" or that "intentionally target" residents of New York with their products or services, which gives the law extra-territorial application. The law applies to businesses of any size, is not limited to for-profit businesses and does not include a revenue threshold like the CCPA. The NYPA is very similar to the CCPA. It would empower individuals to inquire about what data a business has collected on them and whom they have shared it with, request that the business correct or delete the data, and opt out of having their data shared with or sold to third parties. The NYPA would complement New York's existing data breach notification law by expanding protection of personal information.[655]

NYPA is the only U.S. data privacy law that will impose fiduciary duties on any legal entity that collects, sells or licenses personal data. The law defines those duties broadly; businesses must secure consumers' personal data against any risk and in any way that affects consumers. A significant point is that the data fiduciary responsibility supersedes "any duty owed to owners or shareholders".[656]

The proposed regulation is stronger than other state laws in that it requires businesses to put their customers' privacy before their own profits. This privacy legislation has a very

[654] Cynthia J. Larose, The National Law Review, *Penalties for Non-Compliance with the CCPA, August 26, 2020 Volume X, Number 239*

[655] Ryan Brooks, *U.S. Privacy Laws: State-Level Approaches to Privacy Protection*, July 3,2020.

[656] Ibid

controversial line that says that organizations should "act in the best interests of the consumer." It does not explain, however, what companies should actually understand about the interests of New Yorkers and other customers.[657]

Another highly debated provision of the NY privacy law is the "private right of action". The law would give consumers the right to sue companies directly over privacy violations rather than leaving enforcement to the Federal Trade Commission or state attorneys general. Another law that was recently passed in New York, the Stop Hacks and Improve Electronic Data Security (SHIELD) Act, might affect the NYPA, because the SHIELD Act updates New York's breach notification requirements and consumer data protection obligations, and also broadens the state Attorney General's oversight with regards to data breaches impacting New Yorkers. [658]

The NYPA does not provide the scope of penalties, leaving the decision to the court. The court will consider the number of affected individuals, the severity of the violation, and the size and revenues of the covered entity. However, the status of the act is pending in the state senate.[659]

INDIA

India is not a party to any convention on protection of personal data which is equivalent to the GDPR or the Data Protection Directive. However, India has adopted or is a party to other international declarations and conventions such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which recognise the right to privacy. India has also not yet enacted specific legislation on data protection. However, the Indian legislature did amend the Information Technology Act (2000) ("IT Act") to include Section 43A and Section 72A, which give a right to compensation for improper disclosure of personal information. India has introduced a biometric based unique identification number for residents called 'Aadhaar'. Aadhaar is regulated by the Aadhaar (Targeted Delivery of Financial and Other Subsidies Act) 2016 ("Aadhaar Act") and rules and regulations issued thereunder. [660]

Finally, personal data is protected through indirect safeguards developed by the courts under common law, principles of equity and the law of breach of confidence. In a landmark judgment

[657] Ibid
[658] Ibid
[659] https://www.nypa.gov/-/media/nypa/documents/document-library/governance/power-authority-act-2019.pdf
[660] https://www.prsindia.org/

delivered in August 2017[661], the Supreme Court of India has recognised the right to privacy as a fundamental right under Article 21 of the Constitution as a part of the right to "life" and "personal liberty". "Informational privacy" has been recognised as being a facet of the right to privacy and the court held that information about a person and the right to access that information also needs to be given the protection of privacy.

The court stated that every person should have the right to control commercial use of his or her identity and that the "*right of individuals to exclusively commercially exploit their identity and personal information, to control the information that is available about them on the internet and to disseminate certain personal information for limited purposes alone*"[662] emanates from this right. This is the first time that the Supreme Court has expressly recognised the right of individuals over their personal data.

Fundamental rights are enforceable only against the state and instrumentalities of the state and the Supreme Court in the same judgment recognised that enforcing the right to privacy against private entities may require legislative intervention. The Government of India therefore constituted a committee to propose a draft statute on data protection. The committee proposed a draft law and the Government of India has issued the Personal Data Protection Bill 2019 ("PDP Bill") based on the draft proposed by the committee.[663]

This will be India's first law on the protection of personal data and will repeal S. 43A of the IT Act.

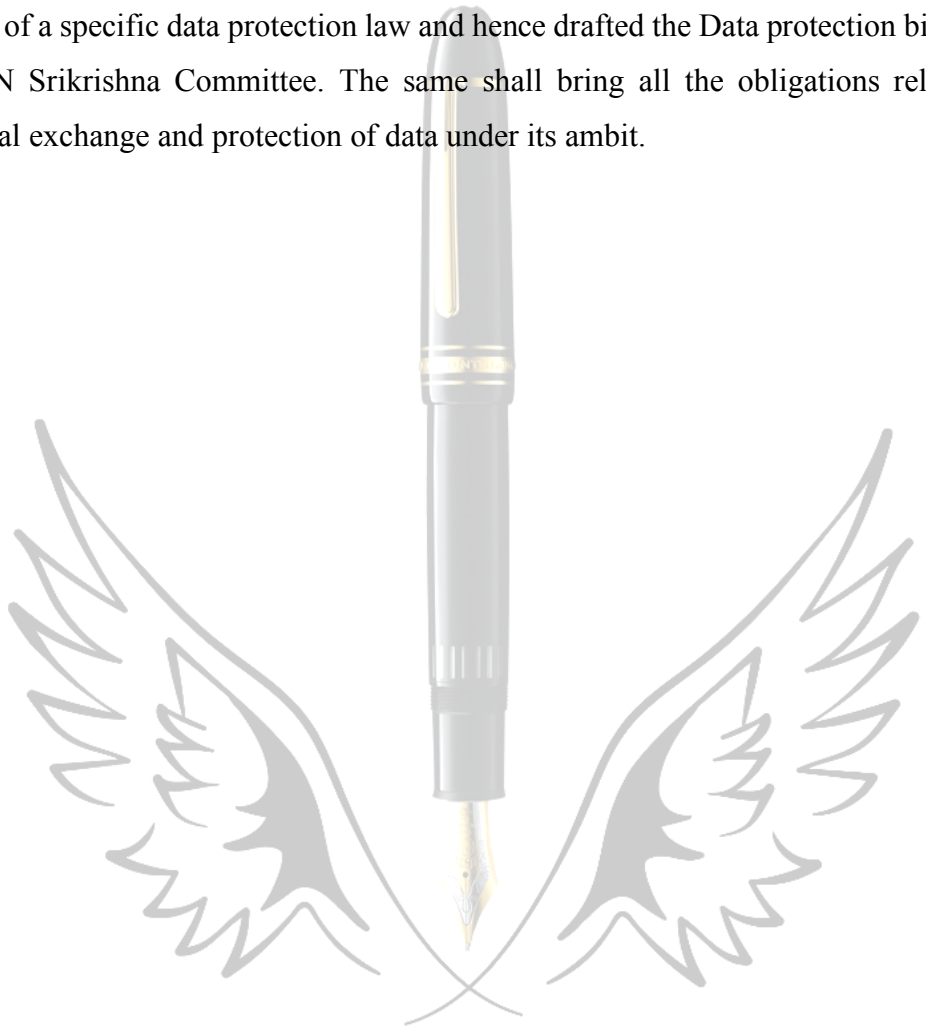
CONCLUSION

The Edward Snowden whistle blow was a major breakthrough that led to a renaissance in how the data privacy of various nations is monitored. While Edward Snowden did manage to enlighten the world upon how the data privacy of billions of citizens has been under a threat, the NSA has failed to address the issue and the entirety of his contention has moreover fallen on deaf ears of most of the authorities linked to the given leak of information.

A new era needs to be set on how the data of citizens is being handled and the international conventions such as the GDPR must be kept in mind to implement the same. As seen in the CCPA, the same fails to bring the government agencies under its jurisdiction and beats the purpose of Mr. Snowden's sketch of the population being aware of the choice that they should

[661] Justice K.S Puttaswami & another Vs. Union of India, WRIT PETITION (CIVIL) NO. 494 OF 2012
[662] Ibid para 415.
[663] Talwar Thakore, *Data Protected India*, https://www.linklaters.com/

have for such a data being used. The NYPA does bring in a stricter form of law but is due for its approval by the senate. A centralized law giving its utmost importance to the safety of personal data would be welcomed with open arms by this generation. India is also prioritizing the dearth of a specific data protection law and hence drafted the Data protection bill under the Justice BN Srikrishna Committee. The same shall bring all the obligations related to the commercial exchange and protection of data under its ambit.



SANSKAR MARATHE VS THE STATE OF MAHARASHTRA AND ANR: IS SEDITION LAW AN OPPRESSION OR NEED?

- AVIK SARKAR & DEBASRITA CHOUDHURY

ABSTRACT

Freedom is a little word but it carries much heavy weight. Probably heavier than we can contemplate. Humanity broke and fell to rise again in freedom. But is this freedom, this democratic nation absolutely so, in the true sense of the term? Any law that suppresses freedom has been repealed at some point of time. Then y not the law of sedition, which curtails freedom of speech, and is still prevalent. The case of Assem Trivedi is a golden example of this injustice. A law which is to be used just for neutralising threats against national security is being misused to curb the voice of dissent. The following case commentary explores the limitations of freedom of speech enshrined in Article 19(1)(a), tenets of democracy and how a law like sedition in Section 124A of IPC still exists in contemporary India.

INTRODUCTION-

"It is the first responsibility of every citizen to question authority." – Benjamin Franklin.

Blind belief in authority brings about devastating outcomes as seen time and again in the pages of world history. Questioning authority and a constituent body that respects and honours differing opinions makes for an efficient democracy, otherwise it is just dictators hiding behind the garb of a 'democratic nation'. Every great leader, religious or political emerged out of questioning the age-old systems and almost ritualistic practices, thus paving the way for new and contemporary ones. In rudimentary terms, if a belief is not questioned, how can its tenacity be proved?

In every sound political system, the citizenry has to be given a right of expressing themselves, however their opinions may differ from authority. The same rationale has been enshrined in the constitution of India, as freedom of speech and expression- a fundamental right in Article 19(1)(a). Opposing to this is an archaic law made during British regime to stop criticism of the British rule once and for all as it came accompanied with severe punishments. Naturally, the British wanted to deprive the people of all their rights including the freedom to express their views. In contemporary India, this sentiment is instituted in Section 124A of the Indian Penal Code which lays down the punishment for *sedition.* It provides punishment for anyone who shows disaffection towards the government by words, either spoken or written, or by signs, by

visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government in general. Many freedom fighters suffered the penalty on account of seditious acts, be it starting protests or reading supposed seditious pieces of literature in public. The first known registered case under the charges of sedition was in Calcutta High Court in 1891, **Queen Empress v Jogendra Chunder Bose**[664]. In his magazine Bangobasi, he had criticised the Age of Consent Act. He described it as a forced conversion to Euro-centric ideals and condemned it saying that it rendered hindus incapable of showing dissent towards the same. His article was held to be inciting the seeds of revolt against British rule. The sedition trial of 1897 against **Lokmanya Tilak**[665] is historically famous. He faced sedition charges thrice.

One would expect this law to be abolished post-independence given the purpose of it dwindled. And emotionally speaking, so many patriots of the freedom struggle were imprisoned under it. In a surprising turn of events, not only is it prevalent till date, but several notable authors, artists, activists and politicians have been charged under it in the 21st century. A notable example among them is that of **Assem Trivedi,** in the case **of Sanskar Marathe vs The State Of Maharashtra And Anr**[666]**.**

FACTS OF THE CASE

Assem Trivedi, a political cartoonist was arrested based on an F.I.R alleging him of the offence of sedition under section 124A, IPC. He is claimed to have not only defamed the Parliament, the Constitution of India and the Ashok Emblem but also tried to spread hatred and disrespect against the Government. He published the said cartoons on "India Against Corruption" website, which amounts to insult under the National Emblems Act as well as amounts to a serious act of sedition. Immediately after the arrest, he was produced before the Metropolitan Magistrate. Initially, he did not want to file a petition of bail as he wanted to be absolved of all the charges.

JUDGEMENT AS GIVEN BY THE COURT

The respondent Assem Trivedi contended that his acts were under freedom of speech and expression enshrined in article 19(1)(a) of the Constitution of India. And by no means does his action come within the purview of the restrictions that are enshrined under Article 19(2) of the Constitution.

[664] (1892) ILR 19 Cal 35
[665] Emperor Vs Bal Gangadhar Tilak, (1917) 19 BOMLR 211
[666] 2015(2)RCR(Criminal)351

Later, the police decided to drop the sedition charges as the charge levied against Assem Trivedi was invoked arbitrarily. And just to make sure that such charges are not invoked arbitrarily the court went to demystify the conundrums regarding the invocation of sedition charge and to make sure that there is no further invocation of sedition charge arbitrarily.

While discussing the said provision, the Court had invoked various precedents. Using those precedents, the courts have tried to crystallize the said law in **Kedar Nath Singh v. State of Bihar**[667]**.**

Firstly, the Court tries to clarify that the sedition law does not transgress the rights of freedom of speech and expression given under Article 19(1)(a) and it falls within the purview of Article 19(2). It's an incontrovertible fact that the right to freedom of speech under Article 19(1)(a) is subjected to certain restrictions given under section 19(2) which comprises of (a) security of the State, (b) friendly relations with foreign States, (c) public order, (d) decency or morality, etc. And the constitutionality of Section 124A of IPC is only consistent with the part of 19(2) as far as public order and security of the country is concerned. According to section 124A of IPC, it is only words either spoken or written or through some visual representations which excite dissatisfaction towards the government established by law. It must be noted that the word "government established by law" has a separate entity than the people in it. "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. And to provide this stability to the State the sedition law is being introduced so that any act of violence shall not put the stability of the State into jeopardy.

Secondly, it is a well-established fact that a mere comment or criticism towards any action of the State won't lead to the invocation of the said law. The contentious part arises only when a strong speech is made against any action of the State which has the potentiality to excite the citizens of the country against the government. In such cases, on one hand, the Court must ensure the protection of the fundamental rights given to its citizens as they are the custodian and guarantor of fundamental rights. On the contrary, it also must make sure that unfettered right without any restriction shall not become an instrument for vilification towards the government. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.

[667] AIR 1962 SC 955

The Court, has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Act.

The courts have time and again iterated that the freedom of speech is of utmost importance and cannot be balanced with the restrictions that have been given. Therefore, the courts are of the opinion that 19(2) is invoked only when the community interest is endangered. The danger anticipated should not be insinuations, conjectures or surmises. It should have proximate and direct nexus to the issue. The expression of thought should be intrinsically dangerous to public interest. After dealing with the nuances of the said law the court issued certain guidelines to be followed by Police while invoking Section 124A IPC. This, in turn, would lead to the non-arbitrary invocation of the section 124A of IPC. The guidelines are as follows:

1. The words, signs or representations must incite hatred towards the government established under law.
2. Words, signs or representations against politicians or public servants do not fall in this category of sedition.
3. Comments expressing disapproval or criticism of the Government with a view to obtaining a change of government by lawful means without any of the above are not seditious under Section 124A.
4. Obscenity or vulgarity by itself should not be considered as a factor of consideration for deciding whether a case falls within the purview of Section 124A of IPC.
5. A legal opinion in writing which gives reasons addressing the aforesaid must be obtained from Law Officer of the District followed within two weeks by a legal opinion in writing from Public Prosecutor of the State.

CRITICAL ANALYSIS

Though prima facie there seems to be no flaws in this particular judgement. But the question to be considered is whether the arbitrary invocation of section 124A of IPC has expunged or not? Well, sadly the answer is negative. It is still a very common phenomena, that this section is used as a mechanism to shut dissenters.

"For, after all, how do we know that two and two make four? Or that the force of gravity works? Or that the past is unchangeable? If both the past and the external world exist only in the mind, and if the mind itself is controllable – what then?" ― George Orwell, 1984.

Indeed, what then? Democracy without dissent sounds almost like the hyperbolized dystopia found in George Orwell's 1984, where everyone must speak the same, revere the same

authority and mere thought of anything otherwise is violently wiped out. Only, here, in the reality, the authority is 'sophisticated' enough to hide behind archaic and draconian laws to shun and shame all who disagree.

Sedition law has always been under the scanner since the time it was formulated. It's purpose was to stifle the Indian Freedom Movement back in the colonial period. Sedition is a criminal offence under section 124A of IPC. Anyone who tries to bring hatred or dissatisfaction towards the government established by law by way of words either spoken or written or through visible representations shall be punished. Now, this brings us to a very harrowing question that how can sedition and democracy exist at the same time? How does this law ameliorate the condition of the country?

A plethora of judgements have been spawned which ensure our freedom of speech under article 19(1)(a). Dissent and criticism towards the government have been considered essential features of democracy. But the said law seems to sabotage absolute democracy. In cases of sedition, the plaintiff is always the state or, to be precise, the government. Therefore, such law may be misused by the State whenever it feels that its position is getting subverted. As stated by Justice Madan Lokur "***Sedition is being used as a sort of iron hand to curb free speech, which I think is an overreaction to the expression of opinion*** **(or an)** ***expression of views by people".*** And there has been a lot of instances where the government (or party in power) has seemed to have used this law to strengthen its position.

The courts have been continuously iterating that a mere criticism or comment on the actions of the State do not lead to the invocation of the said law. It is only when any comment made which incites hatred or dissatisfaction towards the government will lead to a conviction under the said law. But on the contrary, criticisms are made in order to make the people of the State aware of the malfunctioning or consequences of a State action. Therefore, it is bound to create dissatisfaction towards the authorities in power. Criticism without any kind of reaction from the citizens of the country would lead to a breakdown of the democratic system, thereby leading it to be infructuous. For example, if the opposition party does not point out the anomaly in the working of the present government then how are they going to come in power? Raising questions against the government will, by default, create dissatisfaction in the citizens of the country towards the government.

Though the said law prevails in the name of maintaining peace and harmony in the country, the State has been using this as an instrument to curb the voice of dissent. Even in the recent case of Mr **Prashant Bhushan**[668] where he was held liable for contempt of court, it can be easily construed that his intention was just to make the citizens of the country aware of the anomaly that is prevailing in the court of law and not to scandalise the Supreme Court. His statements were misconstrued, subsequently, he was held liable.

From the arguments, it can be clearly stated that this law is way too contentious than it seems on paper and ought to be repealed. It is apparent that the State has no plan of repealing this law as it may come in handy to deal with unprecedented situations. This piece of legislation should have been done away with like all the other redundant and oppressive ones at the onset of our independence. The circumstances are similar in case of the UAPA Act[669]. If one reads the UAPA Act it almost runs analogous with the sedition laws, but it is not being repealed on similar grounds. UAPA Act was formed at a time when there was a lot of militancy prevailing in the country. That was the main purpose, to neutralise such threats. However, with the ushering of independence, advent of a new era, most of such problematic elements dwindled. But the Act was not repealed. Naturally one would assume that the conditions of sedition or use of UAPA Act are to be imposed on only such threats prevalent till date. But it's being misused far too much to silence anyone who does not speak in accordance with the accepted norm.

Presence of these laws can have a lot of abysmal implications on the country. If such laws are not repealed then concepts about democracy, equality, freedom would be a myth and remain engraved in the books with no actual implication. These laws have more power to procrastinate or sabotage the growth of a country than to direct a country towards a brighter future. *In a democracy, singing from the same songbook is not a benchmark of patriotism.* People should have the liberty to portray their love towards their country in their own way. Every citizen's way of portraying love towards their country can be different, some can indulge in constructive debates, some will point out loopholes in the working of the current government. Expressions that are supposedly used might be harsh and unpleasant to some, but that cannot render an action to be seditious.

[668] This is a very recent case, judgement being passed on 31st August 2020

[669] . Unlawful Activities (Prevention) Act, 1967

CONCLUSION

The case of Assem Trivedi is a golden example of how sedition law is misused by the State. Basic tenet of our democracy is being tarnished through this oppressive law. If one wants respect for the law, he first has to make the law respectable. Even the people the authority doesn't want to listen to, should be given a voice to express their views. Otherwise, it's hardly a democratic nation. "If we don't believe in free expression for people we despise, we don't believe in it at all." – Noam Chomsky.

