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We, at Jurisperitus believe in the principles of justice, morality and equity for all. We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you
Jurisperitus: The Law Journal.

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CYBER CRIMES: EVOLVING TRENDS AND REMONSTRANCES

- ANUJ RAGHUVANSHI[1]

Abstract

Computers and internet are becoming an essential part of our daily life. They are being used by individuals and societies to make their life easier. They use them for storing information, processing data, sending and receiving messages, communications, controlling machines, typing, editing, designing, drawing, and almost all aspects of life. Cyber Crime may be generally understood as "unlawful acts wherein the computer is a tool, a target or both" .

India is emerging as an Information Technology hub and at the same time is also becoming a major ground where cyber offences are increasing day by day victimizing the innocent users of the technological innovations. In such a situation it becomes very necessary to protect the rights of the citizens from those criminals who use to take advantage of the ignorance of the common people. Cyber world has made all the technologies to change in such a way that it has created a generation gap between those who are known to these technologies and those who stayed behind in this race. India is a country with much rich and poor divide along with-it higher rates of poverty and illiteracy. Therefore, such generation gap gets even more widened due to such reasons. Thus, both the law makers and the law keepers have a big responsibility to introduce an efficient legal mechanism for addressing such issues of cyber-crimes that takes place in the virtual world which is much difficult for monitoring through real mechanisms. This paper will thus make an attempt to analyze the legal framework with an aim of understanding the efficiency of in regulating cyber-crimes in India.

Keywords: *Cyber-crimes; Cyber world; Internet; Information Technology; and Legal Framework*

I. Introduction:-

Since the invention of Internet, its users are increasing day by day across the globe. in India too, the number of internet users are increasing and surprisingly India surpassed the number in US where US users amounts to only 4.4% population of global internet users while India amounts to 17.2% of total global users.101 Majority of the population using internet in

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India belongs to age group of less than 30 years which indicates that the workforce in India is basically dependent on IT based technologies as a result of which IT and Business Process Outsourcing Industries have gained global prominence in India.102 However, we must also acknowledge that this internet has also created a virtual world with no borders and to some extent with very limited regulatory control across the world. Many activities can take place through internet where the actors might not get recognized. In such cases it becomes quite difficult to regulate criminal activities and to secure the virtual world with legal rules that are fit for real world but may not suit the virtual world. This Article therefore will make an attempt to analyze the Indian legal framework over the matter of regulating cyber-crimes in the virtual cyber world especially at such a time when the process of digitalization has increased to a significant level.

II. Modes of Cyber Crime:-

1. **Unauthorized Access to Computer Systems**: This kind of offence is normally referred to as hacking in the generic sense. However, the framers of the information technology act 2000 have where used this term as to avoid any confusion. We would not interchangeably use the word hacking for 'unauthorized access' as the latter has a wide connotation.

2. **Theft of Information Contained in Electronic Form**: This includes information stored in computer hard disks, removable storage media etc. Theft may be either by misappropriating the data physically or by tampering it through any virtual medium.

3**. Email Bombing**: This kind of activity refers to sending large number of emails to the victim, which may be an individual or a company or even mail servers .This targets at ultimately crashing of the system or the data.

4. **Data Diddling**: This kind of an attack involves altering raw data just before a computer processes it and then changing it back after the processing is complete. The electricity board faced a similar problem of data diddling while the department was being computerized.

5. **Salami Attacks**: This kind of crime is normally prevalent in the financial institutions done with the purpose of committing financial crimes. An important feature of this type of offence is that the alteration is so small that it would normally go unnoticed, e.g., the Ziegler case wherein a logic bomb was introduced in the bank's system, which deducted 10 cents from every account and deposited it in a particular account.

6. **Denial of Service Attack**: In this case the computer of the victim is flooded with more requests than it can handle which cause it to crash. Distributed Denial of Service attack is also

a type of denial of service attack, in which the offenders are target in number and widespread. e.g. Amazon, Yahoo.

7. **Virus Attacks**: Viruses are programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worms, unlike viruses, do not need the host to attach themselves to. They merely make functional copies of themselves and do this repeatedly till they eat up all the available space on a computer's memory, e.g., love bug virus, which affected at least 5 % of the computers of the globe. The losses were accounted to be $ 10 million. The world's most famous worm was the Internet worm let loose on the Internet by Robert Morris sometime in 1988 and almost brought development of Internet to a complete halt.

8. **Logic Bombs**: These are event dependent programs. This implies that these programs are created to do something only when a certain event (known as a trigger event) occurs. Some viruses may be termed logic bombs because they lie dormant all through the year and become active only on a particular date (like the Chernobyl virus).

9. **Trojan Attacks**: This term has its origin in the word 'Trojan horse'. In software field, this means an unauthorized programme, which passively gains control over another system by representing itself as an authorized programme. The most common form of installing a Trojan is through e-mail, e.g., a Trojan was installed in the computer of a lady film director in the U.S. while chatting.

III. Legal Mechanism Pertaining to Cyber Crime:-

In India, the main legislation that deals with computer related offences is the Information Technology Act, 2000 which was last amended in 2008. However, laws like Indian Penal Code 1860, Indian Evidence Act, 1972, etc. do contains certain general provisions related to cyber offences and even such laws were amended to include certain specific provisions for dealing with IT related matters.

- **Data Theft**- Data theft occurs when someone stoles or purchase information illegally that is of confidential nature and is restricted from being exposed in public domain. Such offences are dealt under Section 43, 43A and 66 of IT Act, 2000. Section 43 deals with the offence while Section 43A and Section 66 provides the penal provisions for such offences. Section 66 was even invoked in the case of ***Syed Assifuddin and Others v. The State of Andhra Pradesh and Others***.
- **Hacking**- it is a much broader offence and one must understand that it is one of such offences that can be committed very easily. Hacking generally implies any

unauthorized utilization of computer or electronic devices, information, or any such other kind of data accessing or sharing devices, applications, etc. Hacking is such a broad category of offence that it may even include utilizing someone's email id without the permission of the owner of such id in cases where such email id has been kept in log in mode in a device by the owner by mistake. Hacking offences are the most commonly increasing offences in India. Even the website of the Ministry of Defense, Jadavpur University, and many such other important websites were hacked from time to time. Hacking has been dealt upon as an offence under Section 66(2) of the IT Act.

- **Web-Jacking**- web jacking occurs when someone forcibly takes over the possession of a website from a actual owner illegally by breaking the password and then starts modifying the contents within the website. Such forceful taking away of possession makes the actual owner to lose all control over the website. In Indian legal framework such offences are dealt under Section 65 of IT Act, 2000.
- **Cyber Bullying**- Bullying generally indicates threatening or intimidating somebody. When such threatening or intimidation takes place through cyber means then it amounts to cyber bullying. Cyber bullying is commonly known as repeated an willful harm affected through the utilization of cell phones, computers and other electronic devices. The Global Youth Online Behavior Survey conducted by Microsoft in 2011 revealed that India ranked third after China and Singapore in terms of cyber bullying where it was estimated that around 53% of children were once subjected to cyber bullying during their entire period of presence at the online platforms. Indian laws have not defined cyber bullying specifically but such kind of offences can be brought under the scope of Section 66 and the penal provisions of Section 43 of IT Act, 2000.

IV. Preventive Measures for Cyber Crime:-

Prevention is always better than cure. A citizen should take certain precautions while operating the internet and should follow certain preventive measures against cyber-crimes which can be defined as: ,

- Identification of exposures through education will assist responsible companies and firms to meet these challenges.
- One should avoid disclosing any personal information to strangers via e-mail or while chatting.
- One must avoid sending any photograph to strangers online as misuse of photograph incidents are increasing day by day.

- An update Anti-virus software to guard against virus attacks should be installed by all the citizens and they should also keep back up volumes so that one may not suffer data loss in case of virus contamination.
- A person should never send his credit card number to any site that is not secured, to guard against frauds.
- It is always the parents who have to keep a watch on the sites to which your children are accessing, to prevent any kind of harassment or depravation in children.
- Website owners should watch traffic and check any irregularity on the site. It is the responsibility of the website owners to adopt some policy for preventing cyber-crimes as the number of internet users is growing day-by-day.
- Web servers running public sites must be physically separately protected from internal corporate network.
- It is better to use security programmes by the corporate body to control information on sites
- Strict statutory laws need to be passed by the Legislatures keeping in mind the interest of citizens.
- IT department should pass certain guidelines and notifications for the protection of computer system and should also bring out with some more strict laws to breakdown the criminal activities relating to cyberspace

V. Conclusion

Cybercrimes exist in almost all the countries, and the respective governments are taking measures to safeguard against cybercrimes. Since 2020, due to the covid 19 pandemic, everyone from children to the elders all are dependent on the digital area. And there has been rise in cybercrimes during this period. There are many issues like cyber bullying, defamation, cyber fraud, etc., that has become most common crimes. The reason cybercrimes take place is because of the easy access of the devices, sometimes the negligence of the users. In India, many people are not be aware of such crimes, and when they are hacked, they suffer losses but they might not know what has happened. So first its very important to be aware of such crimes and their rights in digital space. The Indian government has taken methods to prevent cybercrimes in the country, but still there is no end. The government is making sure that the victims are compensated or provided justice.

References:-

1. Nations prepare for cyber war, By David Goldman@ CNN Money Tech, January 7, 2013. http://money.cnn.com/2013/01/07/technology/security/cyber-war/index.html

2. CYBER WARFARE - Institute for Security Technology Studies. www.ists.dartmouth.edu/docs/cyberwarfare.pdf Similar

3. http://idsa.in/system/files/book_indiacybersecurity.pdf .

4. Noack, David. Computer Viruses Cost $12 Billion in 1999", APB News, Jan. 20, 2000

5. “Love Bug Damage Costs Rise to $6.7 Billion” Press release by Computer Economics, May 9, 2000. 6. “Statement for the Record of Guadalupe Gonzalez, Special Agent in Charge, Phoenix Field Division, FBI on Cyber crime” before the Special Field Hearing, Senate Committee on Judiciary, Subcommittee on Technology, Terrorism, and Government Information, Washington, DC

7. Noack, David. “Businesses Use $12 Billion of Stolen Software” APB News, May 25, 2000,

8. Salkeyer, Alex. “Who Pays When a Business Is Hacked?” Business Week Online: Daily Briefing, May 23, 2000.

9. “Cyber attacks rise from outside and inside corporations”, Press Release from Computer Security Institute.

10. “Ninety percent of survey respondents detect cyber attacks, 273 organization report $265, 589, 940 in financial losses”, Press Release from Computer Security Institute, March 22, 2000

11. Howe, Carl; McCarthy, John C.; Buss, Tom; and Davis, Ashley. “The Forrester Report: Economics of Security”, February, 1998

12. Webster’s Third New International Dictionary, Merriam-Webster, Inc., Springfield, MA, 1986, page 2442.

CYBER-CRIME & LAW: INDIAN PERSPECTIVE

- DR. BINISH BANSAL[2]

ABSTRACT

We live in a digital age when everything from shopping to banking can be completed in the comfort of your own home. Since the internet is a global platform, its contents are available to users all over the globe. Some individuals have been abusing internet technology for illegal purposes, such as hacking into other people's networks and conducting frauds. Cybercrime refers to any illegal activity or online violation that uses the internet as a tool. Cyber Law was coined to describe the body of law that governs the prevention and punishment of online crimes. The term "cyber law" refers to the branch of the law that addresses concerns arising in the digital realm. Freedom of speech, Internet access and use, and the right to privacy or security online are only few of the numerous subtopics it touches on. The term "law of the web" is often used to refer to this principle in its broadest sense.

KEYWORDS: - *Internet, Unauthorized Access, Cybercrime, Cyberlaw, Cyberspace, Punishment, Network.*

1. INTRODUCTION

Humanity has benefited greatly from the development of computers, which are now used everywhere from the home to the offices of multinational corporations. A computer, in its most basic definition, is an apparatus capable of storing and manipulating/processing information or instructions in accordance with the user's instructions. Since decades, the majority of computer users have been making inappropriate use of computers for their own gain or the gain of others [1]. Cybercrime is a direct result of this phenomenon. Because of this, people began partaking in harmful, antisocial behaviours. Cybercrime, often known as computer or network crime, typically occurs in online environments, especially through the internet. "Cyber Law" is a relatively new idea. Cyberlaw, regardless of the fact that there is no single, accepted definition, can be regarded of as the body of rules and regulations that controls the use of the Internet. Cyberlaws are the legal framework for the technologies connected to the internet. Cyberlaw contains a wide scope of subjects, like data protection and privacy, electronic and digital signatures, and cybercrime. The UN General Assembly passed India's first information

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technology act, which was based on the "United Nations Model Law on Electronic Commerce" (UNCITRAL Model) [2].

2. OBJECTIVE

The primary purpose of this document is to increase public awareness of current crimes and offences, via the virtual realm, and the regulations designed to counteract illicit activity there. Additionally, we're making it a priority to think about things like cyber security.

3. TACKLING ONLINE CRIME AND INTERNET LAW

In this context, "Cyber Crime" refers to any criminal conduct committed through electronic communications or information systems, such as the Internet or any electronic device [3].
The term "cyber law" refers to the body of legislation that governs the use of information and communication technologies, most specifically the Internet. It's an attempt to bridge the gap between the traditional legal framework of the physical world and the novel problems posed by human behaviour on the Internet [4].

3.1 Digital Robbery

The term "Cyber Crime" was initially introduced in 1995 by Sussman and Heuston. Rather than trying to pin down what exactly constitutes cybercrime, it's more useful to think about it as a set of related concepts. Material offending objects that have an effect on computer data or systems are the basis for these actions. These are misdeeds in which some type of digital technology or information system is either used in a criminal act or as the intended victim. Electronic crime, computer crime, Cybersecurity, high-tech crime, crime of such information age, etc. are additional names for cybercrime.

Simplified, "Cyber Crime" refers to any criminal prosecution that utilises computerized data storage and access systems, the Internet, or other electronic methods of communication. They generally relate to any illicit conduct that makes use of a network or computer. Given the fact that criminals now can break laws without even being physically present, the number of cybercrimes has escalated as well.

It is rare for crimes to be committed out internet because the victim and also the offender might not ever actually meet. Cybercriminals frequently decide to set up out of nations with

insufficient or non-existent cybercrime legislation in order to decrease their risks of being identified and punished.

In due to the fact that cybercrime may be conducted even when the perpetrator is not actively present in the cyberspace. The issue of privacy in software is a good illustration.

4. CYBERCRIME: A BRIEF HISTORY

Within the year 1820, the First ever cybercrime was registered. But there have been primitive computers in use in countries including Japan, China, and India around since 3500 B.C., the technological development of computers is globally recognised to Charles Babbage's analytical engine. In 1820, French textile maker Joseph-Marie Jacquard invented the loom. Using this apparatus, a continuous sequence of procedures might be included into the weaving of unique textiles or materials. This caused the employees at Jacquard to become very worried that their jobs and ways of life were in danger, leading some to resort to sabotage in the hopes of preventing the new technology from ever being used [5].

4.1 A History of Cybercrime

Morris Worm was a precursor to the more modern form of cybercrime known as ransomware. It's true that many nations, India included, are trying to put a stop to these kinds of crimes or assaults, but they keep evolving and impacting in new ways.

Table 1: The Changing Nature of Cybercrime

Years	Strategies of Assault
1997	The Morris Code worm and other cybercrime and virus outbreaks began.
2004	Dangerous software such as a Trojan horse or a well-developed worm.
2007	How to spot a thief, avoid being phished, etc.
2010	DDoS, Botnets, and SQL Injection assaults, etc.
2013	Conspiracy Theories, Denial-of-Service Attacks, Botnets, Harmful Emails,

	Malicious software, ransomware, etc.
Present	Cyberwarfare, ransomware, keyloggers, stolen Bitcoin wallets, hacked Androids, etc.

4.2 Definitions and Categories of Cybercrime

Person-to-person cybercrime refers to any cybercrime conducted by cybercriminals against a specific person. Some examples of cybercrime aimed towards specific persons are:

1. The term "email spoofing" refers to the practise of creating a fake email header. Which implies it seems like the communication came from someplace other than its true origin. Such strategies are often used.
2. In spoofing or spam tactics, as targets are now more willing to accept a digital email or letter if they consider it has come from a credible source.

5. RELIABLE INFORMATION [6]

Spam refers to unsolicited, or "junk," email. This email blast was completely unwanted. Spam's widespread prevalence since the mid-1990s makes it a headache for everyone who checks their email often. Spam bots are automated programmes that scour the web for email addresses to add to their mailing lists. Email distribution lists are produced by the spammers with the help of spam bots. Spammers send out mass emails to millions of addresses, hoping to get a small percentage of them to reply.

The term "cyber defamation" refers to the damaging of a person's reputation in the eyes of others through the Internet [7]. Making false statements about someone in order to damage their reputation is called defamation. Email and other forms of electronic communication are often used in a scam known as "phishing," in which the offender takes the identity of a trusted person in an effort to get important documents as accounts, passwords, and bank details.
Extortion on the web, hacking, exposing of pornographic material, trafficking, circulation, uploading, credit card theft, & malicious programming are all examples of cybercrimes

committed against persons. It's hard to imagine a more devastating kind of injury that such a malefaction might do to a single person.

Vandalism against computers, theft of intellectual property (copyright, patents, trademarks, etc.), and other forms of cybercrime against property are all examples of cybercrime against property.

Intimidating or threatening language or behaviour online. Examples of intellectual property theft are:

The illegal duplication of software is known as "software piracy."

Infringement of copyright is the act of violating the legal right of a person or group to control the reproduction, distribution, and public display of a work. In layman's terms, it's the illegal use of someone else's intellectual property like music, software, literature, etc.

Infringing on a trademark or service mark occurs when someone does so without permission.

Organizational cybercrime includes the following types of online wrongdoing:

- Data tampering occurs when information is altered or deleted without permission.
- Unauthorized access to, and maybe copying of, private information without making any changes or erasing anything.
- A denial-of-service (DOS) assault is one in which the attacker sends an excessive amount of traffic to the targeted server, system, or network in an effort to overload those resources and render them unusable or difficult to use for the intended victims [8].
- Email bombing is a kind of cyberbullying in which an overwhelming quantity of emails are sent to a single inbox or server in an effort to cause it to overflow.
- Cybercriminals also use methods like the "logical bomb," "Trojan horse," and "data diddling" to cause damage to a company online.

Cybercrime against society entails a variety of activities, some of which are:

Making a fake document, signature, cash, revenue stamp, etc. falls under the umbrella term "forgery." The term "Web jacking," which originally meant "stealing" on the Web, was used to denote criminal Internet activity. A fake site with the message as well as a call - to - action is the endpoint when a user clicks on a fake site. The target will be sent to a phoney website if he follows the seemingly legitimate link. The goal of these assaults is to gain access to or

control of another site. The information on the victim website might potentially be altered by the attacker.

6. INSTANCES OF CYBERCRIME IN INDIA

6.1 Cases studies

6.1.1 Bank NSP Scenario

An aspiring bank manager in this scenario proposed to his girlfriend. The two of them used to spend a lot of time communicating through email on the company's machines. After their marriage had ended, the young woman began sending emails to the boy's international customers using fictitious addresses, including those of "Indian bar organisations." She did this on a bank computer. Since losing so many customers, the boy's business decided to sue the bank in court. It was determined that the bank was responsible for the content of emails sent via its servers.

6.1.2 Case of Bazee.com

In December 2004, the CEO of Bazee.com has been detained on suspicion of selling a CD containing obscene information on the internet and in the Delhi market at the same time. After intervention from both the Delhi and Mumbai police, the CEO was released on bail.

6.1.3 Crime Committed Against Parliament

The Department of Police Research and Development in Hyderabad carried out this investigation. The terrorist who assaulted the Parliament had a laptop that was retrieved. The BPRD's Computer Forensics Division received the laptop computer from the two terrorists who were killed by gunfire on December 13, 2001, during the siege of the Parliament. One of the terrorists was carrying a fake ID card bearing an Indian Governments emblem and seal, and the laptop contained several proofs that affirmed their motives, including a Ministry of Home sticker Before enter Parliament House, they attached a sticker they created on a laptop & placed on their ambassador vehicle. The features of the seal and the emblem (of the three lions) were carefully scanned to be captured and Jammu and Kashmir-specific mailing address were also handcrafted. However, closer examination revealed that the whole thing was a forgery created on a computer.

6.1.4 Problems with Taxes in Andhra Pradesh

It was reported that the Vigilance Department had collected Rs. 22 in cash from the residence of the proprietor of the plastics company in Andhra Pradesh. They needed him to provide proof of where the missing money went. The suspect provided 6,000 vouchers to demonstrate the legality of trade; however, upon closer inspection, it became clear that all of the vouchers and data on his computers were created after the searches took place. It became out that the defendant was hiding 5 other enterprises under the umbrella of 1 and using phoney and electronic vouchers to disguise his true revenue and avoid detection. Officials from the state department obtained laptops used by the suspect, revealing his questionable business practises.

Additionally, the IT Act's Sections 67 and 70 are implemented. A pornographic or slanderous page is posted on the victim's website once hackers get access to it.
Spread of malware by introducing viruses, worms, trojans, etc.

The provisions of Section 63, Section 66, Section 66A of the IT Act, and Section 426 of the IPC apply to those who install harmful software that may acquire access to another person's electronic equipment without the victim's consent.

6.1.5 Virtual sex acts

Despite being outlawed in certain regions, pornographic content on the web is a booming industry. Sections 67, 64A, and 67B of the IT Act include provisions that apply to these offences.

6.1.6 Robbing of the Source Code

Sections 43, 66, and 66B of the IT Act [9] include provisions that apply to these types of offences.

6.1.7 Second Cyberlaw

When it came time to get a handle on the growing problem of criminal activity in the virtual realm, cyber law was born. Cyber law is a term for the study of the legal concerns raised by the widespread use of information and communication technologies.

Why is it so crucial to have Cyber Law?

Cyber law is crucial in today's technological era. It's vital because it affects pretty much everything about our lives in the digital realm, from the things we buy to the ways we socialise. There are legal and Cyber legal perspectives on everything we do and say online, whether we are conscious of it or not [10].

An Act to Regulate Certain Aspects of the Information Technology Industry in India

On October 17, 2000, the Indian Parliament passed the Information Technology Act, 2000, also known as ITA-2000 or the IT Act. This law, which deals with issues relating to the internet and cybercrime, is significant in India. In a resolution passed by the United Nations Assembly on January 30, 1997, the United Nations commission on international Model Law on E-Commerce 1996 was recommended.

7. LAWS GOVERNING CYBERSPACE IN INDIA

- Sections of the Information Technology Act of 2000 are herein as follows:

1) References for Computer-Assisted Role Playing (Section 65)

Whoever destroys, hides, or alters a computer, computer software, system software, or computer network's source code does so wilfully and knowingly.

Punishment:

Any participant in such criminal activity might face up to 3 years in jail, a fine of up to 2 ½ million rupees, or both.

2) Computer system hacking, data modification, etc. (Subsection 66)

Anyone with bad intentions who tries to steal, damage, erase, or otherwise mess with data stored on a public or private computer. In any way that reduces its worth, usefulness, or use, the perpetrator has committed hacking.

Punishment:

Those convicted of such offences face up to 3 years in jail and/or a fine of up to 2 million rupees [11].

3) Not using any communication service to send any anything that might be considered objectionable (Section 66A)

Offensive or threatening content sent through any means of electronic communication.

False or misleading information that is disseminated with the objective to cause harm, alarm, insult, impede, injure, commit a crime, incite animosity, hate, or ill will.

Spam is defined as "unsolicited electronic communication" with the intent to upset, hinder, mislead, or defraud the addressee in some way.

Punishment:

Anyone convicted of violating this provision faces up to three years in jail and a fine.

4) Obtaining stolen computer resources or communication equipment (Section 66B)

To deliberately or with reasonable suspicion receive or keep any stolen computer, computer resources, or communication device.

Punishment:

Anyone convicted of one of these offences faces up to 3 years in jail, a fine of up to 1 million rupees, or both.

5) Identity Theft (Section 66C)

Intentionally impersonating another individual by using his or her digital or electronic signature, password, or other form of unique identification is illegal.

Punishment:

A person convicted of such an offence faces up to 3 years in jail and a fine of up to 1 million rupees.

6) Fraud involving the use of a computer to impersonate another person (Section 66D)

Anyone using a computer, phone, or other electronic means to commit fraud against another person is subject to prosecution.

Punishment:

Get a description for a sentence that might last a maximum of 3 years in prison and/or a fine of up to 1 lakh rupees, or both.

7) Cyberterrorism (Section 66F)

Anyone who tries to deliberately endanger the population or any group of people by:

- Prevent anyone from using the computer's resources.

Any action taken with the intent to gain unauthorised access to, or to exceed the scope of, a computer system or network.

initiating any computer contamination that consequently resulted to, or is likely to lead to, any human injury or death damage to or the destruction of property, interruption of a supply of goods or services necessary to human survival, or negatively impacts the information technology infrastructure described in section 70 of the IT Act.

Intentionally or willingly attempting to circumvent or gain entry to a computer's resources without permission or going beyond the range of permitted access and, as a result, gaining access to the data, info, or the computer's data system that is limited or restricted for a specific reason to state security or international relations, or any limited data system, data, or any information, with the reasonable expectation that such data, information, or the computer's data will be used for unlawful purposes.

Punishment:

Anyone involved in a plot to commit or carry out an act of cybercrime or cyberterrorism shall be subject to a mandatory life sentence.

8) Obscene material transmission or publication (Section 67)

Whoever sends or posts or causes to be posted any sexually explicit material online. Whatever can be categorised as obscene materials.

Punishment:

A punishment either of description carrying a term of a maximum of five years in prison and a fine of up to 1 lakh rupees may be handed down to the first offender, as well as a punishment either of description carrying a term of a maximum of five years in prison and a fine of up to 1 lakh rupees may be handed down to the second or subsequent offender.

8. CONCLUSION

Recently, several cybercrimes have begun to operate due to the increase and spread of newly created technology. Humanity now faces enormous dangers from cybercriminals. Safeguards against cybercrime are essential to a nation's safety, prosperity, and cultural integrity. To combat cybercrime, the government of India passed the Information Technology Act, 2000. The Act also amends the Indian Penal Code (IPC) of 1860, the Indian Evidence Act (IEA) of 1872, the Banker's Books Evidence Act (Evidence of Bank Records) of 1891, and the Reserve Bank of India Act (1934). Since cybercrime may begin anywhere in the globe and cross international borders through the internet, it is difficult to investigate and bring those responsible to justice. To combat cybercrime, the international community must work together to harmonise their activities, coordinate their responses, and cooperate with one another.

The primary motivation for producing this article is to provide information on cybercrime to the general public. We conclude our article, "A short research on Cyber Crime and Cyber Laws of India," with the statement that cybercrimes would never be accepted. Please report any incidents of cybercrime to the local authorities as soon as possible.

9. REFERENCES

[1] http://www.tigweb.org/action-tools/projects/download/4926.doc

[2] http://www.academia.edu/7781826/IMPACT_OF_SOCI

[3] https://cybercrime.org.za/definition

[4] http://vikaspedia.in/education/Digital%20Litercy/inf

[5] https://www.ijarcsse.com/docs/papers/Volume_3/5_

[6] http://searchsecurity.techtarget.com/definition/email-spoofing

[7]http://www.helplinelaw.com/employment-criminal-and-labour/CDII/cyber-defamation-in-india.html

[8] http://searchsecurity.techtarget.com/definition/denial-of-service

[9]http://niiconsulting.com/checkmate/2014/06/it-act-2000-penalties-offences-with-case-studies/

[10] http://www.cyberlawsindia.net/cyber-india.html

[11] https://cybercrimelawyer.wordpress.com/category/i

OTHER REFERENCES: -

[1] Singh, Talwant (2011). Cyber Law and Information technology. New Delhi, India.

[2] Wall, David S. (2001). Crime and the Internet. Routledge, London.

[3] Gaur, K.D., Text book on Indian Penal Code, Fifth edition, 2014, Universal Law Publishing Company Pvt. Limited, New Delhi.

[4] The Constitution of India

[5] The Information Technology Act, 2000

[6] The Information Technology (Amendment) Act, 2008

[7] Code of Criminal Procedure, 1973

[8] The Indian Evidence Act, 1872

A COMPARATIVE STUDY ON THE ADMISSIBILITY AND EVIDENTIARY VALUE OF THE DYING DECLARATIONS

- DR. CHANDAN AHUJA[3]

ABSTRACT

Dying declaration as an exception to the hearsay rule finds its basis on the legal maxim "nemo moriturus praesumitur mentire" which means "a man will not meet his Maker with a lie in his mouth." Apart from evident religious underpinnings, the rationale suggests that the last moments of a person are attended by an involuntary desire to unburden the conscience. Under common law, a dying declaration is a statement made by a declarant, relating to what the declarant believed to be the cause or circumstances of his impending death. "While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present."

This research paper aims to deliver a comparative analysis of three common law jurisdictions, namely, India, the U.S., and the U.K., regarding the admissibility and evidentiary value of dying declarations in the legal system. The scope for studying admissibility has been limited to the nature of proceedings, the death of the declarant, the expectation of death, and the cause or circumstances resulting in declarant's death.

Keywords: Dying Declartions, US, UK, Admissibility, Evidentiary, Legal

I. INTRODUCTION:-

Dying Declaration is a statement made by the person while he was dying and states the reason for his death. The statement given by the dying person can be circumstantial or tells the cause for his death. Hence, the only statement given just before the death of a person is called Dying Declaration. The person who is conscious of Compos Mentis and knows that death is about to happen can make a declaration and state the cause of his death and that statement will be Admissible and treated as Evidence in the Court. Declaration made by the deceased person can be in oral, written and by conduct. The word Dying Declaration explain the word itself.

Dying declaration as an exception to the hearsay rule finds its basis on the legal maxim "nemo moriturus praesumitur mentire" which means "a man will not meet his Maker with a lie in his

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mouth." Apart from evident religious underpinnings, the rationale suggests that the last moments of a person are attended by an involuntary desire to unburden the conscience. Under common law, a dying declaration is a statement made by a declarant, relating to what the declarant believed to be the cause or circumstances of his impending death. "While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present."

This research paper aims to deliver a comparative analysis of three common law jurisdictions, namely, India, the U.S., and the U.K., regarding the admissibility and evidentiary value of dying declarations in the legal system. The scope for studying admissibility has been limited to the nature of proceedings, the death of the declarant, the expectation of death, and the cause or circumstances resulting in declarant's death.

II. NATURE OF PROCEEDINGS:-

Firstly, in India, dying declarations are admissible in both civil and criminal cases alike provided that the cause of death of the person giving the dying declaration is in the issue. For example, "A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B. Statements made by A as to the cause of her death, referring to the rape consist of a relevant fact." Thus, even though homicide is not the charge, the dying declaration is still relevant as the cause of death, which is rape in the above example, comes into question. This differs from the U.K. position, which adopts a narrower scope and allows "admissibility only in cases of homicide, where the death of the deceased is the subject of the charge." In Rex v. Mead , the court "refused to admit the dying declaration of the woman on whom an abortion was performed, holding that even though the declaration at issue related to the cause of death, such statements are admissible only when the death of the party is the subject of the inquiry (an implicit finding that an abortion prosecution was not such a case)." Even though the cause of death, which was illegal abortion, was in question, the dying declaration relating to the cause was still not admissible in the English court. The U.K position in this sense varies from the Indian position as there comes an added requirement of the death being the subject matter of inquiry, consequently limiting the declaration to cases of homicide. When it comes to the U.S., for most of the American history, dying declarations have not been admissible in civil cases, nor have they been admissible in any criminal case except for homicide. The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus, declarations by victims in prosecutions for other

crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception.

However, over time, there has been a shift from this narrow approach to a broader inclusion. This is clear from Rule 804(b)(2) of U.S. Federal Rules of Evidence, which extends the hearsay exception to civil cases. While the scope has not been broadened enough to include criminal cases that are still limited to homicide due to the "belief that dying declarations do not constitute the most reliable form of hearsay," individual states have adopted the Federal Rule with local variations.

Whereas some states continue to follow the common law rule of allowing dying declarations only in homicide cases in which the declarant's death (and not someone else's) is the subject of the charge, there are states who have extended the scope to include civil cases, and in instances of a major deviation, even criminal cases.

The belief that such a dangerous class of evidence should be restricted in its use and application to the public necessity of preserving the lives of the community by bringing manslayers to justice is the reason why some states continue to follow the common law rule.

In contrast for the latter deviations, the rationale behind is stated that if dying declarations are sufficiently trustworthy when the stakes are as high as they are in a homicide case, there is no reason to exclude them in civil cases or in other types of criminal cases in which the stakes are lower. One thing to note in the latter two deviations is that the cause of death of the declarant may or may not be in question, depending on whether individual states follow the requirement of limiting the dying declarations to the causes or circumstances of the declarant's death. So, for example, in a state like Colorado, which allows admissibility in all civil and criminal cases, and where no restrictions pose to the type of statements made so long in good faith, the dying declaration would still be relevant where the cause of declarant's death is not in issue.

III. EVIDENTIARY VALUE:-

While the evidentiary value assigned to dying declarations across the three jurisdictions is more or less the same, we can still observe some discrepancies in the way these declarations are used to bring about a conviction. DPP v. Hester (1973) concluded it as unwise to draw a settled conclusion on the testimony of one person alone, as in many circumstances there can be motives of self-interest, or of self-exculpation, or of vindictiveness in play.

However, such behavior is not expected from a dying man. In the U.K., it is believed as a secular article of faith that the moribund, freed from all normal motives to deceive, will earnestly desire to tell the truth. The point made by Eyre, C.B., in Woodcock, that dying

declarations are evidentially equivalent to evidence given on oath, recurs throughout the nineteenth century and poses relevance even today. When it comes to India, it is held that "the dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.

In other words, since the accused has no power of cross-examination, … the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness in order to be enacted upon. While the outcomes reached by both India and the U.K. are the same, that conviction can be reached on the sole basis of a dying declaration; they differ in their approaches. In the U.K., a dying declaration is taken as a trustworthy piece of evidence on the face of it due to the expectation of death, whereas in India, the evidentiary weight is attached… on the basis of circumstances and surrounding under which it was made.

When it comes to the U.S., there has been a disagreement among courts as to the proper weight to be given dying declarations. While, some courts have held that the evidentiary value or weight of dying declarations is equal to that of the evidence presented under oath and before the jury, hinting at the principle of necessity and religious trappings that underlie the admissibility, many courts have stated that dying declarations are of less evidentiary value and weight than evidence given under oath which is subject to cross-examination.

This shift from the common law rule indicates that the latter are no longer ready to consider dying declarations as inherently trustworthy. While the aspect of not relying on the inherent trustworthiness makes it somewhat similar to what is followed by Indian courts, there exists a difference in the evidentiary weight given to a dying declaration. While the courts in India can forgo corroboration if they come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim,"84 American courts even after finding the declaration trustworthy, can only rely on it as corroborating evidence rather than a sole means for conviction.

IV. CONCLUSION

While dying declarations still hold admissible in courts of the three common law jurisdictions, it has become increasingly hard to justify the age-old admissibility. The U.K., throughout the years, has maintained its narrow scope for admissibility of the dying

declarations. While there is a belief in the sanctity of a dying man's words, such evidence is also held in high scruples.

The declarant is subject to no cross-examination. No oath needs to be administered. There can be no prosecution for perjury. There is always a danger of mistake which cannot be corrected. Thus, placing heavy restrictions on admissibility ensures that such a piece of evidence is administered in the interests of justice. However, one can argue that with the increasing disbelief in divine vengeance, the obvious security from human retribution afforded by approaching death, and the great variety of motives to falsehood which may operate even upon a dying man, make it still more difficult to justify the admission of dying declarations on any reasoning which does not call for the admission of all apparently honest declarations of persons whose testimony has become unavailable through death. A piece of evidence whose veracity remains unchecked due to inherent belief in its trustworthiness, being admitted in a homicide case without any need for corroborating evidence, sounds highly unfair to the accused who is being charged. In light of this U.K. needs to adopt an approach similar to India, where the truth behind the statement is checked before making it admissible.

India has adopted a broader approach than the U.K in most of the requirements for admissibility. One of the important things that it, however, has failed to consider is the rationale behind the admissibility, i.e., the expectancy of death, which makes the accused more inclined towards speaking the truth. Since there is no such requirement of settled hopelessness, believing death to be imminent, it seems wrong to admit the words uttered by the declarant as something so solemn as being placed under oath. Nevertheless, this is offset by the added requirements for the dying declarations to be "wholly reliable, voluntary, and truthful.

The United States has been in the most divided position compared to the other two, where some jurisdictions continue to follow the common law requirement, others have broadened the scope of admissibility significantly. This, however, has also come with a decrease in evidentiary weight and reliability.

In all, different countries might have different ways of looking at dying declarations, but what becomes imperative, while admitting or refusing to admit a dying declaration and assigning it a corresponding evidentiary weight, is striking a balance between the rights of the accused and justice for the deceased.

REFERENCES:-

• Saumya Chowdhary, Dying Declaration - Meaning, Explanation and Case Laws Legal Bites - Law and Beyond (2018), https://www.legalbites.in/dying-declaration/ (last visited Jun 8, 2020).

- Shahbaz Ahmad Cheema & Samee Uzair Khan, Dying Declaration and its Corroboration in Pakistan and India: An Analytical Study of Case Law, 2 SSRN Electronic Journal 94 (2012).
- Irfan Nabi, Dying Declaration: A comparative Study Academia.edu, https://www.academia.edu/9267517/Dying_Declaration_A_comparative_Study.
- William Durfor English, Evidence - Dying Declaration - Preliminary Questions of Fact, 15 B.U. L. Rev. 380 (1935).
- Evidence: Admissibility of Dying Declaration, 20 Mich. L. Rev., 671 (1922).
- HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES, 28 (1839).
- Roderick Munday, Musings on the Dying Declaration, 22 AngloAm. L. Rev. 42 (1993).

RIGHT TO MAINTENANCE TO MUSLIM WOMEN – AN ANALYSIS OF VARIOUS CASE

- DR. MITHLESH BANSAL[4]

INTRODUCTION

In Indian society, there has always been a conflict between female equality and religious customs. Religious traditions take precedence above gender equality, and as a result, the amelioration of injustices encountered by a specific gender, mainly women, is suppressed in order to sustain majoritarian religious ideals[5]. Implementing progressive universal principles that transcend class, religion, and gender inequalities and apply consistently to all is an effective method to combat such marginalization. Only via such application can legislation have a positive impact on gender equality.

Section 125 of the Code of Criminal Procedure is one such progressive statute; it is a uniformly applicable provision that enables civil remedies to enforce a person's fundamental commitment to support his wife, children, or parents while they are unable to do so. Normally, the rights and duties outlined in this section take precedence over personal laws.[6] Previously, this was subject to the Muslim Women (Protection of Rights on Divorce) Act, 1986, which is a self-contained statute that constitutes the responsibilities of a Muslim husband or other relatives towards a Muslim woman and offers remedies for enforcing the woman's rights.[7] This Act codifies the Muslim law notion that a husband's obligation to provide maintenance to his divorced wife lasts only until the Iddat period. Furthermore, Section 125 cannot apply to a Muslim lady unless both the husband and wife consent to it under Section 5 of the Act. The law has evolved through judicial opinion, and it is presently thought that there is no conflict between the Act and the Code.[8]

In the case of *Shamim Bano v Ashraf Khan*, however, has now cleared the judicial situation. The case is a watershed moment because it reads Section 125 of the Code of Criminal

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[5] Siobhan Mullally, "Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case", 24 (4) OJLP 671 (2004).

[6] Umar Hayat Khan v. Mahboobunisa, 1976 CrLJ 395 (Kant).

[7] J. Y. V. Chandrachud, V. R. Manohar, The Code of Criminal Procedure 253 (Wadhwa, Nagpur, 18th Enlarged Ed., 2006).

[8] Shaikh Babbu v. Sayeda Marat Begum, 1999 CrLJ 4822 (Box).

Procedure to be generally applicable to women, independent of personal law's opinions on the subject. Taking the lead from the well-known *Shah Bano* case, the Supreme Court ruled that Section 125 applied to Muslim women and that they were entitled to maintenance regardless of Mahomedan law's opinions on the subject.

It has been determined that Muslim women are entitled to maintenance under Section 125 of the Code both before and after divorce; they can seek maintenance under the Act's provisions.[9] This article investigates the development of jurisprudence for the protection of Muslim women's rights.

DEFINITION OF THE TERM MAINTENANCE

All essentials for survival are included in the definition of upkeep. Because Muslim law does not define the term per se, the basic meaning of the term can be well implied by comparing to the definition given under Hindu law, and so this reference will be relevant.

According to Hindu Law, the term means,

"In all situations, provisions for food, clothes, residence, education, and medical treatment and treatment; in the event of an unmarried daughter, reasonable expenses incurred as a result of her marriage."[10] According to Halsbury's law of England, maintenance is the term given to the weekly or regularly scheduled installments that may be asked on a declaration of separation or nullity to be made for the upkeep and support of the wife amid the life partners' combined lives. As a result, it is a relative acquisition for their profit, which can be made in procedures of judicial separation, nullity, divorce, and restitution of conjugal rights."

Definition of the Term "Maintenance" in Muslim Law

The law of maintenance was somewhat hazy under historical Sharia law, because there was no separation between a legal requirement and an ethical or moral duty under Muslim law, making it difficult to distinguish what a person is legally required to do and what is only a moral duty. A husband is required under Quranic Law[11] that can provide maintenance to his wife and family, and the phrase refers to the amount he is required to pay. The term used for maintenance

[9] Abdul Rashid v. Farida, 1994 CrLJ 2336 (MP).

[10] Section 3 (c) Hindu Adoption & Maintenance Act, 1986.

[11] Khan Ephroz , " Women and Law : Muslim Personal Law Perspective"(Rawat Publications , 2003) 302

in Muslim Law is nafaqa, and it includes food, raiment, and housing, however conventional phraseology limits it to the first.[12]

Despite having the means to care for herself, the wife is entitled to maintenance from her husband. Furthermore, the marriage contract will contain the payment of specific expenses by the husband, where the husband would be obligated to pay these to the wife. These allowances are known as kharch-e-pandan, guzara, mewa khore, and so on. Women can assert this as a right. There are some exceptions. These are: a wife cannot claim maintenance if she is disobedient; a wife will not receive maintenance if she does not grant her husband absolute free access; and a wife who deserts her husband is usually not entitled to maintenance.

Because the husband's commitment to sustain his wife is his personal liability, the wife is not allowed to be maintained by his relatives or out of his possessions after his death.[13]

As a result, we have established that the wife has the right to maintenance. The following event gives rise to such a right. These are as follows: -

1. Matrimony.
2. Separation.
3. Pre Nuptial-Agreement

We can now proceed to list the sources from which these rights have evolved. There are three significant sources. These are as follows: -

1. Islamic Personal Law.
2. Section 125 of the Indian Criminal Procedure Code.
3. The Muslim Women (Protection of Divorce Rights) Act of 1986.

THE SHAH BANO DECISION AND ITS CONSEQUENCES

The famous case of *Mohd. Ahmed Khan v. Shah Bano Begum and Ors* was the first to bring this conflict of opinion to light.[14] In this case, a sixty-two-year-old Muslim woman was divorced by her husband, who exercised his indisputable right to 'talaq.' A Supreme Court

[12] Prof. Ashok Wadje, "Maintenance Right of Muslim Wife: Perspective, Issues & Need for Reformation" National Law University, Jodhpur Law Journal.
[13] G. Chakraborty, " Law Of Maintenance" Sodhi Publications , 2003.
[14] (1985) 2 SCC 556.

constitutional court ruled that a divorced Muslim woman is entitled to support under Section 125 of the Code. The court based its decision on religious scriptures of Mahomedan law and Quranic interpretations, and it also declared that the husband cannot avoid his obligation to pay maintenance by paying mahr or maintenance during the Iddat period.

The conservative Muslim community protested and agitated against this decision, seeing it as an intrusion into their personal law.[15] As a result of the pressure, the government bowed in and passed unanimously the Muslim Women (Protection of Rights on Divorce) Act, 1986, which took precedence over the uniformly applied Criminal Procedure. This Act stated that Muslim women had the right to support from their husbands only during the Iddat period, whereupon the burden of maintenance was shifted to her family or the District Waqf Board. As a result of the impact of politics and orthodoxy, the ability to appeal under Section 125 was mostly restricted to Muslim women, and the law, which should have promoted women's rights, became anti-secular[16] and anti-feminist.

This is the current maintenance law for divorced Muslim women. However, courts have attempted to broadly construe the provisions of the Code and the Act in order to grant relief to Muslim women. Earlier, the Supreme Court based on such harmonious creation, and it is important to examine these decisions to gain a comprehensive knowledge of the maintenance status quo.

THE NEED FOR A COHERENT INTERPRETATION OF THE STATUTES

One of the most noteworthy instances following the Shah Bano decision is *Danial Latifi and Anr. v. Union of India*[17], in which *Shah Bano's* lawyer herself challenged the Act's constitutional legitimacy. The Supreme Court endeavored to clear up the confusion caused by conflicting judgements in the aftermath of Shah Bano in this decision. The Constitution Bench reached a compromise in which it accepted the Act's constitutionality but determined that the provision for support would apply equally to the Muslim community.[18] The Bench broadly read Sections 3 and 4 of the Act, holding that a divorced Muslim woman is entitled to fair and

[15] A.M., "The Shah Bano Legacy", The Hindu, Aug. 10, 2003, available at: http://www.thehindu.com/2003/08/10/stories/2003081000221500.htm
[16] Rajashri Dasgupta, "Historic Judgment and After", 22 (17) EPW 748- 749 (1987).
[17] (2001) 7 SCC 740.
[18] Feminism and multicultural p.673

sufficient provision for livelihood as well as maintenance, and that the husband is obligated to provide this during the Iddat period (as stated by the Act). It was held, however, that this maintenance is not restricted to the Iddat period, and that a Muslim woman is entitled to maintenance for the rest of her life or until she remarries.[19] The court understood the Act to suggest that the limitation in the Act was on the period within which such maintenance or provision had to be made, rather than the form or duration of maintenance. Thus, the Supreme Court attempted to grasp the intent of Section 125 of the Code and apply it to Muslim women on a secular basis. It emphasised the necessity for uniformly applied legislation to prevent future cases of discrimination and arbitrary deprivation.

However, one flaw in *Daniel Latifi* was that the court failed to recognise Section 125's inaccessibility to Muslim women. While Section 125 purports to be universally applicable, it requires the assent of both the woman and the husband to be invoked. Pragmatically, the spouse would not agree to being liable to Section 125 of the Code when he is subject to less obligation under the Act. If a divorced Muslim woman is unable to support herself after the Iddat period, she cannot seek maintenance from her ex-husband and must rely on family or the State Waqf Board. As a result, in most circumstances, women are unable to claim Section 125 of the Code, and this clause is only nominally secular.

SITUATION DECIDED AFTER SHAMIM BANO CASE

The Supreme Court properly decided in the Shamim Bano case that Shamim Bano is entitled not only to Mahr, jewelry, and maintenance under Section 3 of the Act, but also to maintenance for the post-Iddat period, which was not mentioned in the ruling granting mahr. As a result, the Supreme Court made a praiseworthy attempt to equalise Muslim women with other communities. Furthermore, regardless of the fact that her husband, Ashraf Khan, had not consented, the Bench upheld her plea under Section 125 of the Code. The court recognised that if the Section 125 application was denied, Shamim Bano would be rendered helpless because the Magistrate's order simply guaranteed Mahr and did not provide her with any maintenance. As a result, anticipating a miscarriage of justice, the court decided that the boundaries of Section 125 should be applied.

[19] (2001) 7 SCC 740.

Thus, decisions such as Shamim Ara have improved on Shah Bano and given credibility to Section 125's secular nature; this secular characteristic has been beneficial in defending Muslim women from tyranny at the hands of Male orthodoxy. However, the Muslim Women (Protection of Rights on Divorce) Act remains an impediment to these attempts. As a result, it is vital to explicitly define the scope of this Act by limiting it to ensuring reasonable and fair Mahr and maintenance during the Iddat term. Cases like these have aided in eroding the exclusivity of female discriminating legislation in marriage and other areas.

The government shall assume this duty for maintenance throughout the post-Iddat period in order to provide Muslim women with the uncompromised, secular right to file a petition under Section 125 of the Code. As a result, the legislature must change the Act to limit its application exclusively to acquiring Mahr and to abolish Section 5, which requires the husband's approval to obtain maintenance under Section 125 of the Code. Such a result would be harmonious because it considers religious differences while also prioritizing the wellbeing of divorced women.

