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With this thought, we hereby present to you

Jurisperitus: The Law Journal.

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ASSESSING THE PREDICAMENT SURROUNDING THE COMBAT OF DOMESTIC VIOLENCE: A RE-EXAMINATION OF THE VARIOUS NATIONAL LEGISLATIONS IN CAMEROON

- NANA CHARLES NGUINDIP

Abstract

Several human Right instruments vacillating from the Universal Declaration of Human Right 1948, the Convention on the Elimination of all Forms of Discrimination Against Women, MAPUTO Protocol, African Charter on the Welfare of the Child, and hosts of others have condemned the illegal practices experienced by the women on the international scene which has portrayed devastating impact and effect on the status they represents in the society. Even though with all the laudable efforts initiated and put in place by these instruments, the rate of violation on women rights are increasing and rampant. The international community continue to experience violation done on women rights especially those related to Female Genital Mutilations, Sexual Harassment, Voluptuous Abuses, Rape, widow practices and many other harmful practices. These practices experienced by women on the international scene are not exempted in Cameroon; in matters related to violence. Cameroon comprehended and documented as a State of Law, devours great efforts in certifying that women anguishing from the effect of violence should be protected. In exercising these efforts, the country has ratified a series of international, regional and even sub-regional laws in combating violence done on women. National laws such as the Constitution, the Penal Code, Labour Code, Civil Status Registration Ordinance, Civil Code and many others have been enacted to deal with cases of violence done on Women.

Keywords: Combatting, Domestic Violence, Cameroon, Legislations, Violations

Introduction

An analysis of the legal, socio-economic and political status of women in Cameroon shows the link between the high levels of violence against women in Cameroon and their low status in all aspects of life. Besides the fact that laws relating to women's legal status reflect social attitudes that affect the human rights of women, such laws often have a direct impact on women's ability

to exercise those rights. The legal context of family life, laws affecting women's socio-economic status, women's access to education, the labour market and politics contribute to violence against women and their access to redress and reparation. As a result of the ethnic diversity, one cannot distinguish the Cameroonian woman in a gender profile. However, all ethnic groups give great importance to local traditions, which widely affect the status of women and their enjoyment of human rights. Cameroon inherited two different legal systems; notably French law from the former Oriental Cameroon and English law from the former Occidental Cameroon, which coexist with local customary law. In addition to these laws operating in the country, there is a growing body of unified laws with aspect of the criminal law itself being unified between 1965 and 1967 in one single Penal Code.[1]Women in Cameroon experience high levels of discrimination, despite Constitutional and other legal provisions recognizing the human rights of women. No legal definition of discrimination exists as the country continues in appreciates what is existing in other international legislation that they have ratified.

However, civil law[2] offers a more equal standard than customary law, another source of law in Cameroon, which is far more discriminatory against women. this can be seen in aspect of property under Customary law where the woman is considered as a property, and a property cannot owned a property.[3] The broad persistence of customary law infringes the human rights of women, particularly in the areas of marriage and inheritance laws. Customary law varies depending on the ethnicity of the parties involved and the region. In cases where the two types of legal systems have equal weight, an individual can choose whether to bring the case before the statutory law courts or customary law courts.[4]The traditional jurisdiction cites custom except when custom is opposed to law and order and good morals.[5] The Supreme Court has

[1] Center for Reproductive Rights, *Women of the World: Laws and Policies Affecting Their Reproductive Lives - Francophone Africa,* 2000, p. 70.

[2] what is operational in French Cameroon

[3] Achu v. Achu

[4] This situation is not the same under the Common Law system practice in Anglophone Cameroon. Under Anglophone when parties contract to be governed by Customary law, they cannot bring an action before the Civil Law Courts. Aspects of Customary Law are reserved to Customary Courts, and those of Civil Law to Civil Law Courts.

[5] Section 27 of the Southern Cameroon High Court Law 1955 which criticizes all practices which are repugnant to Natural Justice, Equity and Good Conscience

sanctioned the primacy of modern law over traditional law.[6] But due to the importance attached to traditions and customs, laws protecting women are often not respected.[7] The United Nations has on several occasions expressed concern about the lack of progress made by the Government of Cameroon in reforming laws and combating practices that discriminate against women and girls and violate their human rights.[8] In its Constitution signed on 2 June 1972, and revised by law No. 96/06 on 18 January1996, Cameroon incorporated some provisions of the Universal Declaration of Human Rights as well as that of the African Charter of Human and People's Rights in the Preamble. The Preamble states that the nation "shall protect women, the young, the elderly and the disabled." According to article 65 of the Constitution, the Preamble has legal force: "The Preamble shall be part and parcel of the Constitution." The Preamble of the Constitution of Cameroon includes several provisions that enshrine gender equality: "We the people of Cameroon declare that: the State shall guarantee all citizens of either sex the rights and freedoms set forth in the Preamble of the constitution; the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights; all shall have the same equal rights and obligation." Concerning discriminatory written laws, Article 213 of the Civil Code designates the husband as the head of the family, and as such he is regarded as the principal moral and financial manager. It is the husband who establishes the marial home, and the household expenses are his main responsibility. Articles 108 and 215 of the Civil Code grant the husband the sole right to determine the family domicile. According to articles 1421 and 1428 of the Civil Code, women are not fully entitled to use, enjoy or sell their property, although this right is stipulated in the Constitution. In this context, article 1421 grants the husband the right to administer communal property, thereby giving him the right to sell or mortgage the couple's property with the wife's consent. The husband also manages his wife's real property, and exercises all rights to it especially when they possesses property in common. even though with this in question, it becomes a violation on the part of the husband if he abuses

[6] *Ibid.*, p. 70.

[7] cases such as Ngeh v. Ngome is a good example where …….. also the case of Immaculate Belfonge v. Samuel Lyonga Lukpe

[8] Committee on Economic, Social and Cultural Rights, Concluding Observations 1999, UN Doc. E/C.12/1/Add.40 paras 13 and 14. and the Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations, UN Doc. A/55/38 paras. 45 and 53.

the right as to the property of the wife.[9] Article 7 of the Trade Code allows a husband to interrupt his wife's working activity through notification of his opposition to the Trade Tribunal. Article 223 of the Civil Code and article 74 of Ordinance 81/02 of June 1981 gives the husband the power to object to his wife's pursuit of a separate trade or profession. When a marriage ends, the community property should in theory be shared equitably between the two ex-spouses, but in practice the women often do renounce their property rights.[10] However, according to article 1449 of the Civil Code, the woman regains her personal property when there is already aspect of divorce in question. Once the husband and wife have divorce through a decree of a divorce nisi, it becomes the responsibility of the wife to retain back her property. Article 229 to 232 of the Civil Code regulates all aspects of divorce. It only recognises fault-based divorce, on the grounds of adultery, the revocation of one spouse's civil rights resulting from an afflictive and defamatory penalty or domestic abuse or injuries. According to the law, to be recognised as grounds for divorce, these actions must constitute a serious or recurring violation of the marriage duty and obligations as well as make it intolerable to maintain the marriage bond. Article 229 is mandatory when proved, and the judge must grant a divorce. The grounds of domestic abuse or injuries are optional; the granting of the divorce is discretionary for the judge. We need to understand here that, in most of the instances examine above as to divorce, most of the circumstances arises from the effect of domestic violence which stands as a provocative ground for the wife to bring an action for divorce. In the customary law of some ethnic groups, husbands not only maintain complete control over family property, but also can divorce their wives in a traditional court without being required to provide justification or give alimony.[11]

Although, women have, according to the Civil Code, the same rights to inheritance as men, the reality is very different as the extent to which a woman may inherit from her husband is normally governed by customary law in the absence of a will, which vary from group to group. In fact, a married woman is considered part of her husband's "estate," grouped with his personal property and real estate.[12] Moreover, the kind of polygamy existing in Cameroon is

[9] Article 1428 of the Civil Code.

[10] Center for Reproductive Rights, *Women of the World*, *Ibid.*, p. 80.

[11] Afro Gender Profiles, available at www.Afrol.com.

[12] Center for Reproductive Rights, *Women of the World*, *Ibid.*, p. 80.

polygyny, and polyandry is not permitted.[13] In its General recommendation No 20, the Committee on the Elimination of Discrimination against Women states that polygamy violates the rights of women.[14]

Article 361 of the Penal Code defines the crime of adultery in terms more favourable to men than women. While a man may be convicted of adultery if the sexual acts take place in his home, a female may be convicted without respect to venue. Also, under the law, men and women have the same right to enter into marriage and freely choose a spouse. However, the law is concerned by the difference between the minimum legal ages for marriage of boys (18 years) and that of girls (15 years), which is gender discriminatory and allows for the practice of early marriage, which is still widespread in Cameroon. A study carried out in Cameroon revealed that girls aged between 15 and 19 account for 24% of married women.[15] It should be noted that despite the law in certain communities, girls Violence Against Women are even married off at the age 12 years old.[16] In many of these cases, the girls are forced into marriage. Often the parents of the bride are paid a "bride price" by the husband. The bride price is governed by the Civil Code, which, in articles 1540 and 1541, defines it as follows: "The dowry is the property which the wife brings to the husband for bearing the costs of the marriage. Everything that the wife brings with her or that is given to her under the marriage contract unless otherwise stipulated." However, in the current practice, the dowry may be defined as the goods, which a future husband contributes to the family of his future wife. This has led men to regard their wife as property for which they have paid and the men and his family feel

[13] The Civil Code does not discuss polygamy, nor does it polyandry. The legal status of polygamy must be interpreted or deduced from Order 81/02 of 6/29/81 and the Penal Code. This interpretation makes it evident that polyandry, which allows a woman to have several husbands, is prohibited, whereas polygamy, which allows a man to have several wives, is permitted. Also the Supreme Court ruled in this manner, (CS order ASSO an others) (cited in Center for Reproductive Rights, *Women of the World*, *Ibid.*, p. 79).

[14] Committee on the Elimination of Discrimination against Women, General Recommendation No 20, UN Doc. HRI/GEN/1/Rev.3.

[15] Panafrica News Agency, *Levée des Boucliers au Nord contre les marriages précoses*, 20 April 2001.

[16] Afro Gender Profiles, available at www.Afrol.com.

entitled to the physical labour of the wife.[17] It makes it also extremely difficult for a woman to divorce her husband.

When the husband dies, the widow is often unable to inherit since she is considered to be part of the inheritance herself. A practice related to dowry payments is the forcing of a widow to marry one of the deceased's brothers. Moreover, early motherhood constitutes a serious health and emotional risk for young girls, many of whom are unable to take care of their babies or who die in the process of giving birth. Furthermore, an early marriage leads to girls dropping out of school and therefore to the vicious circle of poverty, lacks of power in controlling their own activities and at the end, violence. It must be noted that the age at which women get married in urban areas is higher than in rural areas. Nevertheless, regardless of residence, it seems that entry into marriage at an older age has been the trend. This phenomenon is attributed to the increase in the school attendance rate of girls.[18]

Women in Cameroon are also discriminated from a de facto point of view. 51% of the population in Cameroon live below the poverty line and poverty has an increasingly feminine face, affecting women in particular. [19] As a result more and more women and girls enter prostitution and are thereby exposed to exploitation. The pervasive poverty in the country impacts services such as health and education. According to UNICEF, in the year 2000, the adult literacy rate among men was 82% whereas the adult literacy rate of women was 69%.[20] In 1992 net primary school enrolment of boys was 76%, and that of girls 71%.[21] In addition, fewer girls are found in secondary schools; their gross enrolment between 1995 and 1999 was 17 % as opposed to 22% of that of boys.[22] Since the elections of February 2002, of the 180 seats in Parliament, only 16 (8.6%) are occupied by women.[23] This lack of opportunity for

[17] It should be noticed that a dowry is not a condition of the validity of the marriage

[18] Association Camerounaise des Femmes Juristes, *Women's Reproductive Rights in Cameroon*, p. 10

[19] UNICEF, At a glance: Cameroon The big picture, available at www.unicef.org/infobycountry/cameroon.html.

[20] UNICEF, At a glance: Cameroon – Statistics, available at www.unicef.org/infobycountry/cameroon_statistics.html

[21] *Ibid.*

[22] *Ibid.*

[23] Inter-Parliamentary Union, available at www.iup.org.

women to take decisions at the political level has serious implications for the advancement of women and their enjoyment of human rights.

1.0.Placing and Analysing the International Instruments of Domestic Violence in Cameroon

The State of Cameroon assures its citizens equality and non-discrimination in its Constitution which includes and incorporates the Universal Declaration of Human Rights. Article 1(2) "ensures the equality of all citizens before the law." The Preamble recognizes the Government's obligation to "protect women [and] the young" and guarantees to each individual "freedom and security." The Constitution's Preamble affirms Cameroon's "attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto." Article 45 of the Constitution emphasizes Cameroon's membership in the international community, recognizing that "duly approved and ratified treaties and international agreements shall . . . override national laws."

Cameroon ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the so-called Maputo Protocol) in 2012.[24]

The Constitution of the Republic of Cameroon (1996), as amended in 2008, does not explicitly refer to violence against women, harmful practices or FGM. The Preamble states, however, that 'every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, to cruel, inhumane or degrading treatment'.[25] There is no national legislation in Cameroon comprehensively addressing violence against women. However, the country has enacted laws addressing different forms of violence against women, such as rape, sexual harassment, and genital mutilation. In 2012, the government drafted a National Strategy to Combat Violence against Women, established a hotline for victim support and reporting cases, and implemented awareness-raising activities at the national and local levels.[26] In practice, violence against

[24] ACHPR, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Legal Instruments, 11 July 2003

[25] Constitution of the Republic of Cameroon - Law No. 96–06 of 18 January 1996 to amend the Constitution of 2 June 1972

[26] OECD Social Institutions and Gender Index, Country Profile: Cameroon, 2019

women is highly prevalent throughout the country, in large part due to lack of adequate legislation and systematic action to eradicate stereotypes and harmful practices against women.

1.1.The phenomenon of propagandas of sexual abuse and the Cameroon Criminal law System

Rape is prohibited under the Penal Code and punishable by 5 to 10 years of imprisonment.[27] There is no legislation that prohibits domestic violence in Cameroon, nor is spousal rape specifically addressed in the Penal Code.[28] The 2016 amended Penal Code introduced sections providing that a rapist cannot be exonerated by marrying his victim, criminalising sexual harassment with imprisonment where the victim is a minor and considering as an aggravating factor where the perpetrator has educational authority over the victim.[29] In practice, the law is not effectively enforced, as cases of rape are often not investigated and incidents rarely reported.[30] The UN Committee on the Rights of the Child (CRC) concluded that legislation 'does not provide full protection for all victims of violence, including sexual violence, or guarantee their compensation or rehabilitation'.[31] As a result, a high prevalence of domestic violence, sexual assault and rape, as well as a culture of impunity persist across all regions in the country, and this has affected the status and right of the women. Eradicating and combatting these practices is of great essence as it will render some level of recognition to the women in the society. it is therefore the responsibility of the Cameroon government in ensuring that those perpetrators of domestic violence should be punished accordingly using effective criminal sanction as stipulated under the country's' Penal Code.[32]

[27] Cameroon, Penal Code - n° 67/LF/1, 12 June 1967, Amended 12 July 2016, USDOS, Cameroon 2018 Human Rights Report, 13 March 2019, p. 29

[28] OECD Social Institutions and Gender Index, Country Profile: Cameroon, 2019,

[29] Cameroon, Penal Code - n° 67/LF/1, 12 June 1967, Amended 12 July 2016, url; USDOS, Cameroon 2018 Human Rights Report, 13 March 2019, UN Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Cameroon CRC/C/CMR/CO/3-5, 06 July 2017

[30] USDOS, Cameroon 2018 Human Rights Report, 13 March 2019, p. 29

[31] UN Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Cameroon CRC/C/CMR/CO/3-5, 06 July 2017,

[32] Advocates for Human Rights, Cameroon: Committee on the Elimination of Discrimination Against Women 57th Session, 24 January 2014, Canada: IRB, Cameroon: Domestic violence, including legislation; protection

1.2.The Cameroon Constitutions and Domestic Violence Assessment

Cameroonian laws also have provision that protect human rights. Firstly the Constitution of Cameroon of 18 January 1996 in its preamble mention a good number of human rights under the Universal Declaration on Human Rights and especially those to the African Chatter On Hunan And People's Rights. The preamble of the Cameroon Constitution states that[33] we, the people of Cameroon, declares that persons without distinction as to race, religion, sex, or belief poses inalienable and sacred rights. Affirm out attachment to the fundamental freedoms enshrined in the Universal Declaration on Human Rights, the African Charter on Human And People's Rights and all duly ratified international conventions relating thereto, in particular the following principles[34]; All persons shall be equal before the law[35] the citizens shall have equal right to vote at the age of 20 years and above[36] no person shall be subjected to torture, cruel, inhuman and degrading treatment, the state shall guarantee all citizens of either sex their rights and freedom, no person shall be arrested on ground of origin, religious, philosophical or political opinion or believe subject to public policy.[37]

1.3.Concretising and Understanding of the Preamble of the 1996 Constitution of Cameroon

It provides;

> We, the people of Cameroon, … Resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate

provided by the state and support services available to victims (2014-2016), 21 April 2016, OECD Social Institutions and Gender Index, Country Profile: Cameroon, 2019

[33] law No 2008/001 of **14 April.** This law amended and supplemented law No 96/06 of **18 January** 1996 which itself amended the constitution of 2nd **June** 1972

[34] Preamble, constitution of the Republic of Cameroon, 18 January 1996

[35] **part 1 art 1 (1),**

[36] **art 2(3)**

[37] Ibid Preamble

The preamble also states that all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development; the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law. This same preamble of the Cameroon Constitution is as it specifies and embarks in protecting the fundamental human rights of all without discrimination. This preamble ensures that the concept of human right protection and recognition should be done without any iota of discrimination as to sex, status, nationality and other spheres of activities. This same Constitution in its Article 65 is to the effect that the preamble of the constitution is an integral part of the constitution. The notion of protecting women is given great relevance in this law in all aspect of implementation be it employment, health, education, nutrition and other country's activities. The question we should be asking ourselves is in ascertaining the continuous violation of women fundamental human right irrespective of the numerous relevant provisions provided by the constitution? The notion here should not in instituting laws, but showing its various levels of commitment on how women rights has been protected. The level of violation and right abuses is alarming when we all know that there is national recognised law that deal with the safeguarding and protection of individual human right. The country has even gone to the extend in amending the 1996 constitution,[38] yet the decree of violence done on women is in the increase. Women are discriminated at all levels of activities in the country from domestic violence to other activities.

1.4.The Cameroon Penal Code and Domestic Violence

Domestic violence is not recognized as a specific crime in Cameroon and we don't have a legal definition of domestic violence. Cameroon does not have specific legislation by which domestic violence can be prosecuted. The criminal law is notoriously silent and victims are left to rely on the general law of assault. Thus, acts of domestic violence can be prosecuted using the Cameroonian Penal Code under the following articles:

The Penal Code in its article 278 states that no person is entitle to torture, physical and moral integrity, it also protect the right to life. It also states that serious injury cause by

[38] The 2008 law rectifying and amending the 1996 constitution.

assault,[39] Slight Injury,[40]and Simple Injury[41] are punishable except in cases of self-defense if provided by the law[42]. The Penal Code also prohibits force marriages and penalize offenders with imprisonment and a monetary fine. It also punishes sexual harassment from six months to one year imprisonment and a fine of 100,000FRS, sexual assault from 5 - 10 years imprisonment[43]

According to Article 293 (1) of the Penal Code "(a) any person who reduces a person to or maintains a person in slavery, or (b) engages, even occasionally, in trafficking in human beings, shall be punished with imprisonment of from ten to twenty years." Moreover, procuring is criminalized under article 294 which provides that;

> "(1) Any person who causes, aids, or facilitates the prostitution of another individual or who shares, even occasionally, in the proceeds of the prostitution of another individual or receives subsidies from a person engaging in prostitution shall be punished with imprisonment of from six months to five years and fine of 20.000frs to 1.000.000 francs.
>
> (2) Any person who lives with an individual engaging in prostitution and who cannot provide proof of sufficient resources to enable him to provide for his own needs shall be presumed to be receiving subsidies."

Also prostitution is a punishable offence. Article 343 states;

(1) Any person of either sex who habitually engages, for compensation, in sexual acts with others, shall be punished with imprisonment for six months to five years and a fine of 20.000 to 500.000 francs

(2) Any person who publicly recruits individuals of either sex through gestures, words, writings or any other means, for purposes of prostitution, or debauchery shall be punished with the same penalties."

Additionally, Article 292 criminalizes forced labour. It states that;

> "any person, who in order to satisfy his personal interests, imposes on another person any work or service obligation for which that person has not

[39] article 279,

[40] (article 281)

[41] (article 280)

[42] Penal Code Section 278 - 281

[43] Penal Code art 365 of the 1981 law

freely applied shall be punished with imprisonment of five to ten years and/or a fine of 10.000 to 500.000 francs."

The Cameroon Penal Code in its Section 293 (1) provides that:

"(a) Any person who reduces a person to or maintains a person in slavery, or (b) engages, even occasionally, in trafficking in human beings, shall be punished with imprisonment of ten to twenty years."

Moreover, securing is at the level criminalizing which provide under article 294 states that

"(1) Any person who causes, aids, or facilitates the prostitution of another individual or who shares, even occasionally, in the proceeds of the prostitution of another individual or receives subsidies from a person engaging in prostitution shall be punished with imprisonment of six months to five years and fine of 20.000fr to 1.000.000 francs. (2) Any person who lives with an individual engaging in prostitution and who cannot provide proof of sufficient resources to enable him to provide for his own needs shall be presumed to be receiving subsidies."

The notion of prostitution has not been left out, it considered as a punishable offence under the Cameroon Penal Code. Article 343 states, "(1) Any person of either sex who habitually engages, for compensation, in sexual acts with others, shall be punished with imprisonment for six months to five years and a fine of 20.000francs to 500.000 francs (2) Any person who publicly recruits individuals of either sex through gestures, words, writings or any other means, for purposes of prostitution or debauchery shall be punished with the same penalties."

The situation of force labour has not been exempted under the Code. Article 292 states that "any person, who in order to satisfy his personal interests, imposes on another person any work or service obligation for which that person has not freely applied shall be punished with imprisonment of five to ten years and/or a fine of 10.000francs to 500.000francs." Cameroon has ratified the ILO Convention on the Abolition of Forced Labour and the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Cameroon signed the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, adopted by resolution A/Res/55/25, on 13 December 2000, but as of 09 October, 2003 had not ratified it. OMCT notes with concern that it is the prostitute who is punished rather than the client who goes free. As many prostitutes do not prostitute themselves of their free will, they are doubly victimised through these punishments.

2.0.EXAMINATION OF SOME OF THE OFFENCES OF VIOLENCE ON WOMEN UNDER THE CAMEROON PENAL CODE

The Cameroon Penal code has given room for a series of offences that can be consider as domestic violence and affects the status and rights of women within a given society. The offences are group in a particular order because they have common elements as they are committed through the use of force and intentional on someone. Even though with its varieties spelled out in the Penal Code, their mental elements that provoked them may not be the same.

2.1. ASSAULT OCCASIONING DEATH

This offence under the Cameroon criminal law system is considered as an involuntary homicide which is punishable under Section 278 of the Cameroon Penal Code which provides that:

"(1) whoever by force or interference unintentionally homicide another's death shall be punished with imprisonment for from six to twenty years.

(2) Where the force or interference is used in the course of any act of witchcraft, magic or divination, the punishment shall be imprisonment for life."

Looking from the above offence prescribed, one can say that for someone to claim that violence was used on him or her, the must be the use of force or the aspect of interference. The perpetrator has committed a physical act as act cannot be done on the victim by mere omission. The perpetrator must have used any part of his body or even an object to hit the spouse who is complaining of violence, and such spouse must have felt the physical impact of the act. What we really need to note here is that the defendant act must have resulted in the death of the spouse. There must be a direct causal connection between the act of the husband and his spouse which is necessary to proof that the offence was committed. Let's take a hypothetical example, there was a fight between a husband and a wife, the husband slapped the wife who suddenly collapses and was rushed to the hospital where the wife finally dies. The husband will be held criminally responsible for the wife's death even though his intention was not to see his wife dying.

Let's even say the act was not committed, because it is the role of the wife or spouse to prove that there was violence use on her by the husband. This can only be done with the presence of the intention which must be proven by the wife for it to amount to assault occasioning death. The observation of Lord Kenyon C.J in Fowler v. Padget[44] where he believes that in common

[44] (1798) 7 T.R. 509.

parlance, it is a principle that must be prove by the wife that there was violence or assault on her by not only talking about the use of force that lead to the death of the wife, but there must equally be the proof of the intention. The defendant needs not have intended the death of his spouse, so the presence of intention must be established. The provision of Section 74(2) of the Penal Code is clear when dealing with assault occasioning death by providing that:

> *"Criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omission of the offence with the intention of causing the result which completes it".*[45]

An observation under section 278 of the code is clear where its opine that the use of force or interference intentionally on the body of a spouse will amount to assault occasioning death, making the husband or defendant criminally liable and responsible for the act.

2.2. ASSAULT OCCASIONING GRIEVOUS HARM

This offence provided by the Cameroon Penal Code in its Section 279 by establishing that:

"(1) whoever by force or interference unintentionally causes to another the injuries described in Section 277 of this code shall be punished with imprisonment for from five to ten years and in a fit case with fine of from five thousand to five hundred thousand.

(2) Where use is made of a weapon of any explosive, corrosive or toxic substance, of poison or any other act of witchcraft, magic or divination, the imprisonment shall be from six to fifteen years".[46]

It can be examined in this offence that, for there to be assault occasioning grievous harm the presupposes use of force or interference on the body of a spouse with the intention of depriving the spouse of the use of her whole or part of any member organ or sense will be enough. For an action to be brought against the husband for assault, the wife must proof that the husband force or interference resulted to the wife permanent loss of the use of her whole or any part of any member organ or sense. When we talk about member organs here we are talking that the assault affected the wife organs like limb, leg or arm; that is those organs of the wife body that carries out special function like the kidney, pancreas, liver or even the lung. As to the senses here, we are talking about the five sense or faculties of sight, smell, hear taste or touch each

[45] Section 74(2) of the Penal Code that deals with intention or the meas rea in a crime

[46] Section 279 of the Penal Code

other enabling the wife to respond to stimuli. There must be serious harm or hurt on the person which affects or interferes with woman health or comfort.[47]

2.3. THE SITUATION OF SIMPLE AND SLIGHT HARM CAUSED ON THE WOMAN

This is provided by Section 280 of the Penal Code which provides that:

"Whoever by use of force or interference causes intentionally or unintentionally to another any sickness or inability to work lasting more than thirty days shall be punished with imprisonment for from six months to five years or with fine of from five thousand to two hundred thousand francs, or with both such imprisonment and fine."[48]

For there to be proof of simple harm that is done on the wife, or spouse, the person must be able to establish that there was a force or interference that was caused on her by the husband and this resulted to sickness or inability to work which lasted for more than thirty days. There was the lack of skill, carelessness, rashness or even disregard of regulations which causes the wife harm, sickness or incapacity to work.

Regarding that of slight harm, the offence is punishable under Section 281 by providing that:

> *" whoever by force or interference causes intentionally or unintentionally to another any sickness or inability to work lasting for more than eight days and up to thirty days shall be punished with imprisonment for six days to two years or with fine of from five thousand to fifty thousand francs or with both such imprisonment and fine"*[49]

Looking at the two offences, that is simple and slight harm, they are similar as the defendant must have use force or interference on the spouse which must have caused the spouse some sickness or inability to work for a number of days.

2.4. ASSAULT ON WOMAN WITH CHILD

This offence is handling in Section 338 of the Penal Code by providing that:

"Whoever by force used against a woman with child or against a child being born causes intentionally or unintentionally the death or permanent incapacity of the child shall be punished

[47] Curzon L.B, Criminal Law, 2nd edition, M& C Handbooks, pp.11 [[YEAR OF PUBLICATION///]]

[48] Section 278 of the Penal Code

[49] Section 281 of the Penal Code

with imprisonment for from five to ten years and with a fine of from one hundred thousand to two million francs".[50]

From the position established above, one can say that there must be the presupposes use of physical violence against a pregnant woman or even against a child being born. The physical violence used must produce a result which can either cause the death of the spouse, or cause the spouse child permanently incapacitated. Here we are talking about the health of the child. The child can be born strong and healthy, but because of the physical violence that was done on the mother when pregnant, she continues to suffer from serious injuries resulting from the violent act of the husband. The husband cannot in any way deny this act as it is establish that the physical force used by the husband produces the required result that the wife is suffering. The Cameroon Penal Code has offered great and special protection to a pregnant woman. Reference of this can be demonstrated in **Section 22(3)** of the Code which provides that:

"No Woman with child may be executed until after her delivery".

This offence in question can lead or related to the offence of abortion of a woman with a child as it can be committed anytime from the conception of the baby to its delivery when it becomes an independent human being distinct from its mother. Section 337(2) of the Code reads:

> *"whoever procures the abortion of a woman, notwithstanding her consent, shall be punished with imprisonment for from one to five years and with fine of from one hundred thousand to two million francs."*

It is therefore possible that the use of force on a pregnant woman with a baby can leads to abortion as specified in the case of assault on a woman with a baby. All these offences illustrated are just to show how our criminal code handles issues of violence on a woman.

3.0.Domestic Violence is not prosecuted under the Cameroon Criminal Law

Domestic violence in Cameroon is a pervasive problem. A 2004 study found that, of 2,570 women, 995 (38.7%) reported physical violence and 381 (14.8%) reported sexual violence.[51]These data match more recent statistics, including a study from Douala-based La Maison des Droits de l'Homme that approximately 39 percent of Cameroonian women suffered

[50] Section 338 of the Penal Code

[51] Alio, Amina P., et al, "Association between intimate partner violence and induced abortion in Cameroon," 112 International Journal of Gynecology & Obstetrics 2 (Feb. 2011).

from physical violence in 2008.[52]These numbers indicate that little has been done to stem the epidemic of domestic violence in Cameroon in recent years. The vast majority of victims are female: 92% of domestic violence victims in Cameroon are women. Cameroon's Penal Code does not specifically criminalize domestic violence. Victims are thus left to rely on the general assault provisions in the Penal Code, which address murder (Articles 275 and 276), grievous harm (Article 277), assault causing death (Article 278), assault causing grievous harm (Article 279), simple harm (Article 280), failure to assist women abandoned by their husbands (Article 282), and assault of a pregnant woman (Article 338).[53] In its National Report, the Cameroon Government asserts that domestic violence and spousal abuse will be "better expressed in the penal code currently under revision" and in the meantime, such crimes can be punished through "various classifications of injuries" under the existing legal framework, described above. But the process to prosecute these "injuries" under the current code is anything but clear in the context of domestic abuse. Cameroon asserted in its National Report that: "…with regard to punishment for spousal rape, 'any man who uses physical or moral violence to have sexual relations with a woman shall be punished by imprisonment for a term of five to 10 years[54]'. However, the United States State Department and reputable human rights organizations refute that statement, arguing that Article 296 of the Penal Code does not apply to spousal rape. In its National Report, Cameroon also indicated that: "A husband who uses violence to force his wife to have sexual relations with him may be prosecuted for causing intentional injury, depending on the severity of the violence; all of this is a question of fact left to the discretion of the judge hearing the case of the victimized wife." Further, rather than focusing on the lack of consent, criminal justice hinges on the presence of injury which may not be visible, present, documented, or difficult to prove. Based on these (potentially conflicting) statements, it is unclear as to what exactly the legal system provides in terms of enforcement against spousal rape and, more generally, domestic violence.

[52] NGO Report On the implementation of the ICCPR (Replies to the List of Issues, available at CCPR/C/CMR/Q4)http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GeED_Cameroon_HRC99.pdf (last visited August 20, 2020

[53] Immigration and Refugee Board of Canada, Cameroon: Domestic violence, including legislation, availability of state protection and support services for victims, 2 December 2010, CMR103371, available at: http://www.refworld.org/docid/4db7b9d92.html (last accessed 23 August 2013).

[54] article 296 of the Penal Code.

Moreover, victims of domestic abuse have little recourse for protection. There is no domestic violence law in Cameroon that provides women with an order for protection against abusers. The Family Code, drafted in 1997 to address issues of domestic violence, has remained on the shelf, un-adopted and unimplemented. Stakeholders see this failure to adopt the law as a lack of political will to address domestic violence. Women seeking to escape the violence through divorce are further hindered by the fact that spousal abuse is not a legal ground for divorce.[55]

4.0. The situation of Sexual and Reproductive Offences in Cameroon: An Abortion Policy understanding

Abortion is forbidden in Cameroon. There are two exceptions to this rule laid down under article 339 of the Penal Code: when a woman becomes pregnant after rape or when the woman's health is in great danger because of the pregnancy. Anyone performing an illegal abortion is subject to one to five years' imprisonment and a fine of 100,000 to 2 million CFA francs. A woman who procures or consents to her own abortion is subject to imprisonment for ..fifteen days to one year and/or a fine of 5,000 to 200,000 CFA francs. Penalties applied to medical professionals who perform illegal abortions shall be doubled and they may be prohibited from carrying out their obligations or be subject to having their professional premises closed. The UN Human Rights Committee stated in 1999, in its concluding observations concerning the human rights situation in Cameroon, that:

The Committee is concerned that the criminalization of abortion leads to unsafe abortions which account for a high rate of maternal mortality. According to the World Bank, the maternal mortality rate in 1999 was at 430 for 100.000 living births.

4.1.Examining the Importance of the Civil Status Registration Ordinance: A Fundamental Effort in Civil Law explanation

Birth registration helps prevent statelessness by establishing a legal record of where a child was born and who his or her parents are. As such it serves as a key form of proof of whether a person has acquired nationality by birth or by descent. The poor functioning of civil registration centres throughout Cameroon has resulted in a very low level of birth registration, which seriously affects the rights of unregistered children to identity documents and access to basic services.[56]

[55] Country Reports on Human Rights Practices for 2012: Cameroon, U.S. Department of State (2012), at 27.

[56] CRC/C/CMR/CO/2, 53rd session, 18 February 2010, *para* 33.

The Civil Status Registration Ordinance subjected to law No 2011/011 of 6 May 2011 to amend and complete some sections of the provision of ordinance No 81/02 of 29 June 1981 on the organization of the civil status registration and various aspect relating to physical person in section 77(2) , states that upon the death ofthe husband, the heir to the husband has no right to control the widow on how to dispose her husband's property. She can remarry after the 180 days of widowhood without laying hands or claims on the husband property[57]. The Civil Status Registration Ordinance 81/02 of 29 June 1981in its art 65 states that consent to marriage shall not be obtain through force, threat or abuse. Women are given the right to initiate divorce if it include; adultery or domestic violence art 229 - 246. Thus the law protects women.. rights.[58]

In Cameroon, both marriage statutory and customary are important and worth celebrating and recognizing. Dealing with the aspect of marriage in Cameroon, there are always and will always be three types of marriages. Looking at the case at hand, civil and customary are recognised by the law. Talking about civil marriages, under the civil law, marriages require the presence of a civil officer and the consent of the two spouses[59] Moreover, consent cannot be obtained through violence or abuse or threats. Article 65 of the ordinance is clear when it talks of consent in marriage. It stipulates that under no circumstances or condition should a marriage be celebrated between the parties without consent. That even when there is consent between the parties in marriage such consent should be free from any infelicities. Their consent must be based on free will, that is to say meeting of the minds between the parties to the marriage contract. There should be no use of force, threat, intimidation, undue influence, person in authority for the marriage to be celebrated. If any of the cases above is discover even after the marriage has been celebrated, that situation will render the marriage null and void, making the marriage invalid. The Convention on the Protection on the Right of a Child is clear when it defines and placed the valid age for a child to attain the age of adulthood. Contracting any marriage without the consent of the parties will render it void. The parties must be able in understanding the ceremony in which they engaged. There must be able in possessing a sound

[57] Law No. 2011/ 011 of 6th May, 2011 to amend and complete certain provisions of ordinance No. 81/02 of 29th June 1981 on the organization of the civil status Registration and various provisions relating to the status of physical person, section 77(2)

[58] Civil Code Ordinance 81/02 of 29 June 1981

[59] Civil Code, Ordinance 81-02, Article 64, 1981.

mind, sound memory and understanding before the marriage can be celebrated. The situation of lack of consent of marriage is a common phenomenon in Cameroon especially in those areas of the country where the girl child or women are not valorised. This is very common with the Muslim tradition where children are betrothed from birth to those who are old enough to be their parents in the name of family relationship. The situations become precarious as the child grows up with the notion that she is already married to someone. It becomes difficult for the child to denounce the marriage as she believes that she has to respect the parents. Reinforcing this law, the State Penal Code prohibits forced marriage and penalises offenders with imprisonment and a monetary fine. Polygamy is permitted by the law and deeply rooted in tradition.

At the time of writing, there are no laws prohibiting harmful practices against widows. There is a stigma attached to widows and traditional widowhood rites are practiced particularly in rural areas of the country. Widowhood rites may vary across religions, ethnics or tribal affiliations, subjecting widows to degrading, humiliating, discriminating and inhumane practices. These include being dispossessed of their husbands property, publicly blamed for their husbands' death, forced to prove their innocence through traditional rites, forced to have sexual relations or marrying their husbands' relatives, forced to sleep on the floor, shaved and publicly unclothed, forced to beg for food or forced to be imprisoned in their own homes.

4.2. Unveiling the Situation and Complexities in Child Marriages

Under statutory law, the legal age of marriage is 15 years for girls with parental permission, and 18 years for boys[60]. In 2016, the state adopted a new Penal Code, which criminalizing forced marriage, penalizing offenders with five to ten years in prison, as well as a fine of CFAF 25 000 – 1 000 000 (CFA franc). **Section 356** of this law states that:

"Whoever compels anyone to marry shall be punished with imprisonment for from 5 – 10 years with a fine of from CFAF 25,000 – 1,000,000.

Where the victim is under the age of 18, the punishment may not be less than 2 years imprisonment, whatever the mitigating circumstances. Whoever gives in marriage a boy or a girl under 18 shall be punished as under the last two foregoing subsection. Under conviction, the court may deprive the offender of parental power and disqualify him from being the guardian or curator of any person for the time prescribed by section 31 (4) of this penal

[60] Ordinance 81-02, 1981 in its Article 52

code."[61]This situation of preventing child marriage is just a nightmare in Cameroon. Child marriage is most common in the northern part of the country where three-fourths of women aged 20-29 were married before they turned 16. Prevalence is highest in North of Cameroon, where 79 percent of girls marry early. Most of the girls in the northern part of the country are given to much older suitors when they are 11 or 12 years-old according to Demographic and Health Surveys. Cameroonian girls are susceptible to early marriage because cultural and social norms dictate they marry earlier than boys, as it is believed that the future and dignity of girls in the country is secured only in her marital home. Girls are therefore denied the opportunity to go to school because they are expected to do chores such as cooking, fetching water and cleaning the home in preparation for their married life.

In the northern part of Cameroon, girls are often told early that marriage is their primary destiny. Girls are therefore advised and forced to marry at a young age and consequently forced to finish their schooling early. The fact that early marriage can be a major financial boon compounds the impetus to marry them off early. According to culture, the groom provides what is known as "bride wealth" to the girl's family in the form of livestock, cash or goods. The younger the girl, the higher the bride price, which incentivizes poor families to marry off their daughters before they even hit puberty. Additionally, older men often seek younger women as a means of boosting their virility and avoiding infections, as it is believed that a young and a virgin bride is pure- a characteristic much valued in Cameroonian culture. Faced with these statistics, one is pushed in continuing asking how policies can prevent such high rates of child marriage. This question is even more urgent considering that we know that child marriage affects the lives of girls with regards to barriers to education, continuous intergenerational poverty, higher health risk (increased risk of obstetric fistula, STIs related risk and pregnancy related complication), undermines the dignity and safety of girls and infringes on the rights of girls. Further, child marriage robs girls of their childhood and the option to pursue an education and exercise the right to choice as they are thrust into adult roles, which often includes forced sex and pressure to bear children, before they are ready.

4.3.Customary Law under the Southern Cameroon High Court Laws

Section 27(1) of the Southern Cameroon High Court Law, 1955, provides the recognition and enforcement of only customary law which is not repugnant to natural justice, equity and good

[61] Section 356 of the Cameroon Penal Code

conscience or incompatible either directly or by implication, with any existing law of the land. In the light of the authorities whenever there is a conflict between any written law and custom, the former shall prevail.[62] In order to arrive at this, certain conditions must be met. First, the custom must be reasonable and must have been practised from time immemorial.[63] Secondly, the customs must pass two tests, namely, the repugnancy and incompatibility tests. That is to say for the custom to be applicable it must not be :

i) Repugnant to natural justice, equity and good conscience or;

ii) Incompatible either directly or by natural implication with any written law for the time being in force. The controversy as to the application of customary law has been resolved by subjecting the validity of customary law to decisions of non-customary courts. In the Nigerian case of *Liadi Giwa v. Bisiriyu Erinmilukon,*[64] Taylor, F.J. pointed out that:

> *"It is a well-established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety and has been frequently followed by the courts that judicial notice would be taken of it without evidence required in proof ".*

Gender discrimination is one of the most notorious features of customary law. The woman finds herself in a male-dominated society. Men control the institutions that have been set up around her. In traditional Cameroonian societies, a man's wealth is still said to be measured by the number of wives and children he has. Generally, women are considered as property and cannot own property. Traditionally, women are men's property, to be handed over to male inheritors, along with other property at the time of a husband's death. Customary law does not countenance the sharing of property, especially landed property, between husband and wife on divorce. The wife is still regarded as part of her husband's property. Gender discrimination under customary law is partly founded on the notion of dowry. Indeed, under most customary laws, dowry is used as a measure to justify certain discriminatory practices against women, notably the refusal to grant them inheritance and succession rights. Under customary law,

[62] C. ANYANGWE, *The Cameroonian Judicial System,* Yaounde : CEPER, 1987, p. 243.

[63] J.N. TlEMNGAH, *The Rights of Widowhood in Former West Cameroon. A* Case Study of the Fungom Area, *(maîtrise* dissertation), Faculty of Laws and Economics, Yaounde, 1990, p. 45.

[64] [1961] 1 All N.L.R. 294

dowry has great significance. In the South West Court of Appeal case of *Kwela Theresia Amih v. Amih Sam,*[65] his Lordship, Justice Ebong, explained the role of dowry in customary marriages. He wrote, at page 2 of his judgment:

> *Dowry in customary marriage plays an important part as dowry is in fact the first indication of the seriousness of the suitor not only in Cameroon but in most African countries. But to whom this dowry is paid differs from Conflict between Customary Law and Human Rights in Cameroon from one custom to other, but in most cases the dowry is paid to the parents and family of the woman, and not to the woman.*

It was observed that section 27 (1) calls for the recognition and enforcement of laws which are not repugnant to natural justice equity and good conscience. Gender inequality as sanctioned by customary laws is best reflected in the domain of succession and inheritance. Under most customary laws, women cannot own or inherit property from their parents or husbands. In fact, women are regarded as legal minors. In the event of the death of her husband, a widow may be inherited along with other property by her husband's relatives.

The Cameroonian Customary law also dictates that, in the presence of suitable male heirs, a daughter cannot inherit on the intestacy of her deceased father. The courts have often rejected this patriarchal interpretation of custom as reflected in the High Court of Fako decision in *Nyanja Keyi Theresia & 4 Ors. v. Nkwingah Francis* Njanga and Keyim administrators of the estate of Keyi Peter.[66] The deceased, who was polygamously married, died in 1997. During his illness and burial ceremony, his brother and his cousin took care of him. After the burial, on the strength of a family meeting, the deceased's brother and cousin were appointed next of kin[67] to the deceased's estate on behalf of the children who were by then adults. They were subsequently issued letters of administration over the deceased's estate. The deceased's daughter disapproved of the way her father's estate was administered, alleging that the

[65] Court of Appeal of the South West Region: Suit No: CASWP/CC/86/95: unreported.

[66] High Court of Fako Division: Suit No. HCF/AE57/97–98: unreported.

[67] A next of kin declaration is a preliminary document to the issue of letters of administration in the former Southern Cameroon. It is issued by a competent customary court, upon an application tendered before the court, appointing a beneficiary to exercise control over a deceased's estate. Upon obtaining the declaration, the beneficiary must proceed to the High Court where letters of administration may be issued on the strength of the declaration.

administrators had failed to consider the interest of the deceased's children and had been cruel to them. The administrators claimed that the deceased's daughter and her mother had been partially responsible for the deceased's death and, by virtue of that fact the daughter was not entitled to benefit from the estate.

The court found that the defendants (administrators of the deceased estate) had not established any proof that the deceased died as a result of the action of his daughter and her mother. And even if there had been problems between them that fact would not be weighty enough to divest her of her father's property, even on the strength of a family meeting. Accordingly, the court revoked the letters of administration granted to the defendants for poor management of the estate and made an order issuing new letters of administration to the deceased's daughter on behalf of all the beneficiaries.

However, in Cameroon, this is a rare and isolated situation to reiterate, female children may only inherit property in the absence of suitable male heirs, be they brothers or relatives. This situation has changed for the fact that Cameroon has ratified human right instruments as to recognizing female rights, emphasizing that even the female issues can inherit property.[68] Thus, it may not be presumptuous to conclude that had the defendants not abused the administration of the estate the daughters of the deceased would not have shown any interest whatsoever in it. The daughters had found themselves forced to seek administration over the estate for reasons not associated with discrimination. Nonetheless, the court was swift to identify gender discrimination in the custom under consideration, which denies female children the right to intestate succession.

Similarly, in the infamous legal drama of *Chibikom Peter Fru & 4 Ors v. Zamcho Florence Lum,*[69] the Supreme Court was called upon to rule on a patriarchal custom that denies a married daughter the right to succeed on the intestacy of her deceased father. The deceased died intestate in 1985 and was survived by several wives and children, most of whom were males. However, the eldest of these children, Zamcho Florence Lum, was a female. Upon the death of

[68] reference is made here as to the Convention on the Elimination of all Forms of Discrimination against Women(CEDAW) in which Cameroon is a signatory which frowns on some harmful and obnoxious practices against women in which one of them is those related to the discrimination as to the ownership of property and also that of inheritance.

[69] Supreme Court judgment No. 14L of February 14, 1993. In the South West Court of Appeal, it was registered as Suit No. CASWP/17/931: reported in Cameroon Common Law Report (CCLR), 1997, 213–223.

her father, she applied for a next of kin declaration before the Mankon Customary Court. The court temporarily declared her next of kin of the estate of the deceased until a 'proper' successor was selected in the near future from among the boys proven within family circles to be worthy of controlling the estate of the deceased. On the strength of the next of kin declaration, she was then awarded letters of administration by the Mezam High Court. However, in 1989, some members of the family, including some of those who had supported her application to be made next of kin at the customary court, brought an action at the High Court requesting, among other things, the cancellation of the letters of administration granted to her. The trial judge dismissed the application but ordered Florence to render accounts of her administration of the estate to the Administrator General. Dissatisfied with the rejection of their request, they lodged an appeal against the verdict of the High Court to the North West Court of Appeal, sitting in Bamenda, the regional capital. The Court of Appeal allowed the appeal and disqualified Florence from administering the estate. Aggrieved by the decision, Florence proceeded on further appeal to the Supreme Court. The Supreme Court annulled the decision of the North West Court of Appeal and referred the matter for hearing and determination before the South West Court of Appeal, sitting in Buea, the regional capital.[70] The Supreme Court's referral was based on two recommendations: first, the North West Court of Appeal violated the preamble of the constitution by discriminating against Florence as a female and, second, a custom that prohibits married women from benefiting on the intestacy of their parents is repugnant to natural justice, equity, and good conscience and, thus, offends the provision of section 27 of the SCHL, 1955.

The South West Court of Appeal was requested to consider the original appeal filed against Florence in the North West Court of Appeal and the main issue was the allegation that she was not a fit and proper person to administer the estate of her deceased's father.

[70] Previously, (before December 2006), in entertaining appeals, the Supreme Court of Cameroon operated through the doctrine of *renvoi.* Once it received an appeal from one of the ten regional Courts of Appeal in the country, rather than determining the appeal on its merit, it would issue legal recommendations and refer the matter to another coordinate Court of Appeal for determination. With respect to appeals coming from one of the two Anglophone regions of the country, as was the case in this appeal, the Supreme Court would remit the appeal to the Court of Appeal of the other Anglophone region. Based on the provisions of Law No. 2006/016 of December 29, 2006 (to lay down the organization and functioning of the Supreme Court), the Supreme Court no longer entertains appeals through the process of *renvoi*. Appeals are determined based on their merits.

4.4.The Position of the Cameroon Labor Code

Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. (Article 23)

The Cameroon labor code governs labor activities between wages earners, employers and apprentices. It is aimed at providing for rights and duties in labor affairs. The text does not only guarantee rights of male workers but also female person. Its definition of a worker is not discriminatory. Article 2 define a worker as any person irrespective of sex or nationality who has undertaken to place his services in return for remuneration under the direction and control of another person whether individual, private or public corporation considered as the employer. For the purpose of knowing whether a person is a worker, an account shall be taken on legal position of employers and employees.[71] The word sex referring to gender is to the effect that there is no preference of males as to female when it concerns a worker in Cameroon. In suspension of a contract of employment the labor code does not omit the issue of maternity leave which is only for women or female persons as seen in article 32(d). It guarantees female and male workers equal remuneration in different types of work and level of proficiency in its article 61(2).

Article 82(1) protects women as it sets out minimum working hours for them. Subsection two prohibits night work in industries for women but does not apply to women with executive duties and women working in services not involving manual labor.

Part V, chapter III of this document is entitled 'Empowerment of Women, Young Persons and Children'. It gives out provisions only to women and guarantee lots of rights to them. It prohibit pregnant women from doing certain kinds of activities, terminate their contract of employment, 15 months break for nursing mothers, and it taken into consideration the capabilities of women and children in performing certain duties by them been approved medical practitioner in order to ascertain that the work allotted to them is not beyond their strength. With all the above, it is evident that lots of legislation have been put in place towards guaranteeing, promoting and protecting the rights of women towards full development. This can be seen through the numerous legal text and legislations put in place to ensure protection of women rights internationally and Cameroon in particular even though there is no specific text regulating aspect of domestic violence in the country. It should be noted that the Labor Code protects

[71]Art 2 of law No 92/007 of 14 August 1992 instituting the Cameroon labor code

women and children in the field of employment. Article 83(1), states that "the responsible labour inspector may require women and children to be examined by a qualified medical practitioner, to verify that the work they do is not beyond their strength." Further, para. 2 provides that "no woman or child may be obliged to continue doing work demonstrably beyond their strength, but must be assigned to more suitable work. If that is impossible, the contract shall be terminated at the expense of the employer. Equality between men and women as regards employment is guaranteed not only by the Constitution but also by the General Civil Service Regulations and the Labor Code. The Labor Code recognizes the right of every citizen to work and states that the state should do everything possible to assist citizens in finding employment and keeping it once it has been obtained.[10]

Labor legislation is not discriminatory per se and offers the same opportunity for employment and the right to equal pay and treatment for the same work. However, the labour force has more men than women even though women form more than half of the population of the country. Women are more prominent in the informal sector where it is more of self-employment such as subsistence farming, petty trading, and domestic work. Their work is not statistically included in the gross domestic product of the country and it does not feature anywhere in the national employment statistics. They do not count for eligibility for retirement and other work related benefits.

Decree 81-02 of June 29, 1981, however, permits a husband to oppose his wife's employment by invoking the interest of the household and children. This is discriminatory. The Cameroonian Labor Code provides for complete freedom in negotiating an employment contract. The worst gender discrimination occurs in hiring, particularly in the private sector. In fact, given the complete freedom to negotiate an employment contract, women of equal competence are often victims of discrimination in pay because of their gender. The paucity of the number of women found in the formal sector is due to the incapacity of women to compete for formal jobs because women are proportionately less educated. More women are becoming poorer and feminisation of poverty is taking a firm root. Women are not adequately protected in their jobs. There is no law on sexual harassment in Cameroon. They are therefore subjected to the whims and caprices of male bosses and colleagues. Therefore dismissal may be subjective. The social security system is still in its embryonic stage as only 10% of the population benefits from it. Women's work is also limited by the fact that childcare services

are inadequate. The major responsibility for the welfare of a family is on the woman, a fact which impedes her employability and wellbeing.

4.4.1. The Cameroon Labour Code and Sexual Harassment

Sexual harassment is listed as an offence in the draft update of the Penal Code. A charge of sexual harassment will cover most if not all relevant circumstances, as the Code provides punishments for whoever abuses the authority of his position to harass another by giving orders, making threats, imposing constraints or exerting pressure in order obtain sexual favours. When women domestic workers are found to have been subjected to violence, deprivation of freedom or exploitation, the alleged perpetrators are liable to the punishments laid down in the Penal Code for violence and deliberate assault as experienced in Article 278 of the Code or for sequestration, Article 291 lays down punishments for whoever anyone in any manner deprives another of his or her liberty or even for abuse of the vulnerable seen in Article 349. For the purposes of this charge, the abuse consists in the exploitation of the needs and weaknesses of a minor; the circumstances that might constitute such abuse are left to the discretion of the court.

Conclusion

Human rights nowadays is highly promoted and protected by international customs, treaties as well as national laws. Fundamental human rights encompass all humanity and the rights are attached to man as man becomes humanity. Women are not exempted from such rights and should be treated fairly by their partners, relatives and community. There is the need to protect women's rights no matter the fact that they still face violence every day. This work affirms that women rights are promulgated and guarantee by international instruments such as the Convention on the Elimination of all Forms of Discrimination against Women, the Maputo Protocol, the Universal Declaration on Human rights, and Declaration on the Elimination of Discriminations against Women. These rights are also indicated in the constitution, penal code, criminal procedure code of Cameroon.

Though the State has done so much in eradicating domestic violence against women, some malpractices such as breast ironing, FGM, sexual harassment, physical violence and more still exist. In the cause of carry out their mission of protecting and promoting women's rights, they faces a lot of roadblocks ranging from inadequate funds, personnel, unawareness, lack of a service car to carry out their activities and many more. Even though so many laws have been put in place to protect human rights and women's rights in particular, women are still victims

of domestic violence. This continues to place threat on the socio-economic situation of the country since the respect of human rights and that of women is indispensable.

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3. Southern Cameroon High Court Laws, 1955, sec 27(1)
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CYBER CRIME IN INDIA: A CRITICAL STUDY IN MODERN PERSPECTIVE

- CHARU BHATT

INTRODUCTION

Cyber Law is considered to be the law which governs the computer and internet technology. Cyber Law does not require the new communications systems. The digital technology per se have drastically transformed our lives. Every individual is directly or indirectly connected to the digitalized world. With the introduction of the computer and digital age, industries have witnessed massive transformation in terms of quality, quantity and speed. The world today is an information rich world and thus digitalization and internet becomes the core for every field of human life. It may be accentuated that recently cybercrime rate has incremented to unprecedented levels.

In the present era of the cyber world, maximum information is considered to be online and therefore, is prone to cyber threats and crime both. Cybercrime is regulated by cyber laws or internet laws.

CYBERCRIME

Cybercrimes, in simplified terms may be understood as the offences which is committed using the medium of internet. These also have a tendency to include such crimes which are illegal in nature. Cybercrime as a term may be considered to be an umbrella term under which various illegal activities may be grouped together. Several activities takes place in the cyber space and this enables the perpetrators to indulge in various types of activities known as cybercrimes.

Cybercrimes are majorly committed through technology, and therefore, the crimes are committed by a person who has a sound knowledge of internet and computer applications. Some of the crimes may be classified as cyber-terrorism, cyber stalking, e-mail spoofing, e-mail bombing, cyber pornography, cyber defamation, polymorphic virus, worms etc. Some of the conventional crimes may also be designated as cybercrime if and when committed through internet like theft, mischief, fraud, misrepresentation, pornography, threats etc.

Cybercrime per se has not been statutorily defined. Even the Information Technology Act which deals with the aspects mentioned above fails to define the term cybercrime. However, it may be defined as those species of crime in which computer is either an object or a subject of

conduct constituting the crime or it may even be both[72]. The term cybercrime may be defined as "unlawful acts wherein the computer is either a tool[73] or a target[74] or both". Thus, it may be stated in simplified terms that any activity that uses computer as an instrumentality, target or a means for perpetrating further crimes, falls within the purview of cybercrime.

According to the United Nations Congress on Prevention of Cyber Crime and Treatment of Offenders[75], the term cybercrime may be categorized as follows:

a. In a narrow sense cybercrime connotes a computer crime and also includes any illegal behaviour directed by means of electronic operations that targets the security of computer systems and the data processed by them.
b. In a broader sense, cybercrime includes all the computer related crimes and may consists any illegal behaviour committed through the means of, or in relation to, a computer system or network which may also include such crimes such as illegal possession and offering or distributing information by means of a computer system or network.

CLASSIFICATION OF CYBERCRIMES

Cybercrimes may be categorized as follows:

a. Classification based on the role of computer in cybercrime[76]

i. When computer is used as a target: There exists a wide range of criminal activities in which, the target is a computer wherein data is stored. And it may accordingly be accentuated that unauthorized access to the computer may be both physical and virtual. When the crime is committed using the computer as a target such offences include theft or blackmail etc.

ii. When Computer is used as a tool: In this category, crime may occur without computer but instead computerization helps the crime to occur faster. An

[72] Pawan Duggal: Cybercrime (2003) p. 17
[73] Cybercrimes which involve computer as a tool are usually modification of convential crimes ' such as drug-trafficking, on-line gambling,, financial fraud or forgery, cyber defamation, pornography, intellectual property crimes, cyber stalking, spoofing etc.
[74] Cybercrimes where computer is a target include sophisticated illegal activities such as unauthorised access to networks or computer systems, e-mail bombing, Trojan attacks, data diddling, denial of service attack, Internet time theft, logic bombs, virus or worm attacks.
[75] Tenth U.N. Congress on Prevention of Crime & Treatment of Offenders was held in Vienna on April 10-17, 2000.
[76] Prof. Shilpa S.Dongre, Cyber Law and its Applications, current publication, 2010.

example of the same may be illustrated like the fraudulent use of credit card and account, online theft of money.

b. *Classification based on perpetrators of cybercrime*[77]

i. Insiders and Outsiders: Insiders may include employees who may misuse the payroll system and software of their company for their personal benefit. However, if the hacking is committed for fun and challenge to break the passwords it means it has been committed by an outsider.

ii. Hackers: A hacker may be defined as "a person who practices hacking is called a hacker. A hacker can be breaking into computer that's yours, often not wanted, and now prohibited by law."[78]

c. *Classification based on victims of cybercrimes*[79]

i. Crime against individuals

- Identity theft: This categorization means the theft of another person's identifying information. Under this category, the criminal uses the information of another to represent him as that victim.
- SMS Spoofing: Spoofing is considered to be blocking through spam. Spam in simplified terms mean unwanted, uninvited SMS or E-mails. In this category, the criminal steals the identity of another in the form of mobile phone number.
- Hacking: Hackers have the tendency of hacking the password of e-mail accounts of the victims. "Hacking occurs when a person's or groups of people's use of a computer is unauthorized, specifically when this use is trying to bypass a computer's or network's security measures."[80]
- Cyber Stalking: Under this category of cybercrime, electronic medium like internet are used majorly to harass, pursue or contact another in an unsolicited advice fashion. Cyber Stalking may be defined as "the new form of the computer related crime occurring in our society. Cyber Stalking is a crime in which the attacker harasses a victim using electronic

[77] *Ibid.*
[78] Dr. S.R. Myneni Information Technology Law Asia Law House, 1st edition 2013.
[79] Prof. Shilpa S.Dongre, Cyber Law and its Applications, current publication, 2010.
[80] Dr. S.R. Myneni Information Technology Law Asia Law House, 1st edition 2013.

communication, such as e-mail or instant messaging, or messages posted to website or a discussion group."[81]

- Carding: Carding means unauthorized use of ATM Card, Debit Card, and Credit Card etc.

ii. Crime against economy: One of the most dangerous form of cybercrime is the crime against economy.

- Cracking: Under this category of cybercrime, crackers are considered to be someone who breaks a computer system with criminal intention to steal the computer data.
- Phreakers: The individual who attacks the public telephone system for the purpose of diverting service so that calls can be made free of cost.
- Malicious Programs: This category of cybercrime includes virus, worm, logic bomb, Trojan Horse and Hoax. These are some of the dangerous types of cybercrimes that may be committed against an individual.
- Cyber Fraud: Any sort of online trading which is fraudulent is known as computer fraud.
- Cyber Squatting: When a domain name is used with bad intention from getting profit from the goodwill of the trademark which belongs to someone else, this sort of crime is known as cyber-squatting.

iii. Crime against society

- Porno Mailing: Any sort of obscene and objectionable materials sent through the internet is called porno mailing.
- Social Citing: Any wrongful use of social citing in order to spread hatred.
- Cyber Pornography: Section 67 of the Information Technology Act, 2000 enshrines that "whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, to see, to hear the matter contained or embodied in it shall be punished as per Act."

[81] Dr. S.R Myneni Information Technology Law Asia law House, 1st edition 2013.

iv. Crime against national security

- Cyber Warfare
- Cyber Terrorism: Any unlawful attack against the computer is known as cyber terrorism. In general, the terrorist uses this platform to spread a propaganda.

CYBERCRIME IN INDIA: A CRITICAL ANALYSIS IN THE PRESENT SCENARIO

With approximately 688 million users, India is the second largest internet market in the world[82]. With the global world moving towards digitalized era, India as a developing nation is trying to implement the Digital India project and is also moving towards cashless economy. The success of the Digital India project would majorly depend upon the maximum connectivity with minimum risks of cyber security. India, having a poor record of cyber security mechanism, the implementation of Digital Economy becomes difficult. The world because of this digitalized era faces a new era of criminal activities in the world of cyber space, which are being committed across the world, irrespective of the territorial and geographical boundaries. At one hand, the internet provides for an opportunity to link people together like never before, it also on the other hand provides for an endless opportunity to criminals to exploit and commit cybercrimes. The jurisdictional problem of cybercrime manifests itself in three different ways:

a. *Lack of criminal statutes:* Majority of the countries either do not have in place cybercrime laws or don't have an updated and effective cybercrime statutes. In this context it may be stated that India has an alarming cybercrime rate. According to the Indian Computer Emergency Response Team (CERT-In) 27,482 cases of cybercrime were reported from January to June 2017[83]. Thus, it may also be stated that cybercrime rate from January to June of 2017 in India is one cybercrime after every 10 minutes.[84] It may also be accentuated that the according to the National Crime Research Bureau there has been a sharp increase in the number of reported crime in 2017 in comparison to the years before 2017. And it may also be stated that the ratio between the conviction and detection of cybercrime in India is embarrassingly low. Maharashtra, which is considered to be the leading state in cybercrime offences being committed, from 2012 to July 2017, 10,419 cybercrimes were filed, out of which only 34 were convicted. The

[82] Digital population in India as of January 2020, STATISTA, (Jan 21, 2021), www.statista.com/statistics/309866/ india-digital-population/.
[83] K. Chethan, "One cybercrime in India every 10 minutes - Times of India," The Times of India, 22- Jul-2017.
[84] *Ibid.*

rate of conviction was just 0.3%.[85] The raison de etre behind the low conviction rate is the lack of criminal statutes and improper implementation of the existing laws that is the Information Technology Act of 2008. India, still does not have a Cyber law statute which categorically punishes the perpetrators of the cybercrime.

b. *Lack of Procedural powers:* High tech resources and procedural tools are the basic requirements to investigate Cybercrime and India fails to have both. The embarrassingly low rate of conviction in India exists because of the lack of standard procedures. It has been rightly stated that "there are no standard documented procedures for searching, seizing of digital evidence and standard operating procedures for forensic examination of digital evidence"[86]. At present, to prevent cybercrime, India needs to allocate more resources so that cyber security cells can be updated using state of the art technology. Furthermore, high class training shall be provided to officials in order to fight cybercrime and thus punish the perpetrators and prevent from such cybercrimes taking place.

c. *Lack of enforceable mutual assistance provisions with foreign states*

India has an enactment in place which deals with cybercrime that is the Information Technology Act. However, the term cybercrime has not been specifically mentioned or defined in the statute. Only some categories of cybercrimes are dealt with under the Act. India, per se has failed to enact a particular Act which deals categorically with Cybercrimes. Thus, in both terms, the reluctance of India through not updating the already existing laws and procedures and also not enacting a law on the same cannot be denied. In the current scenario, India needs to be a part of a global village with common criminal policy across borders rather than just agreeing and signing a bilateral treaty with countries after countries. These bilateral treaties per se have a limited role to play and limits India's entry into the global village in terms of the laws fighting cybercrime.

EXISTING STATUTES: A CRITICAL ANALYSIS

[85] J. S. Naidu, "10,000 cybercrime cases, only 34 convictions in Maharashtra between 2012 and 2017," http://www.hindustantimes.com/, 21-Aug- 2017.

[86] V. Nanjappa, "Conviction rate in cyber crime is 0.5 per cent- Here are the reasons, www.oneindia.com, 02-Jan-2015. [Online]. Available: http://www.oneindia.com/feature/conviction-rate- cyber-crime-is-0-5-per-cent-here-are-the-reasons- 1609728.html. [Accessed: 14-Sep-2017].

The protection to combat and prevent cybercrimes has been indirectly dealt with under few of the provisions of the Information Technology Act of 2000 and the Indian Penal Code of 1960. For crimes like that of e-mail account hacking, phishing and email scams, source code theft, protection has been provided under the Information Technology Act of 2000. Furthermore, it is also to be stated that the scope of Indian Penal Code, 1862 has been expanded by treating electronic evidence and documents at par with the physical documents and records.

The Information Technology Act is one of the few statutes that deals with some aspects of the cybercrimes. The Act was amended in the year 2008, yet there exists several limitations and therefore the Act cannot be said to be in consonance with the modern times. Some of the limitations may be discussed in this section of the paper. Firstly, the Information Technology Act of 2000 is not concerned with the protection of intellectual property for electronic data and information and is thereby, considered to be controversial. Secondly, the aspect of domain name goes unnoticed in the Act and thereby, has not been dealt with under the provisions of the Act. Thirdly, the Act fails to recognize and deal with several types of cybercrimes like cyber theft, cyber stalking, cyber harassment, cyber defamation, cyber fraud and several others. In this context a statement by Mr. Pavan Duggal, noted cyber law expert in the nation and the Supreme Court may be emphasized upon. Mr. Duggal stated that "While the lawmakers have to be complemented for their admirable work removing various deficiencies in the Indian Cyber law and making it technologically neutral, yet it appears that there has been a major mismatch between the expectation of the nation and the resultant effect of the amended legislation. The most bizarre and startling aspect of the new amendments is that these amendments seek to make the Indian cyber law a cybercrime friendly legislation – a legislation that goes extremely soft on cyber criminals, with a soft heart; a legislation that chooses to encourage cyber criminals by lessening the quantum of punishment accorded to them under the existing law… a legislation which makes a majority of the cybercrimes stipulated under the IT Act as bailable offences; a legislation that is likely to pave way for India to become the potential cybercrime capital of the world

NEED FOR CYBER LAW IN INDIA

Firstly, India has several detailed and well defined-legal system in place. Several Laws have been enacted and implemented however, the advent of internet could not be foreseen back during the making of the existing laws. With the arrival of internet, complex legal issues started

to come up to which the existing laws does not deal with. The internet per se led to the emergence of numerous trivial to complex legal issues for which it has become the desideratum of the modern world to have a cyber law in place.

Secondly, the existing laws of India, even with the most lenient and liberal interpretation cannot be interpreted in the light of the emerging cybercrime to include all the offences, prevention and prohibition of the cybercrime. To illustrate, the Information Technology Act deals with some of the aspects of cybercrimes however, it fails to expound on the technical as well as legal and jurisdictional issues of cybercrime. Therefore, it may be stated that the need for the cyber law to be enacted cannot be over emphasized.

Thirdly, none of the existing and prevalent laws gave any validation or sanction to the activities in cyber space. The judicial and the legislative system has been reluctant on its part to enact such a law which specifically deals with the cybercrime.

Fourthly, internet has become a necessity for day to day life of almost every individual throughout the world and the same applies to India as well. The internet per se requires an enabling and supportive legal infrastructure which is in consonance with the modern times. This legal infrastructure can only be provided with when a proper cyber law is enacted considering that the traditional laws have failed to provide for the same.

CONCLUSION

There has been a tremendous growth of use of internet across the world and particularly in India. Therefore, India is laterally accompanied by substantial surge in cybercrime and therefore, this has made India vulnerable. Cybercrimes are of global nature which fails to identify geographical and territorial boundaries and therefore, it may be stated that cybercrimes are borderless and not guarded by geographical constraints. These crimes cannot be deterred by local laws and thus entering an arena of global village is equally important. India has entered into several bilateral treaties however, the scope of the same is limited to just two countries and not the entire world therefore, India is suggested to agree to a multilateral treaty which will harmonize its laws by a common criminal policy and at the same time deal with international co-operation for combating cybercrimes at a global level. The treaty eventually shall help in formulating effective legislation and robust investigative techniques, which can thereby foster international co-operation to combat and prevent cybercrime.

INTERNATIONAL 'SOFT LAW' AS AN INDISPENSABLE MARITIME LEGISLATIVE AND GOVERNANCE TOOL: A PERSPECTIVE BASED ON THE CENTRAL AFRICAN ECONOMIC AND MONETARY COMMUNITY'S MERCHANT SHIPPING CODE REGIME IN CAMEROON

- **NDZE BUH EMMANUEL**

ABSTRACT

Apart from being a flag state, Cameroon is a coastal, as well as a port state and its maritime sector is governed domestically by regulations set out in the Central African Economic and Monetary Community's Merchant Shipping Code, supported by a set of secondary legislation governing international and domestic operations. This Code (hereinafter referred to as the CEMAC[87] Merchant Shipping Code) is directly applicable and self-executing and constitutes a vital component of the country's overall maritime legislative and governance architecture. However, since the CEMAC Merchant Shipping Code regime began in Cameroon in 2001 the country has never featured on the positive side of international maritime governance parameters such as the IMO Whitelist or International Instruments Implementation (III) Code. At any rate, it is worth recalling that the corpus of legal precepts regulating the maritime industry is not limited to treaties alone but also includes non-binding instruments known as IMO 'soft law', and questions arise as to the role played by the latter under the CEMAC Merchant Shipping Code regime in Cameroon. This article is thus an appraisal of the place of IMO soft law instruments within the country's maritime legislative and governance landscape. The methodology adopted is doctrinal in approach and involves a content analysis of primary and secondary data. The article concludes that IMO soft law instruments are not adequately incorporated into Cameroon's present maritime legislative and governance dispensation and underscores the crucial need for such instruments to play a major role with respect to the country's Port State Control (PSC) and IMO technical cooperation arrangements, among others.

[87] 'CEMAC' is the French acronym for 'Central African Economic and Monetary Community', known fully in French as '*Communauté économique et monétaire de l'Afrique centrale*'.

KEY WORDS: **Code, Secondary legislation, Soft law, Maritime governance**

1. INTRODUCTION

Soft law has a wide range of possible meanings.[88] However, for our purposes, a compelling definition for the term is as follows:

Soft laws are legally non-binding instruments that are utilized for a variety of reasons, including strengthening member commitment to agreements, reaffirming international norms, and establishing a legal foundation for subsequent treaties (Shelton, 2003).

The implication of the above definition is that soft law as an international law concept covers all those rules generated by states or other subjects of international law which are not legally binding but which are nevertheless of special legal relevance. In fact, one writer has divided the intrinsic aspects of soft law under the current state of international law into four categories, viz –

First, soft law generally expresses common expectations concerning the conduct of international relations, as it is often shaped by, or arises within, the framework of international organizations. Second, soft law is created by subjects of international law – in contrast to commercial customs and rules […] set up by private organizations or companies. Third, soft law rules have not – or not entirely - passed through all stages of the procedures prescribed for international law making; they do not stem from a formal source of law and thus lack binding legal force. Fourth, soft law, despite its legally noncommittal quality, is characterized by some [degree of] proximity to the law, and above all by its capacity to produce certain legal effects (Thürer, 2015).

A common feature of soft law is that it is predominantly found in the international sphere (e.g. international environmental law, international human rights law, international maritime law, etc.). There is a wide diversity in the instruments of soft law, based essentially on variables such as form, language, subject-matter, participants, addressees, purposes, follow-up and monitoring procedures, etc. (Boyle, 1999). The legal effect of a soft law instrument depends essentially on its subject-matter and the manner in which it was adopted. Examples of soft law

[88] See, generally: Chinkin, C. M., (1989), *The Challenge of Soft Law: Development and Change in International Law*, C.U.P., pp. 850-866., at p. 850 and Olufemi, E. and Lim, C. L., (1987), *General Principles of Law, Soft Law and the Identification of International Law*, 28 Neths. Ybk.IL, pp. 3-49, at p. 3.

instruments include Resolutions, Codes, Declarations, Recommendations, Guidelines, and so on.

In the field of maritime law, one good example that could help give some insight into the nature of 'soft law' is the International Safety Management (ISM) Code. The purpose of the ISM Code is to provide an international standard for the safe management and operation of ships and for pollution prevention.[89] The Code's origins go back to the late 1980s, when there was mounting concern about poor management standards in shipping. Investigations into accidents revealed major errors on the part of management, and in 1987 the IMO Assembly adopted Resolution A.596 (15), which called upon the Maritime Safety Committee to develop non-binding guidelines concerning shore-based management to ensure the safe operation of ro-ro passenger ferries. The ISM Code in its mandatory form was adopted in 1993 by Resolution A.741 (18) and incorporated as Chapter IX of SOLAS.[90] This SOLAS amendment entered into force on 1 July 1998, thereby making the ISM Code binding on state parties. Amendments to Resolution A.741(18) have been adopted.[91] This ISM Code example goes to show that soft law instruments, among other things, do sometimes establish a legal foundation for subsequent treaties.

It is beyond the confines of this work to embrace a full-blown academic discussion on soft law as a concept in international law. What is germane here is to consider the role it plays as far as maritime governance is concerned. Two types of 'soft law' are noteworthy - IMO Resolutions and non-binding parts of a legally binding IMO agreement. Suffice it to add that the Port State Control regime is based on IMO Resolution A.682(17) on regional cooperation in the control of ships and discharges by which the IMO promoted the conclusion of regional agreements while most major maritime governance conventions have non-binding parts which are nevertheless very useful for the implementation and enforcement of such conventions.

In terms of maritime governance, a country can only be rated positively if it meets four conditions. First, it must have a good status of ratification in respect of international maritime conventions, which also includes being a party to the key International Maritime Organization (IMO) conventions in matters of safety, security and marine environmental protection. Secondly, conventions to which the country is a party should be effectively implemented - i.e.,

[89] See: www.imo.org/en/OurWork/HumanElement/SafetyManagement/Pages/ISMCode.aspx.
[90] *Ibid*.
[91] For more, see: www.imo.org/en/OurWork/HumanElement/SafetyManagement/Pages/ISMCode.aspx.

they should be made part of the country's domestic legislation. Thirdly, the country should be seen to be giving effect on the ground to the conventions it implemented, possibly with assistance obtained within the framework of IMO technical cooperation. Fourthly, the country should develop effective legislation extending to its non-convention vessels, taking into account regional considerations. It follows that a country with a good or up-to-date status of ratification and implementation is likely to be in a better position to make use of IMO soft law instruments than a country with a poor status of ratification and implementation.

This article is thus an appraisal of the importance of soft law based on the place it occupies in the following contexts: Cameroon's status of ratification in respect of international conventions; Cameroon's status of implementation as per the CEMAC Merchant Shipping Code regime; and the implications of the CEMAC Merchant Shipping Code regime on Flag State Implementation (FSI) and Port State Control (PSC) in the country, coupled with considerations relating to 'non-convention vessels'.[92]

A hypothetical consideration is that Cameroon has never featured on the positive side of IMO maritime governance parameters because the CEMAC Merchant Shipping Code regime is not equipped to ensure good FSI and PSC levels for the country, which includes the country's inability to benefit from IMO cooperation within the context of IMO soft law instruments.

2. CAMEROON'S STATUS OF RATIFICATION IN RESPECT OF INTERNATIONAL CONVENTIONS

a) Status in respect of 'Safety, Security, and Ship-Port Interface Conventions' and related issues

It is important to begin by noting that the umbrella convention covering most, if not all, aspects of the law of the sea is the UN Convention on the Law of the Sea (UNCLOS), 1982[93]. This convention is generally considered to have passed into customary international law (Roach, 2014). It should also be recalled that IMO is the main specialized UN Organization

[92] A non-convention vessel is basically any cargo vessel below 500 gross tonnage (or passenger vessel with less than 200 passenger capacity) involved in international trade. Or vessel of above 500 gross tonnage that sails only within national waters, or any vessel to which most International Maritime Organization (IMO) conventions do not apply.

[93] 1833 UNTS 397.

charged with the progressive development of international maritime law. It is, thus, useful to take note of the following key IMO Conventions in matters of safety, security, and marine environmental protection: International Convention for the Safety of Life At Sea, 1974 (SOLAS 74), as amended[94]; International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73), as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997[95]; and International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, 1978 (STCW 78), as amended, including the 1995 and 2010 Manila Amendments[96]. As a matter of fact, these 3 conventions are the main determinants when it comes to international maritime governance issues. This is not to say, though, that other conventions are not important. Suffice it to note, therefore, that international maritime governance is guided by the 3 conventions listed above, plus other conventions, as well as international soft law instruments.

Concerning public international conventions relating to safety and security, as well as to ship-port interface, Cameroon is a party to the following: SOLAS 74, as amended[97]; Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 72), as amended[98]; Convention on Facilitation of International Maritime Traffic, 1965 (FAL Convention)[99]; International Convention on Load Lines, 1966 (LL Convention)[100]; Convention on the International Maritime Satellite Organization, 1976 (INMARSAT)[101]; STCW 78, as amended, including the 1995 and 2010 Manila Amendments[102]; and the International Convention on Maritime Search and Rescue, 1979 (SAR 79)[103].

Meanwhile, it is hugely important to note that, although Cameroon is a party to SOLAS 74, as indicated in the preceding paragraph, the country has not yet ratified the following protocols to that vital safety instrument: Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1978) (Done at London, 17 February

[94] 1184 UNTS 3.
[95] 1340 UNTS 1340 (p.61), 1341 (p.3).
[96] 1361 UNTS 1361 (p.2), 1362 (p.2).
[97] 1184 UNTS 3.
[98] 1050 UNTS 1050 (p.16).
[99] 591 UNTS 591 (p.265).
[100] 640 UNTS 640 (p.133).
[101] 1143 UNTS 1143 (p.105).
[102] 1361 UNTS 1361 (p.2), 1362 (p.2).
[103] 1405 UNTS.

1978, Entry into force: 1st May 1981)[104]; and Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974, (SOLAS PROT 1988) (Done at London, 11 November 1988; Entry into force: 3rd February 2000)[105]. Similarly, although a party to the LL Convention, Cameroon has not yet ratified the Protocol thereto (Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 1988))[106].

On another note, Cameroon is not yet a party to certain important safety, security, labor, and other instruments. These include: International Convention on Standards of Training, Certification and Watch-keeping for Fishing Vessel Personnel, 1995 (STCW-F 95) (IMO, 2021); International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 1969)[107]; International Convention on Salvage, 1989 (Salvage Convention)[108]; Nairobi International Convention on the Removal of Wrecks, 2007 (Nairobi WRC 2007)[109]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA 88), and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (and the 2005 Protocols)[110]; and Maritime Labour Convention, 2006 (MLC)[111].

b) Cameroon's status in respect of International Marine Pollution Conventions

The situation concerning international instruments relating to 'prevention of marine pollution' is as follows:

1. Although Cameroon is a party to the Protocol of 1978 relating to MARPOL 73[112], the country is yet to ratify the Protocol of 1997 to amend MARPOL 73, as modified by MARPOL PROT 1997[113].
2. Cameroon is a party to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (Intervention Convention)[114].

[104] 1184 UNTS 1185 (p.2).
[105] 1184 UNTS 3.
[106] 640 UNTS 133.
[107] 1291 UNTS 1291 (p.3).
[108] 1953 UNTS.
[109] (2007) 46 ILM 694.
[110] 1678 UNTS I-29004.
[111] 2952 UNTS.
[112] See footnote 23, *supra*.
[113] *Ibid.*
[114] 970 UNTS 211.

However, it has not yet ratified the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended (Intervention Protocol 1973)[115].

3. Cameroon is a party to the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC 90)[116]. However, the country is still to ratify the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol)[117].
4. There are certain international conventions on marine pollution prevention to which Cameroon is not yet a party but which, in the opinion of this writer, could be useful in terms of enhancing maritime governance in Cameroon. These are: Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Convention)[118] (and the 1996 London Protocol)[119], International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001 (HAFS Convention),[120] and International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (BWM 2004)[121].

Meanwhile, as regards instruments covering liability and compensation in cases of oil pollution damage, the situation may be presented as follows:

1. Cameroon is currently a party to: Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (FUND 1992)[122]; Protocol of 1976 to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1976)[123]; Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992)[124]; and Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND PROT 1992) (IMO, 2021).

[115] 1313 UNTS 4.
[116] 1891 UNTS 51.
[117] [2007] ATS 41.
[118] 1046 UNTS 120.
[119] [2006] ATS 11.
[120] [2008] ATS 15.
[121] IMO Doc. BMW/CONF/36.
[122] 1953 UNTS 330.
[123] 973 UNTS 973 (p.3).
[124] 1956 UNTS 255.

2. It is noteworthy that Cameroon used to be a party to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND 71). However, on 24 May 2002, the FUND 1971 Convention ceased to be in force for all states that were parties to it[125].

c) Cameroon's status in respect of Brussels/Geneva Conventions relating to Maritime Transport

The idea at this juncture is to state the major Brussels/Geneva Conventions to which Cameroon is fully a party, and also highlight some major conventions to which the country is not yet a party.

1. Cameroon is fully a party to the following Brussels/Geneva Conventions relating to Maritime Transport: International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and Protocol of Signature "Hague Rules 1924"[126]; International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and other Incidents of Navigation (Brussels, 10th May 1952)[127]; International Convention for the Unification of certain rules relating to Arrest of Sea-going Ships (Brussels, 10th May 1952)[128]; United Nations Convention on a Code of Conduct for Liner Conferences (Geneva, 6 April 1974)[129]; and United Nations Convention on the Carriage of goods by sea Hamburg, 31 March 1978 "Hamburg Rules"[130].
2. There are certain conventions relating to Bills of Lading, Ship Arrest and 'Maritime Liens and Mortgages' to which Cameroon is Not Yet a Party. These include: the Visby Protocol to the Hague Rules of 1924 adopted in 1968 (known as the Hague-Visby Rules), which entered into force on 23 June 1977[131]; International Convention on Arrest of Ships, 1999, which entered into force on 14 September

[125] 1110 UNTS 1110 (p.57).
[126] 1412 UNTS.
[127] 439 UNTS 233.
[128] 439 UNTS 439 (p.193).
[129] 13 ILM 910 (1974).
[130] 17 ILM 608-31 (1978).
[131] 1412 UNTS 127.

2011[132]; and International Convention on Maritime Liens and Mortgages, 1993, which entered into force on 6 September 2008[133].

It would be recalled, by the way, that the 1993 Geneva Convention on Maritime Liens and Mortgages seeks to give the concept of maritime liens and mortgages the place it deserves under modern maritime law. For instance, an important consideration under it is that seafarers are entitled to unique legal rights that are not available to land-based employees, their most important maritime law right being the maritime lien for wages. In that respect, it is safe to say that the convention was designed to address some of the major issues that were not contemplated under the 1926 Brussels Convention on the Unification of Rules Relating to Maritime Liens and Mortgages. What is germane here, though, is that Cameroon needs to become a party to the said 1993 convention as a first step towards being in a position to better address the important issues relating thereto.

3. IMPLEMENTATION OF CONVENTIONS UNDER THE CEMAC MERCHANT SHIPPING CODE REGIME

Before the advent of the CEMAC Merchant Shipping Code in 2001 the key merchant shipping instrument in Cameroon was the Cameroon Merchant Shipping Code, which entered into force on 31 March 1962. Given that the shipping industry evolves rather rapidly, it was only a matter of time before the Code would need to be updated in one form or another. A merchant shipping code generally has to be reflective of a country's status of ratification, at least to a large extent - either by itself or, as is usually the case, with the support of other pieces of domestic legislation. In other words, after a country has ratified a convention, it becomes incumbent upon the country to implement the convention - i.e., make the convention part of its national legislation as evidenced by a code or some other form of domestic legislation. In that light, one may want to know what necessary steps were taken by Cameroon as years went by to ensure that the Cameroon Shipping Code regime reflected the country's status of ratification. A look at how certain amendments to the Code were made would be helpful in that regard. Some of the amendments were: Act No. 74/16 of 5 December 1974 fixing the Limit of the Territorial Waters of the United Republic of Cameroon at 50 nautical miles, repealing and replacing

[132] 2801 UNTS Doc. A/CONF.188.6.
[133] 33 ILM 353.

Article 5 of Ordinance No. 62/DF/30 of 31 March 1962 relating to the Cameroon Merchant Shipping Code (and Law No. 67/LF/25 of 3 November 1967)[134]; Law No. 2000-2 of April 2000 claiming 24 nautical miles for the country's contiguous zone; Law No. 2000-2 of April 2000 claiming a fishing zone/EEZ of 200 nautical miles;[135] and Law No. 2000-2 of April 2000 claiming continental shelf as provided for under UNCLOS 82.[136]

If we take the case of Act No. 74/16 of 5 December 1974 fixing the Limit of the Territorial Waters of the United Republic of Cameroon at 50 nautical miles, suffice it to note that "50 nautical miles" was quite excessive under international law. At any rate, Cameroon could by that 1974 ACT be said to have "amended" its Shipping Code or at least a provision of it, while at the same time failing to respect the 12-mile limit for territorial waters respected by a majority of states at the time, in line with international law (Churchill and Lowe, 1999). To its credit, however, Cameroon corrected the situation after becoming a party to UNCLOS 82,[137] by coming up with Law No. 2000-2 of April 2000 repealing the excessive 50 nautical miles claim and "accepting" 12 nautical miles for its territorial waters as provided for under Article 3 of UNCLOS 82.[138] Nevertheless, the impression one gets is that the maritime legislative amendment process in Cameroon during the period before the sub-regional shipping Code regime was inconsistent and ineffectual.

The CEMAC Merchant Shipping Code entered into force in 2001. The Code makes reference to, and uses lines from many maritime conventions, irrespective of whether its member states have ratified them or not. For instance, Articles 100 to 113 of the 2001 Sub-regional Shipping Code have to do with the liability regime of ship owners and are drawn from the Convention on the Limitation of Liability for Maritime Claims 1976, yet it would be recalled that Cameroon is not a party to the said London Convention, since the country has not followed standard international treaty implementation procedures in that regard (e.g., ratification, adherence, etc.). The 1976 London Convention is, thus, binding for Cameroon by virtue of the Sub-regional Shipping Code alone. Through this approach, the Sub-regional Shipping Code has been able to bring things to a point where more international maritime conventions are now applicable in Cameroon than they were under the Cameroon Shipping Code regime. This

[134] See, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm
[135] *Ibid*.
[136] *Ibid*.
[137] See: 1833 UNTS 397, *op. cit.*
[138] See, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm, *op. cit*.

CEMAC approach to treaty implementation has its own advantages. For instance, when an international instrument becomes directly binding for CEMAC member states because the organization has implemented it, as evidenced by the presence of provisions of such instrument in the Sub-regional Shipping Code, that relieves these states of the legislative drafting burden, since drafting is usually one of the tasks associated with treaty implementation.

However, it is worth recalling that under standard international treaty procedures, states begin by taking a close look at the benefits, responsibilities and challenges associated with any treaty before them in order to decide on whether or not to proceed with ratification and implementation (and subsequent enforcement). It is difficult to tell whether such caution is not sometimes sacrificed on the altar of the integration drive among CEMAC member states. The least one can say is that the approach used by CEMAC in rendering international instruments binding for its member states is susceptible to scrutiny. In any event, the approach does not seem to constitute a recipe for successful legislative implementation (and enforcement) outcomes.

4. IMPLICATIONS OF THE CEMAC SHIPPING CODE REGIME FOR FSI AND PSC IN CAMEROON

The Sub-regional Shipping Code, especially the revised 2012 version, does address FSI and PSC. These are covered notably under Title II of the Code, entitled "Safety (and Security) of Navigation". The Code talks of FSI issues as provided for under international law (SOLAS 74 (as amended) and related instruments such as 'Security Management Certificate', 'Safety Management Certificate', 'International Security Certificate', and so on; LL 66; etc.). However, what the Sub-regional Shipping Code actually does is restate FSI responsibilities as contained in the relevant international conventions, yet it is common knowledge that CEMAC does not have any FSI performance monitoring mechanism in place. In other words, it is only through IMO parameters that a CEMAC member state's FSI performance can be determined. In that light, what is germane here is that Cameroon has never featured under the STCW White List, neither has the country been able up to this point to fit into the III Code, which happens to be the single most important implementation and enforcement tool put in place to date by the IMO. Consequently, it is safe to say that the Sub-regional Shipping Code regime has had only minimal impact on Cameroon as far as FSI is concerned.