AN ANALYSIS OF CORPORATE SOCIAL RESPONSIBILITY IN INDIA

- AADEESH SHARMA

ABSTRACT

Corporate social responsibility (CSR) is a pious platitude all over the world. In today's globalized world, one of the great challenges faced by firms is integration of CSR in business. Stakeholders require a lot more from companies than merely pursuing growth and profitability. CSR has come a long way in India and other emerging markets. It underlines activities like sustainable initiatives, inter-generational equity, human and labour rights etc. Corporate bodies have stated time and again that they have the ability to improve the society in general. This paper focuses on the concept of CSR in India, its length, breadth and depth in India.

KEYWORDS: CSR, initiatives, challenges, philanthropic approach, stakeholders, intergenerational equity.

INTRODUCTION

When we talk about CSR, the first thing which comes to our mind is that the corporate organizations shall work for the benefit of the society and community at large. The basic definition of CSR is defined as 'a company's sense of responsibility towards the community and environment in which it operates'. Companies do this by contributing in reducing social evils, improving educational standards of the lower class, working for improving the standard of living of the people working in their organizations and otherwise also.

At its heart, CSR is about an organization taking responsibility for the impacts of its decisions and activities on all aspects of society, the community and the environment. CSR is more than just donating money or printing double-sided to save trees, it's about contributing to the health and welfare of society, operating transparently and ethically. More importantly, this way of operating should be embedded in the business, rather than an afterthought.

CSR is not a static concept-it is a moving, evolving target. The scope of corporate responsibility is different for different countries, regions, and is different among different interest groups.

Today, our lives are so entwined with the business community, with long hours spent at the workplace building our careers and reliance on corporations for everything from food to financing, electricity to technology.

As such, an enterprise's influence on societal change, innovation and progress cannot be underestimated and it has great responsibilities on a variety of stakeholders, including employees and customers.

Also, companies have a duty to return back what it has earned from the society. Companies use Natural resources and must return back to the society. According to the definition given by United Nations Industrial Development Organization (UNIDO), CSR is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. Some of the key CSR issues are:

- Environmental management
- Responsible sourcing
- Improving the standard of living of labours and employees
- Improving the working conditions
- Social equity
- Gender balance i.e. everyone should be treated equally
- By investing money in improving the Health and Education of people who are poor

CSR, seen through old-fashioned lenses, simply means "paying back to society" through charitable means. For many enterprises, it remains a "nice to have" or "add-on", and to cynics, CSR is a way for an enterprise to improve its image, perception or reputation without doing anything more.

CSR can make a valuable contribution to society. Organizations consider the interests of society by taking responsibility for the impact of their activities on customers, employees, shareholders, communities and the environment in all aspects of their operations. However, to make CSR a success it should be treated like any other aspect of business and not merely philanthropy. The organization as a whole should be involved in it.

This report aims to the key challenges faced by organizations in implementing CSR in its business operations. This report will analyze relevant cases of CSR. Furthermore, the advantages of CSR will be discussed in order to develop organizational strategies for achieving and implementing successful CSR policies. Finally, recommendations are discussed on how organizations can meet these challenges.

This research explores the existing literature available on CSR. The literature review shows trends, definitions starting from the early days of 1950s when CSR was in its budding stage. As of now, the trends have changed and CSR affects not only the company's reputation and

goodwill but also govern the financial performance. It was analyzed that the reporting practices range from the very sophisticated and well-established system to "a brief mention of CSR" in the annual report. CSR reporting will continue to improve globally, but the information it contains would need to be standardized. Many of these initiatives are voluntary but are likely to hinder rather than assist the development in the reporting systems.

REVIEW OF LITERATURE

The review of literature shows that these kinds of practices can generate positive working environment for employees as well as for the business itself.

A survey conducted by "The Energy and Resource Institute's" business community (2004) has brought out the fact that for many companies the CSR initiatives are philanthropic or ad hoc in nature. There was some awareness among companies but was not backed up by implementation and monitoring.

The Economic Times (11 Jan.2013), news highlighted about the company Dell's strategy of motivating its employees in initializing CSR. The news discussed that company's employees are the power that forced the company to do more for the society. Company with its employees has engaged in social responsibility activities in the areas of education, environment and employee's welfare. Beside Dell Company, the news also discussed about other companies like Maruti and Gogrej that these companies also provide induction training to its employees for preparing them for community services. Maruti Company run a program named e-parivartan for a group of employees to make them aware about community problem and their solution.

D.Y. Chacharkar and A. V. Shukla (2004) in their paper entitled "A study of Corporate Social Responsiveness" tried to highlight theoretically the benefit of CSR through "iceberg effect" diagram. The results showed that just like iceberg, except the recognition and appreciation, the larger part of CSR initiatives for the company are invisible in the form of publicity, image building, expansion of customer base and profit.

R.S. Raman (2006), in a study on "Corporate Social Reporting in India-a view from the top", used content analysis technique to examine the chairman's message section in the Annual Reports of the top 50 companies in India to identify the extent and nature of social reporting. The study concluded that the Indian companies placed emphasis on product improvement and development of human resources.

RESEARCH QUESTIONS

- What does corporate social responsibility mean?
- Are the perceived needs of the society and the environment around business being met?
- If not, what needs to be done if these needs are to be met in the future?
- Why it might be challenging for organizations to effectively set and achieve social and environmental goals and objectives, in addition to their operating goals and objectives?
- Why might an organization pay greater attention to adding social and environmental goals and objectives today than, say, it would do 10 years ago?
- In what ways does achievement of CSR goals and objectives strategically differentiate an organization?

RESEARCH HYPOTHESIS

CSR has become increasingly popular due to:

- Improved financial performance;
- Lower operating costs;
- Enhanced brand image and reputation;
- Increased sales and customer loyalty;
- Greater productivity and quality;
- More ability to attract and retain employees;
- Reduced regulatory oversight;
- Access to capital;
- Workforce diversity;
- Product safety and decreased liability.

OBJECTIVES

The objectives of the study of researcher are as follows.

- To check the need of CSR.
- Identify the relevance of CSR.
- To identify the numbers of business houses doing it.
- To evaluate the current initiatives.
- Understand the nature of corporate social responsibility.
- Understand that corporate social responsibility, like any other goal and objective, helps the firm only when aligned with its strategy, vision, and mission.

- To provide suggestions.

CONCEPTS

The concept of corporate social responsibility is now firmly rooted on the global business agenda. But in order to move from theory to concrete action, many obstacles need to be overcome. A key challenge facing business is the need for more reliable indicators of progress in the field of CSR, along with the dissemination of CSR strategies. Transparency and dialogue can help to make a business appear more trustworthy, and push up the standards of other organizations at the same time

There are many big entities who have been actively engaged in the CSR activities but unfortunately the number is relatively less. In order to encourage more entities to participate in the process of development of the society via- CSR, the Government of India has actually implemented the concept of CSR in the new Companies Act 2013. Turning the CSR from voluntary activities to the mandated responsibilities, also governed by the bundle of regulations as follows:

Eligibility Criteria:

Company (includes foreign company with branches or project in India) having:

- Minimum net worth of rupees 500 Crore.
- Turnover up to "1000 Crore"
- Having a net profit of at least '5crore'.

during any financial year, are covered by this provision.

Under the rules, the Government has also fixed a threshold limit of 2% of the "Average' Net Profits of the block of previous three years on CSR activities and if Company fails to spend such amount, disclosures are to be made for the same. But an exemption has been given to the Companies that do not satisfy the above threshold for three consecutive years.

CONTENT ANALYSIS

How can these socially responsible practices help the business?

- **Cost reductions:** CSR initiatives don't have to be a cost. On the contrary, they can help reduce costs. Operational efficiencies can be achieved through streamlining, sustainability and energy saving. Waste can be reduced and materials recycled. These eco-efficiencies can produce both environmental and economic benefits through

reductions in energy consumption, implementation of new cost-neutral building maintenance methodologies and decreasing the cost of workspaces generally.

- **More productive employees:** CSR initiatives have a positive impact on employee wellbeing and motivation. They can and do, contribute to the ease of hiring quality staff, employee retention, commitment and motivation, all of which leads to increased innovation and productivity. Employees want to feel proud of where they work. An invested employee is less likely to look for a job elsewhere. More good people want to work for companies who do not take their staff for granted. More hiring choice ultimately means a better workforce.
- **Enhanced reputation at less cost:** Pragmatically, there's no point in adopting CSR if no one knows about it. As CSR improves your organization's reputation as more responsible and sustainable than your competitors, this improves your ability to be more effective in the way you manage communications and marketing to reinforce existing customers, attract new customers and increase market share. With a good PR mind at work, you may find less need for expensive advertising campaigns as you generate free publicity and benefit from positive worth-of-mouth.
- **Content communities:** CSR involves the way that an organization engages and collaborates with its stakeholders, which include not only your shareholders, employees, suppliers and customers, but also the community in which you are based and operate. By getting involved in your local community and maintaining an open and honest dialogue with them, you can create and foster a credible and trusted relationship, enhancing your support over the longer term.
- **Happier, more loyal customers:** CSR makes customers think more highly of you. If customers like and admire you, they are likely to buy more products or services, will share their enthusiasm with friends and be less willing to change brands. The UK Small Business Consortium reports that "88% of consumers said they were more likely to buy from a company that supports and engages in activities to improve society."
- **Improved access to capital:** An ever-increasing number of investors in business now factor CSR criteria into their selection processes to include socially responsible companies and exclude those that do not strive to meet certain environmental and social standards. So CSR can improve your organization's stature in the eyes of the investment community and thereby your ability to access capital from them.

Challenges and Issues to Successful CSR Strategy Implementation by Organizations.

- Lack of total organizational commitment to CSR
- Challenges in integrating CSR with core business values and practices
- Lack of financial resources to pursue CSR practices
- Economic and commercial pressure
- Different views in the role and responsibility of organizations
- Strong stakeholder conflict

WHAT NEEDS TO BE DONE TO MEET THE PERCEIVED NEEDS OF THE SOCIETY AND THE ENVIRONMENT AROUND BUSINESS?

In order to overcome the issues and challenges of CSR, certain steps need to be taken.

- Firstly, it is found that there is a need for creation of awareness about CSR amongst the general public to make CSR initiatives more effective. This awareness generation can be taken up by various stakeholders including the media to highlight the good work done by corporate houses in this area. This will bring about effective changes in the approach and attitude of the public towards CSR initiatives undertaken by corporate houses. This effort will also motivate other corporate houses to join the league and play an effective role in addressing issues such as access to education, health care and livelihood opportunities for a large number of people in India through their innovative CSR practices. Thus, the social justice agenda of the day would be fulfilled more meaningfully.
- Secondly, it is noted that partnerships between all stakeholders including the private sector, employees, local communities, the Government and society in general are either not effective or not effectively operational at the grassroots level in the CSR domain. This scenario often creates barriers in implementing CSR initiatives. Appropriate steps should be undertaken to address the issue of building effective bridges amongst all important stakeholders for the successful implementation of CSR initiatives.
- Thirdly, companies involved in CSR implement projects in the areas of health, education, environment, livelihood, disaster management and women empowerment, to mention a few. In many such contexts, it's noticed that companies end up duplicating each other's efforts on similar projects in the same geographical locations. This creates problems and induces a competitive spirit amongst companies. Considering the diverse issues and different contexts that exist currently in the CSR domain, the companies

involved in CSR activities urgently consider pooling their efforts into building a national alliance for corporate social responsibility.

- Fourthly, many CSR initiatives and programs are taken up in urban areas and localities. As a result, the impact of such projects does not reach the needy and the poor in the rural areas. This does not mean that there are no poor and needy in urban India; they too equally suffer from want of basic facilities and services. While focusing on urban areas, the companies should also actively consider their interventions in rural areas on education, health, girl child and child labor as this will directly benefit rural people.

EVALUATION OF CURRENT INITIATIVES

In India, there are some organizations which work towards CSR. Because these are those companies for which making money is not everything. They often go the extra mile to give a little something back to their employees, community and world at large.

Ages ago when CSR was not in "fashion", Tata initiated various labour welfare laws, like the establishment of Welfare Department was in 1917 and enforced by law in 1948 or Maternity Benefit was introduced in 1928 and enforced in 1946. They introduced the eight-hour working day in 1912 – an astonishing thirty-six years before the Indian government.

About 7000 villages benefit from programmes run by the Tata Steel Rural Development Society. The Community Development and Social Welfare Department at Tata Steel carries out medical and health programmes, mass screening of Tuberculosis patients and drug de-addiction and AIDS awareness. Tata Steel's Centre for Family Initiatives was successful in influencing 59 per cent of Jamshedpur's couples practicing family planning (compared to the national figure of 35 per cent). The Tata Council for Community Initiatives has created the Tata Guidelines on Community Development. An effort of over three years from the field evolved into a framework of best practices.

Tata Tea's Social-Cause Marketing (SCM) initiative, Jaago Re! is a huge success with the youth. As part of this campaign, Tata Tea aired commercials on social problems – corruption, bad roads, irresponsible politicians, etc.

EDUCATION:

Padhega India Badhega India

FMCG major Procter & Gamble (P&G) in partnership with Child Relief and You (CRY) and Sony Entertainment Television launched 'Shiksha', with the motto "padhega India, badhega India," a programme to educate underprivileged children. It allows consumers to participate

via simple brand choices.- all an individual has to do is purchase a large pack of common-use products like soaps and shampoos and he/she will help support one day's education of one child per pack purchased.

P&G India closed Shiksha '08 with the largest-ever contribution of Rs 3.2 crore to CRY. Irrespective of the sale from Shiksha, P&G has committed a minimum of Rs. 1 crore to CRY.

For The Girl Child

The K. C. Mahindra Education Trust was established in 1953 by late Mr. K. C. Mahindra with an objective to promote literacy and higher education. The Nanhi Kali project was initiated in 1996 with the aim of giving primary education to the underprivileged girl child. The Project supports over 57,000 children under it.

Technologically Yours

Computer Based Functional Literacy Solution is a promising teaching method started by Tata Consultancy Services to eradicate illiteracy. It uses multimedia software to teach adults to read within 30-45 learning hours over a period of 10 to 12 weeks in 1 to 1.5 hour sessions thrice a week. Taking one-third of the time required by writing-oriented methods and solving the problem of lack of infrastructure and qualified teachers, the project is a win-win. Till date 1, 20,000 people have been trained.

HEALTH CARE:

Lasting Legacy G.D.Birla, the founding father promoted the concept of holding wealth as a trust for stakeholders. Aditya Birla carrying on the legacy believes in creating "sustainable livelihood." He opines "Give a hungry man fish for a day, he will eat it and the next day, he would be hungry again. Instead if you taught him how to fish, he would be able to feed himself and his family for a lifetime." The Birla group runs as many as 18 hospitals in India and has touched lives of more than 5000 physically challenged individuals.

Acts of Faith

Novartis and the Novartis Foundation for Sustainable Development (NFSD) are involved in the fight against leprosy. Novartis has worked with the World Health Organization leading to the cure of 4.5 million patients so far. The Novartis Comprehensive Leprosy Care Association, a project sponsored by NFSD and Novartis India, helps in recovering leprosy patients with rehabilitation, including income generation assistance.

We Care

Reliance Industries Limited have made great progress in the field of health care. Its various initiatives include the Dhirubhai Ambani Hospital, Lodhivali which renders quality medical

services to the rural population and prompt service to highway accident victims. Trauma patients are provided free life saving treatment.

RIL extends financial support and professional expertise to Sir Hurkisondas Nurrotumdas Hospital and Research Centre, a charitable hospital offering tertiary health care facilities to all strata of society and providing free and subsidized services to the poor patients. The Hospital continues its tradition of rendering free treatment to all in the casualty ward.

ENVIRONMENT:

Go Green

The ITC Green Centre in Gurgaon is the physical expression of commitment to sustainable development. It is one of the world's largest green buildings and the first non-commercial complex in the country to be awarded the United States Green Building Council-Leadership in Energy and Environmental Design's platinum rating- the highest in the order.

The building is designed to maximize the effect of natural light during daytime, largely eliminating the need for artificial ones. The window glass, while allowing light inside, does not allow heat. With a water re-cycling plant, the building is now a zero water discharge building.

Waste To Wealth

Excellent example for waste minimization is Mc Donald in which all napkins, bags and tray liners are made from recycled papers.

Ambuja Cements Ltd. established a foundation, called the Ambuja Cement Foundation in 1993. Natural Resource Management (NRM) by far forms the largest part of the community initiatives of ACF. Water being the prime mover in rural life and an essential factor for rural development, presets their work in the area of water resource management.

AGRICULTURAL AND RURAL DEVELOPMENT:

Milk Miracle

Till 1961, Moga was a non-descript village in Punjab until Nestle stepped in. Nestle decided to help create a farmer-centric model. Starting with coverage of 180 farmers, it has expanded to over 85,000. Apart from improving production and quality of milk, Nestle has undertaken the responsibility of general betterment of the district. From providing infrastructure to the schools to funding treatment of tuberculosis patients, Nestle has transformed Moga into an industrial hub.

Think Grass Root

E-Choupal is an initiative which provides farmers with know-how and services, timely and relevant weather information, transparent price discovery and access to wider markets. Farmers can access the latest local and global information on weather, scientific farming practices as well as marker prices at the village itself through a portal. It assists rural farmers in procurement of agricultural/aquaculture produce.

Today 4 million farmers use e-Choupal to advantage. Being linked to futures markets is helping small farmers to better manage risk. Launched a decade ago e-Choupal has won over even the staunchest sceptics.

WOMEN'S EMPOWERMENT:

Woman Power

Project Shakti was started in 2001 in Nalgonda district, Andhra Pradesh, by Hindustan Unilever Limited[670] with the objective to uplift rural underprivileged women by providing them with small scale employment enterprise opportunity. Women are trained to become direct – to – home distributors of HUL products through various self-help groups. Not only does it give them the much needed money but more importantly a sense of self-esteem.

Promoting Well-Being Among The Cola Generation

Unhealthy products such as potato chips, chocolates and burgers being advertised on five 24-hour children's TV channels in India set the panic alarm ringing. Seven food and beverage companies have come together for a voluntary initiative to promote healthier lifestyles among children. Their commitment is no advertising of products, except for products that fulfill specific nutrition criteria based on scientific evidence.

RESEARCH METHODOLOGY

In this report, I have used the case study of an Indian Public Sector Undertaking (PSU) like Bharat Petroleum Corporation Ltd to describe its society and local community-related initiatives. Being a PSU and true to its directive, BPCL has undertaken lot of innovative CSR initiatives in and around the areas of its functioning. An attempt has been made here to highlight the same.

Study area: BPCL, Chandigarh.

Nature of study: The study about CSR is descriptive and explanatory in nature. I have describe the characteristics of CSR and explained the things related to it.

[670] Hereinafter mentioned as HUL

Data collection: The researcher will use empirical method in the process of research. While employing the empirical method the researcher will use various primary and secondary sources of data collection.

Primary sources will include interviews, questionnaires, schedules etc.

Secondary sources will include earlier research on topic, records, published statistics, company brochure, newspaper reports etc.

Tool of technique: The researcher will be employing the research techniques such as observation, interview schedule, questionnaire and survey.

Sampling Design: Random Sampling method.

The respondents of the researcher are Regional manager, General manager, workers.

CONCLUSION

Analysis of several surveys in India suggest that though many companies in India have taken on board the universal language of CSR, CSR seem to be in a confused state. Individual companies define CSR in their own limited ways and contexts. The result being that all activities undertaken in the name of CSR are mainly philanthropy, or an extension of philanthropy. It seems that CSR in India has been evolving in domain of profit distribution. There is a need to increase the understanding and active participation of business in equitable social development as an integral part of good business practice. The mélange of corporates and NGOs with the government has the ability to place social development in the fore front.