CONCLUSION

We can see that in Muslim law, maintenance after divorce has been a contentious issue. Initially, the claim to maintenance of a divorced Muslim woman was derived from two sources: section 125 of the Criminal Procedure Code of India and the Muslim Personal Law. There was a dispute between the two since, under the Indian Criminal Procedure Code, a woman's entitlement to seek maintenance extended beyond the iddat period, yet under Muslim Personal Law, the husband was only required to pay support during the iddat time. Section 127 of the Criminal Procedure Code of India was included to settle this, however it was unsuccessful in settling the disagreement and serving as a substitute for maintenance. In this context, the historic Shah Bano Case was resolved, which established the legal stance. The case granted primacy to the Indian Criminal Procedure Code over Muslim Personal Law, and held that if the divorced woman does not have the means to support herself, it is the husband's obligation to support her for her entire lifetime, and therefore much beyond the period of iddat. The decision infuriated traditional Islamic organizations, who considered it as an intrusion on their personal law. In response to public pressure, the then-government established the Muslim Women (Protection of Rights on Divorce) Act in 1986. According to this act, the husband is entitled to provide fair and reasonable maintenance during the iddat term. This created a lot of ambiguity and confusion over the interpretation of the terms specified. Another major decision,

Daniel Latifi v. Union of India, cleared up the uncertainty. In this case, the Supreme Court maintained the Act's constitutional validity, ruling that it does not violate Articles 14, 15, and 21 of the Indian Constitution. The Court interpreted the terms to mean that the husband is obligated to provide for the divorced woman's maintenance even after the iddat period, because the term fair and reasonable maintenance implied this kind of reading. Within was intended to suggest that such maintenance should be performed during the iddat period. The requirement, however, does not end with the Iddat period. As a result, the case is credited with serving the dual objective of upholding the constitutional legitimacy of the Act and reaffirming the position established in the Shah Bano Case. This argument has been supported by the Court on numerous occasions and remains unchanged. Caries danger is also increased. Patients' lack of oral hygiene due to medical conditions, as well as parents' indulgent attitude toward their children's sugar intake, are two variables that contribute to dental caries.

A CRITICAL STUDY ON LEGALITY OF PROSTITUTION IN INDIA: THE MOST CONTROVERSIAL PROFESSION

- **DR. RISHU DEV BANSAL**[20]

Abstract

With the growth of urbanization and industrialization the problem of prostitution have become more serious and complex. The growing population of female prostitutes, child prostitutes, male prostitutes, trafficking of women etc. have created the situation in which a comprehensive and in depth study of prostitution has become necessary. From ancient times Indian society is male dominated society. Indian man is consciously taught to be aggressive and tough while women have conditioned to submissive and docile. The teachings of the society concentrate on the point that woman should please men; they should be useful to men, to make themselves loved and honored by them.

However, the contribution of women engaged in the supposedly immortal trade of prostitution and the effect on them prevailing economic has being a subject of an analytical study. Although such women were viewed with contempt, they still are a part of the entire female component of the society. The aim of this project is to throw light on the unknown aspect of the exploited and neglected life and profession of these women. The instant study seeks an attempt to study the viability on legalising the prostitution in India and drawing an inference by comparison with other countries.

Keywords: *Prostitution, India, Legalizing, woman, society*

I. Introduction:-

Prostitution is one of the oldest professions of the world practiced since the birth of the organized society. Prostitution is practiced in almost all the countries and every type of society. Prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of human person and endanger the welfare of the individuals, the family and community. Prostitution has been generally defined as promiscuous intercourse for hire whether in money or in kind. Prostitution is not to be confused with the illicit sex union of lovers, for there is no affection in prostitution, prostitution as a commercialized vice has existed in the world from time immemorial, though its institution has never been recognized by the society as such. As the world's oldest profession prostitution has

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undoubtedly existed in some form as long as society has attempted to regulate and control sex relationship through the institutions of marriage and the family. Society has not recognized it because it brings in its train not only the personal disorganization of persons concerned, but also affect the life organization of the family and the community at large. Prostitution has been important discourse of female criminality.

With the growth of urbanization and industrialization the problem of prostitution have become more serious and complex. The growing population of female prostitutes, child prostitutes, male prostitutes, trafficking of women etc. have created the situation in which a comprehensive and in-depth study of prostitution has become necessary. From ancient times Indian society is male dominated society. Indian man is consciously taught to be aggressive and tough while women have conditioned to submissive and docile. The teachings of the society concentrate on the point that woman should please men; they should be useful to men, to make themselves loved and honored by them.

However, the contribution of women engaged in the supposedly immortal trade of prostitution and the effect on them prevailing economic has being a subject of an analytical study. Although such women were viewed with contempt, they still are a part of the entire female component of the society. The aim of this project is to throw light on the unknown aspect of the exploited and neglected life and profession of these women.

II. Historical Background:-

Prostitution has existed in our country since ages. Prostitute and prostitution mention even in early Indian literature, they have been addressed by different names in the Sanskrit literature. They have been refereed in Vedas, Puranas, Mahabharata and Ramayana. The Puranas state that the very sight of prostitutes brings good luck. The women prostitutes in those times were classified into three categories, namely, Kumbhadasis, Rupajivas, and Ganikas. Prostitution as a profession has a long history in India.1 The Vedic word sadbarani refers to a woman who offers sex for payment. In Vedic times, most prostitutes seem to have dressed in red, even their gold jewellery was reddened as this hue was assumed to scare away demons and give protection to those who chose to live in a moral grey zone. Devadasi (handmaiden of god) system of dedicating unmarried young girls to gods in Hindu temples, which often made them objects of sexual pleasure to temple priests and pilgrims, was an established custom in India by 300 AD. There are reasonably good records of prostitution in large Indian cities during the 18th and the first-half of the 19thcenturies of British rule; prostitution was not considered as a degrading profession in that period as it was from the second-half of the 19thcentury. Indian Prostitution

was completely independent of the British and other foreigners. Temple dancers, aristocratic courtesans, independent village girls and big brothels could be found in every corner of Indian subcontinent. Thus, prostitution has existed in the society since ages and is still prevalent in modern society.

III. Current Legal Status on Prostitution:-

The Law governing prostitution in India is Immoral Traffic (Prevention) Act which is a 1986 amendment to the primary law passed in 1950 known as the Immoral Traffic (Suppression) Act. The law does not criminalize prostitution per se but only organized form of prostitution is against the law. If a woman uses attributes of her body voluntarily and individually she goes unpunished. But the Act prohibits/criminalize-

- Seduction/solicitation of customer
- Prostitution anywhere near a public place
- Publication of phone number of call girls
- Organized form of prostitution i.e. a brothel, pimps, Prostitution rings etc.
- A sex worker being below 18 years of age
- Procurement and trafficking of women

The Suppression of Immoral Traffic Act, 1956 was the first sustained legal effort concerning with prostitutes particularly. The purpose of the act was to abolish trafficking of women and young girls. The Act had some lapses which is why in 1986 it was amended. Like its predecessor the 1986 Act, also doesn't declare prostitution as illegal per se. however, the new legislation has a wide scope. It includes children and even men can be exploited for commercial purposes and should be protected. Section 3 of the Act has a broader definition of brothels, which will make easier to prosecute the brothel keepers. Section 9 of the Act provides greater punishment to persons who cause, aid, or abet the seduction of women and girls, over whom they have care and custody, for prostitution. The centre government under this act has powers to allow police officers arrest without warrant in any premises where this offence is suspected of being committed and rescue a person forced in this profession. This act also has provisions to have protective and corrective homes for safe custody of children, however, living conditions of protective homes were found to be inhuman and degrading.

The Indian Penal Code is used primarily when it comes to any issue concerning prostitution. Sections 366-A and 366-B make procuration of the minor girl for illicit sexual intercourse as illegal. Sections 372 and 373 make buying and selling of girls of any age for the purposes of prostitution as a heinous crime for which 10 years punishment and fine can be awarded.

Is it evident that if a prostitute works for self and uses her own premises for entertaining clients she is conducting herself lawfully, but then why it is often seen on video footage on T.V. where a sex worker and her client are being herded into the police jeep? The answer is if they do it under provisions like public indecency, public nuisance etc. of the Indian Penal Code then they are penalized. Therefore, prostitution s not illegal per se as per the Acts that deals with prostitution.

IV. A Comparison:-

In United Kingdom, sexual work per se is not an offence. Its related activities such as soliciting, procuring, brothel keeping and living on the earnings of the prostitute is illegal. In United State of America, prostitution is illegal in all the states except Nevada. In Nevada, prostitution is restricted in certain countries. it is forbidden in countries with high populations such as Las Vegas, Reno and Lake Tahoe. Nevada allows prostitution in brothels only, which are registered by the Police. Prostitutes, however, are required to provide finger prints and undergo regular health check up. In Netherlands, prostitution is legal. Street prostitution is confined to managed zones. Brothels are legal, subject to licensing regime, operated by municipal authorities, governing the locations, working conditions, etc. though, receiving money from prostitution, involving a minor in prostitution, of forcing a person to engage in prostitution are offences, as is forcing another person to surrender the income from prostitution. Italy makes prostitution legal but streetwalking and running a brothel and promoting prostitution are offense. In Germany, prostitution is legal both on and off streets. Some areas have been declared prostitution free zones. Coercing prostitution (under duress) is an offence. Pimping and promoting prostitution are offences; however, there is tolerance and civil policing. In Finland, Prostitution is not illegal but selling of sex in public is illegal. Pimping, promoting prostitution and keeping a brothel are offences. In Greece, prostitution is legal. Prostitutes are required to take health checkups twice a week and registered sex workers have citizenship rights as well.

V. Present Scenario:-

The Supreme Court in 2009 case finally suggested rehabilitative measures for those in forced prostitution. However, no effective measure was undertaken.

In August 2012, The Supreme Court , while adjudicating a petition for rehabilitation of sex workers ,clarified on a last order that gave an impression that it seeks to legalize prostitution. Allaying the Centre's fears that it was giving its seal of approval to prostitution, a special bench of justices Altamas Kabir and Gyan Sudha Misra modified its earlier order, saying "the

modification shall not be construed that by this order any encouragement is being given to prostitution."Modifying its earlier order, the bench clarified that it would only examine the "conditions conducive for sex workers to work with dignity in accordance with provisions of Article 21 of the Constitution."It added it was keen that sex workers should be given opportunity to avail rehabilitation measures of the government and other agencies for them. The bench appointed a Panel comprising Senior Counsel Pradip Ghosh as chairman, to conduct surveys in various states in the country and submit recommendations so as to set up rehabilitation centers. Justice Sudha also observed that, the sex workers have right to live with dignity. There has to be collective endeavours by courts and sex workers to give up flesh trade in case they are given alternative platform on employment."

Therefore, the panel is expected to submit the effective rehabilitative measures. The government has in the past came up with several such schemes but none was effective. The Supreme Court latest order has a very broad outlook, the sex workers who wish to leave the trade should be given an alternative platform. Though, for the society it would be difficult to accept them as a part but still by providing some alternative work options in informal sector they could be rehabilitated. Earlier schemes by government lacked implementation , according to a prostitute who wished to be unnamed, her co- sex worker was rehabilitated by a government scheme and was put in the Tihar Jail, she learnt some weaving work and after her release she could not get work and being unaccepted by society she again came back to the trade. The rehabilitative measures in the past have miserably failed. The prostitutes earn good enough in this profession hence; it is their need to continue with this profession. According to them, the measures will not earn them as much as they earn in prostitution.

VI. Conclusion

It is expected that the panel will introduce rehabilitative measures that are effective and those who wish to leave the trade are provided with other ways to sustain their living. Prostitution provides easy money. The rehabilitative measures must provide essential amount of money so that they are not forced to go back into prostitution and others who wish to continue should be allowed to continue and the working conditions for them should be improved. Legalizing prostitution cannot be a solution to trafficking. Since, prostitution is something that will prevail in the society; the need is to regularize this profession. Prostitution cannot be treated to be at par with other professions and prostitutes be treated with equal amount of dignity, but as human beings, prostitutes must be given some dignified life .

References:-

- Carns, Donald E., Talking About Sex : Notes on first Coitus and the Double Sexual Standard, Journal of Marriage and The Family , 35 (193), pp.677-688
- Gangoli, Geetanjali, Prostitution, Legalization and Decriminalization- Recent Debates, Economic and Political Weekly, March7, 1998, pp.504—505.
- Juaeph, Chitra, Prostitution : A Female Perspective, Social Defence, January 1992,Vol.XXXI, PP.55-60.
- Patkar, Priti, Girl Child in Read Light Arias' in Viney Kripal (ed.) 'The Girl Child In 20th Century Indian Literature, 'Sterling Publishers Pvt. Ltd. New Delhi, 1992.
- Pillai, T. Vikraman, Prostitution In India, The Indian Journal Of Social Work, Vol. XLIII, No. 3, Oct.,1982 , pp.313.
- Pomeroy, Wardell B., Some Aspects on Prostitution on, Journal of Sex Research, Nov. 1965, PP. 177-187.
- Dr. Smt. Sarode, S. R., Role Of Prostitutes In Ancient Indian Culture, SOUVENIR (Women Empowerment),Vol. II, Nov.2011, ISBN 978-81- 922414-0-1,PP.394-95.
- Dr. Sarode, S. R., Projection of Courtesan in Buddhist Literatire, Akhil Maharashtra Itihas Parishad Sanshodhan Patrika, Dec. 2012, ISSN No. 2231-4342, pp. 38.
- Sekar, Sanober, The Legal Processing of Prostitution – A- Self Defeating Exercise, Indian Journal of Social Work, Vol. 47, 1986-87, PP. 335-340.

RELEVANCE OF DISTRIBUTIVE JUSTICE IN THE MODERN SOCIETY LAW AND JUDICIAL EXPOSITION FROM INDIAN PERSPECTIVES

- **DR. SUMAN MAWAR**[21]

Abstract

The notion of justice is a varying concept which depends upon the paradigm of the individual who is trying to define the concept of justice and the milieu in which one finds oneself. What is just at a particular point of time or milieu may not be just at another point of time or a different level of economic development of the society. Hence at the every interval of human history we find competing formulations and enunciation of theories of justice be that of the Plato's conception of justice to the present time. Philosophers have been trying to quantify the concept of justice in terms of distribution according to merits or need or in conformity to customs or equal opportunity for self development, utility, or balancing of interest or felt necessities of the people etc. But what is justice after all has to be defined afresh at each point of time. The concept of justice with a particular society is an injustice for another society and also at one point of time something is considered as to be just is a blatant injustice in another point of time. Under the present paper it has been tried to discuss the concept of justice as enunciated by Rawls in the Indian context trying to have to grips of an Indian experience.

I. INTRODUCTION

Justice is a concept involving the fair, moral and impartial treatment of all the persons. Often it is seen as continued effort to do what is right. The doctrine of justice asserts that there should be a just conciliation of the claims of all sections of the society. Justice is foundational concept within most system of law. In jurisprudence, justice is obligation that the legal system has towards individuals and the society as a whole.

The term justice is derived from the Latin word 'jus', which means just. So justice is what appears just to a reasonable man. Justice is both objective reality as well as an abstract quality outside and within the realm of law involving values and reality, ethics and morality, equality and liberty, individual freedom and social control conditioned by the need of individual good

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and community interest.[22] It is Janus[23] like concept looking both, to past and future conserving and reforming.

The ancient Indian, Greeks and Romans had postulated justice as an ideal standard derived from God or based on Dharma, truth, and equality. It is an eternal moral obligation to render everyone it's due the noblest ideal of all human laws. For instance, through Magna Carta (1215.A.D.) where the great people of England wrested their liberty, rights and other freedoms from the clutches of a dictatorial monarchy.

During Renaissance and Reformation period to control the power oriented sovereign various social contract theories were propounded as the basis of new social order was founded on justice and natural rights of man.

During 18th and 19th centuries a series of thinkers like David Hume, Mills, Spencer, Bentham and Kropotkin etc. expounded interests and justice in terms of desirable purposes, interest and values.

Similarly thinkers from Lincoln to Nehru, Marx to Mao and Mahatma to Martin Luther King Jr. have been blazing the trial of justice for 'downtrodden, poorest end lost'.

It was also during the latter half of 20th century under the aegis of U.N. Declaration of Human Right, 1948 that the basic fundamental human rights and the claims to justice, equality and human dignity, non discrimination etc. assumed sacrosanct national and international recognition and enforcement.

Although various contemporary social jurisprudential schools have emphasized the rights of individual founded on justice in a welfare state, the concept found its most vocal support from John Rawls.

II. RAWLS' THEORY OF JUSTICE

The 1960s were an era of much unrest in America. American involvement in the Vietnam War had disillusioned the liberals the world over. The students' agitation, the challenge to the liberalism from the left and the issues relating to race relations in America brought to the forefront the need for a normative theory of justice.

The publication of Rawls' classical work titled 'A Theory of Justice' in 1971 was an event of great of significance in the history of western political thought. In A Theory of justice, Rawls attempts to solve the intractable problem of distributive justice by utilizing, mutatis mutandis, the familiar device of social contract. The resultant theory is known as 'Justice as fairness',

[22] C.K. Allen, *Aspects of Justice* 3-154 (Stevens & Sons Ltd., 1999).

[23] It is a symbolic God of the Greeks having two opposite faces so that he could look opposite direction at the same time.

from which Rawls derives his two principles of justice viz. Liberty principle, and the difference principle.

Rawls' primary objective in "A Theory of Justice" is to provide a solution to the problem of a political obligation or to put it another way, to explain how it is and under what circumstances citizens are obliged to obey the law which the state creates. He does this through the device of hypothetical agreement, made under the conditions of equality so that there are no disparities in bargaining power. This hypothetical agreement justifies the coercive use of state power because; guided by it a state would take a form which all would, under the condition of freedom, consent to. Rawls' called this theory of Justice as fairness.

Rawls follows social contract tradition but approach the subject with a slightly different view. Specially, Rawls posits that a just social contract is that which we agreed upon if we did not know in advance where we ourselves end up in the society that we are agreeing to. This condition of ignorance is known as 'original position'.[24]

III. THE "ORIGINAL POSITION"

At this stage while trying to built-up his theory of Justice, Rawls introduced concept of 'veil of ignorance'. According to him in a pre-political state of nature-----

i. No one knows his position of or place in society, his class or social status.

ii. Nor does any one know his fortune in the distribution of natural resources or assets and liabilities, his intelligence, strength and the like.

Rawls even assumed that parties did not know their concept of Good and the principles of justice were chosen behind the veil of ignorance[25] from behind this veil of ignorance the principle on which a just order would be based can be discovered, since in pursuing their own advantages of all. Rawls' social contract is ratified in a condition of perfect equality.

They are the principles that rational and free persons concerned to further their own interest would accept in an initial position or equality as defining the fundamentals of the terms of there association.[26]

The agreement that stems from the original position is both hypothetical and non-historical hypothetical in the sense that principles to be derived are what the parties could, or would, agree to, not what they have agreed to. In other words, Rawls seeks to persuade as through argument that the principles of justice that he derives are in fact what we would agree upon if we were in hypothetical situation of the original position.

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[24] John Rawls, *Theory of Justice* 12 (Universal Publication, 2005).
[25] John Rawls, *Justice as Fairness* 15 (Universal Publication, 2004).
[26] *Supra* note 3 at p.11.

Non-Historical in the sense that it is not supposed that the agreement has ever or indeed could actually be entered into as a matter of fact.

Rawls claimed that parties in the original position would adopt two such principles, which would then govern the assignment of rights and duties and regulate the distribution of social and economic advantages across society.[27]

IV. TWO PRINCIPLE OF JUSTICE

Considering that men are "rational", they should opt for such a social order as is "just" and in which they feel that they would not have to suffer disadvantages. As free, equal and rational agents, they would agree on the following principles of justice.

The First Principle Of Justice (The principle of greatest basic Liberty)

First: *Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.*[28]

The first principle of justice relates to the concept of basic liberty which would be of various kinds: Economic, Social, personal, intellectual and of course, political freedoms.[29] The 1st principle of Justice differs from classic liberal principle in that it protects not liberty in general but certain specific liberties. There are conventional civil liberties of political liberty i.e. to vote and run for office, freedom of speech and assembly liberty of conscience and freedom of thought, freedom of person along with right to hold property and freedom from arbitrary arrest.[30]

The Second Principle of Justice

Second: *Social and Economic inequalities are to be arranged so that they are both*

(a) To the greatest benefit of the least advantaged, and

b) Attached to the offices and position open to all under condition of fair equality of opportunity.[31]

(a) Difference Principle

[27] *Id*., P. 60.
[28] *Ibid*, and Pp. 201-257.
[29] N.E. Simmonds, *Central issues in Jurisprudence,* 48-49 (Eastern Book Company, 2003).
[30] Lloyd, *Introduction to Jurisprudence,* 569 (Sweet & Maxwell, 2008).
[31] Supra note 3 at p. 303.

The 1st part of the 2nd principle of justice is called difference principle. It is departure from the equality. The principle requires that inequalities in the distribution of resources must be justified by reference to the interest of least advantage group.

In Rawls' theory the least advantage group is explained as people belonging to the income class with the lowest expectations in a well ordered society where all citizens equal basic rights and liberties and fair opportunities are secure.[32]

Rawls in his "A Theory of Justice" gave the answer of the question that why rational person in original position would choose the difference principle as a basic principle of justice to regulate their society.

He explained that rational person in original position must choose principle of Justice, which will regulate the basic structure of the society, and so will fundamentally affect their own prospect in life, the resources and liberty that they will enjoy. But due to veil of ignorance they don't know their position that they will occupy in such a society, nor do they have enough information to, from a meaningful estimate of how probable it is that they will be among better —off or less well off. Due to seriousness of choice and paucity of information on which the choice must be based, the rational person will make their decision according to *Maximin Rule*.[33] This Rule holds that alternative options should be ranked in terms of their best worst outcomes.[34]

For example - The best outcome would be finding that one is in a most advantage group, and the worst outcome will be that in the least advantaged group. Since the difference principle permits increase in overall welfare only when these benefits the least advantaged group. It is necessarily true that the difference principle is most favourable to the interests of least advantage group. If therefore one has the best-worst outcome from point of view of original position. If when the veil of ignorance is lifted, it is discovered that rest assure everyone would be labouring for his benefits; since the difference principle permits other people to improve their material welfare only if in doing so they benefit the one.[35]

Rawls is prepared to allow a trade off between economic efficiency and strict distribute equality in a rather similar way to the utilitarian.

For example, managing director earn more money than car park attendants. This disparity is justified in Rawls view, because if a drop in the earnings of MD than they are present. This

[32] *Id*., p. 98. and *Supra* note 4 at P. 59.
[33] *Supra* note 8 at P. 42-47.
[34] *Ibid*, *Supra* note 3at P. 152-153 and *Supra* note 4, p.97.
[35] *Ibid*

might be result if, say, high earning were necessary to attract able people into managing directorships and a fall in their earnings would result in efficiency, and a corresponding decline in the economy making everyone worse-off.

But in allowing trading off Rawls make a difference that whereas the utilitarian will allow differential earnings and incentive in order to increase the several or overall welfare, Rawls will allow such inequality only when they are necessary to increase welfare of least advantage group.[36]

(b) Principle of fair equality of opportunity

Economic and social inequalities acceptable under the operation of difference principle will only be just if they are attached to the offices and position that are open to all. A formal equality of opportunity requires that all have the same legal rights of access to all advantaged social positions. Rawls principle goes considerably further than this, there must be fair equality of opportunity, not only are jobs to be open to all with necessary qualifications but also to achieve fairness, the best possible education needs to be open to all, including remedial education to counteract disadvantages due to family or social back ground. All are to be given the chance to develop their potential.[37]

Although Rawls' theory of Justice was severally criticized by the Marxist and libertarians but he can take credit for developing a theory which meets challenges of the left and seeks to combine individual liberty with social justice. In essence it is a compromise theory and when we reach a compromise we have to accept something slightly different from what we really want.

V. RAWLS' THEORY AND INDIAN EXPERIENCE

Rawls' principle of justice is very much relevant in developing country like India, where most of the population comprises downtrodden class and weaker section of the society. They have to be lifted to the extent from where they can live with dignity.

If we look at Rawls' first principle of Justice i.e. the principle of greatest equal liberty, the principle is targeted at those "Primary Social Goods' which are essential to foster a basic rights, liberties and powers. They encompass the freedom to participate in the political process i.e. the right to vote and to be eligible to public offices, freedom of speech and assembly (including freedom of press), liberty of conscience, freedom of thought (as defined in rule of law) and right to hold property and freedom from arbitrary arrest and seizure. Our constitutional

[36] *Ibid*.

[37] *Supra* note 3 at p. 84.

provisions correspond with the Rawls' 1st principle. For instance right to freedom under Article 19 in our constitutional scheme is in direct consonance with the Rawls' 1st principle.

Freedom of speech and expression mentioned under Article 19(1) (a) has been bedrock of our civil and political liberties. The Supreme Court in its plethora of judgements has held that freedom of speech and expression, though not absolute is the pre-condition of civil liberties in an organized society. Justice Patanjali Shastri in *A.K. Gopalan Case*[38] observed man as a rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desire by other individuals. If we look into the statement the obvious conclusion is that apex court has tried to reconcile primary social goods which have been described as basic right, liberties and powers by Rawls'. Thus, before Rawls' theory, his concerns have already been addressed by the wisdom of enlightened judges. In *Bennett Coleman's case*[39] the apex court held that freedom of the press is both quantitative and qualitative. Though, the question in case was regarding the rationing of newspaper rolls and restricting the number of pages to be printed. Supreme Court dwells upon the very basic question of freedom of speech and expression. It firmly held that freedom lies both in circulation and in content. Rawls' principle of primary social goods as the target found another expoundation in this case. The view of the Supreme Court in this regard goes down the rules of civil liberties that a citizen or entity are entitled for.

Apart from that *Express Newspaper* v. Union of India[40] and *R. Rajagopal* v. *State of Tamil Nadu*[41] etc. are some other cases where Rawls' theory found its expression in Indian legal pronouncement. Indeed, the pronouncement on the constitutional provisions[42] like freedom of peaceful assembly, to form association, of movement, to reside and to settle anywhere in the country and freedom of profession, occupation trade or business. We find that Rawls' first principle has been time and again employed by the Supreme Court to expound the fundamental rights.

Further, under Article 21 which envisage right to life and personal liberty which can't be taken away without the procedure established by law also take into account of what Rawls' first principle deal with. This is an Article which got broadest ever interpretation by the apex court

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[38] AIR 1951 SC 21.

[39] AIR 1973 SC 106.

[40] 1986 SCC (1) 133.

[41] 1994 SCC (6) 632.

[42] Articles 19(1) (b), (c), (d), (e), and (g) of .the Constitution of India.

to uphold political and civil liberties. The Article 21 is also in consonance with international covenant on civil and political rights, 1966.

The Supreme Court by allowing petitions has expounded the scope of Article 21 in *Maneka Gandhi* v. *Union of India*[43] and held that Article 21 protects the right of life and personal liberty of citizen not only from executive actions but from legislative actions also. Thus a safe conclusion would be that Article 21 insulates a citizen from state tyranny.

In this context, while examining the relevancy of Rawls' first principle vis-à- vis Indian Constitution, Article 22 cannot be overlooked. Rawls' is of the view that greatest equal liberty principle is also targeted at the freedom of arbitrary arrest by the state machinery. Article 22 puts a shield between arbitrary arrests of the citizen without minimum procedural requirement. Hence, Article 22 subscribe to the basic theology of Rawls' principle. Therefore, in *Hussainara Khatun* v. *State of Bihar*[44] treating the post card as Public Interest Litigation the Supreme Court came heavily against arbitrary arrest of indigent persons without procedural requirement.

Slavery and human trafficking has been long held to be most grave infringement of civil liberties and rights in the legal and social forums. Rawls' has condemned this practice and advocated the idea of human life with dignity be an inalienable right for a citizen. Articles 23 and 24 of our Constitution addressed this social malady, hence allowed the percolation of Rawls' idea in our constitutional schemes.

In *Bandhua Mazdoor Mukti Morcha* v. *Union of India*[45] the Supreme Court held that bonded labour practices goes completely against the basic human rights and is detrimental to prosperities of a civilized and organized society. In fact Chapter III of our Constitution which deals with fundamental rights are dotted with the basic postulates of Rawls' first principle and the same can be viewed as the total application of Rawls' theory in our constitutional schemes.

Then, if we look at Second principle of Rawls' Theory of Justice, the first part of the second principle targeted at the distribution of income and wealth, where it has been laid that social & economic inequality should be greatest benefit to the least advantage people i.e. downtrodden and weaker sections of the society. It seems that what Rawls' proposal were inspired from the classical work of Greek philosopher Epicurus who pointed out that because of disparities of circumstances justice not necessarily demands the same result for everybody and ironically as it may sound arguments of Rawls' coincides with that of Epicurus wherein Rawls is of view

[43] AIR 1978 SC 597.
[44] AIR 1979 SC 1377.
[45] AIR 1987 SC 2218.

that inequality of treatment is not an exception but a rule of Justice.[46] The constitution envisages[47] a casteless and classless society, equality for all citizens with equality of treatment under Article 14. Article 14 pervades like a brooding omnipresence. The constitution provides the adopted policy of deliberate preferential treatment for historically disadvantaged peoples. First, untouchability was abolished, and its practice in any form was forbidden by Article. 17. Again under Article 15, all citizens became entitled to equal access to shops, restaurants, hotels and places of entertainment, and to the use of wells, tanks bathing places, roads and place worship. No citizen, on grounds only of religion, race caste, sex, place of birth or any of them could be subjected to any disability. Further the constitution enabled parliament and state legislatures to formulate special provisions through ordinary law for the advancement of our socially and educationally backward classes of citizens and for SC and STs.[48]

Article 16 of the Constitution provides equality of opportunity to all its citizens but the Constitution enables the parliament and State legislatures to make special provisions for adequate representation in public employment for the advancement of socially and educationally backward classes of citizens or for SCs and STs.[49]

In *State of Kerala* v. *N.M. Thomas*[50] the apex court took a liberal view to give preferential treatment to SCs and STs under Article 16 (1) outside Article 16 (4) to help SC & STs. It had thrown in the melting pot the decision of *Devadasan case*[51] in which carry forward rule of reservation was not to exceed 50%.

In *ABSK (Sangh) Railway* v. *Union of India*[52] the Supreme Court following *Thomas case* upheld the validity of Railway Board circular under which reservations were made in the selection of posts for SCs & STs. It also upheld the carry forward rule under which 17% posts were reserved for those categories.

The apex court has consequently evolved clear indicators to be followed in respect of reservation for SCs. & STs by asserting protective discrimination for promoting social justice. In *K. C. Vasanath Kumar* v. *State of Karnataka*[53] the Hon'ble Court observed that:

(i) The reservation in favour or Scheduled Castes and Scheduled Tribes must continue as at present that is without the application of a means test, for a further period not exceeding

[46] Fali. S. Nariman, *Indian Legal System: can it be saved?* 63 (Penguin, 2006).
[47] Articles 14, 15, 16, 17, 38, 39, 39A, 41, 43A, 46, 332 & 340 of the Constitution of India.
[48] 27 15 (3), 15(4) of the Constitution of India.
[49] Article 16 (4) of the Constitution of India.
[50] AIR 1976 SC 490.
[51] *Devadasan* v. *Union of India* AIR 1964 SC 179.
[52] AIR 1981 SC 298.
[53] AIR 1985 SC 1495.

fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution - a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression and humiliation;

(ii) The means test that is to say, the test of economic backwardness ought to be made applicable even to SCs and STs after the period mentioned in (i) above;

(iii) So far as the backward classes were concerned, they should satisfy, two tests, namely, (a) that they should be comparable to the SCs and STs in the matter of their backwardness and (b) that they should satisfy the means test such as State Government may lay down in the context of the prevailing economic conditions;

(iv) The policy of reservation in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity to the state to rectify distortions arising out of particular facets of the reservation policy and to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservation.

In *Indra Swahney* v. *Union of India*[54] the apex court held that affirmative action for uplifiment of downtrodden is permissible. The court examined the scope and extent of Article 16(4) and clarified various aspects on which there were differences of opinion in various earlier judgements. The majority opinion of the Supreme Court on various aspects of reservation provided. Article 16(4) may be summarized as:

1. Backward class of citizen in Article 16(4) can be identified on the basis of caste and not only on economic basis.
2. Article 16(4) is not an exception to Article 16(1). It is an instance of classification. Reservation can be made under Article 16(2).
3. Backward classes in Article 16(4) are not similar to as socially and educationally backward in Article 15(4).
4. Creamy layer must be excluded from backward class.
5. Article 16(4) permit classification of backward classes into backward and more backward classes.
6. A backward class of citizens can not be identified only exclusively with reference to economic criteria.
7. Reservation shall not exceed 50%.
8. Reservation can be made by executive order.

[54] AIR 1993 SC 477.

9. No reservation in promotion.
10. Permanent statutory body to examine complaints of over inclusion of under inclusion.
11. On Mandal Commission Report no opinion expressed.
12. Disputes regarding new criteria can be raised only in Supreme Court.

Besides these constitutional provisions and judicial decisions our political thinkers introduced schemes of Sarvodaya which talks about the welfare of all section of the society. Directive Principle of the State Policy also comprises of these schemes through -

Article 38 - State to secure a social order for the promotion of welfare of the people.

Under Article 39 - State are under mandate to direct their policies for the up-liftment of men and women equally, so that they shall posses same rights of livelihood. It also calls upon the state to formulate policies for the equal distribution of the income and resources.

Article 46 - promotion of educational and economic interests of ST, SCs and weaker section.

Article 47- Duty of the state to raise the level of nutrition and the standard of living and to improve public health.

On the basis of Directive Principles of State Policy the Government took so many corrective measures to alleviate downtrodden class and weaker sections. The Government had implemented various schemes like Swanjayanti Gram Swarojgar Yojana, Samporna Garmeen Rozgar Yojana, Antyodaya Anna Yojana, Rural Employment Generation Programme, Prime Minister Rozgar Yojana, Indira Awas Yojana, Valmiki Ambedkar Awas Yojana, and Annapurna Scheme. Recently the Government had launched the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 which provides that State Government must provide 100 days of Guaranteed wage employment in every financial year to provide minimum employment to the rural poors. All these measures correspond with the first part of the second principle of Rawls' Theory.

If we look at 2nd part of the second principle of Rawls' Theory of Justice which targeted on fair equality of opportunity which talks about economic and social inequalities acceptable under operation of difference principle will only be just if they attached to the office and position that are open to all. In this context the Apex Court's decision in *K Thimmaapa* v. *Chairman, Central Board of Director SBI*[55] is worth examining. Their lordship importing Rawls' concept of justice held that classification must be found on intelligible differentia, which distinguished person or things that are grouped together from other left out of the group and the differentia must have rational relation to the object sought to be achieved by the Act.

[55] AIR 2001 SC 467.

Apart from various decisions on this issue our constitutional provision mentioned above allow us to conclude safely that Ralws' theory especially the first part of the second principle applies in *toto*. The Indian legislature has realized the judgement in *Unni Krishnan, J.P.,* v. *State of A.P. and Others*[56] and introduced right to education as a fundamental right through the eighty sixth Amendment Act to the Constitution which came into effect very recently from April, 2010 that provides free and compulsory education to children within age group of six to fourteen years. This also includes the second part of the second principle of Rawls' theory.

VI. CONCLUSION

Viewed in its entirety, Rawls theory can be found engraved into our constitutional goals. Although, the 1st principle of the theory, is more or less absolute and may not be violated even where this would make for greater equality or even for the sake of 2nd principle. However because various basic liberties may conflict, it may be necessary to trade them off against each other for the sake of obtaining the largest possible system of rights. In our constitutional scheme Articles 14, 15, 16 and 19 can be taken as an evidence where conflicts of rights of individual and classes has been made compatible to achieve social equity. Judicial interpretation and pronouncement had helped in securing this sacrosanct object.

Though the principle enunciated by Rawls came into light in 1971, our constitutional farmers proved themselves to be far ahead of time in knowledge and wisdom by already including almost all of his postulates way back in 1950. It can be safely concluded that Rawls theory appears as a grand elaboration of constitutional goals envisioned by our forefathers for creating a welfare state.

[56] AIR 1993 SC 2178.

A CRITICAL STUDY ON THE EFFICACY OF SECURITIES EXCHANGE BOARD OF INDIA WITH REFERENCE TO BIGGEST FINANCIAL SCAMS IN INDIA

- **DR. SUNEETA BHADOO**[57]

Abstract

In the post-reform period of the last two decades, one of the more important innovations facilitating a more rapid pace of economic development has been the creation of regulators. These are statutory entities that were placed outside of the machinery of the government, but given powers to regulate and supervise a sector. One reason for the government to create such entities was to have expert bodies to regulate sectors where they faced an increasing complexity of economic activities. Here, the regulator would have domain knowledge to deal with such complex issues.

The first statutory regulatory body that the government of India set up post the reforms of 1991 was the Securities and Exchanges Board of India (SEBI). As a regulator for the securities markets, SEBI was given the powers to create subordinate legislation and to investigate wrong-doing and impose relevant penalties. Since the empowerment of the Securities and Exchange Board of India (SEBI) through an Act of Parliament in 1992, SEBI has come up with a number of initiatives aimed at regulating and developing the Indian securities market and improving its safety and efficiency.

Recent repeated misconduct in the stock market have led to an image of disarray, lack of transparency and fraud dominating the financial sector. Gaps in legislation needs to be filled and therefore active part must be taken by the parliament as well to make sure illegal activities like that insider trading, governance scandals like that of Satyam no longer poses a threat to the investors in the market.

Keywords: *financial scams, SEBI, SEBI Act, Satyam, market regulators, India, Asia, transparency, market*

I. Introduction:-

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In the post-change time of the most recent twenty years, one of the more significant advancements working with a more fast speed of financial improvement has been the formation of controllers. These are legal substances that were put beyond the hardware of the public authority, however given powers to control and direct an area. One explanation the public authority made such substances was to have master bodies to direct areas where they confronted a rising intricacy of financial exercises. Here, the controller would have the area information to manage such complex issues.

The main legal administrative body that the public authority of India set up post the changes of 1991 was the Securities and Exchanges Board of India (SEBI). As a controller for the securities markets, SEBI was given the powers to make subordinate regulations and explore bad behavior, and force important punishments. Since the strengthening of the Securities and Trade Board of India (SEBI) through a Demonstration of Parliament in 1992, SEBI has thought of various drives pointed toward directing and fostering the Indian securities market and working on its well-being and proficiency.

As of late rehashed unfortunate behavior in the securities exchange has prompted a picture of chaos, absence of straightforwardness, and extortion ruling the monetary area. Subsequent implodes in the securities exchange have brought about a deficiency of trust in the personalities of financial backers, homegrown and unfamiliar. Likewise considering late administration tricks, there may be a need to rebuild its strategies and execution process. Holes in regulation should be filled and thusly the dynamic part should be accepted by the parliament too to ensure criminal operations like insider trade, and administration scandals like that of Satyam never again represent a danger to the financial backers on the lookout.

VII. SEBI AS A Regulatory Body:-

The financial changes of the mid-nineties moved accentuation away from focal wanting to a more market-situated monetary cycle. The job of the public authority moved away from running organizations towards guideline and oversight. Simultaneously, new regulatory elements were made. The Capital Issues (Control) Act 1947, directed by the Controller of Capital Issues (CCI), represented capital issues in India. As a feature of changing changes CCI was nullified, and SEBI set up in1988, was made a legal body in 1992. Adaptability was expected to answer market exchange, and to arising necessities in the Indian setting. There has

been a steady endeavor to work on regulatory practices and add to the continuous capital market changes[58].

SEBI works under a legal mandate of market improvement and advancement, alongside financial backer security and market guideline, as the legal obligation of the regulator[59]. Conversely, demonstrates that market improvement is certainly not an express objective in that frame of mind of either the U.S. or on the other hand the U.K. securities market regulator[60].

Other than the parent Act, SEBI likewise has abilities under the arrangements of the Securities Contract (Regulation) Act, 1956, (alluded as the SCR Act[61]) to advise the system to manage stock exchanges, and exchanges on the stock exchanges, as well as the safes under the arrangements of the Stores Act, 1996[62].

II. Scams and Its Effects on Financial Market:-

The Regulatory structure must be molded to take special care of the nation's changing monetary situation. With advancement, the job of the public authority as an immediate player is by and large dynamically diminished. Prior, the Public authority had significant control over a huge piece of monetary action and went about as a strategy creator, regulator, and specialist co-op in a few areas.

India has had its reasonable portion of scams since mid 1991:

Harshad Mehta Trick: This is maybe the most notable of every single monetary trick - presumably in light of the fact that it occurred in an exceptionally noticeable period - financial changes had quite recently been begun in 1991. Harshad Mehta rushed to understand the shortcomings of the financial framework, and took advantage of these shortcomings as far as possible. He figured out how to obtain tremendous measures of cash utilizing the purported "Prepared Forward" bargains, and utilized this cash to buy a lot of offers at gigantically expanded costs. He acquired the sobriquet of "Large Bull" because of this inclination. Afterward, the banks got it together of his obscure arrangements, and demanded their cash back[63].

[58] Ashima Goyal, „Regulation and Deregulation of stock market in India" p .10, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=609322> accessed on 2/03.2012

[59] The SEBI Act 1992, Preamble.

[60] Dharmistha Raval, „ Improving the Legal Process in Enforcement at SEBI", p. 7,< http://www.igidr.ac.in/pdf/publication/WP-2011-008.pdf> accessed on 3/03/2012.

[61] Securities Contract Regulation Act, 1956 (No. 42 of 1956).

[62] The Depositories Act, 1996 (No. 22 of 1996).

[63] Joint Committee Report on Stock Market scams and matters relating thereto, Vol-1 Report, para 2.5.

UTI Trick: The Unit Trust of India (UTI) stayed the sole vehicle for interest in the capital market. UTI rode the financial exchange ascent of 1990‟s and its lead plot, US 64, kept promising returns as high as 18%, till the "Ketan Parekh trick" burst the market. An undeniable sudden spike in demand for the securities exchanges would have likely resulted had the public authority not comeout with a salvage bundle[64]. UTI Act was revoked, UTI was separated, and UTI Common Asset actually runs, yet presently like some other shared store, controlling under 10% portion of the market and working a good ways off from the government[65].

Ketan Parekh: A certified CA, and a stock representative, distinguished various stocks (prevalently called the K-10), and took up colossal situations in these. For this reason, he utilized countless Benami accounts and more modest stock exchanges, for example, the Kolkata and Ahmedabad stock exchanges. He additionally acquired intensely from banks, for example, Global Trust Bank and Madhavpura Mercantile Agreeable Bank. A group of dealers, Shankar Sharma, Anand Rathi and Nirmal Bang, known as the bear cartel, submitted sell requests on KP‟s most loved stocks, the purported K-10 stocks, and squashed their expanded costs. Indeed, even the borrowings of KP set up couldn't safeguard his scrips. The Global Trust Bank and the Madhavpura Helpful were headed to insolvency as the cash they had loaned Parekh went into a void with his apparently most loved K-10 stocks[66].

Initial public offering Scams: various key administrators, including corporate stock specialists like Karvy and Indiabulls, were engaged with the Initial public offering trick that spread over the years 2004 - 2005. The usual methodology was basic - the administrators would open thousands of phony records to buy partakes in Initial public offerings, in the desire for selling later at colossal benefits. A spate of Initial public offerings gave during this period was vigorously oversubscribed because of this trick, once in a while by as much as 40 times[67].

Satyam Scandal: In 2009, Ramalinga Raju, director of Satyam PC Administrations, confessed to misrepresentation in the organization accounts and different abnormalities, and sent a chill down the aggregate spine of the Indian monetary framework. Coming on the rear of the global downturn, this episode vowed to bust the Indian reevaluating industry and the securities

[64] Santi Swarup, K., „Measures for improving common investor confidence in Indian primary market: a survey”, NSE Research Initiative, Working paper no. 28, December 2003.

[65] Joint Committee Report on Stock Market scams and matters relating thereto, Vol-1 Report, para 2.7

[66] Joint Committee Report on Stock Market scams and matters relating thereto, Thirteenth Lok Sabha, Vol-1 Report, para 2.5.

[67] Monika Halan, „A Broker goes for Broke‟ < http://www.livemint.com/2009/08/25215204/The-broker-goesfor-broke-Sea.html> .

exchange, however for some deft bailout work by the public authority. Mr. Raju himself had confessed to abnormalities worth around Rs 12,000 crores.

GDR scam: Reassessing a trick including Global Safe Receipt (GDR) issues, the Securities and Trade Board of India (SEBI) banished seven organizations from giving any offers or convertible instruments or changing their capital design in any way. As per the Sebi, a large portion of these organizations gave GDRs in 2009. The usual methodology of the supposed abuse was to give enormous estimated GDR issues in abroad business sectors and then slowly offer it in an organized way to Indian clients definitely known to the FIIs[68].

III. The Recent Controversy:-

ADANI Group & Hindenburg Report

The Hindenburg report - the undulating impacts it made drove Adani Endeavors cancel ₹20,000 crores FPO. Adani Endeavors stocks experienced a huge deficiency of 28.45% on February 1, 2023, shutting at ₹2,128.70. Following the occasion, Adani Gathering reported to cancel their ₹20,000 crores FPO and return financial backers' cash. They expressed that they did it to protect financial backers' inclinations.

In the report, Hindenburg blamed Adani Gathering for "baldfaced stock control and bookkeeping misrepresentation conspire throughout the span of many years." Despite the fact that Adani reprimanded the report as unjustifiable and malevolent and even compromised judicial procedures against the detailing organization, the market reaction was prompt and fierce. Adani Gathering stocks were hit severely. Seeing the unpredictable market reaction, the Adani Board declared that it isn't 'ethically right' to go on with the FPO.

- Citibank Inc's abundance arm reported to quit tolerating Adani Gathering's bonds as security for edge credits and increase examination against the organization's monetary circumstances.
- Citibank Inc. is the second organization to quit tolerating Adani bonds as guarantee. Before them, Credit Suisse yesterday said that following a precarious decrease in the worth of Adani bunch bonds, it has quit getting those as guarantee for edge credits.
- LIC, one of the essential financial backers in the Adani Gathering, likewise said to ask with the organization in regards to the claims made in the Hindenburg report. LIC is

[68] Mani Shankar Aiyar, „Stock Market Scam And UTI Imbroglio" Economic and Political Weekly March 8 2003, p 2, < http://epw.in/epw/uploads/articles/2569.pdf> accessed on 12/03/2012.

cited as expressing that as a financial backer, it has each option to ask about the said extortion.

Following the series of occasions, the RBI guided neighborhood banks to refresh the subtleties of their openings in the Adani gathering of organizations.

Adani Endeavors' stocks have fallen further after the FPO got canceled. Adani Undertakings stocks lost another 13.47% on February 2, 2023, to exchange at ₹1,847.70. The Gautam Adani Gathering's leader organization stocks have slumped 30% in the midst of Credit Suisse news. Every one of the ten stocks having a place with Gautam Adani are trading the red zone.

This event is one of the recent Financial Scams upon which SEBI will make decisions.

IV. Combating Scams: Proposals For Change:-

There is a well established worry that the managing organizations are not satisfactorily prepared andcapable of releasing their essential obligation of saving the honesty of the market processes[69].

A few changes that the SEBI ought to embrace are examined beneath.

a) Rule making Interaction by the Government:

Despite the fact that the SCR Act contains arrangements for assigning powers of the GOI, the public authority holds powers for rule making in certain region of the securities market[70].