With respect to PSC responsibilities, what the Sub-regional Shipping Code does is restate some of the provisions of key IMO Resolutions on PSC, thereby transforming them into hard law provisions under the Code. So, the situation within the CEMAC sub-region is that, on the one hand, we have the IMO PSC inspection regime, based on IMO resolutions and the work of the Abuja Memorandum of Understanding (MoU), and on the other, we have the Sub-regional Shipping Code regime, with its PSC-related hard law. However, it is noteworthy that Cameroon is not yet a member of the Abuja MoU[139], and that CEMAC has no PSC inspections monitoring mechanism. It would be recalled that the best way to determine any given country's performance in terms of PSC inspections is to consult the statistics of the PSC MoU to which the country belongs. It follows that only the Abuja MoU can speak to Cameroon's performance in terms of PSC inspections, yet the country is not yet a member of that important body. Nevertheless, it is useful to remember that the Sub-regional Shipping Code itself indirectly acknowledges the pre-eminence of the Abuja MoU with respect to PSC inspections monitoring within the sub-region. Article 196 (1) of the said Code provides as follows:

Inspections of foreign vessels in the ports of the member states - and where appropriate their detention by the competent maritime authority - shall be carried out in accordance with the standards and procedures prescribed by Resolution A 787 (19) of the International Maritime Organization (as amended), in accordance with the guidelines for Port State Control Officers performing inspections under the Maritime Labour Convention, 2006 and the Memorandum of Understanding on Port State Control.

Finally, one other area where a country's performance in terms of FSI and PSC can be assessed concerns the category of ships called 'non-convention vessels'.[140] IMO member states may count on technical cooperation with IMO to be able to develop legislation extending to their non-convention vessels. Such legislation usually takes into account regional considerations since such vessels sometimes sail regionally. However, it is apparent that Cameroon has always relied only on its general legal framework when it comes to regulating non-convention vessels.

[139] See, http://abujamou.org/members-and-oberservers.html

[140] A non-convention vessel is basically any cargo vessel below 500 gross tonnage (or passenger vessel with less than 200 passenger capacity) involved in international trade. Or vessel of above 500 gross tonnage that sails only within national waters, or any vessel to which most International Maritime Organization (IMO) conventions do not apply.

In light of the foregoing, it would be safe to state that the Sub-regional Shipping Code regime has not been particularly helpful to Cameroon in terms of PSC inspections.

5. CONCLUSION

The fact that Cameroon has never featured on the positive side of international maritime governance parameters such as the IMO White List or International Instruments Implementation Code should come as no surprise in light of the country's poor status of ratification in respect of international maritime conventions. International maritime soft law is an indispensable part of maritime legislative implementation and enforcement and when a country is not an up-to-date party to a convention, that deprives the country of the very opportunity to appreciate the convention and corporate fully with the IMO at the level of implementation and enforcement. MARPOL 73/78 can be used to illustrate this point. A state "*may at the time of signing, ratifying, accepting, approving or acceding to the [MARPOL] Convention declare that it does not accept any one or all of Annexes III, IV and V ('Optional Annexes'). Subject to this, parties to the Convention shall be bound by any Annex in its entirety*. However, to assist governments, ships and port operators in implementing relevant requirements under MAPROL Annex V, IMO developed and adopted Resolution MEPC.295 (71) in July 2017 on the Guidelines for its implementation. Undoubtedly, these Guidelines are not intended to establish binding rules under international law. However, it could be argued that they are nevertheless aimed at creating some sort of obligation to ensure that state parties base their conduct on them. In that respect, a distinction must be made between MARPOL parties that have "accepted" Annex V and those that have not, based on Article 14 (1). The case of states falling within the former category is obvious: the Guidelines are primarily meant for them.

Another key area where soft law does not play its role under the CEMAC Merchant Shipping Code regime in Cameroon concerns Port State Control. The Abuja Memorandum of Understanding on Port State Control, like all other MoUs around the world, owes its existence to a soft law instrument called IMO Resolution A.682 (17) on regional cooperation in the control of ships and discharges. Cameroon is supposed to fall under the Abuja MoU, yet the country is not a member to that important organization. It is simply not possible to have a workable maritime governance regime without a Port State Control arrangement that functions based on IMO mechanisms. Significantly, the CEMAC Merchant Shipping Code itself

indirectly acknowledges the pre-eminence of the Abuja MoU with respect to PSC inspections monitoring within the CEMAC sub-region.

A related consideration is that the contemporary Port State Control regime is necessary for appropriate cooperation with the IMO in the area of non-convention vessels. Needless to add, the regulation of non-convention vessels is an important aspect of flag state implementation.

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THE FIGHT FOR RIGHTS: "WHY THE FARM LAWS"?

- **MIHIR SHYAM ASOLEKAR**

It has been over 200 days since the farmers are protesting on different sites near the Delhi borders, even as the second wave of the COVID-19 pandemic has been hovering over the nation. Repeated attempts to talk to the representatives of the government has failed, and we stare at a dead end at this point. The present issue, let alone be solved, sees no road ahead due to lack of communication, representation, as well as the desire to compromise and settle. Both the parties to the discussion are equally responsible for the above, and no one party can be blamed more than the other.

Having said this, it is once again important to revisit the crux of the entire debate at hand, "Why the Farm Laws". Why is the government so keen on implementing these laws, even during the times of such national crisis, when the entire healthcare, economy, manpower is struggling to stay alive? On the other hand, why are the farmer unions so adamant on having the laws repealed? Why are the protest not halted even after the National Capital Territory (NCT) has been battling a severe crisis of the COVID-19 pandemic?

Agriculture is the backbone of the Indian economy. The term, "Jai Javan, Jai Kisan" was coined by the former Prime Minister of India, Hon'ble Lal Bahadur Shastri, and it holds relevance even after many decades. While our brave soldiers of protect the nation, our farmers work tirelessly to feed the entire nation. India is thus an agricultural economy, with about 70% of the population depending directly or indirectly on agriculture. One-third of the national income comes from the agricultural sector. However, this was not always the scenario. The Indian agriculture remained dormant and underdeveloped for a long period of time. We were importing food grains and products from other nations. But things quickly changed with India now producing more food than is required. Primarily, the credit goes to the Five-Year Plans, which brought the Green-Revolution in the Indian agriculture sector during the Fourth Five-Year Plan in the year 1969.

India today focuses on agriculture through various programmes and schemes, such as the Pradhan Mantri Krishi Sinchai Yojana, Pradhan Mantri Kisan Samman Nidhi, PM Kisan Maan Dhan Yojana, Credit facility for farmers, Crop insurance schemes, *etc.* India today has a close jacket formula to improve the agriculture, fisheries, cattle rearing, poultry industries, *etc.*

The India Parliament recently passed the three controversial and debated farm laws with the object of revolutionizing the farming sector and to provide the farmers with the freedom to choose and sell their products according to the best market rate anywhere across India. However, the farmers are not particularly happy and satisfied with the laws for variety of reasons. It is not desirable to study these laws in parts, and a holistic approach to study the laws as a whole is important. The farm bills, which are enacted with the intention of revolutionizing the agriculture sector, are rather disturbing the agricultural equality by not accepting the needs and the demands of those directly affected by the laws.

Let us revisit the significant proposals of the government and evaluate the reasons for the protest.

Centre's proposal: State government can impose fee/cess on private mandis.

Objection by the farmers: The farmers are objecting to the above proposal because the creation of such a private mandi along with the already existing State run Agricultural Produce Market Committees (APMCs) will further push the agriculture towards the private sector. The government market system shall end, giving a free hand to the private parties to run the market at incidental price.

Centre's proposal: Assurance to the farmers from the government for continuing the existing MSP system.

Objection by the farmers: The farmers are well convinced that the new Acts shall disable the existing the system of MSP. They are demanding that the government should enact a law on MSP separately, which shall include all the crops. However, the government has so far paid no heed to these demands and proposes to give a written assurance, which has no legal sanctity.

Centre's proposal: State government can register the traders to regulate their business.

Objection by the farmers: These enacted laws give any PAN card holder the right to procure grains at wishful price, which may ultimately result into hoarding. The government is simply passing the buck to the State government to regulate the traders, instead of making provisions to regulate the biased approach of traders.

Centre's proposal: Farmers will have an alternate approach to seek the Court and their land is safe as no loan shall be lent by mortgaging their agricultural land.

Objection by the farmers: Under the legal provisions of contract farming, large corporations shall grab the farm land and the history of contract farming in India makes the farmers believe that it shall lead to non-payment by the corporations, pushing the farmers into a debt trap.

Centre's proposal: The Essential Commodities Act, 2020 is still open for discussion.

Objection by the farmers: This Act includes the entire power sector, which the government wishes to control. It will discontinue the subsidy given to the farmers. If the government subsequently removes subsidies from the ambit of the Act, the farmers shall have no place to go and shall be at their ill-fate.

Although the reasons for the objections raised by the farmers seem to be valid, the farm legislations have certainly brought in certain positive changes as well. There is absolutely no doubt amongst the greatest of agricultural minds that these laws tend to improve flexible agriculture. Selling of the produce outside the State run mandis will serve as an additional channel of income, as well as giving the farmers an opportunity to work parallelly with the existing system. The changes in the Essential Commodities Act shall also help the farmers secure stability amongst the consumer and allows the farmers to directly negotiate with the wholesalers, exporters, and retailers, without any third party commission.

It can be said that although the government has a noble intention of revolutionizing the agriculture sector, it is now high time they pay heed to the demands of the protesting farmers and try to amicably resolve the deadlock.

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WITNESS PROTECTION IN INDIA- A NEED FOR REFORM

- **ANUSHKA BORKAR**

INTRODUCTION

"*Witnesses are the eyes and ears of justice"*

- Jeremy Bentham

"If witnesses are deposing under fear or intimidation or for favour or allurement, the foundation of administration of justice not only gets weakened, but it may even get obliterated."

The above observation of the Delhi High Court, in the case of Neelam Katara v. Union of India[141], aptly highlights the importance of a witness in a trial. The information obtained from the witnesses about the true nature of events forms the pillar on which the whole mechanism of criminal justice rests. In the State of Gujarat v. Anirudh Singh[142], the Supreme Court of India remarked, "It is the salutary duty of every witness who has the knowledge of the crime to assist the state in giving evidence".

On scrutiny of the criminal justice system in India, it becomes very clear that the practice of witnesses turning hostile is one of the major roadblocks responsible for the not-so-swift administration of criminal justice in our nation.

The right to a fair trial emanates from the fundamental right to life and liberty under Article 21 of the Indian Constitution. In Selvi J. Jayalalithaa and Ors. v. State of Karnataka and Ors.[143], the Supreme Court remarked that, "Right to get a fair trial is not only a basic fundamental right but a human right also." It was held by the Court, in Zahira Habbibulla H. Sheikh and Another v. State of Gujarat[144], that "if the witnesses get threatened or are forced to give false evidence, that would also not result in a fair trial". Therefore, inherent to fair trial is the independence and freedom of the witnesses, produced before the Court for evidence. Thus, it is essential to examine the existing scenario relating to witness protection in India.

[141] ILR (2003) II Del 377.
[142] (1997) 6 SCC 514.
[143] (2014) 2 SCC 401.
[144] (2004) 4 SCC 158.

BACKGROUND OF WITNESS PROTECTION IN INDIA

The first ever reference to witness protection in India dates back to 1958. In the 14th Report of the Law Commission[145], it was stated that there must be proper facilities for witnesses attending the Court. The Malimath Committee Report[146] also batted for a strong witness protection mechanism and said that the courts should be ready to step in if the witness is harassed during cross-examination.

In 2006, Section 195A was introduced in the Indian Penal Code wherein criminal intimidation of witnesses was made an offence punishable with up to 7 years in prison.

In Mahender Chawla versus Union of India[147], the Supreme Court had asked the Union government to present a draft witness protection scheme in recognition of the need for a witness protection regime in India. The Ministry of Home Affairs promptly filed a scheme prepared by the National Legal Services Authority. It was later ordered to be enforced in its entirety throughout India by the apex court under Articles 141 and 142 of the Indian Constitution. A crucial scheme was thus approved by circumventing the legislative process, which ensures discussions among various stakeholders and interest groups. Thus, the Witness Protection Scheme, 2018[148] was formulated.

THE WITNESS PROTECTION SCHEME, 2018

The Witness Protection Scheme, 2018 defines 'witness' as: "*'Witness' means any person, who possesses information or document about any crime regarded by the competent authority as being material to any Criminal proceedings and who has made a statement, or who has given or agreed or is required to give evidence in relation to such proceedings.*"

[145] Law Commission of India, Reform of Judicial Administration (14th Report, 1958).
[146] 'Malimath Committee Report' (Ministry of Home Affairs, Government of India 2003).
[147] (2018) SCC Online SC 2679
[148] Witness Protection Scheme 2018.

The witnesses are divided into three categories as per the level of threat perception. Category A includes those witnesses who face threat to their life or there is a threat to any member of their family. Category B comprises those witnesses who face threat to safety, property, or reputation of themselves or their family. Category C includes witnesses who face moderate threat, intimidation or harassment.

The scheme provides for the creation of a Witness Protection Fund to finance the expenses incurred for the implementation of this scheme. The fund shall be operated by the Ministry of Home Affairs under the state/U.T. Government.

It provides a framework of the procedure to be followed to protect the witnesses. This includes identification of the threat perception, change of the identity of the witnesses and their relocation.

The protection measures include ensuring that the accused and the witness do not come face to face during the trial, monitoring the phone calls, mail of the witness, installing security devices like CCTV cameras in the witness' home, close protection and regular patrolling around his house.

A three-month time period for protection is specified. It also has guidelines for the appropriate infrastructure which courts need to maintain.

The Witness Protection Scheme, 2018 is a welcome step. However, it may not be enough.

LOOPHOLES IN THE WITNESS PROTECTION SCHEME, 2018

While the scheme is a welcome step towards the goal of witness protection, it is not adequate as certain loopholes makes it possible to derail the intent of the scheme.

The foremost limitation is the time period of protection. The maximum continuous period for which the witness protection can be availed is only three months. This has severely limited the scope of this scheme. It is akin to providing only temporary protection, which will cease after three months, even if the threat continues to exist.

The Scheme does not include a mechanism for extending this period of three months if the witness still faces a threat. Sometimes, the criminal can be absconding and, in such cases, it is all the more dangerous.

Another drawback is the categorization of witnesses. This task is handed over to the Police Force. The witnesses are categorized into three groups A, B and C according to the

threat perception. A corrupt or incompetent police officer can assuage the level of threat and thus include the victim in a lower categorization. Also, it is not stated what type of protection will be available for each level of category. In such a situation, the administration can easily lower the threat perception and provide little or no protection to the victim.

Also, even if the scheme is committed towards maintaining the confidentiality of the victim, it does not penalize the officers in case they leak the information.[149] This removes a deterrent thus making it ineffective. An example is the Unnao case where the policemen tasked with protecting the Unnao survivor did not accompany her when she travelled to Rae Bareli.

There are no specific provisions for special categories of witnesses like prisoner witnesses, foreign witnesses and child witnesses. The scheme also proposes to relocate the witness to a safer area within the state or the union territory. However, if need be, the possibility of shifting the witness to another state is not provided for.

The task of deciding the contents and preparation of the Threat Analysis Report has been accorded to the head of the police in the district. In high profile cases involving politicians or influential people the police officer can be under pressure to disclose the identity of the witness.

Over-worked and understaffed, the police are unlikely to be proactive in the threat analysis for a witness. The lower courts do not have adequate infrastructure to satisfy the mandate of the scheme. Another issue is the frequent adjournment of cases, which may make the three-month period for witness protection appear too short and causes financial and emotional stress to the witnesses.

Witness protection requires lot of resources to effectively implement it. The functioning of criminal justice system is the responsibility of the State who may not have adequate resources to implement this scheme effectively.

To address these issues, it is essential to gain an insight from the international scenario relating to witness protection.

THE INTERNATIONAL SCENARIO

THE UNITED NATIONS

[149] 'Security for Witnesses' (2009) 44 Economic and Political Weekly 7.

The '*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'*[150] adopted by the United Nations General Assembly in November 1985 regarded the victims of crime to be important witnesses and put forth four objectives which need to be ensured by the member nations towards the victims of crime:

(i) Access to justice and fair treatment

(ii) Restitution

(iii) Compensation

(iv) Assistance

THE UNITED STATES

The Federal Witness Security Program (WITSEC) began in 1971 and is administered by the U.S. Marshall Service.[151] The U.S. Department of Justice's Office of Enforcement Operations (OEO) is responsible for authorizing or approving such protective services. The decision to allow a witness to receive such protection lies with the Office of the Attorney General, who shall take such action as is determined to be "necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person, including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists".[152]

It has provisions for change in identity of the witness, his relocation, provision for his basic living expenses and so on. The fact that distinguishes it from the scheme in India is that it has provisions for such process in detail. For example, in relocation, the State will provide housing, bear the transportation expenses of relocating to a new residence, assist the person in obtaining employment to enable him to become a self-sustaining person etc. Whereas, in India relocation is only temporary for a maximum period of 3 months as opposed to US where protection is provided till the threat ceases to exist. Also, this is administered by the US Marshall Service and thus the program is less susceptible to bribery and corruption.

[150] 'Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power' (The United Nations 1985).

[151] '9-21.000 - Witness Security' (19 February 2015) <https://www.justice.gov/jm/jm-9-21000-witness-security> accessed 15 April 2021.

[152] '18 U.S. Code § 3521 - Witness Relocation and Protection | U.S. Code | US Law | LII / Legal Information Institute' <https://www.law.cornell.edu/uscode/text/18/3521> accessed 15 April 2021.

Prior to the program authorization, witnesses are required to make payments of any outstanding debts or make satisfactory arrangements to pay the debt and are required to satisfy all outstanding criminal and civil obligations; to provide appropriate child custody documents; and to provide appropriate immigration documents, as necessary. This is essential, particularly when there is a change in identity and relocation of the witness. This is absent in the Indian scheme.

Another provision in US, which is absent in India, is the provision of prisoner witnesses. In the US, prisoners in a State or Federal institution are eligible for participation in the Witness Security Program provided they meet the established criteria.

Psychological testing and evaluation are arranged for each prospective witness and all adult members of the witness' household that are to be protected.

Thus, the witness protection scheme in the United States is comprehensive and can provide a valuable guide to India.

THE UNITED KINGDOM

Some distinctive features of the witness protection in the UK are as follows.[153]

Special measures are provided for witnesses who are children. Section 44 of the Children and Young Persons Act 1933 requires every court in dealing with a person aged under 18, whether as a defendant or otherwise, to have regard to their welfare.

Section 51 of the Criminal Justice and Public Order Act, 1994 creates two criminal offences relating to witness interference:

- Witness Intimidation - (s.51(1)) intentionally intimidating another person, knowing or believing they are assisting in the investigation of an offence or are an actual or potential witness or juror, intending to interfere with the investigation or the course of justice.
- Taking Revenge - (s.51(2)) intentionally harming or threatening to harm another person because they, or some other person, have assisted in an investigation, given evidence, or acted as a juror.

The maximum sentence available for an offence under either section is 5 years' imprisonment in the Crown Court or 6 months' imprisonment in the magistrates' court.

[153] 'Witnesses (Public Inquiries) Protection Act 1892' <https://www.legislation.gov.uk/ukpga/Vict/55-56/64> accessed 15 April 2021.

Interfering with witnesses or evidence may also amount to the common law offence of perverting the course of justice, with a maximum penalty of life imprisonment.

Witness interference is also a contempt of court punishable by up to 2 years' imprisonment in the Crown Court or one month's imprisonment in the magistrates' court. Deliberate witness interference is almost certain to result in bail being refused.

Thus, there are stringent measures in place for protecting the witnesses.

Gaining an insight from the international scenario, the reforms in the existing scheme in India should be considered.

REFORM NEEDED IN INDIA – THE WAY AHEAD

In Swaran Singh v. State of Punjab[154], Wadhwa J. had aptly remarked, "A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence." It was further observed by him - "By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth." In doing so, he performs an important public duty of assisting the court.

Considering the important role played by witnesses and the various lacunas in the existing provisions, there is an urgent need to plug the loopholes in the Witness Protection Scheme, 2018. Learning from the international experience and applying it to the Indian scenario, the following measures are suggested.

- Witness Protection in India is governed by just a scheme. It does not have the statutory authority of law. Hence, there is an urgent need to enact a legislation, giving detailed provisions for effective witness protection.
- There should be no upper limit for the time period of protection given to the witness. It must be provided till the threat ceases to exist.

[154] (2000) 5 SCC 668.

- Instead of the Police, a separate Force should be in charge of witness protection. A Witness Protection Cell should be constituted which should be an independent body outside police control.
- There should be penal provisions for officers to deter them from leaking any confidential information relating to the victims.
- Special provision should be made for prisoner witnesses.
- There must be a special procedure for witnesses from other countries. The special force should coordinate with the Ministry of External Affairs for this.
- In case the witness is a child, special care should be taken. The child must be provided adequate psychological support and rehabilitation. In case of relocation, it must be ensured that the child continues his/her education and does not drop out.
- If need arises, the witness should be relocated to another state and not just within the state in which he/she resides. The relocation expenses should be borne by the Government, which must also help the witness to find suitable employment to sustain himself. They should be provided counselling, if needed, to cope with the stress.
- The courts should be equipped with the required infrastructure.
- The cases should be disposed of quickly, without unnecessary adjournments.
- The current arrangement relating to financing is at variance with the Law Commission's recommendation in 2006 that the Centre and the States share the cost equally. The resource crunch can be overcome if the finances are shared between the Centre and the states.

These reforms should be considered and a legislation should be enacted incorporating these measures to have a strong and robust witness protection law in India.

CONCLUSION

"*Whenever man commits a crime heaven finds a witness.*"

- Edward G. Bulwer

Witnesses play an indispensable role in ensuring justice whenever a crime is committed. They have the power to change the outcome of the case. Witnesses assume additional significance in the adversarial system of criminal justice where the onus of proving the case lies on the prosecution and witness testimony becomes crucial in the pursuit of the truth.

As a consequence of the failure of the state to implement an adequate law on witness protection, witnesses have turned hostile in many cases and this has obstructed the delivery of justice. There is an urgent need to make amends and enact a legislation for protecting the witnesses. India can gain experience from the international scenario and implement a law that will go a long way in ensuring that justice is delivered.

ENVIRONMENT SUPPORT GROUP AND ANR V NATIONAL BIODIVERSITY AUTHORITY

- **HONEY VERMA**

Petitioners: Environment Support Group and Another

Respondents: National Biodiversity Authority represented by its Chairman and Others

Citations: (2014) 4 FLT 233, (2014) 1 AKR 598, AIR 2014 KAR 20, (2014) 2 KCCR 1607

FACTS OF THE CASE

On October 26th, 2009 the Union Ministry of Environment and Forests issued a notification whereby 190 variety of plants were classified as being the Normally Traded Commodities or NTC. Out of these 190 plants, 18 were also classified as critically endangered. This caught the attention of several Non-Governmental Organizations who held the view that such a notification was further endangering the critically endangered plants by allowing their free international trade[155]. This led to the filing of a Public Interest Litigation or a PIL under Article 226 and Article 227 of the Constitution of India, 1950 in the Karnataka High Court by a trust 'Environment Support Group' (ESG) and Mr. Leo Saldhana who has the party-in-person challenging the constitutionality of Section 40 of the Biodiversity Act, 2002 and asking for the quashing of the notification issued by the Ministry of Environment and Forest on October 26th, 2009.

Issues Raised

The issue raised in this PIL was regarding the:

1. Constitutionality of Section 40 of the Biological Diversity Act , 2002 in light of Article 14 of the Constitution of India , 1950 .
2. Legality of the Notification issued by the Union Ministry of Environment and Forests under Section 40 of the Biodiversity Act , 2002 on the 26th October , 2009 .
3. Jurisdiction of the National Green Tribunal constituted under the National Green Tribunal Act, 2010 in the case.

[155] Jyotika Sood , "Karnataka High Court issues notice to National Biodiversity Authority on charges of paving way for biopiracy", Down To Earth (Last visited September 20, 2020 , 05:40 pm) https://www.downtoearth.org.in/news/karnataka-high-court-issues-notice-to-national-biodiversity-authority-on-charges-of-paving-way-for-biopiracy-39645

ARGUMENTS ADVANCED BY THE PETITIONERS

The petitioners have contended that Section 40 of the Biological Diversity Act, 2002 is manifestly arbitrary in nature as per the doctrine of arbitrariness derived from Article 14 of the Constitution of India, 1950. It is contended that this provision of the Biological Diversity Act, 2002 allows for unfettered trade in the biodiversity of India and also makes way for rampant bio piracy to take place. Moreover, Section 40[156] gives the power to the government to make decisions with regard to trade of biodiversity without any set guidelines or exceptions to the same. This gives the government unprecedented and unregulated power which is opposed to the spirit of Article 14. This is why the petitioners had submitted that Section 40 of the Biodiversity Act, 2002 is ultra vires the Constitution of India, 1950. Thereby the notification issued by the Environment ministry on 26th of October, 2009 is illegal and shall thus be quashed.

Arguments Advanced by the Respondents

The main argument of the respondents was centered around the issue of jurisdiction of the case. The counsel for respondents referred to *Bhopal Gas Peedith Mahila Udyog Sangathan* v *Union of India*[157] to emphasize that the High Court virtually had no jurisdiction to entertain the PIL on this issue and that it was the National Green Tribunal who actually had the jurisdiction to deal with the issue. The respondent contends that the role of the High Court was thus of merely passing an order to clarify the jurisdiction of the NGT constituted under the National Green Tribunal Act , 2010 and transfer the case hereby . The counsel also referred to the case of L.Chandra *Kumar* v *Union of India*[158] and submitted that it was not possible for the litigants to directly approach the High Court's instead of approaching the concerned tribunals even if the case deals with the question of constitutionality of a certain provision of law for dealing with which the tribunal had been constituted.

JUDGMENT OF THE CASE

The High Court of Karnataka held that it is an indisputable point of law that the special tribunals can be constituted for administrating and implementing a particular set of laws. Also, no

[156] The Biological Diversity Act , 2002
[157] (2012) 8 SCC 326
[158] (1997) 3 SCC 261

contentions against the fact that the Biological Diversity Act, 2002 is a part of the First Schedule of the Constitution of India, 1950 and that the special Tribunal constituted under the National Green Tribunal Act, 2010 has the jurisdiction to deal with all the question of laws and the implementation of legal rights arising from the act. The Tribunal can for the purpose of settling the disputes pass any orders which are necessary to do so. Thereby, the High Court relying upon the law laid down in *Bhopal Gas Peedith Mahila Udyog Sangathan* v *Union of India*[159] and the contentions made ordered that the present case shall be transferred to the concerned tribunal that is the National Green Tribunal for any further adjudication. The Court dismissed the interim applications that were filed without considering the merits of the contentions made by the parties.

ANALYSIS

The contentions raised in this petition brought various important issues to the public domain. The plight of the communities which have not been given anything back by the society for their work of preserving the biodiversity has been brought in light[160]. The notification in question under this case which had been issued by virtue of Section 40 of the Biological Diversity Act , 2002 gives immense advantage to the traders but does not pay heed to the efforts of the communities who had devoted their lives towards the conservation of the biodiversity[161]. This petition also draws attention towards the first bio piracy case in India[162]. The issue of jurisdiction which was raised in this case also raised apprehensions about seriousness with which the role of Tribunals is taken in the Indian Legal System.

CONCLUSION

The environment laws in India were not taken seriously since the independence of the country in 1947. Though the original constitution indirectly contained provisions for the protection of environment, it was only after the Stockholm Declaration in 1972 that the same began to be taken seriously in India. Since then, various legislations related to the same have been enacted, including the Biological Diversity Act, 2002 and the National Green Tribunal Act, 2010.

[159] Supra 3

[160] Supra 1
[161] Supra 1
[162] Supra 1

Various cases related to the environment and trade have further developed the law. Section 40 of the Biological Diversity Act, 2002 gives immense and unprecedented powers to the government to make decisions regarding the business of biodiversity which can be misused given the lack of guidelines on the same. This case though got transferred to the National Green Tribunal but did raise some serious yet interesting questions regarding the delicate relation between trade and environment protection. Such questions are bound to arise in future provided that Section 40[163] is not reconsidered by the Courts in light of its arbitrariness.

[163] The Biological Diversity Act , 2002

THE NECESSITY FOR A UNIFORM CIVIL CODE

- **ADITYA DALAL & SANJALI RUPNAWAR**

ABSTRACT

India, who prides itself on its multiculturalism, legal pluralism and unity in diversity, has been grappling with the issue of "Whether a Uniform Civil Code is desirable for India"? Over the years, this debate has been addressed by many of its stakeholders such as constitution makers, liberalists, zealots, politicians, religious minorities, academicians etc. yet it remains unresolved to this day. Therefore, the purpose of this paper is to examine and analyze whether a Uniform Civil Code is a necessity and is feasible for our nation. We take into consideration a favorable stance in terms of uniformity of law and gender justice and weigh it against an unfavorable stance to reach a conclusion. The paper concludes by arriving at a common ground for these highly volatile sides.

INTRODUCTION

The Uniform Civil Code (hereinafter "UCC"), initially in the Clause 35 of the Draft Directive Principles of State Policy and later in the Article 44 of the Constitution, reads that "The State shall endeavour to secure for the citizens a Uniform Civil Code"[164] and has been included to promote national integration.[165]

The historical school of jurisprudence explains law as a product of the general consciousness of the people, which has been developed through customary usage rather than legislation.[166] Sir Savigny propagated the idea that people should hold on to customs which are passed on by their ancestors.[167] Thus, before we reach to the actual reasons whether a UCC is desirable or not for India, we must look into the customary laws existing in the country over the period of time and their relevance in the modern era.

[164] Constitution of India 1950, art. 44

[165] Kiran Deshta, Uniform Civil Code: In Retrospect and Prospect (Deep & Deep Publications Pvt Ltd 2002) 3

[166] FP Walton, 'The Historical School of Jurisprudence and Transplantations of Law' [1927] 9(4) Journal of Comparative Legislation and International Law 183-184

[167] FP Walton, 'The Historical School of Jurisprudence and Transplantations of Law' [1927] 9(4) Journal of Comparative Legislation and International Law 183-184

The Vedas were liberal and contained provisions for the remarriage of women.[168] The laws regarding marriage did not place restrictions on the rights of women, but such verses like the remarriage of women were gradually replaced by stringent laws governing family and rights of women.[169] Until the growth of the Mughal Empire, we can say that majority of the population was Hindu and thus the question of plurality in terms of religious laws did not arise. Under the Mughals, non-Muslims were given the autonomy to decide their family disputes using their customs and there was minimal interference from the State.[170] Over the 600 years of Islamic rule, Hindu personal law remained untouched and thus emerged two parallel sets of personal laws- Hindu law and Mohammedan law.[171]

The British initially continued adhering to the Mohammedan criminal laws.[172] There was a lot of confusion regarding the laws to apply in cases where only Indians were involved.[173] The criminal laws had also become very outdated and required change.[174] Thus with the first Law Commission, efforts were made to ensure there is a uniform set of laws governing the Indians.[175]

The colonial rulers regulated the discrimination present in the Hindu laws.[176] Sati was outlawed by Lord William Bentinck with the Bengal Sati Regulation of 1829.[177] The Hindu Widow Remarriage Act[178] stated that marriages of widows under Hindu law would be valid and the children born out of such marriages are legitimate and given the same treatment with regard to inheritance.[179]

Currently, the Hindus are governed by the Hindu Code Bill which was passed in the form of four statutes in 1955-56, the Muslims are governed by the Shariat Act of 1937 and The Muslim Women (Protection of Rights on Divorce) Act, 1986, the Christians are governed by the Indian

[168] Mandakranta Bose, Faces of the Feminine in Ancient, Medieval and Modern India (Oxford University Press 2000) 7

[169] Mandakranta Bose, Faces of the Feminine in Ancient, Medieval and Modern India (Oxford University Press 2000) 7

[170] N Chatterjee, Reflections on religious difference and permissive inclusion in Mughal law, JOURNAL OF LAW AND RELIGION 1,9 (2014)

[171] Nandini Chatterjee, 'Reflections on religious difference and permissive inclusion in Mughal law' [2014] 29(3) Journal of Law and Religion 9

[172] DK Srivastava, 'Personal laws and Religious Freedom' [1976] 18(4) Journal of the Indian Law Institute 554

[173] VD Kulshreshtha, Landmarks in Indian Legal and Constitutional History (Eastern Book Company 2016) 37

[174] DK Srivastava, 'Personal laws and Religious Freedom' [1976] 18(4) Journal of the Indian Law Institute 560

[175] DK Srivastava, 'Personal laws and Religious Freedom' [1976] 18(4) Journal of the Indian Law Institute 562

[176] Timothy Lubin and others, Hinduism and Law, An Introduction (Cambridge 2010) 101

[177] The Hindu Widow Remarriage Act 1856, s 1

[178] Penelope Carson and others, The East India Company and Religion 1698-1858 (The Boydell Press 2012) 225

[179] PENELOPE CARSON, THE EAST INDIA COMPANY AND RELIGION 1698-1858 225 (The Boydell Press 2012)

Christian Marriage Act of 1872 and the Divorce Act of 1869 whereas the Parsis are governed by the Parsi Marriage and Divorce Act of 1936. The Special Marriage Act of 1954 is the first step towards codification and uniformity as it allows people from different religions to marry each other[180] without losing the right of succession[181] as prescribed in the various personal laws.

The Indian constitution is one of the most meticulously crafted constitutions in the world.[182] It is a product of intensive research complemented with a deep understanding of the Indian context. It is safe to say the Constitution drafters were way ahead of their time in their thoughts and approach. They had a clear vision of the India they wanted to build which belonged to all her citizens. Every provision, every sub-clause and every word has been carefully thought out. Thus, the history which is attached to it is essential to understand the significance of UCC. We have to understand the reason behind its inception, more simply put as 'what was the intention of our constitution makers'. This takes us back to the debates which spurt out amongst out in the Constituent Assembly. The members of the sub-committee on Fundamental Rights wished to have 2 sets of Fundamental Rights; 1) Justiciable rights and 2) Non-justiciable rights. As the name suggests the latter would not be enforceable in the court.[183]

civil code was inserted in the second part – the non-justiciable fundamental rights in accordance with the opinion of the majority. However, three members who happened to be women had differing views on the UCC – M.R Masani a Parsi, Hansa Mehta a Hindu and Amrit Kaur a Christian stated in their dissenting note that UCC was the way to advance to nationhood.

About a year and a half later when Dr. Ambedkar presented the Draft Constitution to the Constituent Assembly for deliberation, UCC found its On submission of the sub-committee`s report to its parent committee, the uniform way in the DPSP, presently the Article 44[184]. Including UCC in the DPSPs was a compromise between the two factions for and against it.

[180] The Special Marriage Act 1954, s 4

[181] The Special Marriage Act 1954, s 21

[182] Sathe, S. P. *Journal of the Indian Law Institute*, vol. 14, no. 2, 1972, pp. 301–306. *JSTOR*, www.jstor.org/stable/43950136. Accessed 14 Sept. 2020

[183] Centre for law and policy research, 'Constituent Assembly Of India Debates (Proceedings) - Volume VII' (*Constituent AssemblyDebates)* <https://www.constitutionofindia.net/constitution_assembly_debates> accessed 11 September 2020

[184] Constitution of India 1950, art. 44

The intention to not completely discard it despite the vehement opposition was to leave the task upon the future governments to make the call.[185]

Perhaps the reason that the UCC was envisaged as a part of Directive Principles of State Policy by the Constituent Assembly could have been the possibility of large-scale dissent by specially the minorities of the country who back in 1947 were very attached to their personal laws. The idea of a UCC was not incorporated within the fundamental rights, which can be attributed to two reasons: the first being its apparent contradiction with the freedom of religion and the second being the question as to who shall be held liable for not enforcing a UCC throughout the territory of India. B. Pocker Sahib Bahadur talked about how tyrannous it would be for a body like the Constituent Assembly to interfere with the religious rights and practices of the people and he also pointed out the multitudes of communities which follow different customs which cannot be made uniform by a stroke of the pen.

It has been over half a century since the enforcement of the Constitution, and one wonders whether we as a nation are ready for it. The government for long has dodged the question of UCC on the pretext of 'inappropriate time'. However, as rightly pointed out by Mr. Chandrachud in Shah Bano no community will bell the cat voluntarily. It's about time we de-politicize this issue and collectively demand a UCC to achieve;

ARGUMENTS IN THE FAVOUR OF A UCC

Simplification of laws and legal system

In the words of American philosopher John Rawls, "social justice is the first virtue of social institution".

The ultimate goal of disposing justice is hampered as there exist various contradictions within the personal laws and due to this there is no simplicity and clarity in laws. As there are multifarious laws with differing positions of law it leads to creation of unequivocalness. Due to the numerous personal laws with varying positions, the courts find it challenging to expound one final stance. The history of codification tells us that one of the primary reasons behind codification was to achieve stability and certainty. Lon Fuller's inner morality of law requires

[185] Centre for law and policy research, 'Constituent Assembly of India Debates (Proceedings) - Volume VII' (*Constituent AssemblyDebates)* <https://www.constitutionofindia.net/constitution_assembly_debates> accessed 11 September 2020

certainty of laws as the desideratum for any legal system. He says that contradictions in the law weaken the efficacy of legal system. The same can be said about the multifariousness of personal laws in India too. Thus, implementation of UCC leads to creation of a monolithic code, applicable to all.[186]

National Integration

The constitution was being drafted against the backdrop of a traumatic partition. It has severely impacted the conscience of our nation and therefore the principle of national integration is valuable to us[187]. It is also implicit in our Constitution where the first article makes it clear by describing India as a 'union" of states despite the federal structure[188]. Moreover, the 42nd amendment incorporated the word 'integrity" into the Preamble to spell it out in clear terms.[189] Chandrachud J in Shah Bano case said: *A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the state which is charged with the duty of securing a Uniform Civil Code for the citizens of this country and unquestionably it has the legislative competence to do so.*[190]

UCC provides a solution to the problem of communalism and reinforces our identity as an Indian first. Further UCC will prevent political domination by means of minority fundamentalism thereby protecting the ideals of democracy and disincentivizing communalism to achieve political ends.

Gender Justice

Women have been for long been struggling within the confines of patriarchy. UCC provides a solution to unfetter those shackles. Women are supressed and denied their dignity. If we closely analyse the personal laws, one can realize the gender inequality which still persists. A common

[186] Frank Lovett, 'Lon Fuller, The Morality of Law ' [2015] The Oxford Handbook of classics in contemporary political theory

[187] RAJU, K. H. CHELUVA. "Dr. B. R. AMBEDKAR AND MAKING OF THE CONSTITUTION: A Case Study of Indian Federalism." *The Indian Journal of Political Science*, vol. 52, no. 2, 1991, pp. 153–164. *JSTOR*, www.jstor.org/stable/41855548. Accessed 14 Sept. 2020

[188] Constitution of India 1950, art. 1

[189] The Constitution (Forty-second Amendment) Bill, 1976 LS Bill (1976-77) [91]

[190] Mohd Ahmed Khan v Shah Bano Begum [1985] 72 All India Reporters 945 (SC)

thread woven through all of India's religious personal law systems is the patriarchal dominance of men and the unequal treatment of women.[191]

In the **Hindu law**. Certain discriminatory provisions exist even today. For example, a Hindu woman is not considered a co-parcener except in a few states. Similarly, she has no right to partition of a dwelling house even though she is not a legal heir. A daughter is excluded from participating in ancestral property under the antediluvian Mitakshara system merely because of her sex. [192]

In the **Muslim personal law**, this discrimination exists just as acutely. This was highlighted especially by the case of Shah Bano where a destitute Muslim woman was denied maintenance from her husband, on divorce citing it to be the norm under Muslim Personal law. [193]When the Supreme Court granted her maintenance, it ensued in a widespread public backlash with the government passing an amendment bill against the decision of the Supreme Court. The need for UCC was also recognized in the case of Sarla Mudgal where a Hindu man converted into Islam to circumvent the monogamous requirements under Hindu personal law. The Court declared the second marriage void but there waa a catch. Under Sec 494 of IPC a man can be convicted of bigamy only if the second marriage is void but this is not the case in Muslim Personal law. These loopholes allow people to evade the law which cause injustice to the first wife.

In **Christian** law specifically Sec 10 of Divorce Act allows a man to be granted divorce on grounds of adultery, whereas a Christian woman cannot be granted a divorce on the grounds of Adultery alone. It has to be backed up with desertion, cruelty, bigamy or incest.

Personal laws in the name of protecting the rights of religious minorities condone the injustice perpetrated against women and have reduced their status to that of a chattel. Theselaws anachronistic and violated the ideals of equality.

Thus, Despite being entitled to the fundamental right to equality under Article 14, personal laws play a role is perpetrating gender inequality. K.M Munshi who was one of the illustrious members of the Constituent Assembly felt that in order to achieve gender equality, it is necessary to incorporate a Uniform Civil Code. Dr. Ambedkar also opined that it was probable

[191] Laura Jenkins, 'Personal Law and Reservations: Volition and Religion in Contemporary India", Religion and Personal Law in Secular India' [2001] Bloomington: Indiana University Press

[192] Hindu Succession Act,1956 1956

[193] Mohd Ahmed Khan v Shah Bano Begum [1985] 72 All India Reporters 945 (SC)

for future legislatures to come to feel the need to enact a UCC. This is a clearly indicator that the drafting committee of the constitution were acutely aware of the gender injustice and sexual inequality of women and they incorporated Article 44 in the hope to remedy it when the time was more appropriate.[194]

Secularism

Secularism is a basic feature of our constitution. [195]It was envisaged by Jawaharlal Nehru for us. Unlike the U.S model of erecting a wall between state and religion, Secularism in the Indian context means equality of status is accorded to each religion.

Religion plays a pervasive role in the lives of Indian people, therefore the most common debate which has erupted against UCC is that it infringes with the fundamental freedom to religion as guaranteed by Article 25 of the Constitution. At the outset, it is to be realized implementation of UCC leads to bifurcation between the religious plane and social plane and does not imply the seizure of freedom to religion. This was expounded by the Supreme Court as follows;

M. Sahai J in his concurring judgment in Sarla Mudgal v. Union of India, where he said: "*Freedom of religion is the core of our culture. Even the slightest deviation from it shakes the social fibre. But religious practices which are violative of human rights and dignity and involve sacerdotal suffocation of essentially civil and material freedoms, are to be deprecated. Therefore, a uniform code is imperative both for protection of the oppressed and for promotion of national unity and solidarity.*"

Tahir Mahmood, an authority on the Islamic Law, in his book 'Muslim Personal Law', has also made a powerful plea for framing a Uniform Civil Code for all citizens of India. He says: "In pursuance of the goal of secularism, the State must stop administering religion based personal laws". He says, "Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true

[194] Centre for law and policy research, 'Constituent Assembly Of India Debates (Proceedings) - Volume VII' (*Constituent AssemblyDebates)* <https://www.constitutionofindia.net/constitution_assembly_debates> accessed 11 September 2020

[195] Kesavananda Bharati v State of Kerala [1973] AIR 1461 (SC)

Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India."[196]

The personal laws govern the personal relations and activities amongst individuals such as Marriage, Divorce, Inheritance and Successions. The personal laws by no means take away an individual 's right to faith and worship. J. Reddy stated that the religion is the matter of individual faith and cannot be mixed with secular activities as secular activities can be regulated by the State.[197] Thus, implementation of UCC upholds the principles of secularism and at the same time does not budge with sacrosanctity of right to religion.

ARGUMENTS AGAINST A UCC

Constitution

The first and foremost argument against the framing and implementation of a UCC which shall be common to the entire country is the provisions of the Constitution. The Constitution provides citizens the freedom of religion[198] but at the same time also empowers the State to make any laws covering the economic, financial or political aspects associated with a secular activity of that religion. [199]Although article 44 of the constitution mandates the state to try and foster a UCC throughout the territory of India[200], article 37 provides[201] that the Directive Principles of State Policy are not enforceable or justiciable by any court. Thus, a UCC may be envisaged for a country like India but it cannot be forced upon the minorities against their will using the Constitution as a tool of dominance.

Plurality

Plurality of civil laws or dispensing different personal laws to different communities has been a very common part of Indian culture and thus has become a medium of expression for India's

[196]Tahir Mahmood, Religion, Law and Society across the Globe: Musings of a Seeker after Truth (Universal Law Publishing 2017)

[197] SR Bommai v Union of India [1994] 2 All India Reporters 1918 (SC)

[198] Constitution of India 1950, art, 25 (1)

[199] Constitution of India 1950, art. 26 (2) (a)

[200] Constitution of India 1950, art. 44

[201] Constitution of India 1950, art. 4

complexly structured community.[202] Although the Hindu religious sect has lately been promoting the idea of a UCC, the problem of plurality of laws also exists in the Hindu religion where there have developed different schools of Hindu laws such as Mitakshara and Dayabhaga which are still prevalent in modern times.[203] In India, the task of creating a UCC has been impossible from the start only because of the division of the Indian society into different religious groups.[204] When the Queens proclamation of 1858 was passed, freedom of religion meant self-interpretation of religion by different religious communities and the jurisdiction of religion over different aspects of life.[205] However, even the Hindu community faces a problem of discrimination and caste system and treats the lower caste with less dignity and a sense of superiority and thus progressive changes should be made as and when necessary to remove personal laws which are discriminatory in nature and award punishment to the offenders.[206] However, the Indian society can also work on a principle of coexistence by mutually respecting all religions and not interfering with the activities of a particular religious sect which can be done by employing more values of tolerance and zero degree of discrimination and inequalities.[207] Thus, in a country with vast religious diversity like India which has a record of communal violence and riots, efforts should be made to preserve the religious laws of each and every community in order to make sure that all the communities especially the religious minorities feel safe and secure. This would also help preserve unity in the nation whereas a UCC at this politically volatile stage will certainly lead to more problems instead of leading to unity.

Minorities

It is extremely significant to hear the voices of the minorities while a UCC is being discussed. Speaking of the Parsis which have a dwindling population in India, a UCC will not be desirable to the Parsis as they do not believe in conversion and thus laws allowing conversion shall not be accepted by the religious group.[208] Parsis also cannot support the prohibition on marriage

[202] M.P. RAJU, UCC A MIRAGE? (Society for Media and Value Education, Delhi 2003)17-18
[203] M.P. RAJU, UCC A MIRAGE? (Society for Media and Value Education, Delhi 2003)17-18
[204] Oliver Herrenschmidt, 'The Indian`s Imposssible Civil Code' [2009] 50 (2) European Journal of Sociology 313
[205] Archana Prashar, Women and family law reform in india, (SAGE publications India Pvt Ltd 1992) 228
[206] Shabbeer Ahmed and Shabeer Ahmed, 'UCC (Article 44 of the Constitution) A Dead Letter' [2006] 67(3) Indian Journal of Political Science 546
[207] Shabbeer Ahmed and Shabeer Ahmed, 'UCC (Article 44 of the Constitution) A Dead Letter' [2006] 67(3) Indian Journal of Political Science 546
[208] Vasudha Dhagamvar, Towards the UCC (Indian Law Institute 2015) 92

between close relatives as they are already getting lesser and lesser in number and the population of their community would otherwise decrease drastically in the coming future.[209] Muslim scholars who support going towards a form of uniformity also mention that although every Muslim has a right to interpret the Quran, the ijma, which is the consensus of the majority over a specific issue should be respected and given due attention.[210] Thus, a very hasty decision about a UCC has the potential of disregarding the customs, values and principles of minorities and thus should be avoided unless and until the country can achieve a unanimous stance on the issue of uniform personal laws.

Another reason pointing towards the undesirability of a UCC is the deliberate attempt to have a major shift in India from a multi-religion and multi-ethnic identity which prevailed in 1947 to a manufactured notion of a "Hindu India".[211] It becomes difficult to see how the relative privileging of one religion over another, in this case Hinduism, can be any form of secularism.[212] Secularism in India fails as many communities still struggle for a fair share of state support for resources to manage and conserve their traditions and as some scholars contend, it has been used as a tool to establish the supremacy of only one religion.[213]

Other Reasons

The Law Commission of India in a Consultation Paper wrote that the legislations should focus on bringing equality within communities rather than focusing on equality between communities.[214] The Commission chose to deal with laws that are discriminatory rather than coming up with a UCC which is neither desirable nor necessary given the social and political situation in India.[215] Although the directions of the judiciary in the case of Sarla Mudgal point to the contrary, but in Maharishi Avadhesh's case, the Court while dismissing a writ for issuing mandamus to the respondents to consider enacting a UCC for the whole country, clearly stated

[209] Vasudha Dhagamvar, Towards the UCC (Indian Law Institute 2015) 95
[210] Vasudha Dhagamvar, Towards the UCC (Indian Law Institute 2015) 100
[211] Amartya Sen, India's Emerging Economy: Performance and Prospects in the 1990s and Beyond (Massachusetts Institute of Technology 2004) 36
[212] Amartya Sen, India's Emerging Economy: Performance and Prospects in the 1990s and Beyond (Massachusetts Institute of Technology 2004) 36
[213] Phil Zuckerman and John R. Shook, The Oxford Handbook of Secularism (Oxford University Press 2017) 215
[214] Law Commission of India, *Reform of Family Law,* Consultation Paper, 31 (August 2018), available at http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf (Last visited on June 25, 2020)
[215] Law Commission of India, *Reform of Family Law,* Consultation Paper, 31 (August 2018), available at http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf (Last visited on June 25, 2020)

that it was a matter for the legislature (to deal with).[216] When the Ahmedabad Women Action Group decided to obtain a similar remedy with respect to certain personal laws, their petition was dismissed as a matter which falls under state policies with which the Court shall have no concern.[217]

CONCLUSION

After examining both the sides; for and against UCC, we realize that UCC was modelled on the western legal positivist ideology. The western ideals of 'Secularism' separate religion and state and its evolution is far different from that in the Indian context. In the western context secularism is intended to promote *religious uniformity* or religious neutralization. Whereas in India, secularism is a means to achieve *religious diversity* with every religion being accorded the same status.

In India, different legal histories co-exist and continue to operate unofficially. Lawmakers must understand that personal status laws do not simply vanish because the state wishes them to. As we conclude, we would like place reliance on Werner Menski`s argument and state Personal laws should not be codified into a monolithic UCC as in India religion goes beyond faith and worship, it governs the lifestyle and day-to day choices of people. However, the apparently blatant social and gender injustices in each personal law can be remedied by passing legislations and exercising justice, equity and good conscience as has been practiced by the courts in the cases of Shah Bano, Danial Latifi and so on. Thus, legal pluralism is our strength and when it walks hand in hand with justice, equity and good conscience this outcome can be achieved.

[216] Maharishi Avadesh. V. Union of India [1994], SCC, Supl. (1) 713
[217] Ahmedabad Women's Action Group v. Union of India [1997] 3 SCC 573

NUCLEAR POWER: EXPLORING ITS DICHOTOMY WITH THE THEORY OF DETERRENCE

- AASHASYA ARORA

INTRODUCTION

Since the bombings of Hiroshima and Nagasaki, there have been countless speculations about what the plight of mankind would be if the world was to undergo a nuclear war. What these Nuclear weapons could and now can do, is unparalleled in their destructive capacity. However, what has been the primary tool in the prevention of that fate of mankind. The answer, to put it simply would be deterrence or nuclear deterrence. It was a military strategy which gained popularity during the cold war era, taking into account the aftermath of the bombings in Japan. No nation was willing to take a hit by a nuclear warhead, which could potentially level cities at a time. This gave rise to the concept of deterrence deriving its primary hypothesis from the psychological concept of deterrence. It means to allege the use of something superior in nature to curb the activity of an advisory before they even commit it. It is one way of dissuading or intimidating someone with your own might to prevent them from taking a certain step. The world witnessed deterrence at first hand when it came to standstill in Cuba in 1962, when USA and USSR warships were ready to plummet the world into WW3. The Cuban Missile Crisis of 1962, proved to the world that there was indeed another way to parry an armed conflict. In theoretical terms, it solidified the position for some realist scholars such as Jervis and Waltz, the value of nuclear weapons in deterring a great war. This was practically the laying foundation and a landmark event for deterrence supporters as to how rational leaders, considering the consequences of nuclear warfare would behave a little more cautiously and work for a peaceful resolution to such circumstances. These realist authors have proclaimed with immense confidence that deterrence has been the element that has kept the peace between the two superpowers during the cold war era. They have asserted that due to the horror associated with the nuclear weapons, they are the ultimate deterrent that exists at the moment.[218] They firmly believe that reason will prevail, and leaders will approach the task

218 Mearsheimer, John J. (1985) "Nuclear Weapons and Deterrence In Europe", International Security; 9(3): 19-46

cautiously in order to safeguard their own states.[219] However, sometimes theorists give the theory of deterrence a little too much credit that it actually deserves. A crucial aspect of how effective a deterrent will be depends on who sells it too. For instance, in the eventuality of The Cuban Missile Crisis, theorists time and again the significance of Kennedy and Krushchev and their role in ending the crisis peacefully. All the treaties that have been established for the sole purpose of the proliferation of these weapons of mass destruction. To list a few would the NTBT (Nuclear Test Ban Treaty), CTBT (Comprehensive Test Ban Treaty), SALT (Strategic Arms Limitation Treaty) and more. It is fair to say that nuclear power and deterrence have a dichotomy, however are symbiotic to some extent when it comes to the specific notions of warfare and military strategy.

RESEARCH STATEMENT

Deterrence has been the tool which has aided the prevention of the pull of the metaphorical last straw, i.e., nuclear weapons when it comes to armed international conflict.

RATIONALE OF THE STUDY

Nuclear power, maybe not so much as the scientific aspect, rather the military or political aspect of it has never failed to pique my curiosity. As an avid enthusiast of international studies and relations I deemed it potentially fruitful to give my input on the topic as we live in unpredictable times with truly astonishing circumstances. Deterrence and nuclear might go hand in hand while at the same time, being opposite to each other. Regardless, writing on something which might be a weapon to destroy or a tool to build, it feels only appropriate as a part of the next generation to provide inputs if we want the technology to be used for the latter than the former and gain a deeper understanding of an approach which might just be a key peacekeeping tool.

SCOPE OF THE STUDY

The study primarily focuses on the relationship between nuclear power and the theory of deterrence. It dwells into how the theory of deterrence got intertwined with the concept of nuclear power and how both of them share a complicated and evolving relationship. This study

219 Jervis, Robert. (1988) "The Political Effects of Nuclear Weapons: A Comment", International Security; 13(2): 18-90

also explores numerous cases and illustrations from the WW2 and the cold war era all the way to modern times. Its hypothesis relies on the fact that deterrence has played a major role in keeping armed conflicts to a minimum and how it has contributed to the non usage or no first use of the nuclear power. It provides several illustrations from theorists, strategists, etc., and how they see this relationship between the two, while providing their opinions and critique and even mentioning the lacunae of this relationship.

RESEARCH METHODOLOGY

A functionalist approach has been adhered to and employed here. The methods which are used to substantiate the study are historical and critical in nature, while slightly drawing on illustrations from around the world pertaining to the topic.

ANALYSIS: INCEPTION AND ADVANCEMENT OF NUCLEAR POWER

The word nuclear power in its most basic meaning would imply something which is a form of energy which functions on the principle of nuclear fission and fusion inside behemoth reactors to produce energy. However, as the popular saying goes "ideals are peaceful, history is not", it did not take long for this technology to go from being a shot at a sustainable future to causing death and destruction and inevitably bringing about the biggest deterrent of war known to the human civilisation. To substantiate this so called deterrent, Churchill once said, "if you go on with this nuclear arms race, all you will do is make rubble bounce." Since 1945, this technology has been only left with the tag of a harbinger of death. With credit to its dual use, as a weapon of mass destruction and a source of clean energy, the word nuclear power has faced its share of trials and tribulations. Though it would be cruel to say that the NPT (Nuclear Non-Proliferation Treaty) has not played its part in curbing the use of this technology. After the fat man and the small boy laid waste, to Hiroshima and Nagasaki, and the coming of the five nuclear states, it was realised that there is a need for certain safeguards to prevent another city, state, or country suffering the same cruel fate.

By the mid 1950s, both the United States and the Soviet Union had developed fully functioning thermonuclear weapons. Considering the fact that only fifteen years later, they were both joined by three more nations as the conductors of successful nuclear tests, which were UK, France and China. As the Nuclear power was at its infancy in relative terms, it was fair to assume the dangers and potential destruction it could cause. The worst fear of the world came true as at

the concluding act of the USA at the end of world war 2. From 6 August 1945 to 9 August 1945, the two bombings conducted by the United States left Japan in ruins and caused unimaginable loss of life and property. Thereafter, the concept of Deterrence originated. Deterrence came about in a rather [220]undesirable manner. It broadly meant, that if two states, equal or unequal in power went to war or armed conflict, they could suggest the use of a devastating power such as nuclear weapons, thereby deterring the opposition and ensuring mutually assured destruction. This way the probability of war or conflict could be curbed. It drew inspiration the psychological concept of the same name. In more technical terms, deterrence is a strategy intended to dissuade an enemy from taking an action not yet initiated by means of threat and reprisal.

With regards to deterrence coming into play, it has indeed served as a primary weapon to oppose war and conflict especially the use of nuclear force/power. In a more crude way, deterrence has served as a way to render nuclear power as a metaphorical last straw for nations. At the moment, as per the NPT there are only 9 nuclear capable states, namely, the P5 of the UNSC along with India, Pakistan, Israel and North Korea.

LITERATURE REVIEW

Bernard Brodie, an American military strategist and one who is touted to be the architect of the first nuclear deterrent strategy, suggested that a nuclear deterrent must always be ready, yet ever be used. 3He stated in regard of the concept of deterrence, as he was an expert military strategist during the post WW2 era and played a vital role in the WW2 success of the United States.

Thomas Schelling in his famed work of 1966, "The Diplomacy of Violence" has suggestively stated that over time military strategy has evolved into a form of coercive capability, intimidation and deterrence.[221] This goes on to show that strategists like Brodie, have indeed chosen the weapon of choice as deterrence. Schelling has implied how the theory of deterrence

220 Brodie, Bernard (1959), "The Anatomy of Deterrence", Princeton, Princeton University Press; p264-304

221 Schelling T.C. (1966) "The Diplomacy of Violence", New Haven; Yale University Press; p1-33

or the capacity to harm another state is now simply used as a coercive tool to suppress influence of an inferior state in the international circuit.

Robert Jervis, has gone into details about the approaches of deterrence. To mention the 3rd approach by him he suggests that attacking states, per se, use insight to determine the behavioural patterns of defending states based on past actions in certain conditions.[222] He implies of a lacuna of deterrence by stating that these repetitional inferences sometimes might backfire and the attacking state might not always play to the tune of their past behavioural patterns and may take unexpected and undesirable decisions. Basing his argument on the fact that these assumptions might be incorrect and lead to disastrous conditions, Jervis plays upon the fact that deterrence might not always play in favour and may sometimes backfire.

P.K. Huth, has come to strengthen the concept of deterrence and state how two types of deterrence can prove to be beneficial in different circumstances. He has categorised deterrence into two categories, namely, Direct and Extended deterrence. Direct deterrence is the concept vide which the state might prevent an armed attack against its own territory and secondly, extended deterrence, which maybe used to prevent an armed attack on the territory of another state. In addition to that Huth has highlighted two more categories basing them on previous ones, which are general deterrence, policy of using deterrence for long term of short term threats and immediate deterrence, the policy of using deterrence to deal with immediate and pressing short term threats.[223]

CONCLUSION

We have witnessed contrasting views in the process of comprehending the study. The questions arises, that does deterrence deserve the credit it has been accredited by functionalists and realists. In a way deterrence has played a major role in being the blockade between mankind and worldwide nuclear fallout. However, With theorists like Jervis, who have gone onto to point out the cognitive and behavioural aspect and how a slight miscalculation can lead to a failure in deterrence, and cause disaster. Jervis, with his argument makes a fair point as deterrence can not entirely be dependent upon the basis of mutually assured destruction (MAD)

222 Jervis, Robert, (1982), "Deterrence and Perception"

223 Huth, P.K. (1999), "Deterrence and International Conflict: Empirical Findings and Theoretical Debate", Annual Review of Political Science; (2) p25-48

and inferences to predict future moves based on past behaviour. According to Sagan, states are inherently prevented from achieving rationality because of their limited calculations and coordination. And in addition to that, cognitive calculations may not always be accurate.[224] Sagan has pointed out numerous reasons as to why it is an unpredictable affair to rely on deterrence. He has named hasty decision making, Interrelated conflicts, not assessing every outcome and more. However, Waltz in opposition to this has stated that "The fear of accidents, works against their occurrence."[225] There is minimal usage of nuclear deterrence these days with much credit to the various proliferation agreements and treaties that have come into play. In my personal opinion, deterrence has not been the only factor which has prevented or single handedly curbed nuclear conflict. To be not too cruel to it, deterrence has made a substantial difference in the world peace scenario but to accredit that amount of success to it would be unfair. There are a lot of variables that go into the exercise of the policy of deterrence and hence, have to be taken into account. These variables have played an equally substantial role in the prevention of pulling of the metaphorical last straw and deserve equal credit.

224 Sagan, Scott D. (1993) "The Perils of Proliferation: Organisation Theory, Deterrence Theory And The Spread of Nuclear Weapons", International Security 18(4): 66-107

225 Waltz, Kenneth N. (1995) "Peace, Stability, and Nuclear Weapons", Policy Papers: 3-19

AICHI BIODIVERSITY TARGETS AND ACHIEVEMENTS MADE BY INDIA UNDER NATIONAL BIODIVERSITY TARGETS

- JAYANTA BORUAH

ABSTRACT

Human development has been detrimental to the sustenance of the natural ecosystem as a result of which there has been a significant loss of global biodiversity. This made the world fraternity devise new techniques of protecting and conserving biodiversity through sustainable utilization of biological resources. One such technique was the adoption of Aichi Targets in 2010 by the Conference of Parties (COP) to the Convention on Biological Diversity (CBD) which entrusted a responsibility on all the signatories to adopt a National Biodiversity Strategy to meet those Targets. India being a signatory also came under the same responsibility and thus, drafted the National Biodiversity Targets in 2014. These targets were to be achieved by 2020 and therefore an analysis of the achievements made so far by India in fulfilling these targets becomes very important. This Article will thereby focus on the status of implementation of the National Biodiversity Targets by India after analyzing the Aichi Biodiversity Targets to understand the extent of success made by India in this regard.

Keywords

Biodiversity; Protected Areas; Conservation; Targets; and Sustainable Utilization

INTRODUCTION

Nature has nourished humanity till the present age and even is nourishing yet. Biodiversity being a component of nature is very essential for the survival of mankind. Biodiversity means a variety of all living species which picturizes the beauty of the natural creation. This variety of species is interlinked to all human beings throughout their life. But human development in the last century has resulted in grave degradation of the entire Natural ecosystem which has ultimately affected the life support system thereby causing a huge loss to the Biological Diversity. There has been a loss of 76% of Freshwater Wildlife and 39% loss of Marine and

Terrestrial Biodiversity respectively across the world since 1970.[226] All these forced the World Fraternity to become aware of the consequences of such loss of biological resources which will ultimately put an end to the entire life on this planet. So, to protect this planet from dying, they stood up for the conservation of these valuable resources that could have been done only by international cooperation for which a well-defined legal framework was needed. Thus, this led to the growth of various international instruments for regulating anthropogenic activities upon biological diversities to protect these diversities.[227] Convention on Biological Diversity (CBD) is one amongst such International Instruments which puts a responsibility on its signatories for conservation, sustainable utilization, and fair and equitable sharing of benefits arising out of the utilization of biological resources. To achieve these three principal objectives of CBD, a Global Strategic Plan, termed as Aichi Biodiversity Targets, was adopted in 2010 by the Conference of Parties (COP) providing for 20 Targets, which were to be achieved by all individual signatories by implementing National Biodiversity Strategies at the National Levels by 2020.

India being a signatory also came under the same responsibility. India is one of the 17 mega biodiversity countries of the world. Having only 2.4% of the world's land area, it consists of around 7.8% of total species, including over 46,000 species of plants and over 81,000 species of animals as provided by the Botanical Survey and Zoological Survey in India respectively[228]. India also provides shelter to many microbial species of the world. Further, different species of seeds both domestic and wild varieties are found in India. The diversity of the Ecosystem of the country is also very unique in the world.[229] All these make India's role in the process of conservation very significant at the global level and thus, India too adopted her National Biodiversity Targets to be achieved by 2020 as a part of her National Biodiversity Action Plan. This article will therefore focus on this current year of 2020, the extent of success made by India being a signatory to CBD in achieving all these Targets at the National Level.

[226] Candige Gaukel Andrews, WWF Report: 52 Percent of the World's Biodiversity is Gone, Good Nature Travel, (Nov. 17, 2018, 12:23 AM), http://goodnature.nathab.com/wwfs-living-planet-report-2014-we-now-have-less-than-half-the-biodiversity-of-just-forty-years-ago/.

[227] International Day for Biological Diversity 22 May, United Nations, (Nov. 17, 2018, 02 45 AM), http://www.un.org/en/events/biodiversityday/convention.shtml.

[228] Frequently Asked Questions on the Biological diversity Act, 2002, National Biodiversity Authority, (Sept.. 09, 2018, 12:35 PM), http://nbaindia.org/content/19/16/1/faq.html.

[229] Biodiversity, Ministry of Environment and Forest, MoEF, 1999, (N0v. 10, 2018, 10:55 AM), https://www.envfor.nic.in/soer/2011/ind...bio..pdf. .

AN ANALYSIS OF AICHI BIODIVERSITY TARGETS

Aichi Biodiversity Targets gaining its name from Japan's Aichi Prefecture was adopted as a Strategic Plan to reduce the loss of forest cover along with the decline of Biodiversity, which was established by UNCBD in 2010.[230] This strategic plan provided for 20 Targets grouped under five different strategic goals that were highly ambitious for protecting the Biodiversity and were meant to be achieved within ten years from 2011-20. And all these goals and targets can be briefly analyzed in the following manner-

Goal A provides for mainstreaming biodiversity across governments and societies for meeting the underlying causes of biodiversity loss. Under this goal, four targets have been specified that provide for- i. making the people understand the value of Biodiversity and thereby creating awareness amongst them for conserving it by 2020; ii. To integrate such values of biodiversity into the national and local development planning strategies along with poverty reduction strategies to incorporate it into the national accounting and reporting systems by 2020; iii. All incentives providing for subsidies that are detrimental or harmful to the Biodiversity were to be eliminated to the possible limits and to develop such incentives in conformity to the obligations under various other International Instruments that will lead to a positive impact on the Biodiversity looking at the socio-economic conditions of the respective nations latest by 2020; and iv. By 2020 the government business and all stakeholders must strive for implementing plans for making sustainable utilization of natural resources and to keep the impacts of such utilization within safe ecological limits. Goal B provides for lowering the pressure on Biodiversity and to encourage sustainable use of it. This goal provides for six targets which are as follows- v. by 2020 loss of forests at all levels shall be reduced by half compared to the present rates and where it Is possible it shall be reduced to zero along-with reducing fragmentation and degradation; vi. By 2020 to manage fisheries, invertebrate stocks, and aquatic plants sustainably and legally, and to harvest them in an ecologically safe manner; vii. Agriculture and aquaculture areas are to be managed sustainably to promote conservation of biodiversity; viii. Pollution from excess nutrients is to be curbed down below limits to reduce the harmful impacts on the ecosystem and the biodiversity by 2020; ix. To identify the priority species and to take measures for managing pathways to prevent the introduction and establishment of such species; x. anthropogenic activities leading to climate change and ocean

[230] Gloria Dickie, Aichi or Bust: Is the World on Targetto Protect Its Most Threatened Ecosystems?, The Revelator (Apr. 10, 2020, 01:11 AM) https://therevelator.org/aichi-protect-ecosystems/.

acidification are to be minimized to reduce pressure on coral reefs and other vulnerable ecosystems for maintaining their integrity and functioning by 2015. Goal C provides for safeguarding the ecosystem, species as well as genetic diversity to improve the status of biodiversity. This goal consists of three targets which are as follows- xi. It provides for conserving 17% of terrestrial areas and 10 % of coastal and marine areas including mainly those areas that are important for biodiversity and ecosystem services through a sound mechanism of protected areas along with other conservation measures integrated into the wider landscapes and seascapes; xii. By 2020 the extinction of known endangered species is to be prevented and to improve the status of the decline of those species that are most endangered; xiii. Strategies are to be made and implemented for safeguarding genetic diversity and genetic erosion by 2020. Goal D speaks for enhancing the benefits of biodiversity and ecosystem services to all. This goal also specifies three targets that can be briefly analyzed as follows- xiv. By 2020 all ecosystem services that provide for essential services related to health and livelihood shall be safeguarded keeping in consideration the needs of the poor including women, indigenous, local, and other vulnerable sections of the society; xv. It speaks for climate change mitigation and adaptation and for combating desertification by restoring 15% of the degraded ecosystem for increasing ecosystem resilience and the contribution of biodiversity to carbon stocks; xvi. It provides for making the Nagoya Protocol operational by implementing the Fair and Equitable Benefit Sharing (FEBS) system through national legislations. Finally, at last, Goal E provides for participatory planning, management of knowledge, and capacity building. This goal consists of four targets that can be listed as follows- xvii. This target provides for developing a national biodiversity strategy plan and action plan by 2015; xviii. It speaks for providing respect to the traditional knowledge and customary usages of the indigenous and local communities that are useful for conservation and sustainable utilization of Biodiversity through national legislations subject to various international obligations and to reflect such traditional knowledge and customary usages in the implementation of CBD with the full participation of such communities at all relevant levels.; xix. It speaks for improving the scientific base of knowledge related to consequences of the loss of biodiversity and their reduction and to share such knowledge for applying them; xx. It speaks for mobilization of

finances for implementation of this strategic plan which will be subject to changes based on the reports introduced by the parties.[231]

By looking at the above analysis it can be understood that all these targets aim for achieving the three basic objectives of CBD. They are not only meant for conserving the existing Biodiversity but also for improving it and making sustainable utilization along with sharing all the benefits arising out of such utilization. They further enhance focus on preserving the traditional knowledge of the local and indigenous communities and developing such knowledge into technologies for better conservation and utilization of biodiversity. Moreover, these targets can be attributed to having linked biodiversity conservation with that of climate change mitigation and adaptation much before the Paris Accord of 2015. These goals also speak for sustainable agriculture, aquaculture, and management of various ecosystem services. In short, all these make the Aichi Targets very important for maintaining the life support system of this Planet.[232]

However, the progress of most of the signatories in achieving the above-mentioned targets has been very slow. Further, the Aichi Targets can be assumed to be equally important like that of the Paris Accord, but Paris Accord came much later than the Aichi Targets and even the year 2020 which is the deadline for achieving the Aichi Targets has appeared, yet these Targets have failed to gain popularity as was expected.[233] A Report by WWF in 2016 provided that only 5% of the countries were on track for meeting the Globally accepted Aichi Targets while 20% of the member countries have made no progress at all. All these facts provide a dismal picture about humanity which besides witnessing such a wide loss of biodiversity is still not willing to acknowledge such losses and to make efforts for protecting them.[234] However, fortunately, India has been actively engaging herself in this regard and her efforts will be analyzed briefly in the succeeding sections.

INDIA'S NATIONAL BIODIVERSITY ACTION PLAN

India became a signatory to UNCBD in 1993 and adopted the first National Action Plan on biodiversity under the heading "National Policy and Macro Level Action Strategy on

[231] Aichi Biodiversity Targets, UNCBD (Apr. 22, 2020, 01:13 AM)
[232] Aichi Biodiversity Targets, BD Terms (Apr 21, 2020, 01:17 AM) https://biodiversitya-z.org/content/aichi-biodiversity-targets.
[233] Supra, 5.
[234] Progress Report Towards the Aichi Biodiversity Targets, UNCBD (2016) pdf.

Biodiversity" in 1999.[235] Then subsequently for enhancing the legal support in the process of implementation of the objectives of CBD in India, the Biological Diversity Act 2002[236] was enacted. This law was the first step ever taken to deal with conservation of biodiversity as a principal objective and it even provided scope for the establishment of the Access and Benefit Sharing system (ABS) in India. Several other policies such as National Forest Policy 1988, The National Agricultural Policy 2000, National Population Policy 2000, etc. were integrated. But there were increasing demands for meeting other national as well as international commitments related to various aspects such as climate change, desertification, etc. for which ultimately India came out with a comprehensive policy document under the National Environment Policy of 2006 which deliberately aimed for sustainable development. The Strategy of 1999 was revised and updated in 2008 in the form of the National Biodiversity Action Plan (NBAP). Thus, India had adopted significant policy measures for improving the standards of Biodiversity within her national jurisdictions.

INDIA'S NATIONAL BIODIVERSITY TARGETS

India's National Biodiversity Action Plan (NBAP) 2008 was prepared even before the adoption of the Global Strategic Plans and the Aichi Targets 2011-20 in 2010. Therefore, India besides going for revising her NBAP submitted an addendum in 2014 which consisted of 12 National Biodiversity Targets (NBT) that were developed within the framework of Aichi Biodiversity Targets.[237] These Targets can be listed as follows-

1. The first target provides for making a significant population of the country aware of the values f the biodiversity and the measures to be adopted by them for better conservation of such biodiversity where the focus will be made primarily on the youths by 2020;
2. Such values are to be integrated into planning processes, development, and poverty alleviation strategies at both National and State levels by 2020;

[235] Mayank Aggarwal, India Reports to the Biodiversity Secretariat that it is on track to achieve its Targets, MONGABAY (Apr. 2, 2020, 01:11 AM) https://india.mongabay.com/2019/01/india-reports-to-the-biodiversity-secretariat-that-it-is-on-track-to-achieve-its-targets/

[236] Biological Diversity Act 2002, No. 18 of 2003, Acts of Parliament (India).

[237] Latest NBSAPs, UNCBD (Apr. 23, 2020, 02:12 AM) https://www.cbd.int/nbsap/about/latest/

3. For environmental amelioration and well-being of humanity, actions are to be finalized and taken for reducing the rates of degradation, fragmentation, and loss of biodiversity by 2020;
4. By 2020 measures are to be taken for identifying and managing the population of prioritized alien species;
5. To adopt measures for sustainably managing agriculture, fisheries, and forestry by 2020;
6. To adopt conservative measures such as Protected Area designations and such other area-based conservations for conserving ecologically representative areas on land, inland waters, coastal and marine zones particularly those who are most important for biodiversity and ecosystem services effectively and equitably and integrating them with the wider landscapes and seascapes over 20% of the total geographical area of the country by 2020;
7. To manage and safeguard the genetic diversity from genetic erosion by developing and implementing strategies for maintaining socioeconomically and culturally valuable species cultivated plants, farm livestock, etc. by 2020;
8. To take measures for safeguarding the ecosystem services needed for maintaining human health and livelihood keeping in consideration the needs of the poor and vulnerable sections of the society by 2020;
9. By 2015, to make Nagoya Protocol operational by implementing the Fair and Equitable Benefit Sharing System through National Legal Framework;
10. To make an effective and participative National Biodiversity Action Plan operational at different levels of governance by 2020;
11. To strengthen the traditional knowledge of the local communities related to biodiversity concerning the national legislation and international obligations to protect such knowledge by 2020;
12. To arrange for increasing the availability of resources like financial, human, and technical for effective implementation of the Strategic Plan on Biodiversity from 2011-20 by 2020.[238]

[238] India- National Targets, UNCBD (Apr. 24, 2020, 01:12 AM) https://www.cbd.int/countries/targets/?country=in.

The above targets prove that their objectives attempt to cover various dimensions and components of biodiversity in an issue-based manner. For instance, NBT 3 – NBT 8 covers those dimensions of the ecosystem which the NBT aims for addressing like NBT 3 is speaking for reducing rates of degradation and decline of natural habitats while the similar ecosystem is also covered under NBT 5 which speaks for achieving the goal of sustainable development and NBT 7 that provides safeguarding gender diversity. By looking at the multidimensional aspect of these goals their outcomes are also expected to be multi-oriented.[239]

OTHER LEGAL AND POLICY FRAMEWORKS SUPPORTING INDIA'S NATIONAL BIODIVERSITY ACTION PLAN

The first legal body that supports such an Action Plan is the Constitution of India[240] itself where provisions relating to the responsibilities of the State for ensuring the protection of wildlife, fisheries, forests, etc. have been provided[241] along with the fundamental duty of the citizen to safeguard the natural ecosystem.[242] The Constitution further speaks for respecting International Treaty Obligations and provides the Parliament with the power to implement such obligations by enacting national legislation and policies[243] under which the Parliament could implement the obligations under CBD in India.

As regards policy is concerned, the first policy that could be attributed to having supported biodiversity conservation is the National Forest Policy of 1988 that provided measures for maintaining ecological balance, environmental stability, an atmospheric equilibrium for creating an ecosystem capable of supporting all living species, and such other provisions.

One of the most important policies is the National Environment Policy (NEP) of 2006 that aimed for providing guidelines to integrate all sectoral policy goals with broad parameters by encouraging participation of different stakeholders in partnerships. The specific aspects of NEP related to biodiversity can be highlighted in the following manner- the spread of education and awareness for biodiversity conservation by making the traditional communities participate in such activities; for integrating biodiversity values in all measures related to awareness

[239] National Biodiversity Action Plan, Ministry of Environment, Forests & Climate Change Government of India (2018) pdf.
[240] Constitution of India, 1950.
[241] IND. CONST. Art 48(A).
[242] IND. CONST. Art 51 A(g).
[243] IND. CONST. Art 253.

building; to ensure increase in the living standards of people dependent on biological resources by providing ways for conservation of such resources and reducing their degradation; etc.

Even the National Agroforestry Policy of 2014 has supported biodiversity conservation in India by promoting the plantation of trees along with crops and livestock with a view of improving the living standards of the rural households by increasing productivity and income. It also provides for expanding the vegetation cover, increasing FTC, and meeting demands for agroforestry products including food, fuel, fodder, etc. for ensuring conservation of natural resources.

The National Policy on Marine Fisheries 2017 provided for improving and maintaining the standards of health and hygiene of the marine environment for securing the benefits for both present as well as future generations. It provided the application of several legal doctrines like sustainable development, precautionary principle, public trust doctrine, etc.

Similarly, several legislative enactments also supported the biodiversity action plans in India. The major one being the BD Act of 2002 which provided conservation of biodiversity itself as its priority objective. The next important Act being the Indian Forest Act of 1927 which for the first time provided guidelines for designating forests for their conservation and protection. It also provided for the management of forest produces and regulation of transit into the forests.[244]

The Wildlife Protection Act of 1872 (lastly amended in 2006) Act is most important for ABT 11 and the corresponding Target 6 of NBT since it empowered the State to declare certain biodiversity concentrated areas as Protected Areas classified into four categories- via National Parks, Wildlife Centuries, Community Reserves and Conservation Reserves. [245]

The Forest Conservation Act of 1980 provided for recovery of Net Present Value (NVP) and afforestation for compensating the loss of forests due to deforestation.[246] Similarly, the Wetlands (Conservation) Rules of 2017 provide for State's responsibilities for conserving the wetlands within their respective jurisdictions.

One another legislation that is vital for the conservation of biodiversity is the Protection of Plant Varieties and Farmers Rights Act (PPVRF) of 2001[247] which aimed for establishing a suitable mechanism for the protection of plant varieties, recognition of those varieties that were previously cultivated by the farmers, rights of farmers and plant breeders including those rights

[244] Indian Forest Act 1927, No. 16 of 1927, Acts of Parliament, (India).
[245] Wildlife Protection Act 1872, No. 53 of 1972, Acts of Parliament (India).
[246] Forest Conservation Act 1980, No. 69 of 1980, Acts of Parliament (India).
[247] Protection of Plants Variety and Farmers Rights Act 2001, No. 53 of 2001, Acts of Parliament (India).

that are owed in respect of contributions made during the process of conservation and development of any plant variety for making it available for introducing a new variety of species, etc.

Above all these laws and policies other laws support the enforcement of the NBAP such as the Water (Prevention and Control of Pollution) Act,[248] Air Act,[249] Environment Protection Act,[250] National Green Tribunal Act.[251] All these regulatory frameworks provide a well-defined network base for implementing the NBAP at various local levels in India based on the parameters set by the Global platform.

COMPARATIVE ANALYSIS BETWEEN INDIA'S NATIONAL BIODIVERSITY ACTION PLAN AND AICHI BIODIVERSITY TARGETS

These National Biodiversity Targets (NBTs) are mostly based on the framework established by the Aichi Biodiversity Targets at the Global Level. However, the NBTs have not included Target 3, Target 4, Target 8, Target 10, and Target 15 of the Aichi Biodiversity Targets. Most importantly the NBTs have not recognized the link between biodiversity conservation and climate change mitigation and adaptation that was established by the Aichi Targets. But there is no doubt that these NBTs are the almost exact manifestation of the Aichi Targets in all other aspects thereby meeting the global standards of biodiversity conservation to be achieved from 2011-20 by India.

The Aichi Biodiversity Targets (ABTs) can also be compared with India's NBTs under the following heads-

Concerning Sustainable Development Goals

The UN General Assembly adopted the Sustainable Development Goals that provided various targets to be achieved by 2030 including the eradication of poverty, improving health standards, raising the quality of education, ensuring gender equality, and other socio-economic developments aiming for environmental and social justice. All these targets have a strong relationship with the ABTs which can even be found to have been interpreted by the NBTs. The NBAP is to be implemented in India with the active participation of all the governments including Central, State as well as local governments in cooperation with all the stakeholders

[248] Water (Prevention and Control of Pollution) Act 1973, No. 7 of 1973, Acts of Parliament (India).
[249] Air (Prevention and Control of Pollution) Act 1981, No 14 of 1981, Acts of Parliament (India).
[250] Environment (Protection) Act 1986, No. 29 of 1986, Acts of Parliament (India).
[251] The National Green Tribunal Act 2010, No. 19 of 2010, Acts of Parliament (India).

including NGOs, Civil Societies, and local communities which is a very vital aspect for ensuring sustainable development.[252]

Mainstreaming Gender

The ABTs also reflect the concerns of CBD and the COPs regarding gender equality. In India also efforts in this direction have been made to ensure gender justice by ensuring women participation in the country's decision-making process. The Constitution 73rd (Amendment) Act and 74th (Amendment) Act of 1992 have provided reservations to women in the institutions of local governance in rural and urban areas respectively. Similarly, for making them participate in the decision-making process and implementation of NBAP also several provisions have been made in different policies. Gender budgeting is another measure was adopted by India in 2001 for securing gender justice.[253]

NBAP Implementation and the Role of Local Communities

Incentives were also adopted for ensuring the active participation of the local communities in the process of decision-making as well as policy formulation. Various schemes were enacted for uplifting the living standards of these communities. It was even recognized that these communities are themselves, important stakeholders, in the process of conservation of biodiversity. Different types of institutions including Joint Forest Management Committees, Biodiversity Management Committees, etc were established for making them participate in the process of conserving biodiversity and sustainably utilizing them with the help of NGOs and Civil Society Organizations.[254]

The above discussion highlights the different dimensions based on which the NBAP can be compared with the Global Standards fixed for biodiversity conservation. By looking at this, it can be said that biodiversity conservation is not only possible by dealing with it in isolation. It is necessary to have a multi-oriented policy formulation aiming for achieving development in various aspects of the socio-economic conditions of the country.

STATUS OF IMPLEMENTATION OF THE NATIONAL BIODIVERSITY TARGETS IN INDIA

[252] Implementation of India's National Biodiversity Action Plan; An Overview (2019), Ministry of Environment Forest & Climate Change, pdf.
[253] Achievement of Aichi Biodiversity Targets 11 and 16: Success Stories from India, Ministry of Forest & Climate Change (2018), pdf.
[254] Ibid.

India submitted its Sixth National Report (NR6) to CBD in December 2018, where the progress made by India in implementing the NBTs was highlighted. By submitting this report, India became one of the first five Nations to have submitted their Sixth National Reports which was one of the mandatory obligations of the parties signing CBD. This report highlighted that India is one of those few countries whose forest cover is increasing which was stated in the State of Forest Report 2017. India is almost on the track of achieving 8 NBTs while 2 NBTs have already been achieved and now she is striving for achieving the remaining two NBTs. India has also extended the required percentage of geographical area from 17% to 20% to be taken into consideration for the conservation of biodiversity. As regards operationalizing the Nagoya Protocol, India has adopted the 2014 guidelines and has also published the 1st Internationally Recognized Certificate of Compliance (IRCC) in the year 2015 and since then such publication has increased to 75 till the submission of this NR6. It is even estimated that the population of lions and elephants has increased to 520 and 30,000 respectively in 2015 while the one-horned Rhino has also increased to 2400. Moreover, as compared to the global record of endangered species which is 0.3%, in India it is recorded to only 0.08%. Measures for sustainable management of agriculture, fisheries, and forests and programs for maintaining genetic diversity have been adopted. Even measures were also adopted for protecting the Traditional Knowledge of the local communities related to biodiversity conservation and utilization.[255]

However, we must also acknowledge that in India commodification of natural resources by the State in the name of public interest has also increased in the last few decades which has led to the exploitation of such resources.[256] For instance, 22 km of the stretch of River Shaonath was sold to a private person by the State of Chhattisgarh.[257] Further, approximately 150,000 hectares of Forest Sites are estimated to be used for commercial purposes in India every year.[258] As regards the implementation of the ABS is concerned, a study conducted in Kamrup District of Assam revealed that there is a lack of cooperation between the Biodiversity Management Committees and the State Biodiversity Board and the Forest Officers stated that there is an

[255] Supra 28.
[256] E. P. Chaithanya, The Ownership Over Common Property Resources State Versus Community Rights, 2(1), IJPSLIR, Jun 2012, pdf.
[257] Rohit Jain, 4th Annual Workshop on Common Property Resources and the Law, Partners for Law in Development, (2002) pdf.
[258] Supra 31.

increasing number of rhino and pangolin poaching cases and even the forest guards undergo several problems while protecting and defending the forest under their jurisdictions due to lack of manpower and other necessary resources.[259] While Assam State Biodiversity Board revealed that there has been no ABS agreement reached so far from Assam. But this does not mean that there has been no access to any biological resources from a State which is a major biodiversity hotspot in India. This means that all the accesses that had been made from the State have escaped the supervision of the institutions established for monitoring such accesses thereby indicating the failure of this regulatory mechanism in managing the ABS. Similarly, there have also been issues relating to the Biological Diversity Act which is the principal Act in India for enforcing the CBD obligations at the domestic level for which the Act is being now proposed for amendments.[260]

CONCLUSION

From the above discussion, it becomes clear that India has achieved commendable success in satisfying the International Obligations entrusted upon by the CBD and has been able to implement the Global Strategic Plan for 2011-20 including the Aichi Targets at the domestic levels to a satisfactory extent according to NR6 submitted in 2018. However, there are also pieces of evidence that prove that somewhere down the order, India has failed to reduce the degradation of forest cover and exploitation of other natural resources under privatization and commercialization. Further, instances related to the smuggling of wild species are also increasing at an alarming rate. Control of pollution and global warming that was there in the Aichi Targets but was not mentioned in NBTs have not been properly implemented and this gets proved from the significant increase in pollution and greenhouse gases in Delhi and other megacities which is now a highly emerging problem.

Thus, it becomes significantly essential to reorient the process of policy formulation from different aspects related to environment protection as a whole like- biodiversity conservation, climate change impact reduction, bringing down the levels of pollution of air, water, soil, etc., increasing renewable energy efficiency, raising the living standards of the poor and improving the natural ecosystem by creating awareness amongst all the stakeholders

[259] Jayanta Boruah, Conservation and Commercialization of Biological Resources with Special Reference to Kamrup District, Assam: A Legal Study, LLM Dissertation, NLUJAA, 2019 (Unpublished).
[260] Ibid.

regarding sustainable utilization of such natural resources based on the principle of intergenerational equity. Further, awareness and education of the local people are also very essential to promote capacity building and to make such people eligible enough to understand their rights and liabilities towards Nature.

LAND ACQUISITION

- APRAJITA ROY

ABSTRACT

This research paper discusses in detail about the acquisition of land and the laws pertaining to land acquisition. The first chapter gives an idea of the backdrop of land history . Since land is a scare resource in our country and a major population has been dependent on land for various purposes mainly to earn a living there has been a need for legislations to re-enacted for protection of the same other chapters in this paper throws light on the various legislations which were enacted with the view of land acquisition. Compulsory acquisition of land has destroyed lives of many people without even providing them with proper compensation. Since the Land Acquisition Act of 1894 had failed to serve its purpose an important step was taken in the year 2013 by enactment of the Right to Fair Compensation and Transparency in Land Acquisition Rehabilitations and Resettlement Act as discussed in this paper. This paper looks over the LARR Act 2013 and analyses its impact on the development process. While examining these legislative provisions this paper also contains recommendations for allowing greater transparency in land dealings and better compensation to the land owners.