SECTION 498-A OF INDIAN PENAL CODE, 1860

- YASHWANTH A S

INTRODUCTION:

SECTION 498-A OF IPC, 1860:

It was introduced in the year 1983 to protect married women from being subjected to cruelty by the husband or his relatives. A punishment extending to 3 years and fine has been prescribed. The expression "cruelty" has been defined in wide terms so as to include inflicting physical or mental harm to the body or health of the woman and indulging in acts of harassment with a view to coerce her or her relations to meet any unlawful demand for any property or valuable security. Harassment for dowry falls within the sweep of latter limb of the section. Creating a situation driving the woman to commit suicide is also one of the ingredients of "cruelty".

SECTION 113A OF EVIDENCE ACT, 1872:

Presumption as to abetment of suicide by a married woman — When the question is whether 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, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation. — For the purposes of this section, "cruelty" shall have the same meaning as in Section 498-A of the Indian Penal Code (45 of 1860).

FURTHER KEY NOTES:

In order to protect helpless women who were regularly getting abused and beaten and tortured by their respective husbands and husband's family members, multiple changes were made to IPC. Accordingly, under Section 498A cruelty to a woman by her husband or any relative of her husband was made punishable for with an imprisonment for a term of three years and also with fine. This was further supported by Section 304B where a woman had committed suicide within 7 years of her marriage or died in circumstances raising a reasonable suspicion that some other person has committed an offence, provisions were being made for inquest by Executive Magistrates.

Further, the Indian Evidence Act, 1872 was also amended to provide that in cases where the woman had committed suicide within 7 years of marriage and it is shown that her husband or any other relative of her husband had subjected her to cruelty, then the Court may presume that such suicide was abetted by her husband or such relative of the husband. However, since the Section was subject matter of controversy, the Hon'ble Supreme Court observed that it was often being "used as weapons rather than shield by disgruntled wives."

OBJECT BEHIND ENACTMENT OF SECTION 498A OF IPC:

"Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical, of the woman is required to be established in order to bring home the application of Section 498A of IPC."

The Court also elaborates on the legislative intent behind insertion of Section 498A of IPC As clearly stated therein the increase in the number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961.

In some cases, cruelty of the husband and the relatives of the husband which culminate in suicide by or murder of the helpless woman concerned, constitute only a small fraction involving such cruelty. Therefore, it was proposed to amend IPC, Code of Criminal Procedure, 1973 and the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by the husband, in-laws and relatives. The avowed object is to combat the menace of dowry death and cruelty.

OBJECT OF SECTION 498A OF IPC AND ITS MISUSE:

In the case of ***Sushil Kumar Sharma v. Union of India***, the Apex Court remarked that the object of the provision is prevention of the dowry menace. But as has been rightly contended by the petitioner many instances have come to light where the complaints are not *bona fide* and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery.

The Court while observing this also elucidated on the remedial measures that can be taken to prevent abuse of the well-intentioned provision. The Court opined that **merely because the provision is constitutional and intra vires, does not give a licence to unscrupulous persons to wreak personal vendetta or unleash harassment.** It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be

appropriately dealt with. Till then the courts have to take care of the situation within the existing framework. As noted above the object is to strike at the roots of dowry menace. But by misuse of the provision a new legal terrorism can be unleashed.

CONCLUSION/GUIDELINES FOR MISUSING OF SECTION 498A 0F IPC:

- **Establishment of Family Welfare Committees-** Constitution of one or more Family Welfare Committees in each District by the District Legal Services Authority. The Committees may be constituted out of para legal volunteers/social workers/retired persons/wives of working officers/other citizens who may be found suitable and willing. The Committee shall look into every complaint filed in the District under Section 498A. Thereafter the Committee shall interact with concerned parties and report shall be submitted by the Committee to the Legal Services Authority within one month from the date of receipt of complaint.
- The Court further directed that no arrest in the matter shall be made unless the Committee's report is received. The report would thereafter be considered by the Investigating Officer or the Magistrate. The Court also stated that in cases where a settlement has been reached, it will be open to the District and Sessions Judge or any other senior Judicial Officer to dispose of the proceedings including closing of the criminal case if dispute primarily relates to matrimonial discord;
- The Court has further directed that if a bail application is filed in the case, then the same shall be attempted to be decided on the same day. The Court also clarified that 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.
- **Complaint under Section 498A against persons ordinarily residing out of India**– In this context, the Court has directed that in such cases impounding of passports or issuance of Red Corner Notice should not be mandatorily adhered to.
- **Other directions-** 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.

The Supreme Court in the case however has stated that the **aforesaid directions does not apply to cases in which the wife has suffered tangible physical injuries or death.** The Court has further directed the National Legal Services Authority to submit a report on working of the

aforesaid arrangement by March 31, 2018 and the matter has been next listed for hearing in April, 2018.

Many instances have come to light where the complaints are not bona fide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial.

Sometimes adverse media coverage adds to the misery. By misuse of the provision a new *legal terrorism* can be unleashed. The provision is intended to be used as a shield and not as an assassin's weapon.

However, a mere possibility of abuse of a legal provision does not invalidate it. Section 498-A is constitutional, *Sushil Kumar Sharma v. Union of India*, (2005) 6 SCC 281.

IMPORTANCE OF LEGAL AID WITH SPECIAL REFERENCE TO LEGAL SERVICES AUTHORITY ACT, 1987

- FAHAD BASHIR KHAN

Since freedom, the level of individuals in India who can manage the cost of a decent way of life has been expanding consistently, while the level of individuals under the neediness line has diminished significantly. This change can obviously be connected as an immediate or aberrant outcome of the approaches of the legislature for upliftment of the needy individuals. However, numerous individuals despite everything have not had the option to receive the rewards of these arrangements and arrangements and the related monetary development. This has brought about the broadening of the hole between the rich and poor people. All things considered, the more unfortunate segments of the general public feel excluded and face different social shameful acts. Exacerbating their issues, it is seen that they don't have anybody to speak to them under the vigil of the court to confront legal procedures and along these lines, are denied of equity. When the educated, well-to-do and urban areas of our populace will in general get away and abstain from taking the assistance of the law because of intricacy of legal procedures, how might one anticipate that the rustic and in reverse masses should see the arrangement of courts and judges as a device of giving equity? All issues can't be profoundly tackled, regardless our Constitution just as legislations gives an answer for the more unfortunate and penniless areas of the general public, who don't have the way to benefit legal administrations, by furnishing them with free legal assistance. This free legal-assistance is called legal aid.

The overall importance of the expression "Legal Aid", in this way is a legal help, security, and social course of action, for expanding and giving extraordinary help or helping the less fortunate and more vulnerable individuals to empower them to uphold their legal rights through legal framework.

Therefore, the provision of legal aid is essential for the safe walk of democracies on the track of Rule of Law and the Equal Protection of Laws[671]. In a country like India, where the poor are neither aware of their rights nor have money to engage lawyers to defend them in the court, justice ends up becoming a rich man's indulgence. The object behind free legal services for the poor is to ensure equal and uniform justice[672].

[671] The Concept of Legal Aid and Social Justice available at http://www.indiasocialstudy.com/2009/04/ concept-of-legal-aid-social-justice.html, accessed on 27-08-2020

[672] Moharana, S.D., Dimension of Legal Aid in 21st Century, Indian Bar Review, Vol. XXXVII (3& 4) 2010.

The basic perspective of legal aid is to ensure identical equity to all, especially to needy individuals, with the objective that no one is denied of equal rights as indicated by the law or denied admittance to the court just as a result of dejection, obliviousness or various deficiencies. All around, in an overall population numerous people can't get reasonable admittance to the court and proportional possibility and correspondence under the gaze of the law as a result of lack of instruction and education. These are the two primary variables which makes a bay between poor people and the court. In the current arrangement of Administration of Justice, millions are denied of equivalent equity as they can't gain admittance to the court because of heavy court expenses, lawyers' charges, and long methodology, etc. Because of their absence of education and numbness they are unconscious of the rights and benefits given to them by the laws and the Constitution. Accordingly, they get constantly denied of those rights and freedoms. Additionally, in view of their poor financial condition, they can't secure those rights against individuals and frameworks with implies. So, the current structure of court strategy isn't helpful for secure equivalent equity to poor people. In addition, the arrangement of legal executive is to secure the Fundamental Rights of the individuals and not to pulverize the privileges of the individuals. In any case, present legal framework isn't sufficient to secure the enthusiasm of poor people. The plan of legal aid means to give the legal aid to these individuals and to expel the hole, which exists, between poor people and the court. The legal aid plot makes mindfulness among the individuals about their privileges and freedoms and gives satisfactory legal help and encourages to make sure about equity for them. A huge number of individuals stay in prisons for quite a long time without preliminary and resistance imperiling their life and freedoms. A huge number of workers and laborers, tillers, purchasers are abused because of their absence of education and obliviousness about their privileges and freedoms. Without legal assistance to these classes of individuals, we can't apply their investment in the current arrangement of equity. Also, in a framework, when millions can't get to equity, equity under the watchful eye of law and equivalent security of law gave by the Constitution, it is only a disgrace. The possibility of legal aid is the test to guarantee equivalent equity to the poor millions[673]. Legal aid is the measure to support these individuals, by furnishing them legal help and counsel with legitimate portrayal to make sure about equity and the foundation of genuine popularity-based society with equivalent equity for all. Universal Declaration of Human Rights 1948, perceives the significance of free legal aid in a country.

[673] Chandra Satish, "International Document on Human Right, Mital Publications,1990, New Delhi 10059, pp.16-31

The way of thinking of free legal aid for the vindicating of common and political rights is cherished in Article 8-A of Universal Declaration of Human Rights, 1948.

Objectives of the Legal Aid:

Now that the states are welfare states, legal aid has a comfortable relationship with the government assistance state. The arrangement of legal aid by the state is an endeavor towards the accomplishment of the objective of government assistance. Legal aid is a government assistance arrangement by the state to individuals who couldn't in any case bear the cost of access to the legal help. Legal aid additionally assists with guaranteeing that government assistance arrangements are implemented by the state giving it to individuals qualified for government assistance arrangements, for example, social lodging, with access to legal counsel and the courts. Verifiably, legal aid has assumed a solid job in guaranteeing regard for monetary, social and social rights which are occupied with connection to government managed savings, lodging, social consideration, wellbeing and training administration, which might be given openly or secretly, by methods for authorization of law and hostile to separation legislation[674]. Justice P.N. Bhagwati appropriately expresses poor people and the uneducated ought to have the option to move toward the courts and their obliviousness and neediness ought not be an obstacle in the method of their acquiring equity from the courts[675]. The most importantly point of legal aid is to offer free legal types of assistance to poor people and destitute segment of the general public. Aside from this, it additionally includes the standards of balance, equity, rule of law and arrangement of assistance to individuals in any case unfit to bear the cost of legal portrayal and access to the courtroom. All things considered, it ought to likewise endeavor to give legal mindfulness, para-legal help, instruct individuals in regards to existing arrangements of law and advance legal education and make legal mindfulness among the more vulnerable areas of the network. Thus, legal aid is a government assistance arrangement by the state to individuals who could some way or another not manage the cost of access to the legal framework[676].

Legal Services Authority Act, 1987 and the Legal Aid:

Legal Services Authority Act, 1987 is a demonstration to establish legal administrations specialists to give free and skilled legal administrations to the more fragile areas of society to guarantee that open doors for making sure about equity are not denied to any resident by reason

[674] *Report of Legal Aid Committee 1971*, Published by Gujrat Government, p.5, Para II
[675] *Report of Legal Aid Committee 1971*, Published by Gujrat Government, p.5, Para III
[676] *Report of Legal Aid Committee 1971*, Published by Gujrat Government, p.5, Para IV

of financial or different incapacities and to sort out Lok Adalats to make sure about the activity of the legal framework advances equity based on equivalent chance. This Act was ordered by the Parliament in the Thirty-Eighth year of the Republic of India. The Legal Services Authorities Act, 1987, which had built up Lok Adalats, didn't from the outset, build up perpetual Lok Adalat. It was the Amendment Act of 2002 that empowered the foundation of the primary changeless Lok Adalat[677]. People who are entitled legal administrations under this demonstration are:

1. To a member of Scheduled Tribe or Scheduled Cast
2. To a victim of trafficking in human beings or beggars
3. To women and children
4. To a person being, victim of mass disaster, caste atrocity, flood, ethnic violence, drought, earthquake or industrial disaster[678].
5. To a person with disability.
6. To a person in custody, including custody in protective homes like juvenile home etc.
7. To a person, whose annual income is not more than 9 thousand rupees as prescribed by the State Government and 12 thousand rupees as prescribed by the Central Government.

[677] https://www.latestlaws.com/wp-content/uploads/2018/07/All-about-Legal-Services-Authority-Act-1987-By-Roopali-Lamba.pdf, accessed on 30-08-2020

[678] https://www.latestlaws.com/wp-content/uploads/2018/07/All-about-Legal-Services-Authority-Act-1987-By-Roopali-Lamba.pdf, accessed on 30-08-2020

DOMESTIC VIOLENCE – THE SHADOW PANDEMIC 2020

- **ASHWINA YADAV**

Domestic Violence is the front line of war against women – Pearl Cleage

Domestic Violence is a behaviour involving physical, emotional, verbal. Psychological and sexual abuse, and any attempted such abuse or violence. As well as the forcible restriction of individual freedom and of privacy, carried out against any woman who have or had family or kinship ties or cohabit or dwell in the same house. It is a form of aggression intended to hurt damage or kill an intimate person. It infringes the basic right of the victims to feel comfortable within home where one can live without any fear or insecurity. It causes more pain than the marks of bruises and scars. It is devastating to become the victim of the violence done by someone you love and think that the person loves you in return.

Domestic violence speaks many languages, has many colours, follows different cultures and lives in many communities. This is the universal truth of the applicable to all cultures and communities: violence against women is practised beneath the skin. One in every three women suffers abuse and domestic violence in her lifetime. This is an appalling human rights violation, still it remains one of the invisible and under recognised pandemic of all time. Domestic violence can be so easy for people to ignore, as it often happens without any witnesses and it is sometimes easier not to get involved.

If the numbers, we are seeing in domestic violence amid this lockdown were applied to terrorism and gang violence, the entire country would be up in arms and it will be the lead story on all the news channels every night.

United Nations Secretary-General António Guterres, noting the "horrifying global surge" has called for a domestic violence "ceasefire".[679] India's National Commission for Women (NCW) has seen a more than twofold rise in gender-based violence during the lockdown in India; total complaints from women rose from 116 in the first week of March to 257 in the final week. Between 23 March and 16 April NCW registered 587 domestic violence complaints, a ~45% increase from the previous 25 days.[680] As TIME magazine reports that the, "mandatory lockdowns ... have trapped them in their homes with their abusers, isolated from the people

[679] "UN chief calls for domestic violence 'ceasefire' amid 'horrifying global surge'". *UN News. 2020-04-05*.
[680] "India witnesses steep rise in crime against women amid lockdown, 587 complaints received: NCW". *The Economic Times. PTI. 2020-04-17*.

and the resources that could help them".[681] Spain's domestic violence helpline noted a 47% increase in calls in the first two weeks of April compared to the same period in 2019, while the number of women contacting essential support services via email or social media reportedly increased by 700%. [682]Mental health professionals in Pakistan reported that cases of domestic abuse had risen in the country during lockdown. Ministry of Human Rights also setup a National Domestic Abuse Helpline. National Disaster Management Authority of Pakistan has setup a dedicated "Gender and Child Cell" to deal with domestic abuse cases[683].

The grounds for the sudden efflux of the number of domestic violence cases are:

Due to the unexpected outburst of the COVID-19 people has to stay inside their homes with their family. During the meantime the violence increased as the abuser don't have a problem with his own anger, he has a problem with the anger of others. No matter how badly a man treats a woman, he believes that her voice shouldn't rise and her blood shouldn't boil. The privilege of rage is reserved for him alone. In this situation woman tries to settle everything by handling all the pain and paying the prize by sacrificing her self-respect, dignity, freedom, happiness. This is the time when domestic violence is the most lethal when the person is trying to leave such situation.

We have more shelters for animals than for battered women. This is one of the another reason for the surge in domestic violence cases as amid lockdown women has no place to go for, they have no chance to report the crime as they have no way to get outside the house as well as no mobile phone to report it, or even if they have they are locked with their abuser and the abuser is watching over her.

A woman is always taught from her childhood that she is the builder of a family. It's her responsibility to take care of it. Due to this learning since childhood it is very difficult for her to leave an abusive partner. It frequently fells like she is failing and destroying her family or not trying to work things out, or not giving her partner a second chance. But this giving of second chance never ends.

Domestic violence is frequently excused when alcohol and other substances are involved. Amid lockdown women suffered violence and harassment because men are not getting alcohol and due to the cries of alcohol and liquor men lands their frustration on women. And when they get liquor they harass and beats women as it happened a day before in Chhattisgarh a man

[681] *Godin, Melissa (18 March 2020).* "How Coronavirus Is Affecting Victims of Domestic Violence"
[682] *Stephen Burgen (28 April 2020).* "Three women killed in Spain as coronavirus lockdown sees rise in domestic violence". *The Guardian.*
[683] "Gender crisis amid COVID-19". *Daily Times. 16 April 2020.*

killed his mother by continuously beating her after drinking liquor when she tried to stop him from drinking. No one came to stop the men as domestic violence is easy for people to ignore, as it often happens without any witnesses and it is sometimes easier not to get involved yet by publicly speaking out against domestic violence. Domestic violence and sexual assault go hand in hand. We are number one in domestic violence homicides. We also have a high rate of alcohol abuse and drug abuse and there's a high lethality rate.

One of the main reasons is Pandemics, financial insecurity, stress and uncertainty have led to increased aggression at home which resulted in global surge of domestic violence cases.

In the light of increasing instances of domestic violence against women the governments and UN women need to take more stringent measures to reduce prevalence od domestic violence against women. Victims of domestic violence need assistance and deserves justice. I commend the crime units' efforts to offenders behind bars and reach out to victims. The more that we choose not to talk about domestic violence, the more we shy away from the issue, the more we lose. During this crisis we are facing another serious issue and to overcome these problems we all have to work together.

UNEMPLOYMENT IN INDIA- A CRISIS

- SHEIKH AMAN RANA

"You should not take too much stress about getting a job. Just put your focus to studies." Aabid's father said while returning late from work. " Insha'Allah", he replied wearing a smile over his sad face. Today, there are numerous Aabids who are burning their midnight oil, just in the hope that one day they will have a job to provide for their family. The number of such persons are growing rapidly especially in India where millions of unemployed men fight for a job where seats are just in hundreds. When a student invests almost two decades getting education in various institutions and yet when he fails to find a living for himself, it surely is a matter of concern and seriousness. Over the last decade, the rate of such cases where people are seeking jobs and still are unable to find one has increased manifolds .The matter of unemployment has never been so unbridled and alarming in decades, yet somehow the people of the country and the authorities in control are not losing their calm except the ones who are part of the unemployment index obviously.

According to the Centre for Monitoring Indian Economy (CMIE), in January, 2020, the unemployment rate was 7.16 % which have been fluctuating between 6 to 8.2 % during the last year, which is the highest in four decades. If this is unable to open eyes of the government, then I do not know what would. And the rate is getting worse day by day. It is unfortunate that such a matter of concern is still out of reach from a great proportion of the country's population. This is caused either due to fake news being spread through various online and offline media or due to lack of awareness of the masses. The impact of unemployment can easily be seen in the economy but the unemployment can create impact on the society in ways beyond the economic impact. For example, unemployment can affect a worker psychologically. It can make a person to question his/her value as a person. This can lead to stress in worker's relationships, causing destruction of lives and families. Historically, India has a record of having unemployment rate between 2- 3 % and now, it is even higher than 8 % which is 4 times the former rate. The average monthly rate of unemployment over the 12 months which ended with January 2020 is 7.4 per cent. Even after such crisis, yet if we stay in denial and do not take corrective actions early enough, then it would be too late.