There is serious areas of strength for a to be made at this phase of securities market improvement, to think about changing the above arrangement of the Act to move more regulatory obligation onto the regulator. Not at all like the SEBI cycle of rule making for the securities, the GOI interaction is neither straightforward nor does it follow any consultative cycle while telling the guidelines under the SEBI Act. There have possibly been a couple of occurrences when such an interaction has been followed. The Act ought to likewise be corrected to guarantee that, regardless of which government is in power or the civil servant in control, a consultative straightforward cycle is constantly continued in the standard making process. There is no reasoning legitimizing the mystery in the standard making cycle of the GOI.

b) Inner Constitution SEBI:

[69] D.N Ghosh, „Market Scandals and Regulatory Governance" Economic and Political Weekly May 17, 2010, p 1918 < http://epw.in/epw/uploads/articles/2805.pdf>

[70] IPO Plot Thickens, Economic and Political Weekly May 13, 2006, < http://epw.in/epw/uploads/articles/2057.pdf>

Regulators all around the world select individuals, who practiced regulation eventually of time in their calling, as the director of the association. It is strange that SEBI doesn't make some entire memories legitimate part to direct the regulator. It is suggested that the SEBI Act be altered so the SEBI Board comprises of no less than one WTM with sufficient practical involvement with regulation and legitimate practice. The presence of a devoted entire time legitimate part, and a different arrangement of officials responsible for semi legal capabilities, at SEBI won't just give the inclination that equity is finished yet in addition that equity supposedly is done[71].

c) Handouts: extension and upkeep:

Successive alterations to the guidelines antagonistically influence the transactions which are in pipeline other than making vulnerability. SEBI is known to give handouts under the guidelines. It is very challenging to monitor the booklets gave by SEBI. There is a need to classifications fliers in a predictable way and track it in the public space so there is most extreme clearness in guidelines. This could be worked with a focal framework that is made inside SEBI, so every one of the first handouts are midway listed and the sequencing of these is preserved[72].

d) Examinations by SEBI:

The researching system of SEBI is one more region that is blurred with vulnerability by which the financial backers, or the market members, don't know about the time allotment inside which the examinations will either be started, or continued forthcoming, or finished. Inside SEBI, there is no arrangement of limit and consequently examinations can be started at whenever and can be continued forthcoming for quite a few years. A framework should be set up by which any examination that is started would naturally come up for survey inside the association, after the predefined timeframe. This would guarantee that examinations are not continued forthcoming for preposterous place of time, which would destroy any abuse on this account[73].

e) Interaction of leading settlement/enquiry/request: Great execution is fundamental for powerful guideline. Actions SEBI takes are generally under Guideline 11, Denial of Fake and

[71] SEBI Cracks Down On GDR Scam, Sebi cracks down on GDR scam | News Archive News,The Indian Express
[72] D.N Ghosh, „Market Scandals and Regulatory Governance" Economic and Political Weekly May 17, 2010, p 1916 < http://epw.in/epw/uploads/articles/2805.pdf>
[73] D.N Ghosh, „Market Scandals and Regulatory Governance" Economic and Political Weekly May 17, 2010, p 1916 < http://epw.in/epw/uploads/articles/2805.pdf>

Unjustifiable Exchange Practices Connecting with Securities Markets[74], and Guideline 13 (4) Methodology for Holding Enquiry and Forcing Penalties[75].

The system followed for giving bearings under Segment 11 and 11(B) of the SEBI Act, 1992, passing reformatory orders against a middle person, and forcing money related punishment are different under the Act. Three distinct methodology are recommended under the Act, rules and guidelines while taking disciplinary procedures. This frequently turns into a reason for disarray to financial backers and noticees with respect to what method which will be trailed by SEBI to pass orders under the SEBI Act, 1992.

V. CONCLUSION & SUGGESTION

The SEBI has been working now as the securities markets regulator beginning around 1991, and has seemed to have done an honorable undertaking in maintaining the mandate it was accused of, in a time of high development and sensibly elevated degrees of financial unpredictability. The standards in view of which the element was made has placed it in an advantageous position. A portion of these standards remember a clearness for the mandate it was to follow through on, non-impedance from the public authority, legal powers to give subordinate regulation which can be advised speedily to oblige the fast changes that happens in the values markets in India and the powers to implement the regulatory mandate.

The validity of SEBI as a regulator likewise seems to have been worked with immensely by the formation of specific courts with particular space information that can quickly survey regulatory actions. Likewise during the time spent guaranteeing that the business sectors foster so that the goal of securities markets keep on being met, the lawful cycles at SEBI have additionally kept on developing in accordance with more elevated levels of straightforwardness of cycles, clearness of actions and believability of legitimate action. Concerning innovation, mechanization, exposure, risk control, and decrease in transaction costs Indian bourses have outflanked those in created nations. More cooperation and profundity of instruments are required. This will occur with a restoration of development and more noteworthy trust in the better checking frameworks. India has additionally taken up the new computerized exchanging framework algorithmic exchanging which expects to diminish human mistake in enormous

[74] SEBI Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market Regulations, 1995, < http://www.sebi.gov.in/acts/futpfinal.html>

[75] SEBI Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty, 2002, < http://www.sebi.gov.in/acts/EnquiryPenalty.html>

volume transactions[76], SEBI has previously emerged with rules in regards to the same[77].

A piece of this task has been given to proposing different changes that SEBI ought to hope to embrace. It is to the greatest advantage of the market that the regulator proceeds to develop and span any holes between current cycle and what the standards driving a decent regulatory working would propose, we recommend that SEBI keeps on fining tune the legitimate cycles, especially in requirement, to accomplish better degrees of lucidity on guideline and the lawful interaction.

REFERENCES

- Ashima Goyal, „Regulation and Deregulation of stock market in India" p .10,
- D.N Ghosh, „Market Scandals and Regulatory Governance" Economic and Political Weekly May 17, 2010, p 1918 < http://epw.in/epw/uploads/articles/2805.pdf>
- Dharmistha Raval, „ Improving the Legal Process in Enforcement at SEBI", IPO Plot Thickens, Economic and Political Weekly May 13, 2006, < http://epw.in/epw/uploads/articles/2057.pdf>
- L.K Singhvi, „Surveillance: Challenge and Reality", Mani Shankar Aiyar, „Stock Market Scam And UTI Imbroglio" Economic and Political Weekly March 8 2003, p 2, < http://epw.in/epw/uploads/articles/2569.pdf>
- Mobis Philipose, 'SEBI"s integrated market surveillance needs a boost" Electronic copy available at: https://ssrn.com/abstract=2293378 iv Monika Halan, „A Broker goes for Broke"
- Nageswaran V. A. and S. Krithivasan, "Capital market reforms in India and ASEAN: avenues for co operation", paper presented at the 1st ASEAN-India Roundtable, February 9- 10 -2004, Singapore
- R. Yegya Narayanan, „Algorithmic trading gaining ground"
- Sachin P Mampatta & Nitin Shrivastava, „SEBI sets curbs on algorithmic trading"
- Santi Swarup, K., „Measures for improving common investor confidence in Indian primary market: a survey", NSE Research Initiative, Working paper no. 28, December 2003.
- SEBI Cracks Down On GDR Scam,

[76] R. Yegya Narayanan, "Algorithmic trading gaining ground"

[77] Sachin P Mampatta & Nitin Shrivastava, „SEBI sets curbs on algorithmic trading" < http://www.dnaindia.com/money/report_sebi-sets-curbs-on-algorithmic-trading_1669543>

MULTIDIMENSIONAL ASPECTS OF CORPORATE CRIMINAL LIABILITY: AN INDIAN SCENARIO

- **ETI GUPTA**[78]

Introduction

Large corporations dominate the global business, and they are present in every sphere of our life. However, a corollary of this dominance is that large companies have started indulging in criminal activities, and considering that they are not natural human entities, their activities criminal or otherwise are also not ordinary. Corporate crime has assumed dangerous presence; particularly considering their criminal behavior defies 'common reality'[79].

Developing world has a major problem of corruption and bribery, especially among the public officials, and this has resulted in increased criminality in under-developed countries that are already burdened with huge debts from the International Monetary Fund[80]. Clearly, the concept of corporate crime must be clearly defined so that it is possible to ascertain the extent of liability to be imposed. This is necessary if the motto of the civilized society has to be "live and let live" meaning "jio or jeene do"[81].

India is not unknown territory as far as corporate crime is considered. In fact, it is a serious contemporary concern due to multidimensional aspect involving in nature of such kind of crime, given the number of corporate scams emerging everyday and threatening the overall economy and welfare of the state[82]. Development of any country depends largely on the corporate sector, although the stability of the economy must not depend on its corporate sector. Corporate criminality[83] seriously threatens the welfare of the society, considering its presence and impact in most aspects of social and community life, and the number of people affected. As a result, corporate entities are in position of causing massive physical and economic harm.

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[79] Shover, Neal. Wright, John P. CRIMES OF PRIVILEGE: READINGS IN WHITE-COLLAR CRIME, New York: Oxford University Press (2001).

[80]Clinard, Marshall B. Yeager, Peter C. CORPORATE CRIME (Reissue ed.), New Brunswick (2006).

[81] Sharma, Sumit. CORPORATE CRIMES & FINANCIAL FRAUDS: WITH BIGGEST FINANCIAL FRAUDS IN THE HISTORY OF INDIA, India: Authorspress (2014).

[82]Goel, Shivam. CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE: SCOPE FOR A NEW LEGISLATION IN INDIA, India: Partridge Publishing (2015).

[83] As quoted by Reddy, P L Jayanthi. CORPORATE CRIMINAL LIABILITY: SOME INSIGHTSAMICUS BOOKS, Hydrabad: ICFAI University Press (2008).

Corporate liability in the present context must be strengthened. The phenomenon of corporate criminality has emerged primarily in the 20thcentury[84]. Reforms of the legal systems are now entailing provisions for this phenomenon. In India, laws pertaining to corporate liability are being strengthened, particularly following the Bhopal Gas tragedy[85]. However, there has not yet been much headway in this regard. The traditional perspective towards crime never included corporate criminality[86]. Business corporate has become a prominent part of society. Considering the penetrative reach of the corporate in the various spheres of social existence, and the commercial outlook in our value systems[87], it becomes all the more important to ascertain the criminal liability of companies.

Laws are being designed to define various acts of companies as criminal if they are harmful for the society even if they are profitable for the business organization[88]. Fraudulent activities and other intentional crimes, particularly in securities[89] and healthcare[90], have come under stringent prohibitive laws. Other criminal legislations, like the various environmental regulations, have been framed to ensure that firms adopt measures to rectify or prevent the harmful impact of their operations. Most legislation is enforced by combining both corporate and individual liability on companies indulging in wrongful activities. The moot question confronting the law enforcers is to find ways to impose structured criminal and civil sanctions against individual and corporate that serves as deterrent.

Difficulties to Prosecute Corporations under the Criminal Law

There was a time when corporate crime was just an insignificant part of legal consideration more of notional relevance[91]. The reason was that there were not too many corporations in existence and their prosecution was rather difficult. An important consideration was that it in case of criminal trials it was necessary to put in personal physical appearance. A company being an artificial person existing only in the eyes of law was unable to perform acts that it had

[84]Kelly-Kilgore, Sarah. Smith, Emily M. *Corporate Criminal Liability*, 48(2),American Criminal Law Review,421-453 (2011).
[85]*Supra* note 3.
[86] Nagarajan, G. Sheriff, J. Khaja. *White Collar Crimes in India*, 1(9), International Journal of Social Science & Interdisciplinary Research, 157-164 (2012).
[87]*Supra* note 3.
[88]Uhlmann, David M. *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 (4), Maryland Law Review, 1295-1344 (2013).
[89]*Supra* note 3.
[90] Braithwaite, John. CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY,London: Routledge and Kegan Paul (1984).
[91]Pyne, Radhanath. *White Collar Crime and its Punishment Policy*, 49(12), The Management Accountant Journal, 40-45 (2014).

not been authorized to perform, and so by its very definition, such acts would be *ultra vires*[92]. Therefore, whether the company could perform or even support such acts was debatable. Furthermore, it was quite a challenge to determine the *mens rea* or 'a guilty state of mind' in a notional concept like a corporation. Most significantly though was the fact that company was an artificial person, and so the relevant criminal punishments like imprisonment and so on were obviously not possible.

Nonetheless, there are many criminal activities which a corporation can and unfortunately does get involved in, starting from workplace death and hurt to injury to the person and damage to the property of consumers and other members of the public. The lack of perception to associate the corporate image with such crimes has been, according to the Bronitt and McSherry (2010)[93], instrumental towards the abysmal rate of success in assigning liability for them and prosecuting them. The evolution of the concept of criminal liability of corporations is thus characterised by the relentless struggle of the legislature and the judiciary to overcome the problem of assigning criminal blame to fictional entities in a legal system based on the moral accountability of individuals.

However, there are many ways, as noticed by Ashworth and Horder [94](2013), to categorize corporate criminal liability, liability is only of those individuals committing the crime; company alone is to be held liable; or liability rests with both the individual as well as the company. For instance, a corporate vehicle may be used by an individual to commit a crime, wherein the liability definitely rests with the individual using the vehicle. It would be debatable as to the extent and nature of liability to be allocated to the corporate vehicle. Conversely, if it is only possible to identify the vehicle in particular situation, then to what extent will the vehicle be liable as a legal entity separate and independent of its manager or owner is again debatable[95]. Definitely, there are merits and demerits in each of the above discussed scenarios. The only point of consensus is that at least one entity must be held liable for the crime committed using the company's vehicle.

Prosecution of corporations under Criminal law is riddled with two types of namely, theoretical and practical.

[92]Husak, Douglas N. THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS, USA: Oxford University Press (2010).

[93]Bronitt, Simon. McSherry, Bernadette. PRINCIPLES OF CRIMINAL LAW (3rd ed.), Australia: Thomson Reuters (2010).

[94]*Supra* note 13.

[95]Sutherland, Edwin, H. *Is White-Collar Crime Crime?* 10 (2),American Sociological Review, 132-139 (1945).

Theoretical Hurdles

The traditional arguments were regarding the need for holding corporations liable for criminal punishment, when the mechanism of civil penalties already existed[96]. This debate was rooted in the social morality in the context of criminal law. Wells[97] (2001) contends that social morality and criminal law are closely connected. Criminal law is a mechanism to reinforce the social morality and ensure that crime is prevented to avoid causing human to suffer. As such, with the intention to prevent harm to members of the society, the State is authorized to use the powers at its command.

Companies have conventionally been seen only as profit-making enterprises. However, in the aftermath of the Industrial Revolution and the two World Wars, the number of corporations just grew tremendously requiring a re-look at the till-date complacent way corporate liability was treated in the criminal law. However, the perceptions of the society toward corporations began to change from the mid 20th century, with corporate crimes finding little tolerance among the general public[98]. That the activities of the corporations have a huge propensity to harm the social values and interests became clear to everyone, and the society looked to the State to use its powers to rein in the corporate crime. Corporate entities were now required to be socially responsible as well. Changing moral standards ensured that corporations were included in the domain of the criminal law[99].

Despite the general idea in place, there were some ground difficulties to be addressed. First, it was a challenge for the courts to attribute *mens rea* in cases to show they were 'intent crimes'. Interpreting the individualistic concept of *mens rea* as established in the traditional criminal law was a challenge in the case of corporations, since attributing intent on a 'juristic person', incapable of acting or thinking for itself, had never been visualized in the domain of *mens rea*. Trying to adapt the concept in corporate context posed severe challenges.

Practical Problems

A major problem that had to be addressed pertained to the kind of sanctions that can be imposed on a corporation if there was a conviction. The question was: whether the courts could impose fines in place of the sentence mandated in the law, since for obvious reasons imprisonment was

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[96] Nanda, Ved P. *Corporate Criminal Liability in the United States: Is a New Approach Warranted?*, 58 American Journal of Comparative Law, 605-630 (2010).

[97] Wells, Celia. CORPORATIONS AND CRIMINAL RESPONSIBILITY (2nd ed.), Oxford: Oxford University Press (2001).

[98] Wells, Celia. *Corporations-Culture, Risk and Criminal Liability*, Criminal Law Review, 551-566 (1993).

[99] Fisse, Brent. *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions,* 56, Southern California Law Review, 1141 (1983).

not an option for a corporation[100]. (Due to its artificial identity) Other options now had to be considered.

In India, this issue came up with a twist. In many sections of the Indian Penal Code, punishment must include fines as well as imprisonment. The moot point was that for such offences that require both imprisonment as well as fine, what should be the punishment meted out to a corporation, since corporation being a 'juristic person' cannot be imprisoned. This issue has been addressed in the ground-breaking cases of *Assistant Commissioner, Assessment II, Bangalore v. Velliappa Textiles*[101] and *Standard Chartered Bank v. Directorate of Enforcement*[102]. Companies cannot escape prosecution just because the offense for which they must be prosecuted involves a mandatory sentence of imprisonment. The apex court ruled in the case of *Iridium India Telecom Ltd. v. Motorola Incorporated and Ors*[103] that the position of the corporation is same as any individual attracting conviction under common law and statutory offences including even those where *mens rea* is necessary. It was made very clear by the apex court that there is no immunity for corporations from criminal prosecution based on the contention that criminal *mens rea* was missing when the act was committed. Embracing the principles of attribution and imputation has negated the very idea of a corporation not capable of being held liable for the commission of a crime.

The very concept of corporate criminal liability is developing in India since past some years. Amidst increasing the many dimensions of corporate crimes and defaults, authorities are feeling the urge to have clearer and stricter laws and norms, which could deter them from committing such crimes. Courts have also started adopting stricter approach towards corporate criminal liability and are extending it further beyond its limited traditional scope. The spread of the concept of corporate criminal liability has extended beyond IPC, 1860 but has spread across different statutes and legal provisions[104]. Ever since the concept of corporate criminal liability has come into existence, its understanding has only been emerging. Many of the typical difficulties in its application in practical circumstances have been overcome. Understanding of the kind of evidences which could conclude corporate criminal liability and the procedural tests of the same have emerged and accepted legal systems in India as well as worldwide. Establishing individual criminal liability has been relatively easy but when it comes to

[100]Gobert, James. Punch, Maurice. RETHINKING CORPORATE CRIME, London: Lexis Nexis Butterworths (2003).
[101]AIR 2003 SC 721
[102]AIR 2005 SC 380
[103](2011) 8 Comp LJ (SC): (2011) 1SCC 74.
[104]As quoted by Williams, Franklin P. Marilyn, D. McShane. CRIMINOLOGICAL THEORY, Prentice Hall (2004).

corporate, it has not been the same. Indian courts have also redefined corporate criminal liability and its consequences gradually. The *Iridium India Telecom Ltd v. Motorola Incorporated and others*[105] and *Sunil Bharti Mittal v. Central Bureau of Investigation ("CBI") and Others*[106] are the two recent cases where courts have attempted to clarify legal definition and implications of corporate criminal liability.

A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring *mens rea*. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.

Normative Recognition of Corporate Criminal Liability in India: The Companies Act, 2013

India's legal governance atmosphere is evolving just like its understanding of corporate criminal liability. The Companies Act, 2013 is one good example of the same. The law has been reformed considerably to control and deter corporate frauds and standardise governance process more effectively. There are clear provisions under this Act dealing with frequent corporate crimes like fraud, cheating etc. The Act controls frauds and deters their recurrence by bringing in more accountability and responsibility upon independent directors, auditors etc. they are the watchdogs to ensure company's compliance to The Companies Act and other such legal provisions of the law. The Act also prescribes personal liabilities upon Key personnel, auditors, employees etc.[107]

The present Act has received appreciations from industry experts and legal fraternity alike because it is not only comprehensive but is also strict with practical penalties effective in controlling frauds. Collectively it can be said that India's legal system is evolving and adopting towards the rising need for curbing and controlling multidimensional nature of corporate crimes.

Punishment for corporate fraud [Section 447]

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105 *Supra* note 25.

106 Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl.) No. 3161 of 2013)

107 Chopra, Rajiv. *Companies act, 2013: an analysis of key rules*, 5 (7), International Research Journal of Management. Articles Published, (2014).

Section 447 of Companies Act defines fraud as an act of omission or commission leading to consequences against the interest the company misusing or abusing his/ her authority by virtue of his position. According to this Act, fraud is an offence punishable by imprisonment not less than six months and can go up to maximum of ten years. The provision for fine cannot be less than the amount of fraud and may extend up to three times the fraud amount. The Act has been effective in controlling corporate crimes and frauds.

Report of The Companies Law Committee (February 2016)[108]

The Committee received suggestions that the ambit of Section 447 was too broad and would result in minor infractions being punished with severe penalties, which are non-compoundable. However, it was also suggested during the discussions that once the offence of fraud is established, it would not be tenable to provide for a threshold for it to be punishable under Section 447. The Committee observed that "*the provision has a potential of being misused and may also have a negative impact on attracting professionals in the post of directors etc. and, therefore, recommends that only frauds, which involve at least an amount of rupees ten lakh or one percent of the turnover of the company, whichever is lower, may be punishable under Section 447 (and non-compoundable). Frauds below the limits, which do not involve public interest, may be given a differential treatment and compoundable since the cost of prosecution may exceed the quantum involved*"[109].

New Face of Corporate Crime Tomorrow

Several new kinds of frauds and crimes are emerging each day and most of the times we are caught unaware [110]. Different dimensions of corporate crimes as have been witnessed by the world, According to Deloitte India Fraud Survey, in times to come India could witness four common frauds due to emerging trend of using high technology digital media in regular business models. Media scams, e-commerce scams, scams related to cloud computing and virtual currency scams. [111] The following are the excerpts from the Deloitte India Fraud Survey and the information given below is taken from the survey only.

[108] Ministry of Corporate Affairs (Government of India). *Report of The Companies Law Committee*. Report submitted to Honourable Finance Minister on 1st February, 2016.
Available at:http://www.mca.gov.in/Ministry/pdf/Report_Companies_Law_Committee_01022016.pdf
[109] *Supra* note 30.
[110]Source: http://www.fbi.gov/scams-safety/e-scams
[111]Deloitte. *India Fraud Survey- 2014*.
Available at: http://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-finance-annual-fraud-survey-noexp.pdf

1. E-commerce Fraud

Presently e-commerce is involved in almost every business and numerous transactions are conducted using computer networks, Internet and online media. E-commerce industry has been growing at a very fast pace and presently it is valued at nearly INR 224 Bn. It is expected to grow to nearly twice this figure in next two years[112].

Travel industry occupies much of the e-commerce space presently with transactions ranging from ticket bookings, hotel bookings, online buying etc. internet penetration in India has been increasing and so is the possibility of transacting online. It is estimated that by year 2014 the total number of Internet users will increase to more than 243 million[113]. With increasing number of computer literate who are also good prospect for online companies give significant scope for online scammers.

2. Cloud Computing Fraud

People are increasingly using and demanding online access to their data and applications which can help them do so. Several devices are being used like desktop PC's, smartphones, laptops, tablets etc. Cloud computing solves this problem very effectively. Not only is the Indian younger generation using cloud solutions, companies are also using cloud access for speedy and simultaneous sharing of internal data. This leaves a large possibility of online frauds[114].

Presently, with the use of cloud technology companies can share and edit data and documents and simultaneously viewing and using it from different locations. People on cloud can interact on real time basis at a very low cost. Applications and uses of cloud based computing are so many that it has become target to online scammers risking the data shared on cloud computing. Intellectual property, internal information and several other data are at risk of being stolen or misused[115]. Cloud computing has also increased the risk of identity threat, hacking etc.

3. Social Media Fraud

[112] *Supra* note 33.
[113] *Supra* note 33.
[114] http://www.rediff.com/business/slide-show/slide-show-1-special-most-competitive-countries-in-the-worldindia- ranks-60/20130905.htm
[115] *Supra* note 33.

Now days, social media is one greatly popular and used tool. Companies are using it to improve their visibility and popularity among people. Social media is also a platform where companies can come closer to customers and interact with them. Although companies have started using social media as strategic marketing and customer relationship tool, they are still in the process of understanding how it works[116]. Whereas social media is widely used by customers of all ages, gender and all places but at the same time hacker may hijack the data and manipulate it against the marketer. Moreover there are other risks like negative publicity, customer data loss etc. that makes it risky and tempting ground for corporate crimes.

4. Virtual / Crypto-Currency Fraud

Virtual currency also known as 'crypto currency' is in thing today. 'Bitcoin' is one virtual currency that is much popular on black market website which was under scrutiny by US authorities. This currency is based on complex systems and networks and is accepted in exchange for goods and services at various online portals. The transactions involving crypto currency range from online transfers, mobile recharges and several online trading or exchanges for goods or services[117]. Whereas production of physical money is regulated and controlled, generation of crypto currency has is far less regulated and can be manipulated relatively easily.

Conclusion

The concept of corporate criminal liability is still in its emerging stage in India as well as globally. Although attempts are made in terms of legislations like Companies Act, 2013 to control and reduce corporate crime, the very definition and concept of corporate criminal liability is still at its emerging stage. Corruption is an emerging menace that Indian government is trying hard to fight. Such offences are of the nature where not only individuals but the companies also need to share the liability for.

It is still a matter of debate as to how effectively can laws and regulations control corporate behavior moreover the extent of strictness of such norms and the most suitable approach towards corporate criminal liability is again debatable. As a result most courts are trying to find most practical outcome under given circumstances, instead of adopting standardised approach. The legal provisions in their present shape are still ineffective in control many corporate crimes. The crimes are evolving and so is the need to define corporate criminal liability.

[116] *Supra* note 33.
[117] *Supra* note 33.

Presently it has been observed that companies are not held criminally liable under most circumstances. Provisions like Companies Act, 2013 are good effort towards improving corporate governance practices and making companies more responsible and answerable.

Clearly a lot is required to be done in the area but the efforts done so far should not be undermined. Provisions must be made to avoid conflicts in interpretation of corporate criminal liability and its implication for companies.

THE OPPROBIUM OF WHITE-COLLAR CRIMES: A NEED OF COGENT MECHANISM

- GAJENDER SINGH NANDA[118]

Abstract

We as a citizen of a developing country especially saw so many changes in the context of law because that is our need with every change in our surrounding's. Due to many changes in political, economic, social and legal procedures, things get complicated especially in matters of White-Collar Crimes because persons who are doing this start taking advantage of these changes. Professor Edwin H. Sutherland the famous criminologist said one thing very correctly. "White Collar Crimes are committed by a person of respectability and high social status in course of their occupation". There is always pre-decided parameters for civil society but there are some criminal activities present in our society that are especially destroying our monetary areas slowly and steadily. White Collar Crimes which is spreading rapidly in our country like fire and destroying things speedily.

Keywords: *Occupational Crime; White Collar Crime; Compensation; Corporate Structure; Corporate Culture.*

I. Introduction:-

Crimes such as the White-Collar Crime are not what a common man perceives a crime to be. A crime for a common man means a threat to his or her security or property. However, unlike such day to day crimes like theft, murder, rape, dacoity, white collar crimes are difficult to identify. The very first of its kind, popularly referred to as Carriers Case was committed in England, wherein an English carrier who was entrusted with the responsibility to carry bales of cotton by a Flemish merchant had kept the bales for his own use rather than transporting it as per the instruction. Even though he couldn't be convicted of theft as the law existing in England didn't provide for any such crime.

However, the judge held the defendant guilty for embezzlement which subsequently went on to become a crime.4 India too, as a growing economy has witnessed numerous crimes which are of such a nature. The nation has also introduced various laws to reach its ambit to all such crimes which are committed in the due course of employment/ occupation. To name a few;

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Sahara Case, Satyam Case, 2G Scam Case, Nirav Modi Case, Vijay Malaya/ Kingfisher Case. The authors shall look into the various acts and the leading cases to arrive at a conclusion of its impact on the society.

Even though there are different methods used by a criminal while doing these types of crime but, still there is some very common crime done in our surroundings which are common those are given below:

- Corporate Fraud
- Embezzlement
- Ponzo Schemes
- Extortion
- Bankruptcy Funds

II. Status of Corporate Criminal Liability in USA:-

In the context of corporate criminality, prosecution in the United States labours under notion that the corporation is a person but an artificial one. Here the entity is guilty if any person commits an offence to benefit the corporation while acting within the scope of his corporate duties. The authors, in an effort to examine the fall-out of actions based on such an assumption, arrive at the conclusion that the premise may not always hold true in the present scenario.11 Particularly in the case of large public companies, the stigma and moral judgment that befall the corporate entity, conventionally meant as an agent of deterrence for the offender, are often transferred to thousands of innocent employees and shareholders. With large-scale multinational corporations being under the supervision of professional managers, the owners seldom play any meaningful role in the management of corporate affairs – holding them liable for the acts of employees may thus often lead to results rationality. It is this very concern that leads prosecutors to strike at the wrongdoing of individual employees instead of putting corporations on trial, despite the existence of legislations like the Sarbanes-Oxley Act of 2002 that exposes corporations to increased criminal liability after the high profile cases like Enron and World com.

The legal regime in United States assigns vicarious liability to a corporation for the acts of its employees if the individual:

(a) Acted within the scope and nature of his employment;

(b) Acted, at least in part, to benefit the corporation; and

(c) The act and intent can be imputed to the corporation. The first criterion is fulfilled if and only if the employee has actual or apparent authority to engage in the act in question, with the

burden of proof to demonstrate the same lying with the prosecution. In several cases, federal courts have held the corporation accountable for an employee's act despite the former having implemented policies explicitly prohibiting such behaviour, although proof of such implementation may qualify as mitigating circumstances. The U.S. Model Penal Code holds corporations liable for employee behaviour if liability is imposed by statute (either directly or tangentially through legislative intent) or if the commission of the offence has been authorized or tolerated by the directors or by a highranking agent acting on behalf of the corporation within the scope of his duties. Regarding the second component, the employee's mere intention to bestow benefit to the corporation should suffice, with actions favourable to the corporate interest being viewed as manifestation of such intention. However, if the action under consideration is expressly prejudicial to the corporate interest or constitutes a breach of fiduciary duty to the corporation, liability can no longer be assigned to the company.

III. Judicial Pronouncements:-

Some of the important pronouncements of the apex court on the Doctrine of Corporate Criminal Liability in India are as follows; The question that arose for consideration was whether a company or a corporate body could be prosecuted for offences for which the sentence of imprisonment is a mandatory punishment?

In CST v. Parson Tools and Plants:

It was provided that "if legislature willfully omits to incorporate something of an analogous law in a subsequent statue, or even if there is a causa omissus in a statute, the language of which is otherwise plain an unambiguous the court is not competent to supply the omission by engraving on it or introducing in it under the guise of interpretation, by analogy or implication, the primary function of court is the duty of the court is to decide what the law is and apply it; nit to make it.

In Velliappa Textiles' case:

It was held that the company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. It was further held that where punishment provided is imprisonment and fine, the court cannot impose only a fine. The majority was of the view that the legislative mandate is to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favor of the construction which exempts a citizen from penalty than the one which imposes the penalty.

In State of Maharashtra v. Jugmander Lal:

It was held that expression, "shall be punishable for imprisonment and also for fine" means that the court is bound to award a sentence comprising both imprisonment and fine. So the court has quashed the prosecution against the corporation. Hence, court provided that unless a statue specifically provides the company can be attributed for the crime of his officers or workers. The next is declined.

In, Standard Chartered Bank and Ors. etc. v. Directorate of Enforcement and Ors. etc.:

The SC had made the scenario crystal clear. It overruled the previous views regarding the Corporate Criminal Liability and had given a new touch to the said doctrine. In this case, Standard Chartered Bank was being prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act of 1973 ("FERA"). Ultimately, the Indian Supreme Court held that the corporation could be prosecuted and punished, with fines, regardless of the mandatory punishment of imprisonment required under the respective statute. The Court initially pointed out that, under the view expressed in Velliappa Textiles, the Bank could be prosecuted and punished for an offense involving rupees one lakh or less as the court had an option to impose a sentence of imprisonment or fine. However, in the case of an offense involving an amount exceeding rupees one lakh, where the court is not given discretion to impose imprisonment or fine, that is, imprisonment is mandatory, the Bank could not be prosecuted.

IV. White Collar Crimes Society:-

If we are saying that these crimes are limited to a particular person or profession because now every person who is even tried to do small tax evasion by showing income low or using other loop and holes to get benefits then even they consider as accused under this. People are keeping forgetting that somewhere for our benefit we are ready to let down someone else.

Yes, the major role is indeed played by an industrialist in the context of White-Collar Crime but at the same time somewhere we are also supporting them even at the smallest level makes them believe that It's ok to do things for their benefit that's how things worked for all persons. We can't deny this fact even our Educational Institutes are also involved in these crimes especially at the time of payment of taxation. A country like India always supports education because that is the only way for a country to come out of many wrong situations and to improve this government always give benefits to the educational institute.

So, besides giving benefits as support to educate children lots of educational institution owners are just get registered their institutes and make benefits for their own. Their motive is not about educating children their main motive is to increase their earnings on the name educational

institute and at the same time get benefits from the government. When our Educational Institute does these things what can we expect from other professional people? When we talked about justice and all we forget at that time somewhere we miss use our law by using its loop and holes to get benefit from it.

Another thing we always tried to make our situation better and in all this we always forget other losses. We do not understand that the situation which we are facing right now we are responsible for it because somewhere at starting we support this even in the smallest way. Those business houses which we consider as the established working place is having maximum fake and illegal contracts. They do that to generate money for their other contract which may be a clean one but yes even this is not wrong that they earn that money from the wrong method.

V. Conclusion

From the preceding sections a strong contrast has been drawn between traditional crimes and White-Collar Crimes. Just like the economy is growing at an ever-increasing rate with the greatest technology and inventions been made of, the crimes are also changing with the changing times. Every advancement comes with its own disadvantages, in case of technology it was the amateur systems which gave rise to the increased mis-handling of the systems. With the greatest advantage that these crimes are not identified very easily, offenders in their greed for more end up committing such crimes which leave its imprint for decades to come. It directly impacts the economic cycle of the nation, resulting from one effect to another.

As per a latest news report, absconders have defrauded the nation of Rs. 17, 900 crores and in around 66 cases the proclaimed offenders have left the nation. This is a clear indication about the increasing crime rate and the inability of the existing legislations to serve the cause. Apart from the legislations, the authorities are not empowered to take the necessary steps to sop the offender from leaving the nation. It is also time for the nation to realise the importance of extradition policies. Now it is become imperative on part of the nation to punish the guilty of their crime or else upcoming generations shalln't fear the prosecution and would continue to defraud the nation and take away a substantial portion of its investments which could have been constructively put to use for the development of the nation.

One of the very first steps that should be taken to curb these crimes is to make the legislations strong so as to deal with the future face of these crimes. This has to be in respect of all the petty and the serious offences, which deter the offender from committing any such offence. Next being it to make the surrounding authorities competent enough to take the necessary actions as and when required. The nation shall also focus on strengthening its extortion policies and

treaties so that immediate steps can be taken to punish the guilty and retrieve back the money to the national economy.

References:-

- Andersen, J. J., Johannesen, N., Lassen, D. D., & Paltseva, E. (2017). Petro Rents, Political Institutions, and Hidden Wealth: Evidence from Offshore Bank Accounts. Journal of European Economic Association, Volume 15, Issue 4, 1 August 2017, Pages 818–860.
- Association of Certified Fraud Examiners (ACFE). 2016. Report to the Nations on Occupational Fraud and Abuse. Available at: https://www.acfe.com/rttn2016/docs/2016- report-to-thenations.pdf .
- Benson, M. L., & Simpson, S. S. (2015). Understanding White-Collar Crime: An Opportunity Perspective. New York: Routledge.
- Bilimoria, Diana. 1995. "Corporate Control, Crime, and Compensation: An Empirical Examination of Large Corporations." Journal of Human Relations 48 (8): 891-908.
- Croall, H. (1989). Who Is the White-Collar Criminal? The British Journal of Criminology, 29(2), 157–174.
- Clinard, Marshall B. and Peter C. Yeager. 1980. Corporate Crime. New York: The Free Press.
- Clinard, Marshall B. 1983. Corporate Ethics and Crime: The Role of Middle Management. Beverly Hills: SAGE Publications.
- Coleman, James W. 1985. The Criminal Elite: The Sociology of White Collar Crime. New York: St. Martin's Press.
- Croall, Hazel. 1992. White Collar Crime. Buckingham: Open University Press.
- Dearden, T. E. (2017). An Assessment of Adults' Views on White-Collar Crime. Journal of Financial Crime, 24(2), 309–321.
- Dhami, M. K. (2007). White-Collar Prisoners' Perceptions of Audience Reaction. Deviant Behavior, 28, 57–77.

DOMESTIC VIOLENCE AGAINST WOMEN: A CHECK ON THE EFFICACY OF LEGISLATIVE FRAMEWORK

- GAWARAJA SUTHAR[119]

Abstract

Domestic violence is a very well-known and most frequent towards women's in India. Domestic violence against women is understood as a situation supported and reinforced by gender norms and values that place women in a subordinate position in relation to men. This study reviles the presence of domestic violence in Indian women's. A woman is still neglected lot and subject to discrimination and victimization at home as well as outside home.

This grim picture is both at national and international. Women, irrespective, of their caste, colour and creed have been discriminated and were given subhuman status. The dominance of the then male centred ideas adversely affects the status of women. The prevalence of domestic violence reveals that, contrary to popularly held belief that home is the safest place to live in often turns out to be the dangerous. Indian women have been victimized, humiliated, tortured and exploited through the ages. Female-foeticide, *Satipratha,* child marriage, dowry, social boycott of the widows, etc., are just a few examples of the atrocities suffered by women.

Keywords: *domestic violence, women, gender discrimination, gender sensitization*

I. Introduction:-

Domestic violence is a serious social malady, an exploding problem. Also, it is one of the most common but least reported crimes. In recent times, however, there is a rush of publicity regarding women abuse in general. There are those who the victims as wrong-doers and justify violent acts such as wife beating. Some human right activists prefer to consider domestic violence as 'structural' violence in the family that manifests itself in poverty and unequal access to health, education etc.

Worldwide domestic violence is estimated between 20 to 50 per cent in various countries. Domestic violence is the manifestation of structural rigidities, unequal distribution of power and abuse of power itself. Further, as Jawaharlal Nehru said, "The status of women indicates the character of the society". Domestic violence is a manifestation of structural rigidities, unequal distribution of power and abuse of power itself. Further, as Jawaharlal Nehru said,

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"The status of women indicates the character of the society". Domestic violence, alternatively called ‘violence in the family' is not an occasional menace like eve-teasing nor a rare argument or fight; it is a serious social malady, an exploding problem. Even in families where women are not secluded or relegated to the background women are no longer safe, physically or emotionally. There are many reports of abuse and atrocities against women committed by not necessarily by some distant relative or ‘in-laws' but even by an intimate and co-habiting partner. There are also instances of violence in silence. Torture and deaths have also occurred in many cases in educated, cultured and modern families.

Domestic violence is thus, a crime. There are cases to show that women suffer violence in homes before, during and after marriage. The housewife is now designated as the ‘homemaker'. Even ‘family' – known for its deep bonds as an institution – has also become sources of vulnerability and victimisation of girls and women. Home – the basic unit in the society where equality of opportunity and participation in decision-making should start – has become the habitat of discrimination and violence (Hans & Cardoza, 2011).

II. Absence of Gender Security:-

The Chamber's Twentieth Century Dictionary defines violence as, "excessive, unrestrained or unjustifiable use of force". In a legal sense, violence is the employment of methods of physical coercion for personal or group ends. One of the kinds of societal violence is domestic violence, or ‘family and intimate violence'. Domestic violence refers to the inhuman treatment of women at home – spouse, children, parents, servants or anybody living in a dependent situation in a household – whether physically, sexually, verbally or emotionally. In a narrow sense, domestic violence is violent victimisation of women, within the four walls of the house but in a broad sense, she carries the infliction outside, if she has dual or multiple roles. Home-harassment is what domestic violence simply means.

Gender-based violence (GBV) is violence targeted at individuals or groups on the basis of their gender. Research suggests that a significant proportion of women worldwide will at some point in their lives experience GBV (GSRDC, 2015). GBV is often divided into two interlinked categories, interpersonal and structural/institutional violence.

There are two central conceptualisations: a gendered (patriarchal) and a feminist. Historically, patriarchal views of heterosexual relationships have influenced familial constructs in most parts of the world. With patriarchy generally understood as "a system of society or government in which men hold power and women are largely excluded from within the lens of patriarchy, women's existence as the property of their husbands comes from legal constructs of marriage

derived from property law, under which women were seen to be dependents of men, without legal capacity. This had often resulted in male voices dominating over female voices in economic, sexual, intellectual, cultural, spiritual, and emotional spheres of influence within the family (Pence & Dasgupta, 2006: 6). The acceptance of the dominance of men can lead to domestic violence and other forms of violence within the family household.

III. Existing Legislative Framework

A coordinated and systematic response needed for the domestic violence in India. U/s. 498A of the Indian Penal Code is the most significant reforms for protecting women's rights. It is also important that civil law remedies to provide protection to women victims of domestic violence and the Domestic Violence Bill, 2005 is one of the most significant. The Indian Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women.[120] In the sphere of right to equality no uniform judicial approach has been followed by the Indian judiciary in analyzing the legal position of women. In the early cases, the courts have employed a differential analysis in classifying between men and women as a group and in upholding legislations that conferred advantageous position to women. Gradually in cases relating to public employment, discriminatory provisions favourable to men etc., the differential approach was disregarded and assured a welcoming step in ensuring gender justice.[121]

(a) Immoral Traffic (Prevention) Act, 1956:

To prevent the practices of selling and buying of minor girls for immoral purposes this act was passed. Traffic in human beings i.e. selling and buying of men and women like goods, for Article 23 of the Constitution of India prohibits such acts, for immoral purposes.

(A) Protections under Criminal Law

Protections available to the women under criminal laws are as follows:

(a) Female Foeticide - (Causing miscarriage): Offences relating to the birth, death, exposure etc. of children are made punishable to protect the female foetuses.[122] Female foeticide related examinations are violence against unborn girl child. It is a silent violence even before the birth of a female child and this practice is used to get the rid of female foeticide. The tragedy of a girl child begins in the so called institution of the society, 'the family', when the child is in the

[120] Anjani Kant, (1997), Women and the Law, A.P.H. Publishing Corporation, New Delhi,p.130

[121] AIR v *Nergesh Mirza* 1987 SC 1829; *C.B. Muthamma* v. *Union of India* A.I.R. 1979 S.C. 1868; *Ammini EJv. Union of India* A.I.R. 1995 Ker 252,268.

122 Sections 312-318 of IPC.

mother's womb. Thus it is identified as crime against life, relating to birth or death of children[123].

(b) Female Infanticide: To protect girl children from Female Infanticide the offences of infanticide are made punishable under IPC. Causing infanticide is offence against life after birth. Exposure and abandonment of a child under 12 years by parents or persons having care of a child, with the intention of wholly abandoning it, is an offences. The punishment is imprisonment for seven years or fine or both[124]

(c) Rape: Rape is not strictly the offence committed by the family members but there is a possibility of such occurrences within four walls also.

Sexual intercourse by a man with his own wife who is below the age of 15 years is considered as marital rape.[125]

(d) Kidnapping or Abduction for Different Purposes:

Kidnapping or abducting a woman, to compel her to marry any person, against her will or to force or seduce her to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. This section prescribes punishment for any person who abuses his authority to criminally intimidate a woman or induces her to go from any place with intent that she may be forced or seduced to have illicit intercourse

(e) Murder:

Murder is the most dangerous offence against the life of any person. It is not directly concerned with the offences against women but it includes the incidences of dowry deaths and Sati, thus, the cases of dowry death can be covered under section 302 along with section 304 B and the cases of Sati can be covered under section 302 and 309 of IPC (attempt to commit suicide.

(f) Immoral Traffic in Human Beings:

Traffic in human beings means selling and buying of men and women like goods and includes immoral traffic in women and children for immoral purposes.[126] The law prohibits the sale and purchase of minors for immoral purposes. These provisions relate to selling or buying of persons under eighteen years of age for immoral purposes. [127]

123 Section 314 IPC.
124 Section 317 IPC.
125 Section *375* IPC.
126 Raj Bahadur v. Legal remembrance. AIR, 1953. Calcutta, 522.
127 Section 372-373 IPC.

(g) Indecent Representation of Women: These are the offences against public morals and decency. The sections of IPC do not expressly include obscenity against women but indirectly these sections protect women from being annoyed and hence aim at preventing obscenity. IPC prohibits selling, distributing, importing, printing (for sale or hire) or publicly exhibiting any obscene book, pamphlet, paper, drawing, painting, representation or figure or any obscene object what so ever or attempting or offering so to do. It also prohibits singing, reciting or uttering in public obscene song or words to the annoyance of others. For the purpose of the world obscene ordinarily is immoral and is also connected with something, sexual.[128]

(h) Cruelty and Torture: The Indian Penal Code prohibits a husband or a relative of a husband of a woman subjecting her to cruelty[129], and punishment of imprisonment for a term which may extend to three years or fine or both.

(j) Mock Marriage:

Mock marriages are strictly prohibited by the penal law which provides that, cohabitation or sexual intercourse caused by a man deceitfully inducing a woman to marry with him is punishable with imprisonment for ten years and fine.

(B) <u>Protections under Special Laws</u>

There are also special legislations to protect the victims of domestic violence. The following laws are directly or indirectly related to the problem of domestic violence.

(b) Guardianship And The Wards Act, 1890:

It says that, where a guardian of the minor is to be appointed or where the questions of custody of the minor is to be decided, the courts take into consideration various factors which may vary in each particular case, the paramount consideration being the welfare of the minor.[130]

(c) The Child Marriage Restraint Act, 1929 (Amendment in 1978):

Girls being considered a liability, are often married off by their families at an early age. The Child Marriage Restraint Act of 1929, after an amendment in 1978, thus raised minimum age of marriage of girls to 18 years and for boys to 21 years. The Act authorizes police officers to investigate cases of child marriage as if they are cognizable, but does not authorize them to arrest any person without a warrant or an order of Magistrate. The Act clearly makes 'Child

128 Section 292-294 of IPC.
129 Section 498 -A IPC.
130 . Section 17 of the Guardianship and the Wards Act, 1890 read with section 13 of the Hindu Minority and Guardianship Act.

Marriage', a criminal offence, which is punishable by law but it does not invalidate the marriage.

(d) The Hindu Adoptions And Maintenance Act, 1956:

A Hindu male or female is bound, during her/his lifetime, to maintain his/her minor (under the age of 18 years) children, legitimate/illegitimate or adopted. Maintenance, u/s 3(b) here includes food, clothing, residence, education and medical attendance and treatment. In case of unmarried daughter, it includes, 'the reasonable expenses of an incident to her marriage'[131].

(e) The Hindu Minority And Guardianship Act, 1956:

It applies to Buddhists, Sikhs and Jains. It applies to minors i.e. any child legitimate or illegitimate, who has not attained the age of 18 years of age.[132]

(f) Medical Termination Of Pregnancy Act, 1971:

The state has enacted special legislation mainly for the purpose of prevention of the occurrences of miscarriage. If the termination of pregnancy is carried out to get rid of female foetuses and if it is hazardous for a woman's health, is punishable under this Act.

(g) The Dowry Prohibition Act, 1961, (Amended in 1984):

Realizing the gravity of the situation, the Govt, of India passed the Dowry Prohibition Act, 1961. This Act prohibits the system of 'Dowry' i.e. a property or valuable security given or agreed to be given either directly or indirectly, by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person at or before (or any time after the marriage) (in connection with the marriage of the said parties but does not include) Dowry Or Mehr in the case of persons to whom the Muslim personal Law (Shariat) applies.

The penalty for demanding dowry is imprisonment for a term which shall not be less than six months but which may extend to two years and with fine up to Rs. 10.000.[133]

(h)The Family Courts Act, 1984:

In cities, where the Family Courts Act, 1984 is implemented, matters relating to maintenance, custody and access come under the jurisdiction of the Family Court.[134] One common legal provision on the issue of maintenance, which is applicable to all communities,

131. Section 20 and Section 3{b) of the Hindu Adoptions and Maintenance Act, 1956.
132. Sec. 4(a)). Section 6 (a), (b) and (c) of The Hindu Minority and Guardianship Act. 1956.
133 The Dowry Prohibition Act, 1961(Amended in 1984).
134 The Family Courts Act. 1984.

is the Criminal Procedure Code. This provision is applicable to both legitimate and illegitimate children.[135]

(i) Juvenile Justice Act, 1986:

This Act is enacted for the protection of neglected, uncontrollable and delinquent juveniles. The Act considers 'Cruelty' to juveniles as a special offence. Putting children under begging is another form of child labour and also child abuse, which is considered a serious offence under both IPC and Juvenile Justice Act, 1986, (JJA).