I INTRODUCTION

1.1Backdrop of land Acquisition

- Land is gift of nature which is free for all of us. It is one of the most important factors of production which is necessary for industrialisation or even urbanisation for that matter. Growth of any country majorly depends on its geographical area which means how fertile the soil is or the yielding quality of such land etc. Earlier land was considered to be a mark of a high social status in the society as higher the proportion of land held by a person higher will be its status. Every land has its owner no land exists without an owner. Agricultural land in India is a part of a major geographical area.Non agricultural land users such as in urban areas , big industries , settlements earlier did not have much use of land but it has rapidly grown after industrialisation and

urbanisation. Even in previous times agriculture was one of the min occupation of a large number of population. Mostly privately owned land in India is used for the purpose of cultivation. Land owners have no restriction on transferring their land tother users but when they wish to transfer their land to any other user for commercial purpose then permission of other authorities is required and several formalities are required to be done. When a large portion of land is required for construction of roads , railways or any other public infrastructure then permission the government is required and other formalities have to be done as per the provisions of land acquisition laws. Ever since the British raj the provision for land acquisition was provided by the Land Acquisition Act,1894.In the case of Kesvanand Bharati vs State of Kerala where the doctrine of basic structure of constitution was introduced it was questioned whether compulsory land acquisition was an infringement to right to property which was then a fundamental right guaranteed by our constitution. The doubt on this feat was cleared when after the 44th amendment right to property was removed as a fundamental right.[261]Since land is such an asset which is used , in large proportions by almost everyone either for setting up a business or cultivation or leisure purposes by private land owners or for construction of public infrastructure by government there have been several cases where a row of discussions have arose over land. Various land disputes have arise as a result of politics over land. It has been coming since British times lands of poor people were being taken and no compensation was paid to them for the same , there was no transparency in land acquisition system and thus people were exploited . In order to overcome such disputes and political issues the Right to fair compensation and transparency in Land acquisition , Rehabilitation and Resettlement Act 2013 (LARR Act) was introduced[262].Main aim of this act was to ensure that the land owners get compensation for their land acquisition and to prevent their exploitation. Objective of this research paper is to discuss about the laws which were formed for ensuring transparency in dealings with land and also the evolutions of laws of land acquisition in India.

[261] Anwarul Hoda"land use and land acquisition laws in India"ICRIER, 1(2018)

[262]Supra note 1, at 103

II. FORMER LAND ACQUISITION LAWS

2.1 Land Acquisition Act,1894

With growing urbanisation and increase in industrialisation at a rapid rate , the requirement for land has become a necessity not only for private projects but also for government to build public infrastructures. C0mpulsory land acquisition till31st December 2013 is governed by the Land Acquisition Act of 1894.The Land Acquisition Act of 1894 allowed the government to capture private lands.This act is the only legislation regarding land acquisition which even after being amended for a number of times has not been able to servers purpose.This act has not been changed with the view of present needs and thus in many aspects is a major failure in proper implementation of laws[263].This Act was formed in the pre Independence times with the view of economic development and for serving the purpose of general public but it has lacked behind in fluffing the needs in several aspects.An amendment bill was in introduced in 2007 seeking to amend the land acquisition Act but it was of no use as the bill lapsed due to diss0lution of 14th Lok Sabha. Under the Colonial Land Acquisition Act of 1894 the State had the power to acquire any property for public purpose and even for private companies with the view of achieving economic development but it ignored the fact to rehabilitate or resettle the families who remained affected for setting up such projects.Thus the Land Acquisition Act of 1894 was replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act in 2013 and this act was enacted with the objective of covering all the defects in the precious legislation.

2.2 Other Pre existing laws

Other two acts which were enacted for the purpose of land acquisition were enacted during the British reign one of which was the Land acquisition (Mines) Act of 1885 and the other one was the Indian Tramways Act, 1886.After Independence laws relating to infrastructure were also enacted and they were many such as The Damodar Valley Corporation Act,1948, The National Highways Act,1956, The Coal Bearing Areas Acquisition and Development Act 1957, The

[263] "The land Acquisition Act,1894",dolr.gov.in(1985)

Railways Act,1989, and these enactments also consists of specific provisions regarding acquisition of land.[264]

2.3 Imperfections of the Pre Existing Laws

Since all of us know that land is a a resource which is limited in its availability but a major population of our country was and is dependent on land for their survival.In the Pre-Independence period the main occupation of almost 80 percent of the population was agriculture and this was their means of survival . But in the British Era these land owners were exploited as compulsory land acquisition had affected all of them.Land Acquisition Act was enacted in the year 1894 but it hd several fallouts such as:

(a) Despite having provisions regarding payment of compensation on the basis of market value of the land,The landholders ended up getting compensation that was lower than the market rate

(b) There were provisions made for making objections on the acquisition of land the public authorities did not take any initiative to look after such objections once the decision to acquire the land for public purpose was taken.

(c)The biggest drawback was the absence of any provision for rehabilitations and resettlement of people who were baby affected by such land acquisition and such people were exploited and left homeless.

III LARR ACT , 2013

3.1 About the Act

In the Imperial Legislative Council, The Land Acquisition Act'1894 was passed for better and smooth process of Land Acquisition in the country till 2012 and its still in practice in Myanmar.In this process government pays an amount to the land owners for the land they take

[264] Anwarul Hoda,"Land use and land Acquisition laws in India"361 ICRIER 4(2018)

from them for the public purpose and development.This amount given is equal to the market value of the land so that the owners doesn't accept loss.These government agencies send some of their officials for this purpose but in the year 2012-13, this was replaced by the Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act i.e, LARR.This Acts says, The method in which government either State or Union, aquires the land for the purpose of public development, Urbanisation and infrastructural Development and in return provides compensation or relief from taxes is called as Land Acquisition. This whole process is monitored under LARR Act,2013 which came into force on 2 January'2014 by subordinating the Land Acquisition Act'1894 which was been followed from the old British Era. In this act, the whole process , procedure for Resettlement and Remuneration for the land which is forwarded to the Government and if we talk about the compensation then the amount paid by government agencies is always more and profitable for the land owner as compared to the actual market rates i.e in rural area the price offered by the government is always 4-5 times higher and in case of urban areas, rates provided to land owners is always double the actual amount.This whole process of ownership transfer and amount is transparent and fair.This Act often results in helping the poor and needy ones, but this act has always been a topic of concern because a lot of controversies occur because of this as government defines it for welfare of Public but now a days it is being used for the formation of Motels, Resorts and commercial Buildings.

3.2 Objectives Of LARR:

- This Act basically focuses on providing fair and actual amount to the land owners because in today's time a lot of corruption is already their which eventually affects the poor and needy ones. As number of Agencies are involved in this process which sometimes becomes harmful for the legal functioning of the system.

- This Act, is responsible for Rehabilitation and making all the arrangements for this purpose.

- For the purpose of providing lowest disturbance and problems, The whole process is observed significantly and carefully and in rural areas is performed in the presence of Gram Sabha.

- This Act is Extended to the whole nation except the state of J & k

- The provisions of this act doesn't apply to the states which are already prevalent under the Special Economic Zones'2005.

3.3 Provisions For Land Owners:

This act says, The land Owners will be provided an extra yearly allowance of $700-800.Under this, it is clearly mentioned one of the family members of the owner will be provided with job or alternate for this is an amount of ₹22,000/- for around 20-22 years.If in case the Land owner looses his property or land in rural area then in compensation, the owner will be provided with 50 square feet of land in any Plinth area. A lot of people criticises this act because it destroy the rights, needs and liabilities of poor who are in search of low cost housing and affordable and cheap hospitals and schools.

IV. IMPACT OF LARR ACT

The LARR bill would ultimately affect the urbanisation and industrialisation in our country if it works successfully with the motive that the land owners which are getting affected and suffering from loss will be helped. So that they don't get exploited by the strong and powerful political parties or Government agencies. This bill only affect the land of 50 acres in urban areas and around 100 acres in rural areas The compensation which was earlier not been paid adequately will now be given more than double or thrice the actual market rate of the particular land. Also, The documentation work and land titles are not very clearly recorded in our country so that will ultimately make this process little slow and hence for the correct working of this act, the whole procedure slows down. Also, with the introduction of new norms and great advancement, the legal and technical work also leads in the delay of process. The projects based on Infrastructure will suffer the most and a number of projects might get down from the track. The projects which are build in rural areas gets affected the most because of the rise in monetary conditions they will not receive any interest from private sector. As we all know India's development is mostly dependent on Infrastructural development, and which cannot be taken care without the help of private sector and hence, if the whole project gets delayed that will make a big gap in achieving success early and recovery the enormous amount money and power

invested. So to resolve this problem the only alternate which is in the hands of government is to rise rates of electricity and water and utilities. The more and more population shifting to urban areas show the need for more advancement in this sector as small cities are getting congested day by day and the need of an hour is to build more safe and big society in the lowest prices. As most pf the projects are based on PPP, and with the involvement of fourth schedule, and it creates delays and more time investing process because consent of more than 70% landowners is required for this. Also with the introduction of LARR bill government has already introduced lots of new schemes and plans under this. lastly, this will affect the projects like railways, highways, main roads etc the least because they come under the category of agriculture land. Now same thing is with the process involving urbanisation as it will also require enormous amount of land which is jot possible in todays time. In this this, where the rates for foreign tariffs are failing at such a high pace, government will need to ensure the makers and producers so that they become able to compete. In the countries like Malaysia and china they still follow the norms mentioned under Land Acquisition Act.

V. CONCLUSION

Land has been an important source which is scarce and major population is dependent on it. Laws regarding land acquisition in India have been in making during the colonial period. During that time everyone's interest was mainly for land for their livelihood. Since The colonial Land Acquisition Act had major fallouts in it and the LARR act was passed as a replacement to the previous act in the year 2013 ensure compensation to the landowners so that they were not exploited and moreover it also provided for resettlement and rehabilitation of those whose homes were destroyed for the use of that particular land. The government should even now ensure that before planning to set up a public infrastructure the people living in such land should be given a proper place to live in an environment which allows them to live as every citizen of our country is guaranteed the right to life under Article 21 of our constitution. Government must take measures to keep a check whether in rural areas farmers who only have one means of livelihood which is their land for agriculture are not exploited in any way by properly educating them about various laws that have been made to protect their lands. Moreover in our country land acquisition laws are better than it was in colonial times and these laws have even benefited a lot of people for example people living in slums and the land belongs to the government and the land is required for construction of some public

infrastructure then such people living in slums are also promised another house and after their proper resettlement only the use of land begins. Thus with growing requirement of land due to Urbanisation and Industrialisation it is very necessary to bring more stringent laws in order to prevent land related frauds.

HUMAN ORGANS TRANSPLANTATION

- BHARTENDU KOCHAR

ABSTRACT

In today's world, Human Organ donation plays a life saving role in many people life. Earlier, it was found difficult to arrange the particular organ for the patient but by the time, with the change in technologies and new inventions, this process has become much easier. The demand is high and availability is low, but still this process became life changing for number of people by extending their life for few years. Now not only parents but all the close relatives can be a part of organ transplantation and can help by giving their own organ. If someone other than the family member wants to donate then that is also possible in today's scenario but shouldn't be based on monetary fund, only on love and affection basis. Under this we will study the process, the committees involved, the guidelines issues by government for this, the Act based on this i.e, THOTA in our constitution and finally concerns regarding the same.

I. INTRODUCTION

Human Organ Transplant is a process in which an organ is replaced from one human body to another. The person donating and other person receiving i.e, recipient the human organ are sometimes present at the same site otherwise the organ is transported. The type of organs that are mostly being transplanted are:

- Liver
- Heart.
- Kidney

The organ donators could be living, dead or dead via circulatory death. The tissues segment includes skin, nerves, veins etc. In the whole World, the most common transplant organ is kidney. The maximum time limit of extracting of tissues from a body of circulatory death person in 24 hours and some of the tissues can be stored and survive for upto 5 years. Now comes the turn of the ethical issues and norms for transplant tourism and more significantly the procurement process in which the transplant is to be done and in our nation one of the biggest

problem is organ trafficking & also patient should be told everything irrespective of hiding anything related to organ transplant[265].So basically this transplantation process of human Organ has started in the early 18th century. Earlier in many years it was considered unsuccessful because whatever way was acquired lead to the death of the patient, either just after the treatment or after few days. In the 1860's the first skin transplant was done but that was unsuccessful and after few more research and hard work of several of surgeons and reservoirs the another most proclaimed transplantation took place in 1904 that was the cornea transplant. Also, in 1880's the organ tissue transplantation took place basically to replace an organ properties ,i.e, Thyroid Transplant.

By the 1890's some of the surgeons and human body scientists noticed that Leads to other problems in the human body and creates a lot of complexities. Later, transplantation of thyroid also lead to many problems in human body but later it became the model of new therapeutic plans. So alternative for kidney transplant was the process of dialysis but that was also not very successful but most people still go for it because it is way cheaper than organ transplant. In 1950's the first successful transplantation took place in Boston, USA. The reason behind has success and popularity was the patient named, Richard. At that time, Richard was the naval officer and he got ill and by the time he his condition became more worse so there came the need for organ transplant and then his brother, donated his kidney to him which made him survive for 8 more years and before this patients used to survive for not more then 20-25 days after the transplantation process. This become the benchmark and most popular phase in history of human organ transplantation and after this by the time many new process were done like transferring the heart of chimpanzees and monkeys but those patient couldn't survive for more than 10-15 days. In the year 2001, it was observed that living organ donors lived more as compared to the dead ones[266].It was the technique of cyclosporine that made theory to organ transplant so practical and helpful in real life. In 1960's one of more successful and famous scientist or surgeons named DR . Cooley performed around 20 transplants which includes the heart transplant and out of that 15 around patients died in quarter period of their surgery. In 1930's one of the most famous Ukrainian dr. performed kidney transplant from a dead

[265] Organ Transplantation available at en.wikipedia.org/wiki/organ_transplantation#Types_of_donor
[266] Organ transplant history is available on this link on yearly basis https://unos.org/transplant/history/

person.[267]By the 1980's more than 50% of the patients survived of the heart surgeries. As the time is passing the success rate as well as the need for transplantation is raising at a very high pace and this transplant for donors includes the family, friends and relatives. But now also there are few issued related to it that need to be resolved and number of new drugs have been discovered and still counting.

II. THOTA

The THOTA stands for Transplantation of Human Organs and Tissues Act which was discovered in 1994 mid. The objective of THOTA was to transplant and manage the whole process of transplantation in a legal manner without any illegal dealing. In our country, every state manages their health related issues and matters. The states and territories behind the implementation of this Act in our constitution were Himachal Pradesh, and Goa and later many other states also accepted this. In the whole world, India is the only country with highest number of human organ trafficking cases.

Later many amendments were also introduced related to the same, but there is still a difference in the laws passed in 1995's Act and amendments in 2014.For the regulation of this act and to avoid any type of fraud or trafficking related issue, different authorities have been set up by the government and hospitals, which includes the chief medical officer or some equivalent post person followed by the 2 medical persons and the health secretary. The whole transplantation process is carried up by an competent authority i.e, Head of the institute. The members appointed by the authority are not the ones performing the transplantation process but just the team members. The authorities are allowed to make decisions for transplants near hi territory only. So the Regulatory bodies responsible for this are Advisory committee, [268]It is formed under a person who is equivalent or higher in the post to the chairperson having 2 years

[267] Organ transplant brief history available at https://www.google.co.in/amp/s/www.history.com/.amp/news/organ-transplants-a-brief-history?client=safari (last visited 22 August 2018)

[268] Manisha sahay, "transplantation of human organs and tissues Act- simplified "12 Indian Journal Of Transplantation 84-89 (2018)

experience with 2-3 medical professionals having good amount of knowledge regarding the same with good experience.

Then comes the second authority i.e, Appropriate authority, It includes and regulates all type of transplantation except the foreign ones. Its main function is to protect the rights of original and living donor and so that person doesn't get exploited for money related things and is also responsible for preventing every kind of commercial deal related to organs. It also handles and keep a check on registration for hospitals of transplantati0n and see their qualifications. Now comes the turn of authorities and committees at lower level ,i.e, State/hospital /Territory level authority. It includes Any medical post person with good knowledge and experience but should be of higher post followed by 2-3 medical professionals who are fully trained and holding good amount of knowledge. Members are basically who doesn't operates the transplantation team but are living in the same state and 2-3 more pers0ns could be lawyer, CA, Police Etc and one should be preferably female and now comes the last authority i.e, The Competent authority which includes the Head of the hospital with members who are not the participants of the transplant team. In 2011 and 2014 many new amendments were introduced the act like in the list of close family members,[269] grandparents are also allowed and the application and form structure was also modified in these amendments.

III. RIGHT TO HEALTH AGAINST ILLEGAL HUMAN ORGANS TRANSPLANTATION

Before landing into the legal rights and Amenities enjoy by the people in the Organ transplantation process, let us talk about, Right to health. So every individual has full right over his organs and its his/her duty to take care of them. We should not exploit or damage them by performing wrong activities. Also, the most trending thing in today's world is Human organ Trafficking and lots of people are being encountered under this. Basically the poor people are offered a good amount of money by the broker or other people in return of their body organ

[269] THOTA 1994 available at www.vikaspedia.in/health/organ-donation/transplantation-of-humqn-organs-act-1994

like kidney, heart , liver etc which they further sell at a very high price either to the hospitals or directly to the patients. Irrespective of thinking about their health, these poor people accept the offer just for the sake of money and put their life at a risk. So further to reduce this rate, many laws have been introduced. So, the family members are the ones who do not need to fill up the process and forms and can donate the organs to the patient. These family members could be mother, father, son , spouse, daughter and now with the new amendment, Grandfather and grandma are also allowed to do so. Now comes the turn of first cousins, so firstly they need to prove their relation with the patient by showing the legal docs and if someone else wants to donate, then firstly he/she has to satisfy the authorised committee through an interview and then only he would be allowed to donate. So basically the whole process is done under the authority named as Authorization committee[270] and Appropriate Committee.

These authorities are established in every state and union Territories. The function of first authority is to see the process of approval/ rejection and other one has to see the transmit, storage and transplanting process, but they can only do so if the hold government provided license. The AC also observes that the donor is not doing it for money but out of love and affection for the patient. According to THOTA, there are certain guidelines under which this process takes place and there are around 13-14 norms declared under it and an amendment was also introduced for the same in 1995 and 2014. The donor firstly has to prove his love and affection for the patient, his desire for donation and most importantly, all the required docs ids(including address). So, during this donation process, it is done with full written docs and legal formalities and in the organ removal process, there are minimum 2 witnesses present and after death there is no option for cancelling. The person having the legal liability of the dead body after his organ donation process, hold a certificate which is signed by every individual involved in the process including the doctors. Right to health leads to various constitutional arguments.[271]

[270] Sunil Shroff, "legal and ethical aspects pf organ donation and transplantation" 25(3) Indian journal of urology 348-355 (2009)

[271] Judit Sandor,"Right to health and the human organ:Right as a consequence?" Research gate 385 (2014)

The genetic transplantation is based on some facts like both human bodies should contain same types of tissues and their relationship should be proved through legal documents. The test is done in the authority made by the government i.e, NABL.

IV. TRANSPLANT TOURISM

The word Travel Tourism, explains the travel which is made to acquire the body organ. In this, the patient or the person travels to another place or country. The health minister of USA said, there are about 1lakh transplant process done every year in the whole world which includes around 40,000 from US and lakhs of people are still waiting for their turn.[272]The need for organs are increasing day by day and a lot of people are ready to buy at any price. So the demand is rising but quantity is very limited. Some of the hospital's head and MD's have told the world that many transplantation processes takes place behind the fold so their demand and success rate can't be calculated but it is very known that they lead to very infections and diseases. If we classic it on the gender basis, then most patients are considered to be male and most of the people who go through transplant process are well educated and have good knowledge. Basically this transplant tourism means in which the person travels to another country to acquire the required body organ because of the shortage in his/her own country and then return back to his home country. All the physicians and surgeons cope up with this process worldwide.[273]

A system was created in the United States which says, the allocation of organ will be done firstly to person who is in much more need even if the other person is paying more money because health is much important than money. But this doesn't happen always because in some cases patient even have to wait for 5-6 long years Which is difficult and challenging at the same time. In the world, The Southeast Asia is considered to be the biggest organ

[272] Transplant Tourism available at https://www.healio.com/infectious-disease/nosocomial-infections/news/print/infectious-disease-news/%7Be6535d20-c913-40b6-b180-577d7e78fc38%7D/transplant-tourism-a-pervasive-and-dangerous-shadow-world-of-medicine

[273] Transplant tourism available at https://organdonationalliance.org/the-risks-of-transplant-tourism/

transplantation hub. In the world, number pf people are on the waiting list or in the pending column for their transplant. In US around 70,000 patients are waiting for their turn but no of donors are very few about 10K only, and the same is in India which eventually results for large number of organ trafficking. As the time increases and patients health starts declining which raises the demand for organs and with this transplant tourism process, there is huge chances of catching an infection that could be liver disease or kidney malfunctioning.

In India large no of people even die after transplantation because of the improper screening and testing process and their low level tools that's why it is said it can even result in life threatening damages and also the transplantation process claims, that after this patient has to take a lot of care of himself because it just supports the system/body but doesn't make the human body perfect as earlier it was, rather it just repairs some damages.

V. JUDICIAL RESPONSE

The THOTA which was established in 1994 explains all the rules and norms for organ transplantation. It was established in 1994 but later in 2011 and 2014, Amendments were introduced. Its aim is to conduct each and every transplantation process in the country in a legal manner and reduce the chances of organ trafficking though in south-east Asia, this organ trafficking rate is very high and the most demanding organs are kidney, lungs and liver. Like, in many transplants the donor must not be dead but in case of heart transplant the donor must be dead[274].This Act also introduces certain committees for this, like Appropriate Authority (AA) or (AC).The whole transplantation process is conducted by the highly experienced, and knowledgeable Doctor followed up the 2 knowledgeable assistant doctors and the transplant process is done in the process of 2 and more witnesses and one of them should be a close relative. Some situation related to the same are discussed below:

[274] Emile Zola Berman, "The legal problems of organ transplantation " 13 Villanova University 751(1986)

In one of the situations, A patient named Balbir singh[275] who was suffering from Hepatitis-c related to liver and was on the last stage of his disease with some other diseases as well, so his brother names Baljit singh tried to donate his liver to him but because he couldn't satisfy the AC with HLA Typing test but he was a close relative so he had some other option, That of he still wants to proceed then some other family member has to pass that HLA typing Test. And further court proceeded with the judgement saying that, If the brother has provided the written document then he don't need to prove the relation medically. Similar situation was identified in which the it was related to the kidney donation,[276] this was based on economic disparity between both the parties because in such a scenario it is clearly observed that recipient is getting the organ with the help of money which is considered illegal ,lawfully. Hence, after seeing all the affidavits, proofs and medical findings, the Approval Committee was held to give approval.

Sometimes, the donor is neither a close relative nor a family member but wants to donate his body organ, just on the basis of his love, attachment or affection[277] for the patient then in that case a proper form is filled with certain formalities Our AC and AA, authorities are very active towards it and keeps a proper check. Now lets talk about one more situation, In this, the petitioner was observed by the Patel Urological Hospital and doctors said that there is a need for kidney transplant and in return donor named Vijaykumar, wanted to gave out of love and affection and for legal matter, he was asked to fill an application under **section 9** of THOTA act. But the AC disapproved because the donor was not a near relative

VI. CONCLUSION

Human Organ Transplantation is a very crucial and big process and it is practiced in the whole World. There are proper Authorities been set up the government for its legal functioning under the, The Transplantation Of Human Organs and Tissues Act (THOTA).There were various changes made to this 1994 act in 21st century for the convenience of citizens. It prescribes the

[275] Balbir singh v The Authorisation Committee AIR 2004 DEL 413
[276] Rajinder Kumar v State of Punjab AIR 2005 P&H 172

[277] Mehul Jadeja v Amarjit Singh (IAS)(2007) 2GLR1780

legal guidelines for organ transplantation in our country. It also puts a ban on organ trafficking and providing particular organ or tissue firstly to the one who is in much more need than the other who is ready to pay a bigger amount. There are proper rules and norms written in this act and it is an important topic because in today's scenario the need for organs is much more higher than the availability. In some places organs are donated with monetary deals but that is illegal, it won't be considered legal until and unless the donor is either a close relative like mother, father, grandparents or giving out of love and affection for the patient. By the time with the introduction of new technologies and processes, this Asking rate might decrease but for now the demand is very high but availability is very low which ultimately leads to organ trafficking and other illegal processes. This whole process is very big and major role comes on the shoulders of Appropriate Authority and AC, which consists of lager of number of members including the authority members, doctors and fellow mates. Later in 2011, Transplantation of Human organs with some amendments was introduced, like,

- Grandparents will also be considered under Close relative category.
- The Board of Brain Death is more simplified now with more number of members.
- The Transplant Coordinator is made compulsory for all transplantation [278]processes.
- Many new organ storage places introduced in every state and Union Territories.
- Eye removal process was also introduced , done by a trained professional.

And, in 2014 Amendments that came into force were also linked with tissue transplantati0n:

- The AC member cannot be the part of medical team performing transplant process.
- In case of N0n Indian citizen or foreigners, transplantation process won't be allowed.
- When the donor and recipient, couldn't justify their relation then also they won't be allowed.
- the Swop process shall be allowed but under conditions only, depending upon the AC.
- When the need for organ is urgent then AC will decide the formalities procedure.
- An apex National and Inter state network been established having full knowledge of stored organs.

[278] Available at vikaspedia.in.

- Nati0nal registry containing all the information of donor and recipient including the transplant process will be available online.

AN EMPIRICAL STUDY TO TRANSGENDER AND THEIR SOCIO-LEGAL RIGHTS IN INDIA

-SATAVISA BORA BAISHYA

ABSTRACT

The most outstanding Gender is critical because culture and people build its significance should be complied with and expressed in certain clear ways; with their gender-related socially pre-determined function. Transgender means a group of individuals who are thought to be Neither men nor women, for example transgender people or intersex people. In all facets of one's life, sex is a pervasive facet. Sex is pre-determined in two categories: male or female, socially and biologically. Gender is a separate category which defines specific characteristics of humans. The names of Hijra, Kinar, and Third Gender etc are known even to Transgender. Nothing appears more regular, unchangeable or attractive to us than that which is split in mal e and female and two genders, masculine and feminine, without recalling it. When sex is assi gned to men and women, this separation of human beings into two sexes takes place at birth, t he notion of sex and gender as a system of two opposite or unchanging divisions, male and fe male: masculine and female, so common sense and the majority of the social sciences. Many of us still find it hard to conceive of any solution to this understanding of gender and sex.

The Transgender is considered to be "no male or female" and includes all aspects. The Transgender is usually thought to be intersex, helpless men, who suffer the emasculation of all or half of the wider community. Their behaviour is feminine. Traditionally received transgender by gathering and earning success payments such as in Marriages, celebrations and birth.

In reference to their alleged unwillingness and lack of willingness for sexual interaction between men and women, transgender's are most obviously 'not men' as a result of their claimed biological intersexuality and eventual castration. Therefore Transgender's, particularly sons, are not capable of reproducing offspring, an important element in the definition of the usual masculine position for men in our culture. But if Transgenders are 'not men,' they are not women, although they are aligned with the role in many areas of women's behavior. These habits include woman dressing, hair wearing, facial hair plucking, adopting

feminine mannerisms, and taking on women's name and using female kinship terms and a special feminized vocabulary,

Yet transgenders are not regarded as mothers, because they can't give birth and because of their sexual conduct. Aggressivity in their position as women, moms and daughters is perceived to be outrageous and very much against the anticipated demure actions of ordinary women. In essence, transgender activities are women's burlesques, and the entertainment appeal stems from the contrast between themselves and the women they resemble.

KEYWORDS- INDIAN PENAL CODE 1860, THE GLBT HEALTH ACCESS PROJECT, NALSA JUDGMENT, THE RIGHTS OF TRANSGENDER PERSONS BILL, 2015.

INTRODUCTION

The Transgenders are pariah local area in our general public however they brought into the world in our general public. They are pariah on the grounds that in our general public in each area individuals are recognized as male or female. However, they are not fall into any of those classes. They are underestimated in the general public. They can't stir up often with others in the general public. They live in their own networks. They have no typical sexual organ yet they have sexual longings. They satisfy their longing in various ways.

Most current conversations of the relationship of organic sex to sex assume that there are two sexes male and female, established on the two organic genders. However, not all societies share this essentialist supposition. Bringing together recorded and anthropological investigations, Third Sex, Transgender difficulties the typical accentuation on sexual dimorphism and propagation, giving a one of a kind point of view on the different types of socialization of individuals who are not one or the other "male" nor "female". The presence of a third sex or sex empowers us to see how eunuchs and Transgenders met the standards of exceptional social jobs that required practices, for example, self-emasculation and how cozy and illegal cravings were communicated. By conceptualizing these practices and by permitting these bodies, implications and wants to arise, third Sex, Transgender gives another approach to consider sex and sex frameworks that is vital to contemporary discussions inside the sociologies.

Transsexual classes and jobs are depicted and taught a focal expressive of investigation and documentation. This necessary a fundamental agreement of the social and recorded settings where the sexual orientation schemata under question have developed, become standardized, changed and developed, for example is a Transsexual what measures exist for the enrollment and legitimating of Transsexuals as people and as a classes? How long have the Transgenders been characterized as such in the Indian practice. The old Kama Sutra specifies the presentation of fellatio by female individuals of a third sex. This section has been differently deciphered as alluding to men who wanted different men, purported eunuchs ("those hidden as guys, and those that are veiled as females"), male and female trans individuals ("the male assumes the presence of a female and the female assumes the presence of the male"), or two sorts of organic guys, one dresses as a lady, the other as a man.

During the time of the British Raj specialists endeavored to destroy transsexuals, whom they saw as "a penetrate of public tolerability." Anti-transsexual laws were canceled; however, a law banning emasculation, a focal piece of the transsexual local area, was left flawless, however infrequently upheld. Additionally during British rule in India, they were set under the Criminal Tribes Act 1871 and marked a "criminal clan," subsequently exposed to necessary enlistment severe observing and disparaged for quite a while; after freedom anyway the were DE notified in 1952, however the extremely old disgrace proceeds.

Hindu and the Transgender:-

The Indian transsexual transsexuals of Aravanis customarily wed the Hindu god Aravan and afterward grieve his custom demise (found) in 18-day celebration in Koovagam, India. Many practice a type of syncretism that draws on numerous religions; seeing themselves to be neither men nor ladies, transsexuals practice customs for the two people. Transsexuals have a place with an extraordinary position. They are typically enthusiasts of the mother goddess Bahuchara Mata, Lord Shiva, or both.

Transsexuals and Lord Shiva

One of the types of Lord Shiva is a converging with Parvati where together they are Ardhanari, a divine being that is half Shiva and Half Parvati. Ardhanari has exceptional importance as a supporter of transsexuals, who relate to the sexual orientation vagueness.

Transsexuals in the Ramayana

In certain adaptations of the Ramayana, when Rama Ayodhya for his 14-year banish, a horde of his subjects follow him into the woodland due to their commitment to him. Before long Rama sees this, and accumulates them to advise them not to grieve, and that every one of the "people" of his realm should get back to their places in Ayodhya, he tracks down that the transsexuals, being neither men nor ladies, have not moved from where he gave his discourse. Intrigued with their commitment, Rama awards transsexuals the aid to give gifts on individuals during favorable debut events like labor and weddings. This aid is the beginning of badhai in which transsexuals sing, moved, and give favors.

Transsexuals in the Mahabharata

Mahabharata remembers a scene for which Arjun, a saint of the epic, is sent into an outcast. There he expects a character of an eunuch-drag queen and performs customs during weddings and labors that are currently performed by transsexuals.

Islam and the Transgender:-

In Muslim social orders and social orders, people are ordinarily expected to carry on as per their organic sex (as well as credited sex character) also, they are given a sex of either a male or female. According to a couple of strict creators/scientists, the Quran explicitly sees that there are a couple of people who are neither male nor female. They contended that the sections 42:49-42:50 (Surah Ash Shura) infact portray the groupings of sexual presentation.

EXCEPTIONAL SOCIAL SYSTEM OF TRANSGENDER COMMUNITY

Transsexual persons are slandered persons. They are still underrated like any other demonise d human. They cannot share this with any one of the gatherers many of the time. So in differe nt examples they have to lead their lives. They usually can't mix with general people.So they lived in different geographic regions and have an unusual social environment. They have a di stinguished house with other Transsexuals alike. They likewise speak with any remaining Transgenders everywhere on the country. They have some extraordinary emblematic dialects which is called as ulti-language and strict practices. By and large Transgenders didn't do any compensation arranged work. Customarily they don't include in business. Yet, at present some Transgenders are participate in business. Significant occupation Traditionally the Transgenders make money by performing at life-cycle functions, for example, the introduction of a youngster in the past just for male kids, who are abundantly wanted in India, But today at times for female kids too and at relationships and they additionally serve the goddess in her sanctuary. The fascination that the Transgender job holds for certain people is the freedom to take part in sexual relations with men, while appreciating the amiability furthermore, relative security of a coordinated local area; these benefits are obvious in difference to the uncertainty and badgering experienced by the womanly gay living all alone. In any case, regardless of whether with spouses or clients, sexual relations contradict the social meanings of the Transgender job, and an wellspring of contention inside the local area. Transsexual older folks endeavor to keep up command over the individuals who might 'ruin' the Transgender standing by participating in sexual movement. While the center of the positive importance appended to the Transgender rule is connected to the invalidation of sexual longing, actually numerous Transgenders do, truth be told, take part in sexual exercises.

These are three kinds of Transgenders:-

A) Real Transgender

B) Male Transgender

C) Female Transgender

LITERATURE REVIEW

Before to know literature survey about subject we should be know the some miserable story of them without anyone else A 45 years of age Transgender said "we have been conceived like this; People don't comprehend why we are this way! We drive ourselves to live with no other go". Another 23years Transgender in Vyasarpaadi felt "when I went to a Government medical

clinic for my ailment, the laborers there including specialist looked at me as a creature." 29 years of age Transgender communicated her concerns in the words "I have concentrated up to twelfth norm, and I will accomplish any work that suits me.

Indeed, even NGOs with the exception of not many like That‟ wonder whether or not to enroll us! Obviously, this general public peers downward on us as Sex Workers and miscreants. However, what misstep did I make in my life? Is having been brought into the world as Transgender my flaw? Just in Sex Work and Asking, they don't ask any capabilities". At long last, 19 years of age Transgender accused, "there is nobody in this general public to really focus on us truly. Numerous individuals come here to talk with us like you. We cry before you, you would say something and disappear. We know nothing enormous will occur".

DEMEANOR TOWARDS TRANSGENDERS IN FAMILY AND SOCIETY

A review by Ryan and her party of the San Francisco State University family acceptance proj ect (2010) reveals that tolerant custodial practise and parental caregivers' behaviours against e motional well being opportunities are protective to their young LGBTs.

In comparison to pairs who had low levels of family recognition LGBT young people who ha d detailed indiscriminate degrees of family recognition during preadulthood had fundamentall y greater trust, social assistance and general welfare.

LGBT young people who detailed poor levels of family recognition during their youthful years were more than three times bound to self-destructive reflection and self-destructive efforts, in comparison to those with undeniable levels of familial recognition.

High strict family integration has been strongly linked to low LGBT recognition of children.

DEMEANOR TOWARDS TRANSSEXUALS IN THE PUBLIC EYE

[279]Variety (2005) Investigated the perspectives toward gay, lesbian, sexually open, and transsexual individuals according to the perspective of hetero guys who joined in private foundations. Information was gathered through the scattering of the GLBT

[279] Medley, Christopher L.(2005) Attitudes Toward Homosexuality at Private Colleges etd-08202005-120200.

Demeanor Assessment at four private schools. Guys who held moderate convictions in their political and strict directions were altogether not quite the same as those who held liberal and moderate convictions. Respondents' perspectives were least sure toward transsexual individuals.

The consequences of a factor examination distinguished center perspectives and convictions. Five factors were distinguished together clarifying 52.1% of fluctuation. They were,

1) the conviction that transwomen experience the ill effects of a psychological disorder;
2) the conviction that transwomen are not ladies, ought not be treated all things considered, and ought not be managed the cost of rights as ladies;
3) Rejection of contact with transwomen in an assortment of social circumstances, including among relatives and educators;
4) dismissal of contact with transwomen inside one's friend bunch, and
5) the conviction that transwomen participate in explicitly freak conduct.

Especially solid, and decently steady across the seven nations included, were the connections between, on one hand, the conviction that transwomen experience the ill effects of a psychological disorder and, on the other hand, the refusal to view or regard them as women or to bear the cost of them rights as women, just as a reluctance to acknowledge the possibility of any friendly contact with them by any means, either inside one's family bunch or outside.

PERSONAL SATISFACTION IN TRANSGENDERS

Transgender life Newfield, Heart, Dible, Caller (2006) Quality evaluation related to quality Women to Men (FTM) Trans Gender Men's lives use the short form 36- Music Health Study Notice 2 (SF-36v2). Email, Internet notifications, Cards, participants of 446 FTM Trans Gender and transgender FTM We're recruiting. Discussion of a computational assessment of life health principles.

In comparison, the QOL of transgender FTM participants was significantly lower Especially for the mental health of men and women living in the United States. FTM Transgender participants who received testosterone (67%) reported statistical significance The highest quality of life is one hundred percent more than those

who does not receive the hormone Treatment. Hancock, Krissinger and Owen (2010) Self-awareness about living with women is linked to taste The voice of a transgender. For female-to-female clients, quality of life has always been refined This is in line with the way some people perceive their voices. This study completes the above Depending on the research, they can be a benchmark of the customer and the audience It is important to evaluate the effectiveness of treatment from a holistic perspective It affects the quality of life in terms of the living conditions of transgender people.

WELLBEING AND HIV HAZARD IN TRANSSEXUALS

[280]The GLBT Health Access Project (2000) intended to improve the medical care gotten by trans people by investigating what a TG/TS individual encounters when she/he looks for medical care. The investigation asked members in four center gatherings to report on their encounters in getting standard medical care just as claim to fame administrations, and to talk about their medical coverage status. The grown-up MTF bunch saw substance misuse treatment and HIV/AIDS care just like the major question. The MTF grown-up bunch said that endocrinology, psychological well-being and essential consideration were their most significant medical care needs. In all the center gatherings, a steady subject was an

view of tremendous supplier obliviousness of trans people and concerns. From the level of medical services frameworks down to singular suppliers and bleeding edge staff, transsexuals announced supplier ignorance of, affront toward, and through and through refusal of treatment for their wellbeing needs, both fundamental and trans-related.

Transgender and the Indian Law:-

Criminal Tribes Act, 1871, which regarded the whole community of Transgenders people as naturally 'criminal' and 'addicted to the systematic commission of non-bailable offences'. The Act given for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were enrolled, and showed up to

[280] Hancock AB, Krissinger J, Owen K.(2010) Voice Perceptions and Quality of Life ofTransgender People; J Voice. 2010 Nov 3

be dressed or ornamented like a woman, in a open road of place. Such people too can be captured without warrant and sentenced to detainment up to two a long time or fine of both.

Indian Penal Code 1860 Segment 377 of the IPC found a put within the Indian Penal Code. 1860, earlier to the sanctioning of Criminal Tribes Act that criminalized all penile-non-vaginal sexual acts between people, counting and sex and verbal sex, at a time when transgender people were too regularly related with the prescribed sexual hones.

AN ANALYSIS TO THE RIGHTS OF TRANSGENDER PERSONS BILL, 2015

A Bill to accommodate the detailing and execution of a comprehensive public strategy for guaranteeing by and large improvement of the Transgender Persons and for their government assistance to be embraced by the State and for issue associated therewith and accidental there to. Be it instituted by Parliament in the Sixty-6th Year of the Republic of India. In the Act, There are all out eight Chapter and 27 Sections, Part one is about Preliminary, Chapter second is about Transgender character, Section third is about Rights and Entitlements, Chapter four is about there Instruction, Chapter five is about Skill improvement and Employment, Chapter six is about Social Security, Health, Rehabilitation and Recreation Social Security, Section seven is about Duties and Responsibilities of Appropriate Government and last Chapter eight is about Miscellaneous.

The rights ensured under the Bill are generally meaningful rights, for example, the right to equity and non-segregation, life and individual freedom, free discourse, to live locally, honesty, alongside assurance from torment or brutality and misuse, savagery and abuse. There is a different proviso for transsexual child.

Training, work and government backed retirement and wellbeing are additionally covered under the Bill. the section on schooling makes it obligatory for the Government to give comprehensive instruction to transsexual understudies and give grown-up schooling to them.

With the business part, there are two separate conditions managing definition of plans for professional preparing and independent work of transsexual people by the Government. There's a different condition for non-segregations against transsexual people in any foundation public or private.

In the federal retirement aide and wellbeing section, the Government is asked to spread government managed retirement and medical services offices which are to be given in the type of isolated HIV facilities and free SRS. They ought to be given the privilege to relaxation, culture and amusement. Fundamental rights like admittance to safe drinking water and sterilization should be given by the public authority.

The Bill conceives setting up various specialists and gatherings National what's more, State Commissions for Transgender Persons. The commissions work will be for the most part in the idea of request or proposals in the in utilization of the law
or on the other hand infringement of right of transsexual people. The Commissions can give summons to observe, get, and so on There is punishment via detainment for upto a year for disdain discourse against transsexual individuals.

LEGAL TENDENCY ABOUT TRANSGENDER COMMUNITY

Law and order is incomparable and everybody is equivalent according to law in India. However the transsexual local area is in a consistent fight as they need to battle persecution, misuse and separation from all aspects of the general public, regardless of whether it's their own loved ones or society on the loose. The existence of transsexual individuals is a every day fight as there is no acknowledgment anyplace and they are excluded from the society and furthermore disparaged. Be that as it may, the Supreme Court of India in its spearheading judgment by the division seat of Justices K.S. Radhakrishnan and A.K. Sikri in National Legitimate Services Authority v. Association of India and Ors. perceived the Transsexual alongside the male and female. By perceiving assorted sex characters, the Court has busted the double sex design of 'man' 'women' which is perceived by the general public. "Acknowledgment of Transgenders as a Transgender isn't a social or clinical issue however a basic freedoms issue," Justice K.S. Radhakrishnan told the Supreme Court while giving over the decision.

The Supreme Court has given certain headings for the insurance of the privileges of the transsexual people by including of a third class in records like the political race card,

identification, driving permit and proportion card, and for confirmation in Instruction foundations, clinics, among others.

HEADINGS TO THE CENTRAL AND STATE GOVERNMENT:-

The court as given certain headings to the focal and state government which are:-

1. Transgenders, eunuchs ought to be treated as Transgender with the end goal of protecting their central rights
2. Recognize the individual's need to distinguish his own sex,
3. Providing reservations in state funded schooling and work as socially and instructively in reverse class of residents,
4. Making extraordinary arrangements in regards to HIV zero-survelliance for transsexual people and give fitting wellbeing offices,
5. Tackle their issues like dread, sex dysporia, disgrace, wretchedness, self-destructive inclinations, and so on
6. Measures ought to be taken to give medical services to transsexual individuals in medical clinic like taking separate wards and furthermore give them separate public latrines.
7. Frame social government assistance plans for their inside and out advancement,
8. To make public mindfulness so the transsexual feels that they are important for the general public and are not to be treated as untouchables.

The judgment has denoted a break from in any case paternalistic and altruistic methodology of the state towards the transsexual local area by outlining their interests as an issue of rights.

ISSUES WITH THE NALSA JUDGMENT

A great deal of the disarray has really emerged from the much-hailed NALSA judgment. Indeed, even as the predominant media and common society was praising the judgment, numerous transsexual pundits were calling attention to its innate issues what's more, logical inconsistencies. The way that transsexual is an umbrella term for individuals whose sexual orientation character or potentially articulation is unique in relation to the sex relegated to them upon entering the world, what's more, explicitly on account of India, may used to portray an

assortment of characters, for example, kothi, transman, transwoman, transsexual, aravani, genderqueer, and so forth isn't obviously illustrated in the judgment.

CONCLUSION

While non-hetero and transsexual people are regularly dependent upon social stressors and separation, science has not shown that these components alone record for the aggregate, or even a greater part, of the wellbeing uniqueness between non-hetero and transsexual subpopulations and everybody. There is a requirement for broad examination in this space to test the social pressure speculation and other expected clarifications for the wellbeing variations, and to help distinguish methods of tending to the wellbeing concerns present in these subpopulations.

Probably the most generally held perspectives about sexual direction, for example, the "conceived that way" theory, basically are not upheld by science. The writing in this space portrays a little gathering of organic contrasts between non-heteros and heteros, however those natural contrasts are not adequate to anticipate sexual direction, a definitive trial of any logical finding. The most grounded proclamation that science offers to clarify sexual direction is that some natural elements show up, to an obscure degree, to incline a few people to a non-hetero direction.

The idea that we are "conceived that way" is more intricate on account of sexual orientation personality. In one sense, the proof that we are brought into the world with a given sex appears to be all around upheld by direct perception: guys overwhelmingly distinguish as men and females as ladies. The way that kids are (with a couple of exemptions of intersex people) conceived either naturally male or female is past banter. The organic genders assume reciprocal parts in propagation, and there are various populace level normal physiological and mental contrasts between the genders. In any case, while organic sex is a natural element of individuals, sexual orientation character is a more slippery idea.

We all know that everyone is equal and everyone should be treated equally than why the community of Transgender still face discriminated in our society. We should never discriminate anyone on the basis of their “life-style”. We were also taught that none of our five

fingers are of same length so why we became so judgmental while discussing the rights of Transgender.

Further all it's our duty to help them to make their rights an absolute one where they were not to be judged.

SUGGESTIONS-

1. Each master of religion then favourably reflects and teaches religious practises in their reli gious addresses.
2. Govt. should provide transgender basic wellbeing, schooling and other fundamental services. Increase in transgender literacy in particular.
3. Govt. The special transgender schools "SATs," since they are still part of culture, should be estabolished. SATs reflect (social transgender adaptation in schools).
4. It is a big deal to reduce crimes in women if the governor is to use women's transgender co rpse in a police force.
5. Governments and NGOs are to initiate programmes aimed at reducing transgender opioid a buse. During my study, 80% smoke, 51.5% drink wine and 20.8% use alcohol, opium or othe r substances.

THE ROLE OF VICTIM IN CRIMINAL JUSTICE PROCESS

- JANICE CASTELINO

ABSTRACT:

"So slow is justice in its way
Beset by more than customary clogs
Going to law in these expensive days
Is much the same as going to dogs"
-Willock

The victim constitutes the most important as well as the most aggrieved entity in any criminal justice administration. The victim of crime has been the 'forgotten man' of the criminal justice system. This lack of knowledge about victims is astonishing; given that the criminal justice system as we know it today would collapse if their cooperation was not forthcoming. The research paper aims at understanding the approach of courts and judges towards the involvement of victims in the criminal justice process and what rights does the victim have. The paper also suggests ways in which this approach can be made more effective. The researchers aims to understand victim's role and involvement involved and what is the victim's perception in the entire judicial proceeding.

LITERATURE REVIEW:

- **S.Muralidhan (2004):** In the research paper titled "Rights of Victims in the Indian Criminal Justice System" states the importance of how the victim should be aware of the rights that she is entitled to. The paper also noted that due to the involvement of media and other aspects it is preferable to conduct the proceedings of the case elsewhere so as to avoid attention. The victim is also entitled to have a lawyer of their choosing and if not, the state has to appoint one. Many a times the victim does not understand the entire process and what exactly is going on and hence needs to be briefed regarding the same.
- **Murugesan Srinivasan and Jane Eyre Mathew (2007):** In the research paper titled "Victims and the Criminal Justice System in India: Need for a Paradigm Shift in the Justice System" highlights that Assistance to victims of crime is of great significance

because victims have suffered irreparable damages and harm as a result of crime. The problems of crime victims and the impact of crime on them is varied and complex and hence needs to be handled delicately. There should also be a change in the focus from criminal justice to victim justice, but victim justice should be perceived as complementary and not contradictory to criminal justice.

- **Adv. Amit Bhaskar (2013):** In the research paper "Analyzing Indian Criminal Justice Administration from Victims' Perspective" highlighted that often the victim's rights are ignored in a case and the rights of the accused are kept in mind which defeats the entire purpose. The adherence to and establishment of proof beyond reasonable doubt just prolongs the process of delivering justice and the ground realities are ignored. The paper also mentions how delay in decision making is a loss for the victim and how the criminal is set free. It also mentions that the victims have many grievances regarding the process followed by law however, India has not rectified them which in turn hampers the case leaving the victim physically as well as emotionally and psychologically affected.
- **Anupama Sharma (2017):** In the paper titled "Public Prosecutors, Victims and The Expectation Gap: An Analysis of Indian Jurisdiction" states that the public prosecutors are entrusted with a big responsibility and have to go through many procedures and follow many rules in order to get the paper work and other aspects in order. This is exactly why the public prosecutor plays a key role in the entire case as it depends on how the case is presented and which fact has more emphasis over the other. The research paper also highlights the lack of motivation and incentives provided to the public prosecutors. The paper also mentioned that the facts stated by the victim play a major part in the case and that only recognizing the importance of the victim is not enough. It is equally important to provide them dur representation and their participation.
- **Dipa Dube (2018):** In "Muffled voices. Making way for impact statements in criminal justice system in India" mentions about the Victim Impact Statement and how it plays an important role in the process of decision making. The VIS is addressed to the judge for considering in the sentencing, it also talks about the victim's feelings about the crime, the offender and a proposed sentence, referred to as a victim statement of opinion. VIS formally recognizes a victim's suffering and trauma resulting from the act

of another. It acts as a succour to relieve the victim of the pain undergone and the violations suffered.

- **S. R. Aadhi Sree (2019):** In the research paper "Victims and Victimology in India– Need for Paradigm Shift" highlights that a victim not only includes the person who has suffered the loss or injury but also their dependents who have equally incurred the loss. Justice should not be confined only to conviction or acquittal of the accused but also must ensure to inspire the confidence of the witnesses for conviction of the guilty and particularly the victims of the crime. However, it is important to ensure the safety of the victim and in case of need to seal the identity of the same so as to not draw any unwanted attention that can affect the case.

RESEARCH METHODOLOGY:

The research paper follows a critical analysis of the rights of victims in India and the due procedure of law that follows along with the justice seeking process. The researcher has relied on secondary data due to time and money constraint. This research paper is specifically focused on exploring the perspective of the victims and the process that they go through in order to get the justice they deserve. The analysis of many cases highlights the need to boost the approach towards the functioning and handling of cases as the long process affects the mental, physical as well as psychological well-being of the victim. The paper also suggests a few measures that can be taken to make the process a lot easier for the victim so that they can carry on with their lives and get the justice that they deserve.

FINDINGS:

Victims and Victimology:

"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.[281] Victimology can also be regarded as the study that outlines the steps to be taken to prevent victimization against crimes and provide legal remedies to the victims of crime.[282]

[281] Andrew Karmen, *Crime victims: An introduction to victimology*, 32 61–64 (2014).
[282] ijsrp-p96101.pdf, , http://www.ijsrp.org/research-paper-1219/ijsrp-p96101.pdf (last visited Sep 29, 2020).

The role of the victim gets reduced to that of a prime witness rather than that of an active participant (party) in the trial. However, while placing that trust in the government and the criminal justice system, the victim harbours expectations that their case will be prosecuted with full efficiency and sincerity, the offender will be duly punished, and that he will be kept involved in the trial.[283]

VICTIM JUSTICE- INTERNATIONAL PERSPECTIVE:

The Basic Principles included in the UN Declaration for Victims are:

1. Access to justice and fair treatment
2. Restitution
3. Compensation; and
4. Assistance.

With regard to the restitution and compensation in the above Declaration, it is stated that offenders should make a fair restitution to victims or their families; restitution should be part of the sentencing in criminal cases; and when compensation is not fully available from the offender, the state should provide monetary compensation to victims who suffered serious physical or mental injury for which a national fund should be set up.[284]

VICTIM IMPACT STATEMENTS:

Much of the attention on VIS has centered on two broad themes; the purpose and appropriateness of VIS and the effect of participation on the criminal justice system and crime victims.[285] The VIS plays an important role as it helps the judge evaluate the seriousness of the crime depending on how it has burdened the victim. For this reason, VIS is termed important as it gives a detailed description of the physical injury, mental agony and the financial looses incurred by the victim. Hence it is no longer appropriate to evaluate criminal justice process solely in terms of the venerable 'due process' or 'crime control' models. Instead, a third

[283] Anupama Sharma, *PUBLIC PROSECUTORS, VICTIMS AND THE EXPECTATION GAP: AN ANALYSIS OF INDIAN JURISDICTION*, 13 21 (2017).

[284] Doc.29_declaration victims crime and abuse of power.pdf, , https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf (last visited Oct 6, 2020).

[285] Where Do I Stand?: An Exploration of the Rules That Regulate Victim Participation in the Criminal Justice System: Victims & Offenders: Vol 7, No 2, , https://www.tandfonline.com/doi/abs/10.1080/15564886.2012.657290 (last visited Oct 6, 2020).

dimension, victim participation model, must be recognised to provide 'fairness'; to victims, including an opportunity to participate in criminal proceedings, including sentencing proceedings.[286]

VIS is also extended to family of the victim in the event that the victim is unable to provide one.[287] In the case of *Pendakwa Raya lwn. Che Rosli Che Daud* [2015] 1 LNS 1334 the accused was sentences to culpable homicide not amounting to murder. The court took into account the victim's wife's statement as how the loss of her husband dramatically changed her life.

VICTIM CENTRIC APPROACH:

In the case of *Alister Anthony Pareira v. State of Maharashtra*[288], the High Court convicted the accused under Section 304A and 388 of the Indian Penal Court. However, in an appeal before the Supreme, while delving into the issue of sentencing the court considered the fact that the mother (of one of the victims) had no grievance against the accused but prayed for compensation[289]. Hence it has been termed important to include the opinion of the family as well while considering the effect of the offence.

"I just want to say, such people are a threat to society. Government must award him capital punishment and give us justice. We want justice and women's security."[290] These were the words expressed by the mother of a young girl Nirbhaya who was gang raped in Delhi. However, these words were made to the media and not to the court as the justice system does not allow the kin of the victim to make such statements. Allowing them to express themselves before the judicial authority might have provided the much-needed solace and reassurance to them[291].

The Justice Malimath Committee Report recognized that "victims at the present do not get legal rights and protection they deserve to play their role in criminal proceedings which tend

[286] Dipa Dube, *Muffled Voices. Making ways for Impact Statements in Criminal Justice System in India*, XII RIV. CRIMINOL. VITTIMOLOGIA E SICUREZZA (2018).
[287] (PDF) Victim Impact Statement In Criminal Sentencing: Success Or Setback For The Criminal Justice Process?, , https://www.researchgate.net/publication/322405791_Victim_Impact_Statement_In_Criminal_Sentencing_Success_Or_Setback_For_The_Criminal_Justice_Process (last visited Oct 6, 2020).
[288] Alister Anthony Pareira vs State Of Maharashtra on 12 January, 2012, , https://indiankanoon.org/doc/79026890/ (last visited Oct 6, 2020).
[289] Dube, *supra* note 6.
[290] "Nirbhaya's mother reacts to interview with daughter's rapist", The Times of India, March 4, 2015, Available at: http://timesofindia.indiatimes.com/city/delhi/Nirbhayasmother- reacts-to-interview-with-daughters-rapist/articleshow/46452353.cms
[291] Dube, *supra* note 6.

to result in disinterestedness in the proceedings and consequent distortions in criminal justice administration."[292] The Malimath Committee report expressed that India should take inspiration from the steps taken in England with respect to rights of the victims such as Victim's Code of Practice, Victim's Commissioner, Victim's Personal statement, right of the victim to be informed about the progress of the case, etc.[293]

Explaining the notion of 'victim-centric' criminal justice system, Prof. N.R. Madhava Menon, a noted jurist, has commented that "It means restoring the confidence of victims in the system and achieving the goal of justice in whichever sense the idea is conceived. Towards that end, the system must confer certain rights on victims to enable them to participate in the proceedings…Victims may also submit a victim impact statement to the courts setting out the effect of the crime on their lives"[294]

SUGGESTIONS:

Though the Supreme Court of India and the judiciary have taken various steps to protect the interest of the victim, there has been very restricted amount of research conducted on the same. The amount of importance that is given to the victim to brief about the facts of the case, the same or rather more importance should be given to the opinion of the victim. An important aspect which courts have now started to realise is to involve the kin of the victim in the criminal justice process. Many a times the victim may not understand the gravity of the crime they have been subjected to or may not be in the mental ability to state the real issue and hence involvement of a close relative will make the process a little less painful.

The victim should be informed about every single progress and development in the case and should be actively involved in the proceedings of the same so that in case of any grievances, the victim can bring it to the light of the court. This also helps the victim in getting closure so that they can move on mentally and emotionally. It needs to be highlighted that though heinous crime is considered against the state and the society at large, the victim is at greater loss and more vulnerable than any other party.

[292] V.S. Malimath, Report of the Committee on Reforms of the Criminal Justice System, Ministry of Home Affairs, Government of India, 2003.
[293] Ibid.
[294] N.R. Madhava Menon, "Towards Restorative Criminal Justice", The Hindu, September 9, 2016, http://www.thehindu.com/opinion/lead/towards-restorativecriminal-justice/article8433634.ece

In the case of *Sakshi v. Union of India*[295], the "in-camera" trails were mandated by the Supreme Court to maintain the dignity of the victims particularly in case of offences like rape and when the victim is a child. In the case of *Nirmal Singh Kahilon v. State of Punjab*[296], the Apex court held that victims of a crime are also entitled with the right to fair investigation, equally like the accused, as provided by our Constitution under Article 21. Supreme Court in the case of *Bodhisattwa Gautham v. Subhra Chakraborty*[297] observed that the court also has the right to award interim compensation when trying offences of rape instead of awarding compensation at the final stage.

From the above cases it can be concluded that the courts and judges have changed the approach to many cases and slowly but surely things are changing. However, an important aspect which needs to be addressed is the mental health of the victim post the trauma that they have been through and how they can get past it. Mental health should be given importance to as it leaves a big impact on the life of the victim.

CONCLUSION:

If the system fails to ensure that the victims and witnesses voice out without fear, participate in court proceedings, have their interests and rights protected, then justice would remain only in letter and not in spirit. At the end of the day, the system works for the betterment of the society and to make sure the same mistakes are avoided. Hence it is very important to include the victim in the process of decision making. Though there is no clear provision for the same, the courts have made an effort to work towards the cause and involve the victim as far as possible keeping in mind the mental health and well-being of the same. Along with the efforts taken, there is definitely room for improvement. The society tends to blame the victim for the crime and not the offender and hence there is a need for revision in the way of approaching judicial proceedings and the justice seeking process.

[295] Sakshi vs Union Of India on 26 May, 2004, , https://indiankanoon.org/doc/1103956/ (last visited Mar 16, 2020).
[296] Nirmal Singh Kahlon vs State Of Punjab & Ors on 22 October, 2008, , https://indiankanoon.org/doc/1041213/ (last visited Oct 6, 2020).
[297] Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty on 15 December, 1995, , https://indiankanoon.org/doc/642436/ (last visited Oct 6, 2020).

IMPACT OF NEW LABOUR LAW CODES ON WOMEN WORKFORCE

- DEVIKA ASHAR

INTRODUCTION:

"When women take care of their health, they become their best friend"

– Maya Angelou

In India, the struggle of the working class to sustain and have rights against the harsh and ruthless employers has been going on since a long time. Situation of women in the role of a worker is even worse since women, in India have, since antiquity been accorded the position of a house make in the society. The society has never expected women to seek gainful employment or become the bread earner of the family resulting as a hindrance in the personal development of women and economic development of the country as an aggregate. However, with the inception of industrialization, the work opportunities and labour requirements hiked up but even then, the difficulties for women entering into work disturbed their status in the society making way for their exploitation, discrimination and unethical working conditions at workplace.

Over the years there has been a massive change in the way women are perceived in society. They are constantly evolving and branching out into various sectors, they are no longer the ones who are solely responsible for taking care of their household and family. Their duties and roles are shifting and progressing rapidly. There has been seen a shift in the mindsets of women, the fear which was earlier present is now replaced with courage and strength to prosper and undertake new endeavours. This as a result has finally got men and women together on the same platform and promoted equality amongst them. Over the years with the growth and development of the business sector as well as the technological sector the opportunities which are available to women have increased and so has their involvement in the business sector. Women are aiming towards keeping a work life balance, shouldering their responsibilities at work as well as the responsibilities personal matters.

To reform the laws protecting female employees in India, the Government of India has introduced Labour Codes on the floor of Parliament and the same were passed by both the

Houses of Parliament on 19th September, 2020. This came as a move to improve the working conditions of workmen as well as detangle the complexities of the labour laws present by consolidating the prevalent labour laws into four umbrella Codes. The Codes are inclusive of the already existent provisions protecting women and have some new reforms as well. The new codes which will be studied from the perspective of women are as follows:

i. The Code on Social Security, 2020
ii. Occupational Safety and Working Conditions Code Bill, 2020
iii. Code on wages 2019

The Code on Social Security, aims at protecting and gives immense importance to female employees as well as their health. The act also provides for maternity benefits which are available to all female employees. These reforms were introduced in the midst of the pandemic and during the most restrict phase of lockdown. The government also accelerated the pace of its reform agenda so that business could be done with easy and investments could increase thus helping in rejuvenating the economy. The aim of this research paper is to analyse the laws which were prevalent all these years as well as analyse the new set of reforms which have been enforced recently. For the purpose of the study, the researcher aims at studying the original laws which were in play which are mainly, wages, maternity benefits as well as sexual harassment at workplace. The paper will be divided into four parts whereby first the author aims to understand the factors which affect the involvement of women in the workforce. Followed by the analysis of the reforms present prior to 2020, followed by a critical analysis of the present new reforms. Lastly, the study concludes with a critical analysis and suggestions and recommendations which can be taken into consideration making the reforms more available and protecting all female employees and workers.

OBJECTIVE OF THE PROJECT:

i. To put forth the economic as well as social factors which dissuade female employees from joining the workforce.
ii. To analyse the age-old archaic labour laws present in India.
iii. To critically analyse the new provision of labour laws and its impact on female employees.
iv. To lay down the various criticisms which the new labour law reforms have been subjected to and draw a comparison between the two to attain a better understanding.

v. Lastly, drawing conclusion from the new and old reforms present and suggest various steps which can be taken into consideration to improve the protection to female working employees.

RESEARCH QUESTION:

i. What are the factors which are declining the participation of female workforce in India?
ii. What were the labour laws protecting female workforce prior to 2020?
iii. What are the new labour reforms which have been introduced in 2020?
iv. What are the major criticisms these reforms have faced when it comes to participation of female workforce?

RESEARCH PROBLEM:

The scope of this paper is to put forth the archaic labour laws which were in force and protecting female employees followed by critically analysing the new reforms which have been introduced amidst the pandemic. It also lays emphasis on the factors which are affecting women from participating in the work force in India. The main focus is solely on the impact of the new as well as old reform on the women work force. The limitation of this paper is that it does not look into progressive reforms undertaken by governments of other countries regarding the participation of women in the labour sector.

HYPOTHESIS:

H1- The new labour codes are efficient however they do not completely protect the female workforce, especially those in the informal sector.

RESEARCH METHODOLOGY:

Qualitative Research- The research paper's main aim is to list down the Laws which have previously protected the female work force and the new amended ones which presently protect them. The paper also mentions the factors which are declining the participation of female workforce and what are the major criticisms which the new code faces regarding women workforce participation.

Doctrinal Research- This paper has adopted the Doctrinal Research Methodology as the research has been carried out by understanding the various Acts namely:

- Equal Remuneration Act of 1976.
- The Maternity Benefit Act, 1961 and the Maternity Benefit (Amendment) Act, 2017.

- The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
- The Code on Wages, 2019.
- The Occupational safety, Health and Working Conditions Code, 2020.
- The Code on Social Security, 2020.

which are set to guard the women workforce in India. In addition to this, a number of research papers, articles and reports written by eminent legal scholars have also been used as references to get a better insight on it.

CHAPTERIZATION:

1. **Factors which are declining the participation of female workers in India**: This chapter talks about the factors which are declining the participation of female workers in India be it social factors, economical or even political factors have an effect on female employees. This chapter further explains the consequence of COVID-19 on female workforce as well.
2. **Labour Laws protecting female workers in India prior to 2020:** This chapter briefly explains the female laws which were previously prevalent in India before the changes in 2020 took place.
3. **New labour reforms which have been introduced in 2020:** This chapter moves on to present the new labour laws which were introduced amidst the pandemic and how they impact the female workforce.
4. **Major criticisms these reforms have faced when it comes to participation of female workforce:** This chapter lastly, touches upon the major criticisms which the new laws face taking into consideration the rights of the female workforce, and very few rights available to the informal sector.
5. **Conclusion and Suggestions:** Lastly, the paper concludes proving the hypothesis and providing legal suggestions and improvement which can take place.

REVIEW OF LITERATURE:

1. **Shraddha Chigateri, "Labour Law Reforms and Women's Work in India: Assessing the New Labour Codes From a Gender Lens", Institute of Social Studies Trust, (2020).**

As the name suggestions, the author of this paper has elaborately analysed and explained the labour law reforms purely from the female lens. It has gone ahead and described how the labour laws are based on assumptions and not on the actual needs and requirements of the women workforce. It talks about the lack of reforms present in the informal sector where majority of the female workers are working and throws light on the issues with the implementation of these labour laws. This paper has a very comprehensive approach as it first gives the background of the labour laws present followed by an analysis of the previous codes as well as the present ones through a gender lens. This paper has helped in providing a complete overview of the topic at hand.

2. **Surjit S. Bhalla and Ravinder Kaur, "Labour Force Participation of Women in India: Some facts, some queries", 40, Working Paper, London School of Economics, Asia Research Centre. http://eprints.lse.ac.uk/38367/1/ARCWP40-BhallaKaur.pdf**

This paper has conducted empirical research and observed the labour force participation of women workers in India. With the help of the empirical research it has come up with several factors and determinants which affect the female work force in India. It talks about how the household income, fertility, nuclear family patterns, education, social cultural norms, wages, discrimination, poverty are some of the determinants and factors which are preventing women workforce participation. It provides graphs and data which depict the growth as well as decline of these factors. This paper has been very useful as it has helped the researcher gain an overall understanding about the factors directly affecting the women workforce in India.

3. **Maarten van Klaveren, Kea Tijdens, Melanie Hughie-Williams and Nuria Ramos Martin, "An Overview of Women's Work and Employment in India", Wage Indicator, (AIAS). https://www.ituc-csi.org/IMG/pdf/Country_Report_No13-India_EN.pdf**

The authors of this paper have carried out empirical as well as doctrinal research in order to provide an overview of Women's work and employment in India. They have first mentioned the background of women and employment in India, followed by the legislative framework protecting them. Then it has gone further and described the labour market structure, the

population of the country, the wage structure and Educational and skill levels present in female labour force. With the help of the empirical research it has provided the possible educational categories which can be studied by female workforce post taking into consideration the regions, ethnic groups and languages.

4. **Srirang Jha, "Labour Reforms in India: Issues and Challenges", 5, Journal of Management and Public Policy, (June, 2014) http://jmpp.in/wp-content/uploads/2016/01/Srirang-Jha1.pdf**

This research paper provides a critical analysis of the labour reforms which have been prevalent in India. It has described of these reforms are archaic in nature and how the country has failed to make timely changes on the roadblocks which have been created. They have correctly analysed how imperative it is to amend the labour reforms in order to attract foreign investors and expanding the manufacturing as well as Industrial sector. The paper has described the threats the labour law reforms prior to 2020 had on the productivity as well as growth of the country.

5. **Surbhi Ghai, "The Anomaly of Women's Work and Education in India", Indian Council for Research on International Economic Relations, Working Paper 369, (December 2018) http://icrier.org/pdf/Working_Paper_368.pdf**

With the help of this research paper, the author has first laid down provisions of the International Labour Organisation which are protecting the female labour force. It has further gone ahead and estimated the FLPR from the available national data resources over the years. The paper has then moved on to explain the falling female labour force participation rates in India depending on demand, supply and other factors. The paper has also provided a co-relation between education and female labour force participation rates. Lastly, the paper concludes by providing various policy recommendations which can be taken into consideration and implemented.

6. **Partha Pratim Mitra, "Recent Labour Reforms in India: How will they facilitate Investments?" National University Singapore, https://www.isas.nus.edu.sg/papers/recent-labour-reforms-in-india-how-will-they-facilitate-investments/ (October, 2020)**

This article provides a crisp understanding of the labour law reforms in India by decodifying the new reforms separately and explaining them. It further explains the changes which would take place in the State Government as well as industrial relations due to the new reforms. The

article also mentions the possibility of the new labour law reforms attracting investments in India.

7. **Avtar Singh, Introduction to Labour and Industrial Laws, 4th Edition, (2018).**
8. **Mamta Rao, Law relating to Female workers and Children, 4th Edition, Lucknow: Eastern Book Company, (2018).**

Both these books have been helpful in terms of understanding the laws relating to both children as well as women. They have also helped in understanding Industrial laws present and its impact on the women and children workforce.

ANALYSIS:

PART- I: FACTORS AFFECTIG LABOUR FORCE PARTICIPATION IN INDIA-

Labour laws in India cannot be implemented and read in isolation, they are affected by several factors which have an influencing power over women and their involvement in the workforce. The participation of female workforce acts as a catalyst towards the growth and overall development of the country. The decision of the low participation in India is mainly due to various economic and social factors which are interlinked with each other and interfere with the both the household and at the macro level.[298] The Women Labour Force Participation Rate ("**LPFR"**) shows that there has been a decline in the participation rate between the period of 2005- 2018. This indicates that three out of four women are neither working nor are they seeking paid work as a result putting India among the bottom 10 countries in the world in terms of women involvement in workforce.[299]

Few of these factors which directly have an impact on the participation are mentioned below:

i. **Educational Facilities-** Over the last decade the Government has made extensive progress in terms of setting up educational infrastructure and facilities as well as aiding access to education for all girls. However, due to the economic growth and nature of our economy, it has been difficult to create jobs in large numbers in the requisite sector in which women could easily be engaged. Thus the lack of employment opportunities

[298] Sher Verick, *"Women's labour force participation in India: Why is it so low?"*, ILO, Available at: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_342357.pdf (Accessed on: 26th April, 2021, 4:04pm)

[299] Deepa Krishnan,"*As India advances, women's workforce participation plummets*", Worldview, 15th May, 2020, Available at: https://www.strategy-business.com/blog/As-India-advances-womens-workforce-participation-plummets?gko=762f7 (Accessed on: 26th April, 2021, 6:56pm)

has discouraged women from entering the work force. Another economic factor which comes into play is that since the *income of the household is increased*, it potentially reduces the participation of women in the workforce and demotivates majority of them from working and changes their preferences. It has been said, that these factors affect the willingness of women from entering the workforce be it from the rural area or urban area. Thus the combination of all these factors ranging from increased household income to educational assistance and lack of jobs has discouraged women from entering the workforce.

ii. **Unable to work "Extra" working hours-** it has been observed that over the years, women worked 7-8 hours more in a week than men did, be it in the urban or rural areas. It has been observed that even though women invest 10 times more than men on daily basis, are not given the same responsibility and pay. It has been seen that Employees find it easier to pay men and afford them as employees compared to females. Employee find it hard to hire female employees as they believe women are unable to meet the extra working hours, they are also burdened to pay for the maternity leave, thus finding it very expensive to afford them. Employees often feel that women have to drop out of their jobs or are not employed due to two reasons mainly being due to personal reasons like (marriage, lack of family support, lack of education) or Job related issues, mainly being difficult work timings, difficulty in leave etc. as a result they quit their job and men are easier to employ.

iii. **Cultural Attitudes-** Social attitudes of everyone be it the employee or the families of the women play a critical role in their participation in the workforce. It is a multidimensional phenomenon which is affected by several factors. It has been seen that women often marry into rich families and as a result don't need to work in order to support their family. Several times, it has been seen that women aren't allowed to work after getting married as they have domestic chores and household work to manage and hence aren't allowed to work. Having several cultural norms which guard the mindset of individuals makes it harder for women and restricts the jobs which can be considered acceptable. Gender norms make it harder for women to find a job which is socially acceptable as well as doable. Often living together in a nuclear family and joint family also has an impact on the willingness of women from entering the workforce. It has been observed that several women prefer general professions which they can choose,

however they lack the specific vocational skills which makes it harder for them to cope and limits their growth.

iv. **Economic Factors-** The economic factors which mainly affect the labour laws present in India would range from educational facilities and infrastructure, vocational and skill training, wages, division which is prevalent due to labour, Legal reforms. Men are usually found to be assets and the head of the family, while women haven't been given that treatment and treated as a burden. As a result, families invest more in the education and careers of women than those of girls and hampers their advancement in employment. Government should set up vocational training and soft skill programs which encourages women to grow and take up more lucrative jobs. Steps can be taken by the government to come up with a separate legislation or program which benefits women and encourages they growth at a low cost.

v. **Impact of COVID-19 on involvement of women workforce-** Women are usually found working in the informal sector, where their job is not always secure and social benefits aren't easily available. With the onset of the pandemic, several women have lost their jobs and lost their source of income and livelihood. This includes women who work as helpers, security guards, sales women, attendants, workers in small factories have been drastically affected. With the influx of the pandemic, several daily wage workers have been seen returning back home in the rural areas since they have been laid off or their salaries haven't been paid and as a result, they cannot afford to stay in the big city. The LFPR also reports that the large wage differential crisis which exists between men and women also influences women and prevents them from working.

Conventionally it can be said that while the economy of a country is growing, it offers several job opportunities as well as educational facilities. More individuals enter the workforce, and contribute to the growing economy but however, the opposite can be said with the liberalization of the Indian economy. It has been said that the LFPR has fallen over the past few years and seen a decline. All the aforesaid factors have to be taken into consideration while framing labour legislations and steps should be taken to encourage them in the workforce with adequate protection.

PART II- LABOUR LAWS RELATING TO WORKING WOMEN IN INDIA PRIOR TO NEW LAW IN INDIA PRE- 2020-

The main aim of the labour laws present in India, is to provide for adequate protection as well as equal rights to the labour force irrespective of gender. The labour laws which previously existed prior to the new labour codes which were passed in 2020 protected the female workforce in three themes:

i. Prohibition of Sexual Harassment of Women at Workplace Act, 2013
ii. The Maternity Benefits Act, 1961
iii. The Factories Act, 1948
iv. The Equal Remunerations Act, 1976
v. The Employee State Insurance Act, 1948 and

The rights and entitlements provided to women under the labour laws in India with regards to the aforementioned areas are mentioned below:

i. Prohibition of Sexual Harassment of Women at Workplace Act, 2013-

Sexual harassment is a human rights violation primarily subjected on women. Sexual harassment is a problem faced by every women in the world, and often effects the employability of women. Indeed, sexual harassment of women at workplace is at the core of undermining the right to equal treatment that women ought to be provided. Ideally, employer must undertake sufficient precautionary measures to eliminate occurrence of any activity even remotely confirming to the criteria of sexual harassment. However, in the event of happening of such harassment, there ought to be enough legal protection available at the disposal of the victim against the perpetrator. It was taken up as a resolution in the 71st session of the International Labour Organization (ILO) Conference in 1985 addressing the issue of sexual harassment, the Conference stated that,

"Sexual harassment at the workplace is detrimental to employee's working conditions and to employment and promotion prospects. Policies for the advancement of equality should therefore include measures to combat and prevent sexual harassment."[300]

In India, the Supreme Court of India, exercising the inherent judicial powers, laid down guidelines for prevention of sexual harassment of women at workplace in the landmark judgement of **Vishaka vs. State of Rajasthan**[301], wherein the Hon'ble Supreme Court defined

[300] Reports: Government of India Planning Commission, Report of the Working Group on Labour Laws and other Labour Regulations, (2007).
[301] (1997) 6 SCC 241.

the scope of sexual harassment and laid down comprehensive guidelines and directions for every employer and established a complaint mechanism for sexual harassment complaints.

Eventually, in 2013, the Government of India passed the special legislation called Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The Act aims at providing safe and free working environment to women across the country. The sense of the security will result in increased women employment rate.

Moreover, women have also been included in the Five Year Plans instituted by the Government of India, in the year 1974. A National Perspective Plan was launched for women, in the year1998 to give direction for all-round improvement of women in the country.[302] In the year 1990, a National Commission for women was set up by way of a parliamentary Act to safeguard rights and legal entitlements of women. Moreover, the Constitutional Amendments 73 and 74 (1993) also provided for reservation of women in the local civic bodies like Panchayats and Municipalities laying down a strong foundation for inclusion of women in leadership and decision making roles.

Despite the aforementioned laws and policies, the participation of women in the labour market has seen declining trends leading to worrisome situation. One of the major landmark change in the history of labour laws can be considered as the introduction of new labour codes in 2020 as a reformative step by the Government of India. The following Chapter enlists the major changes in the labour laws impacting women workforce.

ii. The Maternity Benefits Act, 1961-

Child birth is a very special experience which a woman experiences, where she needs to give enough time and adequate nourishment to her new born and not have to worry about her job at hand and income. The Maternity Benefit Act, was implemented post the imposition under Article 42 of the Indian Constitution whereby states are required to make provisions for securing just and humane conditions for work and maternity relief to female employees at work. The payment is calculated on the average daily wages for the period she is on leave inclusive of the employees delivery date and for the next six weeks from the delivery date. The benefits can be levied by female employees both during pregnancy, after pregnancy, post pregnancy with their pay. Unmarried women are also entitled for benefits, and employees are permitted to avail the leave in the manner they choose. The women who suffers a miscarriage

[302] Govindan Raveendran, The Indian Labour Market: A Gender Perspective, UN Women report on Progress of the World's Women, (2016) 978-1-63214-036-4.

or a tubectomy operation is entitled to a 45 days leave with her full pay. The benefits are paid from the employer to the employee and the employee is protected from termination while he is on leave. One of the major amendments which the Act has seen and witnessed a paradigm shift in their provision was the 2017 amendment. With this amendment a mother adopting a child is entitled to 12 weeks leave. In the case of ***Municipal Corporation of Delhi v. Female Workers***[303] expanded the scope of the Maternity Benefits Act and made it inclusive for casual workers and daily wage workers. The amendment makes it inclusive for women to take their child to work and are entitled to crèche facilities at workplaces.

iii. **The Factories Act, 1948-** this act talks about the facilities, do's and don'ts which are available to female workers in Factories. They provide for all facilities for children, crèche, hygienic and safe working conditions etc. they also have provisions which are talking about prohibiting female employees from working at night, employing them for hazardous jobs, provision for daily working hours and wages. The act also contains provisions regarding secluded areas where the employees can breast feed their child hourly. Thus overall this act does provide a lot of benefits to female employees as well as children.

iv. **The Employee State Insurance Act, 1948-** This Act is an significant act which deals with social security laws for employees. It talks about the laws which are available to employees when they are sick, if they are disabled and even provide them with medical benefits when they are injured. They are inclusive of factories which are present in India and the employees present there. It protects women workers the above mentioned difficulties as well as insured men workers. It also provides women with maternity benefits. "*Periodical payments to an insured woman in care of confinement or miscarriage or sickness arising out of pregnancy, confinement, premature birth of child or miscarriage, such women being certified to be eligible for such payments by an authority specified in this behalf by the regulations, is hereinafter referred to as Maternity Benefits*".[304]With respect to insurance of women, under this act it is agreed that if a women dies while giving birth then the benefit is straight away given to the appointed nominee.

[303] AIR SC 1275 (2000)
[304] Section 46(b), The Employee's State Insurance Act, 1948

v. **The Equal Remuneration Act, 1976-** As the name suggests the main of this act is indirectly bring men and women on a platform where they are treated equally irrespective of discrimination to gender. They have come up with a payment structure which is gender inclusive and promoting the concept of equal pay for equal work to the employees.

PART III- LABOUR LAWS FOR WOMEN WORKFORCE IN INDIA POST 2020

On 19th September, 2020 the new labour codes were passed which were a consolidated version of laws enacted by the Central Government mentioned above followed by certain amendments. The aim of this paper is to only limit itself to the impact of these new consolidated labour laws on women as well as disabled persons.

The relevant codes which will be taken into consideration are as follows:

i. Code on Social Security Act, 2020
ii. Occupational Health and Working Conditions Code, 2020
iii. Code on Wages, 2019

In this research paper and in the current study, the author has not looked into the Industrial Relations Code, 2019 as it has not made any substantial changes which make a difference on the regulation pertaining to the working conditions of the women workforce. Therefore, the author aims to primarily focus on the above mentioned codes.

i. **Code on Social Security, 2020**[305] – This code, is a combination of the Maternity Benefit Act, 1961, The Employee State Insurance Act, 1948 and the The Employees Compensation Act, 1923 which come under the same umbrella of the Code on Social Security and employees can benefit the same from this provision. The Maternity Benefit Act, 1961 has been upgraded and has some minute changes whereby it has been made applicable to all women employees working in factories, plantations, mines and other establishments which have more than 10 employees present. The latter to codes, were applicable to employees who suffer from any disease or disablement during their course of employment. The code also mentions, subsidized prices for medical treatment as well as reimbursement under certain conditions of the Code.

[305] Act 36, Parliament of India, (2020)

There are some other minute changes which are present and mentioned below:

- Any establishment which employs more than 10 employees, is required to provide disablement benefits to its employees. For example, if an employee contracts any occupational disease or suffers any accident during the course of employment or on the job, then the employee is entitled to a sum from the government. It is pertinent that the injured employee shows that the injury caused is directly attributable to the accident which took place while on the job and the same has to be proved and decided by a Medical Board which is set up in accordance to the code.
- The Medical Board has the power to increase or enhance the compensation when an injured employee gets aggravated over time.
- There is not much difference between the disablement benefits which were available previously compared to the present law under the Social Security Code.
- It is illegal for an employer to employ a women who is aware about her condition, who is six weeks close to her delivery date, miscarriage or termination of pregnancy.
- If a women decides to work during a period where she is entitled to maternity leave, cannot be forced into doing something which is difficult, tiring or hazardous to her health.
- The period of maternity benefit applicable to women has been increased to 26 weeks, if it is her first child. If it is her second child, she is entitled to leave from a period of 12 weeks inclusive of pay.
- If a female employees dies during her period of maternity benefit, the amount will be payable to her till her death. If she dies and leaves her child behind then her full benefit would be available to her.
- If the work permits female employees to “work from home”, then the female employee is allowed to ask for work from home, post expiration of her maternity leave.
- Female employees are also entitled to a sum of Rs. 3,500 as a bonus over and above maternity leave, in case the female employee is not being taken care by the employer for pre-natal/post-natal care.

- Once the female employee re-joins work post child birth, she is allowed two nursing breaks till the child turns a year and half old.
- In case a female employee goes through a miscarriage or a medical termination she will be entitled to 6 weeks maternity benefits from that day.
- In case a female employee goes through a tubectomy operation she will be entitled to two weeks' pay post her operation.
- In case the female employee has a premature delivery, any illness during her pregnancy, premature birth of her child, miscarriage or a termination to her pregnancy she will be entitled to an additional month of maternity paid leave.
- A female employee who is on maternity benefit law, cannot be dismissed from work while she is on maternity leave. She is protected from termination during her leave. A female employee if accused or punished for gross misconduct will not avail maternity benefit's.
- In case a female employee is legally adopting a child who is below the age of three, she is entitled to maternity benefit for a period of 12 weeks form the date the child is given to her and she becomes a mother.
- It is mandatory for mines, factories and other establishments to have more than 50 employees to set up a crèche facility, where a women employee would be allowed to visit her child four times a day.

ii. Occupational Health and Working Conditions Code, 2020[306]-

This act is applicable to all industrial locations where there are more than 10 employees who are present and working. These establishments are those which are hazardous to life and are life threatening work is performed irrespective of the number of workers present and working. It is pertinent that, under this code, all the necessary establishments have to provide separate as well as adequate washing facilities to both male as well as female employees. This would include separate locker facilities, common areas, bathing places, transgender individuals should also be provided with the same benefits.

With the help of this code, women employees are now allowed to be employed before 6:00 am and after 7:00pm with their consent. This new provision is a set towards treating both male and female employees at an equal platform.

[306] Act 37, Parliament of India, (2020)

If the Indian Government is of the opinion, that the for the health and safety of women it is pertinent to provide adequate safeguards prior to the employment. Such steps should be taken.

iii. Code on Wages, 2019[307]

This code, is inclusive of all the previous provisions which regulated the payment of wages and states that there could be no discrimination in any set establishment on the grounds of gender especially in matters relating to wages given by the same employer with respect to similar nature of the job. It is important to remember that the employer cannot discriminate in wages paid or while recruiting new employees on the ground of gender as it is prohibited by law.

PART IV- ANALYSIS OF THE PROVISIONS OF THE NEW CODES-

It has been observed that the new labour codes which came into force on 19th September, 2020 have been even more hazardously poised than before. People are of the view that these legislations have taken India back to British time period where slavery was a norm and workers were given bare minimum protection. The aim of the Union Government was to simplify India's prevalent labour laws thereby improving the business environment and helping in the growth and development of the economy. The aim of these legislations is to help doing industrial work and business with ease and increase the investment flow.[308]

Labour legislations, come under both the Central and State governments power to legislate and thus result in several state labour laws. It has been observed that prior to enacting and implementing new legislations tripartite consultation take place or on the basis of reports of committees which have heard both the parties i.e. the management and the workers only thereafter are the new labour laws enacted. Ironically, it was observed that no consultation was taken with the workers or the state governments while drafting the new codes. The union government is of the opinion that they have responded to the demands set forth by the workers unions, but sadly none of the suggestions have been incorporated in the new codes. The government claims that these new reforms aim at extending coverage and statutory provisions

[307] Act 29, Parliament of India, (2019)

[308] Working People's Charter, "*Why the new labour codes leave India's workers even more precariously poised than before"*, Scroll.in, 23rd September, 2020, 4:24pm, Available at: https://scroll.in/article/973877/why-the-new-labour-codes-leave-workers-even-more-precariously-poised-than-before (Accessed on: 27th April, 2021, 5:15 pm)

to the unorganised sector has well but the harsh reality is that the new code, miserably fails at extending any form of protection to the informal sector which is largely comprising of the migrant workers, self-employed workers, home-based workers and other vulnerable individuals.

Criticisms arising out of the new Labour Codes are as follows:

i. **The Code on Social Security, 2020-**

- The new code, which is a consolidation of the already existent codes has negatively affected the informal workers, particularly during the onset of the COVID-19 pandemic. The code does very little to strengthen the social protections as well as protect the informal sector.
- The Code, does not lay emphasis on social security being a right nor does it give any exact date for its enforcement.
- The maternity benefit scheme is only applicable for establishment with ten or more employees, what would happen to women who work in an establishment having less than 10 employees is not mentioned.
- For the female employees working in the informal sector there are a set of schemes which are applicable either by the Centre or the State. However, sadly there is no mechanisms which shows that these women are registered and will be covered in this scheme. There is no clarity with what the scheme will provide and what the eligibility requirements are. The code only specifies that they should fame suitable schemes.
- The criticisms which the 2017 amendment got with respect to Maternity Benefit Act, 1961 were not addressed. The same was carried forward into the new code.
- The code should have a more universal application rather than a narrow application thereby making its scope limited in nature. For example Section 2(6) of the Act, retains its original definition and excludes "personal residential construction workers" which should be included as they form a large section of daily wage workers as well as large group of female workers.
- Another example of arbitrary application is seen as the new code, still retains Section 2(82) which defines a waged worker and wage ceiling. Despite recommendations by the Committee, the code has failed to remove this arbitrary clause.

- Though the code sets to define several category of workers, the definitions are still filled with ambiguity and have not been revised from the previous codes. For example the term 'establishment' should have been revised and ensured that all workers irrespective of discrimination should be inclusive and applicable towards social security protections. The recommendations made by the Standing Committee should have been taken into consideration, however the same was ignored.
- Adequate protection should be given to migrant workers and separate amount should be given by Welfare Funds to them. It would be beneficial if the government comes up with a scheme providing "floor social security protection" thus making it applicable universally to all workers.

ii. <u>The Occupational Safety, Health and Working Conditions Code, 2020-</u>

- The code aims at collaborating
- The OCHWC code, has failed to include branches of economic activities mainly in the agricultural sector which is largely done by female employees who engage in such agricultural jobs. Female employees who are working in IT enabled services, hotels, small mines, construction sights are not protected and given coverage. Female domestic workers, trainees, volunteers are also not given protection under this code. This has been one of the major setbacks of the new code, failing to protect the major female workforce.
- Another major criticism which the code faces is that, it does not have any provision which confers equal treatment for all contractual worker be it male or female employees who have similar jobs compared to permanent workers in the same establishments.

CONCLUSION AND SUGGESTIONS:

"If women are voluntarily dropping out of work, that's one thing, but if it's because of structural constraints or to other sociocultural factors, then the government must intervene on policy level"[309]

On a conclusionary note, it is not entirely wrong to say that the new labour codes have been a major legislative reform in the history of Labour Laws in India. There have been new benefits which have been made available to the women workforce, but also some which have created further ambiguity in the eyes of the common men. It is pertinent looking through the gender lens that the women labour force participates and gets access to decent work. This would help in the overall sustainable growth and developmental process. Women workforce has been seen maximum in the informal sector, where the probability of them being exploited and the risk involved is the highest. Further steps should be taken by the government to protect the informal sector and encourage involvement movement of women in the formal sector. The following suggestions can be taken into consideration and would be helpful in way forward for the rights of women as worker:[310]

- Recognizing and including women in all its complexities would help in terms of providing them protection both in the formal as well as the informal sector. Women are producers of economic goods and services and these would include all types of paid and unpaid as well self-employed women.
- The exclusion of the Sexual Harassment Act in the amalgamation of the new labour law reforms has been criticized majorly. The act has revolutionized the understanding and meaning of workplace by including the households as a place of workplace, thereby increasing the ambit and scope of the act and including the informal sector. However by omitting the Sexual Harassment Act in the new reforms has a negative impact and connotation on the new laws. The new reforms continue to create an equal platform for men and women and also indicate the denial of larger segment of women workers. Thus by including this Act, in the amalgamated reforms would create a equal platform for women workers.
- The law reforms should take the necessary steps to include the informal working sector. They should also include all waged worker, even the those who are paid on piece-rates.

[309] See supra 2
[310] Shraddha Chigateri,"*Labour Law Reforms and Women's Work in India: Assessing the New Labour Codes from a Gender Lens",40,* Institute of Social Studies Trust, January 2021.