In various recent reports ,it is expressed that the population of India reached 1,341.00 million in March,2020 and the Labour force participation has dropped to 51.81% in Dec,2019.According to a study conducted by Azim Premji University ,it says that the educated

and youth are most without jobs. It is estimated that 5 million men lost their job since, 2016 right after the demonetization. However, it has been denied by government that there is no such substantial relation between demonetization action and the recent unemployment index change. Whether related or not, it should be a matter of concern.The major causes of unemployment being Slow economic growth, Population increase, Fall of cottage and small scale industries, Slow growth of Industrialization, Less investment, Defective planning , Gap between demand and supply , etc.

If we talk about women, which are an inalienable part of the society and an important part of labour force of India, comprise about 48.4% of the country's overall population. But it is unfortunate to the Indian economy that it still comprise only about 26.97 in Labour Force Participation Rate (LFPR) according to World Bank report in India. However, the world's average is at 48.47% in 2018.This shows the declining rate of women participation in labour force especially in India, which is not a good sign of economy as we fail to get that demographic dividend that we should be getting.

According to a Joint report by Bain & Company and Google, the Labour Force Participation Rate among Women in the country is one of the world's lowest and is continue to decline[684]. In country like India where women are always seen as inferior to men from the ancient times, there is still a long road to cover for the position of equal participation in the society. Even today, women are supposed to do the household jobs and expected to raise the children. This too is a major reason for less contribution of women section of the society in the economic affairs particularly in India. According to the Study, the unemployment rate of women in particular is 18% in 2020, which is almost double as compared to the 7% of overall unemployment rate. Only 1 in 5 entrants to labour force is a woman. It shows that women are reticent in joining the labour force.

Above all other the circumstances, the **Corona virus pandemic** has worsen the already fractured condition of unemployment not only in India but all over the globe..According to a survey by the Indian Society of Labour Economics (ISLE), the most immediate and severe impact of **COVID -19 crisis** is the job losses.About 5 million salaried employees have already lost their jobs , whereas about 80% and 54% jobs are affected in urban and rural economy.

[684] Niharika Sharma, "It's a bad time to be a job seeker in India-And a double whammy for women" Quartz India, Feb.20, 2020

While long term effects, would be lower economic growth and rise in inequality.[685] Another important topic that should be addressed by the country is that the ratio of people who are seeking jobs and not getting it is dealt under the unemployment index, but the crucial question is that how many people are actually seeking jobs?. In the recent surveys, it is said to be declining. In this situation, it is even worse as India is not rich enough or economically capable so that people can stop seeking jobs. There is already decline in the labour participation and even though lesser people are seeking jobs, the number of people who are not getting jobs is in higher proportion

In order to tackle all these unemployment related issues and meet jobs creation requirement of the country, a major role is played by the Union Budget and other governmental schemes. Also due to declining GDP of the country and other depreciation factors, the budget of the year is expected to fulfill the requirements and meet the need of the hour. Therefore, the budget should focus on reviving demands. In rural areas, the interest of the marginal farmers and the landless labourers to be boosted. The Schemes like PM-KISAN and MNNREGA should be encouraged. The unnecessary taxes paid by the rural farmers should be removed. In case of, urban areas, the activities like construction and related activities should be revived. The activities that engage maximum number of people should be encouraged by the government.
The Finance Minister talked a few measures that would facilitate in the establishment of start-ups or MSMEs (Ministry of Micro, small and Macro Enterprises) in the Budget 2020 that could help in the creation of new jobs[686] which is very necessary specially after the COVID-19 crisis.

At last, we know that there are hopes of every Aabid to have a work or a job in order to lead life with prestige and honour. For that cause we should understand the gravity of the unemployment factor as how it can affect lives and cause stress in relationships. It can get worse than that when a person choose the path of crime to fulfil his basic needs and requirements of life after trying and getting no other work or to end his life. At that very moment, the country fails. It fails to cater his sons and daughters to have an eminent life. Moreover, the youth should also try to be more versatile according to requirements of the modern jobs and advancement of the society in addition to the governmental attempts for the same. Youth should prefer to have pragmatic skills in addition to the vocational training and

[685] Editorial, "Job loss most severe immediate impact of COVID-19" THE ECONOMIC TIMES,Jun 11,2020
[686] Editorial, "India needs job! Can Budget 2020 fix the problem?" Business Today,14 feb,2020

other qualifications. They should not totally rely upon the degrees given by the universities in order to get a job of choice.And the country should take remedial measures; otherwise it will be too late. We should not stay in denial and take corrective actions should be taken as soon as possible for the betterment of country's unemployment crisis.So that, India will once again rise and shine and be known as 'VishwaGuru' in the world.

THE WATCHDOG GONE LOOSE?

- JAGRATHI YALADALU SOMAIAH & RAGHURAM PILLAI

INTRODUCTION

Media is considered as the fourth pillar of democracy along with the executive, legislature and judiciary in our country. It is undoubtedly true that media has become the voice of public opinion since the late 20th century. It is the only medium which spreads awareness among people about various important affairs such as new government schemes, politics, business, sports, international, national and local current events, etc and ensures their participation in the development of the country. Media is unimaginably powerful as it has the ability to change the opinion of millions of people in the country and it is impossible to imagine a country without it. We have heard about trial by media and its trending cases in the recent past. However, from tabloids covering Commander KM Nanavati's case in the late 1950s and early 1960s to social media and television extensively covering the death of Sushant Singh Rajput since the past few months, trial by media has always been a part of the system.

WHAT IS TRIAL BY MEDIA?

To define trial by media, it is the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt or innocence before, or after, a verdict in a court of law. In this process the media disregards the vital principles of "*presumption of innocence"*[687] and *"guilt beyond reasonable doubt"*[688].

PROS OF MEDIA TRIAL

Media has several positive impacts on law and the society. Media is the communication outlet or tool used to store and deliver information or data. The term refers to components of the mass media communications industry, such as print media, publishing, the news media, photography, cinema, broadcasting and advertising and thus playing a vital role in keeping the public informed about the current events. Trials by media have helped the judiciary across nations to initiate suo-moto proceedings after it was widely publicised by the media. It also

[687] The Universal Declaration of Human Rights, article 11, states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."
[688] "all persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt", Merriam - Webster.

plays a pivotal role in busting scams which would not have come to light if not for the investigations conducted by the media. This has ensured that politicians and other important persons do not act according to their whims and fancies as they are always under public scrutiny. Thus, media functions as an independent watchdog in the country.

If we look at famous American trials of Ted Bundy[689], Scott Peterson[690] and Timothy McVeigh[691] which attracted public attention, it is clear that justice would have been far from reach without media coverage in these cases. Similarly, in India, trial by media has assumed considerable importance. Some well-known criminal cases that would have gone unpunished but for the intervention of media and public outcry are Priyadarshini Mattoo case[692], Jessica Lal case[693], Nitish Katara[694] murder case and Bijal Joshi rape case[695]. Intense pressure from media and public have helped people get justice in these cases. Thus, displaying the enormous power vested in the hands of the media.

CONS OF MEDIA TRIAL

Though media has played a key role in delivering justice to people in certain cases, it does have a negative impact on law and society. Media, in its trial, takes law into its own hands and undermines the very basis for which the judiciary exists. It sabotages independent court proceedings and hence, these trials amount to contempt of court. Prejudicial media proceedings without proper evidence are built on baseless assumptions and allegations. Another negative impact of media trials, is the heavy media coverage which makes these cases sensational and distorts the reputation of parties involved. The famous American trials of People of the State of California v. Orenthal James Simpson[696] and Roscoe "Fatty" Arbuckle scandal[697] are two examples of how media can destroy the reputation of the accused and ruin their career causing irreparable damage even after they are acquitted by means of a fair trial.

[689] BUNDY v. FLORIDA, 479 U.S. 894 (1986).
[690] PEOPLE v. PETERSON Supreme Court Case: S132449.
[691] 954 F. Supp. 1441 (1997).
[692] Santosh Kumar Singh vs. State, (2010) 9 SCC 747.
[693] Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1.
[694] case (1978) 4 SCC 161.
[695] Chandan Panalal Jaiswal and Another v State of Gujarat and Another 2005 (1) Bom Cr C 12 Guj.
[696] Michigan Journal of Race & Law, 1996, Volume 1
[697] The "Fatty" Arbuckle Scandal, Will Hays, and Negotiated Morality in 1920s America, Western Kentucky University, May 2015.

We have seen similar character assassinating media trials in India such as in the Aarushi Talwar murder case[698] and Jasleen Kaur's case[699] where the accused in both the cases were declared guilty by media but later acquitted by the Court after a fair proceeding. In these cases, the media has shifted its position from story-tellers to story-makers. Media also observes sub-judice[700] matters and creates controversies around it in order to increase their TRPs[701].

Another recent example of this is the case with regard to the death of Bollywood actor Sushant Singh Rajput which has left the public shocked and angry. The media, with its frenzied with coverage of the events concerning his death and have accused so many people in the process giving rise to many speculations and conjectures affecting the lives of the individuals concerned.

HOW IS MEDIA TRIAL AFFECTING LAW AND ORDER IN THE SOCIETY?

Media trials are conducted with the protection of Freedom of speech and expression which is a fundamental right incorporated under Article 19 (1)(a)[702] of the Indian Constitution. However, Article 19(2)[703] provides reasonable restrictions on the right if it amounts to contempt of court, defamation or incitement to an offence.

Media trials definitely amount to contempt of court as it scandalizes, prejudices trial and hinders the administration of justice. There is infringement of several rights of accused/suspect namely, right to fair trial, right to live with dignity and right to privacy which are all conferred upon people in the country under Article 21[704] of the Constitution of India. Trial by media also violates principles of natural justice and creates a bias in the minds of people even before or during the court proceedings. An unfortunate reality about media trials is that the facts are presented in an exaggerated manner sometimes even blowing it out of proportion making the media a parallel judiciary where a person is presumed to be guilty until proven innocent. Zahira

[698] 2013 (82) ACC 303

[699] Jasleen Kaur case: Sarvjeet acquitted after four years, netizens demand apology from Kejriwal, Arnab for maligning him, The Indian Express, 26th October, 2019.

[700] "under judicial consideration and therefore prohibited from public discussion elsewhere"

[701] Television Rating Point (TRP) is a tool provided to judge which programmes are viewed the most. This gives us an index of the choice of the people and also the popularity of a particular channel.

[702] (1) All citizens shall have the right (a) to freedom of speech and expression;

[703] Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense.

[704] Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

Habibullah Sheikh v. State of Gujarat[705], the Supreme Court explained that a "fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."

Media trials affect all the parties involved or related to the case. As previously discussed, it damages the reputation of the accused/suspect making it impossible for them to lead a normal life. It also affects the lives of the victims and their near and dear ones. Furthermore, media controversies can influence the judicial proceedings and affect the delivery of an unbiased judgement. Advocates are also under public scrutiny especially the defence counsel who are also often subject to harassment. Similarly, there is a lot of pressure on the investigative agencies as their competence is often questioned and condemned if the investigation is prolonged. Police investigation in many cases is interrupted by media trying to get their hands-on evidence rendering the investigation fraught with inaccuracies. Lastly, media also tries to reach out to witnesses in high-profile cases to seek exclusive interviews which will influence the public opinion and thus, media trial affects administration of justice.

CONCLUSION

The media has a history of presuming a suspect or an accused as guilty even before that person is given a fair trial through due process of law. Trial by media is the antithesis of rule of law as it can result in miscarriage of justice if it exceeds the limit. According to the Indian jurist Fali Sam Nariman, "A responsible media is the handmaiden of effective judicial administration"[706]. Therefore, media must act in accordance with the code of law and ethics while releasing any information and realise its social responsibility. It must always bear in mind that the true spirit of journalism is upheld and realise that their race to quench their thirst for TRP is frowned upon. It should not be allowed to usurp the functions of the judiciary of our country. There is an urgent need to enact laws that will help control and regulate the information published or broadcasted through media. It is a necessary evil that cannot be withdrawn from the society. We should embed the values of ethical journalism and not encourage sensationalism of mere facts. The medium must not be looked at as an entertainment industry but rather as a service to the society.

[705] Zahira Habibullah Sheikh v. State of Gujarat, (2004) 4 SCC 158.
[706] Nariman, Fali S., Are Impediments to Free Expression in the Interest of Justice, CIJL Yearbook, Vol 4, 1995.

JUVENILE JUSTICE MINISTRY: WHY SHOULD IT BE IMPLEMENTED IN INDIA?

- DEBASRITA CHOUDHURY

'The work of restoration cannot begin until a problem is fully faced' – Dan B Allender

INTRODUCTION-

According to the Juvenile Justice (care and protection of children) Act[707], a juvenile is a child under the age of 18 years. Crimes committed by juveniles, their trials and punishments have been an age old challenge. It has been there for a long time and sparked enough controversy. There is a popular argument that if a child commits heinous crimes, he should get punishments like an adult would. Juveniles committing heinous crimes brought under debate if 16-18 year old juveniles are to be treated as adults. If so, why the mark at 16? Who is to be treated as an adult, and what classifies this demarcation? Is it the nearness of age to adulthood, or the nature of crime, or their backgrounds? For the moment, let us make our peace with this never-ending debate saying it's case specific. The ambit of this essay is to cover what happens after trials are done, and punishments are meted out.

What is Juvenile Justice Ministry?-

Once the juvenile offender is imprisoned, it is the duty of the State to guide and rehabilitate them rather than destroying their future prospects once and for all. However, is only a jail term or being sent to a remand home[708] sufficient for the child's reformation? After they serve their time, would they be competent enough to re-enter society? Deepak Chattopadhyay, a former member of Juvenile Justice Board feels otherwise, "Juveniles sent to remand homes don't get rehabilitated. Once someone steps into one of these, he comes out as a professional." He feels that before redressal, there needs to be a system to understand the plight, backgrounds and circumstances that made offenders out of these juveniles. Something seems to be amiss in the rather abrupt transition from an inmate to a member of the society absolved of crimes again. This change is made relatively easy by a juvenile justice ministry.

[707] Juvenile Justice (Care and Protection of children) Act, 2015

[708] According to the Indian constitution there should be separate jails for the juvenile prisoners or under-trials. They are Observation Homes formerly known as remand homes.

A juvenile justice ministry is a youth outreach program, found mainly in countries of North America carried out in several correctional facilities, remand homes, juvenile prisons etc. It is a method of positive reinforcement to at-risk or incarcerated youth. Juvenile justice ministry is different from juvenile justice boards as the board consists of members including a judicial magistrate of the first class and social workers who are in charge of resolving the cases regarding the juvenile as efficiently as possible. Their aim is to hold a child culpable for their criminal activity, not through punishment, but counselling the child to understand their actions and persuade them away from criminal activities in the future. Purpose and need of juvenile justice ministry is much more dynamic.

Most children who become juvenile 'delinquents' come from impoverished and dysfunctional households. Growing up they develop anti social and violent attitudes. Most juvenile offenders are quick to anger and show signs of harming others and/or themselves. For monetary needs they get sucked into the world of crime. Hardened criminals often use them as pawns since juveniles serve less period of jail term than adults and are soon back on the streets again. Effective juvenile justice ministry strives to understand the difficult situations of the incarcerated child and through positive reiteration of ideals make them easier to enter society as a regular citizen. For effective functioning, the ministry is compassionate while talking to the troubled youth and endeavours to reinstate their agency as fruitful individuals who can contribute to society. Changing the troubled mind and attitude of a child towards a positive and more open-minded direction promotes shaping a better tomorrow. It is a rigorous social work, a social duty and society would flourish all the more for it.

Example- Dr. Scott Larson, founded the Straight Ahead Ministries Inc. in Los Angeles, California. which is a faith based reformatory programme, that aspires to instil Christian faith amongst the at-risk and incarcerated youth and bring positive change. But a juvenile justice ministry is not restricted to theological teachings. Several contemporary socio-legal issues like depression, addiction, racism, domestic abuse are addressed, with a goal to understand and cope with them better.

Arguments for implementing in India- According to the latest NCRB[709] reports, juvenile crime soared in India after 2016, the leading city on this matter being New Delhi. The national capital

[709] National Crime Records Bureau

registered an 11.5 per cent increase in the number of crimes committed by juveniles in 2017, according to the report. Most common crimes committed by juveniles are theft, simple assault, disorderly conduct, drug abuse etc. But the 2012 Delhi gang-rape and fatal assault is a widely known landmark case that led to changes in the Indian judiciary system[710]. One of the rapists in the case was a minor.

In a case[711] of 2018, a boy, seventeen years of age, faced an allegation of inhumanly killing a three and half year old. Even though the motive was uncertain, the offence was still heinous. Another boy, of sixteen and half years, faced the allegation of, firstly, conspiring with the older boy in the offence and, secondly, helping him, later, to "make the evidence disappear," besides shielding the older boy from police detection as well. The Juvenile Justice Board assessed the older juvenile's physical health, mental growth, and other relevant factors, and decided to try him, under Section 15 of the Juvenile Justice Act, 2015, as if he were an adult. After applying the same standards, it, however, decided to try the younger one as a juvenile.

In 2019, cases soared of culpable homicides, assault, even suicide in juveniles regarding and later for consequent ban (in 2020) of mobile game PUB-G.

From 2017, the majority background of juvenile offenders in India, shifted from poor illiterate children to educated youth. Along with the previous factors like poverty, illiteracy, lack of basic amenities, now comes into play other aspects like mental health, home environment, neglect of children, addiction etc. In this backdrop, a juvenile justice ministry is essential for the at-risk or imprisoned children. Indian society is far from egalitarian. Inequalities and class struggles are rampant. Family structures and environments are also different. The diversity of state, cultures, religion makes it difficult for implementing a singular program with one faith discipline and making it agreeable to all. So rather than making this ministry faith based, it can be more therapeutic and focussing on issues that need to be addressed. In terms of Indian society, certain things are to be discussed with at-risk children, even children in general. Sexual education, knowledge about homophobia, bullying, mental illness, colourism, being influenced by violent content of social media, these are sociological issues, knowledge of which needs to be conveyed in simple comprehensive ways. At the basic level, some skilled work need to be taught so the at-risk children can find employment rather than being sucked into crime the moment they re-enter society.

[710] Mukesh & Anr vs State For Nct Of Delhi & Ors , 2019 (1) SCJ 624, popularly known as the Nirbhaya case
[711] Mumtaz Ahmed Nasir Khan and Ors. vs. The State of Maharashtra and Ors., 2019(4)BomCR(Cri)261

'Let us sacrifice our today so that our children can have a better tomorrow.' – APJ Abdul Kalam. If not sacrifice, we should at least try to give the children chance at a better future.

CONCLUSION-

'He who opens a school door, closes a prison.' – Victor Hugo.

The purpose of Indian prisons is reformation, they are correctional facilities to rehabilitate people who have gone astray. After they serve their time, no prejudice is to be harboured towards them. This is especially true in the case of juvenile so-called 'delinquents'. The aim is not to punish but to rehabilitate and mould them for a crime-free future. And juvenile justice ministry can help in achieving just that.

ENDAGERING OF WOMEN: VIOLENCE AGAINST WOMEN

- TAHMINA NAZ

"Violence against women isn't cultural, it's criminal. Equality cannot come eventually, it's something we must fight for now."

Samantha Power (Former United States Ambassador to the United Nations)

Million years, Billion months and Trillion dates passed away but still the fight for the rights of women is on. Women plays a very important role in society but the women are the major victims of violence in society. Violence against women occurs throughout the life cycle from pre-birth, childhood, adolescence, adulthood to old age. The United Nations defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." Violence against women is a social, economic, legal, educational, human right and health issues.

The National Crime Record Bureau report shows stark increase in violence against women in India in the forms of dowry deaths, acts of sexual harassment, torture, rapes, domestic violence and acid attacks. In India, 86% of women who experience violence do not seek for help, 77% do not mention the incidents of violence to anyone, 14.3% of victims seek for help and 7% only reach out to relevant authorities. During the COVID-19 pandemic, the domestic violence complaints were highest in the last 10 years during the lockdown. There were 1,477 complaints of domestic violence between March 25 and May 31st in 2020. As per World Health Organization(WHO) report about 1 in 3 almost 35% women worldwide have experienced either physical or sexual violence. It is a major public health problems and a violation of women's human rights. Globally, 38% of murders of women are committed by a male intimate partners. According to WHO estimates less than 40% of the women who experience violence seek help of any sort in the world. And less than 10% of those women seeking help for experience of violence sought help by appealing to police in the world.