(j) Indecent Representation of Women (Prohibition) Act, 1986:

Any person who contravenes the provisions of the Act shall be punishable on first conviction with imprisonment of either description for a term which may extend to 2 years and with fine which may extend to Rs.2000. And in the event of second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with fine not less than Rs. 10,000 but which may extend to Rs. 1,00.000. The legal position thus effectively affirms and promotes the principles of equity and equality of women and takes care of their special needs.[136]

(k) Pre - natal Diagnostic Techniques Act, 1994:

It suggests stringent action by law enforcing bodies and to put check on the occurrences of female foeticide. One who contravenes any of the provisions of the Act or rules is made punishable with imprisonment for a term which may extend to three years or with fine which may extend to Rs. 10,000, and on any subsequent conviction with imprisonment which may extend to five years and with fine which may extend to Rs. 50,000.[137]

IV. Conclusion

On the analysis of prevalent laws relating to domestic violence we may say that they are not complete in the sense that they provide for criminal trial of violence and is silent on means for immediately stopping the violence occurring in the family. Secondly it covers only married woman, other intimate relationships are outside the gambit of this law, this law also does not protect the right to reside in shared household which is very important aspect of law. Statistics indicate that woman in the country do not own property or the matrimonial home which belongs either to the husband or to his family members. The man therefore is literally lord and master of the home. This analysis would not be complete without mentioning that the matrimonial

135 Section 125 of the Criminal Procedure Code.
136 . Section 6 of Indecent Representation Of Women (Prohibition) Act, 1986.
137. Section 23 of Pre - natal Diagnostic Techniques Act, 1994.

laws of this country do not contain any significant rights to matrimonial property for women, therefore on the breakdown of a marriage, the woman has to literally leave with empty hands. Domestic violence is a widespread problem throughout the developed and developing world and makes serious impact on quality of human life and broader development. Violence against women is the manifestation of a historically unequal power relationship between men and women. It is a conditioned response and it is not natural or born of biological determinism. In the olden days violence against women was a result of the prevalent atmosphere of ignorance and feudalism. Today violence against women is an uncontrollable phenomenon, which is a direct result of the rapid urbanization, industrialization and structural adjustment programmes which are changing the socio-economic scenario of our country.

Domestic violence affects the lives of many women both in the urban and rural areas in India. It has been found to recur throughout the life cycle of women and has extensive repercussions. Violence against women takes many forms-physical, sexual, psychological and economic. These forms of violence are interrelated and affect women even from before birth till old age. Women who experience violence suffer a range of health problems and their ability to participate in public life is diminished. Violence against women harms families and communities across generations and reinforces other violence prevalent in society. Violence against women also impoverishes women, their families, communities and nations.

References:-

1. Althreya U.B., Sheela Rani and Chukath "An Indian Mother Expendable," The Hindu; dated 7th January 1996.
2. Ahuja R. "Crimes against women" Rawat Publication, Jaipur; 1987.
3. Anveshi. "Women in India and their mental Health",Hyderabad;1995.
4. CaralisP.V.and Musialowsk R. women's experiences with domestic violence and their attitudes and expectations regarding medical care of abuse victims, Southern Medical Journal 90 (11):1075-1080, 1997.
5. Flavia, Agnes. "Protecting women against violence", Economic and Political Weekly; 25th April 1992.
6. Gulati, Ramalingam and Gulati, Gender profile Kerala WID, royal Netherlands Embassy, New Delhi,1997.
7. Anjani Kant, (1997), **Women and the Law,** A.P.H. Publishing Corporation, New Delhi,p.130

8. Sinha, Niraj, (1984), Women and Violence, Vikas Publishing House, New Delhi, pp.22-36.
9. Suneetha, A & Nagaraj V. (2005), Economic and political Weekly "Adjudicating (Un) domestic battles", 40(38), 4101,4103.
10. Medha Bisht, (2004), Women's Link, Women as victims of violence: Emerging Nuances and Interventions, Vol. 10, No. 4, 8-10.

RESERVATIONS IN HIGHER EDUCATION: A DEVELOPING OR ABORTIVE APPROACH

- GUNJAN SHARMA[138]

Abstract

Reservation Policy in India is a process of reserving certain percentage of seats (maximum 50%) for a certain class such as Scheduled Castes, Scheduled Tribes, Backward classes, etc. in Government educational institutions, government jobs, etc.

'Reservation' has always been a debatable topic. The basic object of reservation (as it is said) is the upliftment of weaker sections. There is reservation in the field of education, employment etc. However, this paper is basically concerned with respect to reservation in higher education. The paper critically evaluates the reservation policy in the light of recent judicial pronouncements as well as changing needs of time. It throws light as to how far the object of reservation has been realised, and finally makes an appeal that it is high time to rethink over the reservation policy in an impartial and objective manner.

Keywords: *Reservation, India, Higher Education, Policy*

I. Introduction:-

The educational institutions in India, in order to maintain their standard and reputation, take the best talents. However, it is subject to article 29(2) of the Constitution which imposes a limitation that no citizen shall be denied admission into any educational institution either maintained by the state or receiving aid from the state on the grounds only of religion, race, caste, language or any of them. It is also subject to general mandate of non-discrimination under articles 14 and 15 of the Constitution. One finds here the philosophy that the doors of temple of learning will be kept open for every eligible candidate.

But the practice has not been so with many institutes of higher learning. Special by-lanes have been made for different categories of students to enter into the universities/colleges, bypassing the rigid eligibility requirements and/or tests. There are reservations prescribed by the government and there are reservations created by the educational institutions themselves. Some

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have been adopted under the constitutional umbrella, some have been made as a vote catching device, and a few are introduced to appease the agitators or those who are on „fast unto death". In such circumstances, surprisingly, the Supreme Court of India on April 10, 2008, in its landmark judgment in Ashok Kumar Thakur v. Union of India & others,[139] upheld the government move for initiating 27% OBC quotas in all government funded institutions, including institutions of higher education. As a result of this, the government is now in a position to reserve upto 49.5% of the seats in all central universities, prestigious professional schools, and elite colleges, such as the Indian Institute of Technology (IITs), Indian Institute of Management (IIMs), National Institute of Fashion Technology (NIFT) and government medical colleges etc.

This paper makes an attempt to look into the intrinsic value of these questions and try to sort out the best possible answers for the same. The present paper critically evaluates the reservation policy; its necessity, constitutional permissibility, impact on the standard of education and also seeks to advance certain alternative suggestions to do away with reservation in higher education.

II. Historical Background:-

. Some major events relating to reservation policy in pre-constitutional period followed this rule:

- 1882 - Hunter Commission was appointed. Mahatma Jyotirao Phule made a demand of free and compulsory education for all along with proportionate reservation/ representation in government jobs.
- 1891 - The demand for reservation in government jobs was made as early as 1891 with an agitation in the Princely State of Travancore against the recruitment of non-natives into public service overlooking qualified native people.
- 1901 - Reservations were introduced in Maharashtra in the Princely State of Kolhapur by Shahu ji Maharaja.
- 1908 - Reservations were introduced in favour of a number of castes and communities that had little share in the administration by the British.
- 1909 - Provisions for reservation were made in the Government of India Act, 1909.
- 1919 - Montagu-Chelmsford Reforms were introduced. Provisions for reservation were made in the Government of India Act, 1919.

[139] (2007) 4 SCC 361.

- 1921 - Madras Presidency introduced Communal G.O. in which provisions for reservation were made: 44% for non-Brahmins, 16% for Brahmins, 16% for Muslims, 16% for Anglo-Indians/Christians and 8% for Scheduled Castes.
- 1935 - Indian National Congress passed a resolution called Poona Pact to allocate separate electoral constituencies for depressed classes.
- 1935 - Provisions for reservation were made in Government of India Act, 1935.
- 1942 - B.R. Ambedkar established the All-India Depressed Classes federation to support the advancement of the scheduled castes. He demanded reservations for the Scheduled castes in government services.
- 1947 - India obtained Independence. B.R. Ambedkar was appointed chairman of the drafting committee for Indian Constitution. The Indian Constitution prohibits discrimination on the grounds only of religion, race, caste, sex and place of birth. While providing equality of opportunity for all citizens, the Constitution contains special clauses "for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Separate constituencies allocated to scheduled castes and tribes to ensure their political representation for 10 years. (These were subsequently extended for every 10 years through constitutional amendments).

It is significant to note that article 15(4), which provides a constitutional basis for reservation in education, did not form part of the Constitution as it originally stood in 1950, although there was provision for reservation of appointments or posts in favour of any backward class of citizens under article 16(4). However, an equivalent of the current article 15(4) was the subject matter of considerable debate amongst the founding fathers of the constitution.

III. Reservation in Higher Education – A Critique:-

It is a well-settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the state concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which include the SCs and STs, to reserve certain seats in educational institutions.

The pivotal role of an activist Supreme Court in shaping India's affirmative action policies cannot be gainsaid. With due respect to the Apex Court, I most humbly submit that it has failed to understand the rationale behind reservation, which was a temporary measure but it now seems to continue till eternity. It seems that the discretion of the state has been converted into a right of a particular undefined group of persons. The court has accorded caste-based

classifications such a presumption of constitutionality that it has made them quite unchallengeable. The Court has given unbridled discretion to the state to determine the condition that is appropriate to trigger affirmative action for the backward classes. India's affirmative action policy, by its very nature, is not susceptible to any pre-fixed termination date. The national commission that reviewed the working of the Constitution for the past half-century recommended "that the ultimate aim of affirmative action or reservation should be to raise the level of capabilities of people of the disadvantaged section and to bring them at par with other sections of the society." This seems to be an aim in perpetuity.

Any sort of discrimination or classification, in order to withstand the test of equality enshrined in article 14, must satisfy the following two conditions: I)The classification must be founded on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and II)The differentia must have a rational relation to the object sought to be achieved.

- **No Intelligible Differentia-**

This classification might have been justified 60 years back when social evils like „untouchability", caste system etc. were greatly practised in India. As a result, people belonging to these categories were prevented from mixing with common masses and deprived of all social, economic and political benefits. But now the situation has significantly changed. The light of education has helped us to abandon many of the evil (non-scientific) practices. Now, we have been able to abolish untouchability from our society. We have different statutes to protect the interests of SCs and STs such as the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 etc.

It may be worthwhile to mention that the Supreme Court in ***Ajay Kumar Singh v. State of Bihar***[140] and in several other cases held, "A class/caste may be backward in present time, but it may not be so in coming years due to their socialisation with society and job opportunities. Once a caste is socially and educationally backward community, it cannot remain so for all times to come. It requires periodical review.

- **No Reasonable Nexus with the Object-**

The basic policy of reservation is to off-set the inequality and removes the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and strategies. Thus, the main ground on which reservation is sought to be justified in India is that the people belonging to the class- SC/ST/OBC were historically oppressed and

[140] (1994) 4 SCC 401.

denied respect and equal opportunity in Indian society and were thus under-represented in the nation building process. Hence, reservation is a way to bring them at par with the general class of the society. Thus, the object sought to be achieved by way of reservation is the overall upliftment of SC/ST/OBC. It is to be remembered that reservation is not an end in itself; it is one of the means to achieve equality. The policy of reservation adopted to achieve that end must, therefore, be consistent with the objective in view.

But, in the present time, it seems that the policy of reservation is being continued without any object. Even after sixty years of India's independence, no concrete steps have so far been taken to determine as to how far the object of reservation has been achieved. The specific requirement of periodic review as stated in section 11 of the National Commission for Backward Classes Act,1993 and in para 847 of Indra Sawhney case has not been followed, and as a consequence, the prevailing lists have swelled to include several thousand "castes" which are treated as „backward classes", thereby satisfying the political mandate.

- **Hampers Quality-**

It is also a fact that reservation of any kind hampers the quality of higher education. Through reservation, we may simply create a pass for the reserved category students to enter institutes of higher learning and professional excellence. But it is really very shocking that the majority of such students fail to cope up with the standard of education required at such level. This becomes clear from the fact that in the last ten years or so, in the courses like IITs etc, more than 90% SC/ST/OBC students are either dropped out or were declared failed in the first year or in the second year. In many cases, they simply failed to acquire the benchmark required to sit in the examination.60 Thus, the reservation made by the central government/state government has become redundant as these students fail to acquire the minimum benchmark. As a result of this, the reserved seats in higher courses are lying vacant.

IV. Conclusion

The primary imperative of articles 14 and 15 is equal opportunity for all across the nation to attain excellence. Excellence cannot be allowed to be compromised by any other considerations because that would be detrimental to national interest. Therefore, to sympathize whimsically with the weaker sections by selecting sub-standard candidates, and that also in the higher level of education, is to punish the society as a whole by denying the prospect of excellence.

There is no denying the fact that there exist weaker or backward classes in the society which need special care and attention for their development. In fact, uniform development of society is not possible without the development of backward classes. But reservation is not the only

means for the development of backward classes and that also in the higher level of education which aims at quality education. But, in the modern time, the determination of the backward class has itself become a matter of huge controversy. Therefore, first of all, proper procedure and criteria should be laid down to determine the real backward classes of the society who need special attention. Caste should not be considered as relevant criteria for determination of backwardness as it is against the constitutional principle. Rather poverty, geographical location, educational level and occupation may be considered as relevant criteria. A statute in this regard is the need of the time to avoid arbitrariness and confusion in the determination of backward classes. The Law Commission of India, the National Commission for Scheduled Caste and Scheduled Tribe and the National Commission for Backward Classes can successfully help in framing a statute in this regard.

Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunate or backward classes in the mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be withdrawn in the own interests of „the protected" so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level only keep the cripples, crippled forever

References:-

1. The Constitutional Law of India by Dr. JN Pandey, Central Law Agency.
2. D.D. Basu, 2 Commentary on the Constitution of India 1827 (2007).
3. Paramananda Singh, "Promoting equality through reservations: A critique of judicial policy and political practice", 20 DLR 46 (1998).
4. Nani Palkhivala, We the Nations: The Lost Decades 179 (1994).
5. Government of India, Report of the National Commission to Review the Working of the Constitution (March 31, 2002); available at http://lawmin.nic.in/ncrwc/finalreport.htm. (popularly known as Venkatachaliah Commission Report).
6. K.G. Janpillai, "Equality in the affirmative action", 27 Academy Law Review 48 (2003).
7. R. L. Chaudhari, Concept of Secularism in Indian Constitution 184 (1987).
8. B. Shiva Rao, 2 The Framing of India's Constitution 125 (2005).

9. Marc Galanter, Who are the Other Backward Classes: An Introduction to the Constitutional Puzzle 1812, available at: http://marcgalanter.net/Documents/papers/scannedpdf/WhoAretheOtherBackwardClasses.pdf.

A GLANCE ON ENCOUNTERING DIFFICULTIES IN JUVENILE JUSTICE POLICY IN INDIA

- **HARBIR SINGH**[141]

Abstract

In India, the Juvenile Justice (Care and Protection of Children) Act, 2015, replaced the previous Juvenile Justice Act of 2000. The Act provides a framework for the care, protection, treatment, and rehabilitation of children who are in conflict with the law, as well as children who are in need of care and protection.

Juvenile Justice policy in India treats juveniles in a different way than adults because our society believes that juveniles are different from adults, both in terms of criminal responsibility level and juvenile's potential for rehabilitation. Child is the future of man and protection of their rights is fundamental for future of mankind. Having realized the importance of promotion and protection of child rights, the international community under the aegis of the UN has adopted special convention for the welfare of child. Thereafter, most of countries of the world including India have also enacted protective laws and formulated policies in matching with international human rights standards and norms relating to protection of their rights.

The paper seems to make an attempt to highlight the difficulties being faced in real by the virtue of shortcomings in the Juvenile Justice Policy in India.

Keywords: *Juvenile Justice, Child, Human Rights, UN, Welfare*

I. Introduction:

In India, the Juvenile Justice (Care and Protection of Children) Act, 2015, replaced the previous Juvenile Justice Act of 2000. The Act provides a framework for the care, protection, treatment, and rehabilitation of children who are in conflict with the law, as well as children who are in need of care and protection.

The Juvenile Justice system in India is based on the principle of reform and rehabilitation rather than punishment. The system is aimed at providing care and protection to children in need of it and rehabilitating those who have committed an offense. The system aims to ensure that the child's best interests are protected at all times and that their rights are respected.

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The Act provides for the establishment of Juvenile Justice Boards (JJB) and Child Welfare Committees (CWC) at the district and sub-district levels to deal with cases of children in conflict with the law and children in need of care and protection, respectively. The JJB is responsible for determining the age of the child and whether they have committed an offense, while the CWC is responsible for the care and protection of children who are in need of it.

The Act also provides for various forms of rehabilitation and reintegration measures for children in conflict with the law, such as counseling, education, vocational training, and community service. The aim is to ensure that the child is not stigmatized and has the opportunity to reintegrate into society as a responsible citizen.

Overall, the Juvenile Justice system in India aims to provide a protective and rehabilitative environment for children in need of care and protection and those in conflict with the law, while also ensuring that their rights and best interests are protected.

II. Historical Perspective:

" No civilised society regards children as accountable for their actions to the same extent as adults' ... The wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed".

The history of the juvenile justice system in India dates back to the colonial era when the British enacted the Apprentices Act of 1850. This act allowed for the apprenticeship of children who were orphaned or whose parents were unable to care for them. The act was amended in 1867 to provide for the protection of child workers and apprentices. In 1891, the Bengal Children Act was enacted, which provided for the establishment of juvenile courts and probation officers. However, the act was limited in scope and only applied to the province of Bengal.

After India gained independence in 1947, the Children Act of 1960 was enacted, which provided for the establishment of juvenile courts and probation officers in all states. The act aimed to provide for the care, protection, and rehabilitation of children in conflict with the law.

In 1986, the Juvenile Justice Act was enacted, which provided for a comprehensive legal framework for dealing with children in conflict with the law. The act was amended in 2000, and again in 2006, to strengthen the legal provisions for the protection, care, and rehabilitation of children.

Subsequently, India being signatory to the United Nations Convention on the Rights of the Child, 1989, enacted the Juvenile Justice (Care and Protection of Children) Act,2000. The age

of Juvenile was fixed at eighteen years irrespective of gender under the Juvenile Justice (Care and Protection of Children Act, 2000. In order minimize the stigma and in keeping with the development needs of the juvenile or the child, the new Act classifies juvenile into two classes, 1) Juvenile in Conflict (delinquent juveniles) and 2) Child in need of care and protection. The Juvenile Justice Board is constituted to dal with juvenile in conflict with law while Child Welfare Committee is constituted to deal with child in need of care and protection.

In 2015, the Juvenile Justice (Care and Protection of Children) Act was enacted, which repealed the earlier acts and provided for a more child-friendly justice system. The act focuses on the rehabilitation and reintegration of children in conflict with the law, rather than punishment. Today, the juvenile justice system in India is governed by the Juvenile Justice (Care and Protection of Children) Act, 2015, and aims to protect the rights of children and ensure that they receive the care and support they need to lead productive lives.

III. Insights of The Juvenile Justice (Care and Protection of Children) Act, 2015:

The new 2015 Act attracted many critiques challenging the validity of the Act for not meeting the international standards governing the child rights and constitutional guarantee a child is supposed to be provided with. Of the many critics, the significant one is change under the new 2015 Act is categorizing the offences as "Petty". "Serious" and "Heinous" and transferring the juvenile above the age of sixteen to adult court, if the Juvenile Justice Board concludes that the level of maturity of the juvenile indicates that he committed the heinous offence as an adult and not as a child. The object of the legislators was to see that a Juvenile committing a 'heinous' crime would meet rigorous treatment as that of an adult compared to the Juvenile committing less serious crimes.

- **Preliminary Assessment Report** - Difficulties:

The Juvenile Justice Board is required to assess the mental and physical capacity of a child above the age of sixteen who committed heinous offence with reference to his ability to understand its consequences, and the circumstances in which the said offence was committed. The Board may obtain the assistance of experienced psychologists for making preliminary assessment of the child. The fixed parameters for making mental and physical assessment of child is not provided under the Act, therefore the preliminary assessment report would be based on inferences basing the gravity of the offence committed by a child as an indicator of his level

of maturity. In absence of any scientific method for determination of maturity level of child, it would be difficult for the Board to make preliminary assessment report for accurately determining the maturity level of a child.

Infact, the research on neuroscience reveal that while the cognitive capacity of a child above the age of sixteen is similar to that of an adult but the psychosocial maturity is not8 ,as such correlating the heinousness of crime to the maturity of the juvenile would be contrary to the medical research. In absence of no scientific accurate method to determine the maturity of an individual, the demand for making an individualistic determination of the maturity of juvenile between the age of sixteen to eighteen, poses difficulty to the Board in making preliminary assessment report in order to transfer a juvenile to the a Children's Court for trial as an adult.

- **Age of Consent and Juvenile Justice Act-**

The amendment of Juvenile Justice Act, 2015 has created controversy in regard to the Age of Consent, when it is read with the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and the Prohibition of Child Marriage Act (PCM Act) . First of all the POCSO Act states the age of Consent is 18 years10 and if any crime committed by a Juvenile under the POCSO Act then as per the section 23 of the POCSO Act it will be dealt as per the provision of Juvenile Justice Act, 2000 (Now as per the new amended Act). Again, the PCM Act states that the child marriages are voidable but not void11.In such a situation, many Juvenile who are involved in love relationship can marry and perform consensual sex. In such circumstance the consented sexual act may attract the provision of POCSO Act and Juvenile Justice Act, 2015 and they may be tried as adult offender.

- **Ambivalence in Children Court-**

As per Section 19 (1) of the 2015 Act, upon transfer of juvenile to the jurisdiction of the Children's Court, such Court is empowered to conclusively determine whether there is "need for trial" of the child as an adult. If the Children's court concludes that trial as an adult is not required, it conducts an enquiry as a Board and passes appropriate order under Section 18 of the Act. And in case, child is tried as an adult, such child would be prosecuted and punished as an adult in accordance with the Code of Criminal Procedure, 1973. It is pertinent to note that the basis for exercise of discretion by the Children Court under Section 19 of the Act is absent, as such the inquiry for determination as to "need for trial" of the child as an adult is highly subjective and prone to arbitrariness.

IV. Conclusion:

Despite a uniform law on juvenile justice coming into force way back in 1986, not much has changed in terms of preventing juvenile crimes or treating children in conflict with law in a manner consistent with international standards and policy commitments. On the contrary, even while the child rights movement in India continues to struggle for improving the present juvenile justice law and its implementation, inability of the current juvenile justice system to deal with children committing heinous offences is being stated by the government as one of the primary reasons for changing the law and subjecting children in conflict with the law to the adult criminal justice processes and increased incarceration. India is not new to the changes being brought about in the national juvenile justice laws and policies across the globe. The economics of emotions seems to be guiding the economics of juvenile justice and very little is available to assess its impact on society and national development. Diverting away from the well-established principles of juvenile justice and child rights and preferring a punitive approach to the restorative justice approach, without creating scientific evidence to support such moves and without even implementing the existing law the way it ought to have been done, cannot be our policy on juvenile justice. Certainly not, unless we accept that we have lost the capacity to even think what impact such changes can have on generations to follow and the society at large.

One must not forget that juvenile justice law is based on a strong foundation of reformation and rehabilitation, rather than on retribution. Therefore, drastic changes proposed in some key areas of the existing system of juvenile justice need very deep introspection. There were minimum five judgements of the Supreme Court, namely **Rohtas (1978), Raghbir (1981), Abujar Hussain (2012), Salil Bali (2013) and Subramaniam Swamy (2014)** which have been ignored in the new 2015 Act in enacting Section 19 which provide for transferring juvenile aged above 16 year to Children's Court. In each of these judgements, it was categorically provided that all children should be dealt with under the juvenile justice system but not under adult criminal justice system.

References:

- Bhattacharya S (2000) Juvenile Justice: An Indian Scenario, New Delhi Regency Publications

- Chowdhary R (2005) Law relating to Juvenile Justice in India, Allahabad, Orient Publishing Company 3.R.V Kelkar, Criminal Procedure, Sixth Edition, Eastern Book Comp.
- Ram Ahuja, Social Problems in India, 3rd Ed, Rawat Publication, Ch-15,Pg-379.
- Juvenile Justice (Care and Protection of Children) Act 2015.
- Preston Elrod & R.S Scott Ryder , Juvenile Justice-A Social Historical and Legal Perspective, 3rd ed, Jones and Bartlet Publishers, Ch-1,Pg-8.
- Justice P.S Narayana, Commentary on the protection of children from Sexual offence Act 2012, Universal Publication, 2013 Edition.
- Rolf Loeber,David Farrington, Serious and Violent Juvenile Offenders, Sage Publication.
- Ram Ahuja, Social Problems in India, Rawat Publication, 3rd ed, Ch-15,Pg 379

THE RECENT TRENDS OF PUBLIC OPINION AND CONCOMITANT ISSUES ENCOUNTERED IN CRIMINAL JUSTICE SYSTEM

- HARPREET SINGH[142]

Abstract

This article reviews evidence for the effects of public opinion on court decision-making, capital punishment policy and use, correctional expenditures, and incarceration rates. It also assesses evidence about the factors explaining changes over time in public support for punitive crime policies. Most of this evidence originates from outside of our discipline. I identify two reasons that criminologists have not made more progress toward understanding the opinion-policy relationship. One is an unfamiliarity with important theoretical and empirical developments in political science pertaining to public policy mood, parallel opinion change, majoritarian congruence, and dynamic representation. Another is our overreliance on cross-sectional studies and preoccupation with comparing support levels elicited with different questions (global versus specific) and under different conditions (uninformed versus informed). I show how the resultant findings have contributed to misunderstandings about the nature of public opinion and created a false summit in our analysis of the opinion-policy relationship.

Keywords: *Punitiveness, Policy Mood, Public Opinion, Capital Punishment, Sentencing, Courts*

I. Introduction:-

With the emphasis placed on democratic values in contemporary society, much attention has been paid to the role of public opinion in the formation of public policy generally and criminal justice policy specifically. The punitive turn in criminal justice policy, epitomized by policies such as "three strikes" laws, truth-in-sentencing, and mandatory minimums, is often attributed in part to demand for harsher criminal justice responses from an increasingly punitive public. It has been argued that public opinion, known to be both largely uninformed and frequently misunderstood, both indirectly and directly affects policy. It is known, for example, that politicians and policymakers look to polls and other measures of public opinion to gauge the mood of the public or the popularity of proposed crime policy.

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In other states the criminal justice policymaking process is largely insulated from public influence and opinion. Indeed, there are a number of competing theses about the nature of the relationship between the media, public opinion, and public policy. The media is certainly the source for most of the information the public processes about crime, and research has consistently found that the media, with its focus on stories that emphasize the most unusual and extreme (yet least common) types of crime, offers a decidedly distorted picture of the nature and extent of the crime problem. Much of what people think they know about crime is thus not particularly accurate. Members of the public then form opinions about criminal justice policy issues on this less-than-optimal understanding of crime. Misconceptions aside, public opinion data from a variety of sources offer policymakers a window into the views of their constituents. Some have argued that punitive criminal justice policy is simply evidence of "democracy at work," with policymakers simply responding to the desires of their constituents. Others have argued that policymakers take advantage of, or exploit, public opinion to gain electoral advantage—pandering to an ill-informed public. Still more argue that policymakers actually use the media to manipulate (indeed manufacture) the very opinion that they then use to justify their popular, yet often ineffective, criminal justice policies.

II. Prevailing Scenario in India:-

In India there is glaring absence of much required and anticipated Sentencing policy. Neither the Government nor the Judiciary have led down any structured guidelines regarding it. Meanwhile several Government committees have recommended the laying down of Sentencing guidelines at the earliest. In 2003 the 'Malimath Committee' laid down the guidelines to minimize the uncertainties in awarding sentences. It stated that:

"*The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence*."

Even then Law minister Mr. Veerappa Moily said that "*We are working on the uniform Sentencing policy which is on the lines of ones in place in United States and United Kingdom"* Courts have laid down guidelines regarding Sentencing in several Judgements in the form of *obiter dicta.* Supreme Court of India has laid down the guiding principle of Death Sentence in *Jagmohan Singh* v. *State of Utter Pradesh* where the court gave the concept of balancing '*Aggravating and Mitigating factors'* while awarding Capital punishment. This approach was put to test in *Bachan Singh* v. *State of Punjab* where the court said that:

"*Since an amendment was made to Indian Code of Criminal Procedure, the rule has changed so that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so*"

More recently the well-publicised '*Priyadarshini Mattoo Case'* has proved to be an eye-opener for the whole Criminal Justice system of our country. In Trial Court Additional Sessions Judge G.P. Thareja said of Santosh (convict) that *"though he knew that he is the man who committed the crime, he was forced to acquit him, giving him the benefit of doubt."* Under unprecedented public pressure and media publicity the Government had to file an Appeal in Delhi High Court, where the main accuse was convicted and awarded Capital punishment. The verdict criticized Justice G.P. Thareja's original judgment: *"The trial judge acquitted the accused amazingly taking a perverse approach. It murdered justice and shocked judicial conscience."* In 2010 an Appealwas filed by Santosh in Supreme Court where it was argued by him that the decision given by the lower court is under excessive pressure of '*Media Trial'* which have made the popular Public Opinion against him. The Court upheld his conviction by the Lower Court but commuted his Death Sentence to Life Imprisonment. This decision was widely criticized by the family in particular and Public at large.

In *State of M.P.* v. *Bablu Natt*, the Supreme Court observed that:

"*The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with."*

In *Soman v. State of Kerala*, Supreme Court observed that:

"*Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges*."

III. Significance of Public Opinion in Shaping Sentencing Policies:-

From the above mentioned cases and judicial observations it can be concluded that there is an absolute requirement of Sentencing Policy in India. Judiciary is going through a phase of lack of confidence because of an established model which is opaque, non-responsive and devoid of accountability. Judiciary is believed to be an elite class and its isolation from Public is considered to be legitimate and essential because it imparts a sense of authority to it. In India the Courts have got exclusive privilege to interpret the Law and to stretch its meaning to such an extent which sometimes causes interference in the working of other instrumentalities of the State. Now the question arises how far the basic meaning be extended so that it do not lead to the breakage of social network.

To impart legitimacy to the Criminal Justice system and more specifically the Sentencing policy, it is necessary to give due importance to the Public Opinion. Public Opinion is often confused with Media dominated reactionary utterances of people, popularly known as Opinion Polls, which is far away from accuracy and reasonableness. The response given by the people is mostly based upon his socio-politico-cultural affiliation and is largely emotional in nature. The problem lies not in the Public but the way in which the problem is being put forward before them. Media, which nowadays represent large business conglomerates, generally take up some ongoing controversies and gives an emotional angle to it before putting it in public domain, which make them highly unreliable. This practice is fundamentally wrong because it defeats the very purpose of Opinion Polls right at its nascent stage. The practice should be, to first of all give relevant factual description along with constraints and possible ramifications and then take a well 'Informed' Opinion Poll. In the exercise of Informed Opinion Poll, 'deliberation' plays a very important role. The target of Informed Public can be achieved by initiating a well-managed Public debate. This will help in transformation of individualistic view into a rationale Public view on Sentencing policy.

Two extreme views can be adopted while deciding the Sentencing policy- one based on 'Isolationism' and another based on 'Populism'. In Isolationistic view Public has little or no knowledge of Sentencing policy and the Policy Makers are also not concerned about it. The main criticism of this approach would be that it is highly undemocratic and will create disconnect and disenchantment among Public. Furthermore, since there is no Public role in policy forming, it will give chance to the Politicians to put an undue pressure on the Judiciary as and when required, and in case of any unpopular decision by Court, the Public will stand against Judiciary.

In case of Populist view the Public will not understand the underlying principle behind the Sentencing policy. The Public perception will depend upon Media driven promulgation which in turn may be controlled by some Political motive or some emotional narration presented to them.

The prudent approach lies somewhere in between. The Public should be first educated and then consulted on the policy matter. A constructive debate should be initiated so that a consensus on the policy can be arrived at. The Judges and other Law officials should outreach the people, like taking seminar, because in most of the cases the Public is being misrepresented about Sentencing policy.

Public Opinion is much more complex as it is being perceived by the Policy Makers. Very often they will come across a wide range of views regarding a particular prospective policy decision regarding Sentencing. It is a boon in disguise because it gives ample opportunity to them to introduce alternative Sentencing reforms, which if introduced will not only make decision process faster but also reduce the economic burden of the policy. These reforms can be made acceptable to the society by involving them in discussions which might not be acceptable to them individually. It is not always necessary that just by increasing the severity of the Sentence a valid deterrence can be created in the mind of prospective convict. For example after recent *Nirbhaya case* a popular demand which have been vindicated by Media and Public is that to award Death Sentence to the rape convict. But the Policy Makers should make them understand that Death Sentence falls in '*rarest of rare'* category and burden of proof so required will be quite high. Thus it may lead to lesser conviction. Only by involving Public in discussions this stand can be made clear.

IV. Conclusion

Sentencing policy is the most vital link in Criminal Justice system which signifies the rule of Law in a State. In this respect Public Opinion is an indispensable asset which should be utilised in a proactive and step-wise manner by the Policy Makers. Informed Public Opinion should be involved right at the beginning of the formation of Sentencing policy so that a consensus can be arrived at about its actual objective.

In the following stages of its implementation, if some anomaly arises regarding its interpretation, a well-managed Public debate should be initiated by the authorities on various platforms. It is very important to carry out the economic audit of the Sentencing policy and the ensuing result must be communicated to the Public so that they can understand its future implications. Inclusion of Public Opinion in Sentencing Policy will not only help to remove

the *Iron Curtain* between the Courts and the society but will also improve the level of acceptance of the Court's decision regarding sentencing by the people at large.

References:-

- Hindelang, Michael J. 1974. Public opinion regarding crime, criminal justice, and related topics. *Journal of Research in Crime and Delinquency* 11:101–116.
- Peter D. Hart Research Associates. 2002. Changing attitudes toward the criminal justice system. Washington, DC: Peter D. Hart Research Associates.
- Roberts, Julian V. 1992. Public opinion, crime, and criminal justice. In *Crime and justice: A review of research*. Vol. 16. Edited by Michael Tonry. Chicago: Univ. of Chicago Press.
- Pranab Tanwar & Saurabh Pandey, 'Public Opinion and the Ayodhya Case: Breaking the myth of infallibility' (*The Leaflet*, 29 Oct, 2018) <https://www.theleaflet.in/public-opinion-and-the-ayodhya-case-breaking-the-myth-of-infallibility/>.
- Arifa Khan, 'Judiciary, Media and Public Opinion : An overview' (*Lexquest*, 4 October 2017)<https://www.lexquest.in/judiciary-media-public-opinion-overview/ >.
- VVLN Sastry, *Influence by Trial Media on Criminal Justice System of India* (Walden University 2019), https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=8084&context=dissertations

A STUDY ON SUBTLE VICTIMIZATION OF CHILDREN FROM DOMESTIC VIOLENCE IN INDIA

- JATINDER JAIN[143]

Abstract

Domestic violence is a widespread social menace. But although its various causes such as alcoholism and patriarchy are frequently reported, its impact on children gets less attention. In India, various forms of direct and indirect violence against children are still normalised. The 2020 UNICEF report showcasing how Indian parents use 30 different forms of abuse on kids from the age group of 0 to 6 years is a testament to the same. Despite this body of evidence, the impact of domestic violence on children at home is not spoken about enough.

We tend to focus on the effects of domestic abuse on the adult victim and overlook the trauma that may be inflicted on children who just witness the violence. It's true that men are disproportionately responsible for the aggressive, abusive, or threatening actions that occur within the context of domestic and family violence. But what you may not know is that children are also victims of domestic abuse, which can have serious consequences for their physical and mental health, particularly at younger ages. The purpose of this study is to investigate the effects of domestic violence on children and to provide solutions for its prevention and treatment.

Keywords: *Domestic Violence, Abuse, Child, UNICEF, Children*

I. Introduction:-

The issue of domestic violence is something which still goes unacknowledged by various cultures of the world. Domestic violence has emerged as one of the predominant issues in the third world countries as the legislative bodies in most of these countries do not concede the fact that stringent law should be enacted in order to safeguard the children or young people from any physical or mental abuse. The United Nations, an inter-governmental body observed this phenomenon of domestic violence as a pattern of behavior of an individual who holds a significant advantage of authority over another irrespective of any intimate relationship.

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By contrast, a model code on domestic and family violence limits its definition to acts of physical harm, including involuntary sexual acts, or the threat of physical harm. Investigators have usually studied children from violent families that are characterized by multiple stressors (e.g., histories of drug and alcohol abuse, single parenting, shelter residence, and poverty) and multiple forms of maltreatment (i.e., neglect, sexual abuse, spouse abuse, and child abuse. This study was also designed to identify the distinctive effects of experiencing different types of domestic violence.

Children who are victims of physical abuse are more likely to display externalizing and internalizing behavior problems than children from comparison groups

II. Nature of Domestic Violence on Children:-

The biggest victims of domestic violence are women but there is little or no relevant information available on the issue of domestic violence against children. This indicates the lack of awareness among people regarding the grievous repercussions of such violence against children. Therefore it is indispensible for all the governments of the world to enact stringent laws against the practices of child abuse.

Children around the globe are exposed to two types of domestic violence. The first is Corporal Punishment, in this situation the parent(s) or guardian(s) of the child use the forces of physical nature to compel their child to act in accordance to their set of rules. The examples of corporal punishment include slapping, thrashing, and belting. Corporal punishments are induced against children when they oppose or resist any instructions which are directed towards them from their parents or guardians. This includes compelling a child to ingest a food or forcing them into certain activity.

The other form of domestic violence which is practiced upon children is Psychological Violence, in this situation the parent(s) or guardian(s) of the child are involved in the usage of force which makes an impact on the mind or conscience of the child. This involves building a sense of fear or intimidation within the child not by the use of physical force but with the help of verbal communication like aggression, threats, guilt, manipulating the emotions of the child, withdrawal of love towards the child etc. The aforementioned forms of domestic violence leaves behind lifelong effects upon the child, therefore the victims of this violence are at more risk of getting exposed to the situation of child abuse as compared to the children who did not face such violence in their respective lives.

III. Legal Provisions to Safeguard Rights of Children:-

To attenuate the impact on children certain safeguards have been established by the government. Child rights are recognized internationally and our Indian Constitution incorporates most rights included in the UN Convention on the Rights of the Child, as Fundamental Rights and DPSPs. The households with abuse should adhere to constitutional guarantees that are specifically for children: –

- Right to free and compulsory elementary education for all children in the 6–14-year age group (Article 21A).
- Right to be protected from any hazardous employment till the age of 14 years (Article 24).
- Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength (Article 39(e)).
- Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and moral and material abandonment (Article 39 (f)).
- Right to early childhood care and education to all children until they complete the age of six years (Article 45).
- Moreover, children are also entitled to fundamental rights under Article 14-17,21,23,24 of the constitution as any other citizen of the country.
- UN Convention on Rights of the Child has been ratified by the Indian government on 12 November 1992 which acts as a compass and guides the policymakers on which measures are to be adopted and implemented.
- New National Policy for Children, 2013 was implemented on 26 April 2013 replacing the 1974 child policy which states that the safety and security of all children are imperative for their well-being and children should be protected from all kinds of harm, abuse, neglect, violence, maltreatment, and exploitation. The Ministry of Women and Child Development oversees the implementation of the policy and the National Plan of Action for Children (NPAC) was released by adhering to the norms of the policy.
- Under the Commission for Protection of Child Rights (CPCR) Act,2005, the National Commission for Protection of Child Rights (NCPCR) was established in March 2007 which focuses on how to safeguard and promote the rights of the children.
- Juvenile Justice Act, 2015:- The act provides protection to the rights for the children whose rights and privileges are infringed. This is the fundamental law which is enacted in India for the purpose of providing protection for the children against such practices.

- Prevention of Children from Sexual Offences (POSCO) Act, 2012:-This code of law provides protection to the children who faced sexual assaults or harassment by anyone. This law prescribes rigorous punishment to the people who are responsible for infringing the rights of the victim.
- Indian Penal Code section 373:-This section states that whoever is involved in the activity of buying, hiring or has any sort of possession of any minor girl for the purpose of prostitution. Such person shall be liable for fine and an imprisonment which can extend upto a period of ten years.

IV. Preventive Measures for Domestic Violence Against Children:-

Domestic violence against children can happen in any family irrespective of their income, religious beliefs, caste, color, creed etc., the prevalence of such abuse in high in the following environment –

1. Parents who belong to a young age group tend to practice more violence upon their children as compared with the parents belonging to an older age group.
2. Parents, who are not educated or aware, tend to get more involved in this kind of abuse.
3. Children raised in poor families are often exposed to domestic violence.
4. Domestic violence against children also prevails in a family where parents themselves are involved in committing violence against each other.
5. Children face violence in a family which has a long history of practicing such violence.
6. Parents or guardian with drug or alcohol abuse are more likely to be aggressive towards their children.
7. Parents who are suffering from any mental or physical trauma may also practice violence against their children.

According to various extensive researches and studies, child abuse or domestic violence against children can be countered by the taking into account the following methods –

1. It is the duty of every parent or guardian to be empathetic towards their child, try to learn and understand their frame of mind.
2. Denying the basic needs of the childlike food, sleep, care etc also amounts to violence or abuse as it may cause mental trauma to the child.
3. When children are prone to drug or alcohol, it is better to get help from various NGOs or institutions which are working in order to overcome such issues from prevailing in the society.
4. Parents shall restrain themselves from using any obnoxious language or expressions.

5. Children should be disciplined by their parents in a fair, just, and reasonable manner.
6. Spouses who are about become parents may attend seminars or programs which creates awareness among new parents regarding these issues.

V. Conclusion

Domestic violence or child abuse has overshadowed many issues which are prevailing in the society. This issue becomes far more dreadful in the country like India where the legislation has not yet enacted any Act which explicitly addresses the issue of domestic violence against children. Therefore, the children of this country suffer from such malpractices as there are no stringent laws which can protect them from the perpetrators of such activities. This article has argued that for the significant number of children living with domestic violence, the experience is often traumatic and the consequences in both the immediate and longer term are significant for the majority of these children. Children who appear to cope better tend to have strong attachments to a non-violent parent or other significant adult, and to have had the opportunity to engage in therapeutic work sooner rather than later.

References:-

- Sternberg, K. J., Lamb, M. E., Greenbaum, C., Cicchetti, D., Dawud, S., Cortes, R. M., ... & Lorey, F. (1993). Effects of domestic violence on children's behavior problems and depression. Developmental psychology, 29(1), 44.
- Devaney, J. (2015). Research Review: The Impact of Domestic Violence on Children. Irish probation journal, 12.
- Osofsky, J. D. (1999). The impact of violence on children. The future of children, 33-49.
- Osofsky, J. D. (1995). Children who witness domestic violence: The invisible victims. Social Policy Report, 9(3), 1-20.
- Fantuzzo, J. W., & Mohr, W. K. (1999). Prevalence and effects of child exposure to domestic violence. The future of children, 21-32.
- Stiles, M. (2002). Witnessing domestic violence: The effect on children. American Family Physician, 66(11), 2052.
- https://ourworldindata.org/violence-against-rights-for-children
- https://www.ukessays.com/essays/social-work/domestic-violence-impact-on-children-physical-education-essays.php

- https://www.savethechildren.in/resource-centre/articles/a-brief-on-child-protection-policies-in-india
- https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=1&contentid=1565

CONSTITUTIONALITY OF CAPITAL PUNISHMENT IN INDIA: A FRUITFUL OR FUTILE DETERRENT

- **JATINDER KUMAR GARG**[144]

Abstract

India consider capital punishment as a legal penalty for certain unsual or exceptional offences, termed as rarest of rare cases. Over the years, the manner in which death penalty is being given raises serious questions. It becomes all the more relevant because not all convicts awarded death penalty are executed. Further, despite the rarest of rare doctrine, which was meant to limit capital punishment, the number of death sentences pronounced is high

The Supreme Court of India as the highest Judicial Court of the country has given its authoritative decisions on various points of law from time to time. The apex court has examined the constitutional validity, procedure and many other issues related to death sentence and delivered its valuable verdict on numerous occasions in last 50-60 years. The constitutionality of death penalty has been questioned before the Supreme Court several times on the ground that it contravenes provisions incorporated in Indian Constitution. However, the Court has made it clear many times that the imposition of death penalty is not opposed to the supreme law of the land, Bhagwati, J., is of opinion that Sec. 302 of the I.P.C. in so for as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Art. 14 and 21 of the constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence.

Keywords: *death penalty, India, capital punishment, Constitution*

I. Introduction:

The Supreme Court of India as the highest Judicial Tribunal of the country has given its authoritative decisions on various points of law from time to time. The apex court has examined the constitutional validity, procedure and many other issues related to death sentence and delivered its valuable verdict on numerous occasions in last 50-60 years. The constitutionality of death penalty has been questioned before the Supreme Court several times on the ground that it contravenes provisions incorporated in Indian Constitution. However, the Court has made it clear many times that the imposition of death penalty is not opposed to the supreme

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law of the land, Bhagwati, J., is of opinion that Sec. 302 of the I.P.C. in so for as it provides for imposition of death penalty as an alternative to life sentence is ultra vires and void as being violative of Art. 14 and 21 of the constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence.

Now comes the question as to when should the courts be inclined to inflict death sentence to an accused. By virtue of section 354(3) of Cr.P.C. it can be said that death sentence be inflicted in special cases only. The apex court modified this terminology in Bachan Singh's Case and observed,

"A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed..."

II. Constitutionality & Procedural Reforms:

In Jagmohan Singh v. Uttar Pradesh, the validity of death sentence was first time challenged on ground that it was violative of Arts. 19 and 21 because it did not provide any procedure. It was contended that the procedure prescribed under Criminal Procedure Code was confined only to findings of guilt and not awarding death sentence. The Supreme Court held that choice of awarding death sentence is done in accordance with the procedure established by law. The Judge makes the choice between capital sentence or imprisonment of life on the basis of circumstances and facts and nature of crime brought on record during trial. Accordingly, a 5 member Bench of the Court held that capital punishment was not violative of Arts. 14, 19 and 21 and was therefore constitutionally valid. After this decision the constitutional validity of death sentence was not open to doubt. But in the case of ***Rajendra Prasad v. State of U.P.***, Krishna Iyer, J., held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society.

The constitutional desirability of death penalty came up before the apex court in Rajindra Prasad V. State of U.P. though the main question was not of constitutional validity of death penalty but the court was invited to consider as to on what grounds and circumstances death penalty can be awarded. Justice Krishna Iyer while pronouncing the majority judgment of the court discussed wide range of grounds concerning death penalty. Justice Iyer pointed out that "Section 302 of Penal simply gave discretion to the judges to impose either death sentence of life imprisonment on the persons convicted for the offence for murder, without giving any guidelines as to the exercise of that discretion." He stated that "unguided discretion in this matter even in the hands of the judges was grave risk as the question is of life and death. The

matter should be reviewed because of the irrevocable nature of the death penalty. The error committed by the Judges in sentencing a person to death was beyond correction."

Justice Krishna Iyer gave some factors on which the guidelines for awarding death penalty should be formulated:

1. Change is legislative policy towards life and death.
2. Increased awareness or growth for abolition or restricted use of death penalty.
3. Human rights as well as the concept of social justice which are an integral part of the Indian Constitution.

In ***Bachan Singh v. State of Punjab***, the Supreme Court by 4 : 1 majority has overruled Rajendra Prasad's decision and has held that the provision of death penalty under Section 302 of I.P.C. as an alternative punishment for murder is not violative of Art. 21. Art. 21 of the Constitution recognizes the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law. In view of the constitutional provision by no stretch of imagination it can be said that death penalty under Section 302, I.P.C. either per se, or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment. The death penalty for the offence of murder does not violate the basic feature of the Constitution. The International Covenant on Civil and Political Rights to which India has become party in 1979 do not abolition of death penalty in all circumstances. All that it requires is, that (1) death penalty should not be arbitrarily inflicted, (2) it should be imposed for the most serious crimes. Thus the requirements of International Covenant is the same as the guarantees and prohibitions contained in Arts. 20 and 21 of our Constitution. The I.P.C. prescribes death penalty as an alternative punishment only for heinous crimes. Indian Penal Laws are thus entirely in accord with international commitment.

The constitution validity of death penalty has been restored in India by the Supreme Court. Although it is difficult to award death penalty as compared to other Middle East countries. This is so because in India it is considered as every case where capital punishment is awarded deals with a human life and that life enjoys some constitutional protections given under Article 21 of the Indian Constitution. While giving death penalty to that life the process should maintain some high constitutional standards and should be as per the constitutional principles.

III. Constitutionality of Section 303 of Indian Penal Code, 1860:

Section 303 of I.P.C. incorporates punishment for murder by life convict. It contemplates, whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death. In Mithu v. State of Punjab, the legality of Section 303 was examined by the Full

Bench of the Supreme Court. The majority opinion was that this section violates the guarantee of equality contained in Art. 14 and also the right contained in Art. 21 of the Constitution. The section was held to have been conceived to discourage assaults by the life convicts on the prison staff but the legislatures choose a language which far exceeded its intention. It was, further held that the section proceeds on the assumption is not supported by any scientific data. The majority view was that it mainly violates Art. 21 of the Constitution. In Bhagwan Bux Singh and another v. State of U.P., this section has been declared unconstitutional because it is violative of Arts. 14 and 21 of the Constitution of India. Now it is no longer available for conviction of any offender. A conviction under this section will be altered to one under Section 302. But for awarding death sentence under section 302 it must be established that the case is rarest of rare. If the case cannot be termed as rarest of rare, the sentence would be converted into sentence for life.