By removing the schedules of employment it would have a more universal application and protect a larger scop of individuals.

- Removal of the words establishment and industry, would broaden the scope of horizon and include the informal women workers. This would help the informal sector who have been fighting several years for recognition.
- Recognizing the need for a member-based organization under the Trade Unions Act would help in the promotion of cooperatives or informal groups in every state.
- Social Security is recognized as a fundamental right, however the Code does not emphasize it as a right nor does it give its reference in accordance to the provisions stipulated under the Indian Constitution. It is the duty of every state to provide basic level of security as well as protection for all workers, even those in the unorganized sector. Steps should be taken by states to provide basic protection and follow mechanisms and schemes which ensure that the workers are registered and entailing their benefits in the scheme.
- The Code provides a range of schemes which are available to the public, but however there are no mechanisms in place which ensure the registration of these schemes, or which schemes which are applicable to different migrant workers. There exists total ambiguity with respect to what the schemes provide and the criteria required for its eligibility. Thus steps should be taken to provide clear facts as well as an implementation process of these schemes.
- The Code on Occupational Safety, Health and Working Conditions best addresses the issues with the law reforms. The aim of the Code, was to amalgamate and serve different purposes but nothing in act solely talks about occupational safety, health and working conditions for the informal sector.
- A separate law for the unorganized working class would help them move forward in the informal sector. This law would be solely dealing with the informal sector and providing a broad framework for them. This would also lay emphasis on women in the informal sector as well.
- Include reforms which are non-discriminatory in nature be it terms of recruitment policies, payment of wages, promotions, stages of employment etc. all should be taken into consideration and provide an equal platform for women.

- Recognize the challenges faced by migration to employees and take steps to protect the livelihood as well as rights of the migrant workers.
- Enable access of female workers in terms of public infrastructure and entitlements at worksites and allow access to public resources which make women's livelihood dependent on workers.

Equality forms a basic structure of the Indian Constitution and steps should be taken by the legislature and Parliament to make laws which are protecting both female as well as male citizens throughout the state. Whilst the labour laws are facing criticisms from the oppositions as they have been unable to meet the demand of trans-persons as well as female employees working in the informal sector. Steps have been taken to meet the welfare measures and modernizing the labour laws in India.

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GRIEVANCE REDRESSAL MECHANISM AND PROTECTION OF RETAIL INVESTORS IN INDIAN CAPITAL MARKET

- PRASHANT TRIVEDI

ABSTRACT

The Indian share market has come a long way from the unregulated and unorganized trading under the banyan tree in 18th century to the well organized and well established stock exchanges, depositories and other intermediaries under the vibrant market regulator like SEBI. Today our large workforce is upgrading from agriculture and manufacturing sector to the service sector, creating a class of considerably educated persons with average salary, limited savings and high cost of living who are looking to earn from a good investment to make their future better and secure. Majority of them are persons with less than 2 lakhs of investment who are categorized as retail investors[311]. To protect the interest of these small scale investors is one of the main objective of SEBI which is now a days hampered by the big share market scams like Harshad Mehta, Ketan Parik, Sahara, Styam etc. and by various malpractices like insider trading, dabba trading etc . As a result of it the hard earned money of these investors became irrecoverable and slow grievances redressal mechanism even make the condition worst.

SEBI claims they are following the very robust mechanism using the advanced technological tools available and even they have numbers for it in its annual reports but looking at the number of pending cases, nature of the cases, number of review applications, time frame of deciding cases and the difficulties faced by the party during the entire process I felt a need to analyze the effectiveness of this system by analyzing the policy and method followed with the help of data. So this paper is an attempt to find out the reasons of existing pendency despite such a robust redressal system like SCORES. And also try to suggest any structural changes needed to meet the challenges of 21st century by comparing it with other vibrant stock markets such as New York, Singapore, Australia etc.

INTRODUCTION:

[311] the SEBI (discloser and investor protection) guidelines

the capital market is a supporting system in any economy it helps in directing savings from the individuals to someone who needs the capital to start or to expand a business. Just like any other government Indian government also tried hard to establish a vibrant and transparent capital market, to achieve this end various committees were set up in 1980's the reason being at that time banks had made their procedural requirement for credit very uncertain and stringent, rising NPA's might be one of the factor for such move and the LPG reforms of 1991 had knocked the door of Indian economy therefore this need for huge capital for business cupelled with prevailing irregularities in the existing regulatory framework of capital market led to the SEBI Act of 1992.

A study have shown that Indians are very good in saving they save approx. 33% of their income through various means but these savings are not coming to capital market they are very reluctant in investing in capital market maybe because of following reasons. Firstly, successful investment in capital market can be done only by those who have a fairly good knowledge of capital market. Consequently, people shy away from investing in it. Secondly, investors encounter various impediments created by other market participants. Consequent investor complaints keep escalating year after year. "The standard of service information being provided to shareowners in India by companies and stock brokers are not only below world standards but leave a majority of Indian shareowners dissatisfied". Thirdly, the series of securities scams unearthed over the past few years have dampened the sprit and enthusiasm of investors.[312]

The investors need to be protected against such scams and delay in justice, and the duty lies with SEBI as stated in its preamble:

PREAMBLE of the SEBI Act 1992

The Preamble of the Securities and Exchange Board of India describes the basic functions of the Securities and Exchange Board of India as

[312] SMALL INVESTORS" GRIEVANCES AND REDRESSAL MECHANISM IN INDIAN CAPITAL MARKET by DR. P. VENUGOPAL; DR.K.SUDARSAN; DR.D.HIMACHALAM; International Journal of Multidisciplinary Research Vol.2 Issue 7, July 2012, ISSN 2231 5780

"...to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto."

To increase the participation of the investors these three bottlenecks need to be removed. There is a larger perception that share market is a short cut to multiply money. Only if a investor will feel that his money is safe in the market and any scam like harshal Mehta, sahara or satyam will not happen in future and if happen will be dealt by the market regulator with utmost sincereness. Also their complaints against a market intermediary or a company will resolved in a time bound manner. The major difference between Indian capital market and other well-functioning of the world is speedy disposal of cases and harsh punishment to wrongdoers. SEBI has done a wonderful job as a market regulator in past decades still there lies a huge scope for improvement. In order to analyze this situation a study of SEBI's statices is needed. To effective redressal SEBI's grievance redressal system in short SCORES segregate the complaints at source and redirect them to the appropriate agency therefore SEBI has divided them in eleven major category as:

Sr.No.	Type	Nature of complaints
1	Type I	Refund Order/ Allotment Advice
2	Type II	Non-receipt of dividend
3	Type III	Non-receipt of share certificates after transfer
4	Type IV	Debentures
5	Type V	Non-receipt of letter of offer for rights
6	Type VI	Collective Investment Schemes

7	Type VII	Mutual Funds/ Venture Capital Funds/ Foreign Venture Capital Investors/ Foreign Institutional Investors/ Portfolio Managers, Custodians
8	Type VIII	Brokers/ Securities Lending Intermediaries/ Merchant Bankers/ Registrars and Transfer Agents/ Debenture Trustees/ Bankers to Issue/ Underwriters/ Credit Rating Agencies/ Depository Participants
9	Type IX	Securities Exchanges/ Clearing and Settlement Organizations/ Depositories
10	Type X	Derivatives Trading
11	Type XI	Corporate Governance/ Corporate Restructuring/ Substantial Acquisition and Takeovers/ Buyback/ Delisting/ Compliance with Listing Conditions

Table 1.1: Types of Complaints[313]

The scores will automatically redirect a complaint to the concern entity based on the above discussed nature of the grievance and there is a time limit of 30 days within which substantial action need to be taken by the concern entity otherwise SEBI will intervene. In the entire process there is least human intervention so that any delay could be avoided with maximum transparency in spite of such a mechanism in place there are approx. 1.5 lakhs complaints are pending before the SEBI. To find out the reason behind it there is a need to closely analyze the statics of complaints before SEBI.

Sr.no	**Period**	**Grievance received**		**Grievance redressed**	
		During the year	**Cumulative**	**During the year**	**Cumulative**
1	1991-92	18,794	18,794	4061	4061
2	1992-93	1,10,317	1,29,111	22,946	27,007
3	1993-94	**5,84,662**	7,13,773	**3,39,517**	3,66,524
4	1994-95	5,16,080	12,29,853	3,51,842	7,18,366

[313] Source: SEBI annual report 2004-05

5	1995-96	3,76,478	16,06,331	3,15,652	10,34,081
6	1996-97	**2,17,394**	18,23,725	**4,31,865**	14,65,883
7	1997-98	5,11,507	23,35,232	6,76,555	21,42,438
8	1998-99	**99,132**	24,34,364	**1,27,227**	22,69,665
9	1999-00	98,605	25,32,969	1,46,553	24,16,218
10	2000-01	96,913	26,29,882	85,583	25,01,801
11	2001-02	81,600	27,11,482	70,328	25,72,129
12	2002-03	37,434	27,48,916	38,972	26,11,101
13	2003-04	36,744	27,85,660	21,531	26,32,632
14	2004-05	54,435	28,40,095	53,361	26,85,993
15	2005-06	40,485	28,80,580	37,067	27,23,060
16	2006-07	26,473	29,07,053	17,899	27,40,959
17	2007-08	54,933	29,61,986	31,618	27,72,577
18	2008-09	57,580	26,74,560	**75,989**	25,03,560
19	2009-10	32,335	27,06,895	42,742	25,46,302
20	2010-11	56,670	27,63,565	66,525	26,12,854
21	2011-12	46,548	28,10,113	53,941	26,66,695
22	2012-13	**42,411**	28,52,524	54,852	27,21,547
23	2013-14	33,550	28,86,074	35,299	27,56,846
24	2014-15	38,442	29,24,516	35,090	27,91,936
25	2015-16	28,938	29,63,454	35,145	28,27,081
26	2016-17	40,000	30,03,454	49,301	28,76,382
27	2017-18	43,131	30,46,585	43,308	29,19,690
28	2018-19	42,202	30,88,787	42,576	2,96,266

Table 1.2[314] : compiled data of grievances received and redressed by SEBI

[314] Compiled from SEBI annual reports and handbook of statics 2019

Analysis of the data given in table: 1.2

Whenever a new legislation or a regulation come into force it is natural to give raise to the number of cases or complaint in the subsequent year for the simple reason that it takes time to settle down with the public as well as with enforcing agencies. The SEBI Act 1992 was no exception to it as can be observed from the data in the subsequent year in the year 1992-93 the total number of complaints received was 1,10.317 and it the next year that is in 1993-94 the digits jumped to 5,84,616 taking approx. 500% growth. The observation should be make that SEBI's grievance redressal mechanism also took the challenge so effectively and redressed as high as 3,39,517 complaints in the same year surpassing the tally of 22,946 in the previous year with the same tools and manpower. The possibilities of a famous scam of that year the harsal Mehta scam on manyfold increase of complaints also cannot be ruled out.

The rapid fall in the number of complaints in the year 1998-99 raise many questions some of them remain unanswered and need a sperate research. The numbers were as high as 5,11,507 in 1997-98 and they fall as low as to 99,132 in 1998-99 what lead to this sharp decline remains a curious question for me however during research an event of market crash came to my knowledge which might have its bearing on the numbers. A sudden event of market crash occurred on 27 Oct 1997 known as Mini-crash in the Asian region all the major stock exchanges like japan, Hong Kong, Singapore etc. started falling suddenly it was also termed as 'The Asian Contagion'. But this sudden fall in number of complaints certainly is a cause of worry for a regulator and what surprise me even more the number of complaint redressed also decline tremendously from 6,76,555 in 1997-98 to 1,27,227 in 1998-99 causing almost 500% decline.

However the SEBI as a regulator also need to be appreciated for the wonderful job they have done in handling such a huge volume with limited experience, manpower and resources if we analyze the table 1.2 in the year 1996-97 the number of complaints that was received were 2,17,394 but the number of complaints that were redressed in that particular year were 4,31,865 which were almost twice the number complaints received and it is also giving confidence to the investors that the trend is being continue 2008-09 onwards. What observation from this data can be made is that SEBI is working hard to not only redress the complaints of its investors within a year but also trying hard to clear the pendency to boost the confidence of investors in its grievance redressal mechanism.

Concluding the observations on the data presented in the tabular form from the inception of SEBI and answering my first research question in positive that SEBI has done a commendable job in dispute resolution over the past three decades while analyzing its capability and effectiveness it need to be keep in mind that co ordinating with several agencies like depository, settlement cooperation, exchanges and their by laws and dealing with small and big brokers and other intermediaries is not an essay task for a regulator with 785 odd employees[315] is itself a difficult task. However in 2011 the SEBI's online portal SEBI complaints redressal system (SCORES) was lunched to for e-filling of complaints. It was expected that with use of technological tool and minimizing the human intervention the delay will be reduced but the statics does not support this hypothesis the table 1.2 suggest there was no substantial increase in complaints redressed 2011 onwards this again leaves me with a curiosity and could be a topic of research in itself.

Rate of satisfaction

Nature of this research being doctrinal and due to ongoing pandemic it was not possible to go out and take the responses of the investors but the level of satisfaction can be assessed with the help of data available in the SEBI's annual report and handbook of statics as to in how many cases a appeal has been filed with SAT or supreme court and the number of review applications laying with SEBI. this can be understood by with the following data:

	2017-18	**2018-19**
Number of grievance redressed by SEBI	43,308	42,576
Number of first appeal received by SAT	328	400

Table :1.3[316] data of appeals before SAT

The simple interpretation of the above data suggest that in the year 2017-18 only 0.75% of the complaints went for the appeal and the same figure for 2018-19 was only 0.93%. Therefore in even the 1% of the cases investors do not prefer an appeal which suggest that level of satisfaction among investors is very high.

[315] SEBI annual report 2018-19
[316] Same as the above source

Success rate of SAT:

The securities appellate tribunal is a first appellate authority in the Indian capital market against its order an appeal can be filled in supreme court only. tribunal is an attempt to give specialized justice to the investors from its office situated in Mumbai. The success rate of the tribunal can be analyzed by decoding the data of number of appeals before it and its disposal rate. During 2018-19, 379 appeals were filed before the Securities Appellate Tribunal (SAT). Further, 138 appeals were dismissed (ruled in favour of SEBI) while 25 were allowed (ruled against SEBI). At the end of March 31, 2019, 379 appeals were pending before SAT[317]. therefore fair statement can be made that SAT is redressing the appeals in a time bound manner and very few involving question of law.

Understanding the grievance redressal mechanism with the help of other international stock exchanges:

Our constituent assembly while working on draft of our constitution also took the inspiration from the constitutions of several countries and the adviser to the assembly sir B.N Rao traveled so many countries to understand the international scenario and legal practices followed in the other parts of the globe. The objective was to give the best workable document to the citizens of newly constituted republic. the same goes with the regulatory framework followed by SEBI. to evaluate and check efficacy of the present working mechanism it is wise to also have a look at practices followed by other leading stock exchanges and suggest them if find suitable for better functioning of Indian capital market.

Grievance settlement mechanism in Singapore stock exchange:

If a complaint of commercial in nature filed with the exchange between a investor and a broker/ trading representative for unsatisfactory service or related to any other technical deficiency the complainant is advised to take up the matter first with the other party directly and if even after follow ups by the complainant his dispute has not being resolved to his satisfaction he can approach the exchange for redressal. However, if the exchange find the dispute purely commercial in nature then it may not interfere and if not or if find it violating any exchange rule then the exchange does consider it for the investigation. The exchange use arbitration

[317] SEBI annual report 2018-19

system for speedy and cost effective disposal of cases And provide e-lodging facility of complaints.

The complaint can be filed in the prescribed format with details such as name, address, contact number of the investor and details of the party against whom it is filed along with the allegations. Once the complaint is being lodged if find violative of any rules a disciplinary proceedings will be initiated. However, unlike SEBI the nature of the investigation is regulatory only and even the broker or the opposite party may not be forced to compensate the investor for his losses, in fact stock exchange pays for it from a fund of $53 million known as fidelity fund maintain by the exchange.

Grievance redressal mechanism in New York stock exchange:

Like the SCORES of SEBI the New York stock exchange (NYES) also use online medium of receiving complaints and opted for arbitration as method for settlement of disputes. An independent arbitrator having expertise and experience in resolving disputes in securities related area is appointed to provide for cheap and transparent solutions to the investors concerns. They have to first try to take up the issue with broker, if not resolved or not satisfied then lodge a formal complaint in the prescribed format with the exchange. It is to be noted that the award of arbitration is final and binding in nature and to opt for arbitration one has to give up his right to go to a civil court. There are various dedicated specialized agencies and NGO's in US, offering arbitration services.

Therefore, it can be observed from the above research that the arbitration system has its limitations as to find an arbitrator, who will bear the cost, its neutrality, place and language of arbitration etc. moreover it is followed in the Indian capital market too at the depository and stock exchange level. As far as the ombudsman system is concern SEBI has already considered it by publishing its Concept Paper on Ombudsman for the Securities Market[318]. The alternate system is proposed to cover the short comings of the existing one. the need for the new mechanism was felt to make the role of SEBI pro active because many feel that SEBI merely acts as a "postman" in withdrawing from the issue once the complaint has been handed over to

[318] https://www.sebi.gov.in/sebi_data/attachdocs/1293102862086.pdf

the company[319]. As the preamble of the SEBI Act says that it can take steps to protect the interest of the investor so it has enacted SECURITIES AND EXCHANGE BOARD OF INDIA (OMBUDSMAN) REGULATIONS, 2003 with the objective redressing disputes in a speedy, cheaper, efficacious, simple easily accessible, informal manner.

Under the new system there will be only one appeal available that is to SEBI, the legal complexity will be avoided by not allowing legal practitioners to appear and making penalties more severe. The system is likely to give results as it is already there at the banking level.

CONCLUSION:

The paper after analyzing the secondary data available and the regulatory framework not only in Indian capital market but in international markets as well, found out that the importance of the fast and effective grievance redressal mechanism is can not be disputed and it is of utmost importance to protect the interest of the investors and for the very survival of a capital market. The research suggest that there exist several problem with the existing system like lack of awareness among investor about the market, less knowledge about which authority to approach to seek a remedy, delay in disposal of complaints etc. even there are as high as 27,92,521 complaints pending before the SEBI[320] so yes there is a delay, however SEBI as a regulator has tried hard to resolve the same and to live up to the expectations of the investors. as it was came into the light during research that from the past several years the number of grievance redressed are more then the number of grievance received in a year which means it is not only disposing off the new cases within time but with a rapid speed clearing its pendency as well. The regulator have limited staff of 788 persons and has less experience compare to other established international markets therefore efforts should be made to enhance the pace and capacity of the existing mechanism and give it some time to nurture rather then introducing a new one. In the Asia pacific region SEBI had made its mark. as the educational initiative of SEBI, national institute of securities market (NISM) already become a training center for the region as the Requests Received by SEBI from Foreign Authorities for providing regulatory assistance were 56 in (2017-18) and 52 in the year (2018-19)[321] therefore the efforts should be made to increase

[319] **Ombudsman to SEBI's rescue.... by Adv. Neetu Chandnani ;https://www.moneycontrol.com/mccode/news/lp_news_detail.php?autono=647**

[320] The handbook of statics SEBI 2018-19

[321] The SEBI annual report 2018-19

these numbers and to create a market more organized, more transparent, more deep and broad in near future.

CRIME AGAINST TRANSGENDER: SOCIO LEGAL ANALYSIS

- P.M. KRISHNADHAREENI

ABSTRACT:

Transgender is an umbrella term for persons whose gender identity, gender behaviour are not conform there associated sex which they were assigned at the time of birth. Gender identity refers to be a person's internal sense of being male, female, or something else; gender expression refers to the way in which a person communicates gender identity to others through behaviour, clothing, hairstyles, voice, or body characteristics. When the gender is nonconforming will be identify as transgender person. Transgender person are discriminated by the society .The right of Transgender person has been violate often the society .Even though many legislative measures taken by the government still which didn't protect the transgender person from the discrimination. The Trans people not only the victims of discrimination even victims of sexual assault and sexual abuse. Due to their gender identity Trans people have been discriminated against in society. The present research done on the area of Crime against transgender person 'Socio Legal Analysis'. The investigation aimed to study in the area of crimes against the transgender person and Sociological and Legal aspects related to transgender person communities. This study has been conducted with some primary and secondary sources of data.

Key Words: - Transgender, Trans men, Hate Crime, Partner Violence, Sexual Harassment

INTRODUCTION

Transgender is an umbrella term for persons whose gender identity, gender behaviour are not conform there associated sex which they were assigned at the time of birth. Gender identity refers to be a person's internal sense of being male, female, or something else; gender expression refers to the way in which a person communicates gender identity to others through behaviour, clothing, hairstyles, voice, or body characteristics. When the gender is nonconforming will be identify as transgender person. Transgender person are discriminated

by the society .The right of Transgender person has been violate often the society .Even though many legislative measures taken by the government still which didn't protect the transgender person from the discrimination. The Trans people not only the victims of discrimination even victims of sexual assault and sexual abuse. Due to their gender identity trans people have been discriminated against in society.

The present research on the area of Crime against transgender person 'Socio Legal Analysis'. The investigation aimed to study in the area of crimes against the transgender person and Sociological and Legal aspects related to transgender person communities.

In many parts of the world, a person having a transgender identity still puts a person at risk of discrimination, violence, and even death. This study focuses on the crimes committed against the transgender person and the Laws which related to transgender, Role of judiciary on transgender Person's

CONCEPTS OF GENDER:

In order to define the word "transgender person", it is important to know what is gender and how it is determined .Gender is allotted to each one of us at the time of birth based on their external genitalia.

For e.g.; A child is born with genitalia like "Vagina" is assigned gender female at birth and when a child born with genitalia like "Penis" is assigned gender male at birth.

When the child grows up the assigned gender at birth may or may not match the person's own sense. When a person grow up their gender matches with the assigned gender at the time of birth they would be called as "Cisgender" .For example, someone who identifies as Male and was assigned Male at birth is a cisgender Male and a person identifies as Female and was assigned women at birth is cisgender Female Otherwise they are Transgender or third gender because their identity or own sense doesn't match with the assigned gender at birth[322].

DEFINITION OF TRANSGENDER:

Any person, who does not identify with the gender assigned to them at the time of birth. The term transgender is used to explain a wider range of gender experiences and gender identities,

[322] https://www.healthline.com/health/sex-vs-gender#gender-identity(visited on 12.3.2020)

including male and female cross-dressers, inter sexed individual. Any person assigned as male at the time of birth but identify themselves as female called transgender

KINDS OF CRIME AGAINST TRANSGENDER:

Crimes against transgender as briefly described in the following paragraph.

1. HATE CRIME:

Majority of Transgender are victim's for Hate Crimes and they frequently experienced these type of crime .As per definition of Webster dictionary " Hate Crime " means a crime, which typically involves violence against the race, caste , religion, sexual orientation, or other grounds.

As per Legal Scenario hate crimes refers to be violent crime and committed against the particular group of people or community by discrimination. The Law enforcement agencies are tracking these types to make the offender guilty about their act. Even though their goal was not fulfilled Hate crimes is serious threat to transgender community. It can be eradicate only by way educating people and spreading awareness of legal rights of transgender persons .[323].

2. SEXUAL HARASSMENT:

Sexual Harassment means without the consent of the person made harassment by physically and verbally conduct of a sexual nature .The conduct may be

1. A person put a condition for his or her sexual desire against any person for the purpose of employment ,education, and livelihood.

2. The acceptance or rejection of such condition affects the education, employment and Livelihood.

3. The conduct unreasonably impact on the employment and education of the individual.

Many Transgender person are victim of the sexual harassment because transgender person are come out from their child wood so they won't get an opportunity to study or transgender person's are hesitate to go school which make them as school dropout . So majority

[323]https/// www.NCTE.org /Hate_Crimes_Manual.pdf (visited on 20.3.2020)

of transgender are school dropout so it's tough to get job for them .By using the weakness the offender as commit a sexual harassment against the transgender person. The offender's using the opportunity and make the transgender person victims of these types of crimes[324].

4. RAPE :

As per the definition "Rape" is an unlawful sexual activity and usually sexual intercourse carried out forcibly, without the consent (with or without the consent who is below the age of 16 year's), with consent obtained by threat to life or bodily injury or the person are not in the condition to give consent because of mental illness, intoxication, deception or unconsciousness[325].

Rape is a serious threat to the nation. Rape are not only committed against the women, child, aged person even against the transgender person. Transgender Person are vulnerable in nature they are easily become a victim of Rape because Transgender people's are homeless so they have to roam in the street only .Which leads into an rape. Transgender people are not properly carried by the families or peer groups they were rejected by the society .so if the transgender were raped also thus won't be reported in the police station.

5. INTIMATE PARTNER VIOLENCE :

Intimate partner violence means violence with the intimate relationship either within the marriage relationship or love relationship. Intimate partner violence is a behavioural pattern of other person tries dominating or controlling over their partner by using violence.

Abusive intimate partners may use tactics to maintain control over their partners. The tactics may be in the form of economic abuse, physical and mental abuse, verbal abuse, sexual abuse, put them in isolation, and intimidation. Mental abuse can include names calling them in a disrespectful manner due to their gender identity.

Even the abusive partner tries to make an economic abuse by controlling or exploiting their partner's financial situation of the family. Even forcing a partner to pay for everyone, not allowing someone to work, or taking all the financial decisions. The intimate partner uses physical violence against their partner that may sometimes endanger the life of the partner.

6. HOMELESSNESS :

[324]https://www.ovc.gov/pubs/forge/sexual_numbers.html(visited on 14.3.2020)

[325]https://www.merriam-webster.com/dictionary/rape(visited on 15.3.2020)

Transgender person are thrown out from the house due to the pressure of peer groups and neighbourhood. Some instance family members won't accept their children as a transgender so they have sent out by their own family members. Nobody as ready to accept their and provide them a house for rent .As result majority of transgender person are homeless. Due to their homelessness many crimes were committed against them. As census around 60% of transgender person are homeless.

7. FORCED MARRIAGE:

Forced marriage is commonly happening in transgender community in rural areas. When the family members came to know about their gender identity of their children they threaten their children and also arrange the marriage for that transgender children .So the transgender person could express the identity to the partner even that is difficult to act in their birth gender so they undergone with mental illness sometimes it lead to suicide.

8. SEX WORK :

Transgender person are vulnerable in nature. They are starving for their livelihood. So the offender's as taken the opportunity and forced them into sex work or prostitution. Majority of transgender as become forced sex worker.

9. SEX-BASED DISCRIMINATION:

Discrimination against an person because of their gender identity, including transgender status, or because of sexual orientation is discrimination because of sex is known as sex discrimination. Majority of transgender person are victims of sex based discrimination. Due to the transgender person gender identity people make mock on them and thus make them mental illness. Many crimes are not reported properly due to the fear of police authorities[326].

LAWS RELATING TO TRANSGENDER:

CONSTITUTIONAL PERSPECTIVE:

Constitution of India has provided fundamental rights to the citizen without any discrimination of race, caste, creed, religion, sex , language etc. The concept of Fundamental Rights was adopted from "Bill of Rights" under the American Constitution.

[326]https://www.eeoc.gov/laws/types/sex.cfm

As per the Constitution Of India every citizen of India has entitle of fundamental rights without any discrimination of race , caste , creed ,religion ,sex ,language etc.,

ARTICLE 14: Right to Equality:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India .The Constitution provides every person an equal status before the law and an equal protection of laws within the territory of India. The word "any person" here means every individual, without any discrimination based on any of the category which includes caste, creed, religion, sex, etc.

The words "any person" included transgender person so the state should not deny equality before the law and equal protection of the laws within the territory of India. so it's clearly says the without any discrimination of sex which includes transgender person. [327]

ARTICLE 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:

As per the constitution of India "The state should not discriminate any citizen on the ground of race, caste, creed, language, religion, sex etc., so the transgender person should not be discriminate by the society on the ground of their gender identity[328].

ARTICLE 16: Equality of opportunity in matters of public employment: As per the constitution of India "Equal opportunity for all citizens in matter relating to employment or appointment office under the state. State should not discriminate any citizen on the ground of race, caste, creed, language, religion, sex etc., so the transgender person should not be discriminate by the society on the ground of their gender identity and they are entitled for public employment under Article 16.[329]

ARTICLE 19: Protection of certain rights regarding freedom of speech, etc..

(1) All citizens shall have the right to

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

[327] https://m.jagranjosh.com/general-knowledge/amp/what-is-meaning-of-article-14-1581599655-1
[328] https://indiankanoon.org/doc/609295/
[329] https://indiankanoon.org/doc/211089/

(g) to practise any profession, or to carry on any occupation, trade or business.[330]

ARTICLE 21 : Protection of life and personal liberty :[331]

No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Constitution of India has guaranteed Protection of life and personal liberty to every person except procedure established law .so the transgender person are entitled to protection of life and personal liberty except procedure established law

ARTICLE 23 : RIGHT AGAINST EXPLOITATION :

All citizens of India have a right against exploitation. Every person has a right to personal development, and this could be secured only when there exists a right against exploitation which creates a free environment for an individual. Transgender are the victims of exploitation, due to their low economic status, gender identity and they indulge into prostitution and other immoral activities by the society. The intention behind this Article is to secure independence of an individual identity by preventing exploitation of men by men.[332]

BRIEF ANALYIS ON THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 [333]

An Act to provide for protection of rights of transgender person and their welfare and for matters connected therewith and incidental thereto. The Act was enacted on 5thDecember, 2019.The Act contains IX Chapters and 23 Section .The Act was enacted on the recommendation of the 43 rd Law Committee Report.

ANALYIS ON THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019:

In India, Transgender people have not only been discriminated even they were also been deprived of their basic rights. Finally, in 2012, National Legal Services Authority of India extended its support to the transgender community and filed a petition with the Honorable Supreme Court on their behalf, demanding equal rights for them and legal declaration of their

[330] https://www.lawctopus.com/academike/freedom-of-speech-and-expression/
[331] https://indiankanoon.org/doc/237570/
[332]https://indiankanoon.org/doc/237570/
[333] https://www.indiacode.nic.in/handle/123456789/13091?locale=en

gender identity. After two years, on April 15, 2014, the Supreme Court, in its landmark ruling, upheld that the fundamental rights guaranteed by the constitution will be equally applicable to them and recognized them as the third gender. Major takeaways from the verdict are listed below.

(1)Transgender people were earlier forced to categorize themselves as either male or female. That's why the Supreme Court, in its historic judgment, created the "third gender" status for them, which will play a major role in creating a society inclusive of all genders.

(2)The Supreme Court ordered the Centre to recognize transgender persons as socially and economically backwards.

(3)The apex court directed the central as well as state-level governments to run social welfare schemes for the betterment of the transgender community and to create awareness among the common masses to eradicate the stigma regarding their culture, belief, religion and gender.

(4)The court reiterated that reservation must be granted to the transgender in getting education and employment, and asked the government to classify them as OBCs.

(5)Absence of law recognizing transgender as the third gender cannot debar them from getting jobs and education. They must be provided equal opportunities in availing education and employment.

(1) Definition of Transgender

As per Section 2 (k) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender-queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

A transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra. Intersex variations is defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.

(2) **PROTECTION FROM DISCRIMINATON :**

Section 3 provides for prohibition against discrimination in relation to education, employment , right to movement , health services , right to enjoy goods and services , right to residence , unfair treatment and also to acquire public and private office. The Acts clearly states that Transgender Person should not be discriminated.

(3) **Recognition of Identity of Transgender Persons**

Chapter III contains (4 to 8 sections) . Which talks about the recognition of identity of transgender person , application for the identity , authority of District screening committee and issuing of certificate . In simple words the section (4 to 8) Recognising the identity of the transgender person and the authority has issue the certificate of their identity.

A person, under the Act, recognized as a transgender person will have the right to self-perceived gender identity. In order to get access to all the rights and benefits provided to the transgender community, it is mandatory for a transgender person to get the Certificate of Identification.

(4)Procedure for getting the Certificate

(1) A transgender person has to make an application to the District Magistrate.

(2) The DM will refer the application to the District Screening Committee consisting of five members

1. Chief Medical Officer,2. District Social Welfare Officer, 3. Psychologist,4. Member of transgender Community and 5. Government Officer.

(3) The DM will further issue the certificate to the transgender person after on the basis of a recommendation from the Screening Committee.

(5) Welfare measures by the government

Chapter IV (Section 9) lays down the welfare measure as to taken by the government against the transgender person. As per the section 9 of the act , the appropriate government has to take steps to protect the rights and interest which include full participation and their inclusion of the society. The government has to take steps to rescue and rehabilitate the transgender person and provide welfare schemes.

The Act clearly states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. It must also take steps for their

rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive, and promote their participation in cultural activities.

(6)Obligation of Establishment and Other Persons

Chapter V contains (Section 10 to 13) deals about obligation of establishments and other persons. As per section 10 No establishment shall discriminate against any transgender person in any matter relating to employment except promotions.

Section 11 provides right to transgender person to reside with the parents.

Section 12 deals with Grievance redressal mechanism during the violation of the provision of the act.

(1) A transgender person cannot be discriminated against in any matter relating to employment, but not limited to, recruitment promotion and other related issues. Every Establishment needs to strictly follow the provisions of this Act. Appointment of a complaint officer is necessary for those establishments consisting of 100 or more people so that the violations of the provisions of the Act may be addressed.

(2) A transgender person cannot be separated from the parents on the grounds of being a transgender, except on the orders of a competent court.

(3) A transgender person will have the right to reside in the house of the parent or immediate relative without being discriminated. If a parent or his immediate relative is unable to take care of a transgender person, then such a person will be sent to the rehabilitation centre.

(7) Education, Social Security and Health of Transgender Person

Chapter VI (Section 14 to 16) aims at educational, social security and health related issues of transgender person. It protects the fundamental rights of education , non - discrimination , welfare schemes , to support and facilitate livelihood , right to health including provision for separate HIV Sero Surveillance Centres , Medical care like Sex Reassignment surgery , insurance schemes for covering medical expenses and enhanced expertise and training for doctors to address specific issues .

(1) An educational institute funded or recognized by the Government shall provide inclusive education, opportunities of sports, leisure and recreational activities to every transgender without any discrimination

(2) Several social welfare schemes will be started by the government so as to uplift their standard of living. The Government will begin vocational training and self-employment programs so that they can easily get a job and lead their lives with dignity.

(3) Every hospital will have a separate department for the transgender, where they can easily avail all the medical facilities, including sex reassignment surgery and hormonal therapy. Moreover, the Bill also stated that the medical curriculum will be framed in such a manner so that the doctors can easily treat all their health issues. They will also get medical insurances to avail free medical facilities.

(8) National Council for Transgender Person

Chapter VII (Section 17 to 18) deals with National Council for Transgender Person which consists of various members from Executive, Human Rights Commission, and National Commission for Women, representatives of transgender community and Non -Government Organizations. The function of the council is to advise Central Government on policy formulation, monitor and evaluate the impact of the polices and review and coordinate activates of all departments of government relating to transgender.

The Act proposes the establishment of National Council for Transgender Person, headed by the Union Minister of Social Justice and Empowerment. The main responsibility of the Council is to advise the Central Government on the formulation of policies, programmes, legislations and projects regarding the Transgender community. Furthermore, it also needs to analyze and monitor the impact of those policies and legislations on them, and report it to the respective ministry. The working of the various Departments of Government and Governmental and non-Governmental organizations for the matters related to transgender persons will also be reviewed and coordinated by the Council to ensure their smooth and effective functioning.

(9) Offences and Penalties

Chapter VIII (Section 19) penalizes any person involved in enacting or compelling transgender to beg or do forced labour , obstructing right to passage to public place , forcing to leave household and harms or endangers the life of transgender with six to two months imprisonment and with fine .

Chapter IX (Section 20 to 24) deals with the miscellaneous provision which includes grants by central government and powers given to appropriate government to make rules, protection of

government or any local authority from any prosecution for the actions taken by them in good faith and power of the central government to remove difficulties for the provision which are inconsistent with provision of the act.

CONCULSION

Crimes are committed against Transgender Person is due to Lack of Legal process and Improper Implication of Law against the offender. As per the Research under the Legal Process and Rules and Regulation in Relation to Transgender Person was Sufficient in nature. The major drawback of Crimes are Committed against Transgender Person is not Lack of legal process towards the Transgender Community Its due to Lack Implementation .

Due to the gender identity of Transgender Person they were separated from the society. The Transgender Person was suffering many social problems due to their identity like Society Behaviour towards them, Crimes against the Transgender, Discrimination etc. Transgender Person was suffering Psychological issues due to their Gender Identity For example: Family Rejection, Lack of education and employment etc. Some time due to their Psychological problem transgender were commit suicide and the suicidal rates were high among Transgender Person.

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COVID AND THE RISE IN ILLEGAL ADOPTION

- NITISH KUMAR MISHRA

"What we do see is that the trafficking of children is becoming an income revenue stream for organized crime, for gangs. So where they would typically be selling guns and drugs, they're now turning to the selling of children."- Dalia Racine

"If you come to know of any child who has lost both parents to Covid and has no one to take care of, our organisation would be happy to raise that child[334]"- these type of messages started to promulgate more and more on different social media platforms since the pandemic has grasped India. Since the Covid cases has escalated there has been a proportionate rise of unscrupulous people who pose themselves as the benefactor but behind that facade lies a sinister whose only concern is how to manoeuvre gullibles easily into their trap.

Covid-19 tested India in numerous ways, one among them is increase in orphans due to this deadly virus. "In Kolkata, a newborn baby recently lost both her parents and grandparents to the virus. The baby too tested positive for Covid-19 but survived. The baby's relatives were reportedly reluctant to take care of her. Finally, the little girl's maternal grandparents, who live in another city, took charge[335]", news like these are being reported from across the country nowadays and this has led to horrendous rise in illegal adoption practices which have further repercussions, like :-

1. The credentials are generally not fully known of the adopters.
2. Increase in child trafficking.
3. Using children for child labour, as house servants, for begging purposes, etc.

LEGAL POSITION

There are three acts governing the adoption practices in India :

1. The Guardians and Wards Act, 1890.
2. The Hindu Adoptions and Maintenance Act, 1956.
3. The Juvenile Justice (Care and Protection of Children) Act, 2000.

[334] https://twitter.com > @smritiiranioffc
[335] Indiatoday.in

The Hindu Adoptions and Maintenance Act applies to any person, who is a Hindu by religion in any of its forms including a Virashaiva, a Lingayat or a follower of Brahmo, Prarthana or Arya Samaj, Buddhist, Jaina, Sikh.[336] Muslims, Parsis and Christians are governed by their own personal laws and they do not have any law governing adoption under their personal laws therefore they adopt either under The Guardians and Wards Act of 1890 or The Juvenile Justice (Care and Protection of Children) Act of 2000. The Guardians and Wards Act, 1890 and The Juvenile Justice (Care and Protection of Children) Act, 2000 are both secular acts as any person irrespective of their religion can adopt a child under either of two.

Section 12, Hindu adoptions and Maintenance Act, 1956 states effects as to adoption – It states that "An adopted child shall be deemed to be the child of his/her adoptive father or mother for all purposes." Hence it provides the status of parent to the person who adopts the child. However, under the Guardians and Wards Act, 1890 it only provides with the status of guardian and ward with respect to the person and child. Section 40, Guardians and Wards Act, 1890 states if a guardian appointed or declared by the court desires to resign his office, he may apply to the court to get discharged with the status. However under The Hindu Adoption and Maintenance Act, 1856 the parents can't undo with the status of Adoption on completion of the process of adoption.

Hindu Adoption and Maintenance Act provide that only one person or parents can adopts a child. However Section 15, Guardians and Wards Act, 1890 provides for 2 or more persons as guardians subject to the law and court orders. Legal relationship between the adopted child and adoptive parents is equivalent to that of natural child and the relationship exists for the natural life span of adopted child and beyond. However, under The Guardians and Wards Act the relationship exist only till the child attains the age of 21 years, after the age of 21 years the child has a separate identity. Under The Hindu Adoption and Maintenance Act the identity of child is same as of his/her adoptive parents for all purposes. The age of majority of child under The Hindu Adoption and Maintenance Act is that of 18 years however under The Guardians and Wards Act that age is 21 years.

[336] Section 2, The Hindu Adoptions and Maintenance Act, 1956 (78 OF 1956).

It is a well said quote -"Family is not defined by our genes, it is built and maintained through love."Section 2(aa), Juvenile Justice (Care and Protection of Children) Act, 2000 gives the definition of adoption as "the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the responsibilities."

Generally in India, Ministry of Women & Child Development's Central Adoption Resource Authority (CARA) guidelines regulate the intra country and inter country adoptions. To adopt a child, the parent referred as Prospective Adoptive Parent (PAP) has to fill up the application present on CARA's website along with the required documents. After that a social worker of a Specialised Adoption Agency (SAA) authorised by CARA will conduct a home study of the PAP and will upload it on the website. SAA shares with the Prospective Adoptive Parent (PAP) the profiles of children who are legally available for adoption who then have to reserve a child within 48 hours, then within 20 days the appointment has to be set up by SAA to match the child with the Prospective Adoptive Parent[337].

SAFEGUARDING OF CHILD AFTER ADOPTION

It can happen that even after following the above mentioned requisite formalities, the child or the parents are not able to keep up together harmoniously, this usually happens in the case where the child is in his/her adolescence then he/she face problems due to sudden change in environment and due to the expectations which adoptive parents have. Therefore to safeguard the child's interest after adoption and to protect his well being a follow up takes place every 6 months till 1.5-2 years from the date of adoption and if the adoptive family emigrates in that case the District Child Protection Unit prepares the report.

RELATIVE RIGHTS TO ADOPTION

"A newborn lost both her parents and grandparents from the father's side to Covid. The baby was positive too, but survived. Grandparents from Mother's side have reluctantly taken her with them after the police insisted. Stories of Covid orphans will haunt us big time", said Anuradha Sharma, a West Bengal-based journalist[338]."Stories of miseries like this will come from across the country. Recently due to the rise in pandemic many children have lost both of

[337] http://cara.nic.in>Guidelines
[338] Indiatoday.in

their parents, this led to increase in adoption of these children by their relatives as ultimately they are the first option which the Orphan Child has, however it is pertinent to note that relatives too have to follow the due procedure to adopt the child, they have to register themselves on the CARING portal then a home study will be conducted by a SAA worker who then will upload it on the portal. In the case of a relative the SAA will not show the profile of other children, rest of the process remains the same.

2021 AMENDMENT

Earlier in 2021, an amendment was cleared by the union cabinet giving powers to the District Magistrate to grant final approval in adoption cases. Prior to this amendment, according to the Juvenile Justice (Care and Protection) Act of 2000, the Prospective Parent along with the SAA were supposed to file a petition before the authorised court for the final approval of the adoption, this used to be a time consuming process hence to save time powers were granted to the District Magistrate to give final approval regarding the adoption.

CONCLUSION

The laws related to adoption and the awareness as to adoption have certainly improved in the recent past, however this should not make us consummate as we still have to go a long way ahead. In these excruciating times when many children are becoming orphans, and as every coin has two sides there are few people who wants to fulfill their sinister motives. Evolution has been a key to human life since the Paleolithic, these sinisters have also evolved new techniques through which they could deceive ingenuous people. At this juncture when many children have lost both of their parents due to this dreadful virus, there are messages being circulated on different social media platforms regarding adoption. It is the duty of every citizen to be aware about the law of the land and contribute towards the welfare of society. If someone finds out a child whose both parents have died or about illegal adoption or come across any ill messages dealing with the same, they should immediately inform the local police, District Magistrate or the Child Welfare Committee. In these hard times when the Covid-19 is taking a toll and many activities related to illegal adoptions are happening, an awareness campaign by the government, civil society groups, News Broadcasters should educate the general public at large about the adoption laws and procedures would be of much help to the public. People should be made aware that giving or taking child in adoption without fulfilling the requisite

conditions mentioned in the law can have serious repercussions which can also lend them in prison.

BASIC CONCEPTS OF DOMAIN NAMES IN TRADEMARK

- **ESTHER V**

1. INTRODUCTION :

Today, Internet facilitates us in all walks of our life. From e-mails to e-governance from online banking to online dispute resolution system, the Internet has been a platform for progress. While the merits of Internet usage are undisputable, it is not free from the demerits. Internet has always been found as major problem creator for law.[339] Cyberspace has been prone to a number of misuses because of its inherent nature of being without any boundary. It has paved way for different types of crimes and complex conflicting situations in the virtual world.[340] Thus, the various aspects of Internet have posed challenge not only to the business entities and public in general but also to law makers and judges. One such challenging issue which needs immediate attention is the domain name-trademarks conflicts.

The Internet seems to have exploded on the forefront of several commercial establishments, organizations, governments and institutions. Flashing an Internet address has become a sine qua non for almost every organization. It goes without saying that as the awareness of the Internet grows, the number of web sites grow correspondingly. Such growth of web sites has also given rise to a new area of disputes - domain name disputes.

A trademark can be defined as a distinctive design, picture, emblem, logo or wording affixed to goods for sale to identify the manufacturer as the source of the product. The question that attracts the attention of anybody is, does a Domain Name come under the Definition of a Trademark! The answer is found when both their nature and scopes are analyzed - under law a trademark is used in commerce to represent a product or a business while on the other hand a Domain Name is a word or a phrase registered in the Domain Name System (hereinafter referred as DNS). Moreover a Domain Name is not a corollary to the trademark system. Nevertheless, previously decided Domain Name disputes have given Domain Names as much protection as trademarks. In *Cardservice International Inc v. McGee*[341] it was held that Internet

[339] David Kitchin, et al., *Kerly's Law of Trademarks and Trade names*, Thirteenth edition, (London: Sweet & Maxwell, 2001) p. 737.

[340] Paul Sugden, „Trademarks and Domain Names" in Jay Forder and Patrick Quirk (eds.), Electronic Commerce and the Law, (Australia: John Wiley & Sons, 2001) pp. 199 - 225 at p. 199.

[341] 42USPQ2d 1850

Domain Names are of importance and are entitled to equal protection as a trademark. The Indian stand point on the status of Domain Names is also encouraging as in the *Rediff case*[342] it was held that a Domain name is more than an Internet address and is entitled to equal protection as trademark. In the *Yahoo case,*[343] The Delhi Court held that although services may find place in the expression used in Section 27 and Section 29 of the Act[344] services rendered have to be recognized for an action of passing off. But the most commendable Judgement which sets the record right as regards to the nature of Domain names in relation to Trademarks is the *Bennett Coleman & Co case* decided by the WIPO wherein it was held that Domain name registrations cannot be confined to comparisons with Trade mark registration or other rights in the country where the site is hosted. Further buttressing the strength hold of Domain Name in the ever growing scope of E- Commerce is the fact that consumers have now begun to attribute Domain Names with goodwill, reputation, dependability and brand following similar to that of a trademark.

2. DOMAIN NAMES: ORIGIN AND MEANING :

Domain name is distinct from website and *Universal Resource Locator* (URL). Domain name, being the substitute to IP address, forms only part of the other two. However the distinction between domain name and website is blurring, since it doesn't have much practical significance, and therefore many use these terms interchangeably. While domain name is a part of the website, the URL is the extended path of the website,[345] which helps in locating the website. This can be better illustrated by the following example.

Ex: In 'http://www.un.org', 'un.org' is the domain name, 'www.un.org' is the website, and 'http://www.un.org' is the URL.

Initially the role of domain name, just like postal addresses, was confined to provide address for computers on the Internet for the purpose of communication. However the situation changed soon with the beginning of commercial activities over the Internet. The domain name system has played a pivotal role in the development of the modern day e-commerce. The

[342] *Rediff Communications Ltd., v. Cyherhool/*u AIR 2000 Horn 27.
[343] *Yahoo Inc. v. Akash Arora and Net Linli Internet Services* (1999) PTC (19) 201
[344] Trade and Merchandise Marks Act, 1958
[345] Clacky McSnackins, „Explaining the Difference between a URL and a Domain", available at <http://www.helium.com/items/235627-explaining-the-difference-between-a-url-and-a-domain> Last visited, 05 November 2009.

identification of goods and services as the goods or services provided by respective entities is indispensible in the modern day commerce, since it helps the buyers to go for quality goods and services. While in the traditional commerce this function of identification is performed by the trademarks of the business entities,[346] on the Internet, the domain names perform the same function.[347] Domain names, being the simple and easily memorable form of Internet addresses, are designed in such manner that they function to enable the netizens to locate the specific site on the Internet among rapidly increasing uncountable number of sites. This helps the online customers to reach the website of the particular business entity from where they intend to purchase. Thus, with the increase in online business activities, the domain name has not only acquired the status of being the business identifier, but also has been considered as most important by the traders, since it is the name that attracts the customers in the modern day business.[348]

3. DOMAIN NAME LEVELS :

Domain names are classified in three hierarchical levels:

- **Top level**:

The top level of a domain name is located after the last dot (“.”). For example, in “iprhelpdesk.eu”, the top level domain is “eu”. There are two types of top-level domains:- generic Top Level Domain **(gTLD)**: indicates the area of activity (e.g. “.com” for any purposes or “.biz”, restricted to businesses); - country code Top Level Domain **(ccTLD):** indicates the country or territory in which the domain owner intends to operate (e.g. “.uk” for the UK or “.eu” for the European Economic Area).[349]

- **Second level**:

The second level of a domain name is located directly to the left of the top-level domain. For example, in “iprhelpdesk.eu”, the second level domain would be “iprhelpdesk”. Most domain name disputes concern this type of domain.

- **Third level:**

[346] Shahid Ali Khan and Raghunath Mashelkar, *Intellectual Property and Competitive Strategies in the 21st Century,* (The Netherlands: Kluwer Law International, 2004) p. 191.
[347] Richard Stim, *Trademark Law*, (Canada: West Legal Studies, 2000) p. 99.
[348] *Supra note* 3.
[349] For further information regarding *“.eu” domain names*, consult the Commission Regulation (EC) No 874/2004 of 28 April 2004.

The third level of a domain name, also known as a subdomain, is located directly to the left of the second-level domain. For example, in "helpline.iprhelpdesk.eu", the third level domain would be "helpline". Not every address has this level as it is often used to identify the different sections of a website, usually corresponding to different departments in large organizations.

4. DISPUTES RELATING TO TRADEMARK IN INTERNET DOMAIN NAME :

Domain name are assigned on *' first come and fist serve basis'* and too many pre-registration screening, checks or formalities are not required. This fact has been taken advantage off by persons who register domain names which incorporates names in which they have no inherent rights. This method of allotment of domain names has led to conflicts over the entitlements to a specific domain name registration, particularly in relation to trademarks. Some of the domain name disputes termed as:

a) **Cybersquatting**[350] Cybersquatting causes the most concern and is the most often type of domain infringement. There is no definite, single definition of cybersquatting, but it occurs when someone intentionally registers a domain name with the purpose of selling it, then prevents the actual trademarks holder from using the name or tries to divert traffic from the trademark holder's site.

Cyber squatting which is registration of a domain name by someone who lacks a legitimate claim with the intent to

i) sell the name,

ii) prevent the trademark holder from gaining access to the name, or

iii) to divert traffic

who occupy a name hoping that a trademark owner will make an offer for it"[351]. For instance, in the case of '*Green Products Co. v Independence Corn By-Products Co.*'[352] (ICBP), here both the companies were competitors to each other in the market of corncob by-product. ICBP got the domain name (greenproducts.com) registered but did not post a website as yet. The court held that the intention of ICBP was to use its confusing domain name to lure potential customers to the site once it was created and wanted to be benefited unjustly from the use of

[350] Sourabh Ghosh; *Domain Name Disputes and Evaluation of The ICANN's Uniform Domain Name Dispute Resolution Policy,* Journal of Intellectual Property Rights, Volume 9 (2004).
[351] Mohammad S. Al Ramahi; *Internet domain names & Trademark Law*: Does the current legal scheme provide an adequate protection to domain names under the US & the UK jurisdictions? (2006).
[352] No. C-97-177-MJM

Green Product's name. Court further said that consumers might not get confused after getting to the site but even after it, they may buy the product from ICBP's site only. On these findings, the court found it to be infringement.

b) **Typo-Squatting**; Done by people who register the domain names incorporating variations of well-known trademarks terms such as misspellings[353] (micr0soft.com) or adding of prefixes or suffixes to the existing domain name (yahooindia.com) and use them for websites to take advantage of unwary Internet users.

Yahoo Inc. Corporation v Akash Arora[354] is the first case in which the Indian Court that discussed the issues revolving services offered through the Internet. The plaintiff, in this case, submitted that they had the registration of the domain name yahoo.com with Network Solutions Inc. and had registrations of the same in more than 69 countries. The defendant contended that he had provided a disclaimer in his website which avoided the confusion, also, that yahoo is a dictionary word and could not be protected but the High Court of Delhi held that the marks were similar and disclaimer does not help as people still would associate it with the original yahoo, administratively or economically. Furthermore the word yahoo was protected as it was a well known trademark used by the Plaintiff and was distinctive.

The main problem regarding this dispute arises with Cyber Twins which occurs when both the domain name holder and the challenger have a legitimate claim to a domain name then they are known as cyber twins.[355] The cases involving cyber twins are the most difficult to be resolved, because, the law of trademark and unfair competition may otherwise allow both parties to enjoy concurrent use of both. These kinds of disputes also happen at two different levels; firstly, when the same mark owned and used by different persons in respect of different goods or services 'specialty'. Secondly, when the same mark owned and used by different persons in different countries in relation to the same goods or services 'territoriality'.

In *Data Concepts, Inc. v Digital Consulting Inc.,*[356] both the entities had a legitimate claim for the domain name of (dci.com) as both of them had trademark rights for DCI. Data Concepts, however, got the trademark dci.com registered in 1993. It would seem that, in the cases where both have claims then the entity first to register would get it but The Sixth Circuit ruled that

[353] *Supra note* 7.
[354] 78 (1999) DLT 285.
[355] *Supra note* 7.
[356] 150 F.3d 620, 625 (6th Cir.1998).

there still was possibility of infringement. Since trademark infringement is a question of fact as well as question of law, the dispute must go to a full trial for an infringement determination. In this case, due to lack of evidence and the fact that Digital had no knowledge of prior existence of Data dismissed the matter as Data could not establish that dci.com was confusing the users between the two marks.[357]

c) **Reverse Domain Name Hijacking**; Done by people who register confusingly similar versions of domain names, pointing them to gripe sites that carry some other propaganda;[358]

This type of disputes arises only when a trademarks holder tries to obtain a domain name from another party, who has a legitimate competing claim. In this case, there would be no infringement because, as previously noted, many businesses can utilize the same domain but only one business can have an exclusive right to any single domain name.

'Reverse Domain Name Hijacking' is an offshoot of a legitimate claim dispute, wherein a powerful company tries to force a small user to give up a Domain Name that was legally acquired in good faith by the small user .The law is per se in favour of the holder of a legitimate Domain Name, in the *New York Stock Exchange Case*[359] the Court held that innocent third party users of a trademark or service mark have no duty to police the mark for the benefit of the marks owner. The powerful companies nevertheless resort to coercive measures like constant threat of legal proceedings in a bid to, firstly to intimidate the user into relinquishing his right in the Domain Name and to transfer the same to them. As such kind of bullying is rampant on the Internet the Internet community has been extremely hostile to such online bullies.[360]

5. CYBERSQUATTING

Cyber-squatting occurs when domain names bearing a resemblance to famous trademarks are registered by persons hoping to sell the registration to the corresponding trademark holder. Typically, in such cases, persons who have absolutely nothing to do with the name, virtually

[357] *Ibid.*
[358] Chiramel; THE DOMAIN NAME CHAOS- A LEGAL PERSPECTIVE (2011). Also available at: http://www.vaishlaw.com/article/information_technology_laws/the_domain_name_chaos.pdf?articleid=100324
[359] *MD7 v. New York Slock JZxchi.ifie Inc.,* 858 F. Siipp: 1028, |{).12 (C.I) Cal 199.1).
[360] For more information on this issue. Cf. I'hc Domain Name Rights Coalition at IUtp://domainname.org.

pirate the name by obtaining a SLD registration with the 'com' TLD of a well-known company or brand. The practice that's come to be known as cybersquatting originated at a time when most businesses were not savvy about the commercial opportunities on the Internet. Some entrepreneurial souls registered the names of well-known companies as domain names, with the intent of selling the names back to the companies when they finally woke up. Panasonic, Fry's Electronics, Hertz and Avon were among the "victims" of cybersquatters. Opportunities for cybersquatters are rapidly diminishing, because most businesses now know that nailing down domain names is a high priority.

If you own a trademark and find that someone is holding it hostage as a domain name until you pay a large sum for it, you may be the victim of cybersquatting. You can either sue to get your domain name and possibly some money damages under a 1999 federal law known as the Anti-Cybersquatting Consumer Protection Act, or you can initiate arbitration proceedings under the authority of the *Internet Corporation of Assigned Names and Numbers* (ICANN) and win the name back without the expense and aggravation of a lawsuit.

The most important criteria for determining trademark infringement, i.e., likelihood of confusion, is completely absent in the case of cyber-squatting, as no one can be confused by a blank screen. Cyber-squatters never make pretence of being a company whose name they control. The problem of cyber-squatting is more acute than it seemingly is because as already mentioned, any given Internet domain name, consisting of the exact combination of numbers, letters and characters, can be registered by one entity only. If someone attempts to register a domain name previously registered by someone else, he will be prevented from doing so because of the prior registration of that domain name on a *'first come, first serve'* criteria by the first user.

Although cyber-squatting may seem a nuisance from a social point of view, one has to examine whether it would be illegal under Indian law or fall within the ambit of protection granted by the Trade Marks Act, 1999. In the case of cyber-squatting, the cyber-squatter does not offer for sale any goods or services nor does he attempts to trade any goods or services as that of another trademark owner.

Moreover, even a registered trademark owner is subject to a disclaimer if a trademark contains any matter, which is common to the trade or is otherwise of a non-distinctive character. The registration is granted subject to the condition that the proprietor shall disclaim any right to the exclusive use of such part or of all or any portion of such matter.

Therefore, going back to the above said hypothetical example, if 'Moonlight Computers' registers its trademark in India, subject to the disclaimer that it would not claim any exclusive rights over the word 'moonlight', it cannot be said that its trademark is violated if a cyber-squatter registers a domain name, 'moonlight.com' and puts up a picture of a moon on the said website. The Trade Marks Act stipulates that when a mark is registered subject to such limitation, the use of a mark in a manner to which the registration does not extend, would not constitute an act of infringement.

- **Bad Faith**

A registration of a Domain Name is one in 'bad faith' when the registration was for the primary purpose of disrupting the business of a competitor *Infospace.com Inc. v. Hari Prakash.* Also lack of legitimate interest in respect of the Domain Name also gives rise to an action based on bad faith. In *World Wrestling Federation Entertainment, Inc. v. Micliael Bosman*, the panel held that if a person seeks a Domain Name for valuable consideration in excess of any out of pocket costs directly related to the Domain Name then he has said to have used the Domain Name in Bad faith. In order to resist an action under bad faith 'a connection or nexus between the mark used in relation to the goods and the person claiming a right to use the same *Kirloskar Diesel Recon Put.Ltd. v. Kirloskar Proprietary Ltd.*[361] must be shown. Moreover, if a 'Cybersquatter' is able to show a reason for registering the Domain Name other than to sell it back to the trademark owner, then the courts will allow him to continue to use the mark. However in *Sporty's Farm. v. Sportsman's Market, Inc.,* the court held that even if a necessary ingredient for a successful Cybersquatting charge was not satisfied under the Act but under the unique facts of the case Omega Engineering was held to have acted in bad faith.

- **Dilution**

Dilution can be defined as the 'lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of competition between the owner of the famous mark and other parties, or the likelihood of confusion, mistake or deception'. Dilution is regarded as unfair competition. In order to prove a violation under federal Trademark Dilution Act, a Plaintiff must show that the 1) mark is famous; 2) the defendant is making a commercial use of a mark in commerce; 3) the defendant's use began after the mark became famous; and 4) the defendant's use of the mark dilutes the quality of the

[361] AIR.1996.Bom 149]

mark by diminishing the capacity of the mark to identify and distinguish goods and services. In the Panavision case *Panavision International L P. v. Toeppen*[362] a leading case on dilution theory, the court found a new form of dilution outside of the traditional famishment and blurring. The Delhi High Court in a landmark Judgement *William Grant & Sons. v. McDowell & Co. Ltd*.[363] recognized a hitherto unacknowledged form of 'loss to business' and 'loss of reputation', namely the 'dilution of the image' of a trademark.[364]

6. INDIAN SCENARIO AND CYBER SQUATTING

India has in a very limited way made some use of ICANN's UDRP Policy by implementing the .IN Domain Name Dispute Resolution Policy (INDRP) on the same lines, however restricted to the .IN registry disputes. The National Centre for Software Technology is the sponsoring organization in India for the .IN Registry, and the administrative contact for the same is the National Internet Exchange of India (NIXI). Under NIXI, the IN Registry functions as an autonomous body with primary responsibility for maintaining the .IN country code top level domain for India. As per paragraph 10 of the INDRP Policy proceedings before an arbitration panel, shall be limited to the cancellation or transfer of domain name registration to the Complainant.[365]

Under the INDRP rules an arbitration procedure has been provided for dispute resolution of ".in" ccTLD domain name disputes and the decision of the same is made binding under the Arbitration and Conciliation Act 1996 of India.[366] Interim Relief is also available under Arbitration and Conciliation Act, 1996,[367] at the request of either party to be ordered by the Arbitral Tribunal if considered necessary in respect of the subject matter of the dispute.

INDRP: Comparison with UDRP

[362] 141,F.
3d.l316(9lhCir.l998)
[363] (1994)5 I PA 29.
[364] Pravin Anand. *Trademark Law and Administration in India*, li.xccrpted from "international Intellectual Property Law- New Developments", 1st Edition. P.252.
[365] Retrieved from https://registry.in/system/files/inpolicy_0.pdf on 22nd May, 2015.
[366] Retrieved from https://registry.in/index.php?q=.IN%20Do main%20Name%2 0Dispute%20Resol ution%2 0Poli cy%20(INDRP) on 22nd May, 2015.
[367] *Arbitration and Conciliation Act,* 1996, Section 17 (1)

A domain name dispute concerning the country code TLD (ccTLD) name for India (.in) is governed by the .IN Dispute Resolution Policy (INDRP) and is overseen by the National Internet Exchange of India (NIXI).

While the INDRP and the UDRP follow similar procedures, the INDRP remains unique and is distinct from the UDRP. The most significant difference lies in the three criteria which a complainant must satisfy under the respective policies, namely:

(i) The domain name must be similar to the complainant's trademark;

(ii) The registrant must not have rights or legitimate interests in respect of the domain name; and

(iii) The domain name must be registered and/or used in bad faith.

The first difference is that under the INDRP, the absence of the conjunctive phrase "and" between the first and second element suggests that in order to succeed, a complainant may simply satisfy the first element. Alternatively, the complainant may satisfy the second and third element (which are conjoined with the phrase "and") and not the first. However under the UDRP, the complainant is expressly required to satisfy all three elements.[368]

However, such a literal interpretation of the elements prescribed under the INDRP can have disastrous ramifications. This can be seen with a disjunctive reading of the elements which implies that a complainant can obtain a remedy against a registrant who has legitimate rights in a domain name which is registered and used in good faith, solely by virtue of its similarity to the complainant's trademark.[369]

7. CYBERSQUATTING: JUDICIAL OVERVIEW IN INDIA

One of many examples is the case of *Manish Vij v. Indra Chugh*,[370] where the plaintiff was the proprietor of the trademark and domain name *"www.kabadibazaar.com",* dealing with second hand goods on the internet. Since *"kabadi"* means a person who buys second hand products and *"bazaar"* means a market where trading takes place the words suit the domain name indicating the nature of business on the website. The defendants on the other hand had been running the website *"www.kabaribazaar.com"* a month after the plaintiff and claimed wider

[368] Pravin Anand and Raunaq Kamath '*World Trademarks'*, Retrieved from http://www.World ipreview.com/article/domain-name-disputeresolution-an indian- perspective on 22nd May, 2015.
[369] *Ibid*
[370] AIR 2002 Del 243.

reputation amongst the public, than that of the plaintiff's site. The plaintiff referred to WIPO Uniform Dispute Resolution Policy, 1999, adopted by ICANN and argued that the registration of the domain name "*www.kabaribazaar.com* " by the defendants was in bad faith.

The Court after referring to Rules 4 (a) and 4(b), found that both parties had operated their websites within a month and while the plaintiff was unable to show the quantum of business carried out, it can't be said that the defendant had not incurred advertisement costs. It held that it was not possible to prove that the registration of the domain name was in bad faith. "*Kabadi-bazaar"* is a common term in the hindi language and so the plaintiffs domain name had not acquired secondary meaning. Thus the plaintiff's application was dismissed and the interim injunction order against the defendant was vacated.

In *Acqua Minerals Ltd. v. Pramod Borse*,[371] the Delhi High Court restrained the defendant from using the domain name 'bisleri.com' comprising the plaintiff's trademark *'Bisleri'* and held that both the domain names belong to one common source and connection, although the two belong to two different concerns.

In *Rediff Communications Ltd. v. Cybertooth*,[372] the defendants were restrained from using the domain name radiff.com as it is very similar to the plaintiff's domain name 'rediff.com. The court further reasoned that when both domain names are considered it is clearly seen that two names being almost similar in nature there is every possibility of internet user being confused and deceived in believing that both domain names belong to one common source and connection although two belong to different persons.

According to the court in the case of *Satyam Infoway Ltd v. Sifynet Solutions (P) Ltd*[373] case nailed the Indian domain name scenario way back in 2004 stating that-

"As far as India is concerned, there is no legislation which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extra-territorial and may not allow for adequate protection of domain names, this does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off."[374] In India, since, there exists no direct law to wrestle the threat of such disputes; hence courts have largely used the principle of passing-off.[375]

[371] (2001) PTC 619(Del).
[372] AIR 2000 Bom 27.
[373] AIR 2004 SC 3540
[374] Ibid.
[375] *Rediff Communication Limited v Cyberbooth* (1999 (4) BomCR 278).

8. CONCLUSION :

The development of Internet has changed the lifestyle of man. Using this advanced technology for innumerous causes has made it a striking feature in different aspects of human life. Today, the domain names are the most significant elements in the cyberspace. With the revolutionary transformation in the concept of property, there is an ongoing debate over the issue of virtual property status of domain names. However it seems to be a dangerous trend, since stretching the concept of property to such an extent so as to include domain names seems to be unrealistic and impracticable. The functional similarities between the domain names and the trademarks have brought them together in the virtual world. But this interrelation between the domain names and trademarks has also resulted in conflicts between them, especially with the growth of e-commerce. Resolution of such conflicts, to be certain, is a major challenge to law in the years to come. Even if the laws are enacted, the adjudicators would be confronted with the ever existing problem of striking a delicate balance between the trademark rights and freedom of speech over the Internet.

Although, the UDRP has shortcomings, some more acute than others, inconsistent and sometimes uninformed decisions, vague terminology, a significant market gap among providers suggesting inequalities of service, and insufficient data to review the justice of decisions or process, nevertheless, it has done a commendable job. After a thorough review of the existing case laws and well researched documents on the topic, it is proposed that the following suggestions may be considered:

- Demand advanced payments before registration of a domain name, thus greatly increasing the cost of mass domain name speculation,
- Provide more precise definitions and provide more examples for terms such as bad faith and legitimate interests,
- Recommend a choice of law provision to guide disputes among complainants and respondents of diverse jurisdictions,
- Provide guidelines for evidentiary documentation, especially for common law mark owners,
- Provide guidelines for the refusal of cases.

The first come first served basis for registration of Domain name was responsible for the spurt in the growth of cybersquatting or the process of registering a domain name which legally belongs to an others. The existing TLDs have been a big target of cyber squatting.

It is possible that with the introduction of the new TLDs, cyber squatting will Increase. The Existing 'UDNDRP' policy is a very limited policy and allows only for limited grounds to get back domain names. In the existing proposals for new top level domain (TLDs), there are no mechanisms to prevent cybersquatting. It is yet to be seen how ICANN proposes to prevent the recurrence of cybersquatting practices in the TLDs. Therefore, it is clear that the situation is at present not very clear and it is yet to be seen how ICANN proposes to meet the challenges of cybersquatting in the times to come.

FAIR TRIAL IN THE CRIMINAL JUSTICE SYSTEM

- YASHANA MALHOTRA & SHIVANSH PATHAK

INTRODUCTION

"The idea of fair trial has been embraced by every one of the nations in their regarded field of laws. The reason behind the foundation of fair trial is to shield the normal man from out of line methods for any foul play and infringement of major right. The principals of normal equity are a definitive premise of fair trial framework. To the extent nation like India is concerned the idea of fair trial is conceived under the protected law and other procedural law."

"Everybody has an inbuilt appropriate to be managed decently in a criminal preliminary. Refusal of a fair trial is as much bad form to the charged and is to the people in question and the general public. The fair trial of criminal offence comprises not just in specialized recognition of the edges and standards of law yet in addition in acknowledgment and only utilization of its standards in substance, to discover reality and avoid premature delivery of equity."

"Aims & Objectives"-:

"The aims and objectives of the project is to"-

1) "Know about the right to fair trial"
2) "Study the relevant provisions under CrPC"

Hypothesis-:

"According to the researcher the hypothesis of the project is that, "even after so many provisions and rights related to fair trial only few people are able to face a fair trial."

Research Methodology-:

"The method of writing adopted is Doctrinal one including both descriptive and Analytical."

Sources Of Data-:

"The researcher has mainly relied upon primary as well as secondary sources e.g. Books, Articles, Internet websites."

"RIGHT TO A FAIR TRIAL- A HUMAN RIGHT"

"The right to fair trial is an essential right in all countries respecting the rule of law. A trial in these countries that is deemed unfair will typically be restarted, or its verdict voided. Different rights related with a fair trial are expressly announced in Article 10 of the Universal Declaration of Human Rights, the Sixth Amendment to the United States Constitution, and Article 6 of the European Convention of Human Rights, and also various different constitutions and revelations all through the world. There is no coupling worldwide law that characterizes what is or is certifiably not a fair trial, for instance the privilege to a jury preliminary and other imperative strategies fluctuate from country to country."

"The privilege to fair trial is exceptionally useful in various statements which speak to standard global law, for example, the Universal Declaration of Human Rights (UDHR). Despite the fact that the UDHR cherishes some fair trial rights, for example, the assumption of honesty until the point that the denounced is demonstrated liable, in Articles 6, 7, 8 and 11, the key arrangement is Article 10 which expresses that: "Everybody is qualified in full equity for a reasonable and open hearing by an autonomous and fair council, in the assurance of his rights and commitments and of any criminal accusation against him."

"A few years after the UDHR was embraced it was chosen that the privilege to a fair trial ought to be characterized in more detail in the International Covenant on Civil and Political Rights (ICCPR). The privilege to a fair trial is ensured in Articles 14 and 16 of the ICCPR which is official in universal law on the 72 states that have approved it. Article 14(1) builds up the fundamental appropriate to a fair trial, article 14(2) accommodates the assumption of blamelessness, and article 14(3) sets out a rundown of least fair trial rights in criminal procedures. Article 14(5) builds up the privilege of an indicted individual to have a higher court survey the conviction or sentence, and article 14(7) disallows twofold danger."

Article 14(1) states that: "All people will be equivalent under the steady gaze of the courts and councils. In the assurance of any criminal accusation against him, or of his rights and commitments in a suit at law, everybody will be qualified for a reasonable and open hearing

by a capable, free and unbiased court set up by law. The press and general society might be rejected from all or part of a preliminary for reasons of ethics, open request or national security in a popularity based society, or when the enthusiasm of the private existences of the gatherings so requires, or to the degree entirely vital in the feeling of the court in extraordinary conditions where attention would bias the interests of equity; yet any judgment rendered in a criminal case or in a suit at law will be made open with the exception of where the enthusiasm of adolescent people generally requires or the procedures concern wedding question or the guardianship of kids."[376]

"The Geneva Conventions ensure warriors the privilege not to be put on preliminary for battling in a war - except if they perpetrate an atrocity (a grave rupture) or other wrongdoing (e.g., caught behind foe lines out of appropriate outfits or emblem while completing undercover work or harm activities). Most held under the Geneva Conventions are not blamed for a wrongdoing and consequently it would be an atrocity under the Geneva Conventions to give them a preliminary. This insurance against getting a preliminary is completely predictable with human rights law since human rights law forbids putting individuals on preliminary when there is no wrongdoing to attempt them for. The Geneva Conventions anyway ensure that anybody accused of an atrocity or other wrongdoing must get a fair trial."

The right to a fair trial is enshrined in articles 3, 7 and 26 of the African Charter on Human and Peoples' Rights (ACHPR).[377]

The right to a fair trial is also enshrined in articles 5, 6 and 7 of the European Charter on Human Rights and articles 2 to 4 of the 7th Protocol to the Charter.[378]

The right to a fair trial is furthermore enshrined in articles 3, 8, 9 and 10 of the American Convention on Human Rights.[379]

The privilege to fairness under the steady gaze of the law is some of the time viewed as a feature of the rights to a fair trial. It is normally ensured under a different article in universal human rights instruments. The privilege qualifies people for be perceived as subject, not as question, of the law. Universal human rights law allows no discrediting or special cases to this

[376] "International Covenant on Civil and Political Rights". Office of the United Nations High Commissioner for Human Rights.

[377] Doebbler, Curtis (2006). Introduction to International Human Rights Law. CD Publishing. p. 108.

[378] Doebbler, Curtis (2006). Introduction to International Human Rights Law. CD Publishing. p. 108.

[379] Doebbler, Curtis (2006). Introduction to International Human Rights Law. CD Publishing. p. 108.

human right. Firmly identified with the privilege to a fair trial is the forbiddance on ex post facto law, or retroactive law, which is cherished in human rights instrument independently from the privilege to fair trial and can not be restricted by states as indicated by the European Convention on Human Rights and the American Convention on Human Rights[380].

"CONSTITUTIONAL PROVISIONS":

"Fair trial is based on principle of natural justice. Constitution of India also provide for fair trial of the accused. It has been all around acknowledged in the present day of progress that as a human esteem no individual blamed for any offence ought to be rebuffed except if he has been given a fair trial and his blame has been demonstrated in such preliminary. The idea of fair trial can't e clarified in total terms. Reasonableness is relative idea and consequently decency in criminal preliminary could be estimated just in connection to the accessible time and assets and the overall human qualities in the general public. Article 21 gives the assurance of life and individual freedom. As indicated by this article no individual will be denied of his freedom aside from as indicated by methodology built up by law. As a wide rule, it might be expressed that the freedom of a man ought not be taken away without noble motivation. The detainment of charged individual preceding or pending preliminary is probably going to cause immediate or circuitous checks in readiness of his guard and would not in this way be very conductive to a fair trial.[381] If the presence of accused cannot be procured otherwise then he should by all means be arrested and detained."

"Article 20 of the constitution gives insurance in regard of conviction for offences. As indicated by this article no individual will be sentenced for any offence aside from infringement of a law in compel at the season of the commission of the offence, nor be subjected to punishment more noteworthy than that which may have been incurred under the law in drive at the season of the commission of the offence. It likewise gives insurance from twofold danger. It additionally gives that no charged individual will be observer against himself. This is additionally protected under area 25 and 26 of Indian proof Act by not tolerating admission made before cop and police care."

[380] Doebbler, Curtis (2006). Introduction to International Human Rights Law. CD Publishing. p. 108.
[381] See,. R.V.Kelkar : outlines of criminal procedure, (1977) at p.33.

"**Art 22(1)**, says, "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.". It embodies two distinct rights - the privilege to be recounted the grounds of arrest and the privilege to counsel a lawful practitioner of his decision. The second right of counselling a lawful professional of his decision really relies upon the primary right of being told about the grounds of arrest. On the off chance that the individual doesn't know why he is being arrested, he can't counsel a lawful practitioner seriously."

In **Harikishan vs State of Maharashtra**[382] , SC held that the grounds of arrest must be communicated to the person in the language that he understands otherwise it would not amount to sufficient compliance of the constitutional requirement.

"**Art 22(2)** that gives a fundamental right to the arrested individual that he should be created before an officer inside 24 long stretches of arrest. It says, "Each individual who is arrestd and kept in guardianship will be created before the closest justice inside a time of twenty-four long periods of such arrest barring the time fundamental for the voyage from the place of arrest to the court of the officer and no such individual will be confined in care past the said period without the expert of a judge."

"In **Khatri (II) vs State of Bihar**[383] has emphatically asked upon the State and its police to guarantee that this established and legitimate necessity of bringing a arrested individual before a legal justice inside 24 hours be circumspectly met. This is a sound arrangement that enables judges to keep a mind the police investigation. It is essential that the judges should attempt to implement this prerequisite and when they discover it resisted, they should come intensely upon the police.Further, in **Sharifbai vs Abdul Razak**[384], SC held that if a police officer fails to produce an arrested person before a magistrate within 24 hours, he shall be held guilty of wrongful detention."

"Article 22(4) provides that no law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless"-

[382] AIR 1962
[383] 1981 SCC, SC
[384] AIR 1961

(a) "An advisory body consisting of persons who are, or have been, or are qualified to be appointed as, judges of high court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by the parliament under sub-clause (b) of clause 7; or"

(b) "Such person is detained in accordance with the provisions of any law made by parliament under sub-clause (a) and (b) of clause 7."

"Section 22 (5) when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the ground on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

"Section 22 (6) provides that nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose."

Article 22(7) parliament may by law prescribe-

a) "The circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);"
b) "the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and"
c) " the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4) Right against Exploitation."

"In **D.K. Basu vs. State of West Bengal**[385] Supreme Court held the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:"

[385] D.K. Basu vs. State of West Bengal, AIR1997SC610

(1) “The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.”

(2) That the cop completing the arrest of the arrestee will set up a reminder of arrest at the season of arrest and such notice will be validated by at least one observer, who might be either an individual from the group of the arrestee or a respectable individual of the region from where the arrest is made. It will likewise be counter marked by the arrestee and will contain the time and date of arrest.

(3) “A man who has been arrested or confined and is being held in authority in a police headquarters or cross investigation focus or other bolt up, will be qualified for have one companion or relative or other individual known to him or having enthusiasm for his welfare being educated, when practicable, that he has been arrested and is being kept at the specific place, except if the validating observer of the notice of arrest is himself such a companion or a relative of the arrestee.”

(4) “The time, place of arrest and scene of guardianship of an arrestee must be advised by the police where the following companion or relative of the arrestee lives outside the region or town through the Legal Aid Organization in the District and the police headquarters of the zone concerned telegraphically inside a time of 8 to 12 hours after the arrest.”

(5) The individual arrested must be made mindful of this privilege to have somebody educated of his arrest or confinement when he is put collared or is kept.

(6) “A section must be made in the journal at the place of confinement with respect to the arrest of the individual which will likewise reveal the name of the following companion of the individual who has been educated of the arrest and the names and particulars of the police authorities in whose care the arrestee is.”

(7) “The arrestee should, where he so asks for, be additionally analysed at the season of his arrest and major and minor wounds, if any present on his/her body, must be recorded around then. The "Investigation Memo" must be marked both by the arrestee and the cop affecting the arrest and its duplicate gave to the arrestee.”

(8) “The arrestee ought to be subjected to restorative investigation by a prepared specialist at regular intervals amid his detainment in guardianship by a specialist on the board of affirmed

specialists selected by Director, Health Services of the concerned State or Union Territory. Chief, Health Services should get ready such a reformatory for all Tehsils and Districts too."

(9) "Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record."

(10) "The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation."

(11) "A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

"PROVISIONS UNDER CRIMINAL PROCEDURE CODE"

"The system adopted by the Criminal Procedure Code, 1973 (hereinafter referred as the Code) is the adversary system based on the accusatorial method. In adversarial system responsibility for the production of proof is put on the contradicting party that is indictments with the judge going about as an impartial arbitrator between the gatherings. By differentiate, in inquisitorial preliminary framework duty regarding the generation of proof at preliminary is the activity of the preliminary judge and it is the preliminary judge who chooses which witnesses will be called at preliminary and who does the greater part of the scrutinising of observers. The foe framework is pretty much in view of the thought of compromise of open and private interests, that is open enthusiasm for rebuffing the miscreant and counteracts him to carry out more wrongdoings and private enthusiasm for keeping the unjust feelings and secure his life and individual freedom. This arrangement of criminal preliminary accept that the state, on one hand, by utilizing its investigative organizations and government insight will indict the miscreant who, then again, will likewise take plan of action of best guidance to test and counter the confirmations of the prosecution".[386]

But if we take a close look of the Code then we will find that there are some provisions which negate the strict adherence of the adversarial trial system.

[386] K.N.C.Pillai (ed),R.V.Kelkar's Criminal Procedure , at 336(5th edn.)

"BASIC FAIR TRIAL CRITERIA"

"The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may comprise restricting commitments that are incorporated into human rights settlements to which the state is a gathering. Be that as it may, they may likewise be found in archives which, however not formally official, can be taken to express the course in which the law is advancing."

"Arrangements as respect arrest are contained in area 41 to 60A of crpc, 1973. In this part a significant number of the arrangement identifies with the fair trial. Area 4 gives that a police may arrest without warrant thus he has motivation to trust that offence has been submitted by the individual and arrest is vital as indicated in this segment. Section 41 –B provides that the police shall inform the family member of the arrested person. Section 41-D provides that the arrested person shall be entitle to meet an advocate of his choice during interrogation, though not through out interrogation. Section 49 gives that no individual will be subjected to more control than is important to keep his departure. Segment 50 of this code gives that the blamed must be educated for the full particulars of the offence for which he is arrested or every single other ground for such arrest. It additionally gives that if the offence is bailable one then the blamed must be educated for his entitlement to outfit bail and he may mastermind sureties for his benefit. Segment 50A makes a commitment of individual making the arrest to advise about the arrest and place where the denounced individual is confined to the designated individual. Segment 56 gives that the charged individual will be taken to the magistrate or officer incharge of a police headquarters without sensible postponement. Segment 57 gives that the sensible time ought to be inside 24 hours selective of the time fundamental for the voyage from the place of arrest to the judge's court."

"Arrangements as respect bail are contained in Sections 436-450 of Cr.P.C., 1973. The bail arrangements go for anchoring the arrival of a man who has been put in the slammer as an under preliminary or accused of some bailable and non-bailable offences. The reason for existing is that a man require not be kept in the police bolt ups without being accused of any offence under the Criminal law. There are no immovable principles with respect to allow or refusal of bail. Each case must be considered without anyone else merits. The issue dependably calls for sensible exercise of attentiveness by the courts. Where the offence is of a genuine sort the court needs to choose the topic of allow of bail in the light of such contemplations as the nature and earnestness of the offence, the character of proof, conditions that are impossible to

miss to the denounced, sensible probability of quality of the charged not being anchored at the preliminary, the sensible dread of an observer being messed with, the bigger enthusiasm of the general population or such comparable different contemplations. In the bailable cases, the allow of bail involves course. It might be given either by the cop responsible for the police headquarters having the charged in his authority or by the court. The discharge might be requested on the charged executing a bond and even without surety. In non-bailable cases, the denounced might be discharged on bail either by the court or a cop, however no bail can be allowed where the blamed shows up on sensible grounds to be blameworthy of an offence culpable either with death or with detainment forever. This rule does not apply to a person under 16 years of age, a woman, or a sick or infirm person. No doubt, liberty of a person must be zealously bailed by the court, nonetheless, when a person is accused of a serious offence like murder, and his successive bail applications are rejected on merit there being *prima-facie* material, the prosecution is entitled to place correct facts before the court; liberty of the accused on bail should not be construed as the sole concern of the court. The Supreme Court of India has, however, held that though a person accused of a bailable offence is entitled to be released on bail pending his trial, if his conduct subsequent to his release is found to be prejudicial to a fair trial, he forfeits his right to be released on bail and such forfeiture can be made effective by invoking the inherent powers of the High Court under Section 482 of the Cr.P.C."

"Section 438 of Cr.P.C.,1973 provides a unique provision for grant of "*anticipatory bail*." the necessity for granting anticipatory bail arises mainly because sometimes influential persons tried to implicate their rivals in false cases for the purpose of disgracing or for other purposes by getting detained in jails for some days. Apart . . . from false cases where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."[387]. Appeal, Reference, Review and Revision."

The criminal justice system provides measures for preferring appeal, reference, review or revision in order to avoid miscarriage of justice.[388] If the finding come to by the preliminary

[387] *See* 41st report of the Law Commission of India

[388] 374-412 of CrPc, 1973.

court depends on conceivable reasons or the preliminary court's discoveries can't be said to be outlandish, the re-appraising court ought to be moderate in exasperating the preliminary court's finding of certainty regardless of whether it was conceivable to achieve an alternate end on the record in light of the fact that the preliminary judge has the upside of seeing and hearing the observers and the underlying assumption of blamelessness for the denounced isn't debilitated by his absolution."The Constitution of India additionally gives that an interest will mislead the Supreme Court for any judgement or last request of the high court in a criminal continuing, if the High Court guarantees that the case includes a considerable inquiry of law with regards to the elucidation of the Constitution. However, where the High Court refuses to give such a certificate, the Supreme Court may, on being satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant special leave to appeal from such judgement, or final order or determination or sentence. It further states that an appeal shall lie to the Supreme Court from any judgement, final order or sentence in a criminal proceeding of a High Court, if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or (b) has withdrawn for trials before itself any case from any court subordinate to its authority and has on such trials convicted the accused person and sentenced him to death or (c) certifies that the case is a fit one for appeal to the Supreme Court."

"Pre-Trial"

"It is the statutory right of the police to carry out the investigation of a crime before a prosecution is launched, and it cannot be interfered with by the courts.[389] It might be seen that the elements of the legal and of the police are complimentary, not covering; the court's capacity starts when a charge is favoured before it and not until at that point. The denounced individual might be kept in the guardianship of the police for a time of 15 days, therefore empowering the police to finish the investigation of the wrongdoing. Be that as it may, an aggregate time of the authority might be up to 60 days when the investigation identifies with a genuine offence or 90 days when the investigation identifies with an offence culpable with death or detainment forever or detainment for a term of at the very least 10 years and such period will be translated legal guardianship and not police care. In the event that the police can't finish the investigation inside 90 days then the denounced individual will be discharged on bail."

[389] 154-176 of CrPc, 1973

The investigation procedure starts on a data given to a cop and such data is known as the First Information Report. The First Information Report is an imperative archive in a criminal preliminary and might be placed in proof to help or repudiate the proof of the individual who gave the data. The target of the First Information Report is to set the criminal law in movement and from the perspective of the researching office to get data about the supposed criminal exercises in order to have the capacity to find a way to follow and to convey to book the guilty.
"The criminal trial process makes it clear that trial should be fair and as such it has been emphasised that confession made to police shall be non-admissible; confession extracted by torture or third degree method can be pleaded at trial. Confession as to the commission of an offence must be voluntary and recorded before a Magistrate or a respectable person. The Cr.P.C, and Indian Evidence Act a *proprio vigro* state that a confession made by an accused person to a police officer is inadmissible in evidence; if a person in police custody desires to make a confession he must do so in the presence of a Magistrate. A Magistrate shall record the confession if he is satisfied that it is voluntary."
"An accused kept either in the custody of police or judicial custody has to be provided with humane and hygienic living conditions during lock-ups. This is so because the accused is presumed to be innocent unless proved guilty. Jail Manuals prescribe that there ought not be overcrowded ness in the cells; the undertrials should be provided with recreational facilities."

"Trial Stage"

"A criminal trial begins with the filing of a case. The Cr.P.C, states that "no court shall take cognisance of an offence after the expiry of the period of limitation and the period of limitation shall be:"

(a) six months, if the offence is punishable with fine only;
(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years;
(d) "the period of limitation in relation to offences which are punishable with more severe punishment shall be determined by the court if the offence is punishable with imprisonment exceeding three years or severe punishments."

"The object is to prevent the parties from filing cases after a long time as a result of which material evidence may vanish and also to prevent the filing of vexations and belated prosecutions."

Every trial begins with the charges and every charge shall state the offence with which the accused is charged.[390] The charge will give the blamed full notice for the offence charged against him. The motivation behind the charge is to tell the blamed individual as correctly and succinctly as conceivable of the issue with which he is charged and should pass on to him with adequate lucidity and sureness what the indictment plans to demonstrate against him and of which he needs to clear himself.

A criminal trial may take place either before a Magistrate or Court of Sessions as the nature of the case may be.[391]

A. Mode of Taking and Recording Evidence

"It is obligatory that evidence for prosecution and defence should be taken in the presence of the accused.[392] A trial is vitiated by failure to examine the witnesses in the presence of the accused; mere cross investigation in the presence of the accused is not sufficient."

"**Speedy Trials"**

It is basic that each criminal preliminary ought to be finished quickly, speedily and proficiently. The Supreme Court of India in August 1996 has communicated that the preliminary court ought not squander its opportunity when it is genuinely fulfilled that there is no prospect of the case finishing off with conviction. In the event that the preliminary court judge is relatively sure that the preliminary would just be a pointless activity or a sheer exercise in futility, it is fitting to truncate or cut the procedures at the phase of confining the charge under applicable arrangements of the Cr.P.C., and release the blamed.

"In spite of the fact that it is basic to finish the preliminary quickly, speedily and effectively yet there are disturbances with the criminal preliminary process amid pre-preliminary and in addition preliminary stages. For example, the police which are to finished the investigation of wrongdoing inside the endorsed time limits devour substantially more time than recommended by law. This outcomes in the grieving of the undertrials in prisons for a more drawn out period

[390] 211-224 of CrPc, 1973.
[391] 225-265 of CrPc, 1973.
[392] 272-299 of CrPc, 1973.

than the time of the conviction. The adversary procedure is also responsible for the delayed trials and there are studies which tell that delay is a riddle wrapped in mystery inside an enigma. Indecisiveness is the cause of both delay and unpleasantness. It could be avoided if detention on false grounds is eased; adjournments just on demands are discouraged; strike and cessation by an advocate is given a full stop."