There are various causes of violence like gender inequality, female genital mutilation, acid attack, honour killing etc. Gender inequality, it causes women a risk of several forms of

violence. Regular consumption of alcohol by men, low education, a history of child maltreatment likely increases the violence.The patriarchal society is the main reason of violence against women. Exposure in childhood of physical violence by witnessing the father beating the mother is a predictor of violence against wife in adulthood. The traditional and cultural practices like Female Genital Mutilation (FGM), acid attack and honour killing is the major cause of violence. The Female Genital Mutilation (FGM) leads to physical suffering of women and may lead to death, infertility and mental trauma. The Acid Attacks which disfigures and sometimes kill women and girls for reasons like out of revenge for rejecting marriage proposals, inability to meet dowry demands etc. Honour killing is most prevalent in many countries in the world like Bangladesh, Egypt, India, Pakistan, Turkey, Lebanon. Women are killed for upholding the honour of the family due to reasons like premarital relationships (with or without sexual relations), rape, falling in love with a person the family disapproves. The denial to undergo abortion when the women is carrying female child is also a major cause of violence.

Violence affects women physically, mentally, sexually and etc. The consequences of violence give rise to health issue, economic issue and rights issue. Violence can give rise to health issues like hypertension, anxiety, depression, insomnia and affects adversely reproductive health of women. Violence also affects confidence, ability to work and self-esteem. Violence against women can have serious impact on economy on the household directly like loss of income, productivity and healthcare. or indirectly like child mortality and psychological impact. Violence against women violates fundamental rights under article 14,21,19 and 32 of the Indian Constitution.

Even though several laws are laid down the but still violence is not taking the name to end. There are various ways forward to deal with violence against women like to enact and enforce legislation that favours women in every aspect, developing schemes and policies to address violence against women, financial independence will help women in standing in their own feet and improving women's access to paid employment. Surveys must be there to have a reality check on violence cases, educational support will help women to move forward and shelter homes must be made for rescuing the victims of violence. Though, the acid was banned by the Supreme Court in 2013 but still acids are being sold openly. So, there must be complete ban on them.

There are various Acts which are made for the protection of women against violence like The Dowry Prohibition Act, Sexual Harassment at work place, The Domestic Violence Act and implementation of Section 498 A of IPC. The Dowry Prohibition Act,1961 prohibited from giving and taking of dowry and the violators were punished with imprisonment of 2 years and fine not less than fifteen thousand rupees. Sexual Harassment of Women at Workplace 2013, the act provides protection against sexual harassment of women at workplace (both public and private sector) and for the prevention and redressal of complaints of sexual harassment. The punishment for this act is one to three years' imprisonment or fine. Section 498A of the IPC says that "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 to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. This change was made to protect women who were regularly getting abused, beaten up and tortured.

The Domestic Violence Act,2005 an act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith. The punishment for this act is imprisonment of one year which may extend and with fine of twenty thousand rupees which may extend. There was a change in Domestic Violence Act of 2005, in order to ensure equity in marital discord. The two- judge bench of Supreme Court Justices D. Y. Chandrachund and Hemant Gupta interpreted the provisions of the Domestic Violence Act,2005 to confirm an order of a Panipat Sessions Judge that respondent should pay maintenance to the widow and minor child of his dead brother. Both the brothers lived in the ancestral family home on different floors. After the brother's death, widow was not permitted to live in the same house. The new provision by Supreme Court defined "relationship "in the case of Hindu undivided family(HUF). According to the court, relationships in case of HUF means "relationship were two persons live or have lived together at any point of time in a shared household when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are members living together as a joint family." The court further read the term "shared household" to include "such a household which may belong to the joint family of which the respondent is a member ,irrespective of whether the respondent or the aggrieved person has any right ,title or interest in the shared household."

A short film named *"Ladke nahi rote hain"* directed by Vinil Mathew featuring Madhuri Dixit gave the message that *"don't tell boys not to cry but tell them instead not to make girls or others cry"* .The film commentaries on the ugly truth of the domestic violence. There is a need to curb violence against women because women are the wings of society without wings no one can fly likewise society can't fly with different colours.

"Respect women, treat them equally, give them their rights and let them live freely !! "

"Violence against women is perhaps the most shameful human's rights violation, and it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace."

- Kofi Annan (7th Secretary General of the UN)

SURROGACY – A BLESSING IN DISGUISE

- SANYA AHUJA & RANJAN VYAS

INTRODUCTION

Biggest blessing considered to a person is power to give birth. Mother is thus offered a respectable place in society. Even our country is contemplated as our **Mother India**. But ever thought of a lady who can't bear a child, it's nowhere less than a curse for her. Everyone deserves to conceive such happiness and with changing time a blessing exists which can overcome curse. If she can't conceive her own child, she can raise a child conceived by other. A lady who can't have a child of her own can adopt a child but due to human emotions everyone expect to have child within blood relation. Therefore, only solution to such problem is surrogacy.

SURROGACY

Surrogacy is a method in which a woman agrees to carry baby of someone else. After the baby is born, the mother who gave birth gives custody and guardianship to intended parents. It is generally a legal agreement. There are basically two parties involved in this agreement, one who uses the surrogacy method and other is who surrogates i.e. whose womb is used for child birth.

KINDS OF SURROGACY

There are broadly two kinds of surrogacy-

1. **Traditional Surrogacy:** Surrogate is artificially inseminated with sperm of father. The commissioning mother doesn't have genetic tie with baby and surrogate mother is biological mother of child.

2. **Gestational Surrogacy:** It is done by IVF (In-vitro Fertilization). In this type of surrogacy egg of mother is fertilized with sperm of father and is later placed in embryo of surrogate. Therefore, genetic ties remain with commissioning mother and father and not with surrogate.

Obligations/Requirements:

1. **For person who uses surrogacy:** A couple in which lady has certain medical problem with her uterus, that either she had hysterectomy that resulted in removal of her uterus or some other conditions that made pregnancy risky or just impossible. Earlier, a gay couple, single parent or foreign nationals could opt for surrogacy but now it is prohibited.

2. **For a lady who be a surrogate:** She must be above 21 years of age but surrogacy bill of 2019 proposes that she must be at least 25 or above. Further requirements are, she must have already given birth to a healthy baby and is also well aware about medical risk relating to pregnancy and surrogacy. She must be psychologically well and must have its certificate.
3. **For Agreement:** There must be proper legal agreement with detailed description regarding responsibilities, parental case etc. Consideration may or may not be part of it.

LEGAL PERSPECTIVE

There is no federal law related to surrogacy in India and thus regulations vary from state to state. That is why proper agreements are signed in order to have an exclusive proof. *Before 2008, India was to be termed as surrogacy capital of world.*

Evolution of surrogacy law:

Initially in 2002, the Indian Council for Medical Research (ICMR) has given guidelines which were approved by government in 2005. The guidelines regulate the Assisted Reproductive Technology procedures. After that the Law Commission of India submitted its 228th report on Assisted Reproductive Technology procedures. Some of the observations of Law Commission are:

- Surrogacy arrangement will be governed by contract law and includes terms and conditions.
- Contract includes life insurance cover for surrogate mother.
- One of the intended parents should be a donor for maintaining biological relationship.
- Birth certificate of the surrogate child contains names of the commissioning parents only.
- The right to privacy of donor and surrogate mother should be protected by Indian laws.
- All the cases of abortion are governed by Medical Termination of Pregnancy Act 1971.
- *Surrogate child is the legitimate child of the commissioning parents.*

Then in 2005 certain guidelines were formulated by Indian Council of Medical Research (ICMR) but these guidelines lacked statutory base. Later in 2008, a bill was formulated namely 'Assisted Reproductive Technology' bill 2008. But unfortunately it failed to get recognition. Then with numerous modifications the Assisted Reproductive Technology bill of 2014 was introduced. But it had same fate.

Further, Surrogacy (regulation) Bill 2016 was introduced and passed in Lok Sabha but not in Rajya Sabha. Thus, it was reintroduced in Lok Sabha as Surrogacy (regulation) bill 2019 and is yet not produced in Rajya Sabha.

SUMMARIZED COMPONENT OF 2019 BILL [712]

Surrogacy (regulation) bill 2019 was introduced by Dr. Harshvardhan, Minister of Health and Family Welfare. This bill provides for definition of surrogacy, its regulations and eligibility criteria. Further,

1. This bill proposes that after formation of Act, an appropriate authority must be appointed within 90 days and perform functions like granting or cancelling of registration for clinics, enforcing standards, investigation, modifying rules and regulations.
2. It also proposes compulsory registration for surrogacy clinics.
3. Two separate boards must be constituted for regulations that are classified as National Surrogacy Board (NSB) and State Surrogacy Board (SSB).
4. Bill includes certain offences. These offences are undertaking or advertising commercial surrogacy, exploiting surrogate mother, selling or importing human embryo, abandoning or disowning a surrogate child and such offences can be penalized with imprisonment up to 10 years and fine up to 10 Lakh rupees.

LANDMARK CASES

- **Baby Manji Yamanda vs. Union of India 2008 SC**[713]. Baby Manji was born to a surrogate mother through IVF using a Japanese man's sperm and an egg from an unknown donor. She is neither an Indian citizen nor Japanese citizen. The couple also got divorced during the pendency of the proceedings. Japanese government issued a one-year visa to her on humanitarian grounds. After this case no foreign couples was allowed to surrogate in India and also commercial surrogacy was banned in India.
- **Re TT 2011 United Kingdom (UK) Case**[714]. In this case, the surrogate mother and the commissioning parents entered into a surrogate agreement that after the baby was born surrogate mother would transfer the custody of child to the parents. After the baby was born the surrogate mother denied to give custody to commissioning parents due to

[712] The Surrogacy (regulation) bill, 2019, www.trsindia.org
[713](2008) 13 SCC 518
[714]EWHC 33 (Fam)

emotional attachment with child during her gestation period. UK Court held that Surrogacy agreements are not binding. Therefore, the court in his decision said that custody of child remains with the surrogate mother.

BENEFITS AVAILABLE TO COMMISSIONING MOTHER

Although in India, the concept of surrogacy is not widely accepted by people and even there is lack of statutory recognition. In absence of such statutory law it is not that there is exploitation of parties to surrogacy rather they are protected under various laws. The most crowning glory is that our laws provide benefits to commissioning mothers.

- **The Maternity Benefit Act, 1961 -**

It was amended in year 2017 in which insertion was made within section 3. Clause (ba) was added which defines commissioning mother as a biological mother who uses her egg to create an embryo implanted in other any women. Further, under section 5 clause (4), (5)[715] was inserted. Where clause (4) implies to state that a commissioning mother shall be entitled to maternity benefit for a period of 12 weeks from the date the child is handed over to her. Under clause (5) provision of work from home is also made available. Certain other benefits under the act such as crèche facility are made available to her.

- **Employees State Insurance Act, 1948 –**

The Employees State Insurance Act was amended in 2020 and various provisions are added for benefit of commissioning mothers i.e. 87A and 89C[716].

(i) Section 87 A: Notice of Commissioning Mother

Commissioning mother and surrogate mother have to give notice in Form 17 to the appropriate branch office by post and the Agreement of embryo implantation which is executed between commissioning mother and the other woman.

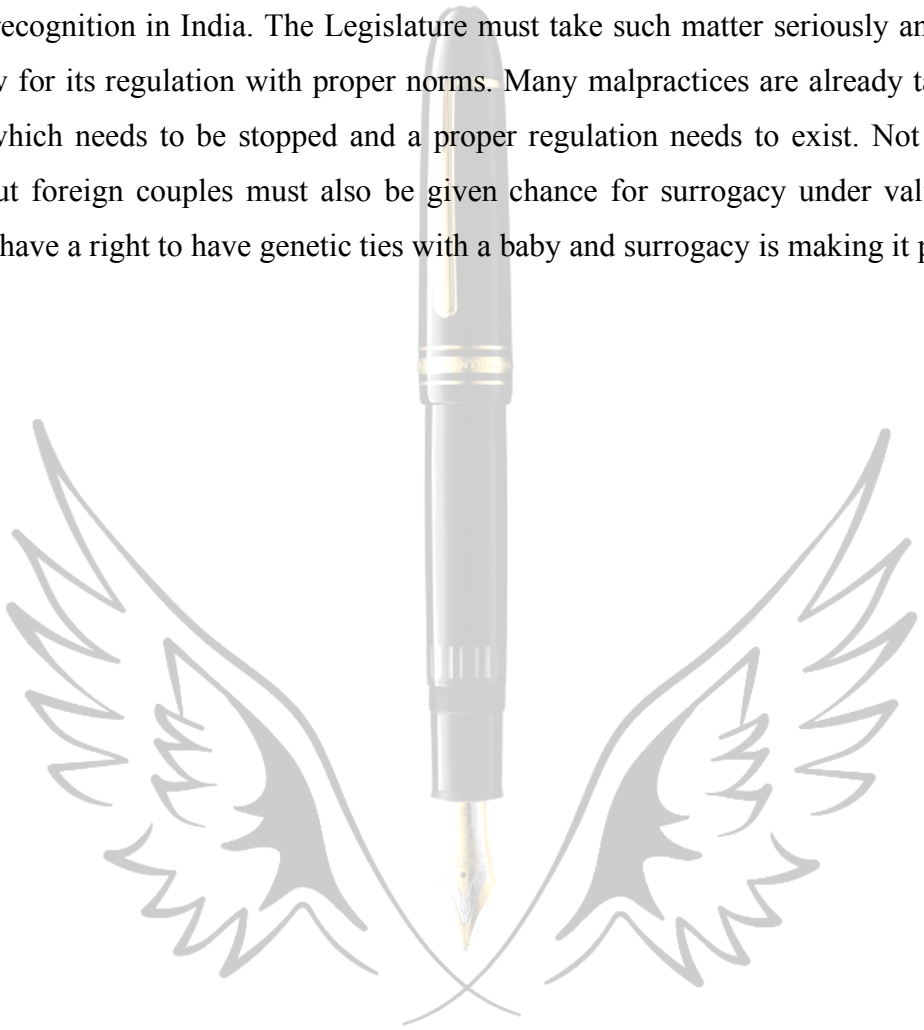
(ii) **Section 89 C: Claim for Maternity Benefit by Commissioning Mother**

A commissioning mother and surrogate mother can claim maternity benefit leave by submitting Form 19 to appropriate branch office by post along with the copy of agreement on non-judicial stamp paper. Other documents to be submitted includes, certificate issued by Assisted Reproductive Technology Clinic and copy of birth certificate.

CONCLUSION

[715]The Maternity Benefit Act, (Amended in 2017), 1961
[716] ESI rules amended, www.taxguru.in

Surrogacy is a blessing in disguise as it is a source of happiness for a couple who is unable to bear her own child as people seek for such arrangement when pregnancy is medically impossible or risky. The legality of surrogacy varies around the world but is still not having statutory recognition in India. The Legislature must take such matter seriously and impose a proper law for its regulation with proper norms. Many malpractices are already taking place illegally which needs to be stopped and a proper regulation needs to exist. Not just Indian citizens but foreign couples must also be given chance for surrogacy under valid grounds. Everyone have a right to have genetic ties with a baby and surrogacy is making it possible.



PERSISTING TOWARDS A BETTER TOMORROW FOR REFUGEES AMIDST COVID-19 PANDEMIC

- STEFY MARIA SEBASTIAN & NILANI CLAIRE N.

"Refugees are not terrorists. They are often the first victims of terrorism."

-Antonio Guterres

INTRODUCTION

The COVID-19 pandemic is a global challenge that does not discriminate but affects everyone equally including the refugees. It has put millions of refugees at risk and distress. Many refugees reside, in countries where they face violence and access to healthcare facilities and basic amenities are extremely limited. The urgency to protect these vulnerable is now more than ever.

The term Refugee is defined as "a person who has been staying outside the country of his nationality or that of habitual residence, i.e. domicile, as a result of the fear of persecution and is unable to return to the country because of the fear."[717]

Approximately, 85% of the refugees live in low and middle-income countries. In the year 1951, during the establishment of UNHCR, there were nearly 1.5 million refugees internationally.[718] At present the global refugee population has risen to nearly 30 million people.[719] Currently, there are 134 refugee- hosting countries reporting local transmission of COVID-19.[720]

CHALLENGES FACED BY REFUGEES AMIDST THE COVID-19 PANDEMIC

1. COVID-19 pandemic affects the mental health of refugees as it leads to the loss of daily wages. This deadly pandemic could cause 25 million jobs to be lost globally with women migrant workers particularly vulnerable.[721]

---

[717] "Pritam Ghosh, The " Illegal Migrant " and " Refugee " Status Dilemma: A critical analysis with special reference to the Rohingya Muslims in India, ACADEMIA (Oct. 1, 2019, 10:04 A.M.), https://www.academia.edu/35968762/The_Illegal_Mi grant_and_Refugee_Status_Dilemma_A_critical_analysis_with_special_reference_to_the_Rohingya_Muslims_in_India".

[718] D McMaster, Asylum seekers: Australia's response to refugees, Melbourne University Press, Melbourne,2001,p. 9.

[719] Thomas Reuters Foundation News ,Businesses urged to give refugees more jobs in COVID-19 era,Deccan Herald,June 19,2020.

[720] Coronavirus Outbreak ,UNHCR The UN Refugee Agency,Coronavirus Outbreak, 14August 2020, https://www.unhcr.org/coronavirus-covid-19.html.

[721] UN Women, How Covid 19 impacts women and girls: Migrants,19 th May 2020, https://interactive.unwomen.org/multimedia/explainer/covid19/en/index.html.

2. COVID-19 pandemic is forcing refugees to flee when lives become unbearable as access to basic amenities and temporary jobs disappear.[722] Hunger levels have aggravated due to this ongoing pandemic. The World Food Programme has cautioned that 265 million people may soon starve across crisis-stricken countries like Yemen, South Sudan, Syria and Afghanistan.
3. Social-distancing and self-isolation measures during the pandemic prevent the refugees from working on a regular basis. This has put them in a devastating situation because of food insecurity and the need to pay rent and other expenses.[723]
4. Refugees are treated as a threat by various countries and they are bullied and discriminated against on the basis of their religion, ethnicity, nationality, race, gender or other identity factor.