While successive Supreme Court constitutional benches have favoured judicial discretion rather than the setting out of detailed guidelines on sentencing, the judicial discretion has proved inadequate as a safeguard against arbitrariness. The judgments in numerous cases demonstrate that the courts, including the Supreme Court, have not always followed the existing law and jurisprudence on death penalty cases consistently. In the same month, different benches of the Supreme Court have treated similar cases differently, often apparently reflecting their own positions for or against the death penalty. While in one case the defendant's youth could be a mitigating factor sufficient to commute the death sentence, in another it could be dismissed as a mitigating factor. In one case the gruesome nature of the crime could be sufficient for the Court to ignore mitigating factors and in another case a similar crime was clearly not gruesome enough. In August 2004, Dhananjoy Chatterjee was executed for the 1990 rape and murder of a girl in the apartment building where he worked as a guard. He was the first person to be hanged in India for over six years, ending a de facto moratorium on executions.

Three days after the execution, a similar case of rape and murder of a child was heard on appeal by the Supreme Court in ***Rahul alias Raosaheb v. State of Maharashtra***, the victim in the former case was 13 years old, in the latter she was four-and-a-half. Neither of the accused had a previous criminal record, and in neither case was any report of misconduct while in prison. Yet the Supreme Court deemed Dhanajoy Chatterjee a menace to society and not only was his sentence upheld by the Court but he wass subsequently hanged. In Rahul's case, he is not deemed a menace, and his sentence is commuted to life imprisonment.

IV. Conclusion:

In India, the provisions for death sentence still prevails as part of criminal jurisprudence but the Supreme Court of India has repeatedly asserted that it should be imposed in the rarest of rare case. The highest Judicial Tribunal of the country has given from time-to-time authoritative pronouncements and made it clear that the provisions for death sentence are not violative of Arts. 14, 19 and 21 of the Constitution. Thus, the provisions dealing with death sentence are not opposed to the Constitution, but care must be exercised in every case to look into the circumstances of the case, facts and the nature of the crime for making choice between the imposition of death penalty and the award of the sentence of life imprisonment. However, the death penalty should be imposed only in accordance with the procedure established by law. The execution of death sentence by hanging by rope is held to be not contravening to provisions of the Constitution and does not amount unreasonably cruel or inhuman punishment, but public hanging is considered as barbaric.

Global trends suggests that States are moving towards abolishing the death penalty. It is argued that capital punishment is inconsistent with the human rights standards. Nevertheless, death penalty remains legal—both under national and international law.

In 1962, the Law Commission of India supported the death penalty on the basis of India's particular circumstances wherein it could not "experiment" with its abolition. In 2015, it called for abolition of the death penalty for ordinary crimes. The 262nd Report also observed that unlike the findings from 35th Report, the available studies provide no useful evidence on the deterrent effect of capital punishment. Few argued for abolishing it altogether, however for reasons explained earlier, the decision to abolish death penalty must not be taken hastily. This will probably avoid embarrassment from re-introducing capital punishment. Further, abolishing death penalty would seriously undermine the relevance of anti-terror laws, since they provide capital punishment, and are considered different from regular crimes. It is submitted that any laxity in fighting terrorism will belittle the demand for action by the world community against cross-border terrorism. Besides, the public sentiments cannot be ignored altogether. Perhaps, the requirement to ensure procedural fairness for those under the sentence of death demands revisit.

References:

- Death Penalty in India, Annual Statistics Report 2021 14, available at: https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/61f6d7e8f0e77848cc843477/1643567095391/Annu al+Statistics+Report+2021+%281%29.pdf.

- Death Penalty India Report Part-II, available at: https://www.project39a.com/dpir#:~:text=The%20Death%20Penalty%20India%20Report,is%20divided%20in%20two %20volumes.
- Aparna Chandra, "Gender Dimensions of the Death Penalty in India", (May 23, 2010), available at: http://dx.doi.org/10.2139/ssrn.1617603. The author argues that "by consistently discounting women's experiences of violence in determining the norms by which a society is to be governed, law threatens to continue the existing social disparity."
- Taslima Nasreen, "Death penalty is not justice, it is revenge", The Print (Apr. 29, 2018), available at: https://theprint.in/opinion/death-penalty-for-rape-isnt-justice-it-is-vengeance/53519/.

A STUDY ON CHALLENGES AND OPPORTUNITIES FOR WOMEN WITH DISABILITIES IN CONTEXT WITH INDIAN LEGAL FRAMEWORK

- **KANCHAN BALA**[145]

Abstract

Disability is a complex social issue and it is increasingly becoming a major concern all over the world. The number of disabled people is increasing across the world due to various reasons. Disabled people comprise a significant minority in most countries and their number also constitutes one of the largest minorities in the world. Among countries with comparable levels of income, India has one of the more progressive disability policy frameworks. This paper focuses on state-level variations in outcomes for women with disabilities to provide an explanation for the contrast between the liberal laws on paper and the challenges faced by women with disabilities in practice. In this research paper the researcher want to give much emphasis on the various legal provisions and Laws available in our country and make a systematic study on how these laws have contributed towards the development of legal status of the disabled persons in India. They faced direct and indirect discrimination and were not able to enjoy the full spectrum of civil, political, social, cultural and economic rights. Whatever the perception of the society towards the women with disabilities may be, it has to be fundamentally accepted that disabled people are integral part of our society. Therefore, to incorporate provisions regarding accessibility in legislations and to execute them is the need of the hour, including the removal of discriminatory provisions that are still prevalent in some legislation. However, laws and policies alone may not be enough. Public perception, attitude and awareness have significant role to play. There is a need for social change through public awareness. There should be endeavor for attitudinal changes in the sense of bringing a culture of belonging. The public in general may be empowered and educated to take action and advocate the human rights and fundamental freedoms of women with disabilities

Keywords: *Women, Disability, Challenges, Opportunities, Legal, Rights, Society*

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I. Introduction:-

The rights of women with disabilities (WWD) are one of most ignored issues in India. Women with disabilities are deprived of rights and privileges because of the existing social attitude towards them. Million people suffer from various disabilities, but still it is regrettable that such huge population is suffering each and every day due to improper care and treatment. In India a large number of disabled populations including women with disability have limited access to education and employment. In the families, they do not participate in the decision making process even in social gatherings.

About 2.2% of India's population–or 26.8 million people–live with a disability, according to the 2011 Census. Many believe this to be an under-estimation because the World Health Organization has estimated that 15% of the global population lives with a disability. Various research studies show that girls and women with disability face an additional risk of violence and sexual violence.There are some co-relating elements we find while studying disability issue. Lack of health care during childhood of a girl child is one of the main reasons for permanent disability.

Further, women with physical disabilities may find it more difficult to escape violence. Those who are deaf may not be able to call for help or easily communicate abuse. Women and girls with intellectual or psychosocial disabilities may not know that non-consensual sexual acts are a crime that should be reported. The stigma related to sexuality and disability compounds these challenges. Gender related violence and discrimination is also a cause and consequence of disability. Discrimination is often compounded for women on the grounds of gender, age and minority status. Gender related practices such as son preference, abandonment of the girl child, discriminatory feeding practices, child marriage, dowry are all gender related acts of violence that lead to mental, physical and psycho social disability. Moreover, Rape or sexual harassments are probably the most common forms of violence against disabled women in India. To add, physical assault by family members or violence by intimate partner is often not considered as a crime rather a day-to-day incident.

II. Women with Disability, UNCRPD and Law in India:-

The UN Convention on the Rights of Persons with Disabilities is a major landmark in the history of disability rights movement. This convention is a reflection of the readiness of the international community to recognize that disability is a human rights issue that requires deeper understanding and specific action to not to treat persons with disabilities as objects of charity in programmes and policies of countries.

The Government of India has signed and ratifies the convention. But to translate the rights as defined in the Convention into implementable rights, the laws in the country need to be harmonizedand need to be synchronized with the Convention. India has done a study to understand the Indian Laws from the point of view of the Provisions of the United Nations Convention on Rights of Persons with Disabilities (UNCRPD). It was proposed to examine the extent to which the rights of Persons with disabilities were recognized and measures & provisions that were in place in the Indian Laws in view of the ratification of UNCRPD by India. However 14 laws including the Constitution of India and the procedural laws, the disability sector laws and the laws related to women and children have been examined in detail and changes have been suggested therein. This study is limited to examining laws and finding out their consonance or resonance with the provisions of UNCRPD. It does not provide for actual word-by-word examination and amendments in provisions.

Constitutional Provisions:-

The Constitution of India through its Preamble, seeks to secure to all its citizens; Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity. Part-III of the Constitution provides for a set of six Fundamental Rights to all the citizens (and in a few cases to noncitizens also). These include – Right to Equality; Right to Freedom; Right against Exploitation; Right to Freedom of Religion; Cultural and Educational Rights and Right to Constitutional Remedies but there is absence of special provision for women with disabilities. Due to which they are exploited at every front and stage. Law making bodies also struggles to formulate an effective law for them. Further in The National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999- The Government has established the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities In 1987 Mental Health Act to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs and for matters connected therewith or incidental thereto.

First time in India The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is a signatory to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region, adopted at the meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002, convened by the Economic and Social Commission for Asia and Pacific at Beijing from December 01-05, 1992. In order to give effect to the Proclamation, It also defines “person with disability” as a Person, suffering from not less than forty per cent of any disability as certified by a medical authority.

Since the subject "Relief of the disabled….." is covered vide Item No. 9 of the List II : State List of the Seventh Schedule of the Constitution, the Act was enacted under Article 253 giving power to the Parliament for enacting "Legislation for giving effect to international agreements" read along with Item No. 13 of the List I : Union List : "Participation in international conferences, associations and other bodies and implementing of decisions made thereat".

India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2007 that ensures access to justice for persons with disabilities. This includes appropriate special facilities for the disabled and other provisions mandated by the Rights of Persons with Disabilities Act, 2016, that protects all persons with disabilities from abuse, violence and exploitation. But there are implementation gaps, investigations showed.

III. The Rights of Persons with Disabilities Act, 2016:-

In the RPWD Act, 2016, the list has been expanded from 7 to 21 conditions. PWD having high support needs are those who are certified as such under section 58(2) of the Act. The RPWD Act, 2016 provides that "the appropriate Government shall ensure that the PWD enjoy the right to equality, life with dignity, and respect for his or her own integrity equally with others." The Government is to take steps to utilize the capacity of the PWD by providing appropriate environment. It is also stipulated in the section 3 that no PWD shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim and no person shall be deprived of his personal liberty only on the ground of disability. Living in the community for PWD is to be ensured and steps are to be taken by the Government to ensure reasonable accommodation for them. Special measures are to be taken to ensure women and children with disabilities enjoy rights equally with others. Special measures need to ensure PWD are not deprived from their Constitutional rights. But there is absence of special provision for women with disabilities.

IV. Barriers between Women with Disability and Access to Service

Women and girls living with disabilities often face additional marginalization in their experiences of abuse as well as specific barriers to accessing services, due to: economic and/or physical dependence on the abuser, which challenges efforts to escape (particularly within institutional settings); suffering from forms of abuse specific to women living with disabilities (e.g. withholding of medications, orthotic equipment, and/or the refusal to provide personal care), which are less-documented and may not be explicit within legal definitions of abuse; lack of or limitations in physical accessibility of shelters for women with disabilities; perceptions by service providers that they cannot provide services for women with disabilities given their resource or capacity limitations; hotline or shelter counsellors who do not have

knowledge of disability-related issues; lack of programming informed by and implemented in consultation with women with disabilities or misinterpretation of their needs in escaping and overcoming the abuse they have experienced; gaps in collaboration between disability organizations and service providers supporting survivors, as well as assumptions by each group that survivors are served by the other; low sensitivity among law enforcement personnel or other service providers, who may not inquire about abuse by caretakers, or disregard reports from women with speech/communication or motor coordination disabilities (e.g. cerebral palsy), assuming they are intoxicated or are not serious in their claims; and biases among judicial personnel and courts, who may provide preferential treatment to the abuser in child custody due to the victim's disability.

V. Conclusion

Discriminations with women because of their disability should be considered as heinous crime. The physical and mental suffering caused due to their disability is dismayed threat to their existence. The trauma and pain suffered by these women are beyond imagination. They can't narrate their suffering and agony. They feel deserted and deprived of their basic fundamental right which The Constitution of India has vested to its every citizen. Serious adherence and formulation of laws in accordance with Convention on the Rights of Persons with Disabilities (CRPD), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)can lead to some change in the living condition of these women. Mere drafting and formulation will not ease their agony. Implementation of the rules and laws at the each level of our society will only make some difference.

Police organization should report immediate FIR and execute adherent action against accuse. A separate and effective body be established , which should expedite all pending legal case. A separate and sole helpline number reserve for the PWD to be made available which encompasses appropriate way to communicate according to their disabilities. Lack of awareness regarding their rights, various Government schemes, grants, compensations, reservation in jobs, and various opportunity for self- employment amongst the women with disabilities hinders their path for social and economic development. Society should be made aware that these people are also human being and they equal right as same as them. People and society should be made aware of the chastisement and consequences of any type of abuse caused or incurred. Today technology has created a new virtual world of digitalization, despite of such advancement these people are left far behind.

There is also a need to closely monitor the condition of State-run homes housing persons with disabilities to ensure that their rights are not being infringed upon. Instead of the courts, a

statutory body can be constituted to consider the decision to sterilize made by parents or State institutions. The authority must comprise medical experts, human rights activists, lawyers, and experts having at least 10 years of experience in dealing with mentally disabled persons, psychologists and teachers of special schools.By engaging women with disabilities and their advocates to better understand their specific experiences and needs, shelter service providers can work to reduce barriers to access and improve service delivery for women with disabilities

References:-

1. Agrawal G, Keshri K, Gaur K, Aging, (2009), "Disability and Health Care Services Among Older Persons in India". Middle East journal of Age and Ageing.
2. Abu Habib, L. (1995) "Women and disability: Double discrimination and disabled women's rights", Gender & Development, vol-3.
3. Abidi, Javed,(1995), "Health for the Millions", Voluntary Health Association of India, New Delhi,vol-21(6),
4. Deenadayalan.S, (1990), "The impact of regular employment on building up the morale and self esteem of orthopedically disabled person", Action and disability news vol.1, Action Aid, Bangalore.
5. Day K, Calkins M.P., Bechtel R, Churchman A., (ed). (2002), "Design and Dementia: The New Environmental Psychology Handbook", John Wiley & Sons, New York.
6. Halder, Santoshi (2009) "Prospects of higher education of the challenged women in India." International Journal of Inclusive Education vol-13(6).
7. Hofman, A, Grobee, D.E., etal (1991) "Determinants of disease and disability in the elderly: the Rotterdam Elderly Study. European Journal Epidemiology, 7

AN ANALYTICAL STUDY ON THE LOCUS OF MEDIA TRIAL UNDER THE CONSTITUTION OF INDIA AND ITS ROLE IN CRIMINAL JUSTICE ADMINISTRATION

- KANISHK GUPTA[146]

ABSTRACT

Participative media is considered as the 'cornerstone' of our democracy. Media acts as facilitator along with being an expediter on many matters including those affecting the collective conscience of society. To cite a few, like Priyadarshini Mattoo case, Jessica Lal case and recently Tehelka case. Though media to a large extent plays irrefutably positivist role, role of media in media trials specifically of sexual offence is doubtful.

The media's the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power. Because they control the minds of the masses." Malcolm X. This quotation speaks itself the gravity and concrete nature of media in democratic set-up of any nation. Present article will focus on current operational interference of media in administration of justice, the role of Supreme Court and its power under constitution. The unavailability of mindset of legislature to insert the effective statute and negation of Supreme Court to impose guidelines on Media Trials, uncertainty of implementing of Law Commission Guidelines, the outcome of such approach and failure to tie jaws of uncontrolled media by government and Court which harming rule of law in India.

Keywords: Accountability of Media, Contempt of Court, Freedom of Expression, Interference of Media, Prejudicial Publicity, Postponement

I. INTRODUCTION:-

Media plays a vital role in mounding and influencing the opinion of the people of society and it also capable of changing the whole viewpoint through which perceive various events. The freedom of media is the freedom of people and therefore article 19(1) guaranteed to the citizens of India, because constitutional framers were aware about that a free and healthy press is indispensable to the functioning of democracy. It is the right of the citizens of India that they should kept aware about the current political, social, economic and cultural life as well as burning topics and important issues in order to enable them to consider forming broad opinion

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in which they are being managed, tackled and administered by the government and their functionaries.

However, with the immense growth of electronic media and extensive use of social media by billions of people's across the world, the scene is otherwise. Media has become super power and is controlling almost everyone including god. The interference in administration of justice the sole domain of judiciary is matter of severe concern for justice loving people and incidents of interference of Media increasing by the day in administration of justice. Such reporting not only affects business sentiments but also interferes in the administration of justice.

II. THE CONSTITUTIONALITY OF MEDIA TRIAL:-

Press freedom is critical to the survival of democracy, which is why the press is regarded as the fourth pillar of democracy. Despite the fact that the press is expected to work as an informant between government organs and the people, the main purpose of the press is to convey information to the masses.

Article 19 of the International Covenant on Civil and Political Rights of 1966 declares that "everyone should have the right to have opinions without interference" and the "freedom to seek, receive, and transmit information and ideas of all sorts, independent of frontiers, either verbally, in writing or in print, in the form of art, or by any other means of his choice."

Article 19(1) of the Indian Constitution provides the right to free speech and expression as a fundamental right (a). Unlike in the United States, freedom of the press is not explicitly addressed, yet the Supreme Court of India has acknowledged that freedom of the press falls within the scope of freedom of speech and expression.

The Supreme Court stated in Anukul Chandra Pradhan v. Union of India that:

"no occasion should arise for the impression that the publicity attached to these matters (the hawala transactions) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence, including the accused's presumption of innocence unless found guilty at the end of the trial."

The Supreme Court stated in LIC v. Manubbai Shah that freedom of speech and expression must be liberally defined to involve the ability to distribute one's opinions orally, in writing, or through audiovisual media. This includes the freedom to express oneself through paper or other media. According to the Supreme Court, "freedom to voice one's views is the lifeline of any democratic institution, and any attempt to choke, suffocate, or gag this right would sound the death knell for democracy and bring in authoritarianism or tyranny."

A trial by press has a risky position because the judge must not only exercise his or her usual due diligence by hearing the case, reviewing the evidence, and simply relying on that evidence without biasness, but also must shield themselves from media attention and avoid being persuaded by the public's opinion.

Under these conditions, it is very challenging for the judge or judges to render an accurate judgement. Additionally, they must ensure that the public's pressure does not result in an injustice being committed. They are referred to as the "opposite of the rule of law.

III. ROLE OF MEDIA IN CRIMINAL JUSTICE ADMINISTRATION:-

During the late twentieth and early twenty-first centuries, the expression "trial by media" was used to describe how television and newspapers could affect a person's reputation by generating a perception of guilty or innocent behavior before, or after, a Court of law judgement. The media has presided over numerous trials in recent years and rendered a judgment before the results of a trial through a judicial has been decided by the court. In India, the press has no particular privileges. However, for democracy to thrive, a free press is a political necessity. The prosecution and the accused both have the right to a fair trial in a criminal trial. Borders are sometimes crossed and rules are broken between free speech and a fair trial, resulting in severe effects for individuals and institutions.

Fear of Media should not be allowed to interfere with a legally binding trial. Digital violence is a breach of peace in and of itself. In a liberal and positive sense, the media is institutionalized anarchy. Whether the media trial should be considered a contempt of court case is a contentious issue that should be debated. To every coin, there is another side. Similar to media trials and journalism, in some instances, a journalist creates a pre-determined image of an accused, which can destroy his or her reputation and affect the trial and decision, thus causing media trials. It's becoming more and more common to see media trials in India. Several instances have occurred in which the media took action against an accused without regard to fair trials in court. It is very easy for the media to influence an individual's thought process.

Recent media trial involves the shocking case of late actor Sushant Singh Rajput, involving the investigation and alleged mishandling of his unnatural death. This case has enraged the country and much concern has been expressed. The media has told the whole story about the late actor's death in a way that has given the general public the impression that the person charged is guilty. As well as publishing information based on mere assumptions and suspicions, the media has been extremely aggressive about reporting on the topic on a daily basis, without verifying factual details based on the evidence.

Judges Dipankar Dutta and Girish S Kulkarni were hearing a PIL filed by eight former senior police officials from Maharashtra, activists, lawyers, and non-governmental organizations, seeking a restraining order against the Media Trial in Sushant Singh Rajput's death case. According to the court, "substantial damage has been caused to the reputations of the parties concerned" in this matter. Regardless of whether they are cleared of the allegations, they will have a stigma on their foreheads if they are not penalized.

The Indian courts have the power to issue pre-publication or pre-broadcast injunctions or prior restraint orders in cases that cause sub-judice. A two-pronged test of necessity and proportionality must be met before a publication delay can be ordered. Moreover, the injunction order shall only be issued when no other reasonable measures can be taken to prevent the danger. In its efforts to meddle with court procedures, the media has reinvented itself as the 'public court' called Janta Adalat and now announces its rulings before the court does.

By ignoring the crucial distinction between an accused person and a convicted one, it undermines the golden concepts of presumption of innocence and guilt beyond a reasonable doubt. Media trials are now commonplace, in which the media performs its investigations and creates public opinion against the accused even before the court hears the case. This causes the public to perceive the accused as guilty, despite the fact that they should be presumed innocent, leaving their rights and liberties completely unaddressed.

Nevertheless, the media's efforts to raise awareness and pressure were successful. In Jessica Lal's case (Sidhartha Vashisht @ Manu Sharma vs. State (NCT of Delhi), it took seven years for the court to determine that the evidence did not suffice to convict the accused, a wealthy brat. It seemed as though the family of Jessica Lal had lost all hope. The media, on the other hand, took the initiative to seek justice for Jessica. The media continued right where the police left off. By instilling a sense of justice in the public, the media put pressure on the police, administration, and government to act quickly. He was ultimately sentenced to life in prison, the son of a high-profile politician.

Another high-profile case where the media should be credited is the Priyadarshini Matoo case (Santosh Kumar Singh vs. State thr. CBI). A 23-year-old law student from Delhi University was brutally murdered by Santosh Singh, the son of a high-ranking IPS officer. It appeared that Priyadarshini Matoo would never get justice when the court acquitted Santosh Singh after three years of court proceedings. Media investigations were conducted in order to uncover the shortcomings in the police investigation, which ultimately resulted in the CBI apprehending the perpetrators.

In State of Maharashtra v. Rajendra Jawanmal Gandhi, the Supreme Court determined that a trial by press, electronic media, or public agitation was the polar opposite of the rule of law. The judge should be cautious of such pressure to avoid a miscarriage of justice. An unbiased jury, free from newspaper dictation or popular Glamour, is a fundamental right of all parties in a court of law.

In the Sheena Bohra Murder Case, the media have completely penetrated the private life of the primary perpetrator Indirani Mukherjee. Her personal life and character were scrutinized by the media on a daily basis. There have been dozens of cases where the media has conducted an accused's trial and rendered a verdict before the court has ruled.

IV. CONCLUSION

Media in today modern world crossing the line between freedom of expression and freedom, liberty of individual life plus affecting the administration of justice especially criminal justice and may crossing the line between investigations and publishing an opinion. To understand the role of media in democratic nation like India is more important and more incumbent now a days. To make awareness in the thinking of normal public man is prime task with conscious effort of this present topic. There should have more concrete and absolute limitation on interference of media through sound and effective legislation and this awareness shall be properly understand not only by legislature of India but also higher judiciary who are restricted to themselves to laid down guidelines to media.

Media is the cornerstone of our Indian democracy which operates for the greater interest of society but legal process should not be hindered by the media coverage of a matter. The rule of law must prevail and the mandate of freedom of press must be construed to be limited to placing a matter in the consciousness of the society without any presumption being given. The Court is a competent forum for such decisions and these forums must be allowed to function without spreading prejudice in the public opinion. Right to free and fair trial under Article 21 of the Indian Constitution must be upheld.

REFERENCES:-

- M B Sardar, “Media Trial, Gujarat”, Law Herald, 26(3) 2006(Sept), J6.
- Samuel Warren and Louis D. Brandeis, “The Right to Privacy”, 4 HARVARD LAW REVIEW 193,196 (1890).
- Sham Lal, “Media in Changing Society”, Mainstream, 32(43), 1994.
- Tara Sinha, “Television Comes of Age”, Seminar, 390, 1992, February.

- Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions As Applied in Judicial Reasoning”, 23 Yale Law Journal. 16
- https://indiankanoon.org/doc/1203995
- https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-2.pdf
- https://indiankanoon.org/doc/493243

THE ROLE OF COMPULSORY LICENSING IN ACCESS TO DRUGS IN INDIA WITH REFERENCE TO DOHA DECLARATION: AN ANALYSIS

- **NEMI CHAND SAINI[147] & DR. ABHISHEK KUMAR TIWARI[148]**

Abstract

Over the last few years, multiple media reports have commented on compulsory licensing of pharmaceutical patents in India. A majority of these reports painted a doomsday scenario and were devoid of facts. However, this simply has happened and India till date has rejected all subsequent compulsory licence applications filed after the Natco/Sorafenib compulsory license application. The purpose of the present article is to collate the present information around the various compulsory licences in India and compares provisions for compulsory licensing in India and sheds light on reasons behind developments especially after trade related aspects of intellectual property rights (TRIPS) provisions. However, compulsory licensing provisions in India have been under criticism particularly at the international front. Without patents, the innovators can neither be adequately compensated for their costs of research nor be encouraged for further research to develop new and improved products. Patent protection is therefore accepted as a necessary evil, despite its conflict with the competitions law and human rights law. Prior to Doha Declaration, pharmaceutical companies were enjoying the monopoly right. Doha Conference on November 14, 2001 forced many countries to amend their patent rights for the purpose of compulsory licensing. Increased cost of patented medicines was a major hindrance for the economic medicinal access. Public health officials considered Doha Declaration on compulsory licensing a positive approach in prioritizing public health over intellectual property rights. It is necessary to strengthen the system of compulsory licenses in the developing and least developed countries because of their inability to cater to the needs of its people.

Keywords: *Patent, TRIPS, DOHA Declaration, Compulsory License, Global Public Health Essential Medicines.*

I. Introduction:

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The Indian Patents and Designs Act of 1911 was amended in 1952 (vide Act LXX of 1952) to provide Compulsory Licences (*hereinafter, referred as CL*) for both product and process patents in the food, medicine, insecticide, germicide or fungicide domain or inventions capable of being used as surgical or curative devices6 as well as provide a mechanism called 'Licence of Rights'. This effectively meant that an interested person could get a license for such patents as a matter of right – hence the term 'Licence of Rights' mechanism.

The 1970 India legislation also provided for grant of CL only under specific grounds. The 1970 Act was amended in 2002 and the chapter titled 'Licences of Right' was removed. Additionally, the provisions relating to CLs in sections 82 through 94 were revised. The Act states that a CL can be sought from the Controller of Patents by a license seeker if it can show any of the below three grounds:

- that reasonable requirements of the Indian public with respect to the patented invention have not been satisfied, or;
- that the patented invention is not available to the public at a reasonably affordable price, or

and the reality is that till date, India has rejected all subsequent licence applications apart from the sole Natco/Sorafenib CL.

Exclusive rights on innovations are permitted to an individual known as patent holder for twenty years who invents a useful or something new, products or process. Patent holder enjoys a kind of monopoly right which prevents him from exploitation on inventions. Government provides rewards in the form of royalty to the patent holder on efforts and skills which encourages further research and innovations. Research and development in pharmaceutical are very costly affair, unpredictable in nature and also time-consuming process. Therefore, patent on intellectual property rights to the innovator pharmaceutical firm is must, which may prevent patent abuse and allows competitor to enter into generic medicine market.

II. Compulsory Licensing & Access to Drugs:

After Independence, Indian Government realized the need for the patent regime. Government of India formulated Tek Chand Committee towards the end of 1948, the Committee known as Bakshi Report 1950, to check the pre-existing Indian patent legislation for patent regime betterment. In the year 1999, amendment was done first time in Indian Patent Act 1970, next amendment was done in the year 2002 and 2005 subsequently. The third amendment in Indian Patent Act 1970 explored the development of compulsory licensing. Grounds for taking permission on compulsory license is by writing an application under section 84 (1) to the patent

controller after expiry of patent period which shall be three years from the date of the sealing of innovation on patent and on the following grounds:

1. If affordable necessities of general public have not been fulfilled,

2. If innovation on patent is not worked within the territory of India,

3. If the patent invention is not accessible to the general public at an economic price.

TRIPS Agreement was proposed to address intellectual property rights as a trade related issue. Most of the developed countries, developing countries under TRIPS excluded pharmaceutical products from patent protection. For example, Brazilian legislation amendment in 1969 declared pharmaceutical processes and products non-patentable. India implemented process patent in year 1970 for pharmaceuticals which resulted into the development of a strong local pharmaceutical sector. Most of the countries feared that product patenting of pharmaceutical drugs would result in endangering affordability to general public.

Moreover, the rationale of such a policy is to give space for the local industry to manufacture pharmaceutical product easily and without infringing. The monopoly in compulsory license granted to pharmaceutical industry resulted in high prices for the innovated medicines. As a result, the right to the exclusive use of innovated drugs excluding potential competition conflicted with the fundamental right to health.

III. An Insight of DOHA Declaration:

The World Trade Organization is a group of 164 countries formed in the year 1995. The Ministerial Conference, which occurs every two years, is the WTO's highest decision-making authority. In the 4th Ministerial Conference in Doha in 2001, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was a key topic. When TRIPS was first introduced, it went far beyond the Paris Convention; it allowed members to use certain kinds of flexibility like granting compulsory licenses for the purpose of supply in domestic markets. TRIPS issued the Doha declaration of Public Health, which allowed for the granting of a compulsory licence for export reasons. The Doha Declaration acknowledged that this constraint on compulsory licencing could make it difficult for nations with little or no pharmaceutical manufacturing capacity to apply it effectively. It was mainly to prevent or remedy the legal impediment created by the regulations of the TRIPS agreement, which stated that a compulsory licence could only be given for the purpose of delivering domestic markets, thereby creating legal barriers for exports through compulsory licences.

Scenario under Indian Patent Law:- Throughout the years, the Indian patent system has routinely been amended, partially as a result of divergent viewpoints and shifting priorities among government, local industry, public, NGOs, and other stakeholders. The move to product

patents in India was rapid. As a signatory to the TRIPS Agreement, India has amended its Patent Act ,1970, once in 1999, allowing for the filing of product patent applications in the areas of drugs, pharmaceuticals, and agrochemicals, even though such patents were previously prohibited, as well as adding a mailbox facility to accept product patent applications and exclusive marketing rights (EMR). In 2002, the Act was amended again, and the patent period was increased to 20 years. From January 1, 2005, full patent protection was granted in all disciplines of innovation, including pharmaceuticals, under provisions relating to the issuance of compulsory licences. While this is expected to limit the generic industry's ability to develop generic pharmaceuticals during the life of a protected product, the Patent Act modifications ensure that India can exercise flexibility to a great extent. In December 2004, an ordinance was passed, followed by the Patent (Amendment) Act, 2005 which was passed by Parliament in March 2005.

The government of India enacted Section 3(d) of the Patents Act of 1970 to keep medicine prices under control. It was created to prevent the patents from becoming evergreen. Any pharmaceutical company's goal would be to maximise profits. Companies used to appoint a research team after 20 years, i.e., when the protective period ended and a patent became an off-patent. They would conclude that the drug's efficiency had decreased in 20 years. They would make some minor changes, come up with a new product and apply for a patent. If the patent is awarded minor changes to the previous product, the corporation will have a 20-year monopoly. Section 3(d) made it harder for corporations to apply for a patent without improving the substance's established efficacy.

In ***Novartis Ag v. Union of India & Ors***[149] (2013) Gleevec, a cancer medication was developed by Novartis and granted exclusive marketing rights (EMR) in 2003. Following the EMR, additional Indian companies making the generic version of Gleevec were forced to halt production. Natco, a generic producer, filed a pre-grant opposition arguing that Novartis' crystalline modification of the medication is an ever-greening technique and that the claimed "polymorph" is the same molecule with a 1993 patent date. As a result, Novartis' patent application for Gleevec was denied by the Chennai Patent Office in January 2006. If Gleevec would have been given a patent, the generic producers would then have been required to discontinue its production, and the cost of Gleevec, which should be taken by cancer patients for the rest of their lives, would have been Rs 1,20,000 per month, as opposed to Rs 8000 per month if made by generic companies. The Indian patent office refused to issue a patent on

[149] (2013) 6 SCC 1.

Gleevec, allowing generic manufacturers to continue producing the drug. The Supreme Court in the Novartis case defined enhanced efficiency as therapeutic efficiency and minor improvements cannot be considered as therapeutic and rejected the application.

IV. The Bayer v. Natco Case:

Bayer Corporation vs Natco Pharma (2013) was the first case in India in which a compulsory licence was granted to Natco Pharma for a Kidney cancer drug named "Nexavar". Natco's application for a compulsory licence for Nexavar was filed before the Controller General of Patents in 2011 in accordance with Section 84(1) of the Indian Patents Act, 1970. The judgement that was delivered on March 9, 2012 stood in favour of Natco as the licence was granted and against the same, Bayer had appealed before the IPAB. Bayer sought a stay on the decision of the Controller but the same was not entertained as IPAB's decision stood in alignment with that of the Controller.

The issue of this case was whether compulsory licences be granted to a generic medicine producer while the same is already patented and used by a registered user. The issue had resulted in many big questions before the pharmaceutical sector as have been pointed out hereunder.

- *Whether Bayer Corporation had failed to abide by the reasonable requirements of the public with regard to the drug?*
- *Whether Nexavar was made unavailable to the public at a reasonably affordable price, thereby making it accessible?*

The final judgement of the controller of the patents was to grant a compulsory licence to Natco Pharma for the drug "Nexavar". The controller gave his judgement under Section 84 of the Patents Act of 1970 because Bayer wasn't able to meet any of the requirements of the section.

There is no doubt that this was a landmark case and it was focused on the welfare of the people but was the problem really solved from its roots? Didn't it affect India in any negative manner? Wouldn't it influence foreign investments in India and hamper the economic condition?

These are all the questions that were left behind with this judgement. Because the main problem wasn't just granting compulsory licences to the third parties it was to ensure that in each and every circumstance the benefit of the people and the society is favoured. Suppose in this case the licence was granted to Natco pharma but will now won't it affect their will to spend tons of money in research and development and create a new drug so that its licence is also given to some other company. So, the problem here to be solved was to create a balance between the welfare of the people and also the economic interests of the country.

V. Compulsory Licensing & TRIPS:

The salient features of compulsory licensing under the TRIPS Article 31 are as follows:

- 'Article 31(a) deals in the application for the issue of compulsory license shall be considered on its individual merit basis.'
- Permission on voluntary license lies in the prior efforts made by applicant from patent holder on the basis of commercial terms and conditions which may be waived in the case of a national emergency or in the cases of public non-commercial use.
- 'Compulsory license shall be issued on non-exclusive basis given in Article 31(d).'
- 'Compulsory license shall be granted for the purpose of availability of medicines only in the domestic market of the country who will issue the license [Article 31(f)].'
- The holder of patent must get enough remuneration on the basis of expenditure made by him. [Article 31(h)];
- 'The compulsory license shall be under legal validity and any decision related to license will be subject to judicial review in the country who issues the compulsory license [Article 31(i) and (j)],'
- Member of World Trade Organizations conference in Qatar on 14 November, 2001 adopted the "Declaration on the TRIPS Agreement and Public Health (WTO Ministerial Conference Doha, 2001).

VI. Measures to Strengthen Compulsory Licensing in India:

1. Corporate social responsibilities: -Indian Government shall have good joint efforts with most big pharmaceutical companies as an involvement in government funded healthcare mission in the form of corporate social responsibilities which would encourage them as an equal partner and by this way, they can reduce the chances of patent abusing.

2. United State Act on intellectual property for protection of patent through government funding named Bayh-Dole shall be enforced in India, which may allow the Indian Government to grant compulsory licenses on inventions in some cases.

3. Indian Government shall exercise pressure on the innovation to the patent holder which may cut the price of the innovative product or may purchase innovated medicines from the producers of patent by drug price control mechanism or by negotiations.

4. Indian Patent Office must issue guidelines related to issue and interpretations of compulsory license which would result into reduction in ambiguity on provisions of compulsory license.

5. Low royalty & royalty free method: Compulsory license for manufacturing of generic version of patented drug is issued in crisis, emergency or on urgent basis when the drug is required on large scale and on economic price. So, medicine should be within the reach of general public.

VII. Conclusion:

The CL measure has been used very sparingly by Indian Patent Office over the last 50 years and that too with extreme care and diligence. To continue to argue ad hominem that India could issue CLs for the asking to every person and in every situation is unwarranted and now proven as incorrect. The rejection of the overwhelmingly large number of CL applications undeniably proves that patentee rights are adequately protected and respected by the Patent Office.

Developed countries Government are limiting most developing countries not to issue compulsory licenses and expert from large pharmaceuticals feel that this policy would affect the research and innovation as patent holder would be unable to recover their amount invested in R&D activity. Opposite to this, NGO's have appreciated the policy of compulsory licensing on the perspective of patient's good health at an economic cost. In order to protect R&D and innovation, patent holder shall be compensated for developing the economic status of country, so this will help the innovator pharmaceutical company to shield their patents and accessibility for the developing countries. The purpose of compulsory license lies in access to affordable drugs. Policies like drug price ceiling limit and control on profit margin on big pharmaceutical firm may control the patent abuse. With such policies, general public shall access the medicines on an economic price. Countries foreign direct investment may get declined when country hold limits on the grant of compulsory license. Therefore, government should put limit on compulsory license only in extreme cases in any country. Doha Declaration and Trade Related Aspects of Intellectual Property Rights provisions give health benefits to the public on non-discrimination basis. The growing concern over compulsory license ultimately lies in country's urge to provide access to medicines at an economic cost.

Compulsory licensing breaks up monopolies, cartels agreements and sometimes provides their residents access to life-saving drugs at an affordable price. Though India is not at a stage to analyse the impact of first compulsory license, experiences of countries which granted such licenses shows that compulsory license has the potentiality to effectively reduce the price of the drugs and increase the accessibility of medicines (Bale, 2005). There have been a handful of decisions that have the potential to foster the unique lines of Indian jurisprudence that projects access to essential medicines as a fundamental public health consideration. A unique

provision that exists in Indian Patent Laws which prohibits patent for the use of known substance throws light in the decision of Novartis Company Ltd. v. Union of India.

References:

- Chander, H., Choudhary, V., &Kumar, V. (2013). Current Scenario of Patent Act: Compulsory Licensing. Indian Journal of Pharmaceutical Education and Research, 47(3), 26-30.
- Cutler, David., M. (2017). Empirical and Mathematical Reasoning: The Business and Politics of Health, Harvard University. Retrieved from https://www.academia.edu/2687041/Empirical_and_Mathematical_Reasoning_20_The_Business_and_Politics_of_Health.
- E, Durojaye. (2008). Compulsory licensing and access to medicines in post Doha Era: what hope for Africa? Journal of Intellectual Property Law, 55(1), 33-71.
- Gupta, R. (2010). Compulsory Licensing under TRIPS: How afar it Addresses Public Health Concerns in Developing Nations. Journal of Intellectual Property Rights, 15,357-363.
- Jain, T. (2009). Compulsory licenses under trips and its obligations for member countries. In Reddy.J (Ed.) Compulsory Licensing Developing Economies (pp.29-63). Hyderabad: ICFAI Press.

Rana, S.S. (2018). IPR the Face of New India: An Update on India's IP Journey. Retrieved May 16, 2023, from http://www.ssrana.in/ Taylor, L. (2013). Novartis loses Indian Glivec patent case. Retrieved from: http://www.pharmatimes.com/ Article/13-04-02

A STUDY ON THE ROLE OF MEDIA VIS-À-VIS PROTECTION OF HUMAN RIGHTS

- RUPINDER WALIA[150]

Abstract

In the modern world, media has many faces; among those faces, social media, available on the smart phone, is one of the basic needs of almost every individual, irrespective of age, class, sex, and profession. Social media not only keep people connected with their relatives and friends, but also keep them updated and aware of the events and news happening across the world.

However, this modern marvel presents us with a series of new challenges. One vital issue is how to guarantee that Internet regulations do not choke the flexibility of human beings. "Blocking", for example, is these days seen as regularly utilized as a way to avoid a particular piece of content from coming to a final client. Social systems without a doubt have a tremendous and developing store of individual information, all of it in advanced form. Our national and international experts will ensure that our rights to privacy and information protection are not surrendered to social systems, but rather strengthened to perceive and meet the scope of modern challenges through effective modern media display.

Keywords: *Human Rights, Media, World, Social Media*

I. Introduction:-

Media plays a significant role in human rights for better or worse. How can it work to protect – and not harm – human rights? There's no simple solution. When it comes to news media, there are journalistic ethics and standards. The Society of Professional Journalists, an organization that represents journalists in the United States, has four principles: seek truth and report it, minimize harm, act independently, and be accountable and transparent. These principles are based on the Society's belief that "public enlightenment is the forerunner of justice and foundation of democracy." Many news organizations have their own codes of ethics but follow these general principles. If an organization does not state its ethics clearly or follow an ethical standard, this is a sign of an irresponsible media outlet.

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When it comes to human rights, people know about entities like the United Nations, governments, and NGOs. The media plays a significant role, as well. How? In any form, the media can raise awareness of human rights issues, expose violations, and empower people to take action. The media can also negatively impact human rights. Whether it's making a positive or negative impact, the role of media should be understood. In this article, we'll discuss the media's connection and responsibility to human rights, its potential as a force for harm, and what a responsible media can look like.

II. The Nexus of Media & Human Rights:-

Article 19 of the UN's Universal Declaration of Human Rights reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media [emphasis added] and regardless of frontiers." States still have the power to decide what government information should be public or protected, but it is widely understood that freedom of expression and freedom of speech are entwined with a free media/press.

So, access to media is a human right, but what is the media's responsibility to human rights? Free media is essential to human rights because, without information, people won't know what's going on locally, nationally, or internationally. Their ability to respond to laws, policies, and events – including human rights violations – is limited by ignorance. Free media has a responsibility to share information and help explain that information to the public in a clear, accessible way. The media also has a duty to hold people in power accountable.

The media must report accurate facts, but their role doesn't end there. Media also plays a huge role in what people believe about the facts. One of the most significant examples can be found in the coverage of climate change. Climate change has huge implications for rights such as the right to food, development, housing, and life itself. According to one study, at least 85% of the world is affected by human-induced climate change, while The World Health Organization estimates that between 2030-2050, climate change will cause around 250,000 additional deaths each year. Historically, the media has not covered climate change with appropriate concern.

Thus, the media play a noteworthy part in strengthening the human rights and making it available to every individual. However, how can it work to secure – and not hurt – human rights? There's no basic solution. When it comes to the news media, there are journalistic morals and measures. The Society of Professional Writers, an organization that speaks to writers within the United States, has four standards: look for the truth and report it; minimize hurt; act autonomously; and be responsible and straightforward.

These standards are based on the Society's conviction that "public illumination is the trailblazer of equity and the establishment of democracy." Numerous news organizations have their own codes of morals but take after these common standards. In the event that an organization does not state its morals clearly or follow an ethical standard, this can be a sign of an untrustworthy media outlet.

As well as planning activity, social media has most vitally permitted us to engage with first-hand accounts of those experiencing human rights emergencies. This has been the core of expanded activism, giving depth and humanity to past impersonal news of human rights infringement. As individual stories about continuous things circulate on the web, untouchables become more associated with the cause. Also, by permitting casualties of human rights infringement to relate their own accounts of their circumstances, social media has come to be a platform for casualties to autonomously move and recover stagnant stories.

III. Human Rights, Freedom of Press & The Constitution of India

Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feeling to others. Freedom of speech and expression is thus a natural right, which a human being acquires on birth.

It is, therefore, a basic right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration of Human Rights (1948). The people of India declared in the Preamble of the Constitution, which they gave unto themselves their resolve to secure to all the citizens liberty of thought and expression. This resolve is reflected in **Article 19(1) (a)** which is one of the Articles found in Part III of the Constitution, which enumerates the Fundamental Rights.

Man as rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. The guarantee of each of the above right is, therefore, restricted by the Constitution in the larger interest of the community. Freedom of Press carries different meanings for different people. But freedom of press can not be absolute. There must be boundaries to it and realistic discussion concerns where these boundaries ought to be set. The right to freedom of speech and expression is subject to limitations imposed under **Article 19(2).**

Freedom of speech is the concept of being able to speak freely without censorship. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing

or in print, in the form of art, or through any other media of his choice. The right to freedom of speech is guaranteed under international law through numerous human-rights instruments, notably under **Article 19 of the Universal Declaration of Human Rights** and **Article 10 of the European Convention on Human Rights**, although implementation remains lacking in many countries. The synonymous term freedom of expression is sometimes preferred, since the right is not confined to verbal speech but is understood to protect any act of seeking, receiving and imparting information or ideas, regardless of the medium used.

In India, freedom of speech and expression is guaranteed under **Article 19(1) (a)** of the Constitution of India. **Article 19(1) (a)** says that all citizens shall have the right to freedom of speech and expression. But this right is subject to reasonable restrictions imposed on the expression of this right for certain purposes under **Article 19(2).** The First Amendment of the Constitution of the United States, guaranteeing freedom of speech, is regarded as the root for the development of this concept in western countries. It can be observed that Article 19(1) (a) of the Constitution of India corresponds to the First Amendment of the United States Constitution, which says, "congress shall make no law… abridging the freedom of speech or of the press".

In ***Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India,*** this court after pointing out that communication needs in a democratic society should be met by the extension as specific right to inform, the right e.g., the right to be informed, the right to inform, the right to privacy, the right to participate in public communication, the right to communicate, etc.

IV. Media Trial Affecting the Right to Fair Trial

One of the fundamental rights that are guaranteed to every citizen of India (and most democratic countries, for that matter) is the right to a free and fair trial. It is considered to not merely be a modern legal right, but also an essential principle of natural justice and, thus, has certain connotations and implications that extend beyond its strict legal character. In short, the right to a free and fair trial is considered sacrosanct and inviolable in most modern democracies, and is an essential part of modern democratic justice systems. If this fundamental right is not ensured to all individuals and entities that are indicted in a court of law, then the integrity of the court and the legal system itself will have been effectively compromised.

Right to a fair trial is an absolute right of every individual within the territorial limits of India vide Articles 14 and 20, 21 and 22 of the Constitution. The right to a fair trial effectively flows from Article 21 of the constitution to be read with Article 14. It must be noted here that the legal concept of fair trial is not purely for the private benefit for an accused – the publics'

confidence in the integrity of the justice system is crucial, as stated in ***Gisborne Herald Co. Ltd. V. Solicitor General***. The right to a fair trial is at the heart of the Indian criminal justice system. It encompasses several other rights including the right to be presumed innocent until proven guilty, the right not to be compelled to be a witness against oneself, the right to a public trial, the right to legal representation, the right to speedy trial, the right to be present during trial and examine witnesses, etc. In the case of ***Zahira Habibullah Sheikh v. State of Gujarat*** the Supreme Court explained that a "fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."

Nowadays, what we observe is media trial where the media itself effectively does a separate 'investigation' of its own, thus constructing public opinion against the accused even before the court takes cognizance of the case. By this way, it prejudices the public and sometimes even judges and as a result the accused person, who should be assumed innocent until proven guilty under the aegis of the principle of Free Trial, is presumed as a convicted criminal, endangering his rights and personal liberty. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime and thus has a significant chance of colouring the proceedings of the case, it amounts to undue interference with the "administration of justice", calling for proceedings for contempt of court against the media. Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent the encroachment of civil rights.

V. Conclusion

The approval of Universal Declaration of Human Rights by the United Nations on 10th November 2008 marked the culmination of Human struggle for freedom and liberty. It can be accomplished that Human Rights are claim, made by virtue of the fact that we are Human beings with an inalienable Right to Human dignity. The term "Human Rights" are very significant for every democratic society. Economic, social and cultural Rights are indispensable components of sustainable expansion and therefore not possible without respect for Human Rights.

In today's world, the media's one of the most essential and indispensable elements on the earth. It is also claimed as the fourth pillar of governance along with legislature, executive, and judiciary. Because it has the control to form the innocent -guilty and to form the guilty-innocent, and that's control. It is possible only because media control the minds of the masses.