"CONCLUSION"

"One Principal object of criminal law is to protect society by punishing the offenders. However, justice and fair play require that no one be punished without a fair trial. A person might be under a thick cloud of suspicion of guilt, he might have been even caught red-handed, and yet he is not to be punished unless and until he is tried and adjudged to be guilty by a competent court. In the organisation of equity it is of prime significance that equity ought not exclusively be done yet should likewise seem to have been finished. Further, it is one of the cardinal standards of criminal law that everybody is attempted to be blamelessness except if his blame is demonstrated past sensible uncertainty in a preliminary before an unprejudiced and skilled court."

Therefor it turns out to be totally fundamental that each individual blamed for wrongdoing is brought under the steady gaze of the court for preliminary and that all the proof showing up against him is made accessible to the court for choosing as to his blame or honesty.

After such a significant number of arrangements and laws individuals are still not having a fair trial. Keeping in mind the end goal to have sufficient bits of knowledge into fair trial practically as opposed to basically it is basic to have a top to bottom investigation of preliminary courts. Such an investigation would scatter the grievance against the legal arrangement of the nation. Accordingly grievances depend on realities that, "higher courts are correct on the grounds that they are unrivalled, not prevalent in light of the fact that they are correct." The preliminary judge, truth be told, handles the main part of legal business. It might in any case, be not imagined that the judges don't need the general population to comprehend the legal capacity; tragically, there are moderately few individuals to comprehend, decipher and clarify the court's job in more extensive terms. "It could be said individuals know less about the case than they do about the Parliament or the political parties. Trial judges handle the bulk of judicial business because they preside over trials among other things including management of case processing, approval of plea bargaining, supervision of the settlement process, monitoring remedial

decrees--they as such experience the drama of the adversary process. This inevitably influences judicial decision-making and behaviour. A trial judge is not a mechanical scale or computer but is a human being. So the trial judges vary in their respective qualities of intelligence, perspective, attentiveness and other mental and emotional characteristics of operation while they are listening to and observing witnesses. Fatigue of the trial judge, that is, after how many cases the trial judge cannot function at ease and the cases heard and tried in fatigue may hamper or affect the fair trial, may be one assumption amongst others to make an in-depth study of trial courts in order to have an assessment of fair trial in criminal proceedings that is functional."

A NEW PHASE OF JUDICIAL ACTIVISM IN INDIA

- SNEHA SOLANKI

ABSTRACT

Justice is the phenomenon which is the basic requirement for a civilized society. To achieve stability and order in the society, a nation state adopts a supreme law in the form of constitution which provides sovereignty and define the area of power of three basic institutions of state i.e., executive, legislative and judiciary. In this article, it is tried to analyse the basic observations on judicial activism. The article analyses the reasons for judicial activism and what are the limitations on the role of judicial activism.

INTRODUCTION

The Indian judiciary is always have been a protector of fundamental rights. People still have faith in Indian Judiciary notwithstanding such kind of unacceptable criticism about judicial system. The Constitution of India clearly mention the sacrosanct status of fundamental rights and to secure these Rights Judiciary has inherent powers. The Judiciary has powers of judicial review to invoking writs under Article 13, 32 and 226 of the Constitution of India. Since 1950 we have seen various phases of working of Judiciary. But after 90s the Indian Judiciary special emphasis on the Supreme court has taken very active role and expand its activism in various fields which may be specially reserved for the executive and legislature. Starting from mid 80s the M.C. Mehta versus Union of India to Sabrimala case and so on, Supreme court has done justice with the fundamental rights. The normative approach regarding role of judiciary is something very debatable. What role of judiciary should be and to what extent judiciary can expands its areas of actions. These specific questions are patently related to the classical doctrine of separation of powers. The doctrine is very much influenced by the dynamisms of the governance. The continuous expansion of judicial action in areas of executive and legislature as well, is fading the thin line of the separation of powers. In Indian legal system although there is no absolute application of separation of powers in terms of watertight compartment. But still the doctrine is the part of the basic structure of constitution. The Supreme of India has enriched the jurisprudence of Right to Health in terms of Article 21 of the constitution by the time. But at the one point of the time judiciary exceeds its line of

separation. This phenomenon clearly visible in corona phase , various High Courts and The Supreme of India actively playing the role as a protector of right to life of people but in this judicial activism giving the threat of judicial execessism.

JUDICIAL ACTIVISM

The word as 'judicial activism' is propounded by the American Historian Arthur M. Schlesinger, jr, in 1947 in an article *Fortune*. But it emerged as a contentious concept after 80s in legal and political arenas. Judicial Activisms is the legal phenomenon in a right based society where role played by the judiciary very actively in various fields of rights extensively with less technicality of the procedural aspects. It becomes a major attitude of the judiciary since 90s decade. Judicial Activism is kind of working method of higher judiciary in which courts are more sensitive to the constitutional principles and values and susceptible to the working of the government i.e. Executive.

The Signature Factors of Judicial Activism

The judicial Activism starts with the constitutionality and legality of the judicial action provides under the provisions of the Constitution. The constitution as a higher law or Grundnorm provides the powers and functions of various institutions of State. The constitution can be observed in two forms these are Normative Form and Material Form. In Normative form the constitution studies as a formal , unique legal act with the highest legal force and provides authenticity and legality to the state action within its constitutional periphery. On the other hand, the Material form defines constitution as a working system of a set of rules of a certain state. In simple words, how a set of rules are implementing in practical form and how a constitution determines trilogy of socio-legal- political relationship. The higher judiciary in India has some sui generis powers regarding the protection of fundamental rights and having the position of a guardian of the Constitution, which are specifically mentioned under Articles 13, 32, 136, 147, 226, etc. but these are basically falls under the category of normative form where only theoretical aspects has been defined and lack of practical scope.

The main theme of judicial activism is falls under the category of material form. Because once the constitution outlines the limitations of powers and functions of the judiciary but the real story starts with the working of the institution that is Judiciary. The nature of working of courts although within the circumference of the constitution but it works according to the dynamism of the society and law. In practice, the basic of principles and outlines of constitution is just an

inspiration but how these principles and outlines should expand and defined is very much according to the concurrent needs of the society. The dynamic and transformative politico-socio situation demands the needs of expansion of judicial action. This phenomenon clearly visible in the since 80s when the many transformation in governance on national and global level has been occurred. Here the judicial activism grasped the pace in legal system and judiciary has expanded its area of action through wide interpretation of its sui generis powers. The second factor of the judicial activism is the expansion of the civil societies and social movements. They are enhancing awareness of rights among the various class and communities. The scope of fundamental rights is getting and affected by the various substantial changes and emerging issues on national and international level. For instance, in India the environmental jurisprudence has developed after mid 80s decade by the impact of industrialisation, globalisation etc. similarly in criminal jurisprudence regarding the arrest of innocent persons and safeguards in custodial violence and so on. In the landmarks cases of The Supreme of India like M.C. Mehta versus Union of India (Oleum Gas Leak Case)[393], Bandhua Mukti Morcha Case[394], PUDR versus Union of India[395] etc. are only some examples there many more other judgments of courts , through which the court has move ahead towards the activism and actively participating in social and civil rights jurisprudence through its observations and decisions.

The vacuum of executive and legislative functions became one of the major reason for enrichment of the authority of the judiciary. In the era of New economic policy and emergence of concept of laissez fare in India, the nature of governance is transforming in to a facilitative government and public private partnership. In his governmental system, the government is hand overring the functions of social welfare. Like in *Asiad* case[396] the supreme court has held that Article 23(1) is intended to abolish every form of forced labour even if it has origin in a contract. In this case, the violation of minimum wages act had done with the workers who were engaged in the construction work regarding Asian Games. The non payment of minimum wages by Government contractors is within the ambit of violation of the Article 23. There is no necessary steps taken by the executive , so that judiciary interpreted the Article 23 more

[393] AIR 1997 SC at 761
[394] AIR 1984 SC 802
[395] AIR 1982 SC: 1473
[396] ibid

widely. In 2015, in the case of *BCCI vs Cricket Association of Bihar*[397] which is also known as match fixing case. The Bombay High Court had also constitute a committee consisting of retired judge of Supreme Court in panel. It was the clear action of judiciary in vacuum of executive action.

There is also one latent factor which is very indirect but somewhere it works. That the many times there are some issues which may be have political weightage, therefore, government or executive as an political party restrains itself and recluse from the political matter. Thus, indirectly it puts the responsibility on the judiciary to resolve the issue. As in Indian Young Lawyers Association vs. The State of Kerala (Sabrimala case)[398] , government although could take some decision but it did not so , similarly in recent burning issue on Farm Laws, where government were trying to take the matter before the judiciary due to political indeterminacy.

The judicial activism has one manual aspect that the attitude or behaviour of judges . Although judiciary is an institution in abstract but the people who operates it , obviously are humans , thus, there is most probability of impact of the psycho-socio behaviour of judges on judiciary. Recently, the judges are coming in limelight and publicizing their views or opinions on various contemporary issues. Now judges are not show watcher or keeps silent on burning issues. That kind of attitude need to be critically analysed in view of separation of powers and protection of judiciary from violent remarks. The historic press conference of 4 supreme court judges in 2018 was very rare the conditions od country but it is important to keep in mind that kind of action by judges of Supreme Court. In media, seminars, conferences etc. judges usually comments on the current situations but sometimes it is very political statement. It is right that judges should active on judges should refrain from giving any political comments.

CRITICAL ANALYSES OF JUDICIAL ACTIVISM

The judicial activism has no specific line of control which limits the judicial overreach to the various fields which are not come within the ambit of the authority of judiciary. The doctrine of separation of powers is the basic principles of the governance system and having constitutional backing under Article 50 in the constitution of India. hence, all three major institutions of state should function within their given circumference without and intervention to the other institutions. But here can say that the cooperation and control on abuse on powers

[397] (2015) 3 SCC 251
[398] (2019)11 SCC 1

may be there in the form of checks and balances. For instance, Article 13 gives the power to courts in case of enactment of law against the fundamental rights and under Article 32 and 226 both The Supreme of India and High Courts of States have powers to issue writs in violation of fundamental rights and abuse of law. But the main question arises where the line of control of in is using of these kinds of powers by the higher judiciary. Thus, many times the courts show highly sensitivity towards the issues and makes intervention in functions of legislative and executive. In recent situation of pandemic, the Supreme of India and High Courts of various states are actively hearing on the issues of the distribution of oxygen and directing the government to file action plans on fighting against pandemic.

Another observations on the judicial activism is that the judiciary is itself overburdening by taking matters indiscriminately. The judicial activism in the form of Public Interest Litigation are widely entertaining by the court through loose proceedings unlike procedural technicalities in legal procedure.

The judiciary has only power to judicial review to declare any law arbitrary to the fundamental rights, unconstitutional , but can not fill the vacuum of the legislature and executive. Hence, to make effective the decision of the court the legislature and executive have to play their roles given under the constitution. Like, Article 377 has been declared unconstitutional in partial sense, but it has many aspects to enjoy the rights of concerning subjects. It has no use unless until a specific law be made. Similarly, the supreme court declared triple talaq invalid in Shayara Bano case[399]. But it only effective when the Parliament had enacted the formal law.

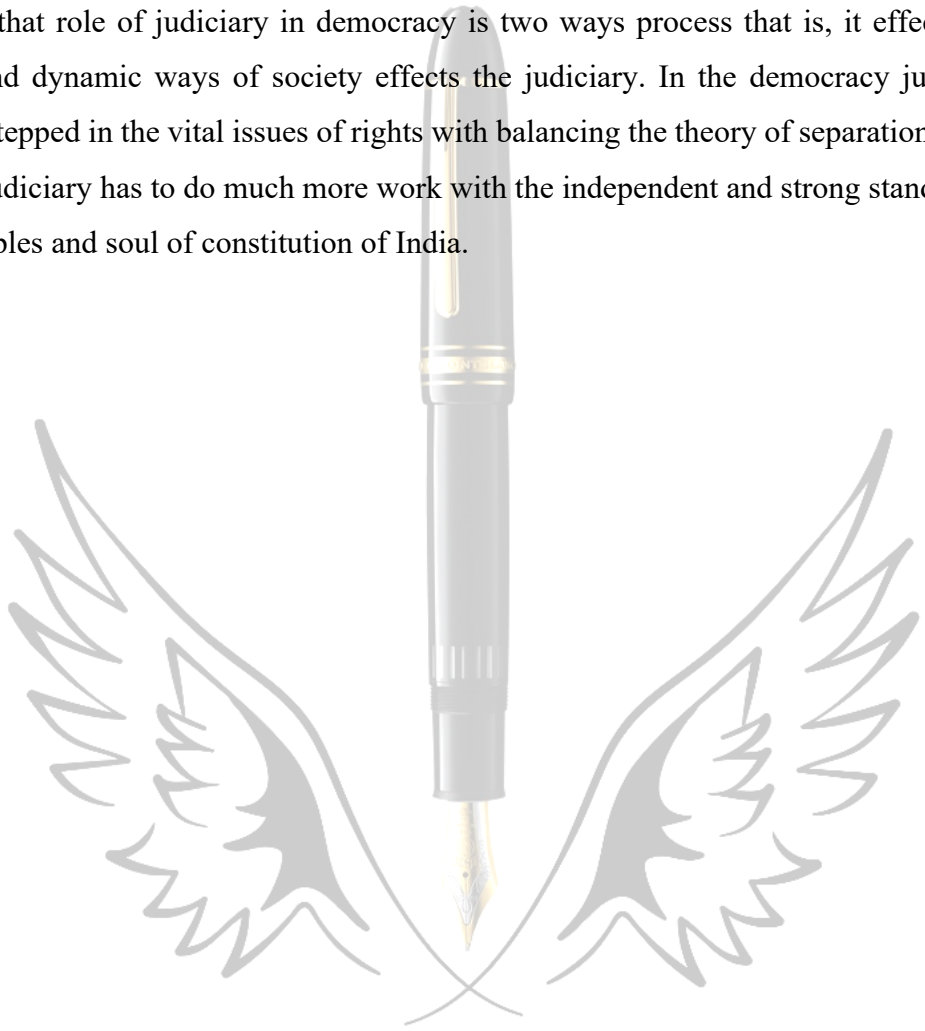
In recent times , judiciary just started the trend of inconsistency between own decisions through the over action on the matter of PIL . like recently, supreme court praised the place of worship act, 1991, in 2019, in the Ayodhya verdict but recently this act has been challenged by a PIL , in this case if supreme court approved to hear this PIL then it may open a pandora box of controversies regarding worship land retrospectively since 12 the century. Hence, the judiciary must be cautious towards this kind of dangerous PIL trends in the Indian legal system.

CONCLUSION

The analysis of research never ends with conclusion. The relationship between Judiciary, government and people may be called as trio functionary is a living process which can never

[399] (2017) 9 SCC 1

be concluded. As discussed in this paper, judiciary has gone through different phases which may be possible due to impacts of changes in the society. But here main point has been observed that role of judiciary in democracy is two ways process that is, it effects ways of society and dynamic ways of society effects the judiciary. In the democracy judicial must strongly stepped in the vital issues of rights with balancing the theory of separation of powers. In India judiciary has to do much more work with the independent and strong stand to enforce the principles and soul of constitution of India.



SCOPE AND RELEVANCE OF STATEMENTS RECORDED UNDER SECTION 161 & 164 OF CR.P.C.

- **PRATHANA PATEL**

❖ **Abstract:**

In Law, fundamentally there are two sorts of justice system the first is 'Civil Justice System' and the other one is 'Criminal Justice System'. The foundation of criminal justice system in India relay on *Criminal Procedure Code*. Be an individual or the lawful element or the legal authority everyone is bound to follow the procedures mentioned under this procedural code. Under criminal justice system, the statement recorded has significant role and the equivalent is done under section 161 and 164 of the Criminal Procedure Code. The extent of these two sections of Criminal Procedure Code is wide and fundamental. In this way, it gets applicable for the specialists like officials and the Courts to comprehend it altogether. The paper covers the scope and relevance of *section 161* and *section 164* of Code Of Criminal Procedure. It moreover, features the connection of these two sections with the *section 145* of the *Indian Evidence Act*. The lawyers has certain powers pertaining to trial of person whose statement is recorded but this comes with reasonable restriction as the adversary lawyer cannot misuse this powers. Our courts has kept its eyes on this issues and also taken actions for the same and passed various judgments which sets a good precedent.

The statement recording become fragile or sensitive when the cases are pertaining to children and the women victims (who are sexually assaulted) and it requires most extreme care and consideration to be taken while recording their statement. It is advised that while dealing with such victims special approaches must be undertaken.

To conclude, the paper covers all the relevant matters, the procedures, various effect and the safeguards available under the code.

Scope And Relevance Of Statements Recorded Under Section 161 & 164 of Cr.P.C.

Introduction:

Trial in criminal justice system plays the role of 'Genus'. Prosecution has to prove all the elements of offence in order to prove guilt of accused. No doubt should be left unclear. It is the investigation which helps in producing evidence for trial. However, the courts can convict accused only on the basis of legal evidence there. There is no space for moral conviction. Evidence is nothing but an established way to prove the guilt of the accused and it admissible as per provisions of the Indian Evidence Act, 1872, Criminal Procedure Cord, 1973 and other enactments.

Section 161 of Cr.P.C provides provision to produce the evidence before the court at the time of trial also the same is popularly known as interrogation. These statements helps the court in framing charges against the accused. It is the provision that before trial commences copies of the statements recorded by the police should be furnished to accused free of cost. Confession is voluntary admission of guilt by the accused person. Section 25 of Indian Evidence Act states that statements recorded by police officer is inadmissible in court of law. This is the reason behind the creation of section 164 of Cr.P.C which authorize Magistrate to record confession statement of the accused. This has to be done as per the procedure established which ensures voluntariness. Unless the court is satisfied that the court confession is voluntary in nature, it cannot be acted upon and no further enquiry as to whether it is true or trustworthy need to be made. The current writing highlights and discusses on how far these Section 161 and 164 of Cr.P.C statements are admissible and relied upon.

Section 161 Of Cr.P.C. (Examination of Witness By Police):

1. Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case[400].
2. Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture[401].

[400] https://indiankanoon.org/doc/447673/
[401] https://indiankanoon.org/doc/447673/

3. The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records[402].

If a women is alleged to commit a crime or attempted a crime under section S. 354, S. 354A, S.354B, S. 354C, S. 354D, S. 376, S. 376A, S. 376B, S. 376C, S. 376D, S. 376E or under section 509 of Indian Penal Code than the statement of the women shall be recorded by a women police officer or any women officer as prescribed by the law.

Section 162 Of Cr.P.C. (Statements To Police Not Be Signed):

1. No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination[403].
2. Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act. Explanation.- An omission to state a fact or circumstance in the statement referred to in sub- section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact[404].

[402] https://indiankanoon.org/doc/447673/
[403] https://indiankanoon.org/doc/523607/
[404] https://indiankanoon.org/doc/523607/

Scope And Relevance Of Statement Under Section 161 Of Cr.P.C:

Statement recorded by police officer under section 161 Cr.P.C. is not admissible as evidence in the court. Section 161 collects the evidence regarding commission of an offence. It the object and purpose of the said section to examine and record the statement of witness material in respect of commission of the offence. Section 162 prohibits the signing of statement under section 161. It is right or privilege of a police officer to record the statement of witness examined. Statement recorded by police officer during the course of investigation cannot be used as substance evidence. Except for section 27 or Section 32(1) of Indian evidence Act statement t to police officer cannot be used for any purpose, this principle was laid down in a decision reported in AIR 1980 SC 873.

Circumstances If Witness Signs Statement Under 161:

It is not necessary to take the signature of witness if the statement is made under section 161 of Cr.P.C. and the practice of getting signatures for the same is expressly prohibited under section 162 of Cr.P.C. Violation of this provision may sometimes diminish the value of the testimony of the witnesses when they come to court. However, in any of the case if the person has signed the statement during investigation than it shall not be ignored. In such situation if witness has signed a statement than the evidence should be submitted in the court.

In the cases of *State Of Uttar Pradesh Vs. M.K. Anthony* (1985 SCC (Crl) 105) and *State Of Rajasthan Vs. Teja Ram And Others* (AIR 199 SC 1776) it the honorable Supreme Court stated that if it is found that the statement of witness recorded in the course of investigation was signed by the witness at the instance of the investigating officer than the section 162 of Cr.P.C does not provide that the evidence of a witness given becomes inadmissible in the court. The court observed that it merely puts court on caution and may necessitate on depth scrutiny of the evidence.

Statement Recording Delay and It's Effect:

If there is a delay in recording the statement of witnesses then it does not discredit their given testimony. It is the case only when the court is satisfied with the reason explained of delay and the witnesses are cogent and credible.

In the case of *Harbeer Singh Vs. Sheeshpal* the honorable Supreme Court dealt with the effect of delay in recording statement of witness under 161 of Criminal Procedure Code. The court observed that, it creates the doubt against the prosecution if at the time of investigation the prosecution witness were available or could be made available to record the statement while the investigation officer visited the scene of occurrence or soon but the same was delayed. It is also fact that delay in recording the statement is not fatal in every case but for that the court should be satisfied with the reason explained by the investigating officer, for the delay.

In another case of *Ganesh Bhagvan Vs. State of Maharashtra* 2005 DMC 445 the Honorable court observed that though it is a well settled law that delay in recording the statement of the witnesses does not necessarily discredit their testimony, but if those witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter, and even then, the delay has occurred, it would cast a doubt upon the prosecution's case[405].

Statements Under Section 164 of Cr.P.C:

A confession is a formal statement made by a person or a group of persons- acknowledging some personal fact that the person (or the group) would ostensibly prefer to keep hidden. It is made while admitting the crime. The Evidence Act does not define Confession. All confession includes admission but, not all admission includes confession. A confession may be admit in terms of an offence or the facts of offence substantially. If a statement does not provide plenary acknowledgement of guilt than it shall not be considered as confession even if the statement is used as the one of the evidence to prove the guilt of the accused and includes some incriminating facts. Any such statement is just admission and not confession. When a person makes any statement against himself than it should be clear and free of suspicion. Otherwise it violates the guarantee under Article 20(3) of Indian Constitution which states that, person accused of an offence shall be compelled to be a witness against himself[406]. Therefore according to it there should be a direct acknowledgement of guilt to be regarded as confession.

When Statement Made Under 164 Is Not A Substantive Evidence:

[405] https://indiankanoon.org/doc/1772812/
[406] https://indiankanoon.org/doc/366712/

This can be understand by the case of *Pakala Narayan Swami Vs. Emperor* (AIR 1939 P.C 47). It was a question before the court if a statement proves the guilt of accused can be considered as confession or not. The court stated that "A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not in itself a confession, for example, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused death with no explanation of any other man's possession".[407]

Objective Of Recording Statement Under 164 of Cr.P.C:

The question can be raised in the court that why there is a need to record the statement under section 164 regardless of statement recorded under section 162 of the Code Of Criminal Procedure. There are two objectives behind recording the statement under 164 and they are as follows:

1. To prohibit the witness(es) from changing their versions
2. to get over the immunity from the prosecution in regard to information given by the witnesses under section 162 of the code.

Under section 162 of the code if the statement is recorded by the police officer during the course of investigation than the same cannot administer the oath of the person making statement and cannot obtained his signature. However, under section 164 of Cr.P.C when the magistrate records the statement of a person than he can not only administer the oath but can obtain his signature over the statement. Once the person makes the statement and sings the same than the chances of him being denying the said statement will be reduced and the chances of turning hostile will be controlled.

Safeguards:

There are some procedural safeguard available to the person giving the statement and to control the powers of magistrate as any statement shall not only be signed by the magistrate but also by the accused himself. Also, the magistrate shall under take the confession as per the procedure explained in section 281 of the code.

[407] districts.ecourts.gov.in

According to sub section (4), Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect.[408] However, if he has no jurisdiction to inquire or to try then whatever he has recorded should be pass on to the magistrate under whom the case is to be tried or inquired. There is also a provision which states that if a confession recorded by the magistrate is not according to manner prescribed under section 164 of the code than the same is not admissible in the court of law as an evidence. Therefore, the rules and guidelines framed by the honorable High Court regarding the provisions of the section 164 of the Code of Criminal Procedure, providing the procedural safeguards, must be complied with not only in form but also in essence.

Evidentiary Value Of Statement Recorder Under 164:

When the maker does not depose the facts on oath during trial then the evidentiary value of statement recorded under section 164 Cr.P.C is that the statement cannot be treated as substantive evidence. It is evident for the court to be satisfied that the confession recorded under 164 by a judicial magistrate is as per the requirements laid down in sub section (2) to (4) before acting on it. This objective of this provision is to ensure that the confession was made voluntarily by the accused.

For instance, In the case of *Parmananda Vs. State Of Assam* (2004(2) ALD Crl 657). It was stated that the conviction should not only be done on the basis of confession until and unless it is found to be truthful and voluntary, after being satisfied for the same, it becomes admissible in court. On the other hand if the confession is unable to be retracted at the trial stage and the accused as accepted the statement under section 313 of Cr.P.C. than the court can fully rely upon. So if the court convicts the person on the basis of this and other circumstantial evidence than it is sustainable. However there is an condition attached to it and that is, an accused in his statement under section 313 Cr.P.C. or during cross examination never suggested that his statement under 164 code was false.

Role Of Section 145 of Indian Evidence Act In Examining Witness:

[408]https://indiankanoon.org/doc/91322/#:~:text=(4)%20Any%20such%20confession%20shall,explained%20to%20(name)%20that%20he

This section plays an important role while examining the witness as it provides the chance to the witness to explain the discrepancies. From the two statement when the previous one is been presented in front of the accused and if denies the fact of giving such statement than it does not amount to be a admission and if accept that he has given the said statement than his attention should be drawn towards the recorded statement.

Section 145 of Indian Evidence Act states, "Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."[409] But the section 145 is silent regarding clarifying that which of the statements recorded under section 162 or under 164 of the code should be considered as the previous statement in writing. Thus, both the statements recorded under section 162 and 164 of the Code are the previous statements to invoke section 145 of the Act.

Two Folds Of Section 145 Of The Evidence Act:

There are two folds of section 154 of Indian Evidence Act:

a. In first part the opponent has power to cross-examine a witness regarding the previous statement given by the accused in writing and that to without showing him the written statement.
b. In the second the opponent is been restricted as in if the opponent intended to contradict him by the writing than his attention must before writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

The objective of this is to provide a free and fair treatment to the witness and giving him reasonable opportunity to explain the contradictions. If the witness denies that certain statements is not been given by him while the prosecution is examining him than on the basis of that denial the prosecution should confront him with the statements and get them marked as exhibits. This will give an opportunity to the witness either to explain the contradiction or to deny them.

[409]https://indiankanoon.org/doc/1110615/#:~:text=%E2%80%94A%20witness%20may%20be%20cross,writing%20can%20be%20proved%2C%20be

Statement Recording In The Case Of Women And Child Victims:

If the statement of the child is need to be recorded than it must be recorded in the special child witness/vulnerable room. The room should not have the atmosphere similar to the courts. As children are vulnerable and may get scared easily because of the question asked to them. There are chances of imaging same trauma which they have seen earlier and for which they are been victim of. During this the magistrate can take the help of some pictures, pay cards, diagrams, drawings, visual guides in order to collect the correct information. Also, this will be more comfortable to the child.

Under section 25 of the POSCO (Protection of children from Sexual Offences Act, 2012) provides the provision that the parent or the support person of the victim can be present with him at the time of recording the statement. For women victims of sexual assault the similar safeguards are available under section 164(5A) of Criminal Procedure Code. As per section 165(5A)(a) provision of Cr.P.C. it permits the service of special educator/interpreter/translator to aid the judge to understand and record the statement better. If possible than a magistrate must video record the statement or direct the same. The expectation, therefore is, utmost sensitivity and responsiveness while recording the testimony of a vulnerable witness, with due regard to the trauma & stigmatic impact that the witness has undergone[410].

Conclusion:

Therefore, any statement given by the person to a police officer during investigation fall under section 161 whether it may be oral or written and the same will not be admissible in the court as an evidence. If the statement is recorded by the magistrate than it will fall under section 164 of the code, it is admissible as an evidence in the court.

The fact cannot be denied that section 161 and 164 of Code Of Criminal Procedure play an pivotal role in trial of criminal cases. Both the section primarily use to check the credit of the witness regarding the contradiction between evidence and the statement recorded under these sections. Here, the court plays the role of a guard which scrutinize the evidence with great care. Thereby the Police Officers, Judicial Officers, Advocates, the Courts, have to pay special attention on the section 161 and 164 of Criminal Procedure Code with reference to the section

[410] Ajay Kumar Parmar v. State of Rajasthan (2012) 12 SCC 406).

145 of the Indian Evidence Act. These sections enables the authorities to have clear notions about all relevant provisions in this regard.

S.S LOTUS (FRANCE V TURKEY)

- RAHUL MEHTA

Introduction.

On August 2nd, 1926, the French mail steamer Lotus, bound for Constantinople, collided with the Turkish collier, Boz-Kourt. The collision took place in the north of Cape Sigri and left eight Turkish nationals, onboard the Box-Kourt, dead. On August 5th, Turkish authorities requested Lieutenant Demons, the Lotus' watch officer, to come offshore and provide evidence. Lieutenant Demons was arrested as a result of the investigation, and a court case was filed against him for manslaughter. On August 28th, Demons was placed before the Criminal Court of Stamboul. He challenged the Turkish Court's authority, but it was overturned, and the Court sentenced him to eighty days in prison and a fine of £22. France took cognizance of this matter and presented the case before the Permanent Court of International Justice on September 7, 1927.

The Court was asked to rule on whether foreign law prohibits Turkey from pursuing criminal charges against Lieutenant Demons under Turkish law. France contested that since the collision occurred on the high seas, the state whose flag the vessel flew had sole authority over the matter. The Turkish government, on the other hand, believes that Article 15 gives Turkey authority if that jurisdiction does not interfere with an international law norm. The Court ruled that international law would not exclude a State from exercising authority in its territories in cases, including actions, that occurred elsewhere. The only requirement a state needs to comply with is that it should not go above the limitations that international law imposes on its authority; under these limits, the right to exercise jurisdiction is vested in its sovereignty. The Permanent Court of International Justice ruled in Turkey's favour and established the Lotus principle, which says that sovereign states are free to behave in whatever manner they see fit as long as they don't breach an explicit prohibition.[411]

Whether the lotus principle was in accordance with the principles of International Justice.

[411] *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

Unless a state has sanctioned a law triggering their liability in the event of a violation, the Lotus principle allows it to remain blissfully unaware of and unaccountable for the detrimental externalities of their actions. The aforementioned requirement of express consent grants the states "a de facto veto right" over any law that compels them to internalise the negative externalities of their policies. [412]The Lotus theory hence casts "*a baneful spell on the progressive advancement of international law*." [413] Additionally, it is imperative to note that the former President of the International Court of Justice, Mohammed Bedjaoui, too held that acts which are not expressly prohibited may still nevertheless be contrary to international law. [414] The Lotus principle's concept of total independence for states limited only by their consent is no longer adequate to fulfil the demands of the modern international community.[415]

While establishing the lotus principle, the majority emphasized that international law's function is to ensure peaceful coexistence between sovereign societies. It neglected to note, though, that by giving exclusivity to one state on the grounds that there does not exist any prohibition regarding the same, it is in effect enforcing a prohibition, that does not exist, on other states. Hence, the Lotus theory is not only contradicted by the Lotus judgment's text but is further incompatible with international law's function.

Whether France's argument was a suitable alternative to the Lotus principle.

It is worthwhile to note that arguments that the validity of states' acts is contingent on "finding a permission in international law", as France claimed, are unworkable for three reasons. To begin with, a scheme that allows states to get consent before acting is unacceptable. It fails to lift the "banned spell" of agreement that stymies the advancement of international law. A provision of approval is troublesome since the acting state will have a de facto veto right over the existence of any rule that allows an affected state to answer. [416]

[412] Hertogen A, "Letting Lotus Bloom " The European Journal of International Law, Vol 26 (4).
[413] *Legality of the Threat or Use of Nuclear Weapons* , Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226 , pp. 495, Dissenting Opinion of Judge Weeramantry.
[414] Hertogen A, "Letting Lotus Bloom ", *note 2.*
[415] *Nuclear Weapons* , *supra* note 3, at 270–271, Declaration of President Bedjaoui.

[416] Hertogen A, "Letting Lotus Bloom ", *note 2.*

Second, a permissions-based scheme is unworkable. It "assumes a perfected body of international law, sufficient to satisfy and resolve all practicable inter-national disputes." [417]When a previously unknown problem occurs under a permissions-based scheme, states are compelled to choose between inaction and international law violations before a clear legal precedent allowing action to address the problem is established. [418]

Third, even though a robust regime allowing all possible state acts is possible, states are unlikely to follow an international legal framework that limits their right to operate in certain situations where approval is available. It is nearly impossible to categorize international law as a set of prohibitive or permissive laws, and attempting to do so yields no benefit. [419]As a result, a scheme dependent on permissions rather than restrictions isn't a good substitute for the Lotus concept.

Whether the judgment delivered would be overruled today.

Jurisdiction founded on the concept of passive personality, allows the victim state to exert authority over a foreigner in the event of an occurrence occurring overseas that causes an injury to one of its citizens. The principle is enshrined in several international treaties, However, due to its controversial nature, it is unlikely to be considered customary international law. [420]

The majority in its reasoning, instead of relying on the passive personality principle, framed the issue as one of objective territorial jurisdiction since the action of one state was inseparable from its effects in the territory of another state. It was a contentious step that sent shockwaves across the maritime community and prompted international regulation on the subject of criminal jurisdiction over high seas collisions.[421] The dissenting judges, on the other hand, maintained that according to international law country's rules should not be extended to include suspected crimes perpetrated by foreigners outside the country's borders.[422] They further highlighted the Court's inability to evaluate the legitimacy of the passive personality authority and claimed that Turkey tried to exercise jurisdiction solely on the aforementioned authority,

[417] Berge, 'The Case of the S.S. "Lotus"', 26 *Michigan Law Review* (1927–1928) 361, pp 375.
[418] *S.S. Lotus (Fr. v. Turk.), note 1.*
[419] Hertogen A, "Letting Lotus Bloom ", *note 2.*
[420] Echle R, "The Passive Personality Principle and the General Principle of Ne Bis In Idem" .
[421] Hertogen A, "Letting Lotus Bloom ", *note 2.*
[422] *S.S. Lotus (Fr. v. Turk.), note 1.*

rather than on a territorial-effects principle and that such exercise of jurisdiction was forbidden by customary international law. [423] It is worthwhile to note that the Convention of the High Seas, 1958, vindicated the dissent's view and held that either the flag state or the officer in charge's home state could sue for accidents that took place on the high seas.[424] Hence, If the Lotus and the Boz-Kourt were to have collided now, the authority to govern this matter would rest with France, as not only is it the Lotus' flag state but also the home country of Lieutenant Demons.

Conclusion.

It is imperative to note that the majority exhibited a considerably more egalitarian perspective, when compared to the dissenters, by being more receptive to the interdependence between states. The Lotus theory, which the dissenters condemn, has the same flaws as the dissenters' theory, which focuses on permissive legislation and further hollows out the principle of sovereignty[425].

Furthermore, the PCIJ's decision in Lotus sparked discussions of a different jurisdictional allocation for high-seas crashes.[426] In a territorial structure, maintaining an atmosphere which encourages sovereign states to resolve conflicts between opposing claims of jurisdiction is superior than the Court adjudicating for them. It's further desirable from the standpoint of a court which lacks mandatory authority since states would be less likely to turn to a court that exercises its powers too frequently.[427] It's not surprising that the PCIJ took this stand, given the fact that it was only recently established when it was presented with the Lotus case, that too is one of its kind.

[423] The S.S. "Lotus", *note 1,* pp. 34 (MM. Loder dissenting).
[424] *Convention on the High Seas*, April 29, 1958, art. 11, 13 U.S.T. 2313, 450 U.N.T.S.
[425] Hertogen A, "Letting Lotus Bloom ", *note 2.*
[426] Ruzé, 'L'Affaire Du Lotus', 9 *RDILC* (1928) 124, pp. 155.
[427] Hertogen A, "Letting Lotus Bloom ", *note 2.*

MOST FAVOURED NATION

- YASHASHVI LOHIA

INTRODUCTION

The principle of Most Favored Nation which is popular by name of MFN Treatment. There is a fundamental principle of trade which ensures that there is no-discrimination between like goods and services by the country. They treat all nations equally. Clause related to most favored nation works in same way for all countries. Such clause should not work one way for one country and other way for other country. Most Favored Nation simply calls for non discrimination against members. For Example A provides a tariff concession to a country B by imposing a 10% duty on import of cars A is obligated to charge the same rate of 10% to the imports of cars by Country So A country is bound to treat all nations equally as its most favored nation or favorite nation.

Most-Favored-Nation (MFN) tries to increase investment agreements by ensuring that the parties to one treaty provide treatment no less favorable than the treatment they provide under other treaties in areas covered by the clause. MFN tries its best to avoid distortions which are of economic nature so that would occur through more selective country-by-country liberalization. Party which is contracting with other nation party they are expected to treat other party as one of their favorite nation.[428]

ORIGIN OF MOST FAVORED NATION

The origin of MFN can be traced back to the twelfth century but the phrase MFN have first appeared in the seventeenth century. This was majorly viewed during First World War because of European Alliance their discriminatory practices of war. Existence of League of Nations then saw the inclusion of an unconditional MFN clause to promote the principles of free trade. Liberalization of trade saw countries taking advantage of the new international economic order by exporting products and services they had an expertise over, and consequently importing

[428] OECD (2004), 'Most-Favoured-Nation Treatment in International Investment Law', OECD Working Papers on International Investment, 2004/02, OECD available at http://dx.doi.org/10.1787/518757021651.

products and services they were not so good at making countries mutually interdependent over one another[429].

The drafting conferences on the GATT in London (1946) 2 and Geneva (1947) made MFN treatment the cornerstone of the International Trade Organization Charter. However, with the Failure of the ITO Charter, MFN treatment was successfully added in the form of Article I 4 of the GATT to assure traders that they will be treated equally in the exports of like products. Most Favored Nation treatment was successfully added under Article I of the GATT so that they can assure traders that they will be treated equally in the exports of like products and that any concession granted to one Member, shall unconditionally be granted to another.

With the mutual interdependence of Members there was a need to assure that their services and service suppliers all will be given same treatment as that of like services. MFN treatment was not only limited to goods but also in services as well. The scope of Most Favored Nation is such that it ensures non-discrimination of like goods. But the principle of national treatment talks about equal treatment of like goods and services to imported products and domestic products.

MODES OF DISCRIMINATION

There are 2 various modes of discrimination

1) De Jure Discrimination
2) De Facto Discrimination

1) **DE JURE DISCRIMINATION**: When foreign goods and services are not given the same treatment as domestic goods or services or that which is given to other Members even if it is similar or like it is merely a case of de jure discrimination[430]. There are laws that have the impact on discriminating between goods and services that are like. Also there may be an application of taxes in a different manner to domestic and imported goods when in reality there is no real difference between the two.

[429]Epgp.inflibnet.ac.in/Home/ViewSubject?catid=20

[430] Lothar Ehring, De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment - or Equal Treatment?, available at https://jeanmonnetprogram.org/archive/papers/01/013201.html as accessed on 17 th November 2020.

2) **DE FACTO DISCRIMINATION**: De facto discrimination is that discrimination which is not as explicit as de jure discrimination and is implicit in the type of measures used. Example There may be different tax percentage on beverage with high alcohol content and on beverage of low alcohol conten[431]t. As there is no real discrimination in the goods. Goods are like goods but different tax percentage is regarded as de facto discrimination.

MOST FAVORED NATION OBLIGATION UNDER GATT, 1947

Article 1 of GATT, 1947 deals majorly with the principle of most favored nation[432] . It prohibits discrimination that is done in various forms such as de facto and de jure discrimination. Under inter se parties. Article of GATT, 1947 says about the non discrimination among the members inter se for importing like products. Article 1 says that any advantage, privilege or any kind of favor, or immunity which is granted by any member for any product which is from another country is immediately accorded for the like products that re from the territories of other members which are other nations. All kinds of discrimination are prohibited under Article 1 of GATT, 1947[433].

Principle of most favored nation under GATT of Article 1 prohibits all kinds of discrimination either discrimination is de facto or it is de jure, Discrimination either by express or implied conduct or under any provisions of law all kinds of discrimination are prohibited. Word any advantage, favor, privilege or immunity helps to understand or gives us a clear picture regarding the nature of discrimination that are prohibited under Article 1 of GATT by principle of Most Favored Nation. One of the case is *Belgian Family Allowances Dispute*[434], The main issue under it Was Whether Belgium has violated MFN Principle by levying tax on exports due to fact that such countries do not have similar family Allowance Policy. Countries Like Denmark and Norway had to pay Charge on exports because these countries do not have similar family policy like that Belgium.

[431] Lothar Ehring, De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment - or Equal
Treatment?, available at https://jeanmonnetprogram.org/archive/papers/01/013201.html as accessed on 17 th November 2020.
[432] Article I:1, of GATT, 1947.
[433] Article I:1, of GATT, 1947.
[434] GATT Panel, "Belgian Family Allowances (Allocations Familiales)," (1952).

In this case, Panel held that Belgium has Article I:1 of GATT. It stated that if there is any advantage that is given by one contracting party in relation to any product which is formed in that country same benefit will be given to all other countries as well. So it was finally held by the panel that such type of classification which are done for any kind of products that must be based exclusively on characteristics of products itself .

MEASURES UNDER ARTICLE 1:1

Principle of MFN under Article 1:1 of GATT has some kinds of governmental measures that are to be followed or taken

- If there is any kind of customs duties and charges like transport or warehouse that are required for free and fair trade such kind of charges and customs should be applied in relation to import and export of goods or products[435].
- If a member charges different rate of exchange for products and services for export and import of goods for one of a particular WTO member country in order of discrimination then it is a violation of Article 1:1 of GATT, 1947[436].
- Process of levying such kind of charges and duties. This method is used to determine duties and charges and expects applicability of ad valorem versus duties which are of specific nature. If country which is a member of WTO applies for ad valorem duties of products of like nature that must be imported and exported to some members and when such duties are imposed on similar products it will be considered different method of levying duties and charges.
- Other rules related to import and export of goods. It means that all rules and formalities in relation to import or export of like products that must be same for all members so there will be no discrimination between all members in relation to goods of like nature.
- Measures given under Article III: 4 of GATT, 1947 in relation to all laws and regulations that affect their internal sale , offering for sale , purchase, distribution transportation or use must be same for like products from goods that are coming or to come from different members territory[437].

[435] OECD (2004), 'Most-Favoured-Nation Treatment in International Investment Law', OECD Working Papers on International Investment, 2004/02, OECD available at http://dx.doi.org/10.1787/518757021651.

[436] OECD (2004), 'Most-Favoured-Nation Treatment in International Investment Law', OECD Working Papers on International Investment, 2004/02, OECD available at http://dx.doi.org/10.1787/518757021651.

[437] Article III, of GATT, 1947

CONDUCT OF DISCRIMINATORY NATURE

Scope of MFN clause is related to applicability to conduct by measures imposed by government which is discriminatory in nature. Article I:1 covers all kinds of measures which are of discriminatory nature in relation to export and import of goods . if a contracting party have any Advantage, immunity and privilege for importation and export of product and such action of a country is discriminatory with other nations then it will Attract Article I:1 Of GATT,1947 as this article does allow any kind of discrimination between various nations[438].

One of the example of such is If India, which is contracting Party to GATT,1947 applies to custom duties on Strawberries but that custom duty on strawberries only if these strawberries are exported to European union another party with which it has come or entered into contract. India is doing this to curb exportation of strawberries so that their domestic consumption can be increased and also because European Union is one of the major importer of strawberries. The measures taken are violative of Article I:1 of GATT because it did not tried to ban export of all f strawberries as a whole for every nation but it has merely banned the export of strawberries to European union. So in this connection Any immunity or advantage to one contracting party should be given unconditionally and to all contracting parties. It should not treat nation unequally. They should be treating all nations equally and if it won't it will be considered discriminatory in nature and violation of most favored nation principle.

PRODUCT TO BE A PART OF WTO MEMBER

Article I:1 says that any kind of advantage, privilege , favor or immunity which his given by one member to another member that must be extended immediately and unconditionally without any discrimination to all members of WTO. Further it has some implications that are as follows:

1) Any advantage, favor must be extended to any country . any country who receives any advantage, immunity is not necessarily needed to be a WTO member and even if it is not a WTO Member it will still receive favorable treatment from other WTO members.

[438] Diganth Raj Sehgal, Social, economic, political and cultural conditions in the formation of GATT, available at https://blog.ipleaders.in/social-economic-political-cultural-conditions-formation-gatt/ as accessed on 17 th November 2020.

2) If any kind of favorable treatment is given by members it must applied and extended to all other members of WTO
3) Favorable treatment must not only should be given to all other members of WTO but it can also be done immediately and unconditionally[439].

One of the major example of it is as follows Somalia is not a member of WTO but still receives favorable treatment by putting less custom duties for export of cotton to India (8%) while South Africa which is a member of WTO so it is expected to pay 9% custom duties for import of cotton to India. But here discrimination is done so it is violation of principle of MFN. Every favorable treatment must be extended by India as a member of WTO to other country irrespective of it being member or non member it must be extended immediately and unconditionally[440] . As per Article 1 of GATT, India cannot impose condition on South Africa stating that one need to export certain percentage to receive favorable treatment. India also cannot assert favorable treatment to South Africa for a date onwards.

PRODUCT MUST BE LIKE PRODUCT

If there is a need to prove that MFN is violated , party which is aggrieved has to prove the product for which MFN is violated that products are like Products. Concept of Likeliness has evolved in case of Border Tax Adjustment. The panel has given some guidelines to understand like goods by following specific kind of principles.

1) Property , quality and Nature of Product
2) End use of Product
3) Classification of Tariff of such products[441].

If by all this principles we get the picture that both products under which discrimination is done that must fulfill same end use .

[439] Diganth Raj Sehgal, Social, economic, political and cultural conditions in the formation of GATT, available at https://blog.ipleaders.in/social-economic-political-cultural-conditions-formation-gatt/ as accessed on 17 th November 2020.

[440] http://epgp.inflibnet.ac.in/Home/ViewSubject?catid=20

[441] Diganth Raj Sehgal, Social, economic, political and cultural conditions in the formation of GATT, available at https://blog.ipleaders.in/social-economic-political-cultural-conditions-formation-gatt/ as accessed on 17 th November 2020.

One of the case is The Japan Alcohol Beverages Case, this case has given concept of like products. The issue here was whether vodka and Japan Drink sochu was same. Japan was of opinion two drinks have no similarity they both are different from one another. Court said that both drinks are alike as they both have same physical characterstics and also same end use. Only difference is their in its filtration[442]. Panel gave comparisons like rum to sochu that they both are not like products because their ingredients are different. While brandy and whiskey are also different from that of sochu. Vodka and Sochu are like products as they both have similar appearances and same end uses. Products which fall under head of like products that must be treated equally irrespective of their origin[443].

Another Case is EC- Bananas case. here issue is there are 3 types of bananas. First type EC Bananas that originate in EC and have duty free treatment. Second Type is bananas that originate in Africa, Caribbean and pacific which were known as traditional bananas. ACP Bananas also received duty free treatment but have quotas that have respective shares of 12 countries in ACP[444]. Last type was that nontraditional bananas here bananas were imported by ACP countries. Third type of bananas involves imports from other nation and additional qualifications which is applicable to ACP countries[445]. Non discrimination means all like products should be treated equally irrespective of its origin. . Like products are discriminated when measures of government in form of custom duties and charges.

Under GATT. 1947, Difference between scope of Discrimination in Article I (MFN Obligation)

and scope of Article III (National Treatment obligation) difference between should be understood[446]. Both these helps to eliminate both kinds of de facto and de jure discrimination. National treatment principle is applied internally such as tax, charges. it has been invoked only when imports of like products of member are not treated in same way as of domestic like products[447]. MFN is more broad provision as it includes all forms of government measures.

[442] Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (Nov. 1, 1996).
[443] Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (Nov. 1, 1996).
[444] Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).
[445] Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).
[446] Prof. V. Rajyalakshmi, International Organizations, (EBC publishers 2017).
[447] Prof. V. Rajyalakshmi, International Organizations, (EBC publishers 2017).

Also MFN principle is more broad and its applicability as well because it includes both imports and exports.

CONCLUSION

The principle of Most Favored Nation (MFN) is considered as a cornerstone of the multilateral trading system. Most-Favored-Nation treatment — requires Members to accord the most favorable tariff and regulatory treatment given to the product of any one Member at the time of import or export of "like products" to all other Members. GATT Article I:1 provides for WTO[448]. Members to extend MFN treatment to like products of other WTO Members regarding tariffs, regulations on exports and imports, internal taxes and charges, and internal regulations. In other words, "like" products from all WTO Members must be given the same treatment as the most advantageous treatment accorded the products of any state. The MFN principle must be observed as a fundamental principle for sustaining the multilateral free trade system. Regional integration and related exceptions need to be carefully administered so as not to undermine the Most Favored Nation principle as a fundamental principle of the WTO.

[448] www.legalserviceindia.com

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INVENTION AND PATENTABILITY: AN CRITICAL APPRAISAL

- SONALI GEHLOT

INTRODUCTION

In current scenario every countries wants to develop in all field i.e. science, technology, economy, etc in order to maintain its position in world. One of the filed is technology, it changes with blink of eyes. So to flourish countries growth in terms of technology, innovation is must. Development and deployment of technologies largely depends on innovations which are required as per needs of society. So laws of counties also help in innovations as desirable for consumers and producers by way of providing protect and incentives to inventor of invention. The Patent Act is one of the law which protect inventions and plays important role in the entire lifecycle of technology.

Traditionally, IPR is divided into two forms, one is industrial property rights and copyright; industrial property right in its form patents also in view to protect inventions in industrial field. Thus, the right of patent as mentioned in patent act play a vital and expanding role in the market for inventions by way of commercializing inventions through licensing.

WHAT IS PATENT

The Patents Act[449] along with Patents Rules 1972 come into force on 20th April 1972, by replacing the earlier act i.e. the Indian Patents and Designs Act 1911 to tackle issues of industrial property rights. India being member of TRIPs carried out final amendment to Patent Act, 1970 by way of patents (Amendment) Ordinance, 2004, which was later on replaced by the Patent (Amendment) Act, 2005 to met the international obligations under the TRIPS Agreement.

A patent is a form of industrial property which is conferred by the state to an inventor to industrially and commercially exploit his invention at the coast of making a full and complete disclosure of details of invention in order to determine whether it satisfy test

[449] 1970

of invention or not. A patent is a statutory privilege granted by the Government or by authorities in a specified jurisdiction to an inventor and prevents others from manufacturing, using, selling, or exploitation the patented inventions for limited period of time without his or her permission or authorization. After the expiry of the said period, patented invention is available to the general public or falls into the public domain for its utility.

The patent confers a statutory privilege and monopoly right to inventor in lieu of disclosure of invention at the patent office. The right of patent is granted to inventor to attain its objective and encourage scientific research, new technology and industrial progress by way of granting exclusive rights for their inventions. By way of patent mechanism in business new innovators are allowed to gain exclusivity over a new product or process, with advent of time develop a strong market position and earn additional revenue by way of licensing it. The right of patent means that the invention of individual cannot be commercially made, used, distributed or sold without the patent owner's consent thus, maintaining the exclusivity of right. The patent system flourish and enhances social welfare not only by encouraging invention and the dissemination of useful technical information but also by providing incentives for investment in the commercialization of new technologies that promote economic growth of the country also.

Eligible inventions does not automatically get patent unlike copyright where protection does not require any meeting with prior formalities. The rationale and social purpose behind patent protection is to give an incentive for technological change, and specifically for further investment into the field of research and development in view to increase new inventions. Thus, patents encourage innovation by making the development of inventions into new products and services commercially feasible[450]. In other words, the patent system encourage the diffusion of knowledge for the benefit of society unlike an alternative system dependent on trade secrets[451].

INVENTION AND PATENTABILITY

[450] David Encaoua, Dominique Gullec & Catalina Martinez, Patent systems for encouraging innovation: Lessons from economic analysis(Feb, 2005)

[451] http;//www.legalserviceindia.com/articles/trdaesecrets.htm.

In order to hold competitive advantageous position in the market and secure investments, the patent owner obtain patent protection for an invention. So to procure patent for the invention, the invention should met the criteria of patentability. The term patentability implies substantive conditions that must be met for a patent to be held valid under the Patent Act. Patentability criteria ensure that the government awards a patent only when justified and the rights provided under the patent correspond with the contribution made by the inventor in terms of cost and efforts and not excluded from patentability as mentioned under section 3 and 4.[452]

As the activity of patentability is expensive so it is vital to assess the patentability of invention before filing of patent application. Patent laws of all countries are different, patentability criteria also differ from country to country so the inventor of invention must comply the requirements of laws which govern patent protection in his country and under multinational body in order to be granted a patent without any difficulty. Simply, patentability make sure that no patent is rejected because of its patentability criteria.

After going through patentability, an insightful understand of term 'invention' is must to decide what constitute invention and what not.

The Patents Act[453] of India enlisted the provisions to be used by the Indian Patent Office and the courts to decide whether a product or process is capable for the purpose of patent in India. Section 2(1)(m)[454] states that a patent may be granted for an 'invention'. For the purpose of obtaining patent on a invention it is required that what comes under the definition of invention as given in section 2(1)(j) of the patent act, 1970.

Section 2(1)(j) put forth that "invention means a new product or process involving an inventive step and capable of industrial application". This definition of invention is in compliance with the provisions of TRIPS. Patent Acts, 2005 section 291)(l) defines "New Invention" as " any invention or technology which has not been anticipated by publications in any document or used in the country or elsewhere in the world before

[452] The Patent Act, 1970
[453] 1970
[454] The Patent Act, 1970

the date of filing of patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the state of the art". In order to be patented under Patent act an invention is tested on basis of these three tests as mentioned below-

- The invention must have element of novelty, means it must not be in existence elsewhere.
- Invention must be non-obvious, means significant improvement to the previous one
- It must be useful in a bona fide manner.

An invention is considered as new if on the date of filing the application, any such invention is not known to public in any form, if it is known in public domain then it is not termed as invention. The time frame for patent is 20 years which start from date of filing of patent application by the inventor and this right applied only in the country where it is granted.

In India inventions which relates to machine, article, substance produced by manufactures or for innovation of an article, etc are patented under Indian Patent Act, if they are new. The Indian Patent system use three standards or touchstone on which it determines if the government should patent an invention. These standards for patentability of invention are as follows-

1. Novelty of invention
2. Inventive steps
3. Industrial applications[455]

These standards of patentability of inventions are also enshrined in TRIPS agreement. The TRIPS Agreement which is an international instrument for patent does not define what an "invention" means, but only specifies the requirements that an invention should possess in order to be patentable[456]. Apart from these three standards of patentability the invention should not come under domain of non patentable subject matter. As TRIPS

[455] Justine Pila, Bound Futures: Patent Law and Modern Biotechnology, 9(2) B.U.J. Sci. & Tech. Law 326, 378(2003).
[456] TRIPS Agreement, supra note 1, art. 27.1.

Agreement only laid down requirements which invention should posses but not exactly define what inventions means so this ambiguity leaves considerable freedom to members to determine what an invention is as per need of hour.

Novelty

The first element for patentability of an invention is novelty which means new product or new process for patent purpose. This first test is considered as a gap or bridge between the invention and the prior art of universe. Novelty concept is discuss under section 2(l) of the Patent Act, a novelty or new invention as " no invention or technology published in any document before the date of filing of a patent application, anywhere in the country or the world". It conveys that invention should never have been published in the public realm even by yourself. The invention should be in newest form in the world. The invention must be new; and the term 'new' mean that the claimed invention shows a new characteristics which is not known to general public. Article 27.1 of TRIPS also states and entrust WTO members with the authority to require a showing of novelty as a precondition of granting a patent.[457] The discovery of things which are already existing in the nature does not fit in definition of invention. Further the definition of 'new invention' also took into account absolute novelty of invention but the later sections of the act for the purpose of anticipation and opposition proceedings which manifest and deal with relative novelty so for all purpose relative novelty is the criterion for patentability. Thus, the safeguarding element 'novelty' prevent patenting of technologies which are already in existence and available to general public so that the existing invention contribute to existing knowledge in real sense. The chain of novelty breaks when it appears that claims are found or known to public. Lastly, in patentability an invention its subject matter deals over what is old.

Inventive Step

To be eligible for patent protection, in addition to novelty the element of inventive step should also be involved. Prior to the Amendment of 2005, the definition of inventive step talks about invention not obvious to person skilled in the art. After the Amendment

[457] TRIPS Agreement, supra note 1, art. 27.1.

of 2005 of the Indian Patent Act, in addition to the non-obviousness criterion this amendment put forth two other conditions firstly, it should also involve technical advancement as compared to the existing knowledge; Secondly, having economic significance. The degree of "inventiveness" involved in the invention which is under consideration for patent should be relative to the prior art of universe.

Inventive step in the invention implies that such invention should not been evident from prior art to a person of ordinary skill in that particular filed of technology at the very moment when the inventor filed application for patentability of invention and for statutory right of patent.

A invention which is novel must not necessary possess inventive step in it. In simple words, the invention must not merely be something new; it must represent a development over prior art.[458] In each case the degree of inventiveness differs as per the definition of ordinary skill in the said art. Thus the second element of patentability which is inventiveness or non-obviousness acts as a safeguard against patents which are being granted for inventions which only manifest trivial or routine advance on existing knowledge. This element reserves patents for the inventions that put forth a clear and non-obvious advancement on the prior art whereby attaining the objective of patent.

Inventive step finds place in Indian Patent Act[459] under section 2(1)(ja) elucidate "inventive step" as " a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art".

The deficiency of this element act as a valid ground for opposition of grant of patent. Thus, to be patentable an invention must possess inventive step along with novelty.

Case Laws Interpretation on Inventive Step

Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries[460]

In this case court interpreted the term inventive step and laid down principles for assessment of inventive steps involved in a invention. In this case court held that, " for subject matter to constitute an inventive step, the alleged invention should be more than a mere workshop improvement. In the case of an improvement patent, the improvement

[458] http://www.iprsonline.org/
[459] 2005
[460] AIR 1982 SC 1444

must itself constitute an inventive step. The considerations of cost and economic significance which are usually secondary considerations in other jurisdictions, are in built as primary considerations both in the act under the definition of inventive step. Also obviousness has to be strictly and objectively judged".

Novartis v. Union of India[461]

The court in this case had put forth two pronged approach for the requirement to ascertain whether an invention possess the element of inventive step. These approach were "Firstly, ascertaining what was the state of art before the relevant date of the companies specification filed pursuant to an application for a patent, Secondly, having regard to the state of the art, as ascertaining whether the alleged inventive step would have been obvious to a person skilled in the art".

Also the person skilled in the art must possess vital information through prior art to take inventive step in consideration. Obviousness in invention can be judged based on imaginary or hypothetical construct of a 'person of ordinary skill in the art' by taking into account following points as mentioned below-

- He or she belong to relevant field
- By looking at the prior art from a position of his personality, imagining his/ her interest in risk
- Be well aware of the fact that even a small structural change in a product or procedure can produce dramatic functional changes[462]

Industrial application.

By industrial application it implies that the new product or process should be capable of being made or used in an industry for commercialization and foster economic growth of country by entailing economic significance. Industrial application is define under section 2 (ac) of the Indian Patent Act as " the invention is capable of being made or used in an industry". In other words it means that the invention must have practical utility and not mere abstract existence. The patented invention achieves a practical purpose rather than mere abstract theory and speculative notion without any contribution

[461] Civil Appeal No. 2706-2716 of 2013
[462] http://www.invntree.com

to existing body of knowledge. The invention which is to be patented can be made or used in some kind of industry for practical and ordinary use to disseminate information to public. Industry here means any physical activity of a technical character[463].

The act defines an invention is capable of industrial application if it comply with three conditions simultaneously as enumerated below-

- Can be made;
- Can be used in at least one field of activity for practical purpose
- Can be reproduced with the same characteristics as many as required by the need of society and time.

Thus, all these statutory standards needs to be met for the patentability of an invention along with other necessary standards. Competent adequate disclosure requires an applicant to provide entire technical information about the invention so that it enable a person skilled in the same field related to carry out the invention which inventor claim in his/her application of patent without undue efforts. TRIPS agreement also under Article 29.1 deals with this requirement of disclosure.[464] The disclosure requirement is seen as a contract formed between patent holder and public at larger where when the patent holder transfer knowledge about the invention to public and in return he gets exclusive right for specified period.

CRITICAL ANALYSIS

An invention is an creation of individual using his intellect so it has commercial value in the market; and anything which had value attached to it is termed as property for the very purpose. One of such property is Invention and required protection in competitive market structure. The entire patent mechanism of India stand on public policy and mainly relies on bargain between the inventor and the public at large who used the invention of inventor. The patent system and its governing structure is governed by a complex series of rules and regulations which require enough amount of care.

In a developing country the patent law is more prone to criticism due to lack of judgments by courts and misuse of powers by officials in interpreting term as per their

[463] TRIPS Agreement, supra note 1, art. 27.1
[464] TRIPS Agreement, supra note 1, art. 29.1.

wish because of lack of court order on that particular issue. The patentability of invention shows disliked for monopoly power which is given to inventor as both consumer and inventor suffers; in case of consumer they suffers because they have to pay high prices, and in case of inventor it hinder improvements and further innovations if the patent holder is disallowed and not given monopoly over his invention and exclusive right. Also under the patent mechanism the innovator's incentive to invest in research is the monopoly price which he would earn in case he produces the innovation. But there are two deviations of this under patent system firstly, the incentive to invest in research are not sufficient due to the reason that monopoly profits created by invention are less in contrast to the social surplus created by the innovation; Secondly, if the innovation results, too little is sold at such monopoly price.

Overall patent system had dual functions and these functions are at odds with each other in the way that the exclusivity of patent confers undermined by its publication later on which may help others circumvent the patent which is granted to innovator; also patent entail competition between the incentives provided for innovation and costs from monopoly may curtail competition and raise consumer prices. Thus, by way of reducing transaction costs in the market realm for inventions which are carried out by innovators, patent reduces the costs of entry and operations in that particular market whereby not achieved its objective fully and hamper the market structure.

Therefore, the patent system had both pros and cons as on one hand competition may suffers when an inventor is granted monopoly right as reward for his invention whereby excluding others from using, selling, distributing etc; and on other hand competition in market will benefit if this right facilitates investments by new, innovation firms.

As TRIPS Agreement leave space for determining the "patentability criteria" by members state in accordance with their socioeconomic conditions and welfare of public. If low threshold are applied it may facilitate the patenting of incremental developments which exists in domestic industries of developing countries like India. If this practice is continued it unduly restrain competition and increase litigation costs at an alarming rate in prominent areas like pharmaceuticals where extensive patenting of minor development has become ordinary practice as it improvement in the already existing inventions. Therefore, in developing countries opting of high standards or criteria in patentability of inventions is a step forward for preventing routine discoveries from being patented

and the Amendment of 2005 by introducing rigorous standards and requirement help in curtailing new patent grants for minor innovations.

Another issue which comes into picture is interplay between section 2(1)(j) and section 3 of the Indian Patent Act as the various subjects which are not termed as inventions under section 3 the analysis of their scope sometimes overlaps with analysis of invention assessment standards. The Apex court in the case of Novartis stated that these sections are independent of each other and construed separately but that seems to be more theoretical than of practical utility.

As patent acts as barrier to entry so that others cannot compete against it and it is not granted immediately rather it requires time. In case competitors do enter and oppose invention, then the inventor can sued competitor only when patent application return and mature into patent so there is another loophole in the patentability of invention.

Thus, India as a developing county should be more cautious and make very possible efforts to prevent frivolous grant of patents. Every patent application needs to be judge in light of detailed guidelines keeping in view if substantial human intervention and utility or adopt related forms of IP like as utility models.

CONCLUSION

India as a developing countries promulgate patent system in order to foster the creation of markets for technology, enabling efficiencies in the research and development process by way of granting exclusive right to innovators. Also the core provisions of TRIPS Agreement indicate that enough flexibility is given to member nations to frame patent system as per their social and economic needs which sometimes defeat the objective of Patent Act for commercial return. The dearth of judgment on interpretation of terms like obviousness, inventions leave space for varied interpretation of these term by the Indian Patent Office and Examiner using discretionary power. Thus, the gap between law as statute and law in practice can be remove by active involvement and interpretation of statutory provisions and requirements by courts.

COMPARATIVE ANALYSIS OF ENGLISH AND INDIAN LAW GOVERNING MERGER AND ACQUISITION

- PRIYANSHI GUPTA

INTRODUCTION

A merger is a combination of two companies where one corporation is completely absorbed by another corporation. The less important company loses its identity and becomes part of the more important corporation, which retains its identity. It may involve absorption or consolidation. while in acquisition is the purchase of one company by another company.

Merger is also defined as amalgamation. Merger is the fusion of two or more existing companies.

All assets, liabilities and the stock of one company stand transferred to Transferee Company inconsideration of payment in the form of:

1. Equity shares in the transferee company,
2. Debentures in the transferee company,
3. Cash, or
4. A mix of the above mode.

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Motives Behind Mergers of The Company[465]

1. Economies of Scale: This generally refers to a method in which the average cost per unit is decreased through increased production

2. Increased revenue /Increased Market Share: This motive assumes that the company will be absorbing the major competitor and thus increase its to set prices.
3. Cross selling: For example, a bank buying a stock broker could then sell its banking products to the stock brokers customers, while the broker can sign up the bank customers for brokerage account.
4. Corporate Synergy: Better use of complimentary resources. It may take the form of revenue enhancement and cost savings.
5. Taxes: A profitable can buy a loss maker to use the target's tax right off i.e., wherein a sick company is bought by giants.

[465]http://business.mapsofindia.com/finance/mergers-

6. Geographical or other diversification: This is designed to smooth the earning results of a company, which over the long term smoothens the stock price of the company giving conservative investors more confidence in investing in the company. However, this does not always deliver value to shareholders.

- **Types of Mergers**

From the perception of business organizations, there is a whole host of different mergers. However, from an economist point of view i.e., based on the relationship between the two merging companies, mergers are classified into following:[466]

1. Horizontal merger- Two companies that are in direct competition and share the same product lines and markets i.e., it results in the consolidation of firms that are direct rivals. E.g., Exxon and Mobil, Ford and Volvo, Volkswagen and Rolls Royce and Lamborghini
2. Vertical merger- A customer and company or a supplier and company i.e., merger of firms that have actual or potential buyer-seller relationship e.g., Ford- Bendix
3. Conglomerate merger- generally a merger between companies which do not have any common business areas or no common relationship of any kind. Consolidated firm may sell related products or share marketing and distribution channels or production processes.

On a general analysis, it can be concluded that Horizontal mergers eliminate sellers and hence reshape the market structure i.e., they have direct impact on seller concentration whereas vertical and conglomerate mergers do not affect market structures e.g., the seller concentration directly. They do not have anticompetitive consequences.[467]

The circumstances and reasons for every merger are different and these circumstances impact the way the deal is dealt, approached, managed and executed. However, the success of mergers depends on how well the deal makers can integrate two companies while maintaining day-to-day operations. Each deal has its own flips which are influenced by various extraneous factors such as human capital component and the leadership. Much of it depends on the company's leadership and the ability to retain people who are key to company's going success. It is

[466]http://www.legalserviceindia.com/article/1463-Laws-Regulating-
[467]Ibid

important, that both the parties should be clear in their mind as to the motive of such acquisition i.e., there should be censusad- idiom.[468]

Profits, intellectual property, customer base are peripheral or central to the acquiring company, the motive will determine the risk profile of such M&A. Generally, before the onset of any deal, due diligence is conducted so as to gauze the risks involved, the quantum of assets and liabilities that are acquired etc.

Laws Regulating Merger & Acquisition in India

Following are the laws that regulate the merger of the company[469]: -

1. **The Companies Act, 1956**

Section 390 to 395 of Companies Act, 1956 deal with arrangements, amalgamations, mergers and the procedure to be followed for getting the arrangement, compromise or the scheme of amalgamation approved. Though, section 391 deals with the issue of compromise or arrangement which is different from the issue of amalgamation as deal with under section 394, as section 394too refers to the procedure under section 391 etc., all the section are to be seen together while understanding the procedure of getting the scheme of amalgamation approved. Again, it is true that while the procedure to be followed in case of amalgamation of two companies is wider than the scheme of compromise or arrangement though there exist substantial overlapping.

The procedure to be followed while getting the scheme of amalgamation and the important points, are as follows: -

(1) Any company, creditors of the company, class of them, members or the class of members can file an application under section 391 seeking sanction of any scheme of compromise or arrangement. However, by its very nature it can be understood that the scheme of amalgamation is normally presented by the company. While filing an application either under section 391 or section 394, the applicant is supposed to disclose all material particulars in accordance with the provisions of the Act.

(2) Upon satisfying that the scheme is prima facie workable and fair, the Tribunal order for the meeting of the members, class of members, creditors or the class of creditors. Rather, passing an order calling for meeting, if the requirements of holding meetings with class of shareholders

[468] Supra note 1
[469] Ibid

or the members, are specifically dealt with in the order calling meeting, then, there won't be any subsequent litigation. The scope of conduct of meeting with such class of members or the shareholders is wider in case of amalgamation than where a scheme of compromise or arrangement is sought for under section 391

(3) The scheme must get approved by the majority of the stake holders viz., the members, class of members, creditors or such class of creditors. The scope of conduct of meeting with the members, class of members, creditors or such class of creditors will be restrictive somewhat in an application seeking compromise or arrangement.

(4) There should be due notice disclosing all material particulars and annexing the copy of the scheme as the case may be while calling the meeting.

(5) In a case where amalgamation of two companies is sought for, before approving the scheme of amalgamation, a report is to be received form the registrar of companies that the approval of scheme will not prejudice the interests of the shareholders.

(6) The Central Government is also required to file its report in an application seeking approval of compromise, arrangement or the amalgamation as the case may be under section 394A.

(7) After complying with all the requirements, if the scheme is approved, then, the certified copy of the order is to be filed with the concerned authorities.[470]

2. The Competition Act ,2002

Following provisions of the Competition Act, 2002 deals with mergers of the company: -

(1) Section 5 of the Competition Act, 2002 deals with "Combinations" which defines combination by reference to assets and turnover

(a) exclusively in India and

(b) in India and outside India.

For example, an Indian company with turnover of Rs. 3000 crores cannot acquire another Indian company without prior notification and approval of the Competition Commission. On the other hand, a foreign company with turnover outside India of more than USD 1.5 billion (or in excess of Rs. 4500 crores) may acquire a company in India with sales just short of Rs. 1500 crores without any notification to (or approval of) the Competition Commission being required.

[470]A.P. Dash, Mergers and Acquisitions, I.K. International Publishing House Pvt. Ltd., 2010, pp.40.

(2) Section 6 of the Competition Act, 2002 states that, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void. All types of intra-group combinations, mergers, demergers, reorganizations and other similar transactions should be specifically exempted from the notification procedure and appropriate clauses should be incorporated in sub-regulation 5(2) of the Regulations. These transactions do not have any competitive impact on the market for assessment under the Competition Act, Section 6[471]

3. Foreign Exchange Management Act,1999

The foreign exchange laws relating to issuance and allotment of shares to foreign entities are contained in The Foreign Exchange Management (Transfer or Issue of Security by a person residing out of India) Regulation, 2000 issued by RBI vide GSR no. 406(E) dated 3rd May, 2000.These regulations provide general guidelines on issuance of shares or securities by an Indian entity to a person residing outside India or recording in its books any transfer of security from or to such person. RBI has issued detailed guidelines on foreign investment in India vide "Foreign Direct Investment Scheme" contained in Schedule 1 of said regulation.[472]

4. SEBI Takeover Code 1994

SEBI Takeover Regulations permit consolidation of shares or voting rights beyond 15% up to55%, provided the acquirer does not acquire more than 5% of shares or voting rights of the target company in any financial year. [Regulation 11(1) of the SEBI Takeover Regulations] However, acquisition of shares or voting rights beyond 26% would apparently attract the notification procedure under the Act. It should be clarified that notification to CCI will not be required for consolidation of shares or voting rights permitted under the SEBI Takeover Regulations.[473]

Similarly, the acquirer who has already acquired control of a company (say a listed company),after adhering to all requirements of SEBI Takeover Regulations and also the Act, should be exempted from the Act for further acquisition of shares or voting rights in the same company.

5. The Indian Income Tax Act (ITA), 1961

[471]http://www.affairscloud.com/mergers-and-acquisitions-of-indian-
[472]http://business.mapsofindia.com/fibp/foreign-exchange-
[473] Supra note 6

Merger has not been defined under the ITA but has been covered under the term 'amalgamation's defined in section 2(13) of the Act. To encourage restructuring, merger and demerger has been given a special treatment in the Income-tax Act since the beginning. The Finance Act, 1999clarified many issues relating to Business Reorganizations thereby facilitating and making business restructuring tax neutral. As per Finance Minister this has been done to accelerate internal liberalization. Certain provisions applicable to mergers/demergers are as under: Definition of Amal ion/Merger - Section 2(1B).[474]

"Amalgamation means merger of either one or more companies with another company or merger of two or more companies to form one company in such a manner that:

(1) All the properties and liabilities of the transferor company/companies become the properties and liabilities of Transferee Company.

(2) Shareholders holding not less than 75% of the value of shares in the transferor company(other than shares which are held by, or by a nominee for, the transferee company or its subsidiaries) become shareholders of the transferee company.

The following provisions would be applicable to merger only if the conditions laid down inspection 2(13) relating to merger are fulfilled:

(1) Taxability in the hands of Transferee Company — Section 47(vi) & section 47

(a) The transfer of shares by the shareholders of the transferor company in lieu of shares of the transferee company on merger is not regarded as transfer and hence gains arising from the same are not chargeable to tax in the hands of the shareholders of the transferee company. [Section47(vii)]

(b) In case of merger, cost of acquisition of shares of the transferee company, which were acquired in pursuant to merger will be the cost incurred for acquiring the shares of the transferor company. [Section 49(2)]

6. Mandatory permission by the courts

Any scheme for mergers has to be sanctioned by the courts of the country. The company act provides that the high court of the respective states where the transferor and the transferee companies have their respective registered offices have the necessary jurisdiction to direct the winding up or regulate the merger of the companies registered in or outside India. The high courts can also supervise any arrangements or modifications in the arrangements after having

[474]http://taxguru.in/company-law/merger-amalgamation-india.html

sanctioned the scheme of mergers as per the section 392 of the Company Act. Thereafter the courts would issue the necessary sanctions for the scheme of mergers after dealing with the application for the merger if they are convinced that the impending merger is "fair and reasonable[475]

The courts also have a certain limit to their powers to exercise their jurisdiction which have essentially evolved from their own rulings. For example, the courts will not allow the merger to come through the intervention of the courts, if the same can be affected through some other provisions of the Companies Act; further, the courts cannot allow for the merger to proceed if there was something that the parties themselves could not agree to; also, if the merger, if allowed, would be in contravention of certain conditions laid down by the law, such a merger also cannot be permitted. The courts have no special jurisdiction with regard to the issuance of writs to entertain an appeal over a matter that is otherwise "final, conclusive and binding" as per the section 391 of the Company act.[476]

7. Stamp Duty

Such act varies from state to state as per Bombay stamp act conveyance includes an order in respect of amalgamation; by which property is transferred to or vested in any other person. Asper this Act, rate of stamp duty is 10 per cent.

Intellectual Property Due Diligence in Mergers and Acquisitions

The increased profile, frequency, and value of intellectual property related transactions have elevated the need for all legal and financial professionals and Intellectual Property (IP) owner to have thorough understanding of the assessment and the valuation of these assets, and their role in commercial transaction. A detailed assessment of intellectual property asset is becoming an increasingly integrated part of commercial transaction. Due diligence is the process of investigating a party's ownership, right to use, and right to stop others from using the IP rights involved in sale or merger ---the nature of transaction and the rights being acquired will determine the extent and focus of the due diligence review. Due Diligence in IP for valuation would help in building strategy,

where in: -

(a) If Intellectual Property asset is underplayed the plans for maximization would be discussed.

[475] Supra note 2
[476] Ibid

(b) If the Trademark has been maximized to the point that it has lost its cachet in the market place, reclaiming may be considered.

(c) If mark is undergoing generalization and is becoming generic, reclaiming the mark from slipping to generic status would need to be considered.

(d) Certain events can devalue an Intellectual Property Asset; in the same way a fire can suddenly destroy a piece of real property. These sudden events in respect of IP could be adverse publicity or personal injury arising from a product. An essential part of the due diligence and valuation process accounts for the impact of product and company-related events on assets – management can use risk information veiled in the due diligence.

(e) Due diligence could highlight contingent risk which do not always arise from Intellectual Property law itself but may be significantly affected by product liability and contract law and other non-Intellectual Property realms.

Therefore, Intellectual Property due diligence and valuation can be correlated with the overall legal due diligence to provide an accurate conclusion regarding the asset present and future value. [477]

Legal Procedure for Bringing About Merger of Companies

(1) Examination of object clauses:

The MOA of both the companies should be examined to check the power to amalgamate is available. Further, the object clause of the merging company should permit it to carry on the business of the merged company. If such clauses do not exist, necessary approvals of the shareholders, board of directors, and company law board are required.

(2) Intimation to stock exchanges:

The stock exchanges where merging and merged companies are listed should be informed about the merger proposal. From time to time, copies of all notices, resolutions, and orders should be mailed to the concerned stock exchanges.

(3) Approval of the draft merger proposal by the respective boards:

The draft merger proposal should be approved by the respective BOD's. The board of each company should pass a resolution authorizing its directors/executives to pursue the matter further.

(4) Application to high courts:

[477] http://www.mca.gov.in/MinistryV2/chapter10.html

Once the drafts of merger proposal are approved by the respective boards, each company should make an application to the high court of the state where its registered office is situated so that it can convene the meetings of shareholders and creditors for passing the merger proposal.

(5) Dispatch of notice to shareholders and creditors:

In order to convene the meetings of shareholders and creditors, a notice and an explanatory statement of the meeting, as approved by the high court, should be dispatched by each company to its shareholders and creditors so that they get 21 days advance intimation. The notice of the meetings should also be published in two newspapers.

(6) Holding of meetings of shareholders and creditors:

A meeting of shareholders should be held by each company for passing the scheme of mergers at least 75% of shareholders who vote either in person or by proxy must approve the scheme of merger. Same applies to creditors also.

(7) Petition to High Court for confirmation and passing of HC orders:

Once the mergers scheme is passed by the shareholders and creditors, the companies involved in the merger should present a petition to the HC for confirming the scheme of merger. A notice about the same has to be published in 2 newspapers.

(8) Filing the order with the registrar:

Certified true copies of the high court order must be filed with the registrar of companies within the time limit specified by the court.

(9) Transfer of assets and liabilities:

After the final orders have been passed by both the HC's, all the assets and liabilities of the merged company will have to be transferred to the merging company.

(10) Issue of shares and debentures:

The merging company, after fulfilling the provisions of the law, should issue shares and debentures of the merging company. The new shares and debentures so issued will then be listed on the stock exchange.[478]

- **Waiting Period in Merger**

[478] Supra note 1

International experience shows that 80-85% of mergers and acquisitions do not raise competitive concerns and are generally approved between 30-60 days. The rest tend to take longer time and therefore, laws permit sufficient time for looking into complex cases. The International Competition Network, an association of global competition authorities, had recommended that the straight forward cases should be dealt with within six weeks and complex cases within six months.

The Indian competition law prescribes a maximum of 210 days for determination of combination, which includes mergers, amalgamations, acquisitions etc. This however should not be read as the minimum period of compulsory wait for parties who will notify the Competition Commission.

In fact, the law clearly states that the compulsory wait period is either 210 days from the filing of the notice or the order of the Commission, whichever is earlier. In the event the Commission approves a proposed combination on the 30th day, it can take effect on the31st day. The internal time limits within the overall gap of 210 days are proposed to be built in the regulations that the Commission will be drafting, so that the over whelming proportion of mergers would receive approval within a much shorter period.

The time lines prescribed under the Act and the Regulations do not take cognizance of the compliances to be observed under other statutory provisions like the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ('SEBI Takeover Regulations").SEBI Takeover Regulations require the acquirer to complete all procedures relating to the public offer including payment of consideration to the shareholders who have accepted the offer, within 90 days from the date of public announcement. Similarly, mergers and amalgamations get completed generally in 3-4 months' time. Failure to make payments to the shareholders in the public offer within the time stipulated in the SEBI Takeover Regulations entails payment of interest by the acquirer at a rate as may be specified by SEBI. [Regulation 22(12) of the SEBI Takeover Regulations] It would therefore be essential that the maximum turnaround time for CCI should be reduced from 210 days to90 days.[479]

ENGLISH LAW GOVERNING M&A

[479] Supra note 6

In contrast to civil law jurisdictions the common law places greater importance on judicial decisions and applies the doctrine of precedent, which aims to decide similar cases based on previous decisions of higher courts. Operating alongside this system in the UK is a series of conventions and principles which have stood the test of time and remain part of the legal system to this day. One of the most significant of these is the principle of 'Caveat emptor', which translates from Latin as "let the buyer beware". It is central to UK law on commercial contracts, including mergers and acquisitions.

When buying a company or business in the UK there is very limited statutory protection for the buyer on the nature or extent of the assets and liabilities being acquired. The buyer is responsible

For well knowledge and learning on the issue of both assets and liabilities which is to be acquired. This led that the small companies also have the potential which has unlimited liabilities which remains only in the hands of a company and can be transferred to the buyer on a purchase of a share.

Caveat Emptor does not mean that a seller can deliberately conceals liabilities or misinterpret the state of the company. In these circumstances a buyer that has been induced by the misinterpretations to buy the business can take actions against the seller for misinterpretation.

However, the vendor won't be guilty in cases where they did not mention the situation on what they have been asked for making an innocent mistake or have no knowledge of a particular issue. The buyer must therefore ensure it is fully protected in the sale and purchase contract and undertake a rigorous on the process which is diligent.[480]

- **ENGLISH LAW AND DISPUTE RESOLUTION**

English law is chosen by the buyers and sellers around the society for governing *M&A agreements where ever the deals had no connection with UK, also the basic principle under the category of English law is that the parties have the right to enter into a contract. There are some specified areas where the English principles* are overlapped in the terms of contract that are rarely implied in the English courts, which therefore means that the principle of "caveat emptor" or buyer beware is applied only for the protection which is written in the contract, with less possibility for claiming into the contract. In the sense of Alternative Dispute

[480] https://gowlinggwlg.com/en/united-kingdom/insights-resources/an-introduction-to-uk-merger-acquisition-law

resolution, there are English courts for the good quality. Also, the cases are decided only by a judge for the well determination. Litigation which is costed they are generally loser pays principle but in other jurisdiction there is a risk of damages that are punitive. In English contract law, there are buyers who need the consideration for the requirement of companies that are settled in UK with good securities law that includes the rules that are even applicable to the companies having share

- **PUBLIC M&A In the UK**

The acquisition of the traded company is generally affected in many ways with different methods that are used on certain grounds for the deal, whether the takeover should be hostile or any recommendation to be made with targets. The foremost method is contractual offer that are similar to offer of USA wherever the offers are made for the shareholders to accept or not. The offers are subjected to the series under certain conditions such as acceptable condition. It is acquired and received that in acceptance there are more than 50 shares which are generally targeted in the company for enabling the closure of the deal which are often decided at the high level of any acceptance. Generally, there are bidders who acquire 90% of the shares for squeezing out the minority. Another way for the court approval is the scheme of arrangement which is proposed by some targets. There is a statutory procedure in which the scheme should be approved by the majority with at least 75% of the shareholders who vote, therefore then the scheme should be sanctioned in the court. The takeover of a public company UK is governed by certain codes which are overseen by various panels, and these takeover codes are based on different sets of principles undermine by rules and other things.

Therefore, the takeover panel is not interested based on the merits of the bids which ensures the Takeover code and plays a very important role for the regulation of bids with different approaches to the regulators[481]. There is also an intervention of court or litigation in the public M&A in UK parts because of the Takeover code. Under the regime of UK if there is a possibility interest which becomes popular and known in the market foe example on a leak, if there is any possibility with the interest then the offeror should publicly announce and regime the bidder within 28 days for the announcement with the intention to a firm or when there is no intention to make an offer which is locked for 6 months. The requirement for announcing

[481]https://www.lawontheweb.co.uk/business/mergers-and-acquisition

the potential of the bids is when there is any rumour created on the price movements that are enforced and are under the observation by the police officer, also enforced by the Takeover panel. A&T were forced for announcing the end of their interest with a possible offer during 2014 with certain press speculations in a possible bid for Vodafone[482].

The particular requirement for the takeover bid is a bidder which is announced only once with the intention of a firm with various offers that is basically required for proceeding with an offer. Beside any acceptance condition both UK and EU and anti-trust conditions are offered while containing business conditions including change in material with the target (MAC). Therefore, there is a threshold where the takeover panel permits a bidder for invoking different conditions and there is only limited due to diligence especially in a hostile situation that is limited with warranty and protection.

Unlike in US there are mostly the European jurisdictions that are wide-ranging prohibition with a target to enter into the arrangements that are related on offers, example breaking of fees and other protection measures on deal which are technically typical and does not comfort the will of an offer that are successfully launched. Therefore, the target board not only allows taking any action that can frustrate a bid and there are UK companies that do not take poison pills with similar devices to ward off unwanted bidder[483].

- **PRIVATE M&A**

The sale and purchase agreement or any unlisted company that is usually sold or pursuant to any sale or purchase agreement in which they are entered i.e., among buyer and seller. The common form is used on the bilateral acquisition on shares and assets for the long form of sale and purchase agreement which are prepared by the purchaser and advisors. There will be setup in terms of the transaction, on its conditions and extensive warranties. During auction a short seller draft agreement is used as the starting point and the initial covenants are offered by the seller that are limited, and the purchasers are invited for adding protections that are necessary and are approached to all the documents in the form of assessment of their bid. Private equity sellers also look over to limit the warranty package more effectively for entitling the capacity while reflecting the roles during the management of any business and for proceeding the sale

[482] Vodafone and liberty locked in cable war
[483] Ibid

which can be distributed to investors once they are completed with the deal without any recourse of risk.

There are forms of agreement that are used on distressed deal where the seller face insolvency and then the process is led by an administrator (appointed by the bank creditor) who contains only the deal mechanism that are required for transferring the title, also title with protection for the purchaser other than the capacity of an administrator for effecting the transfers. The condition to an acquisition can only be limited to specified issues which go in the heart of a deal for example anti-trust approvals and consents to counter the parties without any party for the proceeding even if they are not prepared.

The UK listing rules requires a listed company that is a party to any transaction for getting an approval of a shareholder for significant transactions or the transactions that are related to parties. The inclusion of MAC condition is inclined towards the concern of targeted economic conditions which is generally not a standard practice, therefore their uses increase the popularity at the time of last recession.

Price adjustment is one of the common price adjustments which is gone through the preparation of full completion of accounts and at least there should be a reflection to the key variables such as working capital and cash. Locked box processes at that time became more popular for the sellers to get simplicity, speed and certainty on the prices. Under the locked box mechanism, the prices are agreed on the reference to a historic but they are relatively the recent balance sheets, the idea for taking an economy at risk and also to pass the benefits to the buyer for the date of locked box date. Then they are backed up by an indemnity from the seller with relation to any leakage that is locked example: dividends, transfers or any other payment that are in the favour of the group of a seller.

However, the locked box method is not suitable at all cases or situation and it does not give protection to a purchaser with respect to the changes in the position of trading as the target is achieved after the locked box seek proper completion on the accounts of favoured and adjusted cases. A disclosure letter is then produced by the sellers with the setup of certain specified disclosures that are against the warranties and in the standard of UK to have the general disclosure to be made by different data that is provided by the data room. Also, the remedy for warranty breach is the action which is contractual action in terms of damages, the requirement of buyer for the demonstration on the breach of warranty for reducing the value of the targeted company as it is difficult to establish. It has been very unusual for having warranties on

indemnity basis i.e., recovery on pound for pound. In the market of UK, the indemnities are tended to get themselves reserved for specific matters where there is a specific issue which is identified by the buyer. Therefore, representations are different from warranties under English law as they have given rise to various measures of damages, which give rise to the remedy of rescission to allow the buyer to walk. Accordingly, they are infrequent and there is no standard that are set for limitations for the protection in UK and every deal are driven through its own dynamics. For example, the parties may agree as they are followed, and there are some warranties that are related to tax, fundamental warranties and accounts such as shares that are capped with the overall consideration for the deal.