SAY NO TO VIOLENCE AND GENDER DISCRIMINATION

Every person deserves a life free from persecution and discrimination. Many female and LGBTI refugees are facing enormous challenges everyday due to this ongoing crisis. Some of them are:-

1. **Gender Based Violence (GBV):** COVID-19 pandemic is causing GBV risks like intimate partner violence, sexual violence, sexual exploitation and abuse among female and LGBTI refugees.[724] Many LGBTI youth refugees are confined in hostile environments.[725] This increases their exposure to violence leading to a state of anxiety and depression.
2. **Health:** 40% of the world's population do not have a hand washing facility with water and soap at home. [726]Women and girls, who have already faced health and safety implications in managing menstrual hygiene without access to clean water and private toilets before the crisis, are particularly in danger. LGBTI refugees may not access healthcare services due to fear of arrest and violence.[727]

[722] Jan Egeland,Thomas Reuters Foundation News,OPINION: The crippling cost of COVID-19 on refugees,12 May 2020 14:33, GMT.https://news.trust.org/item/20200512143320-2kqfm.
[723] Shelly Culberstone and Gary Edson,The RAND Blog,How to helpRefugees and Host Countries Combat COVID-19, 18th May, 2020,https://www.rand.org/blog/2020/05/how-to-help-refugees-and-host-countries-combat covid.html.countries Combat COVID-19
[724]UNHCR The UN Refugee Agency,Coronavirus emergency appeal UNHCR's preparedness and response plan (REVISION), May 2020, pg26, https://reporting.unhcr.org/sites/default/files/COVID-19%20appeal%20-%20REREVISED%20-%2011%20May%202020.pdf.
[725] United Nations Human Rights, COVID-19 and the Human rights of the LGBTI people,17 April 2020,https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf.
[726] "*Supra* note 5"
[727] "*Supra* note 9 at 2"

3. **Economic shocks:** Due to the pandemic 58% of the women globally have become unemployed. Female refugees are harder hit by economic impacts. They earn less and hold more insecure jobs in the informal economy. This leaves them less able to bear the economic shocks than men.
4. **Unpaid care work:** Circumstances that lead to women's unpaid care work at home include school closure and stretched healthcare system. LGBTI refugees are more likely to be unemployed and to live in poverty during this pandemic.[728]

MEASURES TO MITIGATE ADVERSE IMPACTS ON FEMALE REFUGEES

1. Ensuring access to social protection and health care, as well as basic needs.
2. Raising awareness campaigns and supporting women groups.[729]
3. No laws should be executed for the refugees in a discriminatory manner including the LGBTI refugees.
4. Human rights and the principle of rule of law must be guaranteed to all refugees, and effective domestic remedies must allow LGBTI victims to vindicate their rights before independent domestic courts.
5. Introducing new cash transfers, for female and LGBTI refugees with care responsibilities.
6. Political leaders should speak out against stigmatization and hate speech directed at females and LGBTI refugees in the context of the pandemic. [730]

PARTNERSHIPS HAVE VITAL ROLE TO PLAY

Partnerships help to minimize the impact of emergencies, provide relief and rehabilitate affected communities among the refugees. The UNHCR and WFP has decided to reach up to 10,000 food insecure refugees in Libya with emergency food aid this year. [731]This partnership was launched due to immense socio-economic impacts caused by Coronavirus. International organizations and private sectors can support Refugees- Led Organizations (RLO's) by the following ways:-

[728] "*Supra* note 5"
[729] United Nations, Policy Brief: The Impact of COVID-19 on Women,9 April2020, https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf.
[730] "*Supra* note 9 at 2"
[731] " *Supra* note 8"

1. Identify, engage, support and build the capacity of RLO's in refugee response from registration exercises to direct service delivery.[732]
2. Donors should reinforce intermediary organizations that mentor and build the capacity of RLO's.
3. Humanitarian workers should engage RLO's within their structures and mechanisms.
4. Providing financial support to RLO's by distributing shelter materials, food and core relief items and strengthening the health and WASH systems, by distributing soap and increasing access to water.[733]
5. Providing learning opportunities for refugee children, through education.
6. Enabling employment by providing job training and entrepreneurship support to refugees.[734]
7. Communicate accurate information to refugees. H&M has helped UNHCR by sharing important messages through social media regarding support, kindness and solidarity to their millions of followers across the globe.
8. Stakeholders should strengthen their relationship by increasing trust and transparency with RLO's and affected refugees to ensure that no one is left behind in the response to COVID-19.[735]
9. Private partners, companies and foundations should support and promote women's participation in refugee-driven and refugee -oriented businesses.[736]
10. Cash-based assistance must be enlarged, to reduce the negative socio-economic impact of COVID-19 on refugees. [737]

[732] Sonia Ben Ali, Urban REFUGEES .ORG raising the Voice of the invisible, The importance ofRefugee Led Organisations to effective refugee responses, https://www.unhcr.org/events/conferences/595e28247/importance-refugee-led-organisations-effective-refugee-responses.html.
[733] UNHCR The UN Refugee Agency,3 ways your company or foundation can help refugees and other people forced to flee,https://www.unhcr.org/5eb52e694.
[734] Michel Botzung, World Economic Forum,What can the private sector do to alleviate the refugee crisis? 17 Jul 2019, https://www.weforum.org/agenda/2019/07/what-can-the-private-sector-do-to-alleviate-the-refugee-crisis/.
[735] By Victor Nyamori,Amnesty International, Refugee-led initiatives are stepping up and need to be supported during the pandemic and beyond, 1st June, 2020, https://www.amnesty.org/en/latest/campaigns/2020/06/refugee-led-initiates-are-stepping-up-and-need-to-be-supported-during-the-covid-19-response-and-beyond/.
[736] ICC- Charter of Good Practice,The role of private sectors in Economic integration of refugees,https://iccwbo.org/content/uploads/sites/3/2020/01/icc-charter-of-good-practice-the-role-of-the-private-sector.pdf.
[737] WHO, Critical preparedness, readiness and response actions for COVID-19,24th June 2020,https://www.who.int/publications/i/item/critical-preparedness-readiness-and-response-actions-for-covid-19.

HIGHLIGHTS OF UNHCR IN SAFEGUARDING THE REFUGEES DURING COVID -19 OUTBREAK

The ultimate aim of UNHCR at present is to safeguard the refugees with life-saving support, including medical care and necessary materials. The UNHCR has produced 23.9 million masks, 1.4 million gowns, 2,000 oxygen concentrators, 640 ventilators, 3,200 refugee housing units, 250 metric tons of PPE and medical items and $50 million COVID-19 related cash assistance reaching 1 million individuals till date. [738]

In Italy, the UNHCR and INTERSOS has launched a digital capacity-building innovation platform for RLO's on topics such as project management, communication, advocacy and international protection.

In Angola, refugee journalists are trained by UNHCR to initiate a mobile radio campaign on COVID-19 prevention.[739]

In India, UNHCR has distributed food to 6,254 families, 15 touchless hand wash stations were installed in the slum areas in Delhi , 40,000 masks have been produced and 6,715 soap bars were distributed to families living in seven locations by the end of April.[740]

MEASURES TO BE ADOPTED TO PROTECT THE REFUGEES AMIDST COVID-19 PANDEMIC

1. All refugees must be given equal access to health services including prevention, testing and treatment of coronavirus. Hand washing stations must be set up with proper sanitation facilities. All states have an obligation to protect the health of all people without discrimination. [741]
2. Every country must ensure that the seventeen Sustainable Development Goals (SDGs) must be equally available to all refugees without any discrimination.
3. The prevention of COVID-19 among refugees should be exercised through non-discriminatory, child- and gender sensitive comprehensive laws and national policies and practices. The health conditions suffered by refugees, including those with COVID-19 infections, should not be used as an excuse for imposing unreasonable restrictions, stigmatization, detention, deportation and other forms of discriminatory practices.[742]

738 "*Supra* note 4"
739 "*Supra* note 8 at 26"
740 UNHCR India, UNHCR update COVID-19 response update.
741 "*Supra* note 21 at 1"
742 "*Supra* note 21 at 2"

4. Accurate information must be provided to all refugees to minimize the risk of transmission. Government should work with aid groups, local civil societies and community leaders to ensure the effective communication of messages.
5. Prevention of COVID-19 outbreaks among refugees should be viewed in the terms of broader government policy and coordination between national, local and other levels of government sectors. Partnerships among and within countries, is important to ensure harmonized responses to the COVID-19 pandemic. [743]
6. Community and religious leaders, local groups and (NGOs) must ensure that refugees are involved in the design of the national and sub-national COVID-19 response plans, decision-making processes and be recognized as co-developers of health and other essential services.
7. Everyone has the right to seek asylum from persecution in other countries. Government's restrictions on air travel and cross border movement should not result in closures of avenues to asylum, or forcing of people to return to situations of danger.

In *Dr. Malvika Karlekar v. Union of India*[744] the Supreme Court of India contended that the authorities should consider whether refugee status should be granted, and until this decision was made, the refugees should not be deported.

CONCLUSION

As a part of building a better world for everyone post COVID-19, let us ensure that the voices that have too often been marginalized are not just listened to but uplifted to ensure a more sustainable future for all our communities. When it comes to fighting a pandemic the most vulnerable needs more protection or else everyone is at risk. Government should enforce strict laws and raise awareness campaigns which will protect refugees from exploitation and discrimination. Everyone deserves the right to live dignity. No matter where we are from, we all have to face this crisis together. To win this fight, supporting refugees is the right and best thing to do.

'Fight prejudice, fight the virus'

[743] "*Supra* note 21 at 3"

[744] *Dr. Malvika Karlekar v. Union of India,* Criminal Writ Petition No.583 of 1992 dated 25 September 1992.

DNA PROFILING TO SETTLE PATERNITY DISPUTES

- SABARI .CH

INTRODUCTION

The Deoxyribonucleic Acid (hereafter mentioned as DNA) is a polymeric molecule found in the cells of humans and other living beings. In humans all the cells contain DNA except the red blood cells and the nerve cells. It is the basic genetic material found in the nucleus and mitochondria of the human cell. It carries the blueprint of an individual; it determines the individual character, behavior and even heritable diseases. As DNA is found in all the cells, its extraction and examination is very easy. Even a minute amount of DNA is enough to get reliable results. Children inherit the DNA from their parents. A child's DNA is a combination of the genetic material from father and the mother. Most part of the DNA is similar in all human beings; however every individual has a unique portion of DNA sequence differentiating him from others. DNA profiling is a scientific method, used to study the complete genetic makeup of the individual. As a child inherits the genetic material from the parents, DNA profiling can be employed to settle paternity disputes, by analyzing the similarity between the child's DNA and the suspected father's DNA, the existence or non-existence of the relation can be established. In case of a pregnancy due to rape, gang rape, or when a person deviously claims he is not a father of the child, DNA profiling can be used to settle the dispute. At present, its significance is growing even under the cases falling under the ambit of section 112 of the Indian Evidence Act, 1872. Though scientific evidence is considered to be secondary evidence, courts are attaching much importance to DNA evidence as it yields more accurate results. While observing the issues in the context of child rights, every child has the right to know about his or her parents.

FEATURES OF DEOXYRIBONUCLEIC ACID

DNA is a double helical structure, two nucleotides are intertwined to form a double helix and it is made up of nitrogen bases, namely the adenine, guanine, cytosine and thymine. Adenine pairs with Thymine and guanine pairs with cytosine by hydrogen bonds. This base pairing determines the overall features of a person. Sugar and phosphates form the backbone of the DNA. The DNA is passed on from one generation to another generation. Only 0.1% of the total DNA differs from person to person, about 99.9% of DNA is similar in all human beings,

that 0.1% is unique in each and every human being.[745] One exception is that monozygotic twins have the same genetic makeup. Both the nuclear DNA and the mitochondrial DNA can be used for DNA profiling.

DNA PROFILING

Renowned scientist Alec Jeffreys was the first to introduce the technique of DNA analysis in the year 1985. He gave the name DNA fingerprinting to the techniques. The samples can be compared to settle paternity disputes. The most widely used techniques are, the RFLP (Restriction fragment length polymorphism), technique developed by Alec J. Jeffreys, It was found that certain sequences in DNA repeated themselves like pearl, beads in a necklace. The repeating fragments are a variable number of tandem repeats and they are used in analysis.[746] The next is Polymerase chain reaction (PCR); it is a more rapid method, Next widely used method is short tandem repeats (STR). The STR's are separated by electrophoresis and silver staining is used to visualize the patterns.

DNA EVIDENCE IN COURT OF LAW

DNA evidence is scientific evidence and it is acceptable evidence. It falls under the ambit of documentary evidence under the Indian evidence act and also, the courts have power to call for an expert, to give his opinion in certain circumstances. Whenever required, the court can call for an expert who is specially skilled in foreign law or science or art to give an opinion.[747] Based on the opinion given by the expert, the court forms an opinion. It is up to the court either to accept or reject the opinion. The medical expert who carried out the DNA profiling can be called by the court to give his testimony. When the expert's opinion is accepted, the grounds on which he came to such a conclusion will also be accepted by the court.[748]

DNA EVIDENCE AND DISPUTED PATERNITY

DNA profiling helps in identifying the parentage of the child when there is a disputed claim. Not only paternity, maternity disputes can also be settled using DNA fingerprinting. In India

[745] B.R Sharma, *Forensic science in criminal investigation and Trials*, P1248, (LexisNexis Haryana, 6th edition, 2020).
[746] Jay Seigal, Kathy Mirakovits, *Forensic science, the Basics*, P.403, (CRC Press – Taylor & Francis group Boca Paton London, 3 rd edition, New York).
[747] The Indian Evidence Act, 1872, (Act 1 of 1872), s. 45.
[748] The Indian Evidence Act, 1872, (Act 1 of 1872), s. 51.

numerous cases were solved by DNA profiling. The status of the child should not be left undecided. Best interest of the child should be given prime importance.

FIRST CASE OF DNA EVIDENCE IN DISPUTED PATERNITY

Kunhiram V. Manoj[749] is the first case in India where DNA fingerprinting was admitted as evidence to decide the paternity of the child. The case summary is that there was a love affair between Vilasini and Kunhiram. Vilasini gave birth to Manoj. Kunhiram abandoned vilasini, she filed for maintenance, for herself and the child Manoj under section 125 of the code of criminal procedure, kunhiram contended that he is not the father of Manoj. The court ordered for DNA analysis. The results clearly proved that Kunhiram is the father. The court admitted the DNA evidence. The decision was upheld by the high court.

DNA PROFILING AND SECTION 112 OF INDIAN EVIDENCE ACT

Presumption as to legitimacy of the children is based on the Latin maxim '*Pater est. quem nuptiae demonstrant*', which means father is the one married to the mother.[750] Section 112 of the Indian Evidence Act provides that any child born during the continuance of a valid marriage or within 280 days after marriage being dissolved and the mother is also not remarried again, and then it will be a conclusive proof that the child is the legal child of the person to whom the mother is married. The section provides one exception that the husband can escape the parentage claim by proving that there was no access between him and the mother of the child during the time when the child could have been conceived.[751] This section aims at protecting the interest of the child.

Earlier trend is that the courts strictly adhered to the provisions of section 112. In Yasu V. Santha[752] It was held that, even proof of adultery by a mother is not a ground to dispute the paternity of the child, if there was access between her and the husband. It is on part of the husband to prove non-access, and section 112 gives special protection to the children. In yet another case, it was held that provisions of Indian Evidence Act are very old and now science and Technology has enormously developed. The framers would have not even contemplated DNA profiling at the time of drafting the Act. Accuracy of DNA test is universally accepted;

[749] 1991 (2) KLT190.

[750] Shivani Rani, Pater est. quem nuptiae demonstrant, available at lawtimesjournal.in/pater-est-quem-nuptiae-demonstrant/ (last visited on Aug 30, 2020).

[751] The Indian Evidence Act, 1872, (Act 1 of 1872), s. 112.

[752] (1975) KLT 533.

however it cannot escape the conclusiveness under section 112 of the Indian Evidence Act.[753] Slowly, the attitude of courts drifted towards DNA evidence. The Madras high court in *Bommi V. Munirathnam* [754] observed that, the courts rather depending on the age old conservative form of evidence, should allow more scientific evidence. DNA analysis could provide conclusive proof of paternity. In yet another case, it was held that DNA profiling provides accurate results and the evidence should be admitted to solve paternity and Maternity disputes. Infallible evidence of parentage is offered by DNA fingerprinting.[755]

In the latest case of *Nandlal Wasudeo Badwaik V. Lata Nandlal Badwaik and others*, The Supreme Court has held that, when there is clear DNA evidence, there will be no need for presumption. The presumption under the Evidence Act should yield to the DNA proof and presumption will be prevailed over by accurate scientific techniques.[756] In many cases courts have held that DNA evidence can be admitted as a proof of non-access between the parties.

DNA FINGERPRINTING AND ARTICLE 20(3) AND ARTICLE 21

In many instances, it was contended that DNA analysis and other scientific methods are violative of Article 20 (3) (protection against self incrimination) and Article 21(right to life and liberty) of the constitution of India, as it amounts to self incrimination and infringement of individuals privacy, This came up for question in various cases. In Gautam Kundu V. State of West Bengal [757]the court held that DNA analysis cannot be ordered in every case of disputed paternity, compelling a person to undergo such a test would be violative of article 20(3) and article 21. However in, Sharda V. Dharampal [758] and Rohit Shekhar V. N.D. Tiwari[759], it was held collection of samples from a person and compelling him to undergo DNA Test in a suit of paternity dispute is not violative of the fundamental rights.

RECOMMENDATIONS OF LAW COMMISSION

The 185th report of the law commission made recommendations to amend section 45 of the Evidence act to include the terms “trade, technical terms, identity as to persons or animals”. It

[753] *Kamti Devi v. Poshi Ram* AIR 2001SC 2226.
[754] AIR 2004 Mad 34.
[755] *Mahasin v. Sayeda Khatun Bibi*, 2005 Cri LJ (Cal)
[756]Nandlal Wasudeo Badwaik v. Lata Badwaik, Criminal Appeal No.24 of 2014, available at https://indiankanoon.org/doc/139951018
[757] 1993 SCR (3) 917.
[758] AIR 2003 SC 3450.
[759] AIR 2012 Del 151.

also suggested insertion of new section 45 A, to make it mandatory to supply the reports of experts to the parties concerned. Another important suggestion was, to make amendments in section 112 of the Evidence act. The commission recommended, addition of 'sterility, blood tests, DNA analysis' in addition to proof of non-access in the cases involving determination of paternity and also Medical tests, blood tests and DNA genetic fingerprinting tests can be done to establish non-access.[760]

CONCLUSION

Scientific evidence is given the status of secondary evidence in India based on the principle of probability. Scientific evidence is often used for strengthening the primary evidence. However, DNA tests are universally accepted to be accurate, chances of them being wrong is very low. DNA evidence started gaining importance during the past few years. In many cases, DNA analysis reports are allowed by the courts to settle paternity disputes. If necessary changes are made in Indian evidence Act to allow DNA analysis it would prove more fruitful. Innocent persons can escape liability and the guilty ones can be made to take responsibility in paternity dispute cases with the help of DNA evidence.

[760] Law Commission of India, 185th Report on Review of the Indian Evidence Act, 1872 (March, 2003).

WHY TRANS ARE BEING LEFT TO CRY: UNCOVERED COVID-19 STORY

- **SHREYA BHARGAVA**

"Everyone gets a card at the beginning of life. I am transgender, I decided to be honest, and that's it."

~Eddie Izzard

History has witnessed, it's a spunk deed to be forthright about the matter which is socially abused and considered as a stigma of mortification. Ever pondered in the world full of callous people, why trans-community (hereinafter referred to as Trans) keeps bestowing blessings on us? Why do they consider the heart as the soul to the body and not the breast or balls? Why do Indians get petrified of being cursed, if money not paid to Trans? Why in the world, we do not acclaim their honesty and ward off others from being upfront? Why rapists and murders are not regarded as profane as Trans are? Why are they shoved off like an inutile box of pizza and dwell on the outskirts of the city? Why are they tormented and made feel wretched alike animals in the COVID-19 pandemic? Does it make you remorseful for being one amongst society and confronting these WHY, when these are a few of the WHYS?

I am valiant, to be honest and apprehend the fact of being one amongst the odds. I am convinced that there are only 10% of the populace, who are mindful of the distinct brackets in Trans. For educating another 90%, I would take the window to enlighten that, transgender, transsexual, cross-dressers, eunuchs, transvestites, hijra are copious clams of Trans, being dissimilar to each other. Similar to the populace's nonchalance in exploring the difference within the Trans, they are also nonchalant in estimating the vulnerable situation of Trans amid COVID-19.

Despite putting up with ages of deprivation and hardship for legalizing their status and making judiciary realize that they are humans, thereby the rightful claimers of basic fundamental rights, they are tormented in COVID for the nascent stigma. In the milestone judgment of ***National Legal Service Authority v. Union of India and others***[761] ***(hereinafter referred as NALSA)***, the court acknowledged the right of choosing gender stating that the Trans are citizens of India and should not be deprived of getting equal opportunities to grow and attain their potential, irrespective of caste, religion or gender. The pandemic has left everyone (non-trans) in agony

[761] *(2014) 5 SCC 438.*

and so are the Trans. The whole differentia between the two is, former are being looked after by government followed by reliefs and latter are not granted reliefs or legged-up reciprocating to their high-pitched voice.