And choose what is redress. For this social media is the extreme equalizer. It gives knowledge, strength, voice and stage to anybody willing to lock in.

It is the task of the media to ensure objectivity of commercial decision making by fearless and honest reporting so that the averment that such decisions are in the greater good of the consumer or the public is indeed followed in principle and spirit.

References:-

- General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)', UN Doc CCPR/C/21/Rev.1/Add, volume 7
- Zoe Pearson, An International Human Rights Approach to Corruption
- Corruption and Anti-Corruption, p. 53 - 55
- Bryce 'Modern Democracies' Vol. 1, at p. 105, referred in AIR 1996 Journal Section at p. 52.
- Report of the Royal Commission on Press, Para 562, referred in AIR 1996 Journal Section at p. 52.
- New York Times v. Sullivan, 376 U.S. 254; New York Times Company v. United States 402 U.S. 713 (1971) (Known as the Pentagon Paper case).
- Sakal Papers v. Union of India, AIR 1962 Sc 305 : (1962) 3 SCR 842.
- P.B. Vijay Kumar v. State of A. P., AIR 1988 A.P. 295, Nilima Priya Darshini v. State of Bihar, AIR 1986 SC 2021.
- Ram Pyari v. Union of India, AIR 1988 Raj 124.

A STUDY ON THE PIVOTAL ROLE OF JUDICIARY IN SHIFTING PARADIGMS OF CAPITAL PUNISHMENT

- SHRI KRISHAN LILA[151]

Abstract

In India, the death penalty is a fundamental aspect of the criminal justice system. With the growing prominence of the human rights movement, the death penalty's mere existence is being questioned as unethical. The 262nd Law Commission report has been widely hailed as a "historic," "seminal," "decisive," and, in a more hyperbolic tone, a "paradigm shift" in the Indian death penalty jurisprudence. But what progress has it achieved by advocating revisions to the language of exception? With terrorism cases, the report replaces the rarest of rare criteria as the exception to death penalty repeal. In recent years, the death penalty issue has garnered considerable attention. While proponents of the death penalty argue that it should only be applied to the most egregious offences, human rights advocates argue that the death penalty violates an individual's basic human rights.

The history of capital punishment in India shows, during the midlevel period inflection of death penalty was commonly practiced for the elimination of criminals. In 19th century, however the public opinion dis-favored the use of capital punishment for offences other than the heinous crimes. The irrevocable and irreversible nature of death penalty gave rise to a number of complications which invited public attention towards the need for abolition of this sentence. Many Asian counties removed capital punishment but in 21st century capital punishment plays an important role in India and it is awarded in rarest of rare cases only.

Keywords: *Capital Punishment, India, Criminal Justice system, Penalty, Human Rights, Offences*

I. Introduction:-

The death penalty is not a novel concept; it has existed since the beginning of civilization. The death sentence (typically involving beheading the individual) was imposed by the king in ancient times for the express non-compliance of any person with any command issued by the king or with any moral obligation imposed on that person. It was eventually inserted into

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the Indian Penal Code of 1860, resulting in its legal incorporation, and it has been lawful in India ever since. In the twentieth century, there was a campaign to abolish the death penalty, which led to numerous states following suit and abolishing the death sentence. However, the death penalty has remained in place in India. This has sparked a lot of discussion and controversy, with human rights advocates presenting compelling arguments for the death penalty's elimination.

The aims of punishment are now considered to be retribution, justice, deterrence, information and protection and modern sentencing policy reflects a combination of several or all these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. In the concept of justice as an aim of punishment growing emphasis is laid upon it by much modern legislation but judicial opinion towards this particular aim is varied an rehabilitation will not usually be accorded precedence over deterrence means both that the punishment should fit the offence and also that like offences should receive similar punishment. Under Indian penal code death sentence may be awarded on the offenders in the following cases only:-

- Waging war against the government of India.
- Abetting mutiny actually committed.
- Giving or fabricating false evidence upon which an innocent person suffers death.
- Murder.
- Murder by a life convict.
- Abetment of suicide of a minor or insane or intoxicated person.
- Attempt to murder by a person under sentence of imprisonment for life if hurt is caused.
- Kidnapping for ransom, etc.
- Dacoit accompanied with murder

II. Judicial Endeavours:-

In 1973, the Supreme Court of India upheld the constitutionality of the death penalty for the first time in the case of ***Jagmohan Singh v. State of U.P***. In the same year, a new Code of Criminal Procedure was adopted. The new Code required judges to note 'special reasons' when imposing death sentences and required a mandatory pre-sentencing hearing to be held in the trial court. The requirement of such a hearing was obvious, as it would assist the judge in concluding whether the facts indicated any 'special reasons' to impose the death penalty.

In 1980, the Supreme Court again upheld the constitutionality of the death penalty in the key case of ***Bachan Singh v. State of Punjab*** with other case, although the bench was not unanimous. The judgment called for aggravating and mitigating circumstances with reference to both the crime and the convicted prisoner to be considered in passing sentence and emphasized that the death penalty should be used only in the 'rarest of rare' cases. In this case Minority Judgment, published in 1982, in which he argued that the death penalty was unconstitutional, Justice Bhagwati of the Supreme Court identified a number of problems within the criminal justice system:

"Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Sometimes they are even got up by the police to prove what the police believe to be a true case. Sometimes there is also mistaken eyewitness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There are also cases where an overzealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility..."

In 1991, a Supreme Court bench again upheld the constitutionality of the death penalty in ***Smt. Shashi Nayar v. Union of India and others***. The Court did not go into the merits of the argument against constitutionality, arguing that the law and order situation in the country had worsened and now was therefore not an opportune time to abolish the death penalty. An argument which assumes executions address such situations.

In a 1994 Supreme Court judgment ***Rampal Pithwa Rahidas v. State of Maharashtra***,the Court observed that 'the manner in which the investigating agency acted in this case causes concern to us. In every civilised country the police force is invested with the powers of investigation of the crime to secure punishment for the criminal and it is in the interest of society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. In this case, the trial court had sentenced eight people to death. The High Court upheld the sentences of five of them, but the Supreme Court acquitted them all, noting that the main evidence against them was not trustworthy. The Court noted sarcastically that the main witness's memory constantly improved his testimony at the trial three years after the incident was observed to be far more detailed than

his confessional statement recorded a few days after the incident). The Court concluded that the witness was pressured by the police to give evidence because "*the investigation had drawn a blank and admittedly the District Police of Chandrapur was under constant attack from the media and the public."*

In a judgment in 2001 ***Sudama Pandey and others v. State of Bihar*** relating to a case in which the trial court had sentenced five people to death for the attempted rape and murder of a 12-year-old child, the High Court had commuted the sentences, but the Supreme Court noted that it was unfortunate that the High Court did not also properly review the evidence. Acquitting the accused, the Supreme Court noted that both the trial court and the High Court had committed a serious error by appreciating circumstantial evidence, resulting in a miscarriage of justice. In an indictment of the lower judiciary, the Supreme Court remarked: "*The learned Sessions Judge found the appellants guilty on fanciful reasons based purely on conjectures and surmises -- It is all the more painful to note that the learned Sessions Judge, on the basis of the scanty, discrepant and fragile evidence, found the appellants guilty and had chosen to impose capital punishment on the appellants.*"

In ***Krishna Mochi and others v. State of Bihar*** a three-judge bench disagreed over the sentence imposed on one of the appellants, while agreeing on the conviction and upholding the death sentence awarded to three other appellants. In a dissenting judgment, Justice Shah argued that the shortcomings in the investigation and the evidence that only proved the presence of the accused at the scene of the offence meant that this could not be a fit case for imposing the death penalty. On the other hand, he observed, "*this case illustrates how faulty, delayed, casual, unscientific investigation and lapse of long period of trial affects the administration of justice which in turn shakes the public confidence in the system*."

The study found that while the Supreme Court had looked at various facets of mental health as a factor in adjudicating on sentencing, there was no consistent response to concerns about mental health, and no established practice of seeking medical evidence in the face of such concerns. In several cases the Court commuted sentences on grounds of questions over the mental health or state of mind of the appellant, while in other cases such questions were ignored. Access to mental health professionals by condemned prisoners or by the accused at trial stage is extremely limited in India. There is no current research on the subject.

III. The International Framework

- Despite the fact that the death penalty was still in practice in the majority of countries in the early 1960s, the drafters of the International Covenant on Civil and Political Rights (ICCPR) have already begun efforts to have it abolished in international law.
- Although Article 6 of the ICCPR allows for the use of the death penalty in restricted circumstances, it also states that nothing in this Article shall be invoked to delay or hinder any State Party to the present Covenant from abolishing capital punishment.
- The UN Economic and Social Council enacted Safeguards in 1984, ensuring that persons facing the death penalty have their rights protected.
- The ICCPR's Second Optional Protocol aims to abolish the death penalty.
- The UN General Assembly ratified the Second Optional Protocol to the ICCPR in 1989, 33 years after the adoption of the Covenant itself, giving abolition a powerful fresh boost. Members of the Protocol's signatories pledged not to execute anyone within their domains.
- Resolutions of the United Nations General Assembly: The General Assembly urged states to observe international standards that protect the rights of persons facing the death sentence in a series of resolutions enacted in 2007, 2008, 2010, 2012, 2014, 2016, and 2018, and to gradually reduce the number of offences punishable by death.

IV. Conclusion

In India Capital Punishment plays an important role in the rarest of rare cases. If we find out ratio of the capital punishment in India, very few cases in which this sentence is granted. There are so many cases in which the Supreme Court converted capital punishment into life imprisonment, these grounds may be as under-

· it constitutes a cruel, inhuman and degrading punishment;

· secondly, it is irrevocable;

· thirdly, it is capable of being inflicted on the innocent;

· fourthly, it does not act as a deterrent to crime;

· Fifthly it is a violation of the right to life provisions of the Universal Declaration of Human Rights and other international covenants.

Turning to the international situation, we find that the UN General Assembly has taken the official position that it is desirable to abolish the death penalty in all countries, that it should not be introduced for crimes to which it does not already apply, that the crimes to which it applies should be progressively reduced and that it should be employed only for the gravest of

crimes. But a large number of UN member states including India have not respected this decision.

References:-

1. Death Penalty in India, Annual Statistics Report 2021 14, available at: https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/61f6d7e8f0e77848cc843477/1643567095391/Annu al+Statistics+Report+2021+%281%29.pdf.
2. Death Penalty India Report Part-II, available at: https://www.project39a.com/dpir#:~:text=The%20Death%20Penalty%20India%20Report,is%20divided%20in%20two %20volumes.
3. Aparna Chandra, "Gender Dimensions of the Death Penalty in India", (May 23, 2010), available at: http://dx.doi.org/10.2139/ssrn.1617603. The author argues that "by consistently discounting women's experiences of violence in determining the norms by which a society is to be governed, law threatens to continue the existing social disparity."
4. Taslima Nasreen, "Death penalty is not justice, it is revenge", The Print (Apr. 29, 2018), available at: https://theprint.in/opinion/death-penalty-for-rape-isnt-justice-it-is-vengeance/53519/.
5. https://icomdp.org/why-the-death-penalty-should-be-abolished/
6. https://www.advocatekhoj.com/library/lawreports/capitalpunishment/24.php?Title=Capital%20Punishment&STitle=Arguments%20for%20abolition
7. https://www.legalserviceindia.com/articles/cap_pp.htm
8. https://indians4sc.org/2020/04/24/abolishment-of-capital-punishment-in-india/#.Yc4KdslBzIV
9. https://www.britannica.com/topic/capital-punishment/Arguments-for-and-against-capital-punishment

THE NON-CONVENTIONAL TUSSLE OF ADMISSIBILITY OF ELECTRONIC EVIDENCE AND ROLE IN CRIMINAL JUSTICE SYSTEM IN INDIA

- **SURBHI DADHICH**[152]

Abstract

The law of evidence has changed dramatically in recent years, with different types of evidence now deemed admissible by a court. This change has also come to India with various changes to the existing legislation.

Despite its susceptibility to being tampered or manipulated, the importance of electronic evidence in this day and age cannot be understated. Therefore, it is important to have a comprehensive set of provisions which can reconcile its relevance and admissibility.

Though electronic records provide convenience, it also has created unique problems and challenges with regards to proper authentication and catering the different views on it. As rapid growing cyberspace, there has been a simultaneous tremendous increase in the misuse of cyberspace; the danger of cybercrimes has evolved. Because of these investigating agencies as well as judiciaries are facing challenges with regard to the admissibility of electronic records (greater chances of manipulation). During the trial stage electronic records substantially impact the outcome of civil, criminal and other judicial proceedings. So, it is really crucial to understand the electronic records, types, admissibility & evidentiary value and their role of evidence. The paper deals with the issue confronting the tussle of admissibility of electronic evidence in the Court of law in India and the concomitant issues therein.

Keywords: *Evidence Act, IT Act, evidence, electronic evidence, digital evidence, Cybercrime, Admissibility*

I. Introduction:

In order to modernize Indian evidentiary practices, Sections 65A and 65B were introduced in The Indian Evidence Act, 1872 ("Evidence Act") with effect from 17th October, 2000. Section 65B in essence permitted electronic evidence to be admitted as documentary evidence. However, it needed to satisfy the conditions for its reliability and accuracy under Section 65B.

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Despite its positive intent, the interpretation of Section 65B left a lot to be desired in terms of fulfilling its intended objectives. This is because, different High Courts have adopted an inconsistent and arbitrary approach towards determining what practices are to be adopted to satisfy the conditions under Section 65B. In order to resolve this question once and for all, the Supreme Court in ***Anvar P.V. v. P.K. Basheer & Ors***. ("*Anvar*") interpreted the requirement of a certificate under Section 65B (4) as the only necessary pre-condition for admitting electronic evidence.

II. Admissibility of Electronic Evidence:

65A and 65B of the Evidence Law are inserted to include the admissibility of electronic evidence in the evidence law under the second annex of the IT Act of 2000. Sec 5 of the Evidence statue provided that evidence can be given related to only facts that are at issue or relevant facts. Section 65B of the Evidence Act establishes that despite everything included in the law of evidence, any information stored in an electronic record, is considered to be a document and is admissible as evidence without any additional proof of production of the original, provided all conditions are met in accordance with section 65B of IEA.

III. Conditions For Admissibility of Electronic Evidence Under Section 65 B:

In the landmark case of ***State vs Mohd Afzal*** the test for admissibility of e-evidence under section 65B was considered for the first time, wherein the Division Bench of the High court of Delhi was called to determine if the call tapes were included in the evidence in accordance with section 65B. The defendant argued that the CDRs (details of call record) were inadmissible because the certificate for subsection 65B (4) was not submitted by appellant. This allegation was refuted by the party on the grounds that the conditions set forth in subsection 65B (2) had been met by oral testimony. Delhi bench accepted the argument of the prosecution and stated that, "*the certificate under subsection 65B (4) it was just another form of proof and compliance with sub-sec (1) and (2) of the section 65B is sufficient for the electronic records to be admissible and to prove it. Comparing computer output under Section 65B to secondary documentary evidence under Section 65 (d), the Court considered that the oral testimony was also sufficient and that the absence of a certificate was not automatic bar for inadmissibility"*.

The four conditions referred to above are:

(1) The computer output containing such information should have been produced by the computer during the period when the computer was used regularly to store or process information for the purpose of any activities regularly carried on during that period by the

person having lawful control over the use of the computer.
(2) During such period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of such activities.
(3) Throughout the material part of such period, the computer must have been operating properly. In case the computer was not properly operating during such period, it must be shown that this did not affect the electronic record or the accuracy of the contents.
(4) The information contained in the electronic record should be such as reproduces or is derived from such information fed into the computer in the ordinary course of such activities

It is further provided that where in any proceedings, evidence of an electronic record is to be given, a certificate containing the particulars prescribed by 65B of the Act, and signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities would be sufficient evidence of the matters stated in the certificate.

IV. Cyber Forensics & Challenges For Law Enforcement:

Cyber forensics is a branch of forensics relating to computer based evidences, their storage, collection and admissibility. It is also known as digital forensics. The reasons for employing cyber forensics techniques are manifold. Firstly, analysis of computer systems belonging to accused; secondly, recovery of data in event of hardware/software failure; thirdly, to gather evidences against the employee or any person the organisation wish to terminate.

Cyber forensics as a discipline requires highly trained professional operating in an organized and comprehensive manner. The growing number of cyber crime indicates setting up of support group consisting of police officers in CBI, CID, state police headquarters and detective department of computer investigation. These trained police officers are needed to understand the nature of crime at the threshold and proceed with the investigation in a correct and required manner. Failing which, it will result in a botched up investigation at the outset leaving no evidences and a total failure to convict the criminal.

Special measure should be taken in conducting cyber forensics investigation. It must be kept in mind that only collection of evidences is not required. The agency is required to ascertain that whether or not the evidences so gathered are admissible in the court of law. For the purpose of admissibility they are supposed to make provisions so that those evidences are not tampered or toyed. Evidences are to undergo a strict test of admissibility. Hence they must draw a clear

picture of sequence of events leading to one and only one conclusion of the accused being guilty.

Another baffling aspect which is involved in these crimes is the intelligence of criminals. Those who commit these crimes are highly skilled persons especially trained in these fields. Hence their understanding of things is far more than what investigators can perceive. In order to match with the intellect and skill of criminals a hyper technical and sharp approach is needed.

Cyber forensics became more challenging since new forms and techniques of data storage are continuously being changed and new technologies are being developed. One of the major challenges faced by the investigators and law courts is the legal framework. In India after the enactment of Information and Technology Act, 2000 and consequential amendments in the Indian Evidence Act, 1872 and the Indian Penal Code, 1860, electronic record is admissible evidence criminal can be bring to book. However, the major problem relates to jurisdictional issue. In case where laws of one country recognize a particular act as crime and laws of other country do not consider it as crime, the problem of enforcement arises. Not to mention the cooperation and support that is required from the other country is also very important.

V. Anvar V. P.K. Basheer: An Analaysis:

The restatement of the law under Section 65B (4) by the Supreme Court in *Anvar* contravened the literal rule of statutory interpretation due to the following reasons. Further, no attempts were made to explain the deviations made.

First, the Supreme Court imposed the certificate as a mandatory requirement without giving litigants any leeway to introduce alternative methods to satisfy the conditions under Section 65B (2). Post-*Anvar*, this rule has already been applied by the Delhi High Court in ***Jagdeo Singh v. State*** where it held that oral evidence was insufficient for authenticating the electronic evidence in question. However, such a conclusion is not supported by the language of the provision. The use of the word 'shall', which ordinarily creates a mandatory requirement, is only used in Section 65B (4) to state that the certificate "*shall be evidence*" of any matter under sub-clauses (a), (b), and (c). However, nowhere does the provision state that the certificate "*shall be submitted*" in order to authenticate the electronic evidence, or that other alternative methods of authentication are barred. This conclusion is further supported by Sections 65B (1) and (2) which do not specify any method for authenticating the electronic evidence.

Second, Section 65B (4) states that a certificate must do "*any of the following things*" before laying down the three sub-clauses (a), (b), and (c). The use of the phrase "*any of the following things*" before the three sub-clauses suggests that a certificate can satisfy either of the three

conditions, in order to be deemed valid. However, in its holding, the Supreme Court interpreted the three sub-clauses as individual mandatory requirements for the certificate to be deemed valid.

Third, the Supreme Court went ahead and read in words where none existed in the original provision. The Supreme Court held that a certificate must state the "*applicable conditions*" under Section 65B (2). However, no such requirement of applicability was present in the original provision. Further, introducing the word 'applicable' created a dichotomy between Sections 65B (2) and (4).This is because, each of the four conditions under Section 65B (2) is mandatory in nature. However, the Supreme Court only required the certificate to confirm the "*applicable conditions*" under Section 65B (2). This contradicts the mandatory nature of Section 65B (2) since the certificate is the only means to satisfy these conditions.

Therefore, the aforementioned criticisms prove that the Supreme Court had not only *re-interpreted* but *re-invented* Section 65B (4) in *Anvar*, by engaging in judicial overreach and displaying considerable negligence in contravening the literal rule of statutory interpretation.

VI. Conclusion:

Recently, the Supreme Court had the opportunity to revisit its *Anvar* judgement in ***Arjun Panditrao Khotkar v. Kailash Kishanrao Goratyal***. Accordingly, it upheld *Anvar* by emphasising on the mandatory nature of the certificate under Section 65B (4). However, it refused to expand its interpretation by allowing any other forms of authentication to supplement the certificate. Therefore, the Parliament should take this opportunity to suitably amend the law in light of the recommendations advanced in Part 6.2 of this paper. This would bring our evidentiary practices on par with leading jurisdictions in this area of law, by embracing modernity.

References:

- Anvar v. Basheer and the New (Old) Law of Electronic Evidence - The Centre for Internet and Society.
- http://mja.gov.in/Site/Upload/GR/Title%20NO.190(As%20Per%20Workshop%20List%20title%20n o190%20pdf).
- https://ujala.uk.gov.in/files/15.pdf 4. Paul, George L. "CANVASSING THE EMERGING LAW OF DIGITAL INFORMATION: STEPHEN MASON'S

„ELECTRONIC EVIDENCE.“” Jurimetrics, vol. 53, no. 4, 2013, pp. 467–481. JSTOR, www.jstor.org/stable/24395659.

- Schafer, Burkhard, and Stephen Mason. “The Characteristics of Electronic Evidence.” Electronic Evidence, edited by Stephen Mason and Daniel Seng, University of London Press, 2017, pp. 18– 35. JSTOR, www.jstor.org/stable/j.ctv512x65.
- TejasKaria. et al,The Supreme Court of India re-defines admissibility of electronic evidence in India, 12 DEESLR. 33, 36 (2015).
- Wani, M. Afzal. Journal of the Indian Law Institute 53, no. 3 (2011): 530-33.
- Arjun Pandit Rao v. Kailash Kushanrao Civil Appeal No. 20825-20826 of 2017 – Judgment dated July 14, 2020

DISSOLUTION OF MARRIAGE ON IRRETRIEVABLE BREAKDOWN OF MARRIAGE: AN ANALYSIS OF RECENT JUDGMENT OF SHILPA SAILESH V. VARUN SREENIVASAN

- **TARUN**[153]

Abstract

In India, with regards to the Hindu Marriage Act and Special Marriage Act, the Government of India has attempted to include 'Irretrievable Breakdown of Marriage' as a ground of divorce as per the recommendations of the 71st report of the Law Commission of India.

The Supreme Court's five-judge Constitution bench has very recently held that it can dissolve a marriage on the ground of irretrievable breakdown of the marriage by invoking special power granted to it under Article 142 of the Constitution and that the mandatory waiting period of six months for divorce through mutual consent can be dispensed with subject to conditions. It is pertinent to note that Article 142 of the Constitution deals with the enforcement of decrees and orders of the apex court to do "*complete justice*" in any matter pending before it.

The Supreme Court delivered the verdict on a batch of petitions relating to the exercise of its vast powers under Article 142 of the Constitution to dissolve broken-down marriages between consenting couples without referring them to family courts for protracted judicial proceedings to get the decree of separation. The paper strives to analyse the very recent judgment passes by Hon'ble SC's ancillary power to dissolve the marriage on the ground of Irretrievable Breakdown of Marriage.

Keywords: *Supreme Court, Marriage, Irretrievable Breakdown of Marriage, Dissolution, Article 142*

I. Introduction:

Irrespective of the three remedies available to parties that is: restitution of conjugal rights, judicial separation and divorce, the judiciary in India is demanding irretrievable breakdown of marriage as a special ground for divorce, as sometimes court face some difficulties in granting the decree of divorce due to some of the technical loopholes in the existing theories of divorce.

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The Supreme Court's five-judge Constitution bench has very recently held that it can dissolve a marriage on the ground of irretrievable breakdown of the marriage by invoking special power granted to it under Article 142 of the Constitution and that the mandatory waiting period of six months for divorce through mutual consent can be dispensed with subject to conditions. It is pertinent to note that Article 142 of the Constitution deals with the enforcement of decrees and orders of the apex court to do "*complete justice*" in any matter pending before it.

The Supreme Court delivered the verdict on a batch of petitions relating to the exercise of its vast powers under Article 142 of the Constitution to dissolve broken-down marriages between consenting couples without referring them to family courts for protracted judicial proceedings to get the decree of separation. The paper strives to analyse the very recent judgment passes by Hon'ble SC's ancillary power to dissolve the marriage on the ground of Irretrievable Breakdown of Marriage.

II. Irretrievable Breakdown of Marriage:

It is pertinent to preface with the theory of 'Irretrievable Breakdown of Marriage'. Under Hindu Marriage Act, 1955 primarily there are three theories under which divorce is granted:

(i) Guilt theory or Fault theory,

(ii) Consent theory,

(iii) Supervening circumstances theory.

The Irretrievable breakdown theory of divorce is the fourth and the most controversial theory in legal jurisprudence based on the principle that marriage is a union of two persons based on love affection and respect for each other. If any of these is hampered due to any of the reason (say cruelty, desertion, adultery, insanity etc.) and if the matrimonial relation between the spouses reach to such an extent from where it becomes completely irreparable that is a point where neither of the spouse can live peacefully with each other and acquire the benefits of a matrimonial relations, than it is better to dissolve the marriage as now there is no point of stretching such a dead relationship, which exist only in name and not in reality.

The breakdown of relationship is presumed de facto. The fact that parties to marriage are living separately for reasonably longer period of time (say two or three years), with any reasonable cause (like cruelty, adultery, desertion) or even without any reasonable cause (which shows the unwillingness of the parties or even of one of the party to live together) and all their attempts to reunite failed, it will be presumed by law that relationship is dead now.

The theoretical basis for including the irretrievable breakdown of marriage as a ground for divorce is now commonly known among lawyers and jurists. Restricting the ground of divorce

to a particular offence or matrimonial disability causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not wish to divulge it, yet there has arisen a situation in which the marriage cannot be worked; that is, where the marriage has all external appearances of marriage but none of the reality.

In such circumstances, there is hardly any utility in maintaining the marriage as a façade, when the emotional and other bounds which are the essence of marriage have disappeared. After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. In a situation like this, the parties alone can decide whether their mutual relation is emotionally and socially real and strong or not. Divorce should be seen as a solution and a way out of a difficult situation. Such divorce should not be concerned with the wrongs of the pasts, but must focus on bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relation in the changing scenario.

III. Plenary Power of Supreme Court Under Article 142 of the Constitution of India:

Article 142 is apparently a very unique provision envisaged in the Constitution of India as it does not have any counterpart in most of the major written constitutions of the world12, has its origin in and is inspired from the age-old concepts of justice, equity, and good conscience. Article 142(1) of the Constitution of India, which gives wide and capacious power to the Supreme Court to do 'complete justice' in any 'cause or matter' is significant, as the judgment delivered by this Court ends the litigation between the parties. Given the expansive amplitude of power under Article 142(1) of the Constitution of India, the exercise of power must be legitimate, and clamours for caution, mindful of the danger that arises from adopting an individualistic approach as to the exercise of the Constitutional power.

Interpreting Article 142(1) of the Constitution of India, in **M. Siddiq v. Mahant Suresh Das**[154], the Constitution Bench of this Court has summarised the contours of the power as:

"1023. …*The phrase 'is necessary for doing complete justice' is of a wide amplitude and encompasses a power of equity which is employed when the strict application of the law is inadequate to produce a just outcome. The demands of justice require a close attention not just to positive law but also to the silences of positive law to find within its interstices, a solution that is equitable and just. The legal enterprise is premised on the application of generally*

[154] (2020) 1 SCC 1.

worded laws to the specifics of a case before courts. The complexities of human history and activity inevitably lead to unique contests "such as in this case, involving religion, history and the law — which the law, by its general nature, is inadequate to deal with. Even where positive law is clear, the deliberately wide amplitude of the power under Article 142 empowers a court to pass an order which accords with justice. For justice is the foundation which brings home the purpose of any legal enterprise and on which the legitimacy of the rule of law rests. The equitable power under Article 142 of the Constitution brings to fore the intersection between the general and specific. Courts may find themselves in situations where the silences of the law need to be infused with meaning or the rigours of its rough edges need to be softened for law to retain its humane and compassionate face…"

In **Union Carbide Corporation v. Union of India**[155], the Apex Court laid specific emphasis on the expression 'cause or matter' to observe that 'cause' means any action or criminal proceedings, and 'matter' means any proceedings in the court and not in a 'cause'. The words 'cause or matter', when used together, cover almost every kind of proceedings in court, whether civil or criminal, interlocutory or final, before or after judgment.

The plenary and conscientious power conferred on the Supreme Court under Article 142(1) of the Constitution of India, seemingly unhindered, is tempered or bounded by restraint, which must be exercised based on fundamental considerations of general and specific public policy. Fundamental general conditions of public policy refer to the fundamental rights, secularism, federalism, and other basic features of the Constitution of India. Specific public policy should be understood as some express pre-eminent prohibition in any substantive law, and not stipulations and requirements to a particular statutory scheme. It should not contravene a fundamental and non-derogatory principle at the core of the statute. Even in the strictest sense, it was never doubted or debated that this Court is empowered under Article 142(1) of the Constitution of India to do '*complete justice*' without being bound by the relevant provisions of procedure, if it is satisfied that the departure from the said procedure is necessary to do 'complete justice' between the parties.

IV. Divorce on the Ground of Irretrievable Breakdown Of Marriage:

[155] (1991) 4 SCC 584.

In the very judgment, Hon'ble court has observed that grant of divorce on the ground of irretrievable breakdown of marriage by SC is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that the marriage should be totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward.

It is implied that the marriage has irretrievably broken down is to be factually determined and firmly established. For this, the Hon'ble Court has observed several factors such as:

- **Period of time the parties had cohabited after marriage**
- **When the parties had last cohabited**
- **The nature of allegations made by the parties against each other and their family members**
- **The orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship**
- **Whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc.**
- **The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor.**

However, these factors have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children.

While dealing with this issue, the Hon'ble Court has also addressed the issue that whether a party can directly canvass before this Court the ground of irretrievable breakdown by filing a writ petition under Article 32 of the Constitution. In response to this, the Court has observed that the parties should not be permitted to circumvent the procedure by resorting to the writ jurisdiction under Article 32 or 226 of the Constitution of India, as the case may be.

Moreover, relief under Article 32 of the Constitution of India can be sought to enforce the rights conferred by Part III of the Constitution of India, and on the proof of infringement thereof. Judicial orders passed by the court in, or in relation to, the proceedings pending before it, are not amenable to correction under Article 32 of the Constitution of India. Therefore, a

party cannot file a writ petition under Article 32 of the Constitution of India and seek relief of dissolution of marriage directly from this Court.

Conclusively, the Hon'ble Court has answered the question of granting the decree of Divorce on the ground of Irretrievable Breakdown of Marriage affirmatively, *inter alia*, holding that the Court, in exercise of power under Article 142(1) of the Constitution of India, has the discretion to dissolve the marriage on the ground of its irretrievable breakdown. This discretionary power is to be exercised to do 'complete justice' to the parties, wherein the Court is satisfied that the facts established show that the marriage has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified

V. Conclusion:

Thus, to conclude, it can be said that marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilization can exist. This foundation presupposes the existence of a platform build on the basis of sound understanding between the spouses.

If this understanding is missing between the spouses and the marriage is a continuous malady, then it is desirable that the marriage should be dissolve with the intervention of the court. There is no useful purpose served by continuing such a marriage. Thus, on the basis of "**irretrievable breakdown theory**" such marriage should be dissolved for the common betterment of both the spouses.

This is the reason why the attitude of legislature changed from the guilt theory to the divorce by mutual consent (the consent theory). There may be a case where relation of the parties has broken down irretrievably and there is no chance of reconciliation and they are also not ready for divorce by mutual consent.

In that eventuality continuing such relation is futile and as per Irretrievable Breakdown of Marriage theory such marriage should be dissolved. It is high time that we appreciate the need of Irretrievable Breakdown of Marriage theory so that spouses can have a new and better life instead of wasting their young days in courts.

References:

- Shilpa v. Varun Sreenivasan, 2023 SCC Online SC 544.
- Dr. Diwan Paras, Modern Hindu Law.

- Kumud Desai's Indian Law of Marriage and Divorce, 7th Edition 2008
- Mulla Hindu Law Vol II, 20th Edition Reprint 2010.
- Garg, S. P. (1998). Law and religion: the divorce systems of India. Tulsa Journal of Comparative and International Law.
- Hasso, F. S. (2011). Consumed desires: family crisis and the state in the Middle East. Standard University Press. 1-272.
- http://www.thehindu.com/news/national/bill-to-make-divorce-easier-may-be-dropped/article6910089.ece
- http://www.ndtv.com/india-news/law-ministry-puts-proposal-to-amend-marriage-bill-on-hold-780561

A STUDY ON GENDER BASED VIOLENCE IN INDIA: ADDRESSING THE ISSUE

- DR. SUMAN KUMARI

Abstract

Denial of women's rights means denial of human rights of half of humanity. Gender based violence is one of the worst forms of violation of woman's basic human rights. Gender Violence is highly pervasive and the increasing number of cases reported confirms this point. The growing concern of the women's movement has placed violence against women (VAW) on the global agenda. At the same time efforts are being made by various groups to eliminate VAW by not only reaching out to the victims but also addressing violence prevention. The present paper discusses women's rights and the nature of gender based violence in India and shares a model of preventing violence by generating community participation.

As already mentioned, such acts of violence are mostly implicated on women and they are the victims in the majority of the cases. In case of women along with the mental health, there are other health risks such as unwanted pregnancy in many cases or abortion due to any injury. In the case of pregnancy, there could be a problem of poor weight gain, vaginal issues, infection, anaemia, low birth weight of the infant, malnutrition child, etc. Other than these, there are more gynaecological problems which can be associated with women. There are various sexually terminated diseases like sexually transmitted infections or HIV which can also be caused due to such harm done to the victim.

Keywords: *women's rights, violence against women, issues and challenges, Parivartan, Delhi Police*

I. Introduction:-

Denial of women's rights means denial of human rights of half of humanity. Gender based violence is one of the worst forms of violation of woman's basic human rights. Gender Violence is highly pervasive and the increasing number of cases reported confirms this point. The growing concern of the women's movement has placed violence against women (VAW) on the global agenda. At the same time efforts are being made by various groups to eliminate VAW by not only reaching out to the victims but also addressing violence prevention. The

present paper discusses women's rights and the nature of gender-based violence in India and shares a model of preventing violence by generating community participation.[156]

1974 is a landmark year in the history of women's movement in India. "Towards Equality — Report on the Committee for Status of Women in India (CSWI)" was released in this year which gave a comprehensive view of the status of women in independent India. The report revealed startling facts which showed that even after 25 years of the country's Independence, women continued to be without any rights despite the many legislative enactments in their favour—they suffered in terms of education, health, political decision making, and careers. Six decades later we in India still are engaged in improving the status of women in the aforesaid areas—education etc…It is not that the Indian government is not gender sensitive, in fact we have one of the most gender sensitive Constitutions framed way back in 1949. We have gender sensitive laws, ratified CEDAW (1993), schemes, programmes and a National policy on women's empowerment. Despite all this the national sex ratio continues to be adversely biased against women who are excluded from benefits of basic human rights and development.

II. Indian Scenario:-

India can be cited as an interesting case for studying women's rights and its violation. This is because of the very rich history that the country has had in terms of the status that women have enjoyed and the respect bestowed on them. Briefly tracing the history, Indian women enjoyed a position similar to the men in the early Vedic period (BC 2000- BC 1000).[157] They were respected in all the fields. They had the opportunity to educate themselves, recited hymns and participated in public debates and discussions with men. It is even said that there were women who fought in the war thus attesting complete equality between men and women during this time.[158]

Things started changing in the later Vedic period (BC 1000-BC 600). Women who once enjoyed a position at par with the men came to be denied position of equality. Their social status deteriorated to the extent that they were now confined within the four walls of home on the pretext of inferior status. Gradually women lost their independence and were totally dependent on the husband. During the British period in India, which lasted for 200 years, India

[156] Ammar, H. (2006). "Beyond the Shadows: Domestic Spousal Violence in a 'Democratising' Egypt," Trauma, Violence & Abuse, 7(4), 244-59.

[157] Kabeer, N., Mahmud, S. and Tasneem, S. (2011). Does Paid Work Provide a Pathway to Women's Empowerment? Empirical Findings from Bangladesh. Working Paper 375, IDS, Brighton.

[158] Barnett, O. W. (2000). Why Battered Women Do Not Leave, Part 1: External Inhibiting Factors Within Society. Trauma, Violence, & Abuse, 1(4), 343-72.

gaining independence in 1947, many social reformers such as Raja Ram Mohan Roy, Ishwar Chand Vidyasagar, Swami Dayanand Saraswati fought for women's rights in the 19th century. Widow re-marriage, education of girls, abolition of sati, and abolition of child marriage were some of the existing practices voiced against by them. We have come a very long way since then. India got independence in 1947 and in 1949 the Indian Constitution was formed which is one of the very well drafted piece of work. Gender equality was given due importance in the document. Today, the Indian economy is doing well. But gender imbalance still prevails in the country which is also reflected in the gender gap index (GPI) released by the World Economic Forum (WEF). Out of the 128 countries evaluated by the WEF India ranks 114. The parameters of the survey include proportion of the resources and opportunities made available to women on educational, economic, political and health parities. India also has the unique distinction of having some states which have the sex ratio lower than the national figures and which believe women to be nothing more than a piece of property. These states snuff out lives out of young girl child as women are treated as economic liability (Whitton).

III. Constitutional Rights:-

The Indian Constitution has given various kinds of rights to its citizens known as the Fundamental Rights. These are equally granted to men and women and can be enumerated as below:

- Right to Equality: A 14& 15 of the Constitution specify that there should be no discrimination against any person on the basis of sex (religion, caste, creed, race, birth place). A 16 says that here should be no discrimination in matters of public employment on grounds of sex.
- Right to Freedom: Freedom of speech and expression.
- Right against Exploitation: exploitation refers to forced labour.
- Right to Freedom of Religion: This means professing and practicing a religion freely.
- Right to Property: Acquiring, holding and selling property.
- Cultural and Educational Rights: This means freedom to get admission to educational institutions and freedom to conserve ones culture.
- Right to Constitutional Remedies: This means right to approach the courts for enforcement of constitutional rights.

The Indian State has plethora of laws in support of its women drafted as early as 1960s and amended subsequently. To name some we have the--Maternity Benefit Act 1961, Dowry

Prohibition Act, 1961 and subsequent amendments which make dowry an offence, The Equal Remuneration Act, 1976; The Medical Termination of Pregnancy Act 1971; The Immoral Drug Traffic Prevention Act 1986; The Family Courts Act 1984; The Indecent Representation of Women's Act 1986 & 1988;The Sati Prevention Act 1987. 73rd and 74th Constitutional Amendments which reserve one third seats for women in Panchayats and Muncipal Corporations. However the status of the women in the country requires proper implementation of the existing laws.

IV. Violence Against Women (VAW):-

Is one of the most pervasive and most undesirable forms of aberration from human rights. It is global, widespread and tolerated as social phenomenon. Violence against women is universal, occurring in all cultures and countries. A study of 90 cultures around the world found family violence in all of them, with violence against women the most pervasive form of violence. A recent UN study on VAW in the family concludes that women in great numbers around the world are murdered, assaulted, sexually abused, threatened and humiliated within their own homes. (Lina Gonslaves, 2001). The absence of national data indicates that the problem is largely unacknowledged and unaddressed. It is treated as a matter of private domain not to be discussed in public.

VAW is one of the greatest barriers to development. It affects health, esteem and ability of women to participate in the development process. Surveys in recent years indicate that about a quarter of world's women are violently abused in their own homes. The figures say that in Thailand it is as high as 50%, 60% in Papua New Guinea and Republic of Korea, 80% in Pakistan and Chile. In the US domestic violence is one of the biggest single causes of injury to women accounting for more hospital admissions than rapes and road accidents combined. Similarly in Britain, domestic violence is one of the biggest problems their society is facing today (Savitri Gooneskere, 2004). Problem is difficult to solve as occurs within privacy of home and friends, neighbours, relations, authorities are reluctant to intrude. The victim themselves voice fewer complaints and have less recourse to law.

VAW in India continues to increase which shows that the law and criminal justice system has failed to respond or has not been able to deal effectively with it. Law against dowry exists and has been amended but dowry is being given and taken and dowry related deaths occur. This is because complaints under the law are filed only when the incident has occurred or there is a

dispute.[159] Neither the state nor women's organizations carry out any awareness raising campaigns on the issue.

In India gendered violence has its origin in various norms, expectations and understandings that define, discipline and subordinate women. One of the most pervasive forms among these is patriarchy. The woman is thus expected be suffer silently. She is then certified as a 'good woman' who has her morals and values intact and the moment she tries to step out of her doormat image she is the 'bad woman'. On top of it if she is a victim of violence in the form of rape, wife beating etc…than she deserves it because she had the audacity to not obey the norms set up by the society i.e. the man. Conventionally the Indian woman is expected to be confined to their home and not to be seen in public as they then come under public gaze, which is not considered inappropriate. This also has been a way to keep women out of public portfolios. Ironically, the woman has the permission to be mobile to attend to the family requirements such as attending to sick, family ceremonies, births etc… In such a situation her being seen in public is acceptable because it involves attending to the family responsibilities but in case the mobility is due to her personal requirements (leisure, professional work etc) then it is considered undesirable and against norms.

V. Issues & Challenges:-

Being a patriarchal society, addressal of women's rights and violence faced by them poses many challenges for the fieldworkers and policy makers. Some of these can be enumerated as below:

- Power Relations: The power relations are biased in favour of men. Thus any attempt to mobilize women is resisted by the man of the house and also the elder women who have been trained to view power with men.
- Resistance: Resistance is shown by men to actions, which they feel would make women stronger, threaten male supremacy and establish woman's independence.
- Public and private domain: It is believed in our society that women's issue should be kept within the private domain and not discussed in public. Infact, women who are outspoken and outside the conventional images of the women are considered to be the 'bad women'. The women too have strongly internalized the image of a good and bad woman as created by the men and the elderly women of the society.

[159] Hadi, A. (2005). Women's Productive Role and Marital Violence in Bangladesh, Journal of Family Violence, 20(3), 181-9.

- Over-burdened poor women: Poor women are already overburdened with work and are thus able to take out little time for anything else outside the 'productive and reproductive' role.
- Profile: Since majority of the population of the country comprises of profile of persons marked by illiteracy, poverty, lack of awareness on state functioning, laws and policies; large family size, indebtedness etc…thus generating awareness among the women on their rights and the existing support system requires lot of sustained effort.
- Field level workers: The level of motivation of the field level workers is an important factor for the strength and failure of any program specifically concerning women.
- Discriminatory practices: Discrimination against women and girls is seen to be practiced with regard to education, access to resources, health care, decision making etc…Thus there is violation of human rights leading to various kinds of abuses including female foeticide, dowry deaths, rape, child prostitution and VAW.

VI. Conclusion

Analysing the various factors involved in domestic violence, it can be concluded that the major and deep-rooted problem of this issue is the mentality and attitude of superiority in major cases. This is the main reason why women are more prone to such crimes than men. The patriarchal set-up that has been there for centuries is still prevalent and can find its place in developed nations as well. However, with advancing times there are slight changes in this aspect and abuses against men can also be seen. This applies to same-sex marriages or partners as well. Therefore, it is important to inculcate the knowledge of laws and the attitude issues in the children from the beginning. There is a need to make awareness in society about the laws about domestic abuse and to make stringent steps so that the law is implemented properly. In the event of such crimes, proper compensations, facilities and training programs should be made available to help the victim in the future.

In nutshell, it can be said that with collaborative efforts between the existing institutions like the universities, caretakers of society, community-based organizations and funding agencies an attempt like Parivartan is welcome. A community-based policing programme it aims at bringing change by creating awareness and changing the existing stereotypes that are dominant in minds of the society. Even a small change introduced with similar programs will go a long way in improving the lives of the women and in making them productive members of the society.

References:-

- Ellsberg, M., & Heise, L. (2005). Researching Violence Against Women: A Practical Guide for Researchers and Activists. Washington DC: World Health Organization, PATH.
- Hallward-Driemeier, M. and Hasan, T. (2012).
- Empowering Women: Legal Rights and Economic Opportunities in Africa. Africa development forum series. Washington DC: Agence Française de Développement and the World Bank.
- Jewkes, R. (2002). Intimate partner violence: causes and prevention. The Lancet 359, (April), 1423-9.
- Johnson, M. P., & Ferraro, K. J. (2000). Research on Domestic Violence in the 1990s: Making Distinctions. Journal of Marriage and the Family, 62(4), 948-63.

STARTUPS IN 2022: REWRITING THE FATE OF INDIAN ECONOMY

- DR. RAM KISHORE MEENA[160]

INTRODUCTION

Indian Economy witnessed massive setbacks due to onslaught of Covid-19 pandemic. However, since 2021, our country's economy is on path to recovery.

Startups form the backbone of the country's economy. They innovate, promote, or improve the existing products. They make India's economy more prosperous and take the nation to greater heights in terms of growth. However, that is not all there is to the importance of startups in India.

Startups have the capability to generate employment opportunities for thousands and millions of people preventing brain drain. People can aspire to better standards of living. The potential of startup ecosystem and the advantages appended to it prompted Prime Minister Modi to declare January 16 as the 'National Startup Day' recently.

Finance Minister Nirmala Sitharaman presented the Economic Survey 2022[161] to the Lok Sabha on 31st January, 2022 and tabled the Budget 2022-23[162] on 1st February, 2022. The Economic Survey Report recorded tremendous growth in startups recognized by the government across the length and breadth of the country. Moreover, the report predicted 8 to 8.5 percent GDP growth between April 2022 to March 2023. Keeping in line, budget 2022 has introduced several initiatives and proposals to boost the startup ecosystem and capitalize on the startup fervor.

INDIAN STARTUP ECOSYSTEM UNDERGOING MASSIVE CHANGES

Innovation, entrepreneurship, and startups will be the cornerstone of India in the next decade, which can be dubbed as the 'technology-driven decade'. It's no mystery that new entrepreneurs are tapping into the technology boom, which has been going on for nearly two decades. Acknowledging their significance, the government has responded by cutting red tape and simplifying the registration and taxes processes.

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[161] Economic Survey 2021-22, January 2022.

[162] Budget 2022-2023, February 1, 2022, *available at:* https://www.indiabudget.gov.in/bspeech.php.

Under the Startup India Fund Scheme, the government has invested INR 8085 crore in 540 businesses.[163]

The government's recognition is a godsend not only for all businesses, but for investors who were previously undecided about making smart investments of their capital. It also provides people, who are hesitant, to start their own business a morale boost.

Investors are seeking for new places to invest, and India is one of these places. During this juncture, the greatest thing for the country to do is to learn from the globally leading players and apply what they've learned to achieve successful results. There will be obstacles when there is progress. Nevertheless, the Indian startup environment is evolving, with bridges being built as one approaches them.

DEFINING A STARTUP

On the 19th February, 2019, Ministry of Commerce and Industry amended the definition of a Start-up and notified that

An entity shall be considered as a Startup:

i. Up to a period of ten years from the date of incorporation/ registration, if it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as a partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India.

ii. Turnover of the entity for any of the financial years since incorporation/registration has not exceeded one hundred crore rupees.

iii. Entity is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation.

Provided that an entity formed by splitting up or reconstruction of an existing business shall not be considered a 'Startup'.[164]

UNDERSTANDING STARTUP INDIA INITIATIVE

[163]Urvi Shrivastav, "Startups in India: The Challenging Rise", *BW BUSINESSWORLD,* January 17, 2022, *available at*: http://www.businessworld.in/article/Startups-In-India-The-Challenging-Rise-/17-01-2022-417880/ (last visited on Feb. 7, 2022).

[164]Startup India, *available at: https://www.startupindia.gov.in/content/dam/invest-india/Templates/public/198117.pdf* (Visited on February 8, 2022).

Narendra Modi, incumbent Prime Minister of India, launched an initiative named 'Startup India' in 2016. It is the government's primary effort to create a strong startup ecosystem, boost long-term economic growth, and provide job opportunities. Its mission is to make India a country of employment creators rather than job seekers.

BENEFITS ACCORDED TO STARTUPS

Once a startup receives recognition from Department of Promotion for Industry and Internal Trade (DPIIT), it can avail of numerous benefits. The Government of India has taken several measures in the form of initiatives to boost the entrepreneurial spirit of the Indians. Moreover, Government has also allowed certain exemptions to support innovation which acts as impetus for startups in the country.