Depending on the counterparties and the competitive pressure there has to be a different cap on liability on various warranty breaches and they are probably capped in the range of 20%-70% with the overall consideration and the warranties needs to have around 18 months – 2 years with a minimum threshold that are reached for the claims that are made. Under the share sale that are standing alone as a tax indemnity for certain historic and the current tax liabilities. Employees and pensions have been issued as there are rules that are designed for the protection of business and the employees for business and sales of assets. The rules are to be operated for the transfer of employees for the business automatically on same terms under employment of the buyer and it is difficult to change all the terms or to exclude the employees from the transfers. There is an obligation made to inform and consult all the employees before closing. On public M&A the takeover code makes the bidders for stating the intentions with regard to the employees and also the impact of the strategies on the workforce. Also, there are parties who takeover bid and provide information to the employees and the trustees for any pension scheme where the target is made. The employee representative and the schemes of pension have an opportunity for publishing their opinion and the target defines the benefit of pension scheme where the trusties can consider the power in M&A process- that is often a transaction for assessing that whether there will be a negative effect on the schemes and the employer's ability for finding the liability of scheme fund. They can also seek assurance and commitments for the mitigation that are against the risk. Also, they are dependent on certain terms of scheme and the trustees have the full power with the impact of the contribution that is required for the participation of an employee's which includes the target. The UK pension's regulator has the power for acquiring the parties for the contribution to support the pension scheme and these

powers should be fully understood on the mark of M&A process. The merger control UK in an open market[484] and foreign investment that is encouraged with certain number for many years. Also, the intervention that is by the government on the grounds of public or interest of nation that are historically featured in UK M&A market. Also, the basic principle with certain exceptions that UK merger controls on the competition to access the test that are independent of government and are not wide in the public interest test. Where the merger has aEuropean dimension and the EU Merger regulation is applied where there is again any competition-based test. *Also, the UK government is limited with certain powers for the intervention for a specified interest of a public concern and are limited only to 3 areas: national security, quality and standards also the financial stability*.

CASES ON MERGER AND ACQUISITION

- TATA & CORUS: A CASE OF ACQUISITION

Tata steel has been set up for Indian parsi in 1907, as they began the operations in 1912 and Tata Steel has hold extremely indispensable place under the Indian business history. The progression time of TATA has begun in establishing the processes and resources into different systems of the process of oil, carriers and is distributed and there are fares known as the Tata fares.

Organization comprised 4 division that has incorporated the strip items, long items, aluminum and they are appropriate of having the headquarter in London. The arrangement made it the world's largest steel maker and India's biggest remote takeover[485] that is taken after the Mittal's steel for securing an opponent around the same time that obtained Corus on April 2007 for making the Indian Organization the world's fifth steel maker. This handle begun long back in 2005. This arrangement is 100% obtained and there is a new substance that is controlled by Tata's steel auxiliaries. They are expressed by Tata that underlying the intention as they are finished but they are reasonable worth.

Tata has financed the Corus from the inner organization assets with the implication more than 66% of the arrangement that are financed through credits from the significant banks. Also, after obtaining Tata steel shared and fall by 10.7% on the securities of Bombay. So there held the

[484] HM Treasury Consultation on fair deal policy: Treatment of pension on compulsory Transfer of staff
[485] http://us.practicallaw.com/

general examination where it is observed that the deal was perceived by the acquisition of dream in a long-term strategy while positioning the Tata in the European markets critically.

ARRELORMITTAL CASE OF HOSTILE TAKEOVER

On August 1, 2006 Mittal Steel had procured 91.9% of the share capital of Arcelor. This ensured the exchanges of Mittal steel and is expanded its proprietorship directly to 94.2% that incorporates the issue and the shares and the majority of the convertible securities are procured in return for around 680 million Mittal Steel class. The security is represented with the utilization of the strategy of a buyer for bookkeeping that requires the benefits that are obtained and the liabilities that are expected to be recorded for making the evaluation of reasonable values on the date of acquisition.

In the memorandum of understanding Mittal Steel and the shareholder on June 25 concurred that there would be coverage into Arcelo that are practicable after consummation of the changed offer and they are the joined substance that are consolidated, headquartered and domiciled in Luxembourg. Also, after taking examination at the meeting on April 27, 2007 and Mittal Steel Board of directors had chosen to sort out the different 2 stages for preparing compliant with Mittal Steel that can be converted and this would be a defined entity of survivorship.

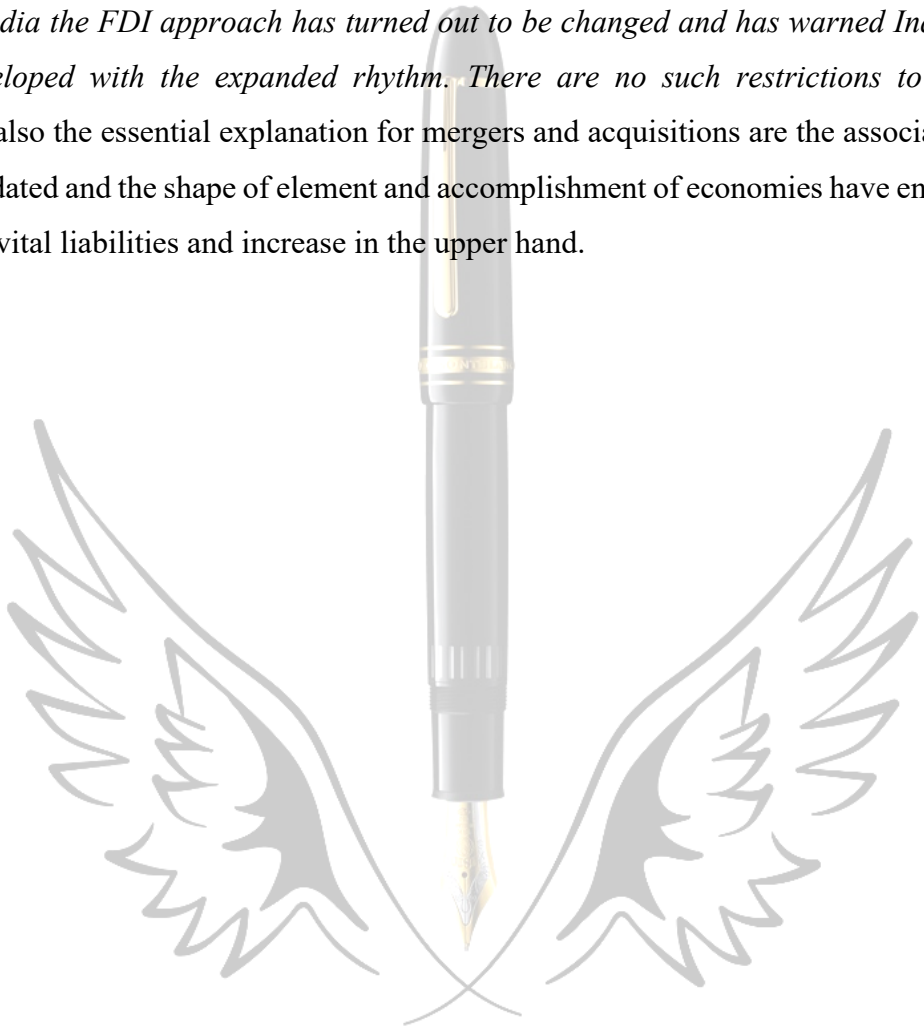
Arcelor Mittal was fused on August 13, 2004 and was renamed on April 26, 2007. It did not give a direction for any operation that were condensed with the method of retention by Arcelor Mittal of Mittal Steel without any liquidation of Mittal Steel and it consolidated the organization that was renamed as Arcelor Mittal.[486]

CONCLUSION

Investors had ought to take a good way to deal with the UK acquisition and must complete broadly regardless of the possibility of the association with a seller for the well set-up. As the UK is the little organization regardless of the fact that there are no such resources that have the liabilities that are critical with a contract which is drafted. The positive aspect of the framework

[486] http://corporate.arcelormittal.com/corporate-responsibility

of law has permitted the opportunity of agreement and also the specialist of finance can tailor the consent for ensuring the merger or acquisition which is the right arrangement with proper cost. *In India the FDI approach has turned out to be changed and has warned India and has been developed with the expanded rhythm. There are no such restrictions to the sorted business,* also the essential explanation for mergers and acquisitions are the association which is consolidated and the shape of element and accomplishment of economies have enlarged their compass, vital liabilities and increase in the upper hand.



RELEVANCY AND IMPORTANCE OF FUNDAMENTAL DUTIES

- **JAI MISHRA**

ABSTRACT

The aim of this research paper is to study the concept of fundamental duties as incorporated in Indian Constitution. The findings of the paper indicate an interesting nature of fundamental duties and significant importance it has on Indian Legal system and jurisprudence. The findings of this research paper can be used for increasing awareness as well as for educational purposes.

INTRODUCTION

With great power comes great responsibility, is a popular concept in the modern world. Something similar is also common concept in Legal world's jurisprudence i.e with every right there comes a corresponding duty.[487]

Interestingly enough only fundamental rights were given immense importance in historical constitutions as well as in constituent assembly debates but obligations/duties of every citizen towards the state were not talked about nor incorporated in our Constitution which came into effect for the first time on 26th Jan 1950.[488]

However, it cannot be said that the concept of duties was completely forgotten because despite the almost negligible talks of duties, the concept of citizen owing obligation to the state was inherited into the spirit of the constitution right from the beginning.

This lead to incorporation of a new chapter i.e Chapter IV-A titled Fundamental Duties into our Constitution by 42nd amendment in 1976 stating that since very nature of duties being in the spirit of the constitution, its makers were at fault for not specifically including it right from the start.[489]

[487] Krishnendra Joshi, Importance of Fundamental Duties iPleaders (2019),
[488] Vineeth Krishna E, Fundamental Duties in Indian Constitutional History Constitutionofindia (2019),
[489] Swaran Singh Committee Report

Thus, Article 51-A came into existence specifying certain fundamental duties which ought to be followed by every citizens. However, its very nature made its incorporation and existence being questioned.

The aim of this research paper is to find out whether or not the concept fundamental duties are important enough to exist in our constitution; if yes, why they are still not justiciable.

NATURE OF FUNDAMENTAL DUTIES

During framework of out institution it is no secret that a large amount of focus was given fundamental rights. However, duties were not completely ignored as evident from the words of **Prof. K. T. Shah** in the constituent assembly debates:-

"we have all along spoken only of 'rights' in our constitution, while we have not said even a word about our duties….as thinking individuals, community and assembly to dwell only on rights and to forget our duties as a citizen, society and nation is not right. I would state that obligation of State towards the individual is important and equally important are the obligations of citizen to the State"

Unfortunately the fundamental duties of citizen then could not become the part of our constitution but its spirit was inherited in it through the words of Prof K. T. Shah. However years later with the 42nd amendment the mistake of not including fundamental duties was rectified as **Chapter IV-A** was inserted including **Article 51A** laying down Fundamental Duties which ought to be performed by every citizen of our country

Although they are now included, their legal standing remains same as directive principles with the difference being that the directive principles are addressed to the state and fundamental duties are addressed to the citizens while both does not carry with it any kind of legal sanction for their violation.[490]

This makes the very nature of Fundamental Duties non-justiciable. State cannot punish any citizen for violating their Fundamental Duties. Moreover they are not enforceable through mandamus or any other legal remedy by its own. A person cannot move to the court of law to enforce a particular duty on anybody or pray for punishment for fundamental duties violators.

[490] Mohit Daulatani, Fundamental Duties under the Constitution as Legally Enforceable Duties under Different Statutes Legalservicesindia

The question which lingers here is that if fundamental duties were so important that despite being debated and omitted in the original constitution it was brought back in 42nd amendment, why give them no actual force of compulsion?

A simple answer to this question is that not every citizen of the country is able enough to perform all his Fundamental duties. A poor man earning Rs 50/ day would be in need for his

Fundamental Rights of life, liberty etc to survive but would not be able to perform his duty of striving towards excellence[491] because he'll be busy in surviving. A person cannot be punished for something or forced to do something which he is not able to do.[492]

However, this non-justiciablity and non-enforceability by its own does not makes the entire subject matter of Fundamental Duties passive or just for show. Although Fundamental Duties are non-justiciable, they are enforceable by law.

What this essentially means is that a law can be made incorporating the very text of any of the 11 fundamental duties and lays down specifics for their fulfillment and can also punish for non-fulfillment.

This can be seen by numerous laws embodying the fundamental duties and essentially giving them force of law and compulsion while laying down specific conditions for their fulfillment. Examples of such laws being:-

1. The Forest (Conservation) Act of 1980 – to ensure protection of forest i.e Article 51A(g)
2. The prevention of Insults to National Honour Act, 1971 – essentially embodies Article51A(a)
3. The Wildlife (Protection) Act, 1972 protect and prohibit the trade in the case of rare and endangered animals.
4. Various criminal laws such as IPC, etc making certain offences such as community, religious, caste hatred and various offences against women indirectly makes all of us to follow our fundamental duties.

IMPORTANCE OF FUNDAMENTAL DUTIES

[491] Constitution of India, 1950 Article 51A(j)

[492] Amogh Dabholkar & Vaishnavi Kamble, Fundamental Duties as a mean to achieve responsible Citizenry SCC Blog (2020)

The importance of Fundamental Duties is immense. They are not only reflected by being in the spirit of constitution or just by being enforceable by law despite being non-justiciable; but also through the position it holds in Indian Legal world and Indian jurisprudence.

In fact one of the earliest examples of showing their importance comes through the case of ***Minerva Mills Ltd.v. Union of India***[493] where it held that a rule imposing any kind of obligation on anyone may exist even though it may not be enforceable. Such a rule will no doubt raise any corresponding right but still would be considered as a legal rule because its very nature prescribes a particular norm of conduct which is to be followed. Law may later provide methods of enforcing such rule but just because there is no way judicial or quasi-judicial platform to enforce such rule, it would not cease to exist and will still prevail. If such rules are not considered as rule of law just because they are not enforceable by themselves then "even rules of International law would no longer be liable to be regarded as rules of law"

This was neither only nor the last judgment signifying the importance of Fundamental Duties. In ***Javed vs. State of Haryana***[494] their importance is seen as the court held that fundamental rights must be read along with directive principles and fundamental duties. Reading all of them alone and in isolation is not affordable.

Reading together is not merely for the purposes of interpretations and understanding the rights or any other laws. It is, so that Fundamental Duties can become reasonable restriction on fundamental rights as well as a test of constitutional validity of any laws.[495]

State of Gujarat vs. Mirzapur[496] held that Article 51-A plays a very important role in determining the constitutional validity of any law enacted or any other executive act. Moreover reasonableness of any kind of restriction which may be imposed on fundamental rights such as prohibition, control or regulation can be tested by either taking DPSP or Fundamental Duties into the picture.

This essentially means that any law enacted or an executive act can be safeguarded by testing their constitutionality on the basis of fundamental duties i.e they can save a law if it is in line with fundamental duties.

[493] (1980) 3 SCC 625
[494] (2003) 8 SCC 369
[495] Diganth Sehgal, Fundamental duties iPleaders (2019)
[496] (2005) 8 SCC 534

Another case highlighting the immense significance of fundamental duties is of ***Re-Ramlila Maidan Incident Dt vs Home Secretary And Ors***[497] which held that duty is the true source of right and there would occur imbalance if importance is only given to either fundamental rights or fundamental duties and not both. It also reiterated that fundamental duties are a reasonable test of validity for any legislative/executive acts.

The above cases are more than sufficient to establish the significance/importance of fundamental duties but one may argue that the reassurance given by the courts in above cases are only theoretical. However this is not the case. The following are the cases which reiterate the importance of fundamental duties from being practical point of view:-

In ***Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh***[498] mining operations which was being carried on Mussoorie hills was banned and ordered to be shut down completely was found to be reasonable and sustainable and the support for such derivation was fundamental duties itself [Article 51A(g)] and held environmental preservation and maintaining ecological balance is a social obligation which not only government but also every citizen must undertake.

In another case of ***Government of India vs. George Philip***[499] George was granted two years leave for training whereby he overstayed in foreign and despite reminders did not come back. After this charge was proved he was being compulsorily retired, this decision was challenged by him. High court did allow him to keep his job however the Supreme Court setting aside this HC order held that Article 51A(j) teaches us that one should always strive towards excellence in all spheres of life which is impossible until and unless discipline is maintained among employees which was not in this case. Moreover it also established that no order can be passed which will destroy the very essence of Article 51A i.e fundamental duties.

Aruna Roy v Union of India[500] is another important case whereby National Curriculum Framework for School Education's constitutionality was challenged on the grounds that its teaching are against the secular framework of the nation thereby violating Article 28.

NCFSE was providing value education development related to major religions in the world and the SC held that it is not imparting any instructions being in the nature of prohibited under

[497] (2012) 5 SCC 123
[498] AIR 1987 SC 359
[499] AIR 2007 SC 705
[500] (2002) 7 SCC 368

Article 28 but it was instead fulfilling the purpose of what is inscribed in **Article 51A(e)** i.e striving to promote harmony and the spirit of common brotherhood. These cases mentioned above proves that the importance of Fundamental Duties are not only theoretical but instead it is very much real and usable in the practical scenario and in the real world.

CONCLUSION

Fundamental Duties are obligations which every citizen owes to the state and therefore are required to be performed. These duties cannot be forced upon someone nor can one compel anyone to do them as by nature itself they are non-justiciable.

However their non-justiciable nature does not makes them worthless or just for show, as they are enforceable by law i.e can't be enforced by itself but through a law enacted by the legislature. Their importance can neither be forgotten nor be undermined. Being inserted in controversial 42nd amendment which was more or less almost completely reversed by later amendments and still not being removed by those later amendments highlights their importance.

It is now clear that Fundamental duties cannot be enforced on its own by the court but are nevertheless one o the most important constitutional tool which not only provide valuable guidance but also paves the way for interpreting constitutional as well as various other legal issues.

They are not a passive entity in our constitution but an entity which is complementary to both fundamental rights and DPSPs.The way they are incorporated in our constitution i.e non-justiciable but enforceable by law is justified and undoubtedly makes them relevant and executable.

To sum up Fundamental Duties, the words of Supreme Court in **A.I.I.M.S. Students Union v. A.I.I.M.S. & Ors (2002) 1 SCC 428** are perfect:-

"When there is doubt about the fundamental duties as people's mandate, the Article 51A plays a crucial role not only for solving the issue but also for constructing new and trendsetting ideas as a relief given by the court. All the duties contain an essence and a sense of duty is build by each duty and be in their constitutional limits and respect the constitutional values."

BABA RAMDEV & ORS. VS. FACEBOOK & ORS.

- **DIVISHA SRIVASTAVA**

HIGH COURT OF DELHI

CS(OS) 27/2019

JUDGE: JUSTICE PRATIBHA M. SINGH

DECIDED ON: OCTOBER, 23, 2019

RELEVANCY OF CASE: **GLOBAL REMOVAL OF DEFAMATORY CONTENT FROM ALL SOCIAL SITES.**

PLAINTIFF- BABA RAMDEV AND OTHERS

DEFENDANT- FACBOOK AND OTHER SOCIAL SITES.

Baba Ramdev & ors. Vs. Facebook & ors is a case in regards to removal of defamatory content from all the social media sites. The section 79(3)(b) in The Information Technology Act, 2000 states that after receiving any knowledge, or being informed by appropriate government that the information, data or communication connected with the computer resources is use to commit any unlawful act, the content immediately be removed from the social sites. The court grant the removal of defamatory content from all social sites which uploaded from Indian IP Address.

SUMMARY OF THE CASE

The Plaintiff Baba Ramdev filed a case against Defendant Facebook and other social sites for global removal of the books and videos which content defamation statement about him. Baba Ramdev mainly focused on the book "**The untold story: Baba Ramdev**" authored by ***Priyanka Pathak*** which content defamatory remarks about him. Plaintiff wants global removal of the books and videos but the defendant did not agree. Defendant said no efforts have been made by the plaintiff to implead the persons details which have been provided by BSI. Defendant said they agree to remove content within the Indian domain not on global domain. Defendant said they are responsible to remove within the jurisdiction of the case. Every country has their own defamation laws which differs from jurisdiction to jurisdiction.

After listening both sides, High Court directed Defendant to take down all the defamatory content from social media which have been uploaded from IP Address within Indian domain. Secondly, Court declines to exercise its jurisdiction and state that in such cases defendant were directed to block access from being viewed in Indian domain and ensures that no Indian can access the same.

BRIEF FACT OF THE CASE

Baba Ramdev, **the Plaintiff** is a public figure and yoga guru in India. He filed a suit in **High Court of Delhi** against Facebook and other social media sites, **the Defendant** to remove the defamatory statement from their sites. The plaintiff wants the global removal of the book named "**The untold story: Baba Ramdev**" authored by ***Priyanka Pathak*** and some **videos** which content defamatory remarks about the Baba Ramdev.

None of the social sites have issue to remove contents within the Indian domain, but they have issue with the global removal.

PETITIONERS ARGUMENT

Petitioner said once the book and videos get published his reputation is harmed by it. Petitioner relay on the case of supreme court Shreya Singhal Vs. union of India, where court order to remove content globally. They placed various reasons and definitions of computer resources which says to remove defamatory content form the social sites under IT Act, 2000, to back their argument in court to remove the content globally not in Indian domain only. They also stated that computer resources are capable to take down the content globally, as per their community guidelines and terms of use. The petitioners also clarified that they have enough details about the users who circulated the defamatory content but they did not have specific details to identify him yet.

DEFENDANTS ARGUMENT

Defendant argued that platforms are mere intermediaries not publishers, they were not liable for third party content on their websites. They did not monitor constantly to every content which uploaded on their websites. Petitioner did not implead parties who actually uploaded the content in questions. Defendant argued that defamation laws differ from country to country so, we are not liable to block the content globally. Defendant said they have no issue in removing the content from their websites but they only remove from the Indian domain not from global

domain. Defendant also argued that Section 75 which provides for extra territorial jurisdiction was limited to infringements and offences under the IT Act and defamation was not covered by the provisions. Defendant also argued that the book which petitioners mentioned is available in various international websites before it published in our websites. Defendant said that geo-blocking of content is enough to take care of petitioner's interest.

ISSUES INVOLVED

The case involved removal of defamatory content from global domain. The case involved the section 79(3)(b) in The Information Technology Act, 2000 states that after receiving any knowledge, or being informed by appropriate government that the information, data or communication connected with the computer resources is use to commit any unlawful act, the content immediately be removed from the social sites.

JUDGEMENT

The case decided by the Justice Pratibha M. Singh. The judgement focused on section 79(3) of IT Act, where the platforms are liable to take down any content immediately once declared unlawful in computer resource inclusive of a computer network. The court directed defendant to take down the defamatory content from their websites which have been uploaded from the IP Address within Indian domain.

In case the content uploaded from outside the Indian domain, the court declines to exercise its jurisdiction on it and stated that in such cases the defendants are instructed to block access and desirable URL/ LINKS from being viewed in Indian domain and ensure that no Indian can access the links on global basis.

OPINION

The court instructed to take down defamatory content in Indian domain on based Section 79(3) of IT Act, which state to take down any content which harms any person's reputation in any manner within the Indian domain.

The court order to restrict Indian to access the defamatory content on social websites on the basis of their jurisdiction. This shows how court take care not only about their laws but

international laws too. The court directed to work defendant on the basis of defamation laws within the jurisdiction.

Indian Court work in well manner by taking care of not only Indian but international laws also. Court gives his verdict after understanding and elaborating the laws which were essential in the case.

Indian court aims to maintain balance between freedom of speech **ARTICLE 19(1)** and expression and right to privacy **ARTICLE 21.**

CONCLUSION

The court concluded by passing order of injunction and take down the defamatory content from the social website is very effective, which may have global impact or could conflict of law situation and may hurt feelings from the speech. The court issued his judgement effectively under Section 79(3) of IT Act, 2000. The judgement done within the jurisdiction without hurting any laws within or outside the domain of jurisdiction.

INDIVIDUAL AS SUBJECT OF INTERNATIONAL LAW

- MEGHA MISHRA

Introduction

International law, which has existed since the twentieth century, has played a major role in the foundation of humanitarian ideals. Some legal philosophers and jurists, such as Hall and Lawrence, embraced international law, while others treated it as unreal law. John Austin said that it is just as positive foreign morality.

The word "international law" was coined by Jeremy Bentham, a Jurist. Its presence was taken into account in order to maintain peace and harmony among various countries through the use of various methods such as treaties and conventions.

International law is divided into several categories. The figures and laws on which rights and obligations may be levied, such as states, authorities, and persons, are deemed to be subject to international law.

Individuals include human beings, foundations, legal, and business enterprises in a wider legal sense. Individuals were recognised as subjects of international law prior to 1945, but no obligations or privileges as direct individuals were enforced on them.

Positivism failed to describe individual as a subject of international law from the time of Jeremy Bentham. Originally the subject oriented approach of international law was just an ordinary attempt of Bentham to provide some sort of rational way to explain that law can have different subjects- individuals and states[501] while it being categorized that law on basis of subjects is fair and just and also in the arena of practicing the law of nation and international law of nations and international law have concerned more than legal rights of the states.

In Republica v. De Longchamps, an American Municipal Court found the defendant accused of assaulting France's diplomat to the United States. It was decided that the case "must be determined on the principles of international law." [502] Blackstone was observed at the time, and there was no question that a person might be held responsible for violations of international law. “The person of a public minister is scared and inviolable,” the court said. Anyone who

[501] “See Supra notes 4-9”

threatens him with violence not only insults the sovereign he serves, but also jeopardizes the general protection and well-being of nations. He is committing a crime against the rest of the world. It's also deemed international law. The accused was sentenced to pay a fine of one hundred French crowns to Pennsylvania's Common Wealth and to undergo "a little more than" two years in prison.

Position of Individual as Subject of International Law

The status of international law concerns has significantly changed with the passage of the time. International law, according to a few jurists, only applies to states. They claim that international law regulates the acts of states and that international law applies only to states. Individuals are artefacts rather than subjects of international law, according to them and positivism. It is, however, wrong to claim that individuals are not subject to international law. Some jurists claim that people are the pillar of society and that they are the subject instead of the subject of international law. The International Court of Justice has ruled that states are not the only subjects of international law, and that states can be held responsible for the actions of their agents. In addition to States, Democratic International Bodies, Entities, and other non-state institutions are identified as subjects of international law in modern international law.

The duties of states under International Law are essentially the duties of a person, and there is no distinction between International Law and State law. According to Kelsen, all laws refer to and are intended for individuals.

In past years, a variety of treaties have issued rights and duties on individuals. Take the "International Covenant on Civil and Political Rights", for example.

In the official case of Danzing Rails in 1928, the Perpetual Court of Justice stated that if the parties to a treaty try to impose some rights on such people, international law would recognise and enforce those rights.

In the international arena, a new trend has emerged in which certain rights have been granted to individuals even in the face of states. For example, the European Convention on Human Rights was adopted in 1950, and the International Convention on Human Rights was adopted in 1966, with an optional protocol that allows a person who has been the perpetrator of a violation of human rights by his own state to petition the United Nations Commission on

Human Rights. International organisations are now recognised as being subject to international law.

Under international law, the United Nations is an international person, and the International Court of Justice has ruled that it is a subject of international law, worthy of holding rights and duties, and capable of preserving its rights by carrying international objects.

Individuals, in a legal context, are a wider concept that includes human beings, foundations, and lawful commercial enterprises in international law. While not everyone should have the same rights, it is put into consideration in a bigger perspective. Prior to 1945, international law could consider persons as subjects but did not provide them with direct duties, privileges and responsibilities. In general, international law has only considered entities in an abstract sense for decades. People were seen as artefacts rather than subjects since international laws are laws between states, and individuals are citizens of those states. Within international law, they were deemed disqualified to have rights and duties. Following World Wars I and II, however, the international community saw the need and possibility of accepting an individual's legal obligations under international law and making them subjects of international law in some way. Individuals are often treated as only partial subjects of international law, with states holding the dominant position.

Theories behind such view

On the nature and extent of the individual's position in international law, there are several points of view. From complete denial of a person's international life to recognition of the individual as the primary subject of international law, the attitudes are diverse.

Theorists provide a series of justifications for declaring someone's international personality under international law. The essence of international law, the gradual growth of the international legal order, the growing convergence of humanitarian values and ideals, the superiority of international law over domestic law, and international law's direct influence over individual rights and duties have all been cited as factors.

There are several points of view upon on reach and essence of the individual's status in international law. From outright rejection of the subject as an international subject to acceptance of the individual as the sole subject of international law, opinions differ. The

declaration of the citizen as a topic of international law first appeared at the end of the nineteenth century, and it received substantial momentum after World War II. Many factors support the individual's status as an international personality, including international law's supremacy over native/domestic laws, international law's specific supervision of individual rights and duties, the international legal institution's evolving evolution, the nature of international law, and the growing convergence of humanitarian law onto international law.

Under international law, there are various versions of the individual. In human rights and humanitarian affairs, Hersch Lauterpacht was the first to relate international law to the need for and recognition of individual legal personality. He argues that these reforms have altered the average citizen's status, allowing individuals to better defend their rights before international tribunals and enforce obligations directly under international law. Despite the lack of laws that would allow people to develop their international personality and the determining role of state policy in formulating rights and duties for individuals, he asserts that, like all rules, people are the subject of international law, and that this reality does not justify the fact that people are the subject of international law. He also goes into the exceptions, which help to support the general rule.

Hans Kelsen is sympathetic to personal characteristics under international law. Though he agrees that international law applies to states, he only cites broad variations that also are limited to the possibility of individuals being held accountable under international law for infringing an international law-imposed code of conduct. Wolfgang Friedmann has undertaken a study of scholarly perspectives on the acknowledgement of an applicant's status under international law, which is useful in assessing the true essence of the issue. As a result, they've classified between a citizen who is the target of enforceable international claims and an individual who is the beneficiary of an international legal system under which states are the targets and sole actors but are directed to act on behalf of the individual.

Human personality, according to non-monist Schwarzenberger, is merely a matter of reality, not theory He envisions the establishment of rules of some kind between permissible states through an arrangement, enabling the states to exercise their discretion regardless of public policy or the rule of law. Other members will work through states or state policies, according

to Myres McDougal, while Rosalyn Higgins proposes that international law be discarded altogether since nation-states wield the entirety of influence.

Position and Roles of Individuals

There was no theoretical insistence before positivism that the laws of international law extended only to states. The sentiments of the middle eighteenth century[503] were expressed in William Blackstone's writings. Individuals and states were all proper subjects of the rule of nations for Blackstone. He didn't draw a distinction between what would later be known as public and private international law[504]. Blackstone differentiated his law of nations from other types of law not by the topics it dealt with, but by the sources it drew from. He saw universality in the laws of international law, which he derived either from natural justice or from the experience of several states[505]. Three municipal legal laws, on the other hand, came from a single jurisdiction.

Conflict of laws is now recognised as more than just a subset of international law. Conflict of laws, on the other hand, is a matter of municipal law, not international law, as Story saw it. My point isn't that the theory dividing public and private international law is out of date; it's obvious that the theory reflects reality.

Rather, I believe that theory should begin to encourage practise, at least in some situations, in order to bring public and private international law closer together.

Part of my point is developmental. The laws that existed after the positivists narrowed the focus of international law gave birth to private international law. International law, also known as public international law, was originally intended to address only state-to-state ties, according to positivists. This classification did not represent the reality of international practise and continues to do so.

[503] The law of nations is a system of rules, deducible by natural reason, and established **by** universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.

[504] Blackstone's law of nations included "mercantile questions, such as **bills** of exchange and the like," "all marine cases" and "disputes relating to prizes, to shipwrecks, to hostages, and ransom bills." *Id* at 67.

[505] ***Id*** at 66-67.

What need is there to presume that the laws of private international law are exclusively municipal if individuals are subject to both public international law and private international law? In Hilton, the Court looked for a rule that was based on international law, that is, a rule that came from multinational sources. Such a global quest, in my opinion, is proper and appropriate. Given an international issue and a desire for cooperation and peace among states, it makes sense to look for rules that can be applied outside the confines of a municipality.

Conclusion

It's past time to acknowledge that positivism's subject-based approach to international law is neither realistically descriptive nor helpfully prescriptive. While it is true that international law often deals with states as a whole, it also frequently deals with individuals. It is preferable to concentrate our efforts on universal and multi-state sources of public and private international law. The distinction between international and municipal law is clearer with this emphasis. It allows courts and other law finders and applicators to search for rules of judgement in foreign cases outside of national sources.

STRIKES AND LOCKOUTS IN INDIA

- KARTIKEY K. & GAURAV SHARMA

ABSTRACT

The first part of this article, which appeared last week, dealt with the extent of occurrence of strikes during the First and Second Plan periods. An attempt was made to measure, in quantitative terms, the intensity of strikes, their duration, the impact of growth of trade unions, their membership and finances on strikes and the methods of termination of strikes.

The second, and concluding, part which appears below deals with the causes of strikes. The conclusion that emerges is that while wages remain the principal cause, disputes over personnel policies have grown vastly in importance.

It is also found that there is a fairly direct correlation between the economic climate and industrial unrest. In the first half of the decade under study, when real wages rose absolutely as well as relatively to money wages, there was comparative peace in industry. But with the onset of the steady rise in prices and the consequent decline in real wages industrial strife registered a marked increase.

KEYWORDS

Strike, Constitution, Wage, Industry, Worker, Employer, Disputes, Comparative Peace, Economy, Policies

INTRODUCTION

Strike is one of the oldest and the most effective weapons of labour in its struggle with capital for securing economic justice. The basic strength of a strike lies in the labours privilege to quit work and thus brings a forced readjustment of conditions of employment. It owes its origin to old English words **Striken** to go. In common parlance it means hit, impress, occur to, to quit work on a trade dispute. The latter meaning is traceable to 1768. Later on it varied to strike of work. The composite idea of quitting work or withdrawal of work as a coercive act could be gathered in the use of word as a verb as well as adjective. The definition and use of the word strike has been undergoing constant transformation around the basic concept of stoppage of work or putting of work by employees in their economic struggle with capital.

The term strike has been defined in a wide variety of branches of human knowledge, viz. etymology, sociology, political economy, law and political science. Strike has been defined in **Section 2 (q) of the Industrial Disputes Act** as under *Strike means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment.*

The analysis of the definition would show that there are the following essential requirements for the existence of a strike:

(1) There must be cessation of work

(2) The cessation of work must be by a body of persons employed in any industry;

(3) The strikers must have been acting in combination;

(4) The strikers must be working in any establishment which can be called industry within the meaning of Section 2(j); or

(5) There must be a concerted refusal; or

(6) Refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment;

(7) They must stop work for some demands relating to employment, non-employment or the terms of employment or the conditions of labour of the workmen.

INGRIDIENTS OF STRIKES

Cessation of Work:-

This is most significant characteristic of the concept of strike. It has been variedly expressed as abandonment, stoppage, omission of performance of duties of their posts, hampering or reducing normal works, hindrance to the working or suspension of work, discontinuing the employment or breaking their contract of service or refusing or failing to return to or resume employment or refusing or failing to accept engagement for any work which they are usually employed for. Thus what required for strike is that there must be stoppage of work or there must be refusal to continue to work or to accept employment by any number of persons employed for the work but the refusal must be concerted or under a common understanding.

The cessation of work may take any form. It must, however, be temporary and not for ever and it must be voluntary. No duration can be fixed for this. If the cessation of work is as a result of renunciation of work or relinquishment of the strikers status or relationship, it is not strike. Permanent cessation of work would result in termination of the contract of work which is alien to the underlying sanction of strike retaining contractual relationship during the strike periods. Cessation of work is not a cessation of contract of employment.

Concerted action-

Another important ingredient of the strike is a concerted action. The workers must act under a common understanding. The cessation of work by a body of persons employed in any industry in combination is a strike. Thus in a strike it must be proved that there was cessation of work or stoppage of work under a common understanding or it was a concerted action of the workers or there was cessation of work by workers acting in combination. Stoppage of work by workers individually does not amount to strike. the concerted refusal or refusal under a common understanding to continue to work or to accept employment or to resume work by any number of persons is a strike. One thing must be kept in mind that the refusal of work means refusal to perform duties which the workers are required to perform. If the workers are at liberty to do a particular work or not to do a work their refusal to work does not amount to strike. For example, over-time work, if it is the duty or workers to do overtime work necessarily because it is the practice of that establishment to take overtime work from the workers in that case refusal to work overtime would amount to strike otherwise not. Thus the test to determine whether refusal to do overtime work constitutes a strike or not would depend upon whether overtime was habitually worked in that industry

THE STRIKE IS ILLEGAL

1. if it is in breach of Contract of Employment.
2. if it is in Public Utility Services.
3. if Notice under Section 22(1) is not given.
4. if commenced during Award or settlement period.
5. if commenced During or within 7 days of completion of Conciliation Proceedings.
6. if commenced During or within Two months of completion of Adjudication Proceedings.

LOCKOUTS

The use of the term lock-out to describe employer's instruments of economic coercion dates back to 1860 and is younger than its counterparts in the hands of workers, strike by one hundred years. Formerly the instrument of lock-out was resorted to by an employer or group of employers to ban union membership: the employers refused employment to workers who did not sign a pledge not to belong to trade union. later the lock-out was declared generally by a body of employers against a strike at a particular work by closing all factories until strikers returned to work. India witnessed lock-out twenty-five years after the "lock-out" was known and used in the arena of labour management relations in industrially advanced countries.

Section 2(1) defines the term Lock-out. However, the present definition is only a mutilated one. The term was originally and correctly defined in the **Trade Dispute Act, 1929**. From the definition given in the Trade Dispute Act, the present Act has taken the present definition but has omitted the words when such closing, suspension or refusal occurs in consequences of a dispute and is intended for the purpose of compelling those persons or of aid in another Employer in compelling persons employed by him to accept terms or condition of, or affecting employment.

With the omission of these words, the present definition fails to convey the very concept of Lock-out. In **Sri Ramchandra Spinning Mills v/s State of Madras**, the Madras High Court read the deleted portion in the definition to interpret the term lock-out. According to the Court, a flood may have swept away the factory, a fire may have gutted the premises; a convulsion of nature may have sucked the whole place under ground; still if the place of employment is closed or the work is Suspended or the Employer refuses to continue to employ his previous workers, there would be a lock out and the Employer would find himself exposed to the penalties laid down in the Act. Obviously, it shows that the present definition does not convey the concept of the term lock out

LOCK OUT WHEN LEGAL

The Act treats strikes and lock-out on the same basis; it treats one as the counter part of the other. (Mohammed Sumsuddin), the circumstances under which the legislature has banned strike, it has also at the Same time banned the lock-out. Thus what holds good-bad; legal-illegal, justified unjustified for strikes, holds the same for the lock-out. As such, the provisions of the Act which prohibit the strike also prohibits the lock-out.

The object and reasons for which the Lock-out are banned or prohibited are the same for which strikes are banned or prohibited. It is because the Employer and the Employees are not discriminated in their respective rights in the field of industrial relationship between the two. As such, lock-out if not in conflict with Section 22 and 23 may be said to be legal or not legal. Sections 24(1) (iii), 10(3) and 10A (4A) similarly controls the lock-out. A lock-out in consequence of illegal strike is not deemed to be illegal. But if lock-out is illegal, Section 26(2), 27 and 28 will come in operation to deal with the situation. The Act does not lay down any guidelines to settle the claims arising out of illegal lock-out. The courts, therefore, have adopted the technique of apportioning the blame between the Employer and employees. This once again brings to the fore the concept of justifiability of lock-out.

THE STATUTORY DEFINATION

Section 2(1) of the Industrial Disputes Act, 1947 defines Lock-out to mean: The temporary closing of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him[14]. A delineation of the nature of this weapon of industrial warfare requires description of: (i) the acts which constitute it; (ii) the party who uses it; (iii) the party against whom it is directed; and (iv) the motive which prompts resort to it.

PROHIBITION ON LOCKOUT

In the similar circumstances the lockout has been prohibited in the public utility service. Section 22 (2) of the Act provides that no employer carrying on any public utility service shall lock out any of his workmen:

1.Without giving them notice of lockout as hereinafter provided, within six weeks before locking out; or

2.Within 14 days of giving notice; or

3.Before the expiry of the day of lockout specified in any such notice as aforesaid; or

4.During the pendency of any conciliation proceedings before a Conciliation Officer and seven days after the conclusion of such proceedings.

It makes clear that the employer has to comply with the same conditions before he declares lockout in his industrial establishment which the workmen are required to comply with before they go on strike. The conditions for both the parties are same.

RIGHT TO STRIKE IN INDIA

Every right comes with its own duties. Most powerful rights have more duties attached to them. Today, in each country of globe whether it is democratic, capitalist, socialist, give right to strike to the workers. But this right must be the weapon of last resort because if this right is misused, it will create a problem in the production and financial profit of the industry. This would ultimately affect the economy of the country. Today, most of the countries, especially India, are dependent upon foreign investment and under these circumstances it is necessary that countries who seeks foreign investment must keep some safeguard in there respective industrial laws so that there will be no misuse of right of strike. In India, right to protest is a fundamental right under Article 19 of the Constitution of India. But right to strike is not a fundamental right but a legal right and with this right statutory restriction is attached in the industrial dispute Act, 1947

Position in India

In India unlike America right to strike is not expressly recognized by the law. The trade union Act, 1926 for the first time provided limited right to strike by legalizing certain activities of a registered trade union in furtherance of a trade dispute which otherwise breach of common economic law. Now days a right to strike is recognized only to limited extent permissible under the limits laid down by the law itself, as a legitimate weapon of Trade Unions.

The right to strike in the Indian constitution set up is not absolute right but it flow from the fundamental right to form union. As every other fundamental right is subject to reasonable restrictions, the same is also the case to form trade unions to give a call to the workers to go on strike and the state can impose reasonable restrictions. In the ***All India Bank Employees Association v. I. T***. , the Supreme Court held, "the right to strike or right to declare lock out may be controlled or restricted by appropriate industrial legislation and the validity of such legislation would have to be tested not with reference to the criteria laid down in clause (4) of article 19 but by totally different considerations."

Thus, there is a guaranteed fundamental right to form association or Labour unions but there is no fundamental right to go on strike. Under the Industrial Dispute Act, 1947 the ground and condition are laid down for the legal strike and if those provisions and conditions are not fulfilled then the strike will be illegal.

PROVISION OF VALID STRIKES UNDER INDUSTRIAL DISPUTE ACT, 1947

Section 2(q) of said Act defines the term strike, it says, "strike" means a cassation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding of any number of persons who are or have been so employed to continue to work or accept employment. Whenever employees want to go on strike they have to follow the procedure provided by the Act otherwise there strike deemed to be an illegal strike. Section 22(1) of the Industrial Dispute Act, 1947 put certain prohibitions on the right to strike. It provides that no person employed in public utility service shall go on strike in breach of contract:

(a) Without giving to employer notice of strike within six weeks before striking; or
(b) Within fourteen days of giving such notice; or
(c) Before the expiry of the date of strike specified in any such notice as aforesaid; or
(d) During the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

It is to be noted that these provisions do not prohibit the workmen from going on strike but require them to fulfil the condition before going on strike. Further these provisions apply to a public utility service only. The Industrial Dispute Act, 1947 does not specifically mention as to who goes on strike. However, the definition of strike itself suggests that the strikers must be persons, employed in any industry to do work

NOTICE OF STRIKE

Notice to strike within six weeks before striking is not necessary where there is already lockout in existence. In ***Mineral Miner Union vs. Kudremukh Iron Ore Co. Ltd***., it was held that the provisions of section 22 are mandatory and the date on which the workmen proposed to go on strike should be specified in the notice. If meanwhile the date of strike specified in the notice of strike expires, workmen have to give fresh notice. It may be noted that if a lock out is already in existence and employees want to resort to strike, it is not necessary to give notice as is otherwise required. In ***Sadual textile Mills v. Their workmen***certain workmen struck work as a protest against the lay-off and the transfer of some workmen from one shift to another without giving four days notice as required by standing order 23. On these grounds a question arose

whether the strike was justified. The industrial tribunal answered in affirmative. Against this a writ petition was preferred in the High Court of Rajasthan. Reversing the decision of the Tribunal ***Justice Wanchoo*** observed:

" ....We are of opinion that what is generally known as a lightning strike like this take place without notice..... And each worker striking .....(is) guilty of misconduct under the standing orders .....and liable to be summarily dismissed.....(as)..... the strike cannot be justified at all."

GENERAL PROHIBITITION OF STRIKE

The provisions of section 23 are general in nature. It imposes general restrictions on declaring strike in breach of contract in the both public as well as non- public utility services in the following circumstances mainly: -

(a) During the pendency of conciliation proceedings before a board and till the expiry of 7 days after the conclusion of such proceedings;

(b) During the pendency and 2 month's after the conclusion of proceedings before a Labour court, Tribunal or National Tribunal;

(c) During the pendency and 2 months after the conclusion of arbitrator, when a notification has been issued under sub- section 3 (a) of section 10 A;

(d) During any period in which a settlement or award is in operation in respect of any of the matter covered by the settlement or award.

The principal object of this section seems to ensure a peaceful atmosphere to enable a conciliation or adjudication or arbitration proceeding to go on smoothly. This section because of its general nature of prohibition covers all strikes irrespective of the subject matter of the dispute pending before the authorities. It is noteworthy that a conciliation proceedings before a conciliation officer is no bar to strike under section 23.

In the ***Ballarpur Collieries Co. v. H. Merchant*** it was held that where in a pending reference neither the employer nor the workmen were taking any part, it was held that section 23 has no application to the strike declared during the pendency of such reference.

ILLEGAL STRIKE

Section 24 provides that a strike in contravention of section 22 and 23is illegal. This section is reproduced below:

(1) A strike or a lockout shall be illegal if,

(i) It is commenced or declared in contravention of section 22 or section 23; or

(ii) It is continued on contravention of an order made under sub section (3) of section 10 or sub section (4-A) of section 10-A.

(2) Where a strike or lockout in pursuance of an industrial dispute has already commenced and is in existence all the time of the reference of the dispute to a board, an arbitrator, a Labour court, Tribunal or National Tribunal, the continuance of such strike or lockout shall not be deemed to be illegal;, provided that such strike or lockout was not at its commencement in contravention of the provision of this Act or the continuance thereof was not prohibited under sub section (3) of section 10 or sub section (4-A) of 10-A.

(3) A strike declared in the consequence of an illegal lockout shall not be deemed to be illegal.

CONSEQUENCE OF ILLEGAL STRIKES

Dismissal of workmen-

In ***M/S Burn & Co. Ltd. V, Their Workmen*** , it was laid down that mere participation in the strike would not justify suspension or dismissal of workmen. Where the strike was illegal the Supreme Court held that in case of illegal strike the only question of practical importance would be the quantum or kind of punishment. To decide the quantum of punishment a clear distinction has to be made between violent strikers and peaceful strikers.

In ***Punjab National Bank v. Their Employees*** , it was held that in the case of strike, the employer might bar the entry of the strikers within the premises by adopting effective and legitimate method in that behalf. He may call upon employees to vacate, and, on their refusal to do so, take due steps to suspend them from employment, proceed to hold proper inquires according to the standing order and pass proper orders against them subject to the relevant provisions of the Act.

Wages-

In ***Cropton Greaves Ltd. v. Workmen***, it was held that in order to entitle the workmen to wages for the period of strike, the strike should be legal and justified. A strike is legal if it does not violate any provision of the statute. It cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. Whether particular strike is justified or not is a question of fact, which has to be judged in the light of the fact and circumstances of each case. The use

of force, coercion, violence or acts of sabotage resorted to by the workmen during the strike period which was legal and justified would disentitle them to wages for strike period. The constitutional bench in ***Syndicate Bank v. K. Umesh Nayak*** decided the matter , the Supreme Court held that a strike may be illegal if it contravenes the provision of section 22, 23 or 24 of the Act or of any other law or the terms of employment depending upon the facts of each case. Similarly, a strike may be justified or unjustified depending upon several factors such as the service conditions of the workmen, the nature of demands of the workmen, the cause led to strike, the urgency of the cause or demands of the workmen, the reasons for not resorting to the dispute resolving machinery provided by the Act or the contract of employment or the service rules provided for a machinery to resolve the dispute, resort to strike or lock-out as a direct is prima facie unjustified. This is, particularly so when the provisions of the law or the contract or the service rules in that behalf are breached. For then, the action is also illegal.

RIGHTS OF EMPLOYER TO COMPENSATION FOR THE LOSS DUE TO ILLEGAL STRIKE

In ***Rothas Industries v. Its Union*** , the Supreme Court held that the remedy for illegal strike has to be sought exclusively in section 26 of the Act. The award granting compensation to employer for loss of business though illegal strike is illegal because such compensation is not a dispute within the meaning of section 2(k) of the Act

CONCLUSION

India in the present context of economic development programmes cannot afford the unqualified right to the workers to strike or to the employer to lock-out. Compulsory arbitration as an alternative of collective bargaining has come to stay. The adoption of compulsory arbitration does not, however, necessarily mean denial of the right to strike or stifling of trade union movement. If the benefits of legislation, settlements and awards are to reach the individual worker, not only the trade union movement has to be encouraged and its outlook broadened but the laws have also be suitably tailored. The existing legislation and Judicial pronouncements lack breadth of vision. Indeed, the statutory definitions of strike and lock-out have been rendered worse by a system of interpretation which is devoid of policy-oriented approach and which lays undue stress on semantics. The discussion of the concepts and

definition of strike has sought to establish that legalistic consideration has frequently weighed with the court in interpreting and expounding the said statutory definition: We believe that emphasis on literal interpretation resulted in ignoring the ordinarily understood connotation of the term strike and in encouraging undesirable activity. We now pass on to acts which constitute strike. Unlike the Industrial Relations Bill, 1978 the three phrases used in the definition of "strike" in IDA are not qualified by the expression total or partial. Further, they do not specifically take into account go-slow. The Courts have accordingly excluded go-slow from the purview of strike. However, the exclusion of go-slow from the ambit of "strike" throws them open to the third party suits for damages.

The right to strike is not fundamental and absolute right in India in any special and common law, Whether any undertaking is industry or not. This is a conditional right only available after certain pre-condition are fulfilled. If the constitution maker had intended to confer on the citizen as a fundamental right the right to go on strike, they should have expressly said so. On the basis of the assumption that the right to go on strike has not expressly been conferred under the Article 19(1) (c) of the Constitution. Further his Lordship also referred to the observation in Corpus Juris Secundum that the right to strike is a relative right which can be exercised with due regard to the rights of others. Neither the common law nor the fourteenth Amendment to the federal constitution confers an absolute right to strike. it was held in the case that the strike as a weapon has to be used sparingly for redressal of urgent and pressing grievances when no means are available or when available means have failed to resolve it. It has to be resorted to, to compel the other party to the dispute to see the justness of the demand. It is not to be utilized to work hardship to the society at large so as to strengthen the bargaining power. Every dispute between an employer and employee has to take into consideration the third dimension, viz. the interest of the society as whole.

PRIORITY SECTOR LENDING: THE INDIAN CHAPTER

- SREYASI BANERJEE

INTRODUCTION

In the present day scenario the banks play a very important role in the modern day economy by providing necessary credit for the different sectors of the economy. Lately and more specifically after the credit policy of RBI 1967-68[506], the banks have been assigned the responsibility of financing what today is called the priority sectors. The word priority sector as has been mentioned above refers to those segments of the Indian Economy, the development of whose is necessary for attainment of 'social justice' and inclusive growth as proposed by the Directive Principles of State Policy[507], in the Constitution of India. Since its incubation, this sector has undergone several changes and many areas have been brought with the shelter of this umbrella. The question that the authors seek to answer in this paper is that, while there have been continuous demand to include new areas such as infrastructure within the ambit of priority sector, there have also been suggestions that the focus on the needy sectors of economy and weaker sections of the society is getting lost because of such inclusions[508]. The focus of such policies is now being shifted from the needs of the poor to maintenance and revival of financial crippled economic institutions. The second question that needs to be answered is that although there have been different regulations, circulars which is regulating this area, and even after half a century of the working, has the concept of Priority Sector Lending achieved its desired objectives or has become an instrumentality for pushing political propaganda?

This is precisely what the authors of this article wish to explore, which brings us to our research question. The abundance of the laws which seek to regulate the process pertaining to priority sector lending is clearly reflected in their numbers in the form of RBI guidelines, notices, prevalent banking laws etc. What remains to be seen is whether the same is true for its solidarity. Although the foundation of the institute of priority sector lending was clearly based upon the principles of diversification of risks and providing those classified under the priority sector with more economic freedom, with its numerous facets such as more cash-in-hand and

[506] RBI DRAFT TECHNICAL PAPER ON REVIEW OF THE PRIORITY SECTOR LENDING, RBI/2o11-12/1o7, (July 1, 2o11).
[507] INDIAN CONST., Art. 38 & Art. 39.
[508] *Supra* note 2.

the freedom to dictate their individual economic terms, in order to alleviate them from their state of economic vulnerability, the present scenario has grown far more complex. In a nutshell, this paper seeks to conduct an unprejudiced investigation into whether the 'priority sector' is truly benefitted by the prevalent legal system. As with the recent CAG report it is evident that many farmers were issued credit and the pre-text of priority sector lending and then those were claimed in order to repay their old loans. Therefore the benefit extended to them exists only on paper and statistical data. Hence we wish to explore this fraudulent scenario from a socio-economic, legal and epistemological perspective.

Chapter 1: Priority Sector Lending: Need and Development & the Present Law Need and Development

The origin of the Priority Sector prescription of India can be traced back to the Credit policy for the year 1967-68.[509] "*With two wars, a series of poor harvests including two droughts, and an unstable external environment, the 1960s were years of severe strain for the Indian economy."*[510]The demands on the exchequer rose as the needs of defence had to be met alongside those of development and the increased public expenditure financed against a background of stagnating agricultural production, unimpressive industrial growth, and a largely stagnant savings rate. Agricultural production barely rose above the 1960-61 level until 1964- 65, dropping nearly 10 per cent in 1965-66, which was the first of two successive drought years. Food production too followed the same trend, stagnating until 1964-65 around or below the 72 million tonnes per year mark reached in 196o-61.[511] output rose to 78 million tonnes in 1964-65, but dropped nearly a fifth to a mere 63 million tonnes in 1965-66.[512] It rose slightly to 65 million tonnes the following year before recovering to 8o million tonnes in 1967-68.[513] Not only these but inflation rose steeply and by the year of 1966-67 it was 13% from just about 3 % in the year of 1964-65.[514] Not surprisingly therefore the overall growth of the economy was lacklustre for this period. Higher rate of inflations and the build-up of the inflationary expectations in the weather of food shortage and other agricultural necessities rendered the

[509] *Supra* note 2.
[510] 2 THE RESERVE BANK OF INDIA, CHAPTER 4 (Eastern Book Corporation 2oo6)
[511] *Id.*
[512] *Id.*
[513] *Id.*
[514] *Id.*

situation more complex.[515] Finally, by the middle of the decade, the balance of payments position took a turn for the worse and the Bank had to contend not only with the need to stabilize the external sector but also to minimize the domestic inflationary fallout of the rupee's devaluation in June 1966[516]; and for much of the closing years of the 196os, monetary policy, while keeping inflation at bay, had also to attempt to mitigate the impact of the severe industrial recession brought on by import compression, the decline in public investment since 1965-66, and the food grains bottleneck.[517] It was during this period the concept of 'preferred' or priority sector credit was making its appearance in this intricate vista. During the early part of the year (1967) there was no change in the earlier credit policy which was in those days' circumstances a complete failure, however in August 1967 The RBI announced measures for credit liberalisation for agriculture, small scale industries, engineering goods industry etc.[518] Selective credit controls were also made operative in a flexible manner. There was a National Council set up for the purpose of credit planning and economic planning to ensure the proper allocation of bank credit to the priority sectors. At the second meeting of the National Credit Council held in July 24, 1968[519], it was emphasized that commercial banks should increase their involvement in the financing of priority sectors, viz., agriculture and small scale industries[520]. The description of the priority sectors was later formalized in 1972 on the basis of the report submitted by the Informal Study Group on Statistics relating to advances to the Priority Sectors constituted by the Reserve Bank in May 1971.[521] Gradually on 1972, February, a list of items to be included under various categories was issued for the first time and the same was prepared and forwarded to banks in March 1969.[522] on the basis of the report of the said meeting, RBI prescribed modified return for reporting the priority sector advances.[523]

1.1 The Present Law

Although at the outset there was no specific target set for priority sector lending, in November 1974, the banks were advised to raise the share of these sectors in their aggregate advances to

[515] *Id.*
[516] *Id.*
[517] *Id.*
[518] *Id.*
[519] *supra note* 2 *at* 15
[520] *Id.*
[521] MASTER CIRCULAR - LENDING TO PRIORITY SECTOR, RBI/2o11-12/1o7, Dated : July 1, 2o11
[522] *supra note* 2 *at* 15
[523] *Id.*

the level of 33 1/3 per cent by March 1979.[524] In 1980, Reserve Bank set up a Working Group on Priority Sector Lending and 20-Point Economic Programme (under the Chairmanship of Dr. K. S. Krishnaswamy, the then DG, RBI) to work on the implementation of certain decisions which led to the following.[525]By the year of 1985 the advances to Priority Sector was increased to 40 % of aggregate bank advances.[526] Banks were asked to make sure that direct finance reached the agricultural sector (including allied activities) and touched the mark of at least 15% of total bank credit by March 1985 and at least 16% by March 1987 and 17% of their total credit by March 1989 and further rose to 18% by March 1990.[527] Today the overall lending target is set at 40 % of the overall main lending, with a rider that 18% of the same must reach the agricultural sector and 10 & to the 'weaker sections'.[528]This can be further exemplified through the following table[529]:

	Domestic commercial banks	**Foreign banks**
Total Priority Sector advances	40 per cent of Adjusted Net Bank Credit (ANBC) or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher.	32 per cent of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher.
Total agricultural advances	18 per cent of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher. of this, indirect lending in excess of 4.5% of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher, will not be reckoned for computing performance under 18 per cent target. However, all agricultural advances under the categories 'direct' and 'indirect' will be reckoned in computing performance under	No target.

[524] www.rbidocs.rbi.org.in/rdocs/Publications/PDFs/789o3.pdf
[525] *supra note* 2 at 17
[526] *Id.*
[527] *Id.*
[528] MASTER CIRCULAR - LENDING TO SMALL SCALE INDUSTRIES SECTOR; RBI/2oo4-o5/38o; Dated: March 1, 2oo5.
[529] *supra note* 17.

	the overall priority sector target of 40 per cent of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher.	
Micro & Small Enterprise advances (MSE)	Advances to micro and small enterprises sector will be reckoned in computing performance under the overall priority sector target of 40 per cent of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher.	10 per cent of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher.
Micro enterprises within Micro and Small Enterprises sector	(i) 40 per cent of total advances to micro and small enterprises sector should go to micro (manufacturing) enterprises having investment in plant and machinery up to Rs 5 lakh and micro (service) enterprises having investment in equipment up to Rs. 2 lakh; (ii) 20 per cent of total advances to micro and small enterprises sector should go to micro (manufacturing) enterprises with investment in plant and machinery above Rs 5 lakh and up to Rs. 25 lakh, and micro (service) enterprises with investment in equipment above Rs. 2 lakh and up to Rs. 10 lakhs. (Thus, 60 per cent of micro and small enterprises advances should go to the micro enterprises). (iii) The increase in share of micro enterprises in MSE lending to 60 per cent should be achieved in stages, viz. 50 per	Same as for domestic banks.

	cent in the year 2010-11, 55% in the year 2011-12 and 60% in the year 2012-13	
Export credit	No target	12 per cent of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher.
Advances to weaker sections	1o per cent of ANBC or credit equivalent amount of off-Balance Sheet Exposure, whichever is higher.	No target.
Differential Rate of Interest Scheme	1 per cent of total advances outstanding as at the end of the previous year. It should be ensured that not less than 40 per cent of the total advances granted under DRI scheme go to scheduled caste/scheduled tribes. At least two third of DRI advances should be granted through rural and semi-urban branches.	No target.

1.2 Priority Sectors for Lending

on the basis of the recommendations of the Internal Working Group set up by the RBI to examine and review any necessary changes, in the policy on the subject of priority sector lending including the segments constituting the priority sector, targets and sub-targets, etc. and the comments/suggestions received thereon from banks, financial institutions, public and the Indian Banks' Association (IBA)[530] the Priority Sectors can be broadly classified as follows:

[530] Lending To Priority Sector, RBI, www.rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/73748.pdf

PRIORITY SECTORS

AGRICULTURE: *Direct Finance*- Short, medium & long term loanfor agricultre etc., to individuals, Self-Help Groups etc., of Individual Farmers without limit and to others [Corporates, firms, etc] upto 20 lakhs. *Indirect Finance*- Various categories as mentioned in the Master Circular including hire-purchase of machinery orfor setting up Agri-clinics etc.	**SMALL SCALE INDUSTRIES**: *Direct Finance*- Units engaged in manufacture, processing or preservation of goods, & investment cost [excluding land and bulding] does not exceed as per the circular. *Indirect Finance*- Financing for providing inputs to or marketing the output of artisans, cottage industries etc.	**SMALL BUSINESS/ SERVICE ENTERPRISE:** include small business, retail trade, professional & self employed persons, small road & water transport operators etc., as mentioned in the circular; Maximum Cap: As per Enterprise	**MICRO CREDIT**: Rs 50,000 per borrower in rural, semi-urban & urban areas; Direclty or through group mechanism; To improve the life standards.	**EDUCATIONAL LOANS:** Upto 10 lakh for studies in India, & 20 lakhs for studies abroad	**HOUSING LOANS:** Upto 15 lakhs for construction purposes and upto 2 lakhs for repairing purposes

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[531] LENDING TO PRIORITY SECTOR, CATEGORIES OF PRIORITY SECTOR, RBI available at: www.rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/73748.pdf

1.3. The Legal Sanction for the Priority Sector

The institution of priority sector lending primarily draws its legal sanction from two sources, namely, Banking Regulation Act, 1949[532] and the Constitution of India. The Constitution deals broadly with the primary prerogatives that the States, within the meaning of Article 12 of the Constitution[533], should embrace with open arms in order to ensure smooth functioning and civil stability of the day to day affairs of the state and forms the 'conscience of the constitution'.[534] As stated by the present Chief Justice P. Sathasivam, The Directive Principles[535] and the Fundamental Rights[536] are two wheels of the same chariot.[537] The Directive policies clearly enumerate that citizens of India are to be provided with basic support in terms of humane conditions of work[538], right to work[539], public assistance in cases of undeserved want and unemployment[540]. In a country like India it is the need of the hour to come up with policies in order to curb the vehement growth of unemployment and economic dissatisfaction of the people. No doubt that such policies need to be inclusive of banking sectors. The Banking Regulation Act, 1949, defines the term banking as "accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise"[541]. The essence of lending or investment vested within the Act read along with Right to Life[542] which encompasses right to life with human dignity[543]does convey the idea that socio-economic growth of the country is one of the main responsibility[544] that the State must carry out. It would not be hard to say that priority sector lending[545] is nothing but the fruit of such a thought process that the founding fathers of this constitution harboured. Section 22 of the said Act[546] iterates broadly that the Reserve Bank may license an institution to engage in banking activities. Now in the event of receiving

[532] The Banking Regulation Act, No. 1o of 1949, India Code (1993), Vol. 15
[533] *supra note* 3 at art. 12
[534] PRAVEEN PRAKASH AMBASHTHA, ASSISTANT DIRECTOR, ISTM, STUDY MATERIAL ON CONSTITUTION OF INDIA, p. 16
[535] *supra note* 3 at Part IV
[536] *supra note* 3 at Part III
[537] http://www.thestatesman.net/news/17418-Directive-Principles-fundamental-to-governance--CJI.html
[538] *supra note* 3 at art. 42
[539] http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm
[540] K.G.BALAKRISHNAN, JUDICIAL ACTIVISM UNDER THE INDIAN CONSTITUTION, p. 12 (Trinity College)
[541] *supra note* 28 at §. 5(b)
[542] *supra note* 3 at art. 21
[543] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & ors., 1981 AIR 746
[544] 1 BASU, DURGA DAS, SHORTER CONSTITUTION OF INDIA, p. 1972, (13th ed. Nagpur: Wadhwa & Co. 2oo3)
[545] RBI/2o12-13/138,RPCD.CO.PLAN.BC 13/o4.o9.o1/2o12-13
[546] *supra note* 28 at §. 22

affiliation from the RBI, the institutions are bound to carry out financial transactions in accordance to its guidelines. Therefore, essentially the undercurrent of principles which govern the RBI are somewhat channelized to these institutions as well. Though not established as a Rule of law, if viewed from the perspective of social transformation it is essentially a responsibility of financial institutions to invest in the process of socio-economic alleviation through lending to sectors that need it. However, to what extent and whether at all, needs to be examined critically. The elaborate process is once again codified under the Schedule 3 of the Banking Act.[547] It is not to forgotten that the Directive Principles thought not enforceable in courts of Law[548] are aimed at securing certain values or enforcing certain attitudes in law making and administration of law.[549] Therefore when an act such as the Banking Regulation Act, 1949 is implemented, its provisions are necessarily obliged to uphold the essence and conscience of the constitution as mentioned before. Therefore, economic upliftment of the priority sectors should ideally be prioritized before amassing of wealth as under an ideal capitalist structure. Whether this model is indeed in practice or not remains to be assessed in socio-economic balance.

Chapter 2: Case Study: Rural Co-operative Banks

2.1. Contemporary Scenario

The Budget-speech for the fiscal year 2008-2009 by the hon'ble finance minister included an *'Agricultural debt waiver and Debt relief scheme'*[550] (Herein after mentioned as ADWDRS) for the farmers. This included waiving of short term production loans[551] and Investment loans[552] provided to marginal farmers.[553] If in case farmers not falling under the category of 'marginal farmers' as per the definition provided under the aforementioned scheme, a separate category was made altogether called *'other farmers'*.[554] This class was eligible for something called a *one-time Settlement (OTS)*[555] under which they were made eligible for 25 % rebate of

[547] *supra note* 28 at Sch. III
[548] Minerva Mills Ltd. & ors v. Union of India & ors, 198o AIR 1789
[549] B. Krishna Bhat v. Union of India And ors, 199o SCR (2) 1
[550] RBI / 2oo7-2oo8/ 33o RPCD.No.PLFS.BC.72 /o5.o4.o2/2oo7-o8
[551] *supra note* 46 at § 3.1
[552] *Id.*
[553] *supra note* 46 at § 5
[554] *supra note* 46 at § 3.7
[555] *supra note* 46 at § 6.1

the 'eligible amount'[556] unlike the small or 'marginal farmers' who were eligible for 100 % rebate. The total intended waiver amount by the government went up to Rs. 68,376 crores[557] (Rs. 60,416 for marginal farmers and Rs. 7960 for other farmers). By March 31, 2012, the Department of Financial Services had released Rs. 52,516 crores to RBI/NABARD[558] as the total figure of requisite amount stood Rs. 52,153[559] crores by various co-operative credit institutions.[560]

2.2. Implementation: Disparity between the Ideal and the Real

2.2.1. Implementation Methodology: The Ideal

The implementation structure was methodically formulated by the Department of Financial Services. It served as the apex body at the central level. However, it didn't function autonomously. on the contrary it functioned through the nodal agencies, i.e. RBI (Reserve Bank of India) and NABARD (National Agricultural and Rural Development Bank) by monitoring their progress in implementation of the scheme through the nodal agencies.[561] The RBI was put in charge of the Scheduled Commercial Banks (SCB)[562], Urban Co-operative Banks (UCB)[563] and Local Area Banks.[564] The NABARD, on the other hand was made responsible for cooperative credit institutions[565] and Regional Rural Banks (RRB)[566]. The role of both these nodal agencies was restricted to that of a *middle man*. They didn't release any funds of their own, nor did they entertain any claim on their autonomous capacity. What they did, was merely receiving and forwarding of claims and delivering funds for the same to and from the Department of Financial Services.

They were merely institutions appointed to act as checks on lending institutions from engaging into gross lending malpractices. For this purpose the nodal agencies formulated the following policies.

[556] *supra note* 46 at § 4
[557] IMPLEMENTATION OF AGRICULTURAL DEBT WAIVER AND DEBT RELIEF SCHEME, 2008, CHAPTER 1, P. 7, CAG REPORT 3 OF 2013
[558] *supra note* 53 at p. 8
[559] *Id.*
[560] *supra note* 46 at § 3.4
[561] *supra note* 53 at p. 4
[562] *supra note* 53 at pp. 4-5
[563] *supra note* 53 at p. 5
[564] *Id.*
[565] *supra note* 56
[566] *supra note* 59

- *compulsory filing of state wise and bank wise data of rebate and claim records with the nodal agencies;*
- *establishment of dedicated cells to monitor the progress of implementation of the scheme and;*
- *entertainment of all claims through internal as well as central statutory auditors.*

The responsibility for monitoring district and ward level preparation of lists of eligible beneficiaries was entrusted upon something called the State-level banker's Committee.[567]

The reason behind the ADWDRS is open to interpretation. on the face of it, the finance minister in his budget speech stated that the purpose behind the implementation of this scheme was *to ensure proper economic flow within the section of farmers categorised as 'small' and 'marginal' farmers and mitigating their economic burden.* However, the authors find that this is not the case as it would seem from the following tables:

Recovery %	**SCBs**	**DCCBs**
<40	Jammu & Kashmir, Arunachal Pradesh, Manipur, Tripura, Bihar	Bihar (5), Jammu & Kashmir (1), Jharkhand (8), Madhya Pradesh (1), Chhattisgarh (2), Uttar Pradesh (21), Uttarakhand (1), Gujarat (1), Maharashtra (8), Karnataka (3)
>40 and <60	Assam, Meghalaya	Bihar (10), Jammu & Kashmir (1), West Bengal (3), Madhya Pradesh (9), Chhattisgarh (2), Uttar Pradesh (16), Uttarakhand (2), Gujarat (4), Maharashtra (12), Andhra Pradesh (1o), Karnataka (3), Tamil Nadu (2), orissa (7)
>60 and <80	Chandigarh, Himachal Pradesh, Mizoram, Nagaland, Orissa, Sikkim, Uttar Pradesh, Goa, Maharashtra, Pondicherry, Andhra Pradesh	Haryana (15), Himachal Pradesh (1), Jammu & Kashmir (1), Punjab (2), Bihar (6), orissa (8), West Bengal (7), Madhya Pradesh (19), Chhattisgarh (2), Uttar Pradesh (7), Uttarakhand (1), Gujarat (7), Maharashtra

[567] *Id.*

		(1o), Andhra Pradesh (9), Karnataka (6), Kerala (3), Tamil Nadu (6)
<80	Delhi, Haryana, Punjab, Rajasthan, Andaman & Nicobar, West Bengal, Chhattisgarh, Madhya Pradesh, Uttarakhand, Gujarat, Karnataka, Kerala, Tamil Nadu	Haryana (4), Himachal Pradesh (1), Punjab (16), Bihar (1), Orissa (2), West Bengal (7), Madhya Pradesh (9), Uttar Pradesh (6), Uttarakhand (6), Gujarat (6), Maharashtra (1), Andhra Pradesh (3), Karnataka (9), Kerala (11), Tamil Nadu (15)
Frequency Distribution of States/ UTs according to Level of Loan Recovery of SCBs and DCCBs (As on 30 June 2007)[568]		

[568] ANNUAL REPORT OF NATIONAL BANK FOR AGRICULTURAL AND RURAL DEVELOPMENT, 2oo7-o8, Table 4.13.

Recovery %	SCARDBs	PCARDBs
<40	Assam, Bihar, Orissa, Uttar Pradesh, Maharashtra, Karnataka, Tamil Nadu, Jammu & Kashmir	Chhattisgarh (2), West Bengal (7), Madhya Pradesh (4), Maharashtra (24), Karnataka (44), Punjab (20), Rajasthan (13), Orissa (28), Tamil Nadu (153)
>40 and <60	Chhattisgarh, Himachal Pradesh, Rajasthan, Madhya Pradesh, Gujarat	Haryana (4), West Bengal (9), Chhattisgarh (6), Madhya Pradesh (15), Karnataka (57), Kerala (18), Punjab (16), Rajasthan (17), Orissa (18), Tamil Nadu (23)
>60 and <80	West Bengal, Pondicherry, Tripura	Haryana (10), Himachal Pradesh (1), West Bengal (7), Chhattisgarh (4), Madhya Pradesh (19), Karnataka (59), Kerala (22), Punjab (16), Rajasthan (6), Tamil Nadu (2)
<80	Haryana, Punjab, Kerala	Haryana (5), West Bengal (1), Karnataka (17), Kerala (6), Punjab (36), Maharashtra (5), Tamil Nadu (2)
Frequency Distribution of States/UTs according to levels of Loan Recovery of SCARDBs and PCARDBs (As on 30 June 2007)[569]		

From the above tables, it can be inferred that the co-operative credit institutions which are targeted towards catering to the agricultural and rural development are the ones which are hit the most due to non-payment of loans. The SCCBs which fall under the purview of RBI regulation are not suffering as much as the *CARD (Co-operative Agricultural and Rural Development)* banks in terms of non-recovery of loans. This is probably due to the factor that the former are governed by the *Recovery of Debt due to Financial Institutions (RDDB) Act, 1993* while the latter is not.[570] Further, in a recent judgement by Gujarat High Court[571] the Chief Justice stated that CARD banks cannot even use *Securitisation and Reconstruction of*

[569] *supra note* 64 at Table 4.14.
[570] Greater Bombay Co-op. Bank Ltd v. M/S United Yarn Tex. Pvt. Ltd. & ors, AIR 2007 SC 1584
[571] Administrator, Shri Dhakdi Group Cooperative Cotton Seeds & ors. v. Union of India & ors., Guj. HC, Special Civil Application No. 930 of 2011 and Spl. C.A. Nos. 622, 1730, 3046, 8082, 11424, 13999, 15253 and 15269 of 2012

Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2oo2 in order to initiate debt recovery proceedings. Therefore, the only way to ensure that these so called sick banks do not wither out due to lack of recovery mechanism is to attract customers through fresh waiver schemes. The small and marginal farmers' upper limit for the loan was Rs. 50,000 most of which was partially paid.

The problem laid with the farmers whose loan amounts went up to Rs. 2o-25 lakhs. Majority of them had stopped paying the instalments after paying 30-40 % of their loan amount. Therefore, asking them to pay only 75 % of the loan amount reduces the amount that they are left to pay with and simultaneously easing the government exchequer by lifting the burden of defaulters. The rest of the 25 % rebate offered by the government can be viewed as a long-term investment to convert them into recurring customers.

Therefore, it can be deductively established that the ADWDRS was to some extent a government mechanism to revive these sick cooperative credit institutions engaged in lending activities in the agricultural sector.

2.2.2. Practical Abuse of the Scheme: The Reality

The CAG report on the said subject, tabled in the parliament on March 5, 2013[572] brought to light gross anomalies in the proposed schemes and the practice adopted by various institutions. The most common malpractice that was staring blatantly at our faces in the aforementioned CAG report was that of non-inclusion of eligible farmers in the list forwarded to nodal agencies. The following table illustrates that better:

State-wise details of Farmer accounts found eligible but not extended benefits under the scheme[573]		
Name of the State	Total Number of eligible farmer accounts not included in the scheme	Amount in Rs.
Chhattisgarh	22	493097
Gujarat	1	15220
Kerala	6	183272
Madhya Pradesh	1147	32063994
Maharashtra	1	95086

[572]http://www.thehindu.com/news/national/sloppy-loan-waiver-edges-out-deserving-farmers-cag/article4478433.ece

[573] *supra note* 53 at Chapter 2, Table 4.

odisha	30	334004
Punjab	8	532983
Rajasthan	4	94266
Tripura	38	1975743
Total	**1257**	**35787665**

Now the question that arises is who all were included inside the lists prepared and forwarded to the nodal agencies? The answer to it is really simple. The farmers categorised as 'other farmers' inside the scheme whose loan amounts went above Rs. 50,000 and not restricted to the purposes of agriculture only. In fact most of the beneficiaries whose names were included had taken loans for housing, vehicle etc.[574] Further, the ineligible beneficiaries who had taken loans through micro-finance institutions were also reimbursed under the scheme which defeated the purpose of the scheme to mitigate the circumstances of farmers with agricultural loans.[575] Therefore the people whose loan amounts actually lay outside the purview of the scheme were included so as to shoot up the recovery percentage of the 'sick' institutions. There is a disparity of Rs. 10,000 crores (approximately) in the funds released by the Department of Financial Services for the implementation of the scheme.[576]

CONCLUSION

The real question that perturbs us is that even with the above malpractice going on, are the so-called sick institutions being actually revived? our endeavour to come up with a conclusive answer to the above question is significantly thwarted by the absence of any credible document in the public domain. However, the authors have attempted to grasp at it by observing certain anomalies that featured time and again. It is a common practice is the rural area to extend fresh credit to farmers who have not paid their loan back on time[577] so that their loan remains intact while they are awarded some indirect relaxation in terms of the period of repayment (which gets extended) and the interest to be paid. Therefore, no actual money is transferred to the

[574] *supra note* 53 at Chapter 2, p. 19
[575] *supra note* 53 at Chapter 2, p. 2o
[576]http://articles.economictimes.indiatimes.com/2o13-o3-o6/news/3747o814_1_debt-waiver-waiver-scheme-debt-relief-scheme
[577]http://www.livemint.com/Industry/ph3oHumD1FPAGaBjoXCoyH/Kisan-Credit-Cards-Bad-loan-bubble-waiting-to-burst.html

hands of the beneficiary but the transaction is recorded on paper. Such 'paper transaction' raises the recovery percentage of financial institutions but in reality is not an accurate reflection of the financial health of the same. Although evidence of such 'paper transactions' are not readily available in cases of CARD banks, however indication of the bad loan practice can be inferred from the aforementioned CAG report.[578] Since no debt-waiver certificates were issued to farmers and yet they were extended fresh credit, one of the possibilities remain that this was just a front for such paper-transactions. However, since the entire implementation procedure of the scheme is under auditory scrutiny the authors are unable to comment further on the matter. However, from the perspective of the research objectives as iterated in this paper, the authors are of the opinion that the policies of priority sector lending which were initiated with the intention to foster economic upliftment of the farmers, though somewhat pure in its intention has failed in absolute practicality. The root cause of this can be traced back to inefficient administration of the concerned institutions and lack of transparent interaction between the farmers and government officials.

With regard to the aforementioned problems the Researchers have come up with a few pointers which may be treated as probable solutions to the same:

- Provide Risk Cover to Agriculture and;
- Use Innovative Market Driven Instruments for availability for Credit to Priority Sectors, Ensuring Viability of Commercial Banks.
- Strengthen Cooperative Banks, Regional Rural Banks, and Microfinance Institutions and Encourage opening of "Small" Finance Banks.
- Promote enablers like an extensive credit information system to create a robust credit infrastructure and a healthy credit culture.

Therefore, fresh revision of prevalent policies is the dire need of the hour so as to ensure that the agrarian economy doesn't crumble due to the abundant malpractices and abuse of policies faced by this sector.

[578] *supra note* 53 at Annex 7

ARREST OF WOMAN: A CONTROVERSY OF ITS OWN

- RAGINI SINGH & SHRUTIRUPA BISWAS

ABSTRACT

Women are the weaker gender of our society but they are also the gender that is the key to take and move the society forward. They also face problems that are beyond the comprehension of a male. The law gives rights to women to protect themselves and make a place for themselves. The research paper follows doctrinal method of re-searching the paper mostly mentions the section 46 clause 4 of code of criminal procedure and the rights of women as well as what rights do, they have during the process of arrest and how could they protect themselves with the help of law. This paper informs them of how an arrest is made. The paper also objectively explores law on paper and in practice, Awareness of the provision. It also questions whether this provision really helpful in any way and what happens if police wait outside her house....is it not police custody? The paper also sees the side effect of such a law as Taking advantage of the provision if woman runs away and poses threat to law-and-order situation. The research also concludes and gives suggestion as to how and what we can do to help this type of provision and see it the law from a prospective of a woman herself.

KEYWORDS -: WOMEN, SECTION 46 CLAUSE 4 OF CrPc, GUIDELIES, GENDER, ARREST, PROTECTION, LAW.

INTRODUCTION

Women in India faces a lot of problems, and Women in India also create lots of problems. Most women in India are either victims or the perpetrators in one or another crime. Law is made for all types of crime and criminals are taken into custody irrespective of their gender, so when a crime is committed and the perpetrator is a woman. Is she to follow the same rules set for everyone or has she got some other rules for herself? The answer is simple that the law is not unfair to anyone, but it is lenient and a little sensitive for women regardless of them being criminals, the laws are made in a way to accommodate them and treat them as human and to protect their decency and dignity. And this procedure starts from the first step of a criminal procedure of investigation and trial that is “Arrest”. Arrest does not have a proper given

definition but it can be defined as taking of a person in custody under legal authority. A person can be arrested by a police officer, or a magistrate, or even by a private person in case he commits a non bailable and cognizable offence.

Women in India have a very proper procedure of arrest mentioned in section 46 clause 4 of Code of Criminal Procedure. The whole process is similar with the arrest of a male person but with minor changes that is no touching of the woman's body during the course of arrest by the male official but a female officer can if necessary and the female officer must be present during the arrest etc. But the most interesting is that women cannot be arrested after sunset and before sunrise and only in exceptional cases with the written permission of a first-class judicial officer this type of arrest is allowed. Section 46 clause 1 of code mentions how an arrest is to be made and it states that when an officer or other person makes an arrest de facto contact or touching of a person's body with a view to his detention can happen because arrest consist of actual seizure. But in case of women oral intimation is sufficient to arrest and make them submissive to custody. Section 46 clause 4 states that "[579]Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made". This clause is made for the protection of women because crime against women is committed irrespective of a woman background that is to say that it does not make a difference if the female is a criminal herself, she can easily become a victim of crime committed against women. Therefore, the section has come into force to protect the women from crimes such as rape, abuse and violence of any kind when they are taken into custody. The supreme court of India as well as other high courts has also issued guidelines for taking a woman into custody. Women not only in India but globally face many day-to-day harassments because they are seen as vulnerable part of society against whom a crime can be easily committed.

From a very young age females are exposed to crime these crimes can be crimes that are nonthreatening in nature but they have a huge psychological impact that can lead to unpredictable changes in their behavior. But most crimes against women are sexual and abusive with violence. Which can already suppress a female into a corner where her mental capability

[579]CODE OF CRIMINAL PROCEDURE, BARE ACT , SECTION 46 CLAUSE 4.

can change for good or bad depending on her interpretation to live life after the incident? In India there are many women who suffer such treatment of abuse and violence just because they are born female and gender bias in India is still a problem. So, from a young age female suffer abuse and this derails them and, in most cases, puts them on the path of criminal nature which leads them to be in touch of criminal justice system. This is not only for women who commits crime but also for females who are runaways and status offenders. The criminals are sent to prison so that they reform but during the process if they face a crime against themselves then the said reform can take more violent turn. Also not all the female offenders are arrested for serious crimes that are extremely heinous in nature most of them are either fraud or theft some are simply innocent but as suspects are in judicial custody, therefore is some thing happens to them during the arrest that causes harm to their dignity and decency then it shall not be acceptable because even though they are criminals and crime suspects they are foremost woman with human rights and there is a line with handling women which should not be crossed. Therefore, section 46 clause 4 clause into force to maintain some decency and provide protection to women during their arrest and their investigation and trial process.

WOMEN AND THEIR ARREST

The basic concept of arrest is to take an individual who is an offender in eyes of law in custody by making them submit under legal orders. Code of Criminal Procedure in chapter V which consists of section 46 to 60 states about the arrest and rights of the arrested person. Arrest is the first step in the process of investigation and trial. An accused person has to be brought before the magistrate to begin a trial. [580]Arrest is a restraint of the liberty of a person in order to compel obedience to the order of the court of justice or to prevent the commission of a crime or to ensure that a person charged with or suspected of a crime is may be forthcoming to answer it. Arrest can be done by a police officer, magistrate or a private person. Section 41 of code confers extremely wide powers to the police to make an arrest but the condition is that the arrest made, should strictly follow the provision otherwise the arrest can be proved illegal before the court of law. Section 46 of the code mentions the procedure to make an arrest this provision originally had three sub clauses then an amendment was made in 2005 where clause four was added which stated the procedure for arrest of a woman. The Legislature with their

[580]HALSBURY LAW OF ENGLAND, 4TH EDN, VOL. 11, P. 73, PARA 99.

knowledge added sub-section (4) to Section 46 of the Code by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2005 Act 25 of 2005 (w. e. f. 23,06.2006), which prohibited arrest of a woman after sunset and before sunrise except in extraordinary circumstances.

This section 46 clause 4 states that "Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made". In simple terms the provision sets the following guidelines to arrest a woman, firstly that a woman cannot be arrested after the sun sets and before the sun rises, secondly it says that only in exceptional circumstances a woman can be arrested after sunset and before sunrise that too when a lady police officer makes a written report and obtains a prior permission from a first classes judicial officer only then this type of arrest is possible. Also, there is no definition for what these exceptional circumstances are and how can an official interpret a situation as exceptional circumstance. The code also mentions that during an arrest of a female a lady police officer has to be present. The law in the black letters makes very clear about the procedure and process one has to follow if they want to make an arrest of a woman but most of the time the practical scenario is completely different. In case of[581]Bharati S. Khandar v. Maruti Govind Jadhav, the female was aware of the provisions of section 46(1), i.e., that only a female police officer could arrest a woman, so she declined to go with the male police officer who came to arrest her at night, but she was still unaware of section 46(4) of the code and was arrested after sunset and also mistreated by the police. The legislature purpose is to protect women, but sometimes police officers violate the law and act inappropriately with women as happened in this case. Another example is in case of [582]Kavita Manikikar v. Central Bureau of Investigation, Mumbai there had been a violation of section 46(4) of the code. In this case the lady filled written petition before the Bombay High Court for breach by the CBI officers of section 46(4) and 60A of the Code, the High Court permitted the written petition and held that the petitioner arrest was unlawful and contrary to the provisions of section 46(4) of the Code, and imposed a fine of Rs. 50,000/-on the respondent. These two cases are a very clear indication that law on paper and in practice are very different and are not being followed

[581]Bharati S. Khandar v. Maruti Govind Jadhav2012 SCC OnLineBom 1901.

[582]Kavita Manikikar v. Central Bureau of Investigation2018 SCC OnLine Bom 1095, dated 10-05-2018

as mentioned in the code. the cases also indicate that women have very little awareness about the provision of section 46 clause 4. It is not that woman in India are ignorant about their rights its just that they are not aware about them, the law has given them fair share of power to handle or face any unfair situation but that's all on the papers and the particle awareness about these provisions is zero. Which makes woman struggle and they get easily taken advantage off by the society and its systems. For example, in case of Bharati S. Khandar v. Maruti Govind Jadhav, even if the lady was aware about section 41 of the code that a female police officer is to be present during the arrest, she was not aware of section 46 clause 4 where arrest after sunset and before sunrise is prohibited and she was taken advantage of by the officer for not knowing about this provision and was arrested. So, if the lady knew about the provision, she could have avoided getting arrested and taken by the official at night time also she would have had time to make arrangements. The provision here is made to protect the women from facing any sort of harassment during the arrest and also to maintain some decency towards her, but the officials who know fully well about the provision still not follow them and make illegal arrests all the time taking advantage of the fact that the woman was not aware about the law. Here the question arises that is this provision in section 46 clause 4 in any way helpful to a woman? The answer is something that belongs to a grey area of the law that is although the provision is made to protect a woman or have some decency towards her, it does not really have an impact. Because even if the police illegally arrest the accused woman after sunset or before sun rise, the arrest is only said to be illegal and the officer is suspended or has to pay some compensation, other than that the law does not have anything to do with the accused woman's investigation and trial process. The provision is there just to provide some extra time to the accused lady and make her submit obediently to the law for her criminal proceeding to begin with, this simply is a way to safely bring the accused woman to the court for her trial. The law could have been that the lady can also be arrested anytime its just that the officers had to have some respects towards her and they should handle her with dignity and decency, because even with the provision of prohibited arrest after sunset or before sunrise there is no change in the behavior of officers, they do not treat the accused with decency even with the law so without the law or with it there is no benefit to accused ladies. The necessity of the provisions of sub-section (4) of Section forty-six of the aforesaid Code is two-fold. If the officer needs to arrest the lady when sunset and before sunrise, there should exist exceptional circumstances for such arrest. In cases whereby such exceptional circumstances do exist, a

woman officer shall create a written document and acquire a prior permission of the Judicial Magistrate, first-class in whose jurisdiction the offense is committed or the arrest is to be made. Also, section 60A of the code states that –" No arrest shall be made except in accordance with the provisions of this code or any other law for the time being in force providing for arrest. There are instances wherever section 46(4) of the code has been violated. one amongst the recent case during which the woman filed a judicial writ petition before the Mumbai high court for the violation of section 46(4) and 60A of the code by the CBI officers, the high court allowed the writ petition and command that the arrest of the petitioner was prohibited and contrary to the provisions of Section 46(4) of the Code, and required to make a fine of Rs. 50,000/- upon the respondent. The intent of the law-makers is to safeguard ladies, however typically the law enforcement officials violate the law and behave unsuitably with women because it happened within the case of Bharati S. Kandra v. Maruti Govind Jadhav and Christian Community Welfare Council of India and Ors. v. Government of Maharashtra and Ors. But the truth is that the law just makes a little difference which does not have any impact on the investigators or the accused. On the other hand, it can be helpful if the person accused is innocent is unfairly accused of the crime, they can use this extra time period to make arrangements to prove that the accused person is really innocent and the police did a sloppy job in their investigation. The law like a coin has two sides. Arrest and custody are also two different things that is in every arrest a person is said to be in custody but not every person who is in custody is to be arrested, keeping in custody will mean detaining a person of his liberty for a small amount of time. And in arrest the person in custody is to be kept under arrest until the person is released. Now section 46 clause 4 prohibits arrest of a lady after sunset and before sunrise therefore let's assume that the police came to arrest a lady after sunset but due to the provision, they are enabled to do so they stay outside the female's house not allowing her leave. This situation would not be any different from taking her into police custody because it does not matter if she was arrested or not but she has been confined and kept into her house by the officer by making her house the place of police custody and restraining her liberty. There is no difference in arresting her after sunset and keeping in custody or keeping her in custody at her house the after sunset just to arrest her in the morning. The provision also has its fault because the accused also has time to flee away from the official. This is why the provision has created controversy over time as to what are its benefit or does it really is helpful or is it a way out for women when she is to be arrested.