The Trans is impuissant than the laborers, migrating to their native place, for they have no home or family to go back to. On account of being abandoned and denounced by their family, they reside in a house filled with gurus and disciples and if anyone of them gets COVID-19 positive, it would be unfeasible for them to maintain social distancing. In the light of records, the Trans have been tested positive for COVID-19 and records states that there are amply infected, but are unidentified due unauthenticated know-how. It has been discovered, the Trans are being stimulated by their Guru that they cannot be infected by the virus and are repellant to COVID-19. It would be a fretting moment for the country if they cut-out at maintaining social distancing amongst them, due to unwitting factual reality.

NALSA judgment watched for the government to fulfill their duty of ensuring access to medical care, separate toilets, separate wards in hospital. The government not only failed at harking-back at Trans while granting relief but also failed at making them conversant with the precautions to be undertaken besides providing the separate wards in the hospitals. The court highlighted that it's the Trans' prerogative to live with dignity, free from any discriminations, thereby receiving the employment, education, and health services at par with non-trans. It was re-affirmed in the revolutionary case of ***Suresh Kumar Koushal and another v. NAZ Foundations and others***[762]

Centre and state government should take positive measures to realize rights of trans-community thereby ensuring trans-community benefitting from reservations for educational institutions and public appointments; making available focused medical care and social welfare schemes; and conducting public awareness-raising campaigns to reduce society's ostracisation of the represented groups[763].

It's no less a known fact that majority trans endure diseases like HIV, TB, Asthma or diabetes, etc, added up by the high consumption of tobacco and alcohol which makes them susceptible to COVID-19, as per the study by the World Health Organisation[764]. This ensures that their

[762] CIVIL APPEAL 10972 OF 2013

[763] India: Transgender Bill Raises Rights Concerns, Human Rights Watch (Jul 23, 2019) available at https://www.hrw.org/news/2019/07/23/india-transgender-bill-raises-rights-concerns.

[764] Tobacco use and COVID-19, World Health Organisation (May 11, 2020), available at https://www.who.int/news-room/detail/11-05-2020-who-statement-tobacco-use-and-covid-19.

immune is more prone to COVID, wherefore the government should save the community from the irrelevant teachings by Gurus. Trans could be a massive carrier of COVID-19 backed by their medical history and the government doesn't bat an eye to conduct the awareness program or providing them with the reliefs and welfare schemes.

The Trans have dainty rate of literacy thereby making them nescient with government provided funds and food[765], which have benefited only 1% of Trans. Their fear, stigma, and discrimination have left them in vain worrying for their livelihood and healthcare. They are distraught physically and mentally, post instances where Trans dressed in saree was forced to stay in men's ward. Aren't the hospital and government supposed to stick to the regulation of Apex Court or they have become superior to court?

The instance of Hyderabad, where the bills and posters were stuck at public places stating **"Talking to trans-community will give you coronavirus",** determines the abhorrence and chauvinism. This heinous episode even didn't givee the goosebumps to government thereby providing Trans with the reliefs. Thereupon NGO started distributing necessities to Trans, which helped them to survive on ration for another couple of weeks. The pondering matter of question becomes, isn't it the duty of government and if it has to be covered by NGO due to the government's negligence, WHY don't India start nominating NGO as the leader of democratic country and relieves government from their burdensome job, forever.

The government has not only failed at safeguarding social-legal issues but also their prime functions and duties. Degrading GDP of India has become the talk of the town. The government is engrossed in privatizing every sector and saving money for the future. As stated by the enormous economist, Raghuram Rajan, the Indian government should use the money at present to reform the future. The privatization of sector will result in hike in the prices. The government should spend money on relief and saving businesses.

The most affected and untouched business is the Trans business. Being socially and economically backward community, they cannot adapt to the new normal digital business structure, due to lack of basic education, leaving no space for them to earn livelihood other than engaging in prostitution, begging, or earning money by blessing and dancing in marriages

[765] ApurvaKumar Pandey, Alex Redcay, Impact of COVID-19 on Transgender Women & Hijra: Insight from Gujrat, India, Research Square, available at https://assets.researchsquare.com/files/rs-44619/v1/3a9b1e9a-84ad-4854-93b4-957bf1207114.pdf.

or birth of babies. The main element of the Trans business is social interaction which has been surpassed by the social distancing due to COVID-19. The incident of no-business no-income has left them with the option of depending on the savings and borrowing money.

They are deprived of reliefs, healthcare, and food but not with the loans and increasing debts. The worst specimen is of the Trans without the legal documents, who cannot take loans from banks and hence are dependent on the private lenders for loans at a higher rate of interest. Unlike the poor, they cannot take the advantage of Pradhan Mantri Jan Dhan Yojana or the stimulus package of 1.7 crore realized on 26th March 2020, due to un-announcement of relief to Trans by the government in the scheme. The above fact distinctly shows the dereliction of duty by government.

The Trans, who have shortly undergone the surgeries are unable to afford the medicines and hormone therapy thereby being terror-struck with the side-effect followed by detrimental health conditions. The Trans have a shorter life expectancy and such situation will result in their death. These situations have led to ample suicidal acts and thoughts. Does the NALSA judgment aimed at granting basic fundamental rights or only right to take one's life, because it looks like the protection granted under Indian Constitution article 14, 15 and 20 have vanished in COVID?

In the new normal world where every mankind should brace each other and grapple together against COVID-19, it looks like the Trans are fighting alone against the pandemic. With the paramount amount of humanity, we humans have failed at being human. The polarity in body parts does not make Trans less human. The campaigns like GoFundMe in Guyana, IMPACTO DIGITAL, and Hire trans-community by UNESCO is granting strength to Trans for fighting against COVID-19, unlike India. India might have accepted the norms of new-normal economy, but for Trans, it's still the old economy, generally and specifically. There are still a few states and mankind helping them out, but the question arises WHY? WHY government is quiet and not sheltering arms?

"Any life is life. When it comes to food, when it comes to 2-3 square meals a day, I don't think it should matter who is male, female, or transgender." – Vyjayanti

SOCIAL MEDIA- A MORAL CHECK ON POLITICS

- ANKITA SINGH

Social media is a platform that provides the voiceless and isolated, a voice of their own. It provides one more way to sneak away from the darkened corners where those voices haven't belonged for far too long and it can make them feel a little bit less powerless, a little bit less voiceless, and a little less isolated. Social media has affected many aspects of our lives be it culture, administration, education, business or politics. We talk about how social media is influencing the current politics, or what impact does social media have in politics, in a democratic country like India? With so much sensation about social media, as more youngsters joining in, the political parties have finally woken up to its importance. The prevalence of social media in politics has made the political leaders and candidates more accountable and approachable to voters. Whereas, at the same time political leaders greatly impact the views and thoughts of the people. Precisely, social sites are presently a genuine factor in political crusades and the manner that individuals consider issues. Political leaders and their supporters often post their outlook on twitter, Facebook, and other social platforms. We should take a gander on the major ways that online life impacts governmental issues today. Furthermore, social media has left both affirmative and dissentient impact on social media.

Political campaigns are in no way confined just to buttons and banners for politicians to reach their constituents. The current political arena is full of commercials, blog posts, and hundreds of tweets. Recently, two major national parties, the Indian National Congress and the Bhartiya Janta Party, have been waging an online political battle in the Indian political landscape. Online propaganda is used relentlessly against one another. Each and Every medium is used to wage a war of words. One tweet leads to an immediate response from the other. The most prominent tweets from both the parties were, BJP calling Rahul Gandhi 'Pappu' and Congress calling Narendra Modi 'Feku.' The two parties tend to downplay the accomplishment and to exaggerate each other's failures. Political parties having their websites and leaders being active on various social media platforms has made people more interactive than ever before. As per the research conducted by IMAI, India has 504 million active users, and 9 out of 10 users in urban areas access the internet at least once a week. According to IAMAI, about 74% of all internet users in urban areas use social media. This suggests that social media can play a crucial role in

affecting Indian urban populations.[766] The use of the internet has increased dramatically for political purposes over the last decade. Nowadays, people are dependent on social media for every news while it serves as a quite good platform for politics. Political parties can make the general public aware of their agendas more comprehensively. It benefits in political campaigns through various surveys and polls. One of the ways the internet has changed governmental issues is the sheer speed at which the news, survey results, propagandas, and gossips are shared. While in primordial days, people had to sit tight for the following newspaper or tv news shows to get the most recent data, now online news is a day in and day out wonder. Social media led to an emergence of citizens that led governance in India. The anti-corruption movement which was initiated by Anna Hazare for passing a stronger anti-corruption Lokpal Bill in the Parliament and protests followed by the Nirbhaya gang rape were channelized via social media. Anna Hazare initiated Satyagraha when the demand was rejected by the Indian government. The movement attracted attention and people showed support through various social media platforms. The strong support of the public led the government to seriously consider the introduction of the Lokpal Bill in the Parliament. Whereas, in the Nirbhaya gang rape, people's collective anger resulted in nationwide protests at India Gate. Social media played a major role in mobilizing people at India Gate while demanding justice for Nirbhaya. T.V channels were covering every incident related to the case but social media was updating people sitting at their places. People received reactions all over the country and got bonded like never before. The massive protest against the rapists led the government to set up the Justice Verma committee to revaluate rape law. After many attempts, the Criminal Law (Amendment) Bill, 2013 was passed by Lok Sabha on 19th March 2013 and on 21st March 2013 by Rajya Sabha.[767] This Amendment brought better and stricter punishments for rapists. The streaming news of late Sushant Singh Rajput due to his sudden demise received much attention due to the involvement of Politicians. It has been a big debate nowadays whether he committed suicide or was murdered. Social media has been a major force behind Sushant Singh's case as the public demanded CBI inquiry. Global politics have witnessed a series of events in recent years, where social media played a crucial role. Social media has brought about significant reform of world politics. On one hand, long-standing dictatorial regimes were crushed under the weight of revolutions, propelled by internet access, on the other hand, voters were swayed by social

[766] (2020) <https://www.livemint.com/news/india/india-now-has-over-500-million-active-internet-users-iamai-11588679804774.html> accessed 5 September 2020.
[767] Sabina Brown, *Impact Of Social Media On Politics* (3rd edn, GIAN JYOTI E-JOURNAL 2013) <https://silo.tips/download/impact-of-social-media-on-politics> accessed 6 September 2020.

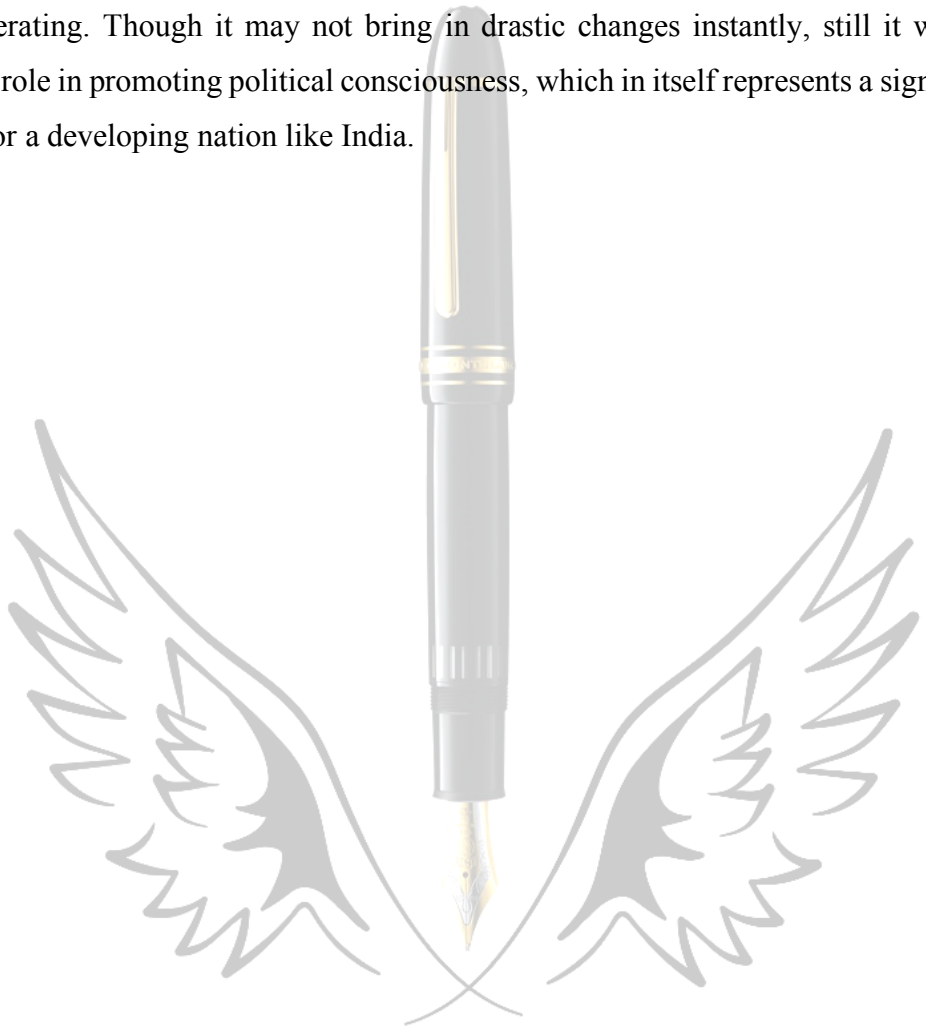
media campaigns. The Presidential Election of Barak Obama in 2008 and 2012 will reveal the role of social media in his elections. He was not only the first African American to be elected President but also the first presidential candidate to effectively use social media as a major campaign strategy. He won the Presidential Elections despite bleak economic conditions, a weak dollar, and a high unemployment rate.[768]

Political issues are currently impacted by every story, regardless of being genuine or not which spreads over the internet. It is getting harder to isolate genuine news from a fake one. Social media makes this modification particularly befuddling. There are currently a considerable number of fake News websites frequently posts stories and sound bona fide. There are several sites with political inclinations or those selling various unverified news. The constant stream of images, connections, and gossips about political leaders is a blend of truths and blatant lies. It is tough to be affected by the fake news posted by our acquaintances, regardless of whether they do mean to misdirect us. It is important to use wisdom before taking anything for granted. Confirmation bias is one of the concealed powers that work via the internet. This is particularly unlikely in terms of dubious topics, including political issues. The vast majority including companions surrounding us would presumably share the same viewpoint which creates a deception that everyone thinks a similar way. Social websites can therefore fortify our prejudices and make it even more difficult to engage in elective perspectives. In political issues, it can make individuals more persistent and less accommodating of others. We can conquer confirmation bias if we endeavor to interface with a group of individuals and utilize social media to make us increasingly liberal.

The emergence of social media has encouraged the 'aam aadmi' to express political opinions with unprecedented empowerment and interaction. The positive impact of the emergence of social media indicates that youth is taking interest in political issues. Earlier the political discussions were confined only to those who read newspapers, watched news channels, or actively participated in discussions in nukkad of clubs or villages. But now, social networking has not only made the youth to sit up and look over but also to debate political issues. They now have opinions on the happenings of political events and also influence the decision-making of administrations. But encouraging the youngsters together to vote in elections and

[768] Claudie Fournier and Chloé Dupuis, 'How Social Media Has Changed Politics - A Short Documentary' <https://youtu.be/UBzhG2kXoVk> accessed 6 September 2020.

using social media as a platform to support political parties is still a pipeline dream. It may take decades in India to replicate other nations in the use of social media campaigning and to influence the voters. In the Indian political space, the social media revolution is real, tangible, and accelerating. Though it may not bring in drastic changes instantly, still it will play an important role in promoting political consciousness, which in itself represents a significant step forward for a developing nation like India.



CUSTODIAL VIOLENCE IN INDIA LINGER IN JUSTICE!

- **SAMRIDDHI RAI**

''Injustice anywhere is a threat to justice everywhere[769]*''*

- ***Martin Luther King, JR***

INTRODUCTION

This phrase is very much relevant in today, a scenario of custodial death in India. The recent case of Tamil Nadu thoothukedi district where jay raj(father) and Bennick's (son) brutally killed in the custody of sathankulam police station during pandemic only because they remain open the shop in lockdown and violated the guidelines of Covid-19. Later, it had created the outrage of human rights and a broken criminal justice system. And it only became main headlines because of the outcry of people nationwide and connected with the George Floyd incident happened days before in America and people came in the protest against the police for discriminating based on black color. Which only reflects the spotlight over the laws and order. And the justice delivery system of India. Custodial death is very unfortunate in India and it is very much prevalent in India and shows the reality that police did not cooperate in proceedings and manipulating and destroying evidence and this question must be raised in the 21st century in democratic and civilized society **''why such custodial violence exist within the ambit of law institution and how we can preclude the human rights and what is liberty''?**

NHRC- ROLE IN CUSTODIAL VIOLENCE

When the Paris principle for human rights introduced in 1991 than in India the central government also enacted the protection of the human rights Act, 1993.which also established the NHRC but the principle laid down only recommendatory guidelines not compulsory against the state. NHRC's existence remains a weak commission and the purpose of bringing such an Act to prevent the human rights in the state. NHRC in 1995 noted that in India it is increasing and failure of a report of custodial death was an alarming situation. And they made one complaint against the police officer in the delay of medical reports and not cooperative in such cases later NHRC made changes and adopted the modes of autopsy protocol but it failed. In the year 2000, NHRC recorded the report of 5 years and found the unaccountability in the administrative work of police officials and practicing defective methods related to custodial

[769] https://www.goodreads.com/quotes/631479-imjustice-anywhere

death case. Later, parliament finally brought some changes in amendments in Crpc and made compulsory judicial inquiry in each custodial death under section 176- 1A, and in 1995 nearly 82 death recorded in Tamil Nadu.

JUDICIAL INTERPRETATION

A landmark judgment in DK Basu v State of West Bengal- Supreme court issued the guideline's which mainly deals with article 21 and 22 of Indian constitution, Crpc, Indian evidence Act provisions. NCRB recorded the 2018 report where 70 people died in police custody and the main reason behind the custodial death is torture which shows only the inhumanity and cruelty of mankind[770].

Supreme court observed in MP v Shyam Sundar- ''Police bound by the ties of brotherhood would prefer to remain silent rather than assist the court[771]''

Kishore Singh v. State of Rajasthan supreme court observed ''nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitution culture than a state official running berserk regardless human right[772].

CUSTODIAL DEATH OR SOCIAL STIGMA?

India is the world's largest democracy and longest constitution with diversity in terms of culture, caste, religion, tradition, dialects, ideology vary state to state, society to society, and people to people. Custodial violence "Is also a part of the social factor of CASTE and RELIGION are the bedrock of this violence many cases reported and recorded surprisingly facts shows that most miserable and vulnerable people were targeted – women's, Muslim, tribal and Dalits like 1 year before Nabbir in Tihar jail prison forced and burned symbol of 'OM' on his body and Mincara begum in Assam arrested in kidnapping offense and she was pregnant and while in her custody she lost her baby because they kicked in her abdomen and the most shocking fact no conviction made. That's why the police never come on the front foot which triggers our fundamental values and the roots of custodial death are very deep and hard to cut off. "***if you want peace, work for justice[773]''- pope Paul.*** Does this quote exactly fit in this

[770] Writ petition (CRL) NO. 592 OF 1897
[771] Appeal (CRL) 217 of 1993
[772] AIR 1981 SC 625
[773] https://www.youtube.com/watch?v=WjkHyelpv6c

scenario but if the gatekeepers of justice delivery start doing injustice still, we can believe peace will come? because now everything comes and ends with the religion and caste which only create abomination within society, people, community, state, and become a national issue.

REPORTS ON CUSTODIAL DEATH

1. In 2019 nearly 1,731 died in custody.
2. Annual report of 2019 on victim torture noted 1,606 death in judicial custody and 125 in police custody.
3. Highest custodial death recorded in Uttar Pradesh with 14 deaths in Tamil Nadu 11 deaths each day recorded by NCAT.
4. Other reports show that the reason for custodial death is unknown (41%), (74 %) died only because of torture, and (19.2%) died under suspicion.
5. According to the NCAT report noted that (60%) mainly belong to marginalized communities. which includes the Muslim, Dalit, tribal, farmers, labor, refugee, and women who faced sexual assault and come from poor and weaker sections of society[774].