In the arena of finance, the government has introduced a number of loans and grants exclusively for the sake of startups. Hence, startups in need of financial assistance can apply for such loans and grants. These loans and grants are discussed as follows:

1. Funds for Startups (FFS)

Indian Government has set up Funds for Startups at Small Industries Development Bank of India (SIDBI). The total fund is worth Rs. 10,000 crores. FFS helps in mitigating the risks associated with investment in different kinds of securities. The startups recognised by DPIIT can apply for this scheme.

2. CGTMSE Scheme

Under the Ministry of Micro, Small and Medium Enterprises (MoMSME) and SIDBI, Indian Government has set up Credit Guarantee Trust for Micro and Small Enterprises (CGTMSE) scheme. Startups registered with DPIIT can avail of this scheme if they meet the eligibility criteria. They can apply for loans amounting to not more than Rs. 1 crore without any third-party guarantee or collateral.

3. MUDRA Bank

Micro Units Development & Refinance Agency ltd (MUDRA) was set up by the Indian Government. It is an agency at the helm of providing financial support to small enterprises, businesses that are non-corporate such as cooperatives, employee-owned business, partnerships and others at low interest rates.

In the arena of taxation, numerous exemptions are provided to eligible Startups under Income Tax Act, 1961. It is pertinent to note that Startup India scheme allows the startups to claim exemption from filing tax returns in the initial three years from the date of registration.

However, it does not end here. Even the Income Tax Act contains several provisions that contribute towards fostering the growth and smooth functioning on startups.

The provisions are discussed as follows:

- Section 80 IAC[165]- Any startup that incorporates between 1st April, 2016 to 31st March, 2022 will be entitled for deduction, provided that the turnover of the concerned startup does not cross the mark of 100 crores in the preceding year for which the deduction under this section is claimed. Any startup that claims the deduction needs to meet certain eligibility conditions such as the startup may have the potential to generate employment on a large scale or committed to innovation or development and the like.
- Section 79[166]- This section allows a startup to carry forward its losses if its shareholders enjoy voting power on the last day of the preceding year in which loss was sustained and continue to hold shares on the last day of the preceding year for which income is to be set off. Relief under this section can be claimed only if the losses are sustained within the seven years from the date of incorporation of the startup.
- Section 56[167]- This section extends exemption to the DPIIT recognized startups if the aggregate amount of paid-up share capital and its share premium is not beyond Rs. 25 crores. A startup can apply for Angel Tax Exemption once it has been recognized by DPIIT.
- Section 54EE[168]- If a startup meets the eligibility criteria, its taxes on a 'long term capital gain' can be exempted if the mentioned long term capital gain or a part of it happens to be invested in a fund that was notified by the Central Government withing six months following the date of transfer of the asset. A startup cannot invest beyond Rs.50 Lakhs in a long-term capital gain and the amount invested in it shall remain locked in for 3 years. If the amount is withdrawn, startup will not be eligible for exemption any further.
- Section 115JB[169]- Minimum Alternative Tax (MAT) is levied on startups as an advance tax. Under this section, if an eligible startup does not earn any profit in the initial five years from the date of its incorporation, it can claim exemption from MAT.

Once a startup gets incorporated, it cannot be referred to as a 'company' initially. It is on the path to become a 'company'. However, the path is ridden with innumerable obstacles and

[165]The Income Tax Act, 1961.
[166]*Ibid.*
[167]*Ibid.*
[168]*Ibid.*
[169]*Ibid.*

several startups lose the battle midway. To avert and mitigate such unfortunate turn of fate that befalls numerous startups, Companies Act, 2013 comes to their rescue. The Act acknowledges the difficulties and needs of the startups and provides them with several benefits that are discussed as follows:

- If a startup accepts a sum of Rs. 25 lakh or more in a single tranche from a person in the form of a convertible note that is convertible into equity shares or repayable within a period of not more than five years from the date of issue, it is not considered a deposit.
- For the first five years after formation, a start-up does not have to comply with the conditions for accepting deposits set out in clauses 'a' to 'e' of section 73 of the Companies Act, 2013.
- A startup may hold at least one board of directors' meeting during the first 6 months and last 6 months of the year, provided that the break of not less than ninety days exists between the two meetings.
- Employee Stock Options may be granted to a promoter, director, or other member of the group who owns well over 10% of the firm's outstanding equity shares within 10 years of its registration.
- For a period of five years after its incorporation, a private firm that falls in the category of a startup is not mandated to observe the upper limit in terms of deposits to be collected from members.

The afore-mentioned benefits are not the only ones provided to startups. Several other benefits extended to them are:

- Startup registration has been totally moved to the internet, via websites and apps. It has simplified the task considerably. Anyone can set up a business by filling out a form and submitting the necessary paperwork to the concerned website.
- Startups IPR Protection allows startups to fill out IP applications quickly. For startups, the cost for registering patents is also lowered by eighty percent. Teams of facilitators are created to assist with the process of filing applications and to provide legal advice throughout the procedure.
- Numerous labour and environmental legal compliance standards have been made more comprehensible. Not only that but several of the norms have been removed. This reduces costs and effort expended on compliance checks for startups. Presently, startups can self-certify abidance with more than seven labour laws and more than 2 environmental laws.

- The government of India has planned of holding couple of startup fests every year to allow all stakeholders in a firm to interact and expand their networks. The afore-mentioned fests will take place on both the domestic and the global scale. This gives aspiring entrepreneurs the opportunity to expand their network and pursue new prospects.
- Online registration and decreased compliance have greatly simplified the entry procedure of the startups. Together with entry, exiting avenues for entrepreneurs have also been eased. A startup can shut or dissolve in as little as the period of ninety days following the filing of the application for its exit.

INDIA'S REGULATORY REGIME FOR STARTUPS: HIGH TIME FOR RECONSIDERATION

Startups in India are being stifled by existing legal frameworks designed for a different technical ecology.

The overall unmanned aerial vehicles startup environment, for instance, was teetering on the boundary between legitimate and illegitimate until the government intervened in to set the record straight and issued comprehensive rules and policies on drones.

It still does not assist startups that are attempting to disrupt the status quo and must cope with find sufficient funding, scouring talent, reconciling with country's compliances, and then engaging in public policy deliberations to change rules that restrict their expansion and bandwidth to create large scale employment opportunities, increase profits, enhance the existing products in the market and the like.

As an example, consider the issue of online-education. We are all aware that online education facility saved the fate of millions of students in our country amidst the unprecedented crisis of COVID 19. Since online education became a necessity and possible in these trying times, why cannot the government take the requisite measures to ensure that at least high school students and college students are provided the flexibility to attend the online classes in cases labs and practical work aren't part of the curriculum? Having digitalized universities would enable the students to access quality education from the remotest corners of India once they are admitted in the institutions. These students will not be restricted by the financial constraints and in turn improve India's literacy levels by several notches. Not only that but in the longer run they will contribute to the India's economy by participating in the organized sector.

In essence, if our country wishes to improve the quality of education for the current and prospective workforce and increase productivity multiple folds, digital universities can be the only solution in the short span of time. However, it is disconcerting to note that concept of 'digital university' is non-existent in India and will continue to be a utopian vision for the coming decades if the government does not take steps to change the face of Indian education with the help of technology and resources at its disposal. Taking steps to undo this will be akin to stepping into uncharted territory that holds only wonders for the eyes of the seeker and revolutionize the economy and fate of Indians for the coming decades.

Hence, if India needs to improve its workforce's educational qualifications and productivity at large scale, digital universities may be one of the most effective ways to accomplish so in a short amount of time. India, on the other hand, does not even have the concept of a digital university. It is impossible to apply and gain recognition as a digital university because such a concept does not exist.

In the 2022, where the administration, citizens, and markets are all working to bring about changes, it is only appropriate to have a platform where startups can help in streamlining and simplifying the existing laws and policies, make them more startup-friendly that in turns enables startups to carve out a niche for themselves in the markets through innovation and growth, expand and generate millions of job opportunities and boost Indian economy like never before.

2022: THE YEAR OF STARTUPS

The 2022 report highlights that in the last six years i.e., 2016 onwards, an array of startups has incorporated and established its presence in India. In the year of Startup India launch, nearly 773 startups had received recognition from DPIIT. However, in the previous year, more than 14,000 startups have received recognition. Consequently, up to January 10, 2022, Government has recognised over 61, 400 startups in the country. With the vast increase in number of startups in India receiving unicorn status, our country has secured third position after US and China. It is remarkable to point out that up to January 14, 2022, India has 83 unicorns with the overall valuation worth US$277.77 billion.

TRACING THE STARTUPS PRESENCE ACROSS THE COUNTRY

In past few years, India's Capital and startup capital became one and the same when Delhi supplanted Bangalore in the latter. While 4,514 startups were recognised in Bangalore, more than 5000 startups were added in Delhi between April 2019 to December 2021. However,

instead of these two cities, Mumbai has recorded the highest number of startups recognised by the Government totalling 11,308 until December 2021. It comes as no surprise that while in 2016-17, nearly 121 districts have at least 1 startup, in 2021, over 555 districts have more than one startup. This reflects the expansion of startup ecosystem with the ever-increasing participants year after year.

ENHANCEMENT IN INDIA'S ECONOMY THROUGH STARTUP ECOSYSTEM

Country's financial markets have fared remarkably, allowing for unprecedented risk capital mobilisation for Indian enterprises. Up to this point, the year 2021-22 has been an extraordinary one for the primary markets, with several newer enterprises, technology driven startups, and unicorns raising money via IPOs. Interestingly, Rs. 89,066 crore was raised between April 2021 to November 2021 through the issues of 75 IPOs, setting a record for the highest amount raised in any year previously in the last decade. Recently, numerous companies are tapping the markets owing to exuberance associated with the listings manifested in huge oversubscriptions by retail, High Net worth Individuals (HNIs) and institutional investors. The overwhelming interest from all classes of investors in company IPOs reflected not only market confidence, but also confidence in performance of corporate sector and the economy's long-term prospects. In January 2022, Piyush Goyal, Minister of Commerce and Industry advised global venture capital funds to search for new sectors that can be invested into unlike the traditional ones and divert attention towards startups recognised in tier-II and tier-III cities of India for rendering them financial support in form of investments, promote their products and safeguard their intellectual property. Moreover, he invited the VC funds to render expertise to startups which will contribute to their expansion and growth.[170]

PRIORITIZING INNOVATION AND NEW-AGE TECHNOLOGY

Government has allowed startups to claim tax exemption till 31st March, 2022 by virtue of Finance Act of 2021 with the goal to incentivize them. Moreover, the government has granted exemption from capital gains reaped from startups investment till 31st March, 2022.

[170]"Piyush Goyal urges global VC funds to focus on startups in smaller cities in India", *THE ECONOMIC TIMES,* January 14, 2022, *available at*: https://economictimes.indiatimes.com/tech/startups/piyush-goyal-urges-global-vc-funds-to-focus-on-startups-in-smaller-cities-in-india/articleshow/88896382.cms (last visited on Feb. 13, 2022).

Startups in the space sector have increased in the last three years to 47 in 2021 against 11 in 2019. With time, the present-day entrepreneurs are not limiting themselves to traditional sectors and exploring new arenas, space sector being one of them.

In the recent years, India has witnessed a spike in filing and granting of patents. Against 39, 400 patents filed in India in 2010-11, 58, 502 patents have been filed in 2020-21. Where 7,509 patents were granted in 2010-11, 28,391 patents were granted in 2020-21.

Government launched Startup Accelerator of MeitY for Product Innovation, Development and Growth (SAMRIDH) scheme in 2021 for startups. This scheme will facilitate a conducive environment to the software-oriented product startups to improve their existing products and procure investment for expansion purposes. It is to be noted that government will render its support to such startups in the initial risk stages. These stages are the most challenging ones for the startups and receiving government support will provide them strong footing and set them up for success at a later stage.

According to the Union budget 2022, one quarter of Defence spending will be provided to the startups and Indian manufacturers.

Startups can gain tremendous advantage from the policies presumably to be announced in sectors such as artificial intelligence, climate change, space economy and the like.

Furthermore, government will support startups in form of application and drone subscription services to promote 'Drone Shakti' as per the budget 2022.

As per the Budget 2022, Government plans to establish a digital university for school students, create and provide online content to them, and increase educational televised channels to 200 against 12.

Additionally, the recent budget introduced 'Digital Currency' by the Reserve bank of India that will result in cheaper currency.

Budget 2022 has also set the gaming industry for massive growth in the next few years. Government has taken measures to promote AVGC (Animation, Visual Effects, Gaming and Comics). It intends to create a flourishing gaming industry in India. This will result in several benefits namely- luring prospective employees to make a career in gaming industry, create employment opportunities as the industry expands in the coming years, promote innovation at national level to minimize existing reliance on other countries.

CONCLUSION

The hovering cloud of Covid-19 has not departed. It comes in waves and recedes with time. However, myriads of consequences have ensued and disrupted the Indian economy from its

footing in 2020. The ripples of economic destruction were felt across the length and breadth of India.

Newspapers and online articles were peppered with afflictions of middleclass and poorest sections of society. Innumerable employees were laid off, many small and large business shut down as Government imposed months-long lockdown and restrictions across the nation.

Amidst the bleak days that passed, many ideas germinated and took shape in the minds of people. Several of them worked towards converting their ideas into reality and establishing its presence in the form of startups.

As the startup ecosystem gained momentum, startups recognised by government sprouted across the country. Government acknowledged the potential of startups in enhancing country's economy and introduced initiatives, policies and tax rebate to boost startups' growth and expansion via Budget 2022. Moreover, the Economic Survey 2021-22 recorded that there has never been a more favourable time for startups.

The government has undertaken the initiative to create a more conducive regulatory and policy-oriented platform for the startups in the country. The afore-stated discussions concerning the benefits of Startup India, highlights of Economic Survey 2021-22 and Union budget 2022 reflect that existing and the newly recognized startups can rely on support from the government and startup ecosystem is here to stay for the long haul. However, the path is not devoid of challenges. The regulatory framework and policy formation has to be in line with government's vision for the Indian startup ecosystem. The persisting lacunae needs to be done away with to preserve the entrepreneurial spirit of the present and prospective startup founders. If not, they will throttle the dreams of millions and plunge the Indian economy into the depths of despair.

The year 2022 and beyond belongs to startups. They will enhance the economy in the coming years and rewrite the fate of India as a developed country against an underdeveloped nation.

RIGHT TO EDUCATION VIZ-A-VIZ SPECIALLY ABLED PERSON: AN ANALYSIS WITH REFERENCE TO INDIAN SCENARIO

- CHATRUGUN KHALDHANIA[171]

Abstract

Education is one of the basic needs of the human society in this modern world. Rate of education is an index to judge the rate of development of a nation. Education is now widely valued not only for its intrinsic value in enriching the lives of individuals but also for its functional value in the development of the human capital of a nation. Gender, race, caste, and language differences were deep rooted into the Indian society. They have all contributed so much in the leg pulling of Indian society as a whole that it resulted for its downfall in terms of education, economy & development. But, later on through judicial activism the right based approach was given to education by including it within the scope and ambit of article 21A. Moreover, in the year 2009, Right to Education Act was enacted and through this specific law educational right for all citizens of India was secured. However, all individuals within a society are not equally capable, certain sections do suffer from physical or mental disabilities that remain at the receiving end when the distribution of the Nation's resources is planned or carried out. Such disabled persons are called Specially Abled Persons or Differently Abled Persons. They need separate care for better promotion for which efforts are been made regularly across the Nation but still, such persons seem to be incapable of achieving such benefits. This article will thus attempt to justify the efficiency of the legal framework in making access to the Right to Education possible for the Specially Abled Persons.

Keywords: *Right, education, India, specially-abled, constitution*.

I. Introduction:-

The Universal Declaration of Human Rights provides that, "all men are born free and equal".[172] However, sometimes abnormal differences appear in human beings either naturally, or due to accidents that make such human beings physically or mentally handicapped. Initially, human civilization treated such categories of people as a burden on the society, and one of the most

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[172] Universal Declaration of Human Rights, 1948.

respected Scholars from human civilization, Plato argued for killing such categories of people right after their birth since they were unnecessary burdens restricting the welfare of the society.[173] But as time passed Stephen Hawkins, Anny Marry Sewell, Helen Keller, and many such other people proved the special abilities that are possessed by those so-called handicapped people and also became an inspiration for many such peoples who can achieve milestones if given certain facilities with reasonable care. All these instances showed that Specially Abled Persons do possess the abilities to bring development and prosperity to a nation if adequate opportunities are given to them free from negligence and ill-treatment from their normal counterparts in society. This proves that why the Right to Education, is essential for the Specially Abled Persons.

The plight of disabled persons regarding access to education is very pathetic in India. No doubt, efforts were made to make disabled persons eligible for accessing the minimum level of education, yet somewhere there seems to be a gap between the objectives of the policies and the results achieved so far. It is required that more efforts are to be made so that better results can be achieved in the direction of capacity building of the Specially Abled Persons. Those efforts will also be counted as a process of nation-building. This paper will attempt to highlight a few of the major laws and policies adopted by India for making the Right to Education accessible for Specially Abled Persons and the issues that are needed to be addressed for better implementation of such policies.

II. Concepts of specially abled person and right to education: -

Meaning of Specially Abled Persons

A disability is a state under which a person faces several limitations in performing his/her day-to-day activities and such disabilities may be either physical or mental. Such people may suffer disability due to any nature of impairments, mental illness, medical conditions, sensory impairments, etc. Further, the Convention on the Rights and Privileges of Persons with Disabilities held that disability is a dynamic concept that requires constant monitoring for adapting to the changes in its concept from time to time.[174] Article 4(32) of the said Convention defines the rights of Specially Abled Persons along with the obligations of State parties towards such Specially Abled Persons.[175] The Americans with Disabilities Act provides a broader

[173] Thomas Joseph Kiefer, Reason and Normative Embodiment in Plato's Republic: On the Philosophical Creation of Disability, 34(1), Disability Studies Quaterly, (2014).
[174] United Nations Convention on the Rights and Privileges of Persons with Disabilities, 2006.
[175] Id, art. 4(32).

definition of disabled persons which includes not only persons suffering from actual physical or mental impairments restricting such persons from conducting one or more major life activities rather also includes such persons who may not have any such actual impairments but have a history of being misclassified as having such limitations which finally caused impairments in such persons.[176]

Section 2 of the Persons with Disabilities Act in Kenya defines disability as, "a physical, sensory, mental, or other impairment including any visual, hearing, learning, or artificial causes, which is irreversible and long term and which impacts adversely on a person's capacity to participate in social, economic, cultural, or political activities.[177] The Constitution of Kenya has provided a special category of fundamental rights for Specially Abled Persons which most importantly includes the right to be properly addressed as well as the right to education.[178] In India, Section 2(i) of PWD Act, 1995 provides that any person suffering from one or more categories of disabilities above 40% as certified by competent authorities out of the seven categories of disabilities which are- a. blindness; b. low vision; c. leprosy-cured; d. hearing impairment; e. locomotor disability; f. mental retardation; and g. mental illness shall be regarded as a PWD.[179] The National Policy has recognized that such Specially Abled Persons are important assets for the development of the nation and thus effective actions are needed to be taken for providing equal opportunities to such persons.[180] All these definitions make one thing clear that the concept of disability is very wide and dynamic. It includes persons with actual disabilities and also those who suffered disabilities in the past and are thereby impaired from doing major activities in the present. Further, considering the development of medical technologies, the notion of disability is very like to change across time.

Meaning of Right to Education

Right to Education was first recognized as a fundamental human right by Article 26 of the Universal Declaration of Human Rights.[181] Article 13(1) of ICESCR[182] also recognizes the

[176] Introduction to ADA, ADA.GOV (May 09, 2023, 02:34 PM) https://www.ada.gov/ada_intro.htm#:~:text=To%20be%20protected%20by%20the,as%20having%20such%20an%20impairment.

[177] Kenya- Persons with Disabilities Act, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND (May 09, 2023, 02:34 PM) https://dredf.org/legal-advocacy/international-disability-rights/international-laws/kenya-persons-with-disabilities-act/.

[178] Inclusion of Perons with Disabilities in Kenya, (May 09, 2023, 02:34 PM) https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_115097.pdf.

[179] Rights of Persons with Disabilities Act, 2016, No. 49, Acts of Parliament, 2016, (India).

[180] Office of the State Commissioner for Persons with disabilities (May 09, 2023, 02:34 PM) http://megscpwd.gov.in/disability-def.html.

[181] Universal Declaration of Human Rights, 1948.

[182] International Convention on Economic, Social and Cultural Rights, 1966.

right to education for all. Article 28(1) of CRC[183] defined the right of a child to education as one of the most important progressive rights. However, education as a right to be provided without any discrimination was recognized by UNESCO's[184] Convention against Discrimination in Education[185] which further provided for the standards and quality of education including the conditions under which such education is provided. Similarly, Article 24 of CRPD[186] recognized the right to education for Specially Abled Persons. The Right of Children to Free and Compulsory Education Act or Right to Education Act (hereinafter RTE Act), 2009, which describes the modalities of the importance of free and compulsory education for children between 6 and 14 in India under article 21A of the Constitution of India. The right to education of persons with disabilities until eighteen years of age is laid down under a separate legislation- the Persons with Disabilities Act.

From all the provisions above it can be held that education as a right means that it is available to all human beings without any discrimination on the grounds of race, caste, religion, sex, color, etc.[187] and it makes the State responsible to provide for such rights through effective mechanisms.[188] The right to education shall also include the right of those individuals who were not able to complete their primary level of education.[189] The right to education shall not only mean free and compulsory primary education rather it should also include the right to secondary and higher education along with the right to choose education of their preference.[190]

Right to Education for Specially Abled Persons

In India, the right to education is considered a fundamental right that is guaranteed to all citizens, regardless of their abilities or disabilities. The country recognizes the importance of inclusive education, particularly for specially abled individuals, to ensure equal opportunities and promote their overall development. The right to education for specially abled persons in India is protected by various legal provisions. The most notable among them is the Rights of Persons with Disabilities Act, 2016. This act ensures that persons with disabilities have access to quality education without discrimination. It emphasizes inclusive education, reasonable

[183] Convention on the Rights of the Child, 1989.
[184] United Nation's Education Scientific and Cultural Organization
[185] Covention on against Discrimination in Education, 1962.
[186] Convention on the Rights of Persons with Disabilities, 2007.
[187] What do you need to know about the Right to Education?, UNESCO (May 09, 2023, 02:34 PM) https://en.unesco.org/news/what-you-need-know-about-right-education.
[188] Manmeet Singh, Right to Education, LEGAL SERVICE INDIA (May 09, 2023, 02:34 PM) http://www.legalservicesindia.com/article/1925/Right-to-Education.html.
[189] Education as a Right, RIGHT TO EDUCATION (May 09, 2023, 02:34 PM) https://www.right-to-education.org/page/understanding-education-right.
[190] Ibid.

accommodations, and equal opportunities for participation in educational institutions. Inclusive education is a cornerstone of empowering specially abled persons in India. It involves providing education within mainstream schools, ensuring that students with disabilities are not isolated or segregated. Inclusive education promotes interaction, understanding, and empathy among students of all abilities. It helps create a nurturing environment where everyone can learn, grow, and thrive together.

Despite the legal framework and initiatives, there are several challenges that hinder the effective implementation of the right to education for specially abled persons in India. Limited infrastructure, lack of trained teachers, and inadequate support services are among the primary challenges. Additionally, social stigma, prejudices, and a lack of awareness about disabilities often create barriers to the inclusion of specially abled students in mainstream education. The Government of India has undertaken several initiatives to address the challenges faced by specially abled students. The Sarva Shiksha Abhiyan (SSA) program aims to provide inclusive education to all children, including those with disabilities. It focuses on improving infrastructure, training teachers, and developing appropriate teaching materials. The Rashtriya Madhyamik Shiksha Abhiyan (RMSA) program ensures inclusive education in secondary schools as well. Non-Governmental Organizations (NGOs) and community-based organizations play a vital role in promoting the right to education for specially abled persons. These organizations work closely with schools, parents, and the community to raise awareness, provide support services, and advocate for inclusive practices. Their efforts include sensitizing teachers, offering assistive devices, and facilitating accessible infrastructure.

III. Indian legal framework on right to education for specially abled person:-

Constitution of India[191]

Article 14 of the Constitution of India provides for Equal Protection of Law and Equality before Law which is common for all citizens as well as non-citizens within the territory of India. This is a fundamental principle under the Constitution that provides for establishing the Rule of Law by prohibiting all forms of man-made discrimination.[192] However, this Article also provides scope for protective discrimination by way of which special legislation for promoting certain disadvantageous groups of individuals can be legally enacted if such legislation passes the test of intelligible differentia, reasonable nexus, and un-arbitrariness. This provides the authority

[191] Constitution of India, 1950.
[192] Article 14 of Indian Constitution, LAW CORNER (Oct 04, 2020, 02:33 AM) https://lawcorner.in/article-14-of-indian-constitution.

to the lawmakers for enacting laws, rules, and policies considering the special needs of disabled persons since the disabled persons also belong to the category of disadvantageous groups of individuals. Further, Article 19 and 21 provide disabled persons with all the six basic kinds of freedoms and the right to live a life with human dignity.[193] However, all these provisions do not make any special reference to Specially Abled Persons but they are common for all including the Specially Abled Persons. Article 41 is a Directive Principles do make an effort in motivating the working abilities, increasing public assistance, or like other means for the Specially Abled Persons during their period of disablements.[194] However, Article 45 of the Constitution was an important provision for all children including disabled children, within the territory of India, since it made education compulsory for every child. The same provision was made a Fundamental Right under 86th Amendment to the Constitution under Article 21 A. Now, education for all children including the disabled children is not only a right of them but also a duty of the State to provide for such arrangements so that the said right is exercised by all children without any discrimination. Now, failure of the State to provide this Right to any child can be made justifiable since this Fundamental Right is not a restriction on State power rather is a positive right that provides the State with the power to take actions for achieving the goal of making all children within the country educated at least to the primary level. However, this Fundamental Right made a separate provision for especially promoting education amongst the PWD children whereby the age limit for which education was to be provided for free was 6-14 years for normal children while it was made 6-18 years for PWD children.[195]

Kothari Commission's Recommendations

The recommendations from the Kothari Commission formed the basis for establishing the 'Common School System' where no discriminations will be made while providing education to the children. For physically handicapped children, the commission recommended establishing National Educational Institutions in different parts across the country which shall be arranged according to the needs and convenience for children with different kinds of disabilities.

The National Policy on Education, 1986

[193] Geetanjali Debi, Emancipation of persons with physical disabilities with reference to kamrup m asom a judicial diagnosis and panacea, Gauhati University (Ph. D Thesis, 2017).
[194] Roopali Adlekha $ Soulvik Kumar Guha, Protecting the Disabled under the Human Rights Regime: The Shift from Welfare to Rights, MANUPATRA (May 09, 2023, 02:34 PM) http://docs.manupatra.in/newsline/articles/Upload/75253EFF-3D2E-434F-B611-FD4A2D9FC3F1.pdf.
[195] CLPR, The Legal Framework for Enforcement of Rights of Persons with Disabilities, THE CAREER FOR INTERNET & SOCIETY (May 09, 2023, 02:34 PM) https://cis-india.org/accessibility/blog/the-legal-framework-for-enforcement-of-rights-of-persons-with-disabilities.

This policy provided that education shall be made accessible easily and in addition to that, such education shall allow the children to earn certain benefits from it. It also supported the previously held views that the children with minor locomotor disabilities shall be enrolled in common schools and to enrol only the severely handicapped children in the special schools. One of the basic features of this Policy is that it emphasized heavily the training of the teachers so that they can understand the diverse needs of the PWD children which will further help in building an inclusive environment inside the class. It further argued for providing hostel facilities for the severely handicapped children in the nearby vicinities of their respective district headquarters, so that they don't need to travel very far. This policy further provided scope for motivating private organizations that are working for the welfare of such disabled children.[196]

Project for the Integrated Education for the Disabled, 1987

This project was an outcome of a joint venture between MHRD and UNICEF. It also provided for educating the specially abled children in common schools with the normal children until and unless such children are not having any severe disabilities. The main reason behind such provision was to build up a psychology within the disabled children that they are no less to anyone.

Plan of Action, 1992

This plan was launched for implementing the Education Policy and to provide for arrangements so that children with lesser disabilities can be properly adjusted within common schools.[197]

Rehabilitation Council of India Act.[198]

The Rehabilitation Council of India was just a society in 1986 but later in 1992, it became a statutory body. The main function of this body is to draft training syllabus, provide trainings, set standards or qualifications needed, etc. for those teachers who are supposed to teach the disabled. It further provides for making preliminary examinations and other arrangements for the proper detection of disabilities in children. It is responsible for monitoring the educational system for disabled children.

Persons with Disabilities Act, 1995

The main objectives of this Act were to provide equal opportunities to Specially Abled Persons, to protect and safeguard the rights of such persons, and to promote them for full participation.

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[196] Ali Baquer & Anjali Sharma, Disbility Challenges vs. Responses, HELP EDUCATION LIBRARY FOR PEOPLE (Oct 05, 2020, 022020, 03:12 AM) https://www.healthlibrary.com/book28_chapter211.htm.
[197] Program of Action, 1992, Ministry of Human Resource Development, Department of Education (Oct 06, 2020, 01:55 AM) https://www.mhrd.gov.in/sites/upload_files/mhrd/files/document-reports/POA_1992.pdf.
[198] Rehabilitation Council of India Act, 1992, No. 34, Acts of Parliament, 1992, (India).

It provided scope for Benchmark Disability and held 40% as the minimum rate of disability required for getting reservations for education, or jobs, or other facilities. It also tried to make the concept of disability a bit clearer by including seven broad categories of disabilities which are- a. blindness; b. low vision; c. leprosy-cured; d. hearing impairment; e. locomotor disability; f. mental retardation; and g. mental illness. The Act further emphasized free education till the age of 18 years for disabled children. It even made scope for awareness programs and all to reduce the rates of potential disabilities. Under this Act, infrastructural facilities were needed to be upgraded by both public and private institutions, for making them accessible to the Specially Abled Persons, like using audio-visual aids including sign languages, ramps, lifts with proper sound technologies, etc.

District Primary Education Program, 1994

This scheme was launched to promote elementary education. It provided for the implementation of the Integrated Education for Disabled scheme at the district level. However, the implementation of this program was criticized for being not done in a proper manner which will be analyzed in the later sections.[199]

Sarva Sikshya Abhiyan, 2000

The scheme was launched in 2000 to spread elementary education to all places across India. Few aspects of this scheme related to disabled children can be cited as follows- a. detecting the disability at the earliest stage; b. education placement; c. aids and appliances; d. support services; e. training for teachers; etc. 85% of the fund for this scheme is to be spent by Central Government while 15% will be spent by respective State Governments.[200]

National Policy for Persons with Disabilities[201]

This policy was adopted for implementing the provisions of UNCRD which provided several measures related to education for Specially Abled Persons.

Right to Education Act, 2009

Considering the need of making a minimum level of education free for all, this Act made Right to Education a fundamental right under Article 21 A and amended the Constitution through 86th Amendment Act, and also made the duty of the parents to make their children educated a fundamental duty under Article 51A(k). This Act This Act provided a responsibility upon the

[199] Ajay Kumar Das, Special Education Today in India, RESEARCHGATE (Oct 06, 2020, 03:22 AM) https://www.researchgate.net/publication/265599013_Special_Education_Today_in_India.
[200] Srva Sikshya Abhiyan to prevent Differently Abled Children, ENABLED.IN (Oct 06, 2020, 04:53 AM) https://enabled.in/wp/sarva-shiksha-abhiyan-to-prevent-differently-abled-children/.
[201] National Policy for Persons with Disabilities, 2006, Minister of Social Justice and Empowerment Government of India, (Shastri Bhawan, New Delhi).

State to provide for free and compulsory education to all children of aged group from 6-14 years and in cases of disabled children from 6-18 years.[202]

Rights of Persons with Disabilities Act, 2016

This Act amended the old Act of 1995 and re-defined the concept of disability by including new forms of disabilities for making it even more dynamic. The categories of disabilities have been increased from 7 to 21. The Act also extended reservation provisions for disabled children in higher educational institutions. It declared several new categories of offenses and made them punishable for removing social stigmas against the disabled population within their respective communities and for improving their status. The Act also provided for several other infrastructural facilities which were also made applicable to educational institutions.[203]

The National Policy on Education, 2020

India's New Education Policy (2020) has replaced its 1986 education policy and ensures to address all issues of neglected dimensions in education for Specially Abled Persons. The main highlights of this policy for the Children With Special Needs are discussed as under:

- NEP recognizes the importance of creating enabling mechanisms for providing Children With Special Needs (CWSN) or Divyang, the same opportunities of obtaining quality education as any other child.
- Children with disabilities will be enabled to fully participate in the regular schooling process from the Foundational Stage to higher education.
- The Inclusive Education as a 'system of education is stressed upon wherein students with and without disabilities learn together.
- While preparing the National Curriculum Framework, NCERT will ensure that consultations are held with expert bodies such as National Institutes of DEPwD.
- Schools/School complexes will be provided resources for the integration of children with disabilities
- Recruitment of special educators with cross-disability training for children with severe or multiple disabilities shall be taken in hand.
- Barrier free access for all children with disabilities will be enabled.
- Assistive devices as well as teaching-learning materials will be made available.
- NIOS will develop high-quality modules to teach Indian Sign Language.
- Adequate attention will be paid to the safety and security of children with disabilities.

[202] Right of Children to free and compulsory education Act, 2009, 35 of 2009, Acts of Parliament, 2009 (India).
[203] The Rights of Persons with Disabilities Act, 2016, No. 49 of 2016, Acts of Parliament (2016) India.

- Home-based education will continue to be a choice available for children with disabilities who are unable to go to schools and they shall be treated as equal to any other child in the general system.
- Assessment and certification agencies, including the proposed new National Assessment Centre, PARAKH, will formulate guidelines for conducting assessment, from the foundational stage to higher education in order to ensure equitable access and opportunities for all students with learning disabilities.
- The awareness and knowledge of how to teach children with specific disabilities will be an integral part of all teacher education programmes.

IV. Conclusion

From all the above analysis, it becomes clear the Specially Abled Persons are still mostly neglected in India for which around 75% of the children with disabilities are school dropouts. We must all together attempt to remove the stigmas associated with them in society by creating awareness programs about how much people have achieved milestones in the past and are achieving even at present. Financial investments are required for which even private sectors can be encouraged to participate in this noble mission. Middlemen shall be removed who exists for helping these Specially Abled Persons in making them eligible for accessing the government benefits, since in most cases such middlemen only makes the Specially Abled Persons suffer the most. In other words, such policies and initiatives shall be made in such a manner that it directly reaches the targeted population.

References:-

1. Chowdhury, P.R., 2013. The Special Case of the Right to Primary Education of Children with Disabilities in India: Legally Lacking. *Global Education Magazine*, (6), p.5.
2. Pandey, S., 2005. Education as a Fundamental Right in India: Promises and challenges. *Int'l J. Educ. L. & Pol'y*, *1*, p.13.
3. Sony, N., 2017. An Analytical Study of the Fundamental Right to Education in India. *Quest-The Journal of UGC-HRDC Nainital*, *11*(3), pp.237-243.
4. Boruah, J., 2020. Right to Education for Persons With Disabilities in India: An Analysis of the Contemporary Legal Developments. *Sarkari School E-Newsletter*, *1*.

5. Bandyopadhyay, R. and Roy, S., 2010. Has India Undeniably Secured the Educational Rights of the Differently Abled-An Appraisal. *Indian JL & Just.*, *1*, p.22.
6. Baxipatra, D., 2013. Rights of the Differently Abled in India: Law, Cases & the Reality. *Cases & the Reality (May 18, 2013)*.

CORPORATE CRIMINAL LIABILITY: A CRITICAL STUDY

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Abstract

Corporations have become a fundamental element of contemporary society. These factors exert significant impacts on the economy, society, and environment. Multinational corporations (MNCs) refer to corporate entities that engage in business operations across multiple countries, alongside their country of origin. Multinational corporations exert a substantial influence across various dimensions of contemporary human existence. The growing significance of corporations has elevated the probability of individuals falling prey to their actions. The concept of Corporate Criminal Liability has emerged in response to the growth of the corporate sector, which has been facilitated by globalization, advancements in information technology, and technological progress. Throughout history, these corporations have been susceptible to the imposition of civil liability. Nevertheless, there is an absence of criminal liability. The current global apprehension regarding the increasing influence and authority of corporations, driven by their economic and financial prowess, has raised concerns about their potential to undermine the significance of the state and its mechanisms. Consequently, safeguarding the rights of individuals has become a subject of intense debate. This study aims to analyze the underlying factors or issues that contribute to corporate criminality, which persist despite the presence of a legal framework, primarily due to the inadequate enforcement of legal mechanisms. Furthermore, the report examines potential strategies that can be implemented to enhance the efficacy of legal frameworks in addressing corporate misconduct.

1. Introduction

In general, a crime is typically attributed to an individual possessing both a physical body and a conscious mind, specifically a human being. A criminal act can also be perpetrated by a corporate entity. In the past, there has been a legal debate regarding the potential liability of corporate entities, which lack physical form and consciousness, for criminal acts. The attribution of actus reus and mens rea to corporations has been developed in various jurisdictions as a means of acknowledging the complicity of corporations in criminal activities.

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The current criminal justice system exhibits inadequacies in effectively addressing these circumstances (1). It is imperative to establish a clear definition of corporate criminality and establish corresponding punitive measures. This research paper aims to examine the principles of corporate criminal liability and their corresponding penal aspects. Large-scale corporations are ubiquitous in contemporary society (2). These corporations are widely regarded as the predominant influence on a global scale, exerting significant impact on various facets of human existence. Corporations have increasingly exhibited criminal behavior, posing significant risks to society. Typically, the commission of the offense is limited to individuals of the human species. An exception to this principle arises in cases where corporate entities can be held accountable for acts constituting corporate offenses (3).

The inquiry pertains to the capacity of a corporate entity to engage in criminal behavior, and if so, the manner in which legal systems can attribute criminal liability to corporations. The previous perspective posited that a corporation should not be held accountable for criminal offenses (4). The establishment of criminal culpability necessitated the presence of both intent and a corporate entity, which, lacking a cognitive capacity, could not possess intent. Moreover, a corporation lacks a physical entity that can be subject to imprisonment. It is probable that the courts will assign liability to the officer-in-charge, directors, or other individuals who are acting within the parameters of their employment (5).

2. Evolution of corporate criminal liability

During the mid-sixteenth and seventeenth centuries, the aforementioned objective was commonly pursued by the general population. For centuries, enterprises have been exempt from criminal liability due to their lack of legal personality, which renders them incapable of possessing "actual malicious intent." In the mid-twentieth century, there was a notable shift in legal practice as courts started to impose criminal liability on corporations in jurisdictions where the effective enforcement of laws would be hindered without holding corporations accountable. The assignment of criminal risk to corporations is faced with various significant challenges. An example of this can be observed in situations where corporations possess fictitious legal identities and lack the intention to commit wrongful acts (mens rea). The development of corporate criminal liability has exhibited divergent trajectories in common law systems as compared to precedent-based law frameworks. In the interim, within the context of common law or precedent-based legal systems, the concept of corporate criminal liability has evolved in a manner that accounts for the diverse financial and organizational structures observed across different countries. The historical progression of corporate criminal liability is

indicative of its adherence to the fundamental tenets of criminal law and the intrinsic nature of corporations. Furthermore, the emergence and formulation of theories pertaining to corporate criminal liability underscore the significance of holding corporations accountable for their unlawful actions, thereby highlighting its crucial role within the realm of public policy (6,7).

The arrangement reconciles the benefits bestowed upon a corporation upon its legal establishment, such as the limited liability of shareholders and the ability of a group of investors to operate under a single corporate structure, with the obligations to adhere to laws and prevent criminal activities that are imposed on the managers of the resulting corporate entity.

The issue of corporate criminal liability has become a significant concern for investigators and courts tasked with determining criminal culpability. Within the realm of customary law, specifically in the context of tort law, the English courts have acknowledged the existence of corporate criminal liability in recent decades. This recognition primarily pertains to statutory offenses that do not necessitate the establishment of mens rea. The evolution of Indian law exhibits parallels to that of English law. In previous legal interpretations, it was commonly held that a judicial entity lacked the capacity to possess mens rea, thus precluding the possibility of indicting a corporation for an offense involving mens rea (8).

2.1. Gopal Khaitan v. State

The judiciary has embraced a revised perspective, asserting that a corporate entity can bear legal responsibility for a mens rea offense, citing the dictum of Lord Denning. In India, similar to the legal system in England, courts have endeavored to establish the mens rea, or guilty mind, of a high-ranking individual within a corporation when assigning criminal liability for mens rea offenses. In India, the concept of vicarious liability has been expanded to criminal law in a limited manner, specifically in cases involving the breach of statutory obligations by a business or other regulatory offense where the mental state of the offender (mens rea) is not a necessary element of the crime. This extension of liability also applies to situations where an individual is held responsible as an occupier of land, as outlined in section 154 of the Indian Penal Code, 1860 (9,10,11).

3. Concept of corporate criminal liability

Over the course of time, there has emerged a pressing inquiry regarding the necessity of establishing a framework for corporate criminal liability. There is no universally applicable response to this inquiry. The examination and determination of liability for corporations must be conducted on a case-by-case basis, followed by the subsequent decision-making process. Critics contend that the doctrine of corporate criminal liability is deemed superfluous based on

two primary arguments. The primary contention put forth is that corporate entities themselves are not the perpetrators of criminal acts, but rather it is the individuals within these entities who bear responsibility for such actions. Additionally, it should be noted that the retributive impact is ultimately shouldered by both shareholders and consumers. This implies that the financial burden of corporate criminal fines and sanctions is ultimately shouldered by both shareholders and consumers in relation to the actions undertaken by corporations. Corporate liability in the field of criminal law pertains to the determination of the degree to which a corporate entity, as a legal entity, can be held accountable for the actions and failures of the individuals it employs. The aforementioned concept is commonly recognized as a component of criminal vicarious liability (4,5).

3.1. The fundamental prerequisites for establishing the criminal culpability of corporate entities.

In order to establish criminal liability for a corporation, certain essential elements must be present. The following items are as follows:

i. **The proposed action must fall within the bounds of employment**: - The initial prerequisite that necessitates fulfilment is that the employee engaging in the transgression must conduct themselves within the scope of their professional duties. The individual is required to engage in activities that have been officially sanctioned by his employer.

ii. **The action must be advantageous to the corporation:** - The second aspect pertains to the requirement that employee behavior or actions must yield advantageous outcomes for the corporation. The absence of personal gain or benefit renders an employee's selfless act highly inconsequential.

4. Corporate criminal liability tests

4.1. Identification test:

In the case of Tesco Supermarkets Ltd. v. Nattrass, Lord Reid made the following statement concerning the issue at hand: "The person who acts is not speaking or acting for the company." He is portraying the role of the corporation, and the mind that governs his acts is the same mind that dictates the activities of the business. He is playing the part of the company. If there was a guilty mind behind the crime, then the company itself must take some of the blame for the offense. There are a number names that have been given to this test, such as the "alter ego test," the "directing mind and will theory," and so on. The courts in England employ this test to

discover who, if anyone, is in control of the company and its day-to-day activities in order to decide whether or not corporations are subject to criminal culpability. The goal of the test is to determine whether or not corporations are susceptible to criminal responsibility (11).

4.2. Aggregation test

In certain cases, a corporate wrongdoing may arise as a result of the collective culpability exhibited by multiple individuals. The determination of an individual's actus reus and mens rea can be facilitated by analysing their conduct and knowledge, particularly when the actions of multiple individuals are consolidated into a unified dataset.

In the legal matter of United States v. Bank of New England, the appellate court upheld the permissibility of collective knowledge, as it enables companies to distribute responsibilities and mitigate liabilities. The utilization of this test has been observed in Australia; nevertheless, it has been deemed unsatisfactory in England (12,13).

4.3. Respondeat superior test

Corporations have been held liable by the courts for the actions of their agents for a variety of reasons. A company can be held responsible for the actions of its employees or contractors (14).

I. Commit a crime
II. Within the scope of employment
III. With the intent to benefit the corporation.

This was clearly held in United States vs. A. P Trucking Co.

4.4. Jurisprudential position in India

The prosecution of criminal offenses is carried out in accordance with the stipulations outlined in the Indian Penal Code of 1860 within the framework of the Indian Criminal Justice System. The term "person" is defined in Section 11. This encompasses any corporate entity, organization, or collective group of individuals. The incorporation of it is contingent upon various factors. Consequently, corporations may face legal prosecution for the perpetration of criminal acts. The determination of criminal liability for corporations becomes necessary in cases where said corporations engage in offenses that warrant mandatory imprisonment and fines as stipulated by the penal code. Several pivotal court rulings have effectively resolved this matter and contributed to the progression and maturation of corporate criminal liability (15).

4.4.1. Assistant Commissioner v. Velliappa Textiles Ltd

Case resulted in a majority decision that established the principle that a company cannot be subject to prosecution for offenses that necessitate the imposition of a mandatory prison sentence in addition to a fine. In cases where the prescribed penalty encompasses both incarceration and monetary sanctions, the court is precluded from solely imposing a fine. The aforementioned challenge was brought to the attention of the Law Commission of India, which, in its 41st report, proposed a modification to section 62 of the Indian Penal Code. The suggested amendment entails the inclusion of the following provision: "In situations where the offense is solely punishable by imprisonment or imprisonment along with a fine, and the offender is a company, body corporate, or association of individuals, the court shall have the authority to impose a fine as the sole penalty" (16).

4.4.2. Standard Chartered Bank and others v. Directorate of Enforcement and others

The highest court of law, known as the Apex Court, rendered its decision. The prevailing perspectives on the concept of corporate criminal liability were overturned by this development. The court ruled that corporations cannot claim absolute immunity from prosecution for offenses solely on the basis of a mandatory imprisonment requirement imposed by the prosecution. The Supreme Court rendered a verdict stating that in instances where offenses require both imprisonment and monetary penalties, corporations should be penalized solely with fines.

4.4.3. Iridium India Telecom Ltd v. Motorola Incorporated Co.

The highest court underscored the notion that a corporation holds a comparable legal standing to an individual and can be found guilty of both common law and statutory offenses, including those that necessitate a demonstration of criminal intent (mens rea). The legal responsibility of a corporation for criminal acts occurs when an offense is committed in connection with the corporation's operations by individuals or a collective entity exercising control over its affairs. Under such circumstances, it becomes imperative to establish the extent of authority and influence held by an individual or group to the point where a corporation can be considered to possess the capacity to think and act through said individual or group (17).

5. Conclusion

The matter concerning the attribution of criminal liability to corporations for their actions has been a subject of considerable controversy. The legal framework surrounding corporate criminal liability has undergone significant development in terms of determining the responsibility of a corporate entity for the intentional actions carried out by its directors, employees, and other agents. The Indian judiciary has consistently endeavoured to ascertain

the mental state (specifically, the controlling and directing influence) of corporations. This principle is applied in diverse legal cases and statutes to establish the criminal culpability of said corporations. The implementation of new penal sanctions by the Indian Legislature is necessary to effectively address the criminal activities perpetrated by corporations within the country.

The advent of modern society has witnessed the profound impact of corporations on the lives of individuals, both in positive and negative ways. The significance of corporate criminal liability is increasing in areas of societal interest, including consumer protection, environmental law, and occupational health and safety regulations. In order to promote societal progress and safeguard the vulnerable populace from exploitation, it is imperative to exercise control over or, ideally, prevent criminal activities perpetrated by individuals occupying positions of power within the social hierarchy. India has implemented a rigorous approach in assessing the risk associated with a corporate entity for the proposed demonstrations submitted by its executives, employees, and other stakeholders. The resolution of corporate crimes necessitates the implementation of robust and rigorous measures to hold the perpetrators accountable, rather than relying solely on the enactment of additional laws or governance practices. In order to address instances of corporate misconduct, it is imperative to enhance the regulatory framework and establish measures for the enforcement of rigorous legal sanctions.

6. References

1. Brown, D. K. (2000). Street crime, corporate crime, and the contingency of criminal liability. *U. Pa. L. Rev.*, *149*, 1295.
2. Laufer, W. S. (2008). *Corporate bodies and guilty minds: The failure of corporate criminal liability*. University of Chicago Press.
3. Yadav, D. V. (2015). Corporate Criminal Liability: A Comparative Analysis of Judicial Trend. *International Journal of Applied Research*, *1*(10), 756-760.
4. Sahu, M. (2012). Criminal liability of corporation: an Indian perspective. *Available at SSRN 2192308*.
5. Pieth, M., & Ivory, R. (2011, November). Corporate criminal liability. In *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé* (pp. 625-655). Dordrecht: Springer Netherlands.