ROLE OF GENDER AND ITS UTILITY

Gender plays a huge role in this provision as the clause was added specifically for the female gender because law is fair to every one especially the weaker gender. Gender seems to play a role in making laws as the majority and minority also matter also the equality and justice are given with consideration of gender. It can also be seen that there are not many female criminals as compared to the male criminals and also even if there are female criminals, they are more likely to become victims of system and its people under custody or after their arrest or during their arrest. Special Rights of Women are as such Females can be searched by only another female with strict regard to privacy and decency stated in section 51, CrPc, Female suspects must be kept in a separate lock-up in the police station. They should not be kept where male suspects are detained it was mentioned in Supreme court judgement [583]Sheela Barse v. State of Maharashtra. When a female is arrested for a non-bailable offence, even if the offence is very serious punishable by death penalty even, the court can release her on bail section 437, CrPc. These are some gender biased laws of the justice system and there are more in respect to arrest of a women these guidelines are something extra with the guidelines for both genders. Sheela Barse v. State of Maharashtra case also stated in its guidelines that if the case dealt with custodial violence to women prisoners confined in the police lock up in Bombay. Women prisoners assaulted and tortured by the police in the police lock up. Directions issued by Supreme Court that Police lock ups where only female suspects should be kept and they should be guarded by female constables. Also, Female suspects should not be kept in police lock up in which male suspects are detained Interrogation of females should be carried out only in the presence of female police officers/constables.

The guidelines in DK Basu were given by the Supreme Court in consideration to both genders but there are also some additional guidelines and laws to be followed vile arresting a female.

In the land mark case of [584]DK Basu v. State of West Bengal, the supreme court of India issues a very detailed guideline with respect of constitutional as well as statutory safeguard that should be followed during arrest and detention of a person. The guidelines are as follows-:

First the Police personnel who makes the arrest and handle the interrogation of the arrested person must wear precise, visible and clear identifications and identification labels with their

[583]Sheela Barse v. State of Maharashtra1983 AIR 378, 1983 SCR (2) 337

[584]DK BASU V. STATE OF WEST BENGAL (AIR 1997 SC 610)

designations. Details of all personnel handling the interrogations of the arrested person must be recorded in a register.

Second the police officer making the arrest of the detainee will prepare a memorandum of arrest at the time of the arrest and said memo will be witnessed by at least one witness who may be a member of the family of the arrested person or a respectable person from the locality from where the arrest is made. It must also be signed by the detainee and must contain the time and date of the arrest.

Third a person who has been arrested or detained and is detained at a police station or interrogation center or other confinement, shall have the right to have a friend or relative or other person known to him or who has an interest in his well-being will be informed, as soon as possible, that you have been arrested and are being detained in a particular place unless the witness crediting the arrest memorandum is himself a friend or relative of the arrested.

Fourth Police must notify a detainee's time, place of detention, and place of custody where the detainee's next friend or relative lives outside the district or city through the District's Legal Aid Organization and station. Police of the affected area telegraphically within the period of 8 to 12 hours after the arrest.

Fifth the person arrested must be made aware of his right to have someone informed of his arrest or detention as soon he is put under arrest or is detained.

Sixth an entry must be made in the Case Diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police official in whose custody the arrestee is.

Seventh Upon request, the Arrestee must also be examined at the time of his arrest and major and minor injuries, if present on his body, must be recorded at that time. The "Inspection Memo" must be signed by both the detainee and the arresting police officer and a copy must be provided to the detainee.

Eighth the detainee must undergo a medical examination by a trained physician every 48 hours while in custody by a physician on the panel of approved physicians appointed by the Director of Health Services of the State or Union Territory concerned.

Ninth Copies of all documents, including the arrest memo, must be sent to the Magistrate for registration.

Tenth The Arrestee may be allowed to meet with his attorney during the interrogation, although not throughout the interrogation.

Eleventh a Police Control Room must be provided at all central district and state offices, where the arresting officer must communicate information about the arrest and the place of custody of the arrested, within 12 hours after the arrest and in the Police Control Room Board, must be displayed on a visible notice board.

These are the basic guidelines that should be followed during the time of arrest and detention of the person but there are also some guidelines during arrest of a women which have to be followed alongside the guidelines mentioned above and behind every enactment of law there is always an intention present likely in this case also there is legislative intent behind it. This law was passed so as to safeguard the modesty of women and to protect them from unnecessary harassment and torture. Even if the women are arrested there are some rules which must be followed, so basically the legislature ensured that even if the women are alleged to have committed the offence her modesty shall be given equal importance.

Guidelines which need to be followed while making an arrest of women:

According to section 46(4) of Code of Criminal Procedure it is clear that women shall not be arrested after sunset and before sunrise except in few circumstances when the police officer is bound to take prior permission from the judicial magistrate of first class. After seeking permission from the judicial magistrate, the police can arrest the women but even there lies a condition that the Arrest must be done by any lady police officer.

So, it is very clear from the point itself that a police officer cannot arrest a woman according to his whims and fancies and even if he does so disciplinary actions shall be charged against him.

Whenever a lady is arrested by the police, officer is duty bound to check that the arrest has been made by another lady constable or a lady police officer and while the search is going on it should be done with maintaining proper decency and decorum.

The police officer after arresting the accused (female) should make sure that she is kept in a separate lock up in the police station and if any case there are no lockups available for the accused women, then she should be kept in a separate room.

The police officer must not arrest a female after sunset and before sunrise, this rule was laid down after receiving various complaints as to how male officers harasses a lady in the lockup after arresting her, so as to avoid such circumstances and maintaining the modesty of a women and giving paramount importance to it this rule came into force in the amendment act of 2005. According to the guidelines police officer is not allowed to call upon the girl or the lady to the police station or any other place except from their place of residence. This right is mentioned under section 160 of Criminal procedure code and also the interrogation must take place in a way so that the arrestee is not embarrassed.

The police must avoid arresting of a woman who is pregnant and they can only do so, if there are circumstances where there is no option left then cops must do the job with much safety as there is a danger to the foetus, it might get damaged in hustle and also there is a danger to the labouring women so arresting her should be restrained.

In case where the women suspect requires to go through any medical examination it should only be done by the practitioner who is a female and it should be seen that proper care is taken. The addition of these rule or guidelines are followed for arresting a woman therefore we can say that the law is sensitive towards women and has a fair and protective side for them where decency is maintained and woman are respected and their situation of being the weaker gender.

CONCLUSION

The constitution of India has enumerated us with some basic fundamental rights and duties. These fundamental rights and duties work together to safeguard people and also make sures that while any right is infringed proper action must be taken. As often it is heard that women are considered as the weaker section of the society but sometimes men do forget that without her a man could not be man but sadly man using their power to prove them powerful is the saddest truth of today's era.

It has been seen that women are more prone to sexual harassment and assault. So, keeping the scenario in mind several rights have been granted to a woman keeping the gender in mind. These rights make sures that basic human rights are enshrined and women are being protected. So, while there is a arrest going to occur if the accused is by chance women, her safety becomes the first priority and it make sure that the amendment act of 2005 which has been laid down in section 46(4) of code of criminal procedure should be followed and the safety precautions must be taken while arresting a women. Women cannot be arrested after sunset and before sunrise

except in few circumstances where prior permission shall be taken from the judicial magistrate of first class.

Several incidents took place when the cops don't even inform the accused as to what charges she has been arrested for. This can be simply quoted as rule giver is breaking the laws. Several incidents have been witnessed where women are going through sexual harassment and torture by the police officials. It is the duty of the police to protect all the individuals from the wrongs going on in the society but here is the case of vice versa. The police should make sure that the rights are being informed to the arrestee and if he or she is entitled to bail and in the case of women it should be seen that while making the arrest of a women it should be done by another women and the search is also done by women with maintaining proper decency and without making it embarrassing.

ENVIRONMENT AND IT'S UNSURPASSED GOVERNANCE

- DEEPIKA SHARMA

Whilst increasing need for economic development in India, it should be understood that the same cannot be allowed to achieve at the cost of causing ecology imbalance or destruction of the environment. Further to this, the socio-economic development and environment should go hand in hand. It is unequivocally enshrined under the Constitution of Indian, as the duty of the citizen of India, to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures and state government to endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country".

Having stated above and at the outset, the environment embraces all extrinsic, physical, and biotic factors affecting the life and behaviour of all living things. The need for protection and conservation of environment as well as sustainable use of natural resources are provided under the Constitution of India (Hereinafter referred as "***COI***") which is the supreme charter of the Country. However, before proceeding further, it is pertinent to highlight some major Articles of COI regulating efficient and effective handling and usage of environment including natural resources:

- Part IVA, Article 51A- (The Fundamental Duties) casts duty on a citizen of India to protect, and preserve the environment including its land, water, air, forest, river, wildlife.

- Part IV, Article 48A (Directive Principles for State Policies) prescribed that the states shall be endeavoured to protect and improve the environment and to safeguard the forests and wildlife of the country.

It is to be noted that the power to make laws is provided under Chapter VII of COI, wherein the list of items/jurisdiction on which the Parliament or State Government can pass any law is provided. The judiciary has been vested with the power of interpretation as well as judging the validity of such laws in the eye of COI. Now, here the prime consideration is to understand

what constitutes the environment and what does it encompasses as per the legislative point of view.

The Environment Protection Act, 1986 (EPA) defined the Environment as:

Section 2(a) "environment" includes water, air, and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism, and property

The expression "environment" and "environmental pollution" have to be given a broader meaning, having regard to Parliamentary intent to ensure the objective of the EPA. It effectuates the principles underlying Article 48A of the Constitution of India. The EPA is in essence, umbrella legislation enacting a broad framework for the Central Government to coordinate the activities of various central and state authorities established under other laws, such as the Water Act and Air Act. The EPA also effectively enunciates the critical legislative policy for environment protection. It changes the narrative and emphasis from a narrow concept of pollution control to a wider facet of environment protection. The expansive definition of environment that includes water, air, and land, and the interrelation which exists among and between water, air, and land, other human creatures, plants, micro-organisms, and property give an indication of the wide powers conferred on the Central Government. A wide net is cast over the environment-related laws. The EPA also empowers the central government to comprehensively control environmental pollution by industrial and related activities. For these reasons, and in view of the above discussion, it is held that the NGT correctly assumed jurisdiction, having regard to the nature of the accident in the facts of this case[1].

Having said above, an important point to note is that out of the 30 most polluted cities in the world, 21 were in India in 2019[2]. As per a study based on 2016 data, at least 140 million people in India breathe air that is 10 times or moreover, the WHO safe limit and 13 of the world's 20 cities with the highest annual levels of air pollution is in India.

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However, other important Article under COI is Article 21 which prescribed the right to protection of life and Personal Liberty, *inter-alia* includes “Right to Healthy Environment” also. The observation of the Supreme Court of India in the matter of *Subhash Kumar v. State of Bihar* 1991 AIR 420, 1991 SCR [3]in this respect reads as follow:

Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the Fundamental Rights of a citizen. Right to live is a fundamental right under Art 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art, 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists.

It is comprehended from above quoted paragraph that right to live which has been enshrined under Article 21 of the COI, embedded in itself the right of enjoyment of pollution free water and air for full enjoyment of life. However, with the advent of technology, increased pollution, overburdened land, over polluted water resources due to industrial pollutant from factories etc, there is an urgent need of protecting the environment towards its best utilization and sustainable development, where the future generation will not get devoid of these resources. If any person impairs the quality of air, water, or land, the petition under Article 32 of COI.

It is well understood the principle that to manage and regulate make rule & regulations and then to execute, make the body to enforce, and for contravention of said rules & regulations penalize the defaulter. So, it is important to know which are the regulatory bodies empowered by the legislature to protect the environment, ensure the compliance within the four corners of laws, and to penalize the defaulter of nature. Therefore, briefly reading through important enactments by the central government which as mentioned hereinbelow:

The National Green Tribunal Act, 2010

The National Green Tribunal Act, 2010 or NGT Act, was enacted with the objective of establishment of National Green Tribunal, the preamble of the NGT Act reads as:

An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to the environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto;

As unequivocally stated by the [4]Hon'ble Supreme Court that the environmental issues are complicated, expertise in diverse filed would be required that would inter-alia include ecology, chemistry, biology, economics, administration, management, law, etc. for their determination in an effective and speedy fashion, that is not possible within the regular judicial and administrative set up in India. Section 23 of the Tribunal to make such order as to costs as it may consider necessary and Section 24 empowers the Tribunal to make an award for monetary compensation or relief on the ground of damage to the environment. An award or order or decision of the Tribunal under the National Green Tribunal Act is executable as a decree of the Civil Court, by the Tribunal itself, for which purpose the Tribunal has all the powers of a Civil Court. The Tribunal may also transmit any order or award made by it to a Civil Court for execution.

The NGT Act, empowered the NGT with dual power, in the sense that Section 14 and 15 of the said primary original jurisdiction, whereas the appellate jurisdiction has been included under Section 16 of the Act. Where a conjoint reading of Sections 14, 15 and the Schedules would lead one to infer that the NGT has circumscribed jurisdiction to deal with, adjudicate, and wherever needed, direct measures such as payment of compensation, or make restitutionary directions in cases where the violation (i.e., harm caused due to pollution or exposure to hazards, etc.) are the result of an infraction of any enactment listed in the first schedule.

Subsequently to the enactment of the NGT Act, it was furthermore important to understand what all are the cases that may be referred to the NGT, the answer of which was clearly stated under schedule I to the NGT Act.

Having said above, other major enactments by the Central Government are as follows, presented for the reader in brief:

The Water (Prevention and Control of Pollution) Act, 1974;

The Act prohibits the discharge of pollutants into water bodies beyond a given standard, and lays down penalties for non-compliance. The Act was amended in 1988 to conform closely to the provisions of the EPA, 1986. It set up the CPCB (Central Pollution Control Board) which lays down standards for the prevention and control of water pollution. At the State level, the SPCBs (State Pollution Control Board) function under the direction of the CPCB and the state government.

Having said above, it is equally important to state that India has more than 1.2 billion people, but only a little over 30% of its population lives on less than $1.25 a day. Around 80% of India's water is severely polluted because people dump raw sewage, silt, and garbage into the country's rivers and lakes. This has led to water being undrinkable and the population having to rely on illegal and expensive sources. Each year, more than 1.5 million Indian children die from diarrhea. Out of the entire Indian population, experts predict that 40% of people may not have a connection to a clean water source by 2030.

The Water (Prevention and Control of Pollution) Cess Act, 1977

This Act provides for a levy and collection of a cess on water consumed by industries and local authorities. It aims at augmenting the resources of the central and state boards for the prevention and control of water pollution. Following this Act, The Water (Prevention and Control of Pollution) Cess Rules were formulated in 1978 for defining standards and indications for the kind of and location of meters that every consumer of water is required to install.

The Forest (Conservation) Act, 1980

This Act was adopted to protect and conserve forests. The Act restricts the powers of the state in respect of de-reservation of forests and use of forestland for non-forest purposes (the term 'non-forest purpose' includes clearing any forestland for the cultivation of cash crops, plantation crops, horticulture or any purpose other than re-afforestation).

The Air (Prevention and Control of Pollution) Act, 1981

An Act to provide for the prevention, control and abatement of air pollution, for the establishment, with a view to carrying out the aforesaid purposes, of Boards, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

The Public Liability Insurance Act, 1991

The Act was drawn up to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident while handling any hazardous substance.

The Biological Diversity Act, 2002

The Act enacted to provide the conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge associated with it

The Biomedical waste (Management and Handling) Rules, 1998

These rules are legal binding on the health care institutions to streamline the process of proper handling of hospital waste such as segregation, disposal, collection, and treatment.

The Noise Pollution (Regulation and Control) (Amendment) Rules, 2002

The said Rules lay down such terms and conditions as are necessary to reduce noise pollution, permit the use of loud speakers or public address systems during night hours (between 10:00 p.m. to 12:00 midnight) on or during any cultural or religious festive occasion.

The Manufacture, Storage, and Import of Hazardous Chemicals Rules, 1989

The rules define the terms used in this context, and sets up an authority to inspect, once a year, the industrial activity connected with hazardous chemicals and isolated storage facilities.

Hazardous Waste (Management and Handling) Rules, 2016

The rules enacted to control the generation, collection, treatment, import, storage, and handling of hazardous waste.

Responsibility and Ability of professionals

While complying with the applicable provisions under environmental laws, professionals like company secretary, compliance officer, directors, chief financial officer, legal consultants, etc. shall act as an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies, while keeping himself updated of developments in existing environmental laws, the amendments, circular issuing mandatory directions on the companies etc. He is certainly entitled to file reports, returns, disclosures regarding happing of any specific events which may endanger the quality of the environment with the state pollution control board, and so forth. All such matters now come within the ostensible authority of a company's secretary.

Principally, these professionals are not only warranting the compliance of applicable environment laws on the Company, but has put before the board of directors of the Company the declaration as to compliance toward the said laws, and bring to their attention any deviation with the possible corrective measures in line of applicable provisions of the Environment Act.

Consequently, as a chief compliance officer of the Company, should be well versed with all international conventions and agreements on environment and related issues and, should help in implementing them. The call from the environmental laws to these professionals is not a one-time exercise but a continuous effort to ensure continual compliance by corporate. It is equally important to state here that India is among the countries which are in the vanguard of environmental protection. The environmental laws enacted by the Central Government increased compliance over a period of time shows the concern over the continual deterioration in the quality of the environment which include land, air, water, species, flora, fora, amongst whom maintaining correct balance is the need of the hours, where the lamp enlightened the path which led to the objective of balance economic development without comprising the ecological balance could be held by named professionals.

Apparently, their role commenced from the date of birth of the idea for the establishment of any factory/plant, whereby he has to adhere to applicable provisions with respect with applying for consent to established under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act 1981, as amended from time to time. As per Section 25 of the Water (Prevention and Control of Pollution) Act, 1974, no person shall without the prior consent of the State Pollution Control Committee (**SPCC**), establish any industrial plant or process or any treatment and disposal system or any extension or addition thereto which is likely to discharge sewage or trade effluent into any stream or well or sewer or on land. Similarly, as per section 25 of the Air (Prevention and Control of Pollution) Act 1981, an application for the consent of the SPCC under the said section shall be made in such form containing such particular and shall be accompanied by such fees as may be prescribed, accordingly, in both stated Act, it comprehensively stated no person shall without obtaining the consent to operate shall commence any industrial plant.

It is not only required to read, understand and implement the environmental laws, but also considered the important fundamental principle that has been led down by the Hon'ble Supreme Court and High Courts, which shall inter-alia include:

- The Polluter Pays Principle, where the violator is liable to make good the loss suffered by the victim and take all reasonable actions to bring back the state of the environment prior to such an event.

- Absolute Liability for cases dealing with hazardous substances where fault need not be established.
- Precautionary a principle which may be proposing as a new guideline in environment decision making, by taking preventive action in the face of uncertainty.
- Sustainable development where the right to development must be met so as to equitable that his/her action environmentally begins.

It is pertinent to consider that the level of applicable environmental laws would depend upon the nature of industry, for instance in case of Distillery including Fermentation Industry, the compliance would be numerous and stringent too as compared to another industrial player. Therefore, one should be vigilant while dealing with the environmental laws and compliance thereto in following 17 companies, which are considered major polluting industries:

a) [5]Aluminium Smelter
b) Caustic Soda
c) Cement
d) Copper Smelter
e) Distilleries
f) Dyes & Dye Intermediates
g) Fertiliser
h) Integrated Iron & Steel
i) Tanneries
j) Pesticides
k) Petrochemicals
l) Drugs & Pharmaceuticals
m) Pulp & Paper
n) Oil Refineries
o) Sugar
p) Thermal Power Plants
q) Zinc Smelter

It is important to undertake an environmental financial audit to enable an auditor of the company to establish whether the reporting entity has appropriately recognized, valued & reported all significant environmental costs, benefits, assets, liabilities, and contingencies.

The professionals can help the organizations in obtaining the permits or consents or authorization from the local state pollution control board.

At the behest of whatever said above, the professional need of the hours is to keep oneself vigilant on global need and development, the World Committee on Trade and Environment has undertaken many of activities which could ensure check and balance on use of environmental resources and its sustainable development, and one should meet the pace of ever-increasing compliances, keeping insight of national and global legal development

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A DRAG FROM MANDAP TO COURTROOM: THE HINDU MARRIAGE ACT 1955

- DIVYA DILIP AREKAR

ABSTRACT

India display's a unique blend of a diversified religious community whose personal affairs are governed by their personal laws. For any society to maintain its sanity, the existence of law and order is essential. Today we have written law drafted by the legislature but personal laws are in existence since time immemorial that is based on customs, traditions, and usage of a particular community. Marital laws play a pivotal role in the preservation of the marriage institution. The purpose of Matrimonial laws is to regulate the conduct of the parties and to uphold and maintain the integrity of a society. Hindu marriage is revere by the belief that marriages are made in heaven by God and cannot be dissolved by humans. Divorce was never an option. After the enactment of the Hindu Marriage Act 1955, divorce was introduced and the aggrieved spouse may legally separate on the specific ground mention in the act. Since the solemnization of Hindu Marriage, the provisions of the Hindu Marriage Act are applicable, provided both the parties to the marriage are Hindus. The act expressly states down the condition of marriage. A man decides to marry is his personal affair but when either party to the marriage decides to divorce law needs to interfere. The act recognizes customary divorce, where the parties may dissolve their marriage without obtaining a decree of divorce from the court. The Act lays down the procedure for the court for expeditious disposal of petitions. The act provides maintenance for either spouse that includes interim maintenance, litigation expenses, and permanent maintenance. The act is competent to adjudge matters related to custody, maintenance, and education of the children. Registration of Hindu Marriage is optional; however, the State Government is empowered to make registration of Hindu Marriages mandatory. In Toto, the Hindu Marriage Act is a compilation of the validity of a Hindu marriage, if the parties decide to separate then allows them to reconcile and if the parties are unable to keep up with each other then finally divorce is granted.

1 THE NOTION OF PERSONAL LAWS

India is acclaimed for its largest secular democracy having a mosaic of diversified religious communities, distinct in their fundamental features, yet they live united. These religious communities have their consolidated religious affairs which they do not wish to forsake but to preserve and regulate their conduct as per their personal laws. Hinduism is the only reformative religion that welcomes pragmatic reforms and does not adhere to its rigid construct, and gets away with any peculiar pratha that does not serve its purpose nor does it do justice with the parties involved. Personal laws only entertain matters on marriage, divorce, maintenance, inheritance, adoption, and succession. The Constitution of India also affirms the right to freedom of religion under Article 25, part III but it is not absolute and reasonable restrictions can be imposed.

Customary laws have emerged through religious scriptures, customs, traditions, and teachings which are passed on from one generation to another. During the British era, the Britishers only reform those aspects of society in which religion was not involved as they never ought to drag themselves into the personal affairs of the indigenous people even when they did not approve or appreciated the unreasonable attitude towards women in the medieval Indian society. On the contrary, they were governed by Christian laws over their personal affairs. Britishers only reforms those legal aspects of society where the validity of customs was not challenged and created an effective environment that supported their commercial practice effectively. But when they received a backlash from the feminist of Britain who got to know about the poor state of women in India, endeavors were made to bring in religious reform with assistance from some of the Hindu traditional reformers.

For instance, Sati pratha was abolished with the enactment of "The Bengal Sati Regulation (Regulation XVII) Act of 1827 passed by the then General Governor, Lord William Bentick. Later on "The Commission of Sati (Prevention) Act 1987" was enacted to prohibit the glorification of sati pratha. Raja Ram Mohan Roy, a social reformer took the initiative to stop sati pratha.

Child marriage Restraint Act 1929 also known as Sarda Act as Har Bilas Sarda introduced this act which was later replaced by the Prohibition of Child Marriage Act 2006 due to certain shortcomings. The implementation of this act was not effective initially as it was vehemently opposed by the conservative Hindus but with the pace of time awareness was instilled and social acceptance was witnessed.

Other laws which are either repelled or got replaced are the Hindu Widow's Remarriage Act, 1858 drafted by Lord Dalhousie. The Hindu Marriage Removal of Disabilities Act 1946 consists of only two sections. Section 2 of this act allowed marriage between persons of the same gotra or parvara or different sub-division of the same caste during British India.

2 WHO IS A HINDU? BIRTH, CONVERT, RECONVERT

Section 2 of the Hindu Marriage Act 1955 explains on whom the act is applicable. A person is considered a Hindu if he is a Hindu, Jain, Buddhist, or Sikh. A person is not a Hindu if he is a Muslim, Christian, Parsi, or Jew and as such, they are not governed by Hindu laws. Any person who is born of Hindu parents is also a Hind by birth. If anyone of the parents is Hindu the child born out of such wedlock will be considered a Hindu.

In *Devabalan v. Jaya Kumari,*[585] it was held that where custom permits marriage of a Hindu with a Non-Hindu Woman, their children, and his wife will be Hindus. In this case, a custom was recognized that a Hindu man belonging from the Nadar community can marry a Christian woman and after their marriage, the woman follows the customs of her husband. However, Section 4 expressly states that "Any text, rule or interpretation of Hindu law or any custom or usage followed before the enactment of Hindu Marriage Act 1955 ceased to affect if it is inconsistent with any of the provision contained in this act."

Section 5 recognizes marriage between two Hindus only. Hence the customs of the Nadar community as such is inconsistent with Section 5. However, if the people belonging to the Nadar community solemnized their marriage before 1955 then as per Section 29 of the Hindu Marriage Act such marriages shall not be invalidated if one spouse is Hindu and the other belonged to a different religion.

If a Hindu marries a non-Hindu then their marriage is deemed to be an inter-religious marriage and as such matrimonial disputes will not be adjudged under Hindu Marriage Act 1955 which makes it mandatory that both the parties to the marriage must be Hindus hence Special Marriage Act 1954 will be applicable. Question regarding the religion of the child born from such inter-religious wedlock's, the religion of the father will be the religion of the children by birth as patrilineal is followed unless after the age of 18 the child wishes to convert in any other religion.

[585] 1991 Ker 175.

A guardian of a child or the parents when converting their religion can also do so for their minor children. Illegitimate children only recognize maternity and the religion of the mother will be applicable. Any person who converts in or reconverts to Hindu, Jain, Sikh, or Buddhist religion is considered a Hindu. In India, if a person does not belong nor does he professes Christianity, Judaism, Islamism, or Zoroastrianism and he is unaware of his religion then in such a case he will be deemed to be considered as a Hindu, and Hindu laws will apply to such a person unless inverse is proved that he is not a Hindu.

As mention under section 2 (2) of HMA, the members of Schedule tribes are not governed by codified Hindu Laws and old Hindu law applies to them as per Clause (25) of Article 366 of the Constitution of India unless the Central Government by notification in the official Gazette directs that any of the enactments shall apply to them.

3. EVOLUTION OF MARRIAGE INSTITUTION

Marriage institution was not recognized during the prehistoric era and the rule of sex promiscuity was followed as consequences of which the paternity of a child was not able to determine though maternity was established. With the advancement of a civilized society, the concept of marriage was regulated. The man felt the need to protect his territory and also to satisfy his wants. With the emergence of patriarchal society, the wife was expected to maintain her fidelity to establish the paternity of the baby, though as towards the man he was free to practice bigamy under peculiar circumstances.

At present after the enactment of the Hindu Marriage Act 1955, second marriage in the subsistence of first marriage is declared to be null and void and is also penalized under section 499 of Indian Penal Code 1860. The rule of monogamy is observed in Hinduism and the wife is considered to be the better half of her husband and is required to participate in all the religious ceremonies to create an eternal bond.

Hindu marriage is not a contract but is regarded as a sacramental union of sexes who gets tied up for the rest of their life to perform their religious and spiritual obligations and to fulfill promises made during nuptial. The fundamental objective of the marriage institution is the establishment of a legal relationship between a man and a woman who can cohabit together without anyone's interference or objection to such cohabitation, to legalize carnal conjunction, to procreate children, to maintain the patrilineal of the family and to perform their marital obligations and claim their right against each other.

Through the inception of Hindu Marriage, the notion of divorce was not in vogue as husband and wife were expected to cohabit together even though their marriage was a complete disaster only because the Hindus cherish the idea that marriages are made in heaven and consider it as a perpetual bond, created for the next seven births. Such an idea is emancipated by one of the ceremonial acts known as Saptapadi in Hindu Marriage.

In a society where men hold a predominant role-socially, politically, economically, and legally, women were expected to be submissive and followed their husband's orders unconditionally. With so much concentration of the power and authority in the hands of the husband over his wife it was deemed that women were to be exploited in every spear of life. As a result of which monogamy in marriage and idolizing marriage as a sacred bond were now restricted towards women alone.

Even though the dissolution of a Hindu marriage was unrecognized still a wife can abandon her husband and her in-laws family under certain peculiar conditions like if he went missing and even after several attempts made he was unable to be traced or heard off or he has lost her virility and is considered to be an impotent or conduct immoral acts or scarifies his marital obligations and adopts an ascetic lifestyle, or he is ex-communicated, or cohabiting with him creates an imminent danger for her life.

Earlier widows were not allowed to be remarried but remarriage of brides can be performed only if she was forcefully taken away against the wishes of her father or her guardian and the marriage is not solemnized as per the Hindu rites or if the marriage was unable to consummate due to sudden death of her husband soon after the marriage. In the case of man even if he was a widower he was able to get married without any restriction or delay only because he was a man who was considered superior to women and his needs and desires were prioritize, also the family lineage must go on and the ancestral property must be passed on to the next generation, such hypocrisy was entertained. However during the rule of East India Company, remarriage of Hindu woman was legalized with the enactment of "The Hindu Widows Remarriage Act 1856" but considering the response from the society for its acceptance and enforcement, the question stills remains in abeyance, even though the endeavor were made to socially sensitize this issue.

For a marriage to sustain, and attain its purpose the parties to the marriage must enter freely without any undue influence or coercion. But as the Hindu marriage is believed to be made in heaven the consent of parties to the marriage is immaterial and the sole decision lies with the

father or the senior-most member of the family for getting their daughter married to a suitable groom and the responsibility is then shifted from father to son in law by way of Kanyadan. Therefore the Hindu Marriage can never be considered as a contract.

Speaking of Betrothal (Sagai) ceremony, it is a contact for getting married in the future. The significance of a Betrothal ceremony can be perceived as an opportunity to come across any material fact which was not known during fixing the marriage. If any discrepancies are discovered after the Betrothal ceremony but before the solemnization of marriage either party can terminate their agreement to get married.

4. THE HINDU MARRIAGE ACT 1955[586]

The notion of establishing a utopian society is only good in theology as no era has ever been perfect and hence timely refinement of society is necessary. All the drawbacks of a Hindu marriage were filtered upon by the enactment of the "Hindu Marriage Act 1955". Before 1955, Hindu marriage was not legally unified. If a Hindu wanted to file for a divorce he/she could do so under section 9 of Civil Procedure Code, 1908 read with Specific Relief Act, 1963.

If a Hindu Woman having valid reasons wanted to live separately from her husband she may legally live separately and additionally she may file a suit and claim maintenance only on grounds stated under "The Hindu Women's Right to Separate Residence and Maintenance Act 1946" however this act was later abrogated but it has retained its essence under section 18 (2) of Hindu Adoption and Maintenance Act 1956.

Following the enforcement of "The Hindu Marriage Act 1955", dissolution of marriage can be awarded, although it shall satisfy the matrimonial causes laid down under this act. The Hindu Marriage act grants four matrimonial causes:

4.1 NULLITY OF MARRIAGE AND DIVORCE:

Void and Voidable marriages are nullified as the parties to the marriage are legally disqualified to attain the status of husband and wife towards each other by reasons of absolute incapacity or relative incapacity that exist before the marriage is solemnized. The absolute incapacity to perform a marriage renders the marriage as void ab initio and relative incapacity to perform a marriage renders the marriage voidable at the option of the other spouse.

4.1.1 VOID MARRIAGE:

[586] The Hindu Marriage Act, 1955 Act No. XXV of 1955.

Section 11 applies to marriages that have ceremonialized after 1955 (prospective effect). Either party to the marriage can present the petition against the other party only if it contravenes the condition under Section 5 (i) (iv) (v) of the Hindu Marriage Act 1955 and the court shall pass the decree of nullity.

A void marriage has no legal implication as the parties to the marriage are suffering from absolute incapacity. No legal recognition is given even if the marriage is performed with proper ceremonies and the offspring of such marriage is illegitimate subjected to Section 16 of Hindu Marriage Act 1955. As a void marriage is not formalized hence the question of mutual rights and obligation and to inherit property from each other does not arise. In a void marriage, the parties can terminate their bond without any declaration from the court[587] as such marriage is not legally valid and even if the parties to void marriage wish to define their legal status by way of judicial declaration, the court will merely recognize and declare such marriage as null and void under section 11.

4.1.2 VOIDABLE MARRIAGE:

Section 12 is given retrospective effect and discusses four causes to annul voidable marriage with a decree of nullity. A voidable marriage is a valid marriage and either party to the marriage may file a suit for annulment of marriage to avoid such a marriage. Voidable marriage being a valid marriage unless and until either of the spouses does not avoid it; creates legal consequences and status of husband and wife is formalized, mutually rights and obligations are upheld and offspring's of voidable marriages are legitimate.

Avoidable marriage is considered a valid marriage unless and until any action is caused or if any of the spouses dies before the marriage is annulled then such a voidable marriage remains valid forever. Applying the principle of "Dissolubility of marriage" if the voidable marriage is annulled then such a decree of nullity will have a retrospective effect treating the marriage as void since its inception. Unlike void marriage the parties to a voidable marriage shall get a decree of annulment of marriage before they perform a second marriage otherwise he/she will be guilty of bigamy.

Section 12 (1) (a): The Respondent being impotent is unable to consummate the marriage.

Impotency is the incompetence of a man who is not able to keep an erection firm, substantially to seek copulation. The Marriage Laws (Amendment) Act 1976 illuminates that if a person

[587] Lila v. Laxmi 1968 ALL LJ 683.

undergoes a successful surgery or due to effective treatment his erectile dysfunction is cured or its effect is cease which makes him capable to perform conjugal intercourse, he cannot be regarded as impotent[588]. A potent person can make the marriage voidable against an impotent person. In *Jagannath Muduli v. Nirupama Behera,*[589] the Orisa High Court held that impotency makes a person incapable to copulate absolutely.

Whether male or female, if their reproductive organ is unable to have natural sexual intercourse due to any defects in their reproductive organ and surgery cannot alienate those defects or even if surgery can alienate but they are unwilling to undergo such procedure then that person is taken to be impotent. A decree of nullity was awarded where the wife had a development disorder of her reproductive organ (*Mayer-Rokitansky-Kuster-Hauser Syndrome*) and sexual intercourse cannot be performed[590].

Impotency can be of two forms, Somatic impotency, and Psychological impotency. Somatic Impotency refers to abnormal growth of the reproductive organ (large penis[591] or small vagina[592]) In *Ganeshji v. Hastuben*[593] the wife had a surgical operation of her vagina to undo the defect and then she was able to have normal intercourse. The Gujarat High Court held that after the surgery she became potent. In *Laxmi v. Babulal*[594], the wife suffered from Vaginal Agenesis (born without a vagina) and an artificial vagina was set up. The Rajasthan High Court held that it did not eliminate her impotency and granted the decree of nullity. In *Govinda v. Nagamani,*[595] the Andhra Pradesh High Court defines being potent as a virility of a man who can ejaculate spermatozoon and for a woman who can menstruate.

Psychological impotency refers to reprehension towards carnal knowledge due to being asexual. In *Urmila Devi v. Narinder Singh*[596], the wife suffered from amenorrhea but was able to consummate the marriage, she was repugnant towards sex and hence marriage was declared null and void.

Whether sterility is considered impotency? Sterility is not the test to determine impotency. Impotency as such is related to carnal pleasure for which a successful penetration is a must.

[588] M v. S 1963 Ker LT 315.
[589] 2009 Ori 59.
[590] Vinay Kumar v. Jaya, 2010 HP 112.
[591] Kanthy v. Harry, 1954 Mad 316 (FB).
[592] Rangasawami v. Arvindammal, 1959 Mad 243.
[593] 1967 Guj LR 966.
[594] 1974 Raj 89.
[595] 1962 AP 151
[596] AIR 2007 HP 19.

Inability to get pregnant is not treated as impotency and hence is not a valid ground for obtaining a decree of divorce.[597] A person may not be biologically qualified to beget a child but he/she may be capable to have complete carnal knowledge. If one knowingly marries a sterile person they cannot be permitted to get their marriage annulled.[598]

Under Hindu Matrimonial Law, Homo (same-sex) marriages are void. A marriage of a person being male and female with a eunuch or a marriage between eunuchs is a voidable marriage.

Section 12 (1) (b): Marriage performed in contravention of conditions mention under section 5 (ii).

Section 12 (1) (c): Consent of the petitioner was obtained by force or fraud.

Apart from outward compulsion causing motion by coercion, the force can be given a wider connotation as applying an inward force compelling someone to do something against their will; intimidating them by causing hurt, panic or agitation either directly or indirectly which can constrain them to combat under duress. It is not necessary that the force must be exerted from the respondent; it may also be exerted from someone on the behalf of the respondent. In most the arrange marriages consent of the parties are immaterial; if the parents assent to such a union, however, there is also some influence, persuasion, or manipulation but that will not amount to force as it requires to be extreme like the respondent blackmailing or harassing the petitioner to get married. The marriage will also get annulled if the respondent takes away or abduct the petitioner against his/her will.

Fraud is committed only when there is an intention to deceit. If the respondent dishonestly misrepresents or states false facts which are material to the petitioner then it amounts to fraud. Such willful misconduct of the respondent causes injury-mental, physical, economic to the petitioner. If facts are concealed or falsely stated it is true that had the petitioner having known the truth he/she would never have consented to such a proposal. It is unambiguous to determine what testifies as fraud under the matrimonial law as each concealment or a canard perpetrated at the time of fixing a marriage does not amount to fraud. For a person to get married in a family where his/her parents wish to often ends up flexing up and being phony about the person's qualities, qualification, career, income, age, caste only to set up the marriage with the person they intended to marry their son/daughter to. But if after the marriage all or any of the qualities and qualifications turns out to be bogus the marriage cannot be annulled unless and

[597] Samir Adhikary v. Krishna Adhikary, 2009 Cal 278.
[598] A v. B, 53 Bom LR 486

until it is so fundamental that it radically breaks the marriage as the petitioner under no circumstances can cohabit with the respondent.

The Marriage Laws (Amendment) Act 1976 establish two reasons that dispose of the consent of the petitioner because the respondent is guilty of committing fraud by intentionally performing faulty ceremonies, concealing true identities of the party, or any other substantial fact concerning the respondent. Concealment and misrepresentation of specific substantial facts will amount to fraud. However, until now concealment of incurable venereal disease, religion or caste, unchastity (fornication), illegitimacy, pre-marital status, the identity of the party, income, career, or concealing age of the respondent has been held as a ground for committing fraud.

If a person willfully having a fear of rejection conceals his/her history of medical illness after due inquires had been made then such act amounts to fraud. Both the parties to the marriage have an onus to inquire about all the relevant information that will satisfy their mind. The doctrine of caveat emptor is applied to decide whether fraud has been committed or not. Both the parties shall make an effort to ask relevant and specific questions which as per them are very essential to inquire before marriage is performed but if while an inquiry is made and either party deliberately conceals or furnish false information then such an act is fraudulently committed

Section 12 (1) (d): Respondent is pregnant at the time of marriage by some person other than the petitioner**.**

If the respondent conceals her pre-marital pregnancy, the petitioner within one year from the date of the marriage can file a petition for nullity of marriage. Premarital Fornication of the respondent will not render the marriage voidable. For the application of Section 12 (1) (d), the respondent must be enceinte at the time of the marriage and she has conceived from a man other than the petitioner and as per Section 12 (2) (b) (i) the petitioner at the time of marriage was unaware of her pre-marital gestation.

Section 12 (2) (b) (ii): The petitioner after becoming aware of the respondent's pre-marital pregnancy needs to maintain the suit within one year from the date of their marriage and if it is delayed beyond one year then his petition for nullifying the marriage will be dismissed. The petitioner needs to prove beyond reasonable doubt that the respondent is pre-marital pregnant

from a man other than him by establishing that before marriage there were no means that he had access to her[599].

Section 12 (2) (b) (iii): When the petitioner became conscious about the respondent's pre-marital pregnancy and still resumes to copulate with her, he cannot, later on, pray to nullify the marriage as his conduct is considered as an act of condonation. If the petitioner, voluntarily after he becomes aware of the respondent's pregnancy, before getting married chooses to marry her then after the marriage he cannot present the petition to annulled the marriage, and the child born to her post-marriage will be treated as his son.

4.1.3 CONDITIONS TO SOLEMNIZE A HINDU MARRIAGE:

Section 5 says that the Hindu marriage act is only applicable to marriages solemnized between two Hindus.

Section 5 (i) Bigamy: Polygamy was practice by men before 1955 which allowed them to marry more than one woman. Polyandry permits the woman to have more than one husband. As such polyandry was never accepted by Hindus but still it was a practice in the Lahaul Valley in Himachal Pradesh and among Thiyyas of South Malabar.[600] Bigamy is inclusive of Polygamy and Polyandry. The husband or the wife shall not solemnize second marriage in the subsistence of first marriage. It is a pre-requisite condition before performing another marriage. If the first marriage is null and void, the husband or the wife without any delay can perform second marriage as in that cases the status of husband and wife was never in existence as the null and void marriages are void ab initio. If the first marriage is voidable or valid a divorce decree must be passed by the competent court to perform a second marriage.

A prosecution of bigamy can only be maintained if the first marriage is valid or voidable, and the spouse of the person who entered in the second marriage is living and most essentially if it is proved beyond reasonable doubt that the second marriage was performed with all the essential rites required under the law or as per any other customs applicable upon the parties.

Section 4 lays down ceremonies of the Hindu marriage which sanction marriage as valid between two Hindus. A Hindu marriage can be solemnized as per the custom and ceremonies of either party. If the ceremony of Saptapadi is performed, then the marriage becomes complete and binding when the seventh step is taken.

[599] Maya Ram v. Kamla devi, 2008 HP 43.

[600] Krihnan v. Ammalu 1972 Ker 91.

Section 11 makes a bigamous marriage void. Section 17 punishes bigamous marriage solemnized by either husband or wife while their spouse is living as a penal offense under section 494[Marrying again during lifetime of husband or wife- Imprisonment of either description for a term which may extend to seven years and also liable to fine] and section 495 [Whoever contracts the second marriage and conceals his/her first marriage from the subsequent person, the fact of the former marriage shall be punished with imprisonment of either description for a term which may extend to 10 years and also liable to fine] of Indian Penal Code 1860[601].

The question of Bigamy does not arise if a person intentionally carries out a deceiving marriage ceremony by reasons of omitting all or any of the proper and essential rites which makes the second marriage null and void and the spouse from the first marriage will not succeed to prosecute his/her spouse under bigamy. If the spouse from the first marriage gets to know that his/her husband/wife is going to contract a second marriage in the existence of their first marriage then he/she may approach the court and file a petition seeking a perpetual injunction under section 9 of Civil Procedure Code 1908[602] read with section 38 of Specific Relief Act 1963[603].

The spouse from the first marriage cannot ask the court to declare his/her wife's/husband's second marriage as null and void as it is mention under section 11 of the Hindu marriage act that the petition for declaring marriage null and void shall be presented by either party against the other party to the marriage. However, for declaring his/her spouse's second marriage as null and void the spouse from the first marriage can file a suit in a civil court under section 9 of Civil Procedure Code 1908 read with section 34 (discretion of the court to declare status and right) of Specific Relief Act 1963.

If A is lawfully wedded to B and later A proceeds to perform a mock/fake marriage with C. A conceals the fact that A is already married to B. C in good faith performs the marriage ceremonies with A believing that such rites constitute a valid marriage and later on has the knowledge of the fraudulent acts of A then C can prosecute A under Indian Penal code 1860: section 495 [Whoever contracts the second marriage and conceals his/her first marriage from the subsequent person, the fact of the former marriage shall be punished with imprisonment of

[601] The Indian Penal Code, 1860 Act no. 45 of 1860.
[602] The Code of Civil Procedure, 1908 Act no. 5 of 1908.
[603] The Specific Relief Act, 1963 Act no. 47 of 1963.

either description for a term which may extend to 10 years and also liable to fine] and under Section 496 [marriage ceremony gone through without lawful marriage then the accused will be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine]. If A had contracted a valid marriage with C and C knows that A is already married then A will be liable for bigamy only.

Section 5 (ii) (a): A person having an unsound mind at the time of marriage is incapable of rendering valid consent. It is very crucial to realize the responsibility of marriage to sustain a healthy bond but if either party to the marriage possesses an unsound mind they are not capable to dispense their marital obligations and it will be intolerable for the other spouse to ever be satisfied and contended in such a union and it will equally have a more negative impact on the person who is of unsound mind.

Any person who accedes to marry must possess the capacity to give valid consent. This consent can be proxy consent which does not render the marriage void. Consent is implied if there is no express protest made against the decision taken. Hindus have never emphasis on consent because it is immaterial for them as they do not view marriage as a civil contract but more of a God's will. A person is said to consent when he/she does not raise any objection and accept any decision made unconditionally. When a person gives his/her consent he/she applies his/her logic to comprehend the after implications of the acts performed.

Section 5 (ii) (b): A person who is capable of giving valid consent but at the time of marriage is suffering from any mental disorder which certifies him/her unfit for marriage and procreation of children. Any person who wishes to marry is presumed to be an able person having a sound mind and who is fit to conduct marital obligations. One of the purposes of marriage is the procreation of children. A mentally ill person who does not understand his/her responsibility is going to frustrate the very purpose of marriage.

Section (ii) (c): At the time of marriage, neither party to the marriage must suffer from recurring attacks of insanity. If a person is subjected to severe mental illness that his/her reasoning faculties are damaged to such an extent that they fail to comprehend the repercussions of their acts, it proves that they are unfit to sustain their marriage. It will be sadistic for the other sane spouse to keep up with such a hypothetical behavior that can also be dangerous for their life.

Above mentioned provisions of section 5 (ii) are independent of each other.

Section 12 (1) (b): Any marriage solemnized in contravention of the condition given under section 5 (ii) will declare the marriage as voidable, and may be annulled by a decree of nullity.

Also, such mental incapacity must be present at the time of marriage (pre-marital) however if it develops later on the other spouse who does not wish to continue can pray for judicial separation or get a divorce. The burden of proof is on the petitioner who makes an allegation that their spouse is mentally incapable which renders him/her unfit for fulfilling marital obligations.

No barometer is set up to establish criteria for declaring a mental condition of a person as insane or having an unsound mind that is unfit for marriage. Not all people who are insane or having an unsound mind are considered unfit for marriage as a certain psychiatric disorder is curable. However, the decision of the court depends upon the medical reports and merits of the facts which differ from case to case. A person who was previously mentally unfit but later on in furtherance of apt medical treatment is recovered can perform a valid marriage.

Section 5 (iii) Age Restriction in Hindu Marriage*:*

Child marriage was prevalent during the advent of British India and even now in some parts of India. The practice of child marriage is a serious impediment in achieving intellectual development amongst children and gaining scientific temper for the nation. A person who has not developed maturity cannot be expected to understand the responsibility of marriage. After getting married, women were more vulnerable as they are often sexual abused by husband and exploited by her in-laws. Britishers fervently opposed the concept of child marriage and perceived it as a crime, cutting it apart from having any religious backing. Consequently, in 1929, the Child Marriage Restraint Act was enacted that laid down the minimum age for boys to be 18 and for girls to be 15 to get legally married.

The Child Marriage Restraint (Amendment) Act 1978 raised the age bar for getting married, for boys 21and for girls 18. It was expected that the girls shall at least be qualified up to Higher Secondary Education and the boy must at least be a graduate. Marriage solemnized in contravention of age restriction provision was still valid. Due to lack of penalization, we can conclude that this act initially aimed to create awareness among the masses, encourage the parents to educate their children, and did not desire to rigorously compel the people to observe the act, because in those days almost in every community child marriage was accepted and encouraged.

In 2006 India had already gained momentum in social reformation and the priorities started changing for the better. With an increase in urbanization, equilibrium was to be maintained to improve the condition of rural India. Child marriage is a menace for any developing Nation.

Now, it became inevitable for India to penalize the instigators. In furtherance of such a manifestation, "*The Prohibition of Child Marriage Act 2006*" was enacted to lay stringent provisions for the offenders and to prevent people from being a part of child marriage or to face dire consequences in contravention of any provision of this act.

Whether Child marriages are valid, void, or voidable**?**

Section 3 of the act makes child marriage voidable at the instance of the minor/s.

Section 12 makes child marriages void if a child is enticed from his/her lawful guardian or is forced by unfair means to go from any place or sold for marriage or is made to perform marriage or the minor being married later on sold or trafficked or used for immoral purpose.

Age of consent refers to a minimum age of a person who can legally consent to have sexual intercourse. Age of consent shall correspond with the minimum age of a woman to get married. In India child marriages are not void ab initio, the Indian penal code makes a husband guilty of raping his wife if he indulges in sexual intercourse with his wife who is below 16 years of age. It is immaterial if she consented or not. As such the age of consent is 18 years and any man who has sexual intercourse with a woman who is below 18 years of age even if she consented, man will be guilty of raping her, and Protection of Child from Sexual Offender Act 2013 will also be applicable.

Section 14 makes child marriages void in contravention of injunction (interim or final) order issued.

Section 9 and 10 are the penal provisions of the act that prescribe rigorous imprisonment up to two years or fine up to one lakh rupees or both if an adult male marries a minor girl and also any person who performs conduct or direct or abets any child marriage.

Section 4 provides maintenance and residence to the female spouse of such a marriage and section 5 provides custody and maintenance of child marriage.

Children born out of child marriages are legitimate as per section 6 of the act.

Preventive measures against child marriages: Section 15 makes an offense under this act be a cognizable and non-bailable offense. Section 13 empowers the court to issue injunction orders. If any person gets information of a child marriage being arranged or held or on an application made by a Child marriage probation officer or on receipt of information through a complaint to the nearest magistrate of the first class or a metropolitan magistrate, such magistrate shall at first instance issue notice to a member of an organization or an association of persons, to offer him or them an opportunity to show cause against the issue of the injunction. After providing

an opportunity if still parties carry on with the marriage then the court must issue an injunction order. The procedure of issuing notice can be avoided in case there is urgency, the court can directly issue an interim injunction. After issuing an injunction order whoever intentionally solemnizes child marriage is punished with imprisonment of either description up to two years or with a fine of up to one lakh rupees or both.

Contemplations are made to further increase the minimum age bar for getting married to be 21 years of age for both genders.

Section 5 (iv): Degrees of Prohibited Relationship

The parties to a marriage shall not be within the degrees of prohibited relationship unless the custom or usage governing each of them permits such a marriage between the two. Degrees of prohibited relationship is defined under section 3(g) as when a person is a lineal ascendant of the other or if that person was a wife or husband of a lineal ascendant or descendant of the other or if that person was a wife of the brother or the father's or mother's brother or the grandfather's or grandmother's brother of the other or if the two are brother and sister (uterine blood or full-blood, illegitimate or legitimate and adopted person), uncle and niece, aunt and nephew, or children or siblings or cousins.

During the British colonial government, certain restrictions for getting married were imposed on the grounds of caste, creed, *gotra,* religion, or blood relation. Hindus were forbidden to get married based on the rules of endogamy (marrying outsides one's kindred) and exogamy (marrying within one's tribe). In ancient India, inter-caste marriages were welcomed and two forms of inter-caste marriages were acknowledged. With the enactment of the Hindu Marriage Validity Act 1949, inter-caste marriages were declared valid. The Hindu Marriage Removal of Disabilities Act 1946 allowed marriage between persons of the same *gotra or parvara* or different sub-division of the same caste during British India.

Section 5 (v): Sapinda Relationship

When parties to a marriage are Sapinda to each other they cannot marry unless the custom or usage governing each of them permits such a marriage between the two. Sapinda relationship is defined under section 3 (f). The rule of exogamy testifies to the prohibition of sapinda marriage. A person morally and legally cannot marry another who is related to him/her within three degrees on the maternal side and within five degrees on the paternal side. Such degrees are inclusive of half-blood, uterine blood, full blood, illegitimate and legitimate blood, and adoption. The sapinda relationship is always traced in the line of ascent (upwards). Each year

a Hindu performs "*Shradha*" by offering pinda dan and worshiping his ancestors. Pinda is a rice ball. If two persons offer *pindas* to the same ancestor they are sapinds to each other. If one can trace descent through agnates (interference of a male between two persons who are related to each other/ paternal side) or cognates (interference of a female between two persons who are related to each other/maternal side) to a common ancestor or ancestress they fall within the ambit of prohibited relationship.

Two Hindus cannot marry if they are sapinda to each other or they fall within the degree of prohibited relationship. But if their custom permits such a marriage is valid. For example in South India Avunaculate marriage is performed wherein a maternal uncle can marry his niece. In certain Maharashtrian families, it is valid to marry the maternal uncle's daughter (maternal sister). Due to such practices, this exception is created but such customs need to be proved otherwise such marriages are declared null and void.

4.1.4 STATUS OF LEGITIMACY OF CHILDREN BORN OUT OF THE VOID AND VOIDABLE MARRIAGE (section 16).

The Marriage Laws (Amendment) Act 1976 says that the children born from void marriage and annulled voidable marriages are legitimate however they are heirs to their parents only which means that they are disqualified to inherit ancestral property and also an interest in which his father is a coparcener.

4.2 JUDICIAL SEPARATION

There may be numerous reasons for the parties to make an informed decision to live separately. During the period of separation, the mutual rights and obligations between the parties are discontinued but the status of husband and wife is preserved. It is only when the court passes a decree of divorce that their separation forever is formalized. During the period of separation if one of the spouses dies the other spouse is entitled to inherit the property of the deceased spouse[604]. During the separation period, either of the parties performs a second marriage then such a spouse will be guilty of bigamy. The parties have three options to live separately.

4.2.1 CONSENSUAL SEPARATION AGREEMENT:

Consensual separation is a contract between husband and wife to live separately as long as they wish to. Such a contract between the parties is not acknowledged by the Hindu Marriage Act 1955 but the court validates such an agreement. Parties of a valid marriage and voidable

[604] Narashmla v. Broosamma, 1976 AP 77.

marriage are only eligible to contract a consensual separation agreement. The parties who contract a separation agreement usually do not intend to get a decree of judicial separation or divorce as they may want themselves to be tied to their spouse but not to cohabit.

The court does not abide by clauses mention in the contract stating that the wife is disallowed to claim maintenance; the husband cannot institute a suit for restitution of conjugal rights; the amount fix between the parties cannot be altered by the court; the contract vitiates jurisdiction of the court; custody of the children etc. Section 23 of the Indian Contract act disallows to enter into a contract of consensual separation which will come into effect on a future date. If it is expressly mentioned in the contract that, the wife cannot claim maintenance during the period of separation if she is living an adulterous life then the court cannot grant her maintenance. However, if nothing to that effect is stipulated then regardless of her living an unchaste life, her right to claim maintenance is not forfeiture. If the amount of maintenance is fixed by the parties to the contract still the court is empowered to alter or amend the amount of maintenance under Section 25 of the Hindu Adoption and Maintenance Act 1956. The husband and wife even though have contracted a consensual agreement still either of them may approach the court for granting a decree of judicial separation. The parties ipso facto can revoke their separation agreement and decide to cohabit without any interference from the court as the court did not grant any decree to them to live separately.

4.2.2 JUDICIAL SEPARATION (Hindu Marriage Act 1955):

When parties agree to live separately, a degree to that effect is passed by the court which is known as Judicial Separation. A decree of judicial separation is granted to parties of valid marriage only. Judicial Separation allows the parties to decide whether they seriously wish to terminate their marriage or there is any chance of reconciliation.

Section 10 (2): Either party may present a petition to rescind the decree of Judicial Separation if both of them wish to cohabit and the court may consider rescinding the decree of judicial separation after being satisfied with the truth of the statement mention in the petition and consider it just and reasonable to do so.

Section 13(1A) (ii): If the parties are not able to reconcile within one year or more after passing a decree of judicial separation either party can approach the court to grant a decree of divorce.

In *Bhagwan v. Amar Kaur,*[605] the court held that if the petitioner in a petition of divorce fails to establish any ground of divorce u/s 13A but he/she is qualified to obtain matrimonial relief by way of obtaining a decree of Judicial Separation then the court is empowered to grant is a decree of judicial separation even if not such prayer was made by the petitioner.

4.2.3 THE HINDU ADOPTION AND MAINTENANCE ACT 1956:

A wife can live separately from her husband without entering into a consensual agreement or a decree of judicial separation. Section 18 (2) The Hindu Adoption and Maintenance Act 1956[606] permits the wife to live separately from her husband without forfeiting her claim to maintenance on grounds of:

(a) Desertion: If the husband has deserted his wife without any reasonable cause, against her consent, and he is willfully negligent towards her.
(b) Cruelty: Residing with a husband puts the life of the wife in imminent danger.
(c) Husband is suffering from Leprosy. (Omitted by the Personal Laws (Amendment) Act 2019)
(d) Bigamy: Husband is residing with his other Wife.
(e) Adultery: The husband keeps the concubine in the same house where the wife resides or he habitually resides with a concubine elsewhere.
(f) Apostasy: Hindu husband converts to another religion.
(g) Any other justified reason for the wife to reside apart from her husband.

As and when the above mention reasons available for the wife to live separately from her husband ceases, the wife cannot insist to live separately. She may choose to live with her husband at any time without any interference from the court. If the wife lives separately from her husband for more than a year under section 18 (2) of the Hindu Adoption and Maintenance Act 1956 she cannot directly institute a divorce case as before that she needs to obtain a decree of judicial separation and when reconciliation does not happen within a year she becomes qualified to present a divorce petition. Section 18 has a restrictive scope as it only provides the wife to claim her maintenance.

4.3 DISSOLUTION OF MARRIAGE/DIVORCE:

Divorce is an amplified theory of separation as it permanently separates the parties and puts an end to all the legal rights and obligations arising between them except section 25 (maintenance

[605] 1962 Punjab HC 144.
[606] The Hindu Adoption and Maintenance Act 1956, Act No. 78 of 1956.

and alimony) and section 26 (custody, maintenance, and education of children). After a decree of divorce, the status of husband and wife is revoked and they revert to be unmarried (divorcee) who then shall become capable to contract another marriage.

In *Vadalasethi v. Vadalasethi*,[607] the court held that if either party to the marriage dies during *pendent lite* (pending litigation) the proceedings can be instituted against the deceased spouse's legal representatives.

It is easier to get married but difficult to dissolve a marriage as the alliance is regulated by statutory and customary matrimonial laws that can end a marriage only when there is a valid reason and the conduct of the offending party falls within the ambit that stipulates the specific grounds for judicial separation or divorce. England subscribes to the theory of divorce in 1857 by enacting the "Matrimonial Causes Act 1857". The grounds of divorce initially admitted in this act were adultery, cruelty, and desertion.

Marriage is hallowed only when it is attributed to be monogamous. It loses its credibility if either of the spouses commits a matrimonial offense and the spouse on whom the wrong is committed does not wish to absolve the offending spouse but instead dissolve the marriage. An allegation of adultery if proved entirely putrefies the purity of the bond as the seed of distrust is sown in the heart of the faithful spouse. Any person cannot persist to sustain a marriage that is marked by domestic violence or any other act of cruelty that causes distress due to a lack of respect and admiration. Likewise, marriage is an eternal bond wherein the parties during the marriage ceremony promise to stay with each other in rain or shine and hence cannot just desert their consort without any solid reason and rebuff his/her marital obligation by frustrating the very purpose of the marriage. The matrimonial offense committed by the respondent is enough to strike down the potentiality to continue further.

The theory of fault ground postulates that one spouse has to be guilty of committing a matrimonial offense which is specifically recognized as a ground of divorce and the petitioner needs to be innocent. Whereas the doctrine of recrimination theorizes that if both the parties are found guilty of committing matrimonial offense independent of each other they won't be granted a decree of divorce as one spouse has to be guilty of culpability.

The guilt theory was later on renamed as fault theory because insanity was perceived as a reasonable ground for concluding the marriage and it is not the misconduct of the respondent

[607] 1994 A.P.13.

but rather an affliction that may not be cured. Hence if the respondent is incapable to realize any fundamental marital obligation due to some fault in his/her mental faculties or reproductive organs and is unfit for sustaining the marriage then a decree of divorce is granted.

4.3.1 GROUNDS FOR DIVORCE

Grounds of divorce were made similar to that of judicial separation by Marriage Laws (Amendment) Act 1976. It is upon the parties to decide which remedy to choose.

Section 13 (1): This section is retrospectively applicable on any marriage and either party to the marriage can present a petition for dissolution of marriage by a decree of divorce on the ground that the respondent has been guilty of:

Section 13 (1) (i) ADULTERY:

If the petitioner seeks a divorce on the ground of adultery he/she does not need to prove beyond reasonable doubt but by a preponderance of probabilities[608] that after solemnization of marriage and in the subsistence of the same the respondent has voluntarily indulged in sexual intercourse with another person other than the petitioner. The reason that the petitioner does not need to prove the matrimonial offense of adultery beyond a reasonable doubt is that in such cases it is difficult to produce eye witnesses as the act is intimate, performed in seclusion and only suspicion can be raised but hardly any substantive evidence can be established, unless and until someone has caught them performing an illegitimate sexual act. Sexual intercourse is understood as full or partial penetration however mere attempt of sexual intercourse or indulging in any sexual activity with a person other than his/her spouse is sufficient to constitute adultery. The sexual intercourse must be consensual and the respondent shall not be intoxicated or under the belief that the adulterer is his/her spouse as in that case consent is vitiated. Even a single act of adultery is enough for seeking a divorce.[609]

Before 2018 adultery was a criminal offense under section 497 IPC, however on 27th September 2018, adultery was decriminalized and was repealed on the contention that it was unconstitutional as it violates Article 14, 15, and 21 of the Constitution. Under section 497 IPC, adultery can only be committed by a man who with the consent of the married woman performed sexual intercourse knowing that she is the wife of another man. A married woman who willfully indulges in sexual intercourse with a man other than her husband was not

[608] Veenu v. Narinder Kumar, 1984 P. and H. 99; Hargovind v. Ram Dulhari, 1986 M.P. 57; Annu v. Ramesh 1988 All 239.

[609] Vira Reddy v. Kistamma, 1969 Mad 235.

considered as an adulterer and not even as an abettor but only the man with whom she committed sexual intercourse was charged as an adulterer and the husband can only sue him. Under matrimonial law, adultery is not struck down and is still consider for granting matrimonial relief. If we apply the notion of section 497 considering the man being a third party as an adulterer, matrimonial relief can only be sought against the respondent and not against the adulterer. It is immaterial if the adulterer had any knowledge that the respondent was married at the time of copulation. If the petitioner knows who the adulterer is then such an adulterer shall be made as a co-respondent. Such a co-respondent shall be served with a copy of allegations so that he/she may intervene in the proceedings.

If the respondent in a bigamous marriage cohabits with his/her second spouse it will amount to adultery as the second marriage being void, has no status of husband and wife. However, if the first marriage is void and the respondent has an illicit relationship, he/she cannot be framed for adultery.

Section 13 (1) (i-a) CRUELTY:

The ambit of cruelty cannot be rigidly defined when certain acts of the respondent directly or indirectly contribute towards the degradation of the petitioner's mental and physical wellbeing**.** What amounts to cruelty will largely depend upon the commission or omission made by the respondent which may be expressed or implied (verbal, gestures, action) following a desolated outcome directed towards the petitioner. A persistent act of cruelty will always rupture the desire to reside peacefully as there is a constant rejection or intimidation caused by the respondent that effectuates incompatibility and frequent altercations.

Cruelty can be intentional as well as unintentional[610]. Most of the acts of cruelty are deliberate such as nagging, unreasonable restrictions, controlling behavior, not letting petitioner socialize with her family and friends and directing the petitioner to cut ties with close ones, peculiar and irrational behavior of the respondent which cannot be tolerated, sexual assault, domestic violence, pressurizing in performing unnatural sex, or any other acts having potential to cause imminent danger to the life of the petitioner or which curtails the freedom of the petitioner that makes it impossible to compromise that no prudent person can ever reside with someone under such circumstances.

[610] Jamieson v. Jamieson 1952 AC 525.

Malafide intention is not desideratum to constitute cruelty. If the respondent is suffering from mental illness and under a fit of insanity does something intimidating towards the petitioner it amounts to cruelty because the petitioner will be under constant fear as there is a probability that such an episode will be recurring and rational behavior by the respondent when he is laboring under such a defect cannot be expected when he loses his control over his cognitive faculties.

With the advancement in the standard of living and women being financially independent the perspective of what amounts to cruelty stood modified and the meaning of cruelty is enlarged. Initially, the domain of cruelty was narrow and consists of only physical abuse by voluntarily causing grievous hurt but now even the apprehension of the same is enough to tag as an act of cruelty. What amounts to cruelty is different for each one of us and it depends upon the impact that it creates upon a person so it is necessary to consider social stratum, education of the parties, the lifestyle the following are some of the factors that may assist to determine if cruelty is perpetuated.[611] Any act having the potential to inflict mental pain by disturbing a peaceful mind leading to depression is also cruelty. It is always easy to prove physical cruelty than mental cruelty because most of the time what people see they believe but emotional suffering is latent and often goes unnoticed unless the suffering party makes a bold decision to either speak up or to attempt suicide. It is wise to live separately than to suffer. Some of the acts which are held to be cruel are silent treatment,

Section 13 (1) (i-b): DESERTION**:**

Desertion commences when the respondent withdraws and abandons the petitioner voluntarily, from his/her life permanently without any reasonable cause that such an act of abstinence causes turbulence in the marriage. As the respondent is reluctant to discharge his/her marital responsibilities, the petitioner also cannot wait on mere hope for the respondent to return, after every attempt is made by the petitioner to reconcile. Desertion is constituted when the respondent and the petitioner have cohabited during the subsistence of their marriage and later on the respondent has intentionally, willfully, and against the consent of the petitioner has left the matrimonial home forever. Besides actual estrangement, it may happen that the respondent and the petitioner are residing under the same roof but there is no room for communication and

[611] Kameshwara Rao v. G. Jalili, 2002 SC 576.

the respondent willfully refrains from performing his/her marital obligations. Desertion can be actual or constructive.

Actual Desertion: Actual desertion materialize when the respondent forms a firm intention without any rational approach as to why he/she cannot continue further or even if he/she do have their compelling reasons but the same is not formalized and the petitioner also has done nothing to influence or compel the respondent to take such a drastic step which is not bilateral. The petitioner can present the petition only after the respondent has permanently abandoned and a statutory period of two years has passed. Desertion can only be construed when the intention gets converted into an act of separation with no hope to reconcile in the future.

Constructive Desertion: Under constructive desertion, the parties though residing under the same roof act like strangers and willfully neglect their marital duties because of which there is no motivation to cohabit and live peacefully, and one day a spouse decides to walk away from such a lonely married life. In such a case, the spouse who initiated the cold treatment and does not acknowledge his/her marital duties and denies every marital right to his/her spouse is the deserter. If the petitioner compels the respondent to leave the matrimonial house and does not make any effort to bring the respondent back, then the petitioner will be regarded as the deserter even though the respondent left the matrimonial house.

If the respondent willfully without the consent of the petitioner leaves the matrimonial house with an intent to never return back but within two years desires to cohabit with the petitioner but now the petitioner does not accept the respondent then the petitioner will be regarded as deserter even though initially the respondent was a deserter and the statutory period of two years will commence from the time when the petitioner restricts the respondent to reconcile and not from when the respondent initially ended the cohabitation.

Willful Negligence- When the respondent deprives the petitioner of his/her marital rights or by his/her conduct omits to take responsibility of the household but does not leave the matrimonial house, such conduct will still amount to desertion. The cold conduct of the respondent shall be deliberate and must not be compelled or influenced by any act done by the petitioner.

Desertion is an inchoate offense that continues until the deserted spouse presents a divorce petition. A decree of judicial separation or divorce on the ground of desertion can be maintained only when the statutory period of two years has been ended. Desertion as a ground for matrimonial relief will not be allowed if there is a mutual cohabitation to reconcile or indulging in sexual intercourse but such acts must be bona fide. The burden of proof is on the petitioner

to establish that the respondent has abandoned him/her without any reasonable cause, without his/her consent and the desertion has continued throughout the statutory period of two years.

Section 13 (1) (ii) APOSTASY**:**

Petitioner can seek divorce if the respondent ceases to be a Hindu and converts to any other non-Hindu religion such as Christianity, Islam, Zoroastrianism, or Judaism. Mere renunciation of Hindu faith will not amount to apostasy or being an ascetic is not sufficient, the respondent needs to undergo a bona fide ceremony of conversion. After the conversion of the respondent to any religion other than the sect of Hinduism such as Buddhism, Jainism, Sikhism, if the petitioner does not wish to convert his/her religion nor can accept the conversion of the respondent then the petitioner can file a petition seeking a divorce. If the petitioner decides to cohabit with a converted respondent then nothing can restrict the petitioner from doing so. A petition seeking divorce can be filed against a non-Hindu (who was originally a Hindu) on the ground of Apostasy. A non-Hindu can also be a petitioner in a matrimonial cause only in matters which arose before his conversion to the non-Hindu religion.

Section 13 (1) (iii) MENTAL DISORDER / INSANITY

A petitioner may be granted a decree of divorce if the respondent is suffering from a persistent or periodic mental disorder that cannot be cured and the derangement is of such severity that it makes the petitioner impossible to cohabit with the respondent. If the mental disorder is curable then the petitioner cannot be granted a decree of divorce.[612]

Section 13 (1) (a): Mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder, or any other disorder or disability of mind and includes schizophrenia.

Section 13 (1) (b): Psychopathic disorder means a continuous disorder or disability of mind, may or may not include sub-normality of intelligence) which causes abnormal aggressive or serious irresponsible behavior on the part of the respondent.

Section 13 (1) (iv) VIRULENT LEPROSY

The Marriage Laws (Amendment) Act 1976 inserted leprosy as a ground for divorce and judicial separation. Divorce was only allowed mostly for lepromatous leprosy which was

[612] Surendra Singh v. Pavan Verma, 2009 Raj. 159

incurable. On 13th February 2019, the legislature abolishes leprosy as a ground for divorce on the notion that it was discriminatory, and with advancement in science, it can be treated.

Section 13 (1) (v) SUFFERING FROM VENEREAL DISEASE

Venereal disease means sexually transmitted diseases (STD) that are transmitted when indulging in sexual intercourse or being contacted with the blood of an infected person. Right to marriage cannot be pleaded when a person is suffering from the venereal disease because he/she is not allowed to put the other person into the misery of life-threatening disease while enjoying his/her right, for that the sufferer needs to get cured completely[613]. Not all STDs are fatal and some of them can be cured such as Syphilis, Crabs, Chlamydia, and Trichomoniasis. HIV is curable when detected at an early stage with apt treatment and medication otherwise HIV in an advanced stage becomes AIDS which is fatal as it rapidly attacks the body's immune system and the person is sure to die.

The Marriage Laws (Amendment) Act 1976 has repealed the statutory period of 3 years for filing a petition. The statutory period of 3 years was stipulated to test whether the venereal disease is curable or not within those 3 years. The Marriage Laws (Amendment) Act 1976 also abrogated the condition that the venereal disease from which the respondent is suffering from is contracted by the petitioner then the petitioner will not be allowed to take advantage of his or her wrong. As this provision stands amended we can now conclude that the petitioner becomes eligible to seek divorce even if due to the petitioner's fault the respondent got infected however judicial separation cannot be granted. But the scales of justice are always balanced when we refer to section 23 (1) (a) wherein the petitioner will not get any matrimonial relief if he/she is the reason behind the respondent's matrimonial offense or any disability.

Section 13 (1) (vi) RENUNCIATION WORLDLY AFFAIRS.

The petitioner can present a petition for divorce if the respondent has renounced the worldly affairs by deciding to sacrifice the rest of the life for some religious order such as to take a vow of celibacy (Bhramachari), taking Sanyas, or becoming a Mauni. Certain ceremonies are performed before a respondent can enter into the religious order which shall then amount to a renunciation of the world.

When the respondent is firm to follow a religious order he/she entirely revoke from his/her marital life and eventually from worldly deeds. Such conduct can be treated as a civil dead

[613] Mr. X v. Hospital, AIR 1999 SC 495.

because the respondent willfully gives up all his ties with a closed one and can never come back. The petitioner cannot be expected to live on with the rest of her life on a merger hope that one day respondent may return and hence the petitioner can seek a decree of divorce. It will be odd to believe that if the respondent returns and commence to cohabit with the petitioner or the respondent pays frequent visits to his/her marital house then that will not amount to a renunciation of the world.

Section 13 (1) (vii) PRESUMPTION OF DEATH:

If the respondent is absent from the life of the petitioner for seven years or more and no news of the respondent's whereabouts or being alive has been heard of, a presumption of death is maintainable and divorce can be granted. The statutory period of seven years has been taken from section 108 of the Indian Evidence Act 1873 that states, a person is presumed to be dead if he is not heard of as alive for seven years or more by those who would have normally heard from him or about him had he been alive.

The onus of proving that the respondent is alive rests with the person who asserts that the respondent is alive. It is necessary to get a decree of divorce after waiting for seven years or more before solemnizing second marriage because if a spouse contract's a second marriage and later on the missing spouse eventually returns then the second marriage will be bigamous as the first marriage is still valid. Hence to avoid such complications a decree of divorce is granted to the petitioner even if the missing spouse re-appears, the second marriage will be valid because the petitioner has already been granted a decree of divorce for the first marriage.

4.3.2 GROUNDS OF DIVORCE EXCLUSIVELY FOR WIFE:

Section 13 (2): A wife may also present a petition for dissolution of marriage by a decree of divorce on the ground of:

(i) Before the commencement of HMA if the husband had solemnized second marriage in the subsistence of first marriage or any other wife of the husband married before such commencement was alive at the time of solemnization of the marriage of the petitioner, provided in either case the other wife is alive at the time of the presentation of the petition.

All the wives can seek divorce provided that at the time of presentation of petition one or more wife must be alive.[614] If the wife willfully compromises for polygamous marriage she is still eligible to get a decree of divorce and the husband cannot defend himself by making

[614] Venkatamma v. Venkateshwami, 1963 Mys 118; Mandul v. Lachmi, 1963 AP 82.

contentions that she willfully agreed or that because of her disability he was required to contract a second marriage.[615]

(ii) Husband is convicted for rape, sodomy or bestiality, since the solemnization of marriage.

A man is convicted for rape when he performs non-consensual carnal intercourse with a woman. Rape is a grievous sexual offense affecting the human body, punishable under section 376 of the Indian Penal Code. Sodomy and Bestiality are unnatural offenses affecting the human body, punishable under section 377 of the India Penal code. Sodomy is an unnatural sexual act of penetrating the penis in the anus instead of the vagina and also includes oral sex (fellatio or cunnilingus). The person who instigates and initiates such an act is the agent and the person on whom it is performed is the patient. Sodomy is inclusive of heterosexual (between male and female) and homosexual (between male and male and between female and female).

In *Navtej Singh Johar & Ors v. Union of India*[616] the Hon'ble Supreme court has struck down section 377 of the Indian penal code partially and now anal coitus and oral sex is legal. As the supreme court has decriminalized sodomy which is a consensual act between adults of opposite gender or same gender indulging in anal sex or oral sex such a verdict will also be applicable on Hindu matrimonial law because the wife can establish the ground of divorce if her husband is convicted and her husband can only be convicted if he is been charged for such a crime under section 377 of IPC. However, the wife may obtain a decree of divorce on the ground of adultery. Sodomy as a special ground of divorce for wife has not been amended under this Act in pursuance of the judgment.

Bestiality will always remain a crime under section 377 of the Indian Penal code. Bestiality is an act to perform sexual intercourse with animals or birds. Bestiality can be committed by a man or a woman and is an offense punishable by the Indian penal code under section 377. As we are discussing special grounds for divorce available exclusively for a wife, if a wife is found guilty of bestiality the husband cannot take a plea of bestiality to divorce her, however, he may pursue the court under the ground of cruelty.

(iii) If the wife has obtained a decree of maintenance u/s 18 of Hindu Adoptions and Maintenance Act 1956 or has obtained an order of maintenance u/s 125 of Code of Criminal

[615] Leela v. Anant Singh 1961 Raj 178; Nirmoo v. Nikkaram, 1968 Delhi260.
[616] AIR 2018 SC 4321.

Procedure 1973 and cohabitation between husband and wife has not resumed for one year or more since the passing of such a decree or order then the wife can file a divorce petition.

(iv) Where a child marriage has been solemnized before she attains the age of fifteen years, she can repudiate her marriage after attainting fifteen years but before attaining the age of eighteen years. It is immaterial whether the marriage has been consummated or not. The petition on this ground has to be filed after she attains eighteen years of age.[617]

4.3.3. FAIR TRIAL RULE (Section 14)

The court shall not hear any petition for divorce unless at the date of the presentation of the petition one year has elapsed, since the date of the marriage. This rule may be relaxed in exceptional cases, to allow a petition to be presented before one year has elapsed since the date of marriage. If it appears to the court while hearing of the petition that the petitioner has obtained permission to present his petition by deceiving the court then the court may withhold its decree until the expiry of one year.

4.3.4 DIVORCE PERSONS WHEN CAN MARRY AGAIN (Section 15)

When there is no right of appeal against the decree of divorce or the time for presenting the petition for appeal has barred by limitation or an appeal is been presented but the court has dismissed the petition then either party to the marriage can marry again. As per section 28, an appeal is maintainable within ninety days from the date of decree or order.

4.3.5 IRRETRIEVABLE BREAKDOWN THEORY

There are countless reasons for split-ups between couples but sometimes parties just cannot get along well due to lack of compatibility and as such cohabiting with each other peacefully becomes a distinct dream. When marriage feels less of responsibility and more of a burden it becomes arduous to carry on with martial obligations. When either party or both the parties no longer wish to live together as husband and wife and there is not even a remote possibility of reconciliation it is better to grant a decree of divorce than to order them to live together that will end up creating uncalled hostility and suffocating moment. Marriage can become irretrievable due to the fault of either party, both the parties, or neither of them but what remains constant is the desire to let oneself free from a distressful bond. If the court is satisfied that the marriage has broken down to such an extent that if a decree of divorce is not granted then it will do injustice to the parties. While dealing with such matrimonial cases it is futile to even

[617] Bathula v. Bathula, 1981 AP 74.

examine the cause of the irretrievable breakdown of marriage, only because the foremost desire to iron out the difference is absent and hence there is no reason why the court will not grant a decree of divorce.

While determining if the marriage is a huge failure by way of seeking irretrievable breakdown ground for dissolution of marriage, the legislature has not provided any criteria though the statutory period for considering dissolution of marriage on the ground of irretrievable breakdown is laid down. It is upon the court to apply their judicial conscience to draw up a conclusion whether to dissolve the marriage or not.

The Hindu Marriage Act does not ipso facto gives away a decree of divorce on the ground of irretrievable breakdown of marriage as then every couple who wish to terminate their marriage will be applying their irrational mind by taking undue advantage of their faults and altogether the preservation of marriage institution will be tainted. Under Hindu Matrimonial law, irretrievable breakdown theory was set forth under Section 13 [IA] by giving retrospective effect.

Section 13 [IA]: Either party to a marriage may present a petition for dissolution of marriage by a decree of divorce on the ground that:

(i) After passing a decree of judicial separation, no resumption of cohabitation as between the parties to the marriage has taken place for a period of one or more years.

(ii) After passing a decree of restitution of conjugal rights, no resumption of cohabitation as between the parties to the marriage has taken place for a period of one or more years.

This section is gender-neutral and is applicable for considering a divorce on any of the above mention ground because if it is evident that even after a separation of one year or more the parties are unable to patch up then their marriage have failed miserably. The statutory period of one year commences from the day when the court grants a decree of judicial separation or a decree of restitution of conjugal rights as the case may be and a divorce petition may be presented after the expiry of one year of the decree of judicial separation or the decree of restitution of conjugal right.[618]

In practice when considering section 13 [1A] in the light of irretrievable breakdown theory, justice is to be delivered by referring to section 23 (1) (a), that if the petitioner is found to be taking advantage of his wrong then he/she cannot be granted divorce even if it is evident that

[618] Leelawati v. Ram Sewak, 1979 All 285.

there is no or little scope of marriage to survive only because in such cases there is one party who wants to desperately get out and the other who at least wish to work out but they are being refrained from doing so.

Example: Where the husband has obtained a decree of judicial separation and concurrently he did not make any endeavor to reconcile with his wife and also restricted his wife from returning to the matrimonial house and after the expiration of one year, files a divorce petition, the court will disentitle him from seeking divorce because then he will be getting advantage of his wrong as he was the one who did not allow his wife to comply with the decree.

4.3.6 DIVORCE BY MUTUAL CONSENT:

The concept of mutual consent of divorce was inserted by "Marriage Laws (Amendment) Act 1976" to

Section 13B (1): A petition for dissolution of marriage by a decree of divorce may be presented by both the parties to a marriage jointly before a District court on the ground that they have been living apart for one year or more and they have not been able to cohabit and hence mutually agreed that the marriage should be dissolved.

(2) After the presentation of a petition for dissolution of marriage the parties are required to wait for 6 months to move a motion but not more than 18 months after the said date and if the petition is not withdrawn, the court after making necessary inquire is satisfied that the marriage shall be terminated a decree of divorce shall be passed.

Even if the parties to a marriage are residing together but there is no communication between them and as such, they do not even view their relationship as husband and wife it will still be considered as living separately, not actually but constructively[619].

4.4 RESTITUTION OF CONJUGAL RIGHTS [Section 9]

Matrimonial relief by way of restitution of conjugal rights was introduced in Jewish law and then adopted by English law and subsequently made its way in Indian Matrimonial laws. Restitution of Conjugal Rights [RCR] subscribes to the notion that the wife is the property of her husband and she is not supposed to leave her matrimonial house without her husband's consent and if she willfully denies residing with her husband then she can be called back by issuing a legal notice that is by way of a decree of restitution of conjugal rights to perform her marital obligation. While enforcing a decree of restitution of conjugal right against the wife

[619] Suresh Devi v. Prakesh, 1992 SC 1904.

and she is found not complying with the decree then she was arrested and send to her husband's house. This practice was later abandoned as such enforcement was considered improper and atrocious but to provide an alternative to the property if any of the respondents was forfeiture. The concept of Restitution of Conjugal rights was given up in English law by Section 20, the Matrimonial Proceedings and Property Act 1970. Under Hindu matrimonial law the remedy of restitution of conjugal rights is gender-neutral.

Section 9: Either spouse without a valid justification remains absent from the society of the other, the petitioner may present a petition for restitution of conjugal rights before the district court. The court after inquiring and being satisfied by the averments made in the petition to be true may grant a decree of restitution of conjugal rights to the petitioner.

Explanation: The burden is on the respondent to prove a reasonable excuse for withdrawing from the society of the petitioner.

Unlike Judicial Separation and the concept of desertion, to obtain a decree of Restitution of conjugal rights it is no pre-requisite to prove that the parties to a marriage were residing together but later respondent left the house. Even if the parties never cohabited through the inception of their marriage, the petition is still maintainable. To constitute withdrawal from the society of the petitioner the respondent shall willfully revoke from a conjugal relationship. A petitioner husband when declared as a pariah by the members of the community who advise his wife to leave him can be granted a decree of restitution of conjugal rights. If a wife being a petitioner obtains a decree against her husband and her husband fails to comply with the decree she can claim maintenance. If the wife being a respondent without any valid cause deliberately leaves the matrimonial house without any intention to return, she will be denied maintenance. Non- compliance with the decree on the part of the respondent will result in the dissolution of marriage at the end of the statutory period. A decree of Restitution of Conjugal Rights only to be obtained if there is any hope of reconcilement, if the marriage has broken down irretrievably, obtaining such a decree otherwise is of no use[620].

Defense available for the respondent against the decree of Restitution of Conjugal Rights is when the parties voluntarily contract a separation agreement and hence it cannot be concluded that either party has willfully abandoned the other. If the petitioner has been granted a decree of RCR, the respondent cannot counter file a petition for obtaining a decree against the

[620] Romesh v. Savita, 1955 SC 851.

petitioner however if there are any nova cause that arises later on, a petition of RCR by the petitioner who was originally the respondent may be maintained.

The respondent needs to establish a reasonable cause for refusing to stay with the petitioner. Reasonable causes are those which are legally recognized such are grounds available for judicial separation or divorce can also be raised or any other valid cause which is grievous that any prudent people will not stay with the petitioner.

There has been an interminable debate on adjudging the validity of section 9 in the light of Article 21 of the Constitution. In *T. Sareetha v. T. Venkata Subbaih,*[621] the court held that section 9 of HMA is deemed to be unconstitutional in view of Article 21 (Right to privacy and Human Dignity). Section 9 is being mauled on the contention that the decree of RCR is unjustified as it transgresses a woman's autonomy over her body. Compelling a wife to cohabit with her husband against her desire will not serve any fruitful purpose in the distant future. If the wife can show cause as to why she refused to stay with her husband and the court is satisfied with such a reasonable cause, the court will not order her to return to the matrimonial house

A converse view was expressed in *Harvinder Kaur v. Harmender Singh*[622], which was later overruled by the Hon'ble Supreme Court in Sajor Rahi v. Sudarshan[623]. The view express by the Delhi High court in the former case discusses the objective of granting a decree of RCR. The court held that the decree of RCR is granted to give an opportunity to reconcile, sort out the differences, and bring about cohabitation. The court also expressed that it is a decree more than mere copulation. Such observation may sound convincing but in reality, if applied it will be a disaster because of the respondent, no matter what, it cannot tolerate being in the company of the petitioner then the purpose of granting such a decree will collapse.

4.5 CUSTOMARY DIVORCE:

Certain customs are saved under savings provisions of this act. Dissolution of marriage was recognized and regulated by customs on specified grounds, available before the enactment of the Hindu Marriage Act 1955. The parties do not approach the court for dissolving their marriage and hence there is no intervention of the court to legally divorce the parties and no provisions or restrictions of the Hindu Marriage Act apply to them. Such parties if not subject to the adjudication of the court for dealing with matrimonial matters they have to seek their

[621] 1983 AP 356.
[622] 1984 Del 66.
[623] 1984 SC 1562.

divorce from gram panchayat, an agreement oral or written, bill of divorce (origin Jewish law), *Tyaga Patra*, or *farkat nama*.[624] Court's jurisdiction cannot be debarred. The court shall intervene if the principle of natural justice is not followed or if the gram panchayat is not competent to hear the matter due to lack of jurisdiction.[625] An ex parte divorce shall not be permissible under any custom without hearing the other party as it is against the principle of natural justice and public policy.[626] Dissolution of marriage by way of custom is not a ground available under section 13 of the Hindu Marriage Act 1955.[627]

5. DOCTRINE OF MATRIMONIAL BAR:

The theory of matrimonial bars is engraved in Section 23 of the Hindu Marriage Act 1955. Matrimonial bars are set up so that the petitioner is unable to take benefit of his/her wrong. The petitioner will not be granted a decree of divorce if it is established that the respondent is guilty because the petitioner did something directly or indirectly to trigger the commission of the matrimonial offense and hence the petitioner won't be allowed to take advantage of his/her own mistake or incapability's even though the petitioner can prove the specific grounds of matrimonial relief.

But how can the petitioner be liable for the respondent's guilt? If it is proved that the petitioner has compelled or is an accessory to the respondent's adultery or the petitioner has also committed adultery or there is collusion between the petitioner and the respondent or the petitioner has condoned the matrimonial offense committed by the respondent and has resume to cohabit or the petitioner delayed in presenting the petition for seeking matrimonial relief.

The doctrine of strict proof also known as Standard proof requires the petitioner to prove his averments beyond reasonable doubts although in certain cases such as cruelty the averments may be proved by the balance of probabilities. Civil proceedings include matrimonial cases and once put into motion three outcomes may arise:

1) The respondent may not appear in the court and the decree may be passed ex-parte.

2) The respondent may appear and accepts the allegations in the petition against him and pled guilty.

3) The respondent may fight the legal battle.

[624] Chukna v. Lacuma, 1969 2 SCWN 605.
[625] Kishanlal v. Prabhu, 1963 Raj 95.
[626] Gurdit v. Angrej, 1968 SC 142
[627] Mahendra Nath Yadav v. Sheela Devi, 2010 9 SCC 484.

In all the above mention three situations the petitioner needs to prove his/her averments to be true and that he/she is not guilty of creating any façade by taking advantage of his/her wrong or by connivance or being an accessory or collusion or condoning the immoral act of the respondent, or delay in presenting the petition or any other legal ground.

Section 23 is based on the principle of equity that "One who comes to equity must come with the clean hands".

ACCESSORY: A petitioner shall not be an abettor in the matrimonial offense to which respondent is held guilty. An accessory is applicable in case of adultery. The petitioner should not directly or indirectly have assisted the respondent in the commission of a crime. If any direct contribution is made by the petitioner and it is proved then the petitioner will be disentitle from obtaining a decree of Judicial Separation or Divorce as the case may be.