NHRC GUIDELINES

Within 24 hours of the occurrence of any custodial death, the commission must be informed, information was to be followed with a post- mortem report, magisterial inquest report/videography report of the post- mortem, etc, the commission has thus now instructed all reports including post- mortem, videography, and magisterial inquiry reports must be sent within two months of the incident[775], the commission has therefore clarified that the post mortem reports and other documents should be sent to the commission without waiting for viscera report, deaths of undertrial and convict in India while in custody have increased by 10% in 2018. 390 under trials and conviction in Uttar Pradesh died in police custody. And the reason behind this violence is the desperation of police for a confession and often they used physical force vigorously on the accused and there are other factors also like CCTV cameras and poor infrastructure in rural police stations[776].

[774] www.thehindu-com.cdn.ampproject.org/v/s/www.hindu.com/news/national/five-custodial-deaths-in-india-daily-says-report/article
[775] https://www.rightsrisks.org/up-content/upload/2020/06/livelaw-custodial-death-what-is-the-procedure-for-inquiry.pdf
[776] https://nhrc.nic.in/press-release/nhrc-issues-fresh-guidelines-regarding-intimation-custodial-death

INTERNATIONAL REGULATION

1. ICCPR (coverlet on civil and political rights) 1966 **Article 7 '' No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment''**
2. Article 5 of UDHR (universal declaration of human rights)1948 '' **No one shall be subjected to arbitrary arrest, detention or exile[777]. Everyone is entitled to a fair and public hearing by an independent and impartial tribunal. No one shall be held guilty of any penal offense on account of any Act or omission which did not constitute a penal offense under national or international law, at the time when it was committed''[778].**

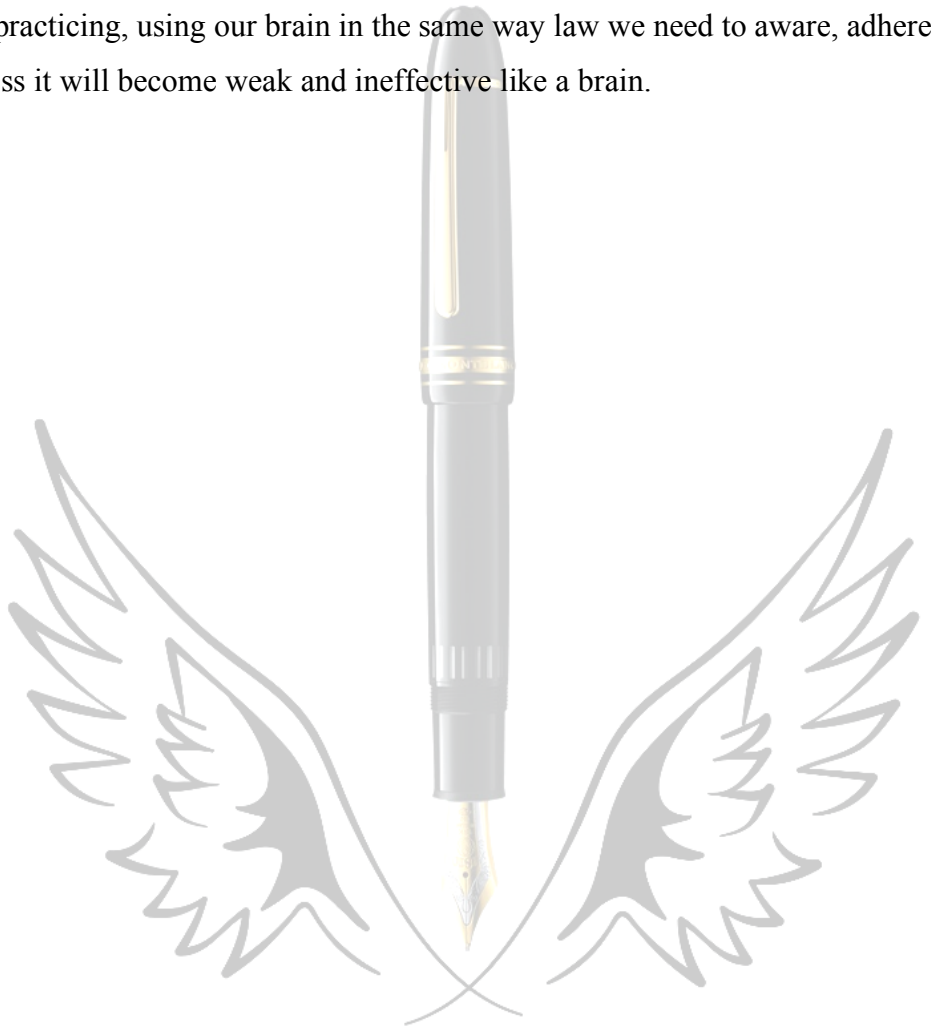
CONCLUSION

''There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest[779]'' ***- Elie Wiesel***

This phrase is rightly said that this issue is perpetuated by the society staunch opponent, politicians, government and we still living like a blind. It's true that privileged, superior class normalized these Acts and encouraged also but it is also true even silence has sound but it depends how and when we create this. The only difference which I found between the two cases one jay raj and bennicks second George Floyd case of America the kind of revolution of rebel, strength, voice raised in America has not happened in India and that's how literate one is also like an illiterate and pinkal having knowledge about their rights. According to the NHRC, NCAT, NCRB reports recorded the data and percentage of deaths which also shows that how our government, politicians, administration are working? In the 21st century coming from blood path history to digitalization, globalization, and advance technology in 2020 which shows that how much we learned from our history. Police officers are the protector of law and order. And custody under police or magistrate which means that the accused person is keeping for further judicial proceedings under the safeguard of police officer and law is clear upon this ''*person shall be presumed innocent until not proven guilty'* 'and even arrested person have also constitutional rights and even accused have full right to live with dignity. we must adhere to law and order. And its high time to make some reforms, the amendment's in our laws and become more vigilant and alert towards such crimes and according to the Indian laws which

[777] https://www.on.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf
[778] https://www.un.org/en/universal-decleration-human-rights/
[779] https://www.youtube.com/watch?v=eGSHM6jA

are enforced and enacted they are enough the only thing is we need some upgradation, advancement more efficacious implementation of laws in India. Law is like a brain center part of our society but like the brain law must use, practice, upgrade, change because if we stop working, practicing, using our brain in the same way law we need to aware, adhere to law and order unless it will become weak and ineffective like a brain.



PENALISING MARITAL RAPE: CHALLENGES AND IMPLICATIONS

- SHAMBHAVI SINHA

ABSTRACT

Rape is an offense which violates and destroys women's dignity, trust, and self -respect, and when it happens inside the four walls of the house. Despite various penal laws, marital rape has increased in two to three decades. There is an urge need for special laws for marital rape.

Rape within the four- walls of the matrimonial house is a concept that misery the wife has faced. The pain of rape within the marriage which the women face affects the psyche of the women. This silence affects the emotional, physiological, and mental stability of women. Because of the lack of Laws and social stigma against marital rape is the reason that such evil is hidden behind the sacrosanct of marriage.

Marital rape is one of the divergent issues. Husband treated wife / women as property and objects of pleasure from long time ago. Women were victims of crimes like rape, sodomy, sexual harassment, female infanticide, etc. Indian legislature has made many laws for the protection and prevention of crime but fails to protect women from her husband by not making provisions to criminalize marital rape.

The concept that women have to sex with her husband without her will, consent is unacceptable to a civilized country. It is known to all that mere criminalization of marital rape will not end the problem but was a necessary step towards the changing women's experience of such sexual violence in a marriage. It's high time to accept rape as rape irrespective of the matter whether it was done by her husband or any stranger.

KEYWORDS – Marital Rape, Criminalization, Penal Laws, Consent.

INTRODUCTION

Marriage is an agreement between two parties that legalize sexual intercourse. A marriage can be known as a sacramental or contractual relationship. As the meaning says marriage legitimizes sexual intercourse it is implied that any sexual intercourse throughout the marriage is right and is lawful. Because of this reason, people committing a marital rape. Marital rape defined as sexual intercourse between married couples without the wife's consent. This clearly states that the husbands utilize the ceremony of marriage as a license to sexually assault his

wife and declares it to be as a husband's right. The ingredients of marital rape include the mental agony of being raped, the trauma of being victimized by her husband, and exceptional scars of these incidences .Domestic violence and sexual abuse is a form of marital rape . It is a chronic form of violence to the victim. The word rape has been derived from 'rapio' which means to seize. of **the supreme court India describes rape as a deathless shame and the gravest crime against human dignity.**[780]

The Constitution of India talks about equality but in the case of marital rape, it does not give equal rights for her sexual desire. Our Indian criminal system discriminates against the female victims who have been sexually assaulted by her husband. When IPC was drafted in 1860, wedded women were not considered as an independent legal entity. They considered the property of the husband. But the times have changed. Indian Laws has now provided the independent entity to women. The US Supreme Court observed that a married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. It was further noted that **marriage is not institutional but personal -nothing can destroy the institution of marriage except a statue that would make marriage illegal**[781]**.**

Marital rape has been expanded in recent years. In today's era marital rape is a highly under-reported violent crime because most of the women do not approach the public authorities due to, they are financially dependent on their husbands and if they report to authorities results in the withdrawal of financial support from his husband. Only fifty-two countries have recognized marital rape as a crime. Criminalization of marital rape indicates that it is a violation of human rights. But in India, marital rape is not recognized as a crime. When countries perceive rape as a crime and give punishments but they exempt in case of marital rape. Enactments regarding marital rape in India are either non-existent or elusive and dependent on the courts. Sec 375 of IPC which states Sexual intercourse by a man with his wife, the wife not being under the age of 15years of age, is not rape. Sec 376 of IPC, which states that the accused will be imprisoned for seven years or may extend to ten years and liable to fine also.

Many Acts and enactments were passed by the legislature in respect of violence against women like laws against dowry, cruelty, domestic violence, and female infanticide but the most shameful wrong within a marriage, where the husband forces his wife accepting that it was his nuptial right to have sex without her consent ‘marital rape ‘has failed to recognize as a crime.

[780] Bodhisattwa Gautam vs Subhra Chakraborty AIR 1996 SC 922.
[781] Eisend vs Baird 405 US 438 (1972)

The husband raped his wife many times not only vaginal but also anal and oral rape. Husband assault their wives when they are asleep, or use coercion, verbal threats, physical violence to force their wives to have sexual intercourse with them. **Protection of Women from Domestic Violence Act 2005 was passed which recognizes marital rape as local violence**. In this, a wife may go to court for legal partition from her husband for marital rape. Marital rape is unreasonable as women's rights were relinquished at the holy place of marriage. Laws related to marital rape are lacking and deficient.

TYPES OF MARITAL RAPE

1. **BATTERING RAPE –** In this woman faces both physical and sexual violence in the relationship. Most of the conjugal assault casualties fall under this category.
2. **FORCE -ONLY RAPE –** In this husband uses force to coerce their wife. This happens after the wife has refused to have sex.
3. **OBSESSIVE RAPE –** In this rape involves assault and most brutal. These include torture, and sexual acts and are physically violent.

MARITAL RAPE AND LAWS IN INDIA

As we all know Marital rape is not a crime in India. Despite various amendments, law commissions, legislatures one of the draining and shameful acts is not a crime. The exception of Sec 375 of the Indian penal code,1872 states that sexual intercourse with his wife, the wife not being under 15 years of age, is not rape. Sec 376 of IPC states the punishment for rape[782]. Sec 376 has a narrow interpretation which lays that a crime related to marital rape stands only if the wife's age is less than 12 years, if she is between 12 to 15 of age and the offense has committed then it will less serious, and have milder punishment. If 15 years of age have crossed there is no legal protection given to the wife. According to IPC, the husband is prosecuted when

- When the age of the wife is between 12 to 15 years, then the offense punishable with imprisonment of 2 years, or fine, or both.
- When the age of the wife is below 12 of age, the offense punishable with imprisonment of fewer than 7 years but may extend to life or a term exceeding 10 years and fine also.

[782] According to this section, the accused should be punished with imprisonment of not less than 7 years but may extend to 10 years and shall liable to fine. If the accused has raped his wife, not being the age of 12 years then he shall be punished with imprisonment which may extend to 2 years with a fine or with both.

- The rape of the judiciary separated wife is imprisonment of 2 years and fine.
- The rape of wife of 15 years above age is not punishable.

As it is noticeable that the law which is considered as the shield of victims is inadequate to protect the interest of those who are affected by marital rape. The main argument which is in favor of this is that consent for marriage is impliedly the consent of doing sexual activities. Sec **375 of IPC requires changes**. The restricted definition was opposed worldwide women, who demand that including oral sex, homosexuality, and penetration by any object within the meaning of rape would be consistent with constitutional provisions, natural justice, or equity. International Law defines Rape as sexual penetration, not just penal penetration but also threatening forceful, coercive use of force against the victim or the penetration by any object. **Article 2 of the Declaration of the Elimination of Violence against women includes marital rape as violence against women.**

Women can protect her right to life and liberty, but not her body within the marriage which just irrelevant. The only provision to married women against the sexual act of her husband is on when the parties were separated by judicial separation by the court under sec 376-B IPC. This was not for women who are in a matrimonial relationship. According to sec 122 of the Indian Evidence Act states that women statement against his husband is not admissible.

RECOMMENDATION BY JUSTICE VERMA COMMITTEE

The **172nd Law Commission report** has considered rape in marriage as an excessive interference within the marital relationship. For strengthening anti-rape laws, the Indian government made a committee name Justice Verma committee on Dec23,2012 after the Delhi rape case which consists of Retired Justice J.S Verma, retired Justice Leila Seth, and solicitor General Gopal Subramanian, has suggested that the exemption of marital rape should be removed and the marriage between the parties will not be an excuse. But, the proposal of this committee was not considered in the Criminal Amendment Act 2013. On 10th March 2016, the women and child Development Minister Maneka Gandhi in Rajya Sabha ask a question of whether the legislature is going to criminalize marital rape? The same word was expressed by our Home Affairs Hari Bhai Prathibhai Chaudhary in April Sabha in April 2015. It is viewed that the idea of criminalizing marital rape in India is not possible because of various reasons like illiteracy, poverty, religious beliefs, etc.

ISSUES AND CHALLENGES RELATED TO CRIMININALIZE MARITAL RAPE

1. Laws related to marital rape already exists – Many of the people state that exception created by sec 375 of IPC was covered by the Protection of Women from Domestic Violence Act, 2005; Sec 498A of IPC and Sec 13 of the Hindu Marriage Act.

The Domestic Violence Act considers sexual abuse under the definition of domestic violence and gives remedies such as compensation, judicial separation. A loophole to this Act as it only provides civil remedies, but does not identify marital rape as a criminal offense. Sec 498A of IPC provides penalties to the husband and his relatives for cruelty. Sec13 of the Hindu Marriage Act allows cruelty as a ground for divorce.

2. Cultural problem – Marital rape should not be criminalized in India because of the different cultures between the prevalent culture in India and the concept of marriage in other countries. India's social customs, values, religious belief, and the idea of marriage as a sacrament along with illiteracy, poverty all these are not for the criminalization of marital rape. The Supreme Court has explained that marriage is personal and nothing short of India State criminalizing marriage can destroy the institution of marriage [783] . The court further expresses that if divorce and judicial separation can't destroy the institution of marriage so how can the marital rape destroy it. As we all know that Indian women are financially dependent on their husbands for their livelihood. If the legislature criminalizes the marital rate then how the women who are dependent on their husband will survive.

3.Implied Consent – The main argument against the criminalization of marital rape is the implied consent in the marriage**. Sir Matthew Hale of England had declared that the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given himself up in this kind unto her husband which she cannot retract**.[784] Lord Keith says that modern marriage is a partnership of equals and the wife should not be considered as a chattel of husband. The argument that marriage has an implied consent is still in India to justify the marital rape exception in the penal code.

4. Family Pressure – In India women still recognizes their husband as pati parmesan. The wife will suffer if they break the marriage. According to Hindu Law, marriage is a sacrament, if once tied should never be broken. The main purpose is to fulfill the religious duties and to beget progeny. Under Muslim law, marriage is done only for the production of a child. In

[783] Independent thought 382 SCC at 57.

[784] SIR MATTHEW HALE, THE history of the Pleas of the crown 628 (1736); Independent Thought,382 SCC

Muslim law, it was specifically mentioned that marriage is a way of fulfilling the sexual desires of men whether women have consent or not.

5. Women will misuse any law against marital rape – The Union Government states that if marital rape will criminalize that it will become a tool to harass the husbands. The women falsely accuse their husbands of various Domestic violence. So, it is difficult for the legislature to criminalize the marital Law.

CONSEQUENCES OF MARITAL RAPE

1. There will be physical injuries to vaginal and anal areas, lacerations, bruises and other forms of injuries which never get healed
2. Anxiety, shock, depression, and other thoughts which lead to lower their self-respect.
3. Gynaecological effects like miscarriage, stillbirth, bladder infection, STD's etc. Lead to a medical complication.

JUDICIAL STAND

Tracing the history of judicial decisions in marital rape the court in **Queen Empress vs. Haree Mythee** [785] observed that the law related to rape does not apply if the husband and wife both are above of 15 years of age, even if the wife is over the age of 15, the husband has no right to disregard her physical safety, intercourse is likely to cause death. In this case, the husband was convicted under sec 338, Indian Penal Code for rupturing the vagina of his 11 years old wife, causing haemorrhage leading to her death.

State of Maharashtra vs Madhukar Narayan Mandikar [786] has referred to the right of privacy over one's body. In this case, it was decided that prostitute also had to right to refuse sexual intercourse. What is sad to know is that all strangers rape has been criminalized and all females, other than wives, have been given the right of privacy over their bodies thereby envisaging the right to withhold consent and refuse sexual intercourse.

Sakshi vs Union of India [787]the Supreme Court observed that inadequacies regarding the law relating to rape and suggested that the legislature should bring changes in the law. After passing the criminal law Amendment bill, the 2013 rape was redefined as the most horrific event where the parliament by an amendment tried to enlarge the ambit of rape and the perception by making oral and anal acts as amounting to rape.

[785] (1891) ILR 18Cal.49
[786] AIR 1991 SC 207
[787] AIR 2004 SC 3566,2004 (2) ALD Cri 504.

Justice K.S. puttuswamy (Retd.) vs. Union of India, [788]the Supreme Court recognizes the right to privacy as a fundamental right and includes the ability to take intimate decisions. Forced sexual intercourse and cohabitation is a violation of fundamental right. Since there was no difference in married and non-married women. All women have the fundamental right to be able to consent and can say no to their husband.

CONCLUSION

Marriage is a tie between two individuals with respect for each other. We should educate boys and men to respect women as valuable partners in life and also, we should educate & aware women of their rights so that they should stand against such heinous crime like marital rape. Still, marital rape is ignored or considered normal in societies. Women should live with dignity which is a fundamental right and marriage is not an excuse for such an inhuman act. Justice Verma states that True achievement of women empowerment and equality has to be achieved by the joint effort of the individual and the state. The institution of marriage is not above the individual dignity and women must have a right to say No and her No must be respected.

But India Laws are lacked to protect women. Still, women are considered the property of the husband. A husband's violent and non – consensual intercourse can lead to criminal assault by the wife. Non-criminalization of marital rape in India is still a major concern. To protect women judiciary should take initiative to protect and safeguard women.

"The day will come when men will recognize women as his peer, not only at the fireside, but in councils of the nation. Then, and not until then, will there be the perfect comradeship, the ideal union between the sexes that shall result in the highest development of the race."[789]

At last, I want to say that the legislature should repeal the exception clause. And the marriage between the parties should not take as a defense, And the must be some amendment in Evidence Act to ensure prosecution in marital rape. The legal position of marital rape should be defined and became a ground for divorce.

9 .26 sep,2018

[789] Words by Susan Anthony