6. Khanna, V. S. (1995). Corporate criminal liability: What purpose does it serve. *Harv. L. Rev.*, *109*, 1477.
7. Weissmann, A. (2007). A new approach to corporate criminal liability. *Am. Crim. L. Rev.*, *44*, 1319.
8. Stessens, G. (1994). Corporate criminal liability: a comparative perspective. *International & Comparative Law Quarterly*, *43*(3), 493-520.
9. Bhaskar, T. K., & Umakanth, V. (1996). Corporate Criminality And Law. *Journal of the Indian Law Institute*, *38*(2), 218-228.
10. Bharamgoudar, R. R. (2003). Corporate Criminal Liability: An Overview.
11. Naniwadekar, M. (2008). The Law of Agency as applied in Company Transactions.
12. Cavanagh, N. (2011). Corporate criminal liability: an assessment of the models of fault. *The Journal of Criminal Law*, *75*(5), 414-440.
13. Wibisana, A. G., & Marbun, A. N. (2018). Corporate Criminal Liability in Indonesia Anti-Corruption Law: Does It Work Properly?. *Asian Journal of Law and Economics*, *9*(1), 20170029.
14. Pitts, C. (2014). Corporate criminal liability. *The Encyclopedia of Criminology and Criminal Justice*, 1-6.
15. Veeraganta, A. (2022). White Collar Crime: Corporate Criminal Liability. *Issue 3 Int'l JL Mgmt. & Human.*, *5*, 459.
16. Singh, V. V. (2018). Corporate Criminal Liability: A Critical Legal Study. *International Journal of Research And Analytical Reviews*, *5*(2I).
17. Andharia, P. (2011). Corporate Criminal Liability: Finding Settled Shores: A Comment on Iridium India Telecom v. Motorola Inc. *NALSAR Stud. L. Rev.*, *6*, 57.

AN OVERVIEW OF CONSUMER PROTECTION ACT 2019

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Abstract - The Indian Parliament has enacted the Consumer Protection Act, 2019, which is a comprehensive legislation aimed at providing enhanced protection to consumers and fostering equitable trade practices. The Consumer Protection Act of 2019 supersedes the Consumer Protection Act of 1986, with the objective of enhancing consumer rights and establishing a more resilient regulatory structure for safeguarding consumers in India. The legislation acknowledges and safeguards the entitlements of consumers, encompassing the entitlement to receive information, the entitlement to make choices, the entitlement to express opinions, and the entitlement to pursue remedies. The legislation enables the formation of regulatory bodies, including the Central Consumer Protection Authority (CCPA) and Consumer Dispute Redressal Commissions (CDRCs), at the national, state, and district levels, with the aim of ensuring prompt and efficient redressal of consumer complaints. The legislation incorporates the notion of product liability, rendering manufacturers, vendors, and service providers accountable for any injury inflicted upon consumers as a result of flawed products or services. Additionally, it forbids inequitable trade practices, such as deceptive advertising, fraudulent assertions, and imposing charges for goods or services that have not been rendered. The legislation encompasses electronic commerce transactions, rendering electronic commerce entities accountable for any infringement of consumer entitlements. Additionally, the legislation facilitates the formation of Consumer Protection Councils at both the national and regional levels, with the aim of advancing and safeguarding the interests of consumers. To encapsulate, the Consumer Protection Act of 2019 represents a noteworthy stride towards establishing a marketplace in India that is more conducive to the interests of consumers and competition. The aforementioned statement highlights the significance of safeguarding consumer rights, instituting regulatory bodies to promptly and efficiently address consumer grievances, introducing the notion of product liability, and prohibiting any form of unjust trade practices.

Keywords: - Digitalization, Globalization, Consumer Insurance Act.

1. Introduction

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Consumer protection refers to the procedures and mechanisms that are put in place to safeguard consumers from unethical business practices. The text outlines the actions implemented to protect consumers from fraudulent and unscrupulous commercial practices perpetrated by vendors, producers, service providers, and other entities, as well as to provide redress in the event of infringement of their legal entitlements as purchasers. The scope of "unfair trade practices" has been broadened to encompass instances of unclear e-publicity, failure to retrieve or withdraw defective merchandise, discontinuation or non-provision of promised services, and offering discounts within or beyond a specified timeframe, all of which must be addressed within a 30-day period. At present, divulging confidential personal information obtained during a transaction is prohibited by law. Each of these advancements represents an attempt to enhance market transparency by means of administrative insurance, with the aim of prioritizing the buyer's interests. The antiquated Act is beset with challenges arising from the proliferation of digitization and necessitates prompt attention. Presently, it is opportune for consumers to observe and acknowledge the novel Consumer Protection Act, 2019, which has superseded the Consumer Protection Act of 1986, commonly referred to as the 1986 Act, that had been in effect for thirty years. On August 6, 2019, the government passed the Consumer Protection Act, 2019, which is considered a significant milestone in the realm of consumer protection. The 2019 Act on Customer Insurance, which was granted presidential assent, was implemented in the middle of August. The 2019 Demonstration effectively nullifies the prior consumer protection legislation that had been operative since the enactment of the 1986 Act. The aforementioned authorization has been modified periodically to comprehend the alterations resulting from the progress of finance, the globalization of commercial sectors, and the digitization of goods and services. However, the practical application of the aforementioned entity did not meet the intended objective of serving as a financial institution that aimed to ensure enhanced safeguarding of consumers' interests. The 2019 Act has significantly enhanced the level of evidence presented to consumers by incorporating advancing cases, supports, and product risk within its scope. These elements play a central role in modifying consumer behavior and retail trends in the 21st century. The Act's prelude employs similar language to convey this information. The advent of the digital age has ushered in a novel epoch of online commerce, accompanied by a shift in consumer preferences. The emergence of the digital era has provided customers with expeditious accessibility, an increased array of choices, and efficient purchasing techniques**.(4) (5).**

Currently, endorsers bear a higher level of responsibility compared to manufacturers and service providers in preventing the dissemination of misleading or fraudulent advertising. The

incorporation of "product liability" within the 2019 Act represents a noteworthy modification, whereby manufacturers and vendors of goods and services are held accountable for any harm inflicted upon a customer as a result of substandard goods or inadequate services. Recently, a proposal has been suggested regarding the implementation of "out of line contracts" as a means of safeguarding consumers against inequitable and irrational agreements that may disproportionately benefit manufacturers or specialized enterprises. The 2019 legislation aims to address specific significant legal concerns that were present in the 1986 legislation. In order to enhance consumer welfare, the 2019 Act proposes a multitude of measures and reinforces the pre-existing regulations outlined in the 1985 Act. This article aims to elucidate the primary distinctions between the Consumer Protection Act of 2019 and the Consumer Protection Act of 1986, with the intention of facilitating readers' understanding of these legal frameworks. **(6)**

2. **Consumer Rights**

Consumer rights refer to the set of entitlements that consumers possess in relation to the sellers who provide them with goods.

2.1. The entitlement to safety- This statement denotes the entitlement to safeguard oneself from the promotion of products and services that pose a threat to one's well-being and possessions. Prior to making a purchase, it is advisable for consumers to prioritize the quality of the products and the assurance of the products and services. **(2)(3)**

2.2. The entitlement to receive information- pertains to the entitlement of consumers to receive comprehensive details regarding the quality, quantity, potency, purity, standard, and price of goods. This provision serves as a safeguard against any unjust or unethical trade practices that may be detrimental to the consumer.(**3)**

2.3. The entitlement to select or decision. Denotes individuals right to a reasonable expectation of access to a diverse range of goods and services at competitive market rates, to the extent that it is feasible. The optimal utilization of this entitlement can be achieved in a market characterized by competition, where a diverse range of commodities are offered at competitive rates**.(1)**

2.4. The entitlement to be heard (right to heard)- The "Right to be Heard" refers to the entitlement of consumers to have their interests given appropriate consideration in relevant forums. The aforementioned provision encompasses the entitlement of consumers to be duly represented in diverse forums established to deliberate upon matters pertaining to their welfare**. (2)**

2.5. The entitlement to pursue redressal- it dented to legal entitlement of consumers to seek redress for instances of unfair trade practices or unscrupulous exploitation. The aforementioned provision encompasses the entitlement of consumers to a just resolution of their legitimate complaints. **(1)**

2.6. The entitlement to consumer education- to obtain the necessary knowledge and expertise to become a well-informed consumer over the course of one's lifetime. The primary cause of consumer exploitation, particularly among those residing in rural areas, can be attributed to their lack of knowledge and awareness**.(2)**

3. Need of Consumer Protection Act 2019

The Consumer Protection Act of 2019 was implemented to tackle a range of concerns pertaining to consumer protection and to enhance the regulatory framework aimed at safeguarding consumer rights within the Indian context. The following are some of the primary justifications for the necessity of the act: **(8)**

3.1. The Act acknowledges and safeguards- the various entitlements of consumers, such as the entitlement to receive information, the entitlement to make choices, the entitlement to express their opinions, and the entitlement to seek remedies. It offers efficient means of ensuring the enforcement of these entitlements**.(8)**

3.2. The emergence of electronic commerce - in India has necessitated the establishment of distinct guidelines and protocols to regulate online transactions and safeguard the welfare of consumers involved in such transactions. The legislation encompasses electronic commerce**.(6)**

3.3. The Product Liability- The legislation incorporates the notion of product liability, rendering manufacturers, vendors, and service providers accountable for any injury inflicted on customers as a result of faulty products or services. This particular provision holds significant importance in safeguarding consumers against hazardous or subpar products and services**.(7)**

3.4. Prohibition of Unfair Trade Practices- prohibits inequitable commercial practices, including deceptive advertising, fraudulent assertions, and billing for goods or services that were not rendered. The aforementioned practices have detrimental effects on consumers and engender an inequitable advantage for unprincipled enterprises. The legislation stipulates severe sanctions for any breach of these provisions**.(7)**

3.5. The enhancement of the regulatory framework- The legislation creates regulatory bodies, namely the Central Consumer Protection Authority (CCPA) and Consumer Dispute Redressal Commissions (CDRCs), which operate at the national, state, and district levels. The primary objective of these entities is **to facilitate the prompt and efficient resolution of consumer complaints.** The aforementioned measure fortifies the regulatory structure aimed at safeguarding the interests of consumers in India and furnishes them with efficacious redressal mechanisms for rectifying their grievances**.(6)**

4. The primary aim of the Consumer Protection Act of 2019

The principal objective of the Act is to ensure the protection of consumers' well-being and to establish a resilient and sturdy structure for the redressal of consumer complaints. The aim of the aforementioned legislation is to:

4.1. Implement measures to prevent the advertisement and dissemination of commodities that may endanger human life and tangible property.

4.2. Disseminating information pertaining to the quality, potency, quantity, standard, purity, and price of commodities is of utmost importance in safeguarding consumers against any possible instances of unjust trade practices.

4.3. Establishing Consumer Protection Councils is a recommended measure aimed at safeguarding the rights and interests of consumers.

4.4. Ensure, whenever feasible, availability of a reliable source of commodities at prices that are competitive.

4.5. Pursue legal recourse in response to unjust business practices or unethical exploitation of customers.

4.6. In order to ensure the protection of consumer rights, it is crucial to establish proficient governing bodies that are capable of managing and resolving consumer complaints with efficiency and effectiveness within a reasonable timeframe.

4.7. Specify the punitive measures for transgressions perpetrated in accordance with the legislation.

4.8. It is imperative to guarantee that the welfare of consumers is duly considered during relevant forums in the event of any issue or conflict.

4.9. Offering consumer education can enable individuals to become knowledgeable about their entitlements.

4.10. Facilitate prompt and efficient resolution of consumer grievances via alternative methods of dispute resolution. **(6) (9).**

5. OVERVIEW OF THE CONSUMER PROTECTION ACT 2019

The legislative framework known as the Consumer Protection Act of 2019 has been developed with the aim of protecting the interests of consumers within the marketplace. The aforementioned legislation offers a thorough and inclusive collection of directives and mandates with the objective of safeguarding consumers against inequitable commercial practices, deceptive promotional materials, and flawed merchandise. The action

The extant legislation of 2019 upholds the continued presence of Consumer Dispute Redressal Commissions at the District, State, and National tiers, which are commonly denoted as Consumer Commissions. Nevertheless, the financial jurisdiction of each commission has undergone a substantial expansion to mitigate the load on the State and National Commissions. This objective is attained by incentivizing customers to seek recourse from the District Commission for grievances amounting to a maximum of one crore Indian rupees. Furthermore, a proposition has been put forth to broaden the jurisdiction of the Consumer Commissions district, allowing complainants to lodge grievances in their locality of residence or work, in contrast to the 1986 Act which mandates that complaints be filed in the jurisdiction where the opposing party resides or conducts business, or where the cause of action arose. The implementation of this measure is anticipated to enhance client convenience by affording them the opportunity to lodge complaints at a nearby location instead of undertaking journeys to other regions to pursue their grievances. The expeditious resolution of complaints lodged with Consumer Commissions is of paramount significance, given that they necessitate prompt attention within a timeframe of 21 days. The 2019 Act has expanded upon a crucial provision that was also present in the 1986 Act. Specifically, failure to address the issue of compliance of a complaint within the designated timeframe will result in the protest being deemed as conceded. It is significant to note that this notable expansion eradicates the incidence of misrepresentation of grievances during the pre-approval stage, which had become a widespread phenomenon, especially at the National Commission. Regrettably, the dissemination of procedural modifications has not been executed, prompting apprehensions regarding the pragmatic feasibility of the suggested modifications. The proposed legislation of 2019 entails an elevated degree of judicial examination, thereby empowering Consumer Commissions to subject their rulings to meticulous scrutiny. The implementation of this measure would lead to a decrease in the workload caused by the submission of claims aimed at correcting mistakes

that are readily noticeable on the record. Unlike the provisions of the 1986 Act, the current legislation mandates that claims originating from the State Commission and forwarded to the National Commission must entail substantial legal investigations. The National Commission's ability to submit requests to the Supreme Court is dependent on the existence of inquiries that have arisen within the National Commission. The temporal allowance for indicating a desire to obtain loans has been tightened to strengthen the imperative for punctual submission of applications **(10) (11) (12).**

6. NEW ADDITIONS IN CONSUMER PROTECTION ACT 2019

Due to the significant change in how the market operates, new consumer protection regulations are now required. International trade is increasing, global supply chains are expanding, and e-commerce is growing quickly. The backlog of unresolved consumer court cases has also been seen in India. A specific examination was required for direct selling and multi-level marketing due to the deceptive advertisements that the new market setup had seen. The general public will profit from the new Act. **(13).**

6.1.E-commerce and fraudulent advertising: - The definition of "consumer" under the new Act, i.e., the 2019 Act, includes consumers who make purchases via an e-commerce platform. This omission in the prior law has been rectified by the 2019 Act, which now includes web-based purchasers. There is a distinct arrangement for the insurance of products and ocean services, which are frequently utilized by large corporations and are insured under the scheme of deceptive and misleading advertising. The burden placed on the VIPs is in addition to the risk borne by the producers and specialized co-ops. The misleading advertisement will also involve concealing material information on purpose. The CCPA, which will be examined subsequently, also regulates deceptive and misleading advertisements **(14).**

6.2. The Food Safety and Standards Act of 2006: - The 2019 legislation has integrated the definition of "food" as outlined in the Food and Standards Act of 2006. The definition of "goods" under the 1986 Act has been substituted by this. This measure would facilitate the incorporation of a larger number of food delivery platforms under the umbrella of consumer protection **(15) (16).**

6.3. The Telecommunications Services: - The 2019 Act has been modified to encompass telecom services by incorporating the term "telecom" into the definition of "services". It would have been more appropriate to incorporate the precise definition of "telecommunication service" as stipulated by the Telecom Regulatory Authority of India Act (TRA) instead of utilizing the term "telecom". The potential of societal

advancement is dependent on empirical evidence demonstrating that the widespread use of mobile phones plays a crucial role in facilitating overall progress **(17).**

6.4. Pecuniary Jurisdiction: - The purchasing power and consumer behavior have experienced significant growth over time. In contrast to the 21st century, the expenditure of consumers on their purchases, projects, and infrastructure was relatively insignificant. Consequently, the National Commission bore an additional responsibility. Hence, considering this matter, the monetary jurisdiction of the Consumer Courts has been modified **(18).**

District forum	State commission	National commission
Before – up to 20L	Before – 20 L- 1Cr.	Before: >1CR
In current up to 1 Cr	In current 1 Cr. -10Cr.	In current Above 10CR

Table 1. Before and current jurisdiction

6.5. Structural Reforms

Particulars	District Forum	State Commission	National Commission
Composition	President -1 Member – 2 at least	President -1 Member – 4 at least	President -1 Member – 4 at least
Location	District & State	State	NCR
Qualification	As per Central Govt.	As per Central Govt.	As per Central Govt.
Filling a Compliant	Central authority – may be through electronically	Central authority – may be through electronically	Central authority – may be through electronically
Place of Suing	The location of the complainant's residence or place of employment.	The location of the complainant's residence or place of employment.	-

If a decision is not rendered within a period of 21 days, the case is considered to have been admitted. In the event that the complainant does not approach the consumer forum, the case will be adjudicated based on its inherent merits **(19).**

6.6. Appeals (20).

From orders of District Commission to State Commission	From State Commission for National Commission	From National Commission to Supreme Court
• Within a period of 45 days, previously 30 days. • The fees for the service will now be 50% of the pre-deposit amount, which was previously set at 25,000 INR. Additionally, it should be noted that if a decision is reached through mediation, there is no option for appeal.	• Within a period of 30 days, the fees for ex-part orders shall amount to 50% of the pre-deposit, which was previously set at 35,000 INR.	• Within a period of 30 days, the fees charged shall amount to 50% of the pre-deposit, which was previously set at 50,000. Partial orders.

6.7. Central Consumer Protection Authority: - The establishment of the Central Consumer Protection Authority (CCPA) aims to advance, safeguard, and elevate consumer entitlements. It is recommended that the headquarters be located in the National Capital Region (NCR), while the determination of regional offices shall be at the discretion of the government. The regulatory body is responsible for overseeing and enforcing regulations pertaining to the infringement of consumer rights, unjust trade practices, and deceptive advertising. An investigation division, overseen by a Director General (DG), shall be established **(21).**

6.8. Contracts that are deemed unfair: - An inequitable agreement refers to a contractual arrangement between a manufacturer, trader, or service provider and a consumer that results in harm to the consumer or a substantial alteration in the consumer's rights. An instance of this can be observed in the unilateral termination of a contract without prior notification. A complaint may be lodged with the State Commission for amounts up to

10 Crore INR, while the National Commission handles complaints exceeding 10 Crore INR, both serving the same purpose **(22).**

6.9. Product Liability: - Under the new Act, the Manufacturer, Product Service Provider, and Product Seller bear responsibility for any harm that may arise from their product(s), leading to injury or fatality of the consumer. Nevertheless, the manufacturer's responsibility will be greater. This principle is also applicable to electronic commerce platforms. The defective product should be the direct cause of harm, resulting in physical injury, death, psychological distress, loss of companionship, or any other form of harm. For harm to be considered valid, it must be tangible and not encompass any financial detriment.

6.10. Alternate Dispute Resolution:- The recently enacted legislation offers a mechanism for mediation that is optional and lacks enforceability on the involved parties. The implementation of the median approach is expected to enhance efficiency, streamline procedures, and facilitate expeditious settlement of conflicts. Establishing a Consumer Mediation Cell (CMC) at the district, state, and national levels is a challenging and time-consuming endeavor due to the limited funding available to courts and inadequate infrastructure, particularly at the district level.

6.11. Filing of Complaint:- The consumer or their legal guardians have the option to initiate the filing of a complaint. The recently enacted legislation enables the consumer to lodge a grievance either at their place of residence or their place of employment. In specific situations, it is possible to electronically submit a complaint and have it adjudicated through video conferencing **(23)**

6.12. Penalties and Offenses penalties for disobeying orders:-

District/ State/ National Commission	**Central Authority**
Prison time ranging from one month to three years Fines between Rs. 25,000 and Rs. 1,000,000 or both	up to six months in prison Penalty of up to Rs. 20,000, or both

Punishment (Products Containing Adulterant)

Does not result in injury	Penalty: up to 6 months in jail; fine: up to Rs. 1,000,000; or both

Injury that isn't gravely hurtful	Penalty: up to one year in jail Up to Rs. 3,000,000 in fines
Injury that causes severe hurt	Up to 7 years in prison; a fine of up to Rs. 5,000,000.
The consumer's death	Penalty: 7 years to life in jail Up to Rs 10,000 in fines

Punishment (Spurious Goods)

Injury not amounting to grievous hurt	1 year in prison; a fine of up to Rs. 3,000,000.
Injury resulting in grievous hurt	7 years in prison; a fine of up to Rs. 5,00,000.
Death of consumer	Penalty: 7 years to life in jail; fine: up to Rs. 10,000/-

7. FUTURE CHALLENGES FOR THE CONSUMER PROTECTION ACT OF 2019

Although commendable, the operational framework of the Authority remains ambiguous, particularly given that incumbent District Collectors have been assigned with responsibilities related to inquiries and investigations. In order to execute this framework, the governing body is authorized to conduct inquiries and investigations, which are carried out by a specialized analytical division overseen by a Director-General, akin to that of the Competition Commission. Additionally, the regulatory body has the ability to document grievances and intervene in disputes prior to the involvement of the Consumer Commissions. Remarkably, the regulatory body possesses the authority to facilitate the evaluation of goods, reimburse the expenses incurred for products and services, as well as prescribe directives and penalize manufacturers and advertisers for fraudulent advertisements. The National Commission must grant approval for progress regarding such petitions. The precise scope of interests that may be subject to consideration by the National Commission is ambiguous and reasonable, and does not necessarily lead to the opening of a Pandora's Box. It is unclear whether cases currently pending before the Consumer Commissions will proceed or if they are likely to be affected by

the changing economic conditions. This ambiguity will exacerbate the delays. The establishment of the Central Consumer Protection Authority (CCPA) aims to advance, safeguard, and amplify consumer entitlements. It is recommended that the headquarters be located in the National Capital Region (NCR), while the determination of regional offices is to be made by the government. The aim is to improve both basic and advanced education, as well as computer literacy and technological infrastructure in rural areas of India, in alignment with the Digital India initiative. This is to be achieved while avoiding dependency on outdated models and fraudulent practices. The recently enacted consumer protection legislation in New incorporates novel approaches and protocols to safeguard consumer rights.

The regulatory body will oversee and regulate instances of violation of consumer rights, unscrupulous exchange practices, and deceptive advertising. The task of authorizing and enhancing this position will be a crucial responsibility for the legislative body, and its recommendations are expected to hold considerable weight for the 2019 Act. Although commendable, there is some ambiguity surrounding the operational mechanics of this position, as well as certain aspects pertaining to assessments and inquiries. There exists a correlation between the components of the principal General in the context of the analytical division and the capabilities related to search and seizure. The CCPA has been implemented to facilitate product evaluations, reimburse expenses, provide labeling, and penalize manufacturers or endorsers. It is noteworthy that any objections to such requests must be presented and approved by the public Commission. The criteria or protocols by which the National Commission will address such cases remain unclear. It is unclear whether the present instances will be relocated due to advancements in the economic sector. However, there exist theories suggesting that individual instances will be categorized under the new jurisdiction. The college administration has implemented notable measures to strengthen the interface between the institution and the business sector. This study centers on the necessity of establishing additional connections to facilitate mutually beneficial outcomes for both academia and industry. The Consumer Protection Act aims to facilitate the purchase of products by ensuring that consumers are adequately informed about the essential features necessary for their successful use. The Act primarily focuses on ensuring that products meet high quality and safety standards. This will enable communication with individuals solely through effective promotional strategies. The ecological impacts of banks are not directly associated with their financial operations, but rather with the activities of their clients. Thus, the impact of a bank's external operations is significant, albeit challenging to quantify **(24) (25).**

8. CONCLUSION

The success of the consumer protection movement in the country hinges on the implementation of consumer education and government-led initiatives, as well as the efforts of consumer activists and associations to raise awareness among consumers. Television programs have recently initiated discussions regarding consumer protection and the consumer movement. Additionally, a distinct department dedicated to consumer protection has been established within the Ministry of Food and Supplies. Hence, it is imperative that domestic products exhibit superior quality to entice consumer interest and establish their trust. In addition, the government should implement specific standards to ensure quality assurance for both domestic and imported products. The implementation of the 2019 Act is a necessary and timely measure to safeguard the interests of consumers in light of the prevailing era of digitalization. The provision of well-defined rights and a dispute resolution process empowers individuals, enabling them to have their grievances addressed through a fast-track mechanism. To gain a comprehensive comprehension of the principles, it is advisable to review some of the significant verdicts rendered by our courts in accordance with the Consumer Protection Act of 1986, which has since been repealed. However, the directives established in those cases aided in the formulation of the new Consumer Protection Act of 2019. This revised legislation provides consumers with a diverse range of advantages and protections against unjust business practices, deceitful or deceptive advertising, and other similar issues. The aforementioned legislation empowers consumers to pursue alternative methods of resolving disputes and engage in mediation, thereby affording the parties involved the opportunity to achieve prompt and efficient resolution of consumer-related conflicts. The legislature's forward-thinking approach is evident in the Act's inclusion of e-filing of complaints and e-consumers within its scope. In addition, the aforementioned legislation also incorporated novel concepts such as product liability and unfair contracts, among others, thereby expanding the ambit of safeguarding consumer rights and empowering consumers to lodge grievances in the event of infringement of their rights under the statute. Consequently, the integration of these provisions serves to address the gaps in the Consumer Protection Act of 1986. The implementation of the aforementioned legislation was of utmost significance as it brought about a significant alteration in the scope of safeguarding the interests of consumers within the nation.

References

1. Ahmad, T., & Mangalam, J. (2009). Globalization and Protection of Consumer Rights in India. *Available at SSRN 1470257*.

2. Arifin, R., Kambuno, J. A., Waspiah, W., & Latifiani, D. (2021). Protecting the Consumer Rights in the Digital Economic Era: Future Challenges in Indonesia. *Jambura Law Review*, *3*, 135-160.
3. Fatima, S. (2020). Advertising Industry in India: Comprehending the Legal Scenario. *DME Journal of Law*, *1*(01), 153-174.
4. Gupta, K. (2023). The Evolution of the Consumers Protection Act as a Tort in India. *Available at SSRN 4443421*.
5. Gupta, R. K., Mittal, I., & Gupta, A. (2011). Measures for Consumer Protection in India and Consumerism. *RMS Journal of Management & IT*, *5*, 9-18.
6. Kapoor, S. (2019). Consumer Protection Act, 2019: A New Milestone in Empowering Consumers. *Yojana*, 53.
7. Kumar, V., & Sharma, A. (2019). Strengthening Consumer Rights: The Advent of Consumer Protection Act, 2019. *SEBI and Corporate Laws*, *156*(2), 7.
8. Majumdar, S., & Gupta, A. (2020). Understanding the Rights of the Consumers: A Commentary on the Consumer Protection Act, 2019. *Supremo Amicus*, *20*, 509.
9. Mandal, S. N. (2010). Protection of consumers' rights: A socio-legal challenge in India. *Available at SSRN 1707568*.
10. Nagarathna, A. (2020). Consumer Protection Act 2019-A Review of Criminal Sanctions Protecting Consumers. *IJCLP*, *8*, 23.
11. Nomani, M. Z. M., Rahman, F., & Alhalboosi, A. K. (2019). Consumer Protection Act, 2019 and its implications for the medical profession and health care services in India. *Journal of Indian academy of forensic medicine*, *41*(4), 282-285.
12. Parimala, S., & Ramachandran, M. (2022, May). A study on E-consumer awareness towards E-commerce Consumer Protection Act, 2019. In *AIP Conference Proceedings* (Vol. 2393, No. 1, p. 020110). AIP Publishing LLC.
13. Patil, A. (2011). A study on consumer protection through maintenance of product safety & standards in India. In *Asian Law Institute* (Vol. 23).
14. Pillai, D. A. V. (2020). Promises and Nuances of Consumer Protection Act, 2019: A Birds Eye View. *Consumer Protection Reporter*, 25-30.
15. Reddy, B. Y., & Pahuja, R. (2022). CONSUMER PROTECTION ACT, 2019: NEW DIMENSIONS.
16. Saha, A., & Khanna, S. R. (2021). Evolution of consumer courts in India: The Consumers Protection Act 2019 and emerging themes of consumer jurisprudence. *IJCLP*, *9*, 115.

17. Saha, A., & Khanna, S. R. (2021). Evolution of consumer courts in India: The Consumers Protection Act 2019 and emerging themes of consumer jurisprudence. *IJCLP*, *9*, 115.
18. Sarkar, R., & Tiwari, A. (2021). Consumer Protection in India: An Overview. *Issue 1 Int'l JL Mgmt. & Human.*, *4*, 1248.
19. Sen, S. K. (2015). Consumers' protection in India in changing economic scenario. *Journal of Law and conflicts resolution*, *7*(2), 9-14.
20. Sharma, N. (2013). Awareness in Consumer about Consumer Protection Act. & Consumer Right in India. *Globsyn Management Journal*, *7*(1/2), 82.
21. Shukla, S., Shankar, R., & Singh, S. P. (2014). Food safety regulatory model in India. *Food Control*, *37*, 401-413.
22. Shukla, Y., & Chandra, T. (2022). Domains Of Consumer Education: With Reference To The Indian Consumer Protection Act. *Journal of Positive School Psychology*, *6*(11), 1038-1055.
23. Sultana, P. (2023). ANALYSIS OF CONSUMER PROTECTION ACT 2019–A CRITICAL APPRAISAL.
24. Tavuyanago, S. (2020). The interface between competition law and consumer protection law: An analysis of the institutional framework in the Nigerian Federal Competition and Consumer Protection Act of 2019. *South African Journal of International Affairs*, *27*(3), 391-411.
25. Turban, E., King, D., Lee, J. K., Liang, T. P., Turban, D. C., Turban, E., ... & Turban, D. C. (2015). Marketing and advertising in e-commerce. *Electronic Commerce: A Managerial and Social Networks Perspective*, 403-456.

REVERSE MORTGAGE – AN ANALYSIS

- S CHETNA[208]

1. INTRODUCTION

Reverse mortgage is a type of loan which is available to senior citizens of the country. It is different from home loans. A homemaker who is above the age of 62 could borrow this loan by keeping his house of any kind of belongings he possesses. The catch is that he doesn't have to pay back the loan which he has taken instead after his death the other family members has to pay back the loan. It can be taken in a bulk amount, monthly payment or line of credit. They can enjoy the loan during the lifetime as they are not responsible for the repayment of the loan. It also has a program for mortgage insurance. The entire loan balances up to its limit. It does not exceed the amount of the house. It is ensured that the loan is paid back by the other family members or the house is sold out.

1.1 RESEARCH PROBLEM

Reverse mortgage is a complex element which includes a high risk of interest rate, maintenance factor, and other factors etc. There has been more discussion about the same in the recent years. Through this paper there has been more in-depth knowledge about the same. And how it is helpful for the older generation.

1.2 LITERATURE REVIEW

- Reverse mortgages have long been considered as a product intended just for the elderly in financial need; nevertheless, there is a bright aspect to it as well.
- This overview of literature aims to convey the many studies on reverse mortgages in a thorough, straightforward manner.
- A review of the literature on existing studies in India was also conducted to understand the relevant studies done thus far, the likely causes for the product's failure, the product's features, government policies, and so on.
- The reverse mortgage as a type of financing dates back to the 1930s, when it was originally implemented in the United Kingdom.

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- Over time, the worldwide challenge of ageing becomes worse by the fact that the majority of these retirees are "home rich- cash poor." Thus, housing was recognised as a stable source of funding for retirement living through home equity conversion.
- The demand for home equity conversion solutions has grown in recent years, and real estate financing has seen the creation of new, innovative products.
- To satisfy the needs of the older homeowner, reverse mortgages arose as an efficient technique for converting illiquid, immovable real estate into cash.
- Reverse mortgages make it possible to take cash from "walled equity."
- Thus, a reverse mortgage allows an individual to transform this housing wealth into consumption, maximising utility distribution over the life period. The major goal of Reverse Mortgage loans is to assist the third generation.
- The theoretical foundation of Reverse Mortgage is strongly based in the life cycle hypothesis provided by Modigliani and Miller in 1954. The formation of the Reverse Mortgage from the life cycle hypothesis is supported by the reality that revenue produced during working years should ideally be spread across all periods of life, including retirement. The life cycle hypothesis explains the elderly's desire to finance consumption by selling assets accumulated while they were younger.
- A study analysed AHS (American Housing Survey) data and concluded that one-fourth of the elderly over the age of 65 with incomes below the poverty line could benefit from reverse mortgages.
- According to one study which used SIPP (Survey of Income and Programme Participation) data, one-third of senior house owners in the United States might improve their income by more than 20% by using a reverse mortgage.
- According to one estimate, approximately 800,000 out of 12 million households could profit from reverse mortgages at some point in time. According to one study, the lump sum payment from a reverse mortgage can be utilised as a last resort for financial situations such as paying for medical bills or property repairs, as well as refinancing/repayment of outstanding debts.
- According to Burns and Widdows, 1990 in Hogarth (1991), reverse mortgages can help the elderly improve their economic situation and minimise their reliance on government subsidies. According to Golovin ski (2006)'s Israeli research, reverse mortgages are quite popular among Israeli senior persons over the age of 67. Clarence (2009) argued in favour of reverse mortgages, noting that financial planning approaches such as

reverse mortgages can give retired Americans with the option to earn extra streams of retirement income. According to Matic (2009), reverse mortgages can help seniors supplement their present income without having to sell their properties. In India, a pioneer study on reverse mortgages concluded that if reverse mortgages are structured and supplied by a sympathetic lender.

1.3 SCOPE AND OBJECTIVE OF THE STUDY

- To have an in-depth knowledge about reverse mortgage
- To understand the features and drawbacks of reverse mortgage
- To understand the relevance of reverse mortgage in the present era.

1.4 RESEARCH QUESTIONS

1. What is the evolution of reverse mortgage?
2. What are the positives and negatives of reverse mortgage?
3. What is the exact functioning of reverse mortgage?
4. What are the silent features of the same?

1.5 HYPOTHESIS

The main aim of this type of loan is to benefit the older generation. It is deeply rooted in the theory of life cycle hypothesis that was proposed by Modigliani and Millar in the year 1954.

1.6 RESEARCH METHODOLOGY

A descriptive and analytical method is followed throughout the course of the paper. The study is based on Primary and Secondary Data. Primary sources referred to in this paper include Statutes, Cases and Books. Secondary sources include various articles and journals that have been referred to for the purposes of this paper. All the information so gathered has been studied analytically to deal with the Research Questions. The descriptive research method is used to obtain information concerning the current scenario with respect to the research problem. Analytical research is followed in this paper for the purposes of critically analysing the research problem. All the necessary and relevant materials which form a part of the study are collected from a wide range of sources that include books, articles, journals, newspapers, reports and various seminars. The present study is basically a theoretical one and as such no field study is conducted.

II. HISTORY OF REVERSE MORTGAGE

The first ever reverse mortgage was in 1961 which was received by a widow football coach. According to Nelson who was an employee at Deering Savings and loan a small bank in Portland. He knew Maine whose husband died and she was looking for ways to sustain herself. This was nelson creative outcome.

Haynes' innovation drew attention and support from UCLA professor Yung-Ping Chen, Wharton School professor Jack Guttentag, and Ken Scholten, who worked with the Wisconsin Board on Ageing and produced three books on the issue. In the next following years even, private banks started taking up this concept.

During the 1980 this concept gets government support. After some initial criticism from the U.S. Department of Housing and Urban Development (HUD), a pilot programme offering government-insured reverse mortgages, now known as home equity conversion mortgages (HECMs), was launched in 1987 with congressional approval.

In 1994, Congress mandated that lenders post entire yearly loan charges at the start of the application process to promote transparency and make it easier for consumers to compare rates and shop around. The HUD Appropriations Act four years later made the HECM scheme permanent.

In 2000, after discovering that a growing number of borrowers were struggling to keep up with property tax and insurance payments, HUD increased origination fees to attract more lenders into the market and partnered with the American Association of Retired Persons (AARP) to improve counselling policies. A single national loan ceiling was also established to replace specific county loan restrictions, and existing HECMs could be refinanced. Reverse mortgages were becoming increasingly popular as a cash-strapped elderly homeowner's answer. However, the HECM did not suit everyone's needs, spurring the development of alternative private-backed loans known as jumbo reverse mortgages or [209][210]proprietary reverse mortgages, which were particularly developed for persons who did not fit HUD's lending standards or required a larger payoff. Then the Great Recession happened. After 2008, proprietary reverse mortgages disappeared for a bit.

In 2010 the reverse mortgage had a desperate start. HUD cut principal limitations (the amount of money that can be borrowed), raised MIPs, and dropped the interest rate floor from 5.5% to

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210 https://www.investopedia.com/mortgage/reverse-mortgage

5%. In 2010, the HECM Saver programme was created, giving elderly homeowners the opportunity to borrow a lesser percentage of their home's worth. HECM Saver promised lower upfront MIPs and closing expenses, however it never caught on with the general public and was phased out in 2013.

In the second half of the decade, principal limits were reduced again, MIPs were reduced, the HECM loan limit was raised for the first time in nearly ten years, lenders were required to provide a second property appraisal in cases of suspect inflated valuations, and the FHA made it easier for homeowners living in unapproved single-unit condos to qualify for a HECM.

2020s have been dominated by two main topics: COVID-19 and inflation. Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, reverse mortgage borrowers impacted by the pandemic were granted more time to get their affairs in order and repay what they owe.

III. REVERSE MORTGAGE STABILIZATION ACT

The Reverse Mortgage Stabilisation Act of 2013 protects senior homeowners who borrow under the FHA's (Federal housing authorities) reverse mortgage programme. The act gives the FHA authority to amend the origination and servicing policies of Home Equity Conversion Mortgages (HECMs), which protects customers and helps to sustain the programme. This act was signed by Obama. In the years since, the act has been invoked multiple times to make amendments to the HECM programme. The FHA has issued multiple mortgagee letters ordering lenders to make adjustments to their HECM programmes, such as increasing borrowing limits, changing the index used to establish adjustable rates, and more.

After this act was turned into a law there were few changes made, that is protect the consumers and reduce taxes. According to reports these were the following changes made;

2015: New protections for non-borrowing spouses under age 62.

2017: Lowering the upfront Mortgage Insurance Premium from 2.5% to 2%.

2019: Implementing a Collateral Risk Assessment, which could require a second appraisal if the FHA is concerned about a potentially inflated home value.

2021: Increasing the maximum loan amount for FHA-insured HECMs to $970,800 for 2022.

2021: HUD removed LIBOR as an approved index for new HECM ARM originations and approved the SOFR index for new annually adjusted HECM ARM originations.

The Reverse Mortgage Stabilisation Act established rules and boundaries for lenders to follow, and it tries to guarantee that prospective borrowers receive sufficient counselling before proceeding. It also allows the FHA to increase borrowing quantities to account for

improvements in housing values. Moreover, during the COVID-19 pandemic, the statute authorised the FHA to immediately issue foreclosure and eviction moratoriums.

IV. HOW EXACTLY DOES REVERSE MORTGAGE WORK

As reverse mortgage is a loan which is given to senior citizens for their well- being. This is how exactly it works,

The person already owns a house, they go to the bank and borrow against this house. The lender then sends you the amount in bulk, monthly payment or credit line. They can enjoy this loan till their death. Most of the repayment is done by the borrowers' heirs and noy by him. They enjoy all kinds of profit out of it. If the family wants back the house, they would have to pay the whole amount which was taken. If the amount exceeds the house value, then the bank takes the house away.

THE WAYS YOU WOULD BE ABLE TO RECEIVE THE MONEY

1. Lump sum – Get the whole amount at once. This is the only option which comes with a fixed interest rate. The others have adjustable interest rates.
2. Equal monthly payments (annuity) – A tenure plan provides steady payments to borrowers for a principal residence.
3. Term payments - The lender gives the borrower equal monthly payment for a fixed period of time i.e., 15 years.
4. Line of credit – The money is available for him to borrow as much as needed. They are only repayment of interest rates.
5. Equal monthly payments plus a line of credit - The lender provides steady monthly payments for as long as at least one borrower occupies the home as a principal residence. If the borrower needs more money at any point, they can access the line of credit.
6. Term payment plus line of credit - The lender gives the borrower equal monthly payments for a set period of the borrower's choosing, such as 10 years. If the borrower needs more money during or after that term, they can access the line of credit.

V TYPES OF REVERSE MORTGAGE

There are basically three types of reverse mortgages;

1. Home Equity Conversion Mortgage:

It is a type of reverse mortgage which is insured by the federal housing administration. Home equity conversion mortgages allow senior citizens to convert the equity in their homes into cash.

The amount can be borrowed against the value of the house. This makes up the most amount of reverse mortgage. It is better than all other types of mortgages. HECMs offer lower interest rates than privately sponsored reverse mortgages, depending on the borrower's age and how long they expect to live in or own the home. Many types of reverse mortgages target seniors with no repayment until the borrower sells or dies.

A home equity loan is similar to a reverse mortgage in that borrowers are issued a cash advance based on the equity value of their home, which acts as collateral. However, with a home equity loan, the funds have to be paid back in monthly interest payments.

HECM loans do not require monthly payments, but borrowers must pay closing and servicing fees and mortgage insurance premiums. These fees and premiums can be rolled into the loan, but this lowers the net principal limit.

The person should be 62 and above for this loan. Should own a house of they own. Use that as principal residence. Should have all the taxes paid for the property. It should meet the FHA requirements. A HUD approved.

2. Single purpose reverse mortgage:

Homeowners 62 years of age and older have the option to use a single-purpose reverse mortgage to convert their home equity into a reliable income stream in retirement.

As with any reverse mortgage, lenders advance borrowers' money from the equity in their homes. Most of the time, lenders anticipate being paid back when a borrower vacates a property or dies, at which point, theoretically, the proceeds from the sale of the property would be sufficient to pay off the loan because the lender bases the loan's payments on the borrower's current equity. Borrowers who use single-purpose reverse mortgages are restricted in how they can use their payments. For instance, lenders can stipulate that funds be used for home maintenance and upkeep or to pay for regular expenses that are in their best interests, like homeowners' insurance or property taxes. Due to their simpler application processes and lower interest rates compared to other reverse mortgage types, they are frequently preferred by borrowers.

However, finding lenders who provide these kinds of loans may prove difficult for borrowers. These loans are more affordable than those that are general purpose because these uses are meant to contribute to the home itself or to its maintenance, which preserves the collateral for the lender. Most of them are issued by government agencies. It can also be done by non-government organizations.

Elderly borrowers who have paid off their homes and require a steady income stream often find that reverse mortgages make the most sense. When obtaining a reverse mortgage, homeowners keep the title to their home. Government agencies do not classify payments as income because they are an advance on equity, so they do not increase the borrower's tax liability or typically have an impact on their eligibility for benefits from Social Security or Medicare.

3. Proprietary Reverse Mortgage:

It can be issues and backed by private companies. It is also called as jumbo reverse mortgage. The borrowing amount is not limited by FHA. You basically borrow tax free loan against your home equity. There is no requirement of monthly payment. The amount can be paid back after you leave the house. The lender pays off the amount of your mortgage if required. You are responsible for keeping the house in a proper manner. It must be ensured that the property should be in your name. Payments done for this mortgage is made either by huge amount or by regular payment. The money which you get out of this is tax free. These are following factors which are considered while giving this loan first is your age, then the current market value of the house, interest rate of reverse mortgage and the amount owned by the current loan.

In the event of death, beneficiaries have an opportunity to purchase a home. They must decide within 30 days whether or not they wish to pay off the mortgage and enter into a repayment agreement with the lender. The lender will start foreclosure proceedings to sell the house and pay the mortgage balance if the heirs decide they do not want the house.

VI SAILENT FEATURES OF REVERSE MORTGAGE

1. Reverse mortgage allows the senior citizens of the country to live independently. This happens with them remaining owners of the house.
2. It can be borrowed against they own house.
3. They can avail the services of the loan along their lifetime with no requirement of repayment.
4. The loan amount would depend on the value of the house.
5. The maximum payment of the loan is for a period of 20 years.

6. The loan amount can be used for various purposes such as renovation of residential property, medical expenses, etc.
7. The amount which i[211]s received is tax free.
8. The non borrowing spouse would also be allowed to live if the other spouse passes away or moves out.\
9. The loan amount would go for revision every year according to the prices of the house or property.
10. The borrowers spouse also have an option of prepaying the loan at any time during the loan tenure, or later without any prepayment levy.
11. No monthly payment is required but there is responsibility of paying property taxes and insurance as well as keeping the property in a proper manner.

VII DRAWBACKS OF REVERSE MORTGAGE

- You don't have enough equity- We should already have assets in hand to apply for this loan. For example, a house, or any kind of property. We need to also fulfil the other factors which are mentioned. We need to have a proper source for taking up this loan which would give you are reasonable amount.
- Someone lives with you- If you have friends, roommate living with you, then you won't be able to take up this loan. They would also be ready to move out once you pass away or the due has occurred. Moving out to a nursing home for consecutive 12 months is considered to be a permanent move out in reverse mortgage. There is a requirement of this house being your primary source of stay.
- When you won't be able to do the repayment- The loan becomes due and payable upon the passing of the final reverse mortgage borrower. The reverse mortgage balance may be paid to the lender by heirs who wish to maintain ownership of the property. For the debt to be repaid they require cash or another mortgage. If your heirs are unable or unwilling to pay back the debt the lender will sell the house to retrieve the property the

[211] https://simplereverse.com/features-of-a-reverse-mortgage/

borrower had. Any surplus after deducting the loan balance from the sale proceeds is given to the borrower's estate. Insurance provided by the federal housing administration covers any negative amount. The heirs receive nothing in return.

- [212]
- Its not for free- Though you don't have to pay back the loan of reverse mortgage if you are not using that house or you don't require it, but there are other expenses you have to manage. You have to pay taxes, insurances etc. You also have to pay insurance premium. You also have to pay a closing value.
- It could have an impact on your other retirement benefits- A reverse mortgage might not be for tax purposes but it could stop your other government aided retirement benefits. It could cause problems for other retirement benefits.

VIII CONCLUSION

Most senior citizens do not have a regular source of income other than their pension, so this adds up to their income and they also would be able to enjoy their lifetime. Even if they receive monthly pension, they might not be able to meet their demands. So, this becomes helpful. In such a situation, senior citizens it can help with their daily expenses. They would be able to have a standard living, pay for medical expenses, and they also have emergency money with them. It is a convenient way of obtaining liquidity for senior citizens with no other source of income. In order to get reverse mortgage, you will need the following, identity verification, proof of address or proof of residence, identity card for the employer.

IX REFERANCES

https://www.investopedia.com/mortgage/reverse-mortgage

https://www.nytimes.com/.../retirement-reverse-mortgages-home-equity.html

https://simplereverse.com/features-of-a-reverse-mortgage/[213]

https://economictimes.indiatimes.com/topic/Reverse-mortgage

https://www.redfin.com/blog/what-is-a-reverse-mortgage/

https://www.cbsnews.com/news/is-reverse-mortgage-worth-it-what-experts-think/

[212] https://www.nytimes.com/.../retirement-reverse-mortgages-home-equity.html

LEGAL MECHANISM TO CONTROL UNFAIR TRADE PRACTICES IN INDIA: A STUDY

- SONIA[214] & DR. SUNIL KUMAR[215]

ABSTRACT

The term Unfair Trade Practice (UTPs) encompasses trade practices that employ unfair methods or deceptive practices to promote the sale, use, or supply of goods or the provision of services. These practices are prohibited by statutes or have been identified as legally actionable through court judgments. This paper will provide a comprehensive analysis of the evolution of Unfair Trade Practices (UTPs) within the context of the Monopolies and Restrictive Trade Practices (MRTP) Act, Consumer and Competition Act. It will explore the abolition of the MRTP Act, the initiatives undertaken by the Sachar Committee and the Raghavan Committee, the establishment of the Competition Commission of India (CCI) and the enactment of the Competition Act in 2002. Additionally, it will examine the legal framework surrounding UTPs in consumer and competition laws, the rationale behind incorporating UTPs in consumer laws, the various elements of UTPs, and the relevant authorities and agencies responsible for addressing UTPs.

Keywords: Unfair Trade Practices (UTPs), Incorporation of UTPs