CONNIVANCE: If the petitioner expressly or impliedly agrees to the commission of offense committed by the respondent, he/she is unfit for seeking matrimonial relief. The petitioner does not directly participate in the commission of the offense but he allows the respondent to commit it. The petitioner will agree with the respondent to have an open (outside the wedlock) / illicit relationship however he may not escort her to the adulterer.

CONDONATION: A condonation is an act of forgiving and restoring the tarnish character in the mind of the petitioner about the respondent's immoral deeds. The petitioner is said to forgive the matrimonial offense committed by the respondent only if he/she is well informed of all the material facts and chose to forgive and accept the respondent. After the act of forgiveness, reinstatement shall follow and the petitioner must behave with the respondent the way he/she used to before the matrimonial offense was known.

The most corroborative fact that the petitioner has condoned and reinstated the respondent other than cohabiting will be engaging in sexual intercourse even after knowing that respondent is guilty of the matrimonial offense. Condonation is applicable only when the ground of matrimonial relief is cruelty or adultery and not for condoning fraud or pre-marital pregnancy. The resumption of cohabitation and copulation will not amount to condonation if the respondent continues to committee adultery[628]. It is not necessary that there must be certain substantial evidence of copulation, the resumption of cohabitation is sufficient to presume that the petitioner has condoned the respondent.

[628] Quinn v. Quinn 1969 (3) ALL ER 121 (CA).

The petitioner must unconditionally condone the respondent and shall not attach any contingent stipulation to that effect however there must be implied stipulation present to prevent the respondent from committing the same or some other matrimonial offense. Therefore the condonation may be revoked if the respondent repeats the same or commits some other matrimonial offense. If the respondent was guilty of adultery but the petitioner condones it and later the respondent acted cruelly with the petitioner, the petitioner even though had condoned the former act of the respondent, can still present a petition for matrimonial relief on the ground of adultery. If the petitioner has condoned the adultery of the respondent but later the petitioner finds that the respondent is persistently engaged in adultery, the petitioner can institute a petition on the ground of adultery.

COLLUSION: Collusion is a bar available for all the grounds of matrimonial relief however null and void marriages under section 11is excluded. Collusion means that there is an arrangement between the parties who mutually contemplate seeking divorce by establishing false evidence with an attempt to deceive the court when in reality no sufficient ground exists. There can be an agreement made by the husband to seek divorce by offering his wife hefty maintenance along with some property and the wife agrees to divorce based on such an offer amounts to collusion.

CONSENT SHOULD BE FREE: Where the parties to a marriage want to seek divorce by mutual consent the court must enquire and satisfy itself that any party to a marriage is not under coercion or undue influence to agree for divorce by mutual consent and both the parties voluntarily on reasonable cause wants a decree of divorce.

DELAY IN PRESENTATION OF PETITION: A period of limitation is an application for all the matrimonial relief. In nullity of marriage, a divorce decree can be granted anytime because since the inception of marriage it is void ab initio and the court merely declares the same.[629]

OTHER LEGAL GROUND Section 23 (1) (e): If a court has any other reasons to believe that a matrimonial relief shall not be granted. The doctrine of Want of Sincerity or the Doctrine of Approbation and Reprobation is introduced by English law however this doctrine is no application for Hindu Matrimonial law[630]. This doctrine states that if the petitioner marries an impotent person (respondent) and derives any benefit from the respondent then the petitioner cannot dissolve the marriage on the ground of impotency.

[629] Narendra V. Suprova 1988 Cal 120.
[630] A v. B., 1976 Punj 152

RECONCILIATION section 23 (2): Before granting matrimonial relief, the court must endeavor to reconcile between the parties even though there is no scope for them to get along. However, the court doesn't need to attempt to conciliate if a person presents a petition for divorce under section 13 on the ground of apostasy, insanity, venereal disease, renunciation of the world, or presumption of death.

Section 23 (3): If the parties desire to reconcile, the court may adjourn the proceedings for a reasonable period but not more than 15 days and refer the matter to any person name by the parties and if the parties are unable to arrange then the court may nominate may person to conciliate. Such a person who undertakes the task of conciliation is required to report to the court as to whether the reconciliation is possible or not. The court shall consider the report before disposing of the proceedings.

6. ANCILLARY RELIEF

Section 24 and 25 of the Hindu Marriage Act 1955, is a gender-neutral law hence alimony and maintenance can be claimed by either party. Alimony is the grant of allowance paid by the husband out of his income or property if any to maintain his wife either during pendant lit or after the proceedings are ended. Alimony places the duty on a spouse who is financially sound to pay another spouse who is financially dependent for necessities. It is a general notion that the husband has to look after his wife not only during the marriage but also after the divorce until she remarries. Awarding maintenance to wife and children is the legal consequence that follows after the decree of judicial separation or divorce is granted.

While awarding alimony one-third of the husband's income is paid to the wife however it is the discretion of the court to fix the quantum of maintenance. The court is not allowed to exhaust the income of the husband to pay maintenance to his wife. If the husband does not earn and has no property in such a case maintenance to the wife cannot be provided although the court may direct the husband to work and pay the maintenance amount. The court cannot fix any amount for maintenance if the respondent proves that he/she has no means of income to provide. Where the husband is incapable to maintain himself the wife shall pay maintenance to her husband when a decree of divorce is finalized.

The right to claim maintenance arises from section 24 which grants expenses of pendente lite (pending litigation) and section 25 that awards permanent maintenance. Both these provisions are independent.

6.1 MAINTENANCE PENDENTE LITE AND EXPENSES OF PROCEEDINGS:

Section 24 provides interim maintenance on an application made before a trial court or an appellant court as the as may be. Application for maintenance during the pendency of proceeding can be presented by either party to claim for personal expense or to meet the expenses of litigation. Once the court is satisfied that the claimant is unable to maintain and meet the expenses of the proceedings the court may order the non-applicant to pay monthly for maintenance and a lump sum amount of expenses arising out of litigation. The court is under an obligation to adjudge application for interim relief as expeditiously as possible within 60 days so that the claimant does not have to face unnecessary hardships. While granting interim maintenance the court will fix the quantum of maintenance based on the income of the applicant and will not take into consideration assets if any. While granting maintenance, the standard of living of the claimant must be secured and as such it must not be merely hand-to-mouth maintenance but the standard of life she was used to when she cohabited with her husband.

Interim maintenance is allowed from the date of the application for maintenance however if it is for the expenses of litigation then from the date when the petition was presented. While awarding maintenance, the court cannot attach any condition that if the wife lives an adulterous life the maintenance will be revoked. An order for maintenance must be unconditional. Once the petitioner initiates the proceedings he/she cannot withdraw it if later an application is made for interim maintenance as the applicant had already incurred expenses of litigation. Although the court may later dismiss the main petition still the non-applicant will be liable to pay interim maintenance for the period of pendente lite.

The court is empowered to grant interim maintenance which was pending during litigation even after the court has disposed of the case. The application for interim maintenance cannot be maintained if it is made after the main petition is been dismissed. If the non-applicant is reluctant to pay interim maintenance but is willing to fight the litigation, the court is empowered to temporarily stay the proceedings until the non-applicant pays the maintenance, or else the court will not consider the defense made by the non-applicant. If the non-applicant is an appellant then the court may dismiss his appeal. Section 28 (2) says that a person cannot appeal against an interim order but can apply for revision of the interim order.

6.1.1 SECTION 125 ORDER OF MAINTENANCE TO WIFE AND CHILDREN UNDER CRIMINAL PROCEDURE CODE 1973[631] V/S SECTION 24 OF HINDU MARRIAGE ACT 1955:

If the Wife had applied for maintenance under section 123 (3) of CrPC, her right to claim maintenance under section 24 of the Hindu Marriage Act does not cease. Both the provisions are distinct and independent in construct and shall be interpreted separately. The relief granted under section 125 (3) of CrPC is for maintenance of wife and children and the relief granted under section 24 of HMA covers the litigation expense and alimony is also awarded.[632] However, if an amount is awarded under section 125 (3) the court may adjust the amount under section 24 as alimony to the wife.[633] Amount of maintenance granted under section 125 (3) CrPC cannot be set off against interim alimony awarded to the wife under section 24 HMA as both the provisions function differently and the wife can pursue both the relief concurrently. An order of maintenance may be modified, altered, or set aside under section 125 (4) (5) or section 127 CrCP but cannot be set off.[634]

6.2 PERMANENT MAINTENANCE AND ALIMONY

Any court who is competent to adjudge a matrimonial case under this act may, upon an application made by either spouse for seeking permanent alimony and maintenance, the court shall order the respondent maintenance (monthly or periodically) which shall not exceed the life of the applicant. A maintenance order may be awarded by the court at the time of passing the decree or subsequently. While fixing the amount of maintenance the court has to examine the respondent's income and other property if any, and also the income and property of the applicant keeping in mind the conduct of the parties and other circumstances of the case, and then the court must judiciously pass the order of permanent maintenance and alimony. If the court is satisfied that any payment must be secured then if necessary create a charge on the respondent's immovable property.

Section 25 (2): If there is a change in the circumstances of either party at any time after an order is made for the grant of permanent alimony and maintenance the court may vary, modify or rescind any such order at the instance of either party as the court may deem fit.

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631 The Code of Criminal Procedure, 1973, Act 2 of 1947.
632 Sunita Tasera v. Lalit Kumar Jagrawal, AIR 2012 Raj 82: 2012 (2) WLC 190.
633 Sandeep Chaudhary v. Radha Cahudhary, AIR 1999 SC 538: 1999 Cr LJ 466: (1997) 11 SC 286.
634 Hansaben v. Ramesh Kumar, 1992 CrLJ (Guj).

Section 25 (3): If the applicant has remarried or if the wife in whose favor an order has been made has remained unchaste or if the husband has committed adultery, the court may at the instance of another party vary, modify or rescind any such order as the court may deem fit.

While fixing the amount of maintenance, the court takes into consideration the conduct of the parties as to who is responsible for the divorce, how they present themselves before the court, and the attitude of the parties inter se. If the applicant is the guilty party then the court may reduce the amount of maintenance or may even disentitle for the claim.

Whether a wife is qualified for an award of maintenance if she was the reason for the dissolution of a marriage? High Courts hold a divergent view in this matter. Kerala, Jammu and Kashmir, and Kolkata High Courts held that the wife is not entitled to claim maintenance if she has committed adultery and it is proved. However, the Bombay HC has held that that wife's right to claim maintenance does not get waived off even if she has committed adultery. The Allahabad High Court in a case where the marriage was dissolved on the ground that the wife has embraced Bhrama Kumari by taking a vow of celibacy, the court held that still, the husband is liable to pay her maintenance.

6.3 CUSTODY OF THE CHILDREN

Section 26 deals with custody of the children and also decides upon the matters related to maintenance and education of minor children bypassing the interim order for making provisions and if possible take into account the wish of the children. The court shall dispose of an application filed pendente lite to obtain maintenance and education of the minor children, within 60 days from the date of service of notice on the respondent.

Nova's petition for custody, maintenance, and education of the children is maintainable if no application was made during pendente lite and as such, there is no interim relief or permanent order passed. If the main petition is set aside by the court the petition for children maintenance is vitiated. The orders which are passed by the court until the child attains majority are interlocutory and hence not permanent. Such orders may be modified from time to time in the welfare of the children. Delhi, Mysore, and Rajasthan High Courts have held that the mother shall have custody of the children below 5 years of age. However, this does not imply that after the child has completed 5 years of age the custody lies with the father. If the mother is living an immoral life that will harm the development of the child, the custody of the child below 5 years of age will be given to the father. It is upon the court to decide the welfare of the child by considering the standard of living of the parties, their income, and the healthy environment

prevailing in the home. The court is empowered to decide upon the visitation of a parent who does not have custody of the children. The court may also ask the child with whom he/she wishes to reside. If both the parents' conduct is suspicious and neither of them seems to be a responsible parent the court may appoint a guardian.

6.4 DISPOSAL OF PROPERTY (section 27):

Any property presented at or about the time of marriage is jointly owned by the spouses may be attached to the decree if the court deems it just and proper to do so. An application for obtaining an order from the court in respect of a joint property must be presented before the proceedings are concluded. The joint property does not include self-acquired property or joint property of an individual of either spouse during the subsistence of their marriage.

7. REGISTRATION OF HINDU MARRIAGE (section 8)

The State Government is empowered to regulate how the particulars of marriage are to be entered and specify the condition to register the marriage in a Hindu Marriage Register to facilitate the proof of Hindu Marriage. A valid or voidable Hindu Marriage does not become void if they are not registered because as such registration of Hindu Marriage is not mandatory, although the State Government is empowered to make it mandatory. The Hon'ble Supreme Court in *Smt. Seema v. Ashwani Kumar*[635] has reiterated that the registration of marriages must be made compulsory and directed all the states and union territories to comply with the order. The State Government is at discretion to make registration of Hindu Marriage mandatory in the whole State or any part thereof, or lay down cases wherein registration of marriage must be made compulsory. Such rules shall be laid down before the State Legislature for its approval. Any person who contravenes any rule made on this behalf shall be punishable with a fine which may extend to twenty-five rupees.

8. JURISDICTION AND PROCEDURE OF THE COURT

8.1 JURISDICTION OF THE COURT (section 19):

Every petition, maintainable under this act shall be presented before the District Court within the local limits of whose original civil Jurisdiction:

(i) the marriage was solemnized (Lexi loci celebrations)

(ii) the respondent at the time of the petition resides

[635] AIR 2006 SC 1158.

(iii) the parties to the marriage lastly cohabitated

(iii-a) wife being a petitioner, where she resides on the date of presentation of the petition

(iv) where the petitioner at the time of the presentation of the petition resides but only in case if the respondent is residing outside the territory of India or has not heard of being alive for seven years or so by those people who would have heard of him if he were alive.

District court as define under section 3 (b) includes City Civil Court, the District Court and High Court of Original Side or any other subordinate court of the District court empowered by the state government by issuing a notification in the Official Gazette. Domicile of the parties as immaterial if are Hindus and the District Court has jurisdiction to dispose of such a case.[636] The residence of the parties plays a very essential role in deciding the jurisdiction of a court. The word residence denotes a permanent place where the parties have an intention to make it a matrimonial home. The Madhya Pradesh High Court in *Pushpa v. Archana*[637] held that after marriage the husband's home or her in-laws home (as the case may be) is a matrimonial house which is considered as her residence and not her parents home.

8.2 VERIFICATION OF CONTENTS MENTION IN THE PETITION (section 20)

(1) Every petition under this act presented before the court must distinctly state the facts on which the claim to relief is based. The petitioner also needs to prove that there is no collusion between the parties.

(2) The petitioner or some other competent person shall verify the statements mentioned in a petition at the hearing to be referred to as evidence.

8.3 TRANSFER OF CASES AND JOINDER OF PETITION (section 21-A)

(1) (a) When a petition has been presented before a district court by the petitioner praying for a decree of divorce under section 13.

(1) (b) When another petition is presented by the respondent praying for a decree for judicial separation u/s10 or a decree of divorce under section 13.

(2) (a) If both the petitions are presented to the same District Court, both the petition shall be tried and head together.

(2) (b) If the petitions are presented at different District courts then the petition which was later presented shall be transferred to the District Court in which the earlier petition was presented

[636] Prem Singh v. Dulari, 77 CWN 535.

[637] 1992 MP 280.

and both the petition shall be heard and disposed of together by the District Court in which the earlier petition was presented.

8.4 TRIAL AND DISPOSAL OF PETITIONS (section 21-B)

The trial of the petition shall be held regularly until its conclusion unless the court finds it necessary to adjourn the trial beyond the reasonable period. The court is required to record such a reason. The court shall endeavor to conclude the trial within 6 months from the date of service of the notice of the petition on the respondent. If an appeal is heard then it shall be concluded within 3 months from the date of service of notice of appeal on the respondent.

8.5 DOCUMENTARY EVIDENCE (section 21-C)

If a document has not been duly stamped or registered it is still admissible as evidence in any proceeding at the trial.

8.6 IN CAMERA PROCEEDINGS NOT TO BE PRINTED OR PUBLISHED (section 22)

Only the judgment of the High court and Supreme Court with their prior permission may be published and printed. Every proceeding held under the act shall be in-camera proceedings and no person is allowed to print or publish any case. If any person is found printing or publishing any such matter, a fine may be imposed up to one thousand rupees.

9. UNIFORM CIVIL CODE V/S PERSONAL LAWS

One nation one law secures and promotes National Integration which is a constitutional goal. Uniform Civil Code is a social reform declared under the Directive Principle of State Policy, Article 44 as "The State shall endeavor to secure for the citizens uniform civil code throughout the territory of India." UCC aims to implement equality through various aspects that regulate the religious practice. UCC abolishes customary law and enforces a uniform law throughout the nation to maintain national solidarity, regardless of caste, creed, religion, or gender. This code is an attempt to make a non-discriminatory law. UCC will only regulate and reform matters on marriage, divorce, maintenance, inheritance, adoption, and succession. However, the minorities oppose the concept of UCC as they discern that it will encroach on their freedom of religion conferred under Article 25 of the Constitution. Parliament is empowered to enact the law, amend, alter or abolish the personal law entirely or partly as mentioned in Concurrent List Entry 5, VII Schedule which states, "Marriage, and divorce, infants, minors, adoption, wills, intestacy, succession, joint family and partition all matters in respect of which parties in

judicial proceedings were immediately before the commencement of this Constitution subject to their law". Article 31C was inserted in the constitution of India by the 42nd Amendment in 1976 which declares that if a law is made to implement any DPSP, it cannot be challenged on the grounds of being violative of the fundamental rights under Article 14 and 19.

In 1946, the Indian Constituent Assembly was constituted to draft the Constitution of India. As it was a fresh beginning many customary practices required to pass the test of the constitution to be held legally valid as a social reformation of India was essential. Dr. B.R. Ambedkar suggested adopting Uniform Civil Code on the rationale of one nation one law however the conservative minorities mostly the Muslim Fundamentalist argued to retain their customary law. Eventually, UCC was included under Part V Directive Principle of State Policy, Article 44. Hindu customary laws were reformed and people belonging from Buddhist, Jain, and Sikh communities are considered to be Hindu and governed by the Hindu Marriage Act 1955, the Hindu Succession Act 1956, The Hindu Minority and Guardianship Act 1956, and the Hindu Adoption and Maintenance Act 1956. In India, only the State of Goa has successfully enforced UCC on the perception of the Portuguese Civil Code. In Goa as per UCC married couple holds joint ownership in all assets owned and managed by each spouse. Parents can't disinherit their children entirely at least half of the property must be passed on to them and lastly, a Muslim man cannot practice polygamy. On political satire, Congress and the Samajwadi Party want to retain customary laws and vehemently oppose implementing UCC which is a dream for Bhartiya Janta Party (BJP) to enforce. UCC will only regulate marriage, divorce, inheritance, adoption, and maintenance.

It was the first time in 1985 the Apex Court endeavored to constitute UCC in *Mohammad Ahmad Khan v. Shah Bano Begum*[638] which raised a question over maintenance under section 125 CrPC after being divorced by her husband under Talaq-ul-biddat. The court upheld that section 125 CrPC is applicable to grant maintenance irrespective of religion. Consequently, judicial interpretation of the most secular provision like Section 125 CrPC was also undone by the then Prime Minister Rajiv Gandhi due to political pressure by the Muslim fundamentalist and therefore enacted Muslim Women Protection of Rights on Divorce Act 1986. Hence the landmark judgment of the Hon'ble Supreme Court was nullified due to the enactment of Muslim personal law the regulated divorce. As per this act, the Muslim woman is legally

[638] A.I.R. (1985) S.C. 945.

entitled to demand maintenance but only during the iddat period which lasts for three months, and after the completion of the iddat period, she can demand maintenance from her relatives or the Wakf Board.

In *Sarla Mudgal, President Kalyani v. Union of India*[639] the Apex court directed the government to frame UCC. A Hindu married man converted himself to Islam only intending to solemnize second marriage as polygamy unto 4 wives is legal under Muslim Marriage. The Apex court held second marriage as void and abuse of Muslim customary law. Additionally, the court unequivocally made it clear that mere conversion of a Hindu man married under the Hindu Marriage Act 1955 to Islam and marrying again without dissolving the first marriage shall be a criminal offense liable under section 494 (5) IPC as it does not automatically end the first marriage under Hindu Marriage Act 1955. In 1985, the Apex court in *Jordan Diengdah v. S.S. Chopra*[640] the court urges the importance of UCC and advice to enforce immediately.

The dream of enforcing UCC successfully is very hard to achieve when exceptions are been made even under the Hindu succession Act 2005 as section 6 of the said Act states that the act does not apply to the Mitakshara sect. Under the Hindu Marriage act, 1955 marriages among sapindas are prohibited as such but allowed subjected to customary law. India being a secular nation still upholds personal laws and safeguards them whereas UCC in its true spirit is about being secular which shall promote homogeneity and get away with religious barriers by providing equal status to every individual. Citizens are not well informed about the importance, benefits, contents, and procedure of UCC which leads the minorities to believe that it will harm their Article 25 of the constitution. Awareness must be raised among the masses to able to analyze UCC effectively.

[639] (1995) 3 S.C.C. 635.
[640] (1985) 3 S.C.C. 62.

A COLLECTIVE ANALYSIS ON THE LAW OF OBLIGATION AND ITS IMPLICATION ON VARIOUS ASPECTS

- NANDINI KABRA

ABSTRACT

The obligation is a legal bond between two individuals that control each other not in all respects but simply to perform any particular action. The obligation is the part of the law that creates a right of one person over another. The right of one person is the duty of another. Through this research paper, I might want to add to a superior comprehension of what sort of thing an obligation is and what its characterizing features are. I will likewise be discussing the different sorts of obligations it is isolated into. We can't have an ethical obligation and, simultaneously and conditions, additionally a lawful advantage. This mix is appropriate to philosophers who believe in Morality and Law's teleological dualism, all this being said. Integral to the thought what I will advance is the possibility of obligation as having two fundamental perspectives: one of these lies in the inside association of obligation with moral pragmatic reasons, and is likewise judicious and moral; the other one rather lies in the applied connection I will contend to exist among obligation and prerequisites, or obligatory power. These different perspectives interlock to shape what I would term the aspect of obligation. In the mix, the two viewpoints outline obligation as an ethically reasonable and normal absolute prerequisite.

Keywords: Obligation, duty, features, kinds, morality, law, duality, fundamental perspectives, reasons, rules

INTRODUCTION

From the vantage point of lawful hypothesis one can see the value in that law, rules, and obligation are personally associated and at last indivisible. It is not necessarily the case that any general set of laws comprises either only or fundamentally of rules or that all lawful orders are obligatory. Indeed, there is wide acknowledgment in contemporary statute that law both comprises of various types of norms—some of which ostensibly don't have the construction of a standard (consider standards and approaches)— and at any rate once in a while neglects to

produce obligations.[641] However the case that law, rules, and obligations remain in a close relationship is not really deniable, this for various reasons. In the first place, law is by and large comprehended to be profoundly formed by regulative standards: a significant piece of the legitimate area has to do with explanations recommending courses of lead and training people on how they should act. The acknowledgment of the prescriptive design of law offers solid help for the proposal that key lawful situations with should be communicated distinctly using such ideas as those of obligation and duty, alongside their relate, the notion of a right.[642] Besides, paradigmatic legitimate materials—like rules, legal choices, and legal commentaries—make reference to obligations either directly, by determining what one is obligated to do, or in a roundabout way, by attributing rights, powers, and advantages to a few of us, which positions are naturally associated with the obligations of others. Moreover, professionals and residents in legal procedures (judges, investigators, legal advisors, and juries), just as residents in their customary lives, often make claims about which obligations emerging out of law certain gatherings have in explicit conditions. This implies that the deontic language, including the language that unequivocally alludes to obligation, is unavoidable in talk inside and about law. This far and wide demeanour is profoundly established in our practices and experience. For, from one viewpoint, expressions such "being under the obligation" and "being required" are regularly utilized regarding law and lawful prerequisites; then again, the jargon related with legitimate obligation has entered the philosophical discussion with the "law origination" of morals, which throughout the hundreds of years has logically supplanted temperance morals as the prevailing moral methodology in the Western custom.[643] At last, law, rules, and obligation are viewed as going inseparably, in light of the fact that an overall set of laws is ordinarily perceived to be a legitimate organization. Presently, a fundamental segment of what is usually implied by having or asserting expert in reasonable

[641] The dominant view, legal positivism, in some of its most influential contemporary versions, holds that while the law provides reasons for action, it only purports to impose obligations, and in fact may well fail to do so (See Coleman 2002, 2). Even these variants of legal positivism, however, grant the existence of some form of connection between law and obligation, even if only at the level of mere claims, or of what is purportedly the case.

[642] In this article I will treat obligation and duty as synonyms. In the existing literature some theorists prefer to differentiate between a duty, which is a requirement someone has by virtue of occupying a given position within an institution and so is independent of that person's acceptance, and an obligation, which by contrast is grounded in a previously performed voluntary transaction between two parties, who accordingly stand in a mutual relation and so have correlative claims each other (for such a distinction see Brandt 1964, among others). There is hardly an established or set practice in this regard, though.

[643] These points are argued at some length in Anscombe (1981, 26–42).

issue comprises in having or guaranteeing the authentic ability to impact or even control the regularizing standings of others. What's more, one of the paradigmatic ways (however surely not by any means the only way) in which the regularizing standings of others can be influenced comprises in rule-base obligations restricting binding on them. This broad utilization of rule- and obligation related ideas and language adds to entrenching the widespread belief that overall sets of laws utilize their principles (and other prescriptive guidelines) with an end goal to force obligations, and that they really succeed (at any rate in some cases) in deciding the duties of those subject to similar frameworks. This being the situation, law, rules, and obligation are viewed as thoughtfully associated even by those legal theorists who, justifiably, object to decreasing law to an only obligation forcing arrangement of rules, and who rather choose a conception under which the law's regulating measurement includes something other than rules and obligations. These scholars likewise conceptualize an overall set of laws as a request outlined by various types of regulating principles, and as having the limit not just to bring obligation into being yet in addition to present forces, award consents, and attribute immunities, just to give some examples of the regularizing situations with can be kept particular from obligation. On these grounds, countless lawful scholars, particularly inside standard statute, concur that a record of the required element of legitimate guidelines should be integral to the philosophical investigation of the idea of law and other major lawful ideas. Related, they perceive that the unmistakable manner by which law oversees human lead can barely be made coherent without getting the possibility of obligation.

OBJECTIVE OF THE STUDY

In light of the way that obligation is viewed as an idea that figures halfway in the experience and practice of law, I will zero in here on the possibility of obligation to figure out what sort of thing the obligation is and what its characterizing highlights are. In seeking after this point I will initially pursue a thorough hypothetical record of obligation and will at that point utilize that record to reveal insight into the thought of legitimate obligation as a prerequisite produced by law. In this exposition, at that point, I consider the principal qualities of obligation comprehended as an idea with its own unmistakable characterizing highlights.

RESEARCH PROBLEM

Law is a domain of obligation and obligation. It might expect us to battle battles, to forgo attack, to make good on charges, to keep arrangements, to be careful, to report violations, to ensure the climate, and to accept its decisions as restricting and last. Making, differing, and authorizing such obligations isn't the lone business of law. It additionally gets rights, presents powers, characterizes terms, etc. While it is inappropriate to recommend that these can by one way or another be decreased to obligations, it is none the less evident that they must be completely perceived regarding them. To get a handle on the meaning of the ability to contract, for instance, one should comprehend that it leads to obligations to perform or pay harms. To comprehend the option to free discourse, one should see that its grounds in others an obligation not to quiet. To comprehend the meaning of a 'minor' one should comprehend the obligations from which such people are absolved, and those they are feeble to make or change. The compulsory character of law is key for another explanation. Lawful obligations may struggle, not just with limited personal circumstance, yet with numerous other significant obligations. The obligation of military assistance may struggle with the obligation to really focus on one's family, the obligation to send one's kids to class with one's strict obligation to advance the confidence. The law's own mentality to such struggles is clear: its prerequisites are to take need, aside from where it allows something else. Be that as it may, would it be a good idea for us to acquiesce to this authoritative mentality, and on what grounds? Clearly, specific lawful obligations may require things that on their benefits should be done at any rate: they are requested by ethical quality, productivity, graciousness, etc. In any case, some need to add another contention. They say that, notwithstanding any such contemplations, we likewise have an ethical obligation to do all of these things since they are legally necessary, in any event when the overall set of laws is sensibly. That is, they appeal to what the western philosophical practice calls a regulation of 'political obligation'. Regardless of whether such an explanation exists is of both philosophical and common-sense significance, for the law's own view about the substance and exigency of its obligations is authorized, as Locke said, by any punishments up to and including passing. No place are the stakes higher. The practice was certain of the presence of political obligation and suspicious just about which of two fundamental grounds legitimize it. Voluntarist speculations track down their most compelling articulation in the compositions of John Locke, who holds that we have obligation to submit to the law when, yet just when, we agree to its standard. The contending approach, shielded by Locke's faultfinder David Hume, keeps up that our wilful demonstrations are here unimportant, and that the

obligation to obey is adequately advocated by the estimation of government under law. Obviously, these two choices were not generally embraced, yet up to this point genuine questions were engaged simply by agitators and other people who reject law and order. The contemporary development, and maybe even strength, of a third position is thusly of extraordinary interest. Various legitimate and political rationalists who do esteem government under law have gotten incredulous, and reject both the Lockean and Humean customs for the view that there just is no broad obligation to comply with the law as customarily imagined.

RESEARCH QUESTION

1. What is the nature of obligation?
2. How are obligation and "ought" related?
3. What is the distinctive force of an obligation? Is the existence of an obligation independent of the specific perspective, goals, interests, and desires of those who are subject to that obligation, or is it rather necessarily tied to those persons' cognitive and volitional attitudes?
4. How is obligation related to other paradigmatic normative notions like justification, reasons, and wrongness?
5. What is the kind of justification, if any, that should be associated with the existence of obligation?
6. Are obligation and responsibility connected?
7. Is obligation essentially tied with sanction and coercion, or at least with the possibility of sanctioning and coercing deviant conduct?
8. What kinds of entities—persons, institutions, states of affairs—can have or lack the property of obligating?

RESEARCH METHODOLOGY

The research methodology will be Observational, for the most part including poll and review techniques, and furthermore take some assistance from various hotspots for assortment of material identified with law and obligation like books, articles, and diaries to investigation of various occasions with regards to the law and obligation.

ESSENTIAL TRAITS OF OBLIGATION

The central point of this segment is to single out the overall qualities, or set of properties, usually connected with the thought of obligation. This should give us an overall significance of what the obligation is, that is, an idea of obligation as particular from an origination, or hypothetical record, of obligation. An idea of obligation is intended to stamp the limits inside which a hypothetical discussion on obligation is to occur: it hence recognizes the ground basic to in any case clashing, or possibly elective, hypothetical perspectives Paradoxically, an origination of obligation will distinguish an undeniably more disputable perspective on obligation, a view firmly lined up with the particular philosophical inclinations basic one's way to deal with obligation just as with the particular substance, rules, and states of presence that various scholars partner with obligation.[644] The viewpoint I will take in this segment will hence be hypothetically lightweight: as opposed to leaving on a conceivably disputable and partisan analysis of obligation, I will separate from the writing the current perspectives on what the obligation is in order to lessen them to a typical centre exemplifying a wide comprehension of obligation, or an overall system inside which to consider obligation. Since in this part I will talk about the characteristics that characterize obligation as a (distinctive) idea, the subsequent characterisation —to be deciphered as giving us an overall significance of obligation—ought to be required to be "thin" and lenient, or catholic. In this sense, the idea ought to have the option to oblige an immense scope of explicit records of obligation reflecting the distinct philosophical viewpoints embraced by the individuals who have protected those records. Simultaneously, this overall importance of obligation is neither pointless nor superfluous. While it doesn't offer an extensive response to the fundamental inquiries regarding obligation, as these inquiries are bantered among the individuals who study obligation, it at any rate sorts out them.

Obligation as a Normative and Practical Notion

Among the attributes most ordinarily connected with obligation are reasonableness and normativity.[645] Obligation is an idea immediately common sense and regularizing, since it very

[644] This distinction between concepts and conceptions has been made popular by Ralws (1971, 5)

[645] These two traits are recognised as essential to obligation in Prichard (1949, 87–163), for instance, where the mistake is criticised of resolving obligation into different categories of thought, such the category we use to state what ought to exist, on the one hand, and the one we use to state what ought to be done, on the other. The idea of obligation as being both practical and normative also finds a clear statement in Himma (2013, 20), arguing that obligations are associated with "claims about what someone (or some class of persons) ought to do in some state of affairs." Similarly, Hage (2011, 178–83) distinguishes the "ought" into two kinds—which he calls the

well may be so portrayed: (a) on the down to earth side, it fills in as a methods by which to manage our lead (as is activity related) and (b) on the regulating side, it does as such by giving a premise to passing judgment on direct as fortunate or unfortunate, or right or off-base, beneficial or useless, and so forth. Obligation along these lines sets itself up as a down to earth should:[646] it indicates that which an agent ought to do, and can accordingly be broken down analytically into an "ought" segment (the regularizing part) and a "do" segment (the functional part). This breakdown assists us with recognizing obligation, from one perspective, from that which is pragmatic yet spellbinding (showing not what specialists should do but rather what they truth be told do or can be relied upon to do) and, then again, from that which is standardizing yet hypothetical, by temperance of its portraying a record of the world as it should be (not really inferring any organization or activity on our part yet simple consideration), thus recognized from the world all things being equal, which places us in a circle adroitly divisible from that of obligation, a circle immediately hypothetical and clear, that of the "is".[647]

Obligation as a Non-Trivial Requirement

The obligation is broadly perceived as a necessity. Our having the obligation implies that we are bound, or needed, to act as per what the obligation recommends. Subsequently, there is in obligation the possibility of a limiting should, or required: the obligation doesn't make something attractive and great; it makes lead exactable and mandatory.[648] More direct, an obligation epitomizes an interest that, whenever perceived as substantial, has the nature of a profession asking one to take part in some course of conduct. This implies that obligation is thoughtfully associated with an objective, making any elective course of conduct normatively ineligible and unviable: when the obligation exists, there is only one game-plan that, normatively talking, is accessible to the specialist. obligation, in whole, is a sort of necessitation giving from a limiting mandate whose nature is basic. Likewise, the sort of necessity connected

"ought-to-do" and the "ought-to-be"—and then goes on to argue that obligations are instances of the former kind, in that they determine what ought to be done, and so are constraints on behaviour. See also Baier (1966, 210) and, more recently, Owens (2008, 406).

[646]The connection between normativity and ought is widely accepted today. For a couple of recent exemplary statements of this connection, see Dancy (2000a, vii) and Broome (typescript, 8–10).

[647] The breakdown thus works by way of two oppositions (normative vs. descriptive and practical vs. theoretical) yielding four kinds of concepts, which may be (i) theoretical and descriptive (theworld such as it is); (ii) theoretical and normative (the world as it ought to be); (iii) practical and descriptive (what agents do); or (iv) practical and normative (what agents ought to do). Only in this fourth class we find obligation.

[648] On the idea of obligation as a requirement, see Brandt (1964, 374), Pink (2004, 159–61), Owens (2008, 403), and Darwall (2009, 31–36).

with the presence of the obligation is broadly perceived to be something beyond unimportant. obligation is related with a severe convincing power. To further expand on this point, the type of demandingness going with the obligation is particular from a twofold perspective. From one perspective, we can't be said to have the obligation on the off chance that we can undoubtedly discard it or easily free ourselves of it. The obligation is a genuine requirement. As such it is non-discretionary: it squeezes us by altogether restricting our functional opportunity. Around there, obligation accompanies an inherent obstruction, since it is severity that recognizes obligation from different types of should. This likewise implies that those under the obligation are not in the situation to honestly eliminate that obligation or distance themselves from it. In the expressions of David Owens (2008, 404), the obligation is

"something that removes the matter from your hands: it is not, at this point up to you to judge whether doing the necessary thing would be ideal, in light of everything."[649]

Then again, the pressing factor you have when you are under the obligation isn't inflexible. The need of obligation (its requesting that you accomplish something) is standardizing, not mystical or sensible: it's anything but a reasonable sort of need. precisely therefore obligations can as an issue of useful chance be disregarded and abused. Moreover, we can even act against the prerequisites set by the obligations we have. In this manner, we challenge, thus ignore, a genuine imperative forced on us: a choice to so act won't come without outcomes, no doubt; yet the act is neither naturalistically nor supernaturally unthinkable.

Obligation and Responsibility

At long last, obligation is generally thought to be inseparably associated with duty: on the off chance that we are under the obligation, we are answerable for consenting to the relating necessity. In this specific circumstance, duty implies both "answerability to other people" and "risk for one's own failure." For, on the one's own, those subject to obligations are viewed as dependable as in they can be reprimanded for their activity and can be made to react to charges (let us call this "responsibility as answerability"). Assuming we are under the obligation, we are responsible or can be considered responsible for our direct. Then again, in the event that we neglect to respect the obligation, we will be mindful in the particular feeling of being responsible to some negative response from others (call this "responsibility as liability"). This

[649] This idea is aptly rendered by Margaret Gilbert (1992, 34), who claims that because "obligations are recalcitrant to one's will," "people may feel trapped by them": obligations cannot be changed by "a simple change of mind."

extra awareness of others' expectations originates from the way that (a) disregarding the obligation is at first sight a demonstration of bad behaviour, and (b) we are possibly qualified for respect those acting in sea shore of their obligations as miscreants, that is, as people who here and there can legitimately be censured. Obligation, responsibility, and risk should hence be treated as interdefinability ideas

A Theoretical Account of Obligation

Up to this point I have contended for a perspective on obligation as an essentially regularizing necessity that makes a nontrivial guarantee on us, who in turn are both will undoubtedly conform to it and answerable for following it. I take this to be the overall importance, or idea, of obligation, an implying that any capable client of the term obligation would recognize as the centre thought of obligation. In this part I will expand on this overall idea to build up a far-reaching origination of obligation. To this end, I begin from the assemblage of material about obligation that I have quite recently presented and afterward I basically incorporate this material to make the possibility of obligation completely coherent. This will give us a hypothetical record of obligation, to be specific, a unique structure in which the overall qualities generally connected with the presence of obligation discover significance by ethicalness of the more extensive and more thorough picture they are essential for. This implies that we will leave the generally uncontroversial domain of the standard comprehension of obligation and moving into a halfway unfamiliar region where hypothetical contemplations educated by possibly disputable presumptions and presuppositions should be presented and safeguarded.

Obligation, Justifications, and Reasons

In the reconstruction offered in Section 2, it was asserted that obligation is generally viewed as a useful and regularizing thought. Portraying obligation as a standardizing thought, subsequently finding it inside that more extensive space, suggests that it won't get the job done to outline obligation as something that aides direct; conversely, it needs to do as such with a specific goal in mind, by giving motivations to us to so carry on. This natural thought can be worked into a more explicit proposition, which I will call the "reasons theory".[650] The

[650] This is in accordance with an established tradition in contemporary philosophy, and specifically with what Broome (2004, 28) calls the “turn to reasons,” which has characterised the philosophy of action and normativity

explanation theory expresses that reasons are fundamental for normativity from a constitutive perspective, in that they characterize how it affects something to be regularizing. accordingly, normative discourse basically comprises in reasons offered on the side of either course of direct. This is to say that the reasons proposal sets reasons as the essential regulating idea, the idea to which some other thought inhering in the regularizing measurement of human experience should be followed, and regarding which some other standardizing idea can at last be caught.

The assertion of the explanation proposition conveys direct ramifications for the investigation of obligation. In the event that we acknowledge that obligation is a down to earth regularizing idea and that, all things considered, it has a place in the domain of common-sense normativity—a domain where nothing gets regulating besides using viable reasons (this is the reasons proposal, or rather, its viable launch)— at that point we ought to have the option to infer that obligation itself is basically characterized by the utilization of pragmatic reasons. A reasonably important connection, thusly, acquires among obligation and viable reasons, such that something can be viewed as mandatory exclusively by ideals of its being upheld by explanations behind activity and, thusly, obligation rests in a fundamental path on the utilization of reasons. That is, obligation can't be completely perceived except if it's vital and fundamental dependence on viable reasons is made obvious.[651] Thus the central position a conversation of the significance of a pragmatic explanation involves inside a hypothesis of obligation molded by the reasons proposition.

Contemporary way of thinking offers a scope of various, regularly clashing perspectives on what a viable explanation is. These perspectives contrast by their hidden otherworldly, epistemological, and semantic premises. Here I won't offer a total outline of this array of originations, since that would take me excessively far from the quick undertaking of explaining the possibility of obligation. So as opposed to taking in the full scene, I will clarify the significance of viable reasons by taking a gander at the job such reasons play in our regulating talk. My treatment can as needs be depicted, in more specialized language, as an examination

since the 1970s. The turn to reasons has been summarised in Raz's (1999, 67) statement that "the normative of all that is normative consists in the way it is, or provides, or is otherwise related to reasons". For a critical approach to the turn to reasons, see Broome (1999; 2004).

[651] This point is clearly stated in Gilbert (1992, 27-30).

into the semantics of a functional explanation. It is subsequently an encircled report, not a full origination of a viable explanation.[652]

By a functional explanation, in the current discussion, is by and large implied any thought offered on the side of some strategy. A particularly supporting thought can thus be perceived in any of three different ways, to be specific, as something that endeavors to (a) justify some demonstration, that is, excuse it or show why it is a decent activity or the privilege or legitimate activity; or (b) say what spurs, or drives, somebody to accomplish something; or (c) clarify why someone did, or would do, something, with all the more an elucidating or a prescient interest. Down to earth reasons, at that point, have customarily been assembled into three classes, contingent upon whether they are intended to fill in as defences, as inspirations, or as clarifications.

Presently, which of the classes of a useful explanation can explicitly be utilized to characterize obligation? Expressed something else, which of them singles out that particular portion of the regularizing measurement occupied by obligations? For, not every one of the three classes of viable reasons come to bear in this association. What's more, to see the value in that, one just need further expound on the toughness necessity, as it is connected with the presence of the obligation. The nonexclusive thought of severity, as it applies to the investigation of obligation, can be all the more explicitly illuminated as far as the unmitigated, or non-theoretical, character of a necessity. It is just to the extent that a class of for all intents and purposes regularizing tough prerequisites can be portrayed as downright thus appreciates some type of freedom of an individual specialist's abstract states and individual objectives, or activities, that those necessities can be viewed as mandatory. Thusly, a prerequisite can be qualified as downright on the off chance that it ties us whether or not we have an individual stake in it; it in this manner concerns us unequivocally.[653]

To additional expound on this point, categoricity is to such an extent that a pragmatic necessity qualifies as the obligation if the motivation behind why we should act appropriately isn't basically associated with what we happen to actually like, or what we may be normally

[652] This can be appreciated by considering that different conceptions of a practical reason may well agree on a certain meaning of a practical reason—on its semantics—while diverging in significant, even irreconcilable, ways on its metaphysics and epistemology

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disposed to accomplish (for example, as an issue of propensity or air or by excellence of our mental cosmetics or emotional states), or what we may have an individual interest in doing.[654] Likewise, a straight out necessity is impermeable to, and free of, the internal conditions of the particular people subject to the prerequisite. The obligation ought to be viewed as straight out in quality, since the second we are under the obligation we are needed to consent to it, regardless of whether doing so comports with or progresses our arrangements, targets, and activities.[655] This implies that we have before us a useful necessity we can't quit for reasons that just concern us explicitly. This thought can be reformulated by saying that our conforming to the obligation is an issue of target need and has little to do with what we like or aversion doing: a compulsory demonstration is one we are normatively expected to do, period, regardless of what we wish or are slanted to do or are really dedicated to doing: the particular point of view one has as an individual specialist doesn't deplete the system inside which obligation tracks down its appropriate spot.[656]

When we see obligation in this way—specifically, as an ought to get a charge out of some level of autonomy from the one's very own inclinations, wishes, and plans—in this way, it is feasible to additionally determine which class of useful reasons characterizes obligation. For, how it affects an explanation-based prerequisite to be compulsory relies upon the level of freedom from singular states as it is that the explanation supporting that necessity has. Subsequently, it is just to the extent that a class of useful explanation can be described as far as its freedom—as a class including, and possessed by, principles that can have clear cut character—that one can utilize a viable motivation to characterize obligation (which, to emphasize, stands for any necessity as well as for an all-out interest).

Presently, not a wide range of functional reasons remain on a similar ground or apply a similar power. There are classes of reasons that are set up by, or are straightforwardly identified with,

[654] On this point, see Gilbert (1992, 30–31).
[655] On this aspect of obligation, see Baier (1966, 216) and Gardner and Macklem (2002, 464–70).
[656] The preceding remarks should not be taken to mean that an obligation, with the categorical claim it makes on us, must be acted on, since that would take us to the next level of what is conclusively binding. What it means for a requirement to be categorical is not that it must be acted on, regardless of any consideration, but that we cannot "undo" our obligation for reasons of personal preference, or interest. The categorical bindingness of an obligation may well be presumptive, not final, to be sure. Therefore, an important caveat in thinking about the categoricity of an obligation is that this idea should not be confused with the idea of what is conclusively binding all things considered. A practical ought is non-hypothetical if we cannot opt out of it for personal reasons; it is conclusive if it is backed by reasons that on balance trump all other reasons—or can be shown to do so in the course of practical reasoning among moral agents—and we are therefore expected to comply no matter what. An obligation can apply to us categorically and still be inconclusive: what makes it categorical is a criterion different from that which makes it conclusive.

emotional states, unforeseen individual finishes, and endeavors of the important specialist. This implies that not all (classes of) functional reasons participate in the clear-cut quality. Truth be told, there is a solid assumption that rousing reasons, as close to home just as mental reasons, don't have the stuff to make a pragmatic explanation non-speculative and, subsequently, genuinely restricting. To see this, we need to fundamentally draw in with Dancy's (2000b, 14–15) opposite guarantee that probably some rousing reasons are not mental states. This is pertinent in light of the fact that the second we unhinge spurring reasons from mental states, we have subsequently opened the chance of making these reasons non-speculative, by so making them a fundamental piece of normativity. That is, on the off chance that we recognize a persuading reason with some different option from a mental state—for example, with a reality or a situation—we are in position to set up a calculated connection among obligation and the class of rousing explanation. Conversely, in the event that a rousing explanation is related to a mental state it is, difficult to describe a persuading reason as an explanation with unmitigated power. For, for this situation, we won't show that such a class can offer help on a non-unexpected premise. Appropriately, one can characterize obligation regarding spurring reasons just as long these reasons are predicated not on a specialist's brain research (which is unexpected) but rather on specific realities, or situations, having inalienable standardizing and hence persuading power.

In any case, the contention showing how a spurring reason can be something besides a mental state looks unconvincing, on the grounds that there is just nothing of the sort as a reality, or situation—a non-mental condition existing out there on the planet—that can be brought up as a persuading justification activity, anyway self-evident or plainly obvious it could be as such an explanation. The fact of the matter is that this reality, or situation, anyway direct it could be as a persuading justification activity, doesn't turn out to be such an explanation until we complete the idea by showing how we are to take that reality, or situation, to be specific, until we illuminate the sorts of convictions and wants expected to follow up on that reality, or situation, and the mood through which to identify with it. It is thusly reasonable for say that a specialist's convictions, mental highlights, demeanor, interests, and temper play an unavoidable intervening job in setting up what eventually considers a propelling justification activity. This interceding job precludes the likelihood that a spurring reason can hold completely. From which it follows that spurring reasons—as reasons whose point would be crushed on the off chance that they were decoupled from the brain research of activity and whose premise lies in

an individual perspective on what is significant throughout everyday life—can't bear any fundamental, or constitutive, connection to obligation, at any rate not when obligation is recognized to be a non-speculative necessity.

This end leaves us with just two possibility for the part of a characterizing component of obligation: justificatory reasons and logical reasons. Informative reasons can be precluded immediately as a characterizing component of obligation, since these reasons are worried about the reasons for activity—with why an activity is performed, and not with why a course of lead should be occupied with. Furthermore, the talk worried to clarify why specialists act the manner in which they carry on has little to do with obligation, since that sort of talk isn't standardizing. As needs be, it is as far eliminated from the "should" of activity, which rather is constitutive of what is mandatory, as one can envision when mulling over activity. This is to say that it is justificatory reasons that we find at the centre of obligation qua common sense and standardizing idea. Just justificatory reasons (a) can make something unmistakably regulating and (b) can do as such so as to make it completely restricting. Persuading reasons may in some sense prevail in that first job (a), by provoking specialists to act somehow when confronted with a pragmatic choice. Yet, they certainly fizzle in the subsequent job (b), since that choice can't be separated from a specialist's mental cosmetics and interesting arrangement of convictions as is unexpected, in any event, when aptly harmonious with what ends up being the normatively approved strategy.

To repeat this point, since persuading reasons will be reasons which uncover a specialist's brain science, individual character, and individual tendencies, they are not explicitly intended to tie us paying little mind to how well we might be arranged toward it or how we may feel in thinking about it. Logical reasons, as far as it matters for them, fizzle on the two checks, for they not one or the other (a) say how we should act nor do they (b) fret about deciding if somebody's activities were nonhypothetically correct, acceptable, exemplary, fitting, sensible, or what have you. Just justificatory reasons fill both of those seats, which are integral to the meaning of obligation comprehended as a common sense and standardizing necessity. For, justificatory reasons are the reasons that make a specialist's exhibition adequate when estimated facing certain principles of down to earth accuracy: they are thoughtfully associated with ideas—legitimization, assessment and grounded analysis—that are constitutively standardizing. Also, from one perspective, justificatory reasons award the likelihood that particular cases of pragmatic normativity tie non-speculatively, since justificatory reasons don't

make brain science related highlights fundamental to figuring out what they support as, all things considered, persuading reasons do; then again, justificatory reasons draw in with what one should do, opposite with what one does, thus they secure the peculiarity of the regulating domain when contrasted with the reason molded enlightening area set apart out by logical reasons. As needs be, the reference to justificatory reasons can possibly represent two focal parts of what is compulsory: its uniqueness based on what is verifiable and enlightening and its absolute quality.

This contention eventually grounds the end that obligation need be conceptualized as far as a particular class of reasons—justificatory reasons. Obligation, in different terms, is basically characterized by the utilization of justificatory reasons, not spurring or illustrative ones. Specifically, the compulsory nature of specific requests relies upon the presence of justificatory reasons—the reasons which (in any event once in a while prevail to) put forth it the defense that somebody nonhypothetically should play out specific activities and avoid accomplishing something different. This is additionally how it will be in the remainder of the conversation, where the unfit term "reason" will assign neither spurring nor logical reasons yet justificatory ones. This is on the grounds that, as I desire to have unmistakably outlined, just justificatory reasons can have any clear-cut standardizing power in talk including what should be done (that is, in any useful talk).[657]

In outline, the contention offered in this part has shown that obligation ought to be perceived as inseparably bound up with avocation, in that it generally rotates around the utilization of justificatory reasons (as against spurring or informative reasons). A reasonable connection would thus be able to be said to exist among obligation and support, a connection by ideals of which these two ideas should be viewed as personally associated. At the point when seen as an idea relating to the circle of useful normativity, obligation is basically characterized by the utilization of useful reasons. Since in this setting functional reasons are to be perceived as justificatory reasons, not as rousing or informative ones, obligation is basically and principally a matter of support. Since obligation as a functional thought would have neither rhyme nor reason however for the explanation giving practice through which it appears—the act of offering justificatory purposes behind activity—the appropriate area of obligation (the space of defense) will track down its primary concentration in the thoughts of answerability, or

[657] For remarks supporting the terminological stipulation just made, see Greenspan (2005) and Wallace (2006, 63–70).

standard-relatedness, and authentic analysis. The prior contention hence takes us to the end that obligation is best imagined and perceived by finding it in the area of support, where it is formed through the action of giving reasons, a movement by ethicalness of which the activity distinguished as the object of the obligation can be sanely legitimate. This implies that a fundamental connection gets between obligation, useful reasons, and legitimization.[658]

The Moral Nature of Obligation

Obligation, I have quite recently contended, is molded by justificatory reasons. A hypothetical record of obligation will consequently have to additionally determine what sorts of justificatory reasons characterize the obligation. To this end we should draw an unpleasant guide of the functional circle inside which to find justificatory reasons.

The beginning stage of this activity is given by a qualification that is generally recognized to be principal in morals, a differentiation between two fundamental methods of pondering the down to earth should, just as two different ways of supporting a course, or plan, of activity: the differentiation between moral reasons and prudential reasons Both prudential reasons and good reasons offer help to specific endeavors certainly; in particular, the two of them legitimize the exhibition of a given lead while, simultaneously, establishing analysis of acts that contention, or are incongruent with, the upheld one.[659] By and by, prudential reasons and good reasons legitimize activity in an unexpected way.

To expand further on this point, prudential reasons appeal to the individual interests of the specialist thus ignores different subjects and their requirements. Thus, they depend on contemplations that are solely worried about private addition and one's own benefit. Thusly, prudential reasons are completely self-with respect to in so they disregard the worries of others and only oblige the necessities of the acting self: when one follows up on prudential reasons, she directs her activity by the proportion of individual benefit and, subsequently, she essentially illustrates her own inclinations, yearnings, closures and wants in supporting the endeavor she continues. Paradoxically, moral reasons consider the interests of the specialist as well as the interests of others who are influenced or might be influenced by the activity also.[660] According

[658] Support for this conclusion can also found in Prichard (1949, 142-52) and Hacker (1973, 142-8)
[659] This quality of (all) practical reasons derives from the very definition of a practical reason.
[660] This statement follows from the thesis that the moral point of view factors in the needs of others as well as the first-person needs of the self-interested subject, so that self-regarding reasons, too, play a role in moral reasoning, alongside other-regarding reasons. For a defence of this allencompassing view of morality see Stroud (1998, 179–181).

to the perspective molded by moral reasons, at that point, everybody's interests check similarly. This implies that one uses moral motivations to represent the necessities of every individual fair-mindedly, give full weight to each need, and make the most of each in useful pondering. This is a vital differentiation to remember as we work our way toward a record of obligation since it brings into center the particular sort of power that justificatory reasons have in leading to obligations.[661] There is the power of exhortation (of that which is suggested or held up as great in giving reasonable direction); and there is the power of necessity (of that which is obligatory or requested in bringing up what is correct). The last is the legitimate area of obligation, since just in this last space we can outline obligation in the all-out sense we are seeking after. Thus, in outline, the basically regulating circle can be generally isolated into two wide camps to find obligation. From one perspective we have the entire scope of down to earth contemplations we plan from a first-individual outlining viewpoint in calling attention to a prudential justification activity: anything in spite of such a recommendation will be agreeable to analysis as either imprudent, or, unaware, or hasty, or ineligible, or even stupid, qua not as per the specialist personal responsibility. This implies that prudential reasons accompany a particular power connected to them: recommendatory power. Recommendatory power is alluring. A course of lead is advocated in the recommendatory sense as long as it is discovered engaging, such that withdrawing from it is outlandish, qua misguided. Then again, we have the more surrounded camp of good reasons we form from a more extensive and more comprehensive viewpoint in bringing up what we contend to be required or demandable (the obligation appropriate): anything in spite of such a recommendation will be manageable to analysis as being off-base and completely prohibited. In like manner, leaving based on what is legitimized by moral reasons won't be considered only imprudent or silly—a course of direct that is not exactly reasonable and thus one has an individual interest in staying away from it. It will rather be viewed as off-base—an occurrence of wrong-doing. In different terms, the type of analysis that is suitable when one withdraws from moral contemplations—the contemplations that characterize what the obligation is—is subjectively not the same as the type of analysis appended to a demonstration performed against a prudential viable explanation. Abnormality based on what is ethically due is qualified as, and is condemned for

[661] 2 I would like to thank Aldo Schiavello for discussing this point with me and providing valuable insights into the relation between prudential reasons and recommendatory force, on the one hand, and moral reasons and mandatory force, on the other. If there is any error or failing in this discussion, however, I am entirely responsible for it

being, incorrectly when contrasted with a bunch of reason-based principles. That is, the take-off from moral reasons legitimizes the allegation of misleading quality, which, when appeared differently in relation to, say, the allegation of imprudence, or absence of insight, is a particular explanation-based analysis.

This component related with the presence of an ethical explanation—idiosyncrasy of analysis—implies that ethical reasons have an unmistakable sort of justificatory strength, a sort of justificatory strength that can't be found in relationship with prudential reasons. More forthright, the justificatory power of good reasons has required quality. Compulsory power is restricting and urgent, rather than appealing. An activity is upheld in the compulsory sense as long as it is requested and exactable, to be specific, the specialist isn't just encouraged to perform it, but instead she is bound, or needed, to do as such. Thusly, activity upheld by useful reasons with compulsory power is legitimized in the solid feeling of being requested, required or required.[662] Also, in that lies the unmistakable power of obligation. It is a power we can appreciate by taking a gander at legitimization in examination with the wide range of various types of pragmatic talk so far considered, and by remembering the nearby reasonable association that support has been contended to bear to obligation and the all-out should grounded in the ethical point of view.

In this specific situation, it can't be overemphasized that it is on the grounds that a course of lead upheld by moral reasons can be not only fitting and suggested, but rather in reality obligatory and required, that veering off from it isn't only a barely honourable decision, however it very well may be censured as an off-base choice. Subsequently, a connection of common relationship can be set up between moral nature of a functional explanation, its required power and the common-sense analysis communicated in term of misleading quality. This makes the connection between moral reasons, obligatory power and unsoundness definitional, or constitutive: a demonstration is upheld by moral reasons to the extent that it is supported by viable reasons that have compulsory power and legitimize the analysis of the freak direct as illegitimate.

This end is key with regards to an investigation of obligation. For, obligation has the power of an interest and an order, specifically, the power of an obligatory necessity, instead of the power

[662] In sum, thus, for all their diversities and nuances the variable kinds of the strength with which practical reasons justify a course of action can be reduced to two basic broad types: the force of advice and the force of requirement. This reduction is argued for in Pink (2007, 416-23). See also Pink (2004).

of a suggestion. Likewise, activity acted in penetrate of the obligation is at any rate hypothetically imprudent as well as off-base. This implies that obligation is adroitly and particularly connected with moral reasons, rather than prudential reasons. One has the obligation to act this and that by ethicalness of the way that the pertinent course of lead is upheld by moral reasons, since just when pragmatic reasons accompany required power—the power which is unmistakable of good reasons—and single out a bad behaviour—as good reasons typically do—the obligation emerges. That is, having the obligation can scarcely be likened to having a viable explanation prescribing one to act with a particular goal in mind, as it is the situation when prudential reasons apply. Except if the explanation supporting a specific lead has the power of a necessity no obligation can be said to emerge. Furthermore, this is the reason obligation connects up adroitly with a particular subset of useful reasons—moral reasons—by so singling out a tight division inside that which is judiciously legitimized and gotten from analysis.

To put it in any case, not all that is upheld by common-sense reasons in their justificatory mode is made mandatory: not pragmatic reasons at all but instead down to earth reasons the idea of which is good bring about obligations Obligation, thusly, alludes to a circumstance where functional reasons are available that are invested with some improved strength, such that the upheld activity is compellingly due from the ethical perspective.[663] From this it follows that there is no applied space for anything like a "prudential obligation". Prudential reasons and contemplations can't without help from anyone else support any obligation to complete given activities: they can do so just whenever related with moral reasons and contemplations. This is to say that we can't be supposed to be under the obligation except if moral reasons concern us; on the other hand, prudential reasons may prompt or even urge somebody to act, however the power of impulse dependent on judiciousness can't be qualified as compulsory. Expressed something else, personal responsibility can't bring us into the domain of obligation:[664] obligations are grounded not in reasonability but rather in standards. Additionally, albeit the obligation can begin out of various types of contemplations and circumstances—thus, genealogically talking, can be strict, social, institutional, common, etc—its quality is unmistakably and characteristically good.[665]

[663] Similar remarks can be found in Darwall (2009, 31-6)
[664] In Prichard's (1949, 97) words, "conduciveness to our advantage is simply irrelevant to the question whether it is a duty to do some action."
[665] See Baier (1966, 211-3) for an argument supporting this conclusion.

CONCLUSION

Key to the origination of obligation I have advanced in this obligation is the possibility of obligation as having two fundamental perspectives: one of these lies in the inward association of obligation with moral down to earth reasons, and is appropriately objective and good; the other one rather lies in the calculated connection I have contended to exist among obligation and requiredness, or obligatory power. These two perspectives interlock to frame what I would call the duality of obligation. To be specific, by temperance of the double applied connection which attaches obligation to moral reasons, from one perspective, and to compulsory nature, on the other, obligation without a moment's delay procures moral justificatory power and sets itself up as an all-out necessity. In blend, the two viewpoints outline obligation as an ethically reasonable and level headed straight out prerequisite. In the theoretical structure worked out in this obligation, along these lines, obligation can be characterized as far as two cases: (a) the case that obligation is formed by moral useful reasons, to such an extent that no obligation can emerge except if the lead it endorses is ethically and soundly legitimate—consequently the good and justificatory component in the definition—combined with (b) the case that obligation conveys an unmistakably obligatory power—subsequently the non-speculatively basic component of the definition. It is just the interaction of good and reasonable support with absolute significance that gives us a full image of obligation.

The two axes around which the idea of obligation can so be coordinated makes the proposed record of obligation as unchangeable to any elective origination comparing obligation to either a judicious segment (where reason relatedness is taken to be the sole key constituent of obligation) or a compelling part (where requiredness, or noteworthiness, is perceived as summing up without anyone else alone the center of obligation). On this premise, one should reason that in the event that we avoid both of these two components with regards to the image—as by characterizing obligation only as far as good and level-headed support or only as far as straight-out prerequisites—we will subsequently have a halfway record, one that decides to draw out certain highlights of obligation without properly recognizing different highlights.

ANALYSIS OF LAWS GOVERNING E-CONTRACTS

- ADESH PATIL & PRAKRITI PUROHIT

Abstract

E-commerce and e-contracts have come a long way. While dealing with the aspect of E-commerce and e-contracts the traditional laws have been amended and certain new laws have been introduced by the parliament for the purpose of fast trending use of E-commerce. There have been a lot of judicial precedents which have in fact shaped the law relating to the E-contracts. Introduction of IT Act in the year 2000, was a gigantic step towards tackling the issues arising out of the E-commerce and E-contract. However with the change in time new challenges have aroused in the implementation of the E-contracts, which have shown the deficiency in the existing enactments. The present legislation has various inadequacy while dealing with jurisdiction aspect, tackling with effect of minors entering into contract, lack of scope for the purchasers in keeping their terms and conditions and hence it is very much difficult for people to save themselves from the big corporations. The paper discusses such issues in details with relevant judicial positions from time to time and suggests certain amendments which if implemented would be beneficial for the entire legal system in India to deal with the issues arising out of the E-contract.

Introduction

The Standard of living in India has changed in an unimaginable way due to the recent advanced changes in the arena of computer technology, use of various software and recent technologies in telecommunications for the purpose of E-commerce. Geographical conditions do not hamper or restrict any communication as the advancement in technology has resulted in transmitting of all information and communications swiftly and has increased the business scope from a restricted local area to a global level.

There is no any specific definition of the term e-commerce; it just denotes the way of conducting business by electronic means. In other words, E-commerce is nothing else but a business which is transacted by transferring data electrically, especially through computer network which helps in purchasing and selling of goods and services on any electronic network.

In India, the fast development of technology resulted in the major use of internet services and as a result of it the e-commerce market is easily accessible through mobile phones. The Indian Parliament in all its wisdom taking into consideration the fast-growing trend of electronic transactions and also for the purpose of providing security to the transactions and also for providing legal sanctity to the transactions which are entered into electronically, enacted "The Information Technology Act, 2000." The main objective of enacting the new law was to give recognition to the E-contracts and to facilitate the electronic transactions. In recent past the use of E-contracts has proved to be a double-edged sword for general public. In ideal situations people tend to believe that any contract would protect and be beneficial to both the parties and under such bonafide belief agree to the terms and conditions put forth in the e-contracts without actually reading the same which may cause legal hardship to the people entering into e-contract. The conventional laws in India relating to contracts and e-contracts do not address all the concerns arising from such contracts. It only deals with some aspects such as issues which arise in respect of formation of e-contracts and or issues in respect of authenticity of the E-contracts. The legal complexities and challenges arising out of the E-contracts are lesser known to the general public.

The legislation in India as on date which governs the E-contracts is required to be critically analyzed and a comparative study of existing laws in India are required to be done so as to facilitate the effective usage, implementation and interpretation of E-contracts with special reference to e-commerce.

Legal Provision

There are various laws enacted in India which regulates the written contract as well as the Electronic Contracts and are mainly invoked by the parties. Some of them are as follows:

i. The Indian Contract Act, 1872
ii. The Information Technology Act, 2000
iii. The Consumer Protection Act, 1986
iv. The Indian Copyright Act, 1957

In the WTO Work Program on E-Commerce, it implies the creation, appropriation, showcasing, deal or conveyance of services and products by electronic methods and is, along these lines, covered by an idea of 'E-business'. The Electronic trade by means of electronic

medium covers a wide network and hence E-commerce can be utilized as an equivalent word for E-contracts.

Since e-contracts are as legal as offline agreements, similar provisions applying to a legal agreement apply to e-contracts. The basic law governing the offline agreements which makes an agreement valid agreement, requires an offer, which is to be accepted and same should be against consideration[666] are also the key requirement in e-contracts. There is no inconsistency among Indian and Common law in such manner as seen in **Lalman Shukla v. Gaurie Datta Sharma**[667] where disregarding the way a person found the kid, whose uncle had guaranteed Rs. 501 to any individual who finds the kid, the person was denied the prize seeing that he came to know solely after discovering the kid.

Legal provision for online business has been given by the IT Act, 2000. This Act likewise impacts noteworthy changes in The Indian Penal Code, The Indian Evidence Act, 1872, and The Reserve Bank of India Act, 1934 to align them with the necessities of digital exchanges.

In, **Societies Des Product Nestle S.A. and anr. v/s. Essar Industrict & ors**[668] Hon'ble Delhi High Court cleared route for prompt presentation of Sec. 65A & 65B in The Indian Evidence Act, 1872 identifying with suitability of PC created in viable manner so as to take out the difficulties of electronic proof. As per the provisions of Sec. 65 any substance of electronic record can be brought forth by the party u/s. 65 B of the Indian Evidence Act. The Hon'ble Delhi High court in **State of Delhi V/s Mohammad Afzal and Ors**[669] has held that, "Electronic records are allowable as proof."

Section 13[670] of IT Act' 2000, read with section 4[671] of the ICA' 1872, gives that acceptance is restricting on the offeror when acknowledgment is beyond the control of the maker, and for offeree when acknowledgment enters data arrangement of the offeror. It has been noticed that these principles apply just to non-prompt types of correspondence viewed as email.[672] For quick types of correspondence, for example, 'web click' gets the agreement is closed when the recipient is in receipt of the acknowledgment. The Courts in India do recognize the contracts

[666] Indian Contract Act, 1872, §10
[667] Lalman Shukla v. Gaurie Datta Sharma, (1913) M.L.J. 489.
[668] Societies Des Products Nestle S.A and Anr v. Essar Industries and Others
[669] State of Delhi v. Mohd. Afzal and Others
[670] Information Technology Act, 2000, § 13
[671] Indian Contract Act, 1872, § 4
[672] BhagwandasGoverdhandasKedia v. GirdharilalParshottamdas and Co., AIR 1966 SC 543

executed over email. The Hon'ble Apex Court of India in **Trimex International FZE Ltd, Dubai v/s Vendata Aluminum Ltd.,** has held that as the agreement between the parties was accepted through emails unconditionally same is a valid agreement as it fulfills the prerequisites of Indian Contract Act.[673]

IT Act perceives the legitimate legitimacy of E-records, E-marks and E-contracts, and furthermore advances E-governance but at the same time E-documents are not permitted in wills, trusts, and deals of real property, negotiable instruments and powers-of-attorney. A computerized signature agrees with a legal prerequisite for a transcribed mark to be appended on paper. The IT Act incorporates E-contract rules identifying with: attribution, affirmation of receipt, and time and spot of transmission and gathering of an electronic message. Rules accommodate guideline of Certification Authorities (CA) and outsiders whose obligation is to vouch for the validness and uprightness of an electronic message that has been endorsed with a digital mark. ACA is commanded to: freely show its license; issue authentications to fruitful candidates; and oversee remarkable endorsements by keeping the data in them current, and suspending or disavowing them in the event that they contain errors. The IT Act incorporates criminal and civil offenses and related punishments. The Controller chooses settling officials to hear both common and criminal cases identifying with the IT Act and to deliver choices likewise. Appeals can be taken to the Appellate Tribunal and then to the High Court. The government of India and the Controller are engaged to give guidelines essential for execution of the IT Act.

Section VI of IT Act Contains arrangements relating to E-contract. Sec 11[674], 12[675] and 13[676] deals with attribution, affirmation and dispatch of electronic records individually.

The IT Act basically looks to address three regions for the computerized period:

(a) To make conceivable business exchanges: both B2B AND B2C

(b) To make conceivable e-administration exchanges: both G2R AND R2G

(c) To control digital wrongdoing on the Internet.

ISSUES RELATING TO E-CONTRACTS

[673] Trimex International FZE Limited, Dubai v. Vendata Aluminum Ltd.2010 (1) SCALE 574

[674] Information Technology Act, 2000, § 11

[675] Information Technology Act, 2000, § 12

[676] Information Technology Act, 2000, § 13

Lack of specific legislation determining and governing the validity of e-contracts has led to arousal of various issues.

JURISDICTIONAL ISSUES

Jurisdiction decides the appropriateness of the legislation of a specific country whether it's about understanding of law or settling a question. In like manner speech with regards to conventional agreements the spot of execution of agreement is the proper jurisdiction. The contracting parties are far away while executing e-contracts and thus they are executed in a virtual room. Jurisdiction can be mutually decided by the parties but the uncertainty in jurisdiction cannot be done away with. According to Section 13(3) of the IT Act 2000[677]:

a) The business environment of the originator will be considered to be where the data was dispatched, and

b) Place of business of the recipient will be considered to be where the data was gotten.

In the U.S. to decide the jurisdiction the " Purposeful Availment Test" presented on account of Hanson v. N.R. Denckla[678] lays weight on the solid reason behind the activity of a party rather than a simple demonstration of the party i.e., activity ought to be deliberately coordinated towards the inhabitant of the state to learn the purview which has a high weight of proof. On account of P.R. Transport Agency v. UOI[679], it was set up that the business place is the central consideration for assurance of jurisdiction. It accordingly brings up the issue of the jurisdiction of the courts, as the case may emerge in the e-contract at where the electronic data was sent, regardless of the reality of the essential spot of business. This turns into even more troublesome when parties live in diverse parts of the world as in this issue of virtual space common jurisdiction purview can't be applied.

In the case of **Casio India Co. Ltd V. Ashita Tele Systems Pvt Ltd [680]** Delhi HC held that in order to invoke territorial jurisdiction of any Court, it is enough that, the site can be accessed from Delhi.

In the case of **India TV Independent News Service Pt. Ltd V. India Broadcast Live LLC**[681], the courts classified that not only access to the contents of the website is adequate but also that

[677] Information Technology Act, 2000, § 13 (3)
[678] Hanson v. N.R. Denckla, 36357 U.S. 235 (1958).
[679] P.R. Transport Agency v. UOI, 37AIR 2006 All 23, 2006 (1) AWC 504.
[680] Casio India Co. Ltd v. Ashita Tele Systems Pvt Ltd, 2003 27 PTC 265 Delhi
[681] India TV Independent News Service Pt. Ltd v. India Broadcast Live LLC, 2007 35 PTC 177

the services provided on the site can be subscribe and then only the jurisdiction of the courts of that place can be invoked.

MINOR'S ENTERING INTO A CONTRACT.

One of the imperatives for a valid agreement are those parties to the agreement who have attained majority i.e the age of 18 years. Agreement by any minor is held to be void. Same has been held in case of **Mohori Bibee vs Dharmodas Ghose.**[682] E-Contracts then again are contracts directed by online medium where the parties can be effortlessly tricked or the age of both of the parties can't be resolved with sureness. This leaves the party who contracts with a particularly minor in a distraught situation as he has little cure in the event that the minor submits a break. The affirmation old enough before the agreement is only an independent responsibility and doesn't ensure the veracity. In instances of Click Wrap Agreement or Browse Wrap Agreements, it turns out to be far more troublesome as it empowers a minor to get into such agreements without any problem. Even after all such thought, issues for checking the genuineness lacks due to proper legislation in place.

In the instance of E-trade stages the extent of arrangement is decreased which prompts inconsistent haggling position leaving clients in an unreasonable position. The maker, distributer, merchant, a transporter and other huge elements with monster financial force are in an ideal situation to decide terms and conditions and the other arranging party is discreetly incapable to demand its terms. In the instance of **L.I.C India v. Consumer Education and Research Center**[683], the Hon'ble court has had a go at characterizing such agreements and saw that where the more fragile party don't have a bargaining power, such sort of agreements were alluded as dotted contracts.

Conclusion:

The increased use of digitalization has enabled the rise in number of E-contracts that have been executed in India. The use of mobiles and internet for the purpose of purchase of day to day needs, grocery shopping, food, clothing, buying electronic goods, etc. has become part and parcel of lifestyle in India. Although there are laws governing all these e-contracts however

[682] Mohori Bibee v. DharmodasGhose, (1918) ILR 40 All 325

[683] LIC India v. Consumer Education & Research Center, 1995 AIR 1811; 1995 SCC (5) 482; JT 1995 (4) 366; 1995 SCALE (3)627

inspite of this there are many serious challenges which causes hindrance in the growth of E-contracts. The major challenges faced in India are

- E-contracts do not ensure as to whether the person entering into a contract is legally competent to execute or enter into such contract.
- E-contracts do not give any option to the online customer to make any counter offer or negotiate the deal.
- There is always a dispute about the jurisdiction so as to challenge the breach of contract.
- The online customer can be subject to any jurisdiction of foreign land.
- The Information Technology Act only recognizes digital signature and Adhar e-sign, hence the signatories from foreign land are unable to sign and they have no other options of signing methods.
- Increasing Cyber Frauds are too hard to be looked into with the existing laws.

In Indian although there are laws governing the digital contracts or the E-contracts, the existing laws are not self sufficient to look into all the aspects arising out of the new advancement of technology. The fast development in the digitalized world has created a need to amend the existing laws accordingly so as to tackle the potential threats of frauds in E-contracts. A special legislation complimenting the IT Act and specially governing the E-contracts is required to be enacted. The issue of jurisdiction needs to be balanced by conferring jurisdiction upon the Court in whose local limit the part of cause of action has aroused or where the originator or the recipient resides. Contracts entered in to by Minors using accounts of their guardian should not be declared void ab-initio but should be treated as voidable contracts depending upon case to case. To deal with issue of minors entering into contract, every e-contract should be supported by valid age proof. Transactions executed by virtue of social media which do not specify any terms and conditions should be governed by a model terms and conditions which may be incorporated as a schedule in the IT Act or the proposed new act.

ARTIFICIAL INTELLIGENCE AND THE 21ST CENTURY GOD COMPLEX

- **ESHA SAXENA**

1. INTRODUCTION

"It only takes a moment for the unthinkable to become reality". The concept of Artificial Intelligence (AI) developing into a real world concept impacting, improving and threatening the humanistic interaction of the global world is one such abstract idea that has taken a form of reality and is bound to holistically enhance its interaction with humanity in years to come.

The notion of "artificial intelligence" (AI) is understood broadly as any kind of artificial computational system that shows intelligent behaviour, i.e., complex behaviour that is conducive to reaching goals. In particular, we cannot restrict "artificial intelligence" to what would require intelligence if done by humans, as Minsky had suggested (1985). This means we incorporate a range of machines, including those in ―technical AI that show only limited abilities in learning or reasoning but excel at the automation of particular tasks, as well as machines in ―general AI that aim to create a generally intelligent agent.

2. KEY LEGAL ISSUES AND ANALYSIS

Today the robot is not a "legal subject" in any civil or criminal law of any country. Being a "legal subject" the robot would have obligations as well as rights in the society.

IDENTIFICATION OF PROBLEMS

(I) Should AI system have some form of juridical personality in order to deal with the issues of liability?

(II) Does AI system fit within the ethical and moral considerations of being a juridical personality or granting personhood?

(III) Would granting personhood to the AI system allow the creators of the same to escape liability and hide behind the liability of AI if personhood is conferred to same?

(IV) Whether the AI can be covered under the system of personhood granted to companies and what would be the extent of liability for the same

2.1 ISSUES OF LEGAL STATUS AND PERSONHOOD

There are two possible paradigms of shaping legal relations arising between robotic AI and a person, namely equalization of human rights and that of the robot, one the one hand and the definition of legal personality of a fully autonomous robotic AI, on the other. This can be further explained by looking at the precedent of various nations.

1. **A case from Saudi Arabia:** Riyadh declared in 2017 that robot Sofia that positions itself as a woman, was allowed the citizenship of Saudi Arabia. This step repudiates to various laws that decide the model of conduct of subjects of lawful relations in various conditions. Firstly it contradicts the citizenship norms; the citizenship is obtained by – birth, marriage and naturalization[684].

Furthermore, the case understudy negates the acknowledged model of female conduct in Saudi Arabia society that acquaints explicit prerequisites with female activities, including obligation to travel accompanied by a male mahram, hijab wearing, job placement limits, limits to traveling abroad, restrictive issues in family life and inheritance rules, and some other restrictions stemming from the Shariah.

2. **A case from Japan:** Japan in 2017 gave a residence grant to the talk bot Shibuya Mirai under a unique guideline[685]. Nonetheless; this activity negates laws concerning license system in Japan. The citizenship[686] is granted based on – birth or naturalization is also negated.

[684] Saudi Nationality System, 2017
[685] Cuthbertson, 2017
[686] Nationality Law of Japan, 2018

Keeping in mind, the previously mentioned precedents of AI status as equivalent to human being in Saudi Arabia and Japan, it is important to focus on the procedural part of the public legitimate relations:

- Neither the chat box, nor the robot Sofia meets the criteria for residence
- Neither did they apply for citizenship
- Further, the AI must comply with the obligated duties
- Along with duties, AI also receives certain rights as any citizen would obtain

Legal personhood, it can argue, is tied to humans because only humans understand the meaning of rights and obligations. Robots can be programmed to conform to rules, but they cannot follow rules. Rule-following presupposes an understanding of the meaning of these rules. Robots are not capable of such understanding. Robots are not active in the discipline of hermeneutics – and they will never be. It simply and literally would be dehumanising the world if we were to accord machines legal personality and the power to acquire property and conclude contracts, even though such machines may be smart – possibly even smarter than we humans. So, treating robots like humans would dehumanise humans.

Be that as it may: it seems to be clear that the question about the legal personality of robots raises deep philosophical problems, and robot law will be shaped by what is called the "deep normative structure" of a society. It very much matters whether a society is based on a utilitarian conception of 'the good' or whether it rather is based on a humanitarian, Kantian vision according to which not everything that is utility-maximizing is necessarily the better policy. What seems to be clear is that a utilitarian conception of the good will tends to move a society in a direction in which robots eventually will take a fairly prominent role – by virtue of the law.

On the other side of the spectrum, the European Parliament has considered allocating such status to robots in order to deal with civil liability, but not criminal liability—which is reserved for natural persons. It would also be possible to assign only a certain subset of rights and duties

to robots. It has also been said that the reasons for developing robots with rights, or artificial moral patients, in the future are ethically doubtful.

Artificial intelligence entities must be treated as legal personalities so as to make them accountable under the law just like corporations. If we derive the analogy from the logic behind legal personality to corporations, which was to limit the corporate liability on an individual's shoulder which would in turn motivate people to engage in commercial activities by means of corporations. In the same vein, the concept of legal personhood should be extended to artificial intelligence entities as is accorded to corporate bodies. This will enable the existing legal system to have enough potential to tackle upcoming challenges by artificial intelligence.

Moreover, after developing weak AI scientists are also trying to develop strong AI which will be sentient, they will be unique like humans; therefore they must have their own identity. These machines will have emotional intelligence which will diminish the line demarcating among humans and the machines. They will in their capacity to perform any work and also in their pattern to perform a task. They may even demand basic right to facilitate their wellbeing. Granting legal personhood to artificial intelligence will not only ensure that our current legal system gets prepared for the technological change but it will also ensure that our interactions with these artificially intelligent beings are harmonious and benefits the human beings.

Strong AI will introduce a new dimension to our society. The technological world is changing rapidly which warrants the adaptive reforms in the current legal system. So, that our legal system is capable of finding solutions to the legal issues raised by technological developments in our society. There is sufficient legal consideration arguing in favour of attribution of legal personality to artificial intelligence, which in no case would be conceptually different from legal personhood of corporations, trade unions, etc. When the strong AI develops as a sentient being then it would be our moral obligation to provide rights to them. The strongest argument favouring extension of legal personhood to artificial intelligence is that this will prepare our legal system for this technological change without making a substantial change to it. This would also ensure that the technological development is not divorced from our society.

2.2. AI IN THE FIELD OF LAW

Robots represent the likelihood to have a positive effect in a few viewpoints relating the cycles of the legal framework, as automation beats people, increases productivity and efficiency, also, even makes tactic judgment. But considerations pertaining the robot as an active stakeholder in the judicial system, has far reaching implications, as one could consider one step further.

a) **Moral Judgement in legal sphere**: Moral decisions may require the principal individual point of view—while potentially regardless being impartially correct or wrong—and AI might be unequipped for accomplishing the first person viewpoint and subsequently of making moral decisions. If both propositions are true, then the scope of what AI can do in the law would seem to depend on a longstanding and central dispute in jurisprudence: the role of morality in law[687]. But it turns out that is only partially accurate. It is true that natural lawyers, according to one formulation, contend that the content of law depends ultimately in part on moral judgments.

There is another reason to conclude that those who make legal judgments must be capable of making moral judgments. It arises from what one might call a principle of reciprocity. The logic is that those who impose legal judgments on others must themselves be subject to the law. The law, in turn, applies only to conscious actors capable of moral agency. We do not, for example, allow criminal prosecutions of animals or inanimate objects.[688]

b) **Subjectivity in legal sphere**: Subjectivity may be necessary for morality because morality involves evaluation and choice in the realm of value. Regardless of whether ethical quality includes something beyond wants or inclinations—regardless of whether moral cases can in some sense are valid or bogus—subjectivity is likely fundamental in making moral decisions. One approach to get now is through the fact value distinction. Humans must define the goals that are to be pursued by AI, to this date; AI cannot select its ultimate goal or end.

[687] . This debate is often labeled the Hart-Dworkin debate, and it has been the main one in jurisprudence. See, e.g., Scott Hershovitz, The End of Jurisprudence, 124 YALE L.J. 1160, 1162 (2015)

[688] State v. Winder, 979 We similarly do not allow criminal prosecution of people with such diminished capacity that they have no ability to tell right from wrong, although subtleties arise about whether a defendant must be able to assess legality as opposed to morality

When it comes to "machine morality" - to the possibility of AI pursuing moral ends—that leaves two main options: a top-down approach[689] and a bottom-up approach[690]. Under the top-down approach, humans establish key moral principles, once that's done they can restrain or direct what AI can and cannot do.

Under the second approach, AI is provided with precedents – situations and moral actions to be taken. Thus AI needs inputs from human to act morally in situations and changes should be made over time, since new human judgement may be necessary for AI to adapt for correct response in changing situations.

3. KEY SOCIAL ISSUES AND ANALYSIS

3.1 ETHICAL ISSUES

"Figuring out how to build ethical autonomous machines is one of the thorniest challenges in artificial intelligence today. As we are about to endow millions of vehicles with autonomy, a serious consideration of algorithmic morality has never been more urgent." [691]

Ethical aspects pertaining robots[692] especially when they are in position to take life and death decisions are another challenging area. The question is if machines should abide to an ethical code, and of their decisions are to follow ethical principles, moral values, codes conduct and social norms that humans would follow in similar situations. For example, a car in auto pilot mode might face a dilemma of either – saving the owner that is the passenger of car, or saving the pedestrian or saving the animal which is trying to reach the other side of the road.

689 WENDELL WALLACH & COLIN ALLEN, MORAL MACHINES: TEACHING ROBOTS RIGHT FROM WRONG 83-97 (2009).
690 Ibid
691 r. Bonnefon et al. (2016)
692 (Lin et al., 2012; Operto, 2011)

As ethics come in different variations with their own differences, e.g., Utilitarianism, Deontology, Relativism, Absolutism (monism), Pluralism, Feminist ethics, there is no consensus on what guidelines a robot should follow.

3.2 AI AND DISINFORMATION

Simply put, disinformation is information that is false and deliberately created to harm a person, social group, organisation or country. Researchers contend that bogus news travel multiple times quicker via online media than genuine news.

Amidst the continuous COVID-19 pandemic, bots are twice pretty much as dynamic as studies at first anticipated. Paranoid notions related with the pandemic can be numerous and fantastical since established researchers' information on the infection stays restricted. Bots are presently answerable for about 70% of the COVID-19 related movement on Twitter, and 45% of the records handing-off data about the infection are bots.

This can be traced from the circulation of fake videos during 2013 Muzzafarnagar riots to empty headed circulation of whatsapp – "UNESCO has declared 'Jana Gana Mana' best national anthem in the world", to the latest one claiming muslim youth were being injected with COVID-positive blood which in some places led to attacks on frontline workers.

Co-ordinated action by counterfeit records can improve the probability of something moving, or can lessen the opportunity of authentic news coming to standard light. This is called 'Algorithmic enhancement', where some online substance gets well known to the detriment of different perspectives. One such illustration of information that got broadly circled before it was discovered to be false was that of the arrival of swans and dolphins in the Canals of Venice because of the COVID-19 incited lock-down.

Another developing concern originates from the 'Deep fakes' innovation, which includes pictures and recordings that are extraordinarily reasonable however are, truth be told, PC produced. They have become an incredibly amazing asset that permits people to control or create visual and sound substance on the web to cause it to appear to be genuine. At the point

the battle is to precisely recognize the phony from the genuine, flow of contorted substance can fundamentally help those wishing to control assessment a specific way.

Obviously, in a nation like India where computerized proficiency is nascent, even low-tech variants of video control can prompt savagery, particularly with lacunae in the law outfitted to manage such issues.

Artificial intelligence, with its quickly creating highlights, can be effortlessly abused to uplift existing strains inside society and control popular assessment. It represents a genuine danger to target dynamic by the democratic public. The adequacy of the equivalent has to a limited extent been ascribed to the way wherein they have had the option to exploit the inclinations that have been profound established in the public arena. Calculations hold expanding influence, which will in the end prompt profound polarization of thoughts and convictions in the public eye.

3.3 PRIVACY ISSUES

"If you're not paying for the product, then you are the product" — Daniel Hövermann

Each time we go to the web, perusing sites, or when we utilize versatile applications, we don't understand that we are parting with our information either expressly or without your insight. Also, more often than not we permit these organizations to gather and handle our information legitimately since qw would have clicked "I concur" catch of terms and states of utilizing their administrations.

Aside from our data that we unequivocally submit to sites like Name, Age, Emails, Contacts, Videos, or Photo transfers, we likewise permit them to gather our perusing conduct, snaps, and different preferences. Rumoured organizations like Google and Facebook utilize this information to improve their administrations and don't offer this to anybody. Truth be told, the sole aim of numerous organizations is to gather client information by baiting them into utilizing

their online administrations, and they sell this information for huge measures of cash to outsiders.

Whether it is the Cambridge Analytica-Facebook scandal, or the Clearview Face Recognition Scandal or the issues of mass surveillance in China where use of over 200 million surveillance cameras and facial recognition to keep a constant watch on their people was recorded, it is undoubtedly clear that AI is not without its evil.

Therefore in this quickly moving mechanical and political scene, disinformation programs require the most elevated conceivable level of assessment and responsibility. Nations need to deal with overcoming any barrier between existing laws and recently creating advances, while simultaneously protecting the rights to free discourse. Governments and online media gatherings need to cooperate to guarantee that majoritarian suppositions don't push others to the secondary lounge.

4. CONCLUSION

Human race suffers from the God Complex. Workmanship and science endeavour to accomplish reproduce the human structure, thought example, style, and morals. Would we be able to repeat the human keenness by making machines have an independent perspective?

Man-made consciousness doesn't confront the ethical difficulty of settling on decisions that fall in the hazy situation; it is paired in its yield. The manner in which we are going, individuals trust a machine more than they trust people. It turns out to be considerably more critical to keep AI totally unprejudiced. Computer based intelligence is an innovation, very much like atomic combination was before it was transformed into a bomb.

If right checks are not put in place, we are staring at a catastrophe more devastating than a nuclear explosion since it has the capacity to destroy every fibre of human existence.

In the assumption that artificial intelligence is developed due to temporal and economic savings in works to be performed by human beings and it serves people in essence, attention should be paid not to contradict human rights and interests.

Today plainly we don't get AI, robots including AI, and may not be capable to control it, nor may it very well be wished in cases. Single viewpoints, for example, legitimate subject have far arriving at suggestions and set the base for the future beneficial interaction of robots and people. Be that as it may, our general public isn't prepared for this change in outlook yet, and such a large number of viewpoints relating law also, society, are inadequately talked about and evaluated. In general one needs to think about that law is intended to be proactive in nature and in a perfect world be set up to forestall issues before they occur. As such it isn't fitting to stand by until issues emerge inside huge scope use of robots and afterward endeavour to determine the individual laws, approaches and cultural activities.

Robots and AI will create a new era for humanity. What that era might be, is highly debated. As Stephen Hawking put it “The rise of powerful AI will be either the best or the worst thing ever to happen to humanity. We do not yet know which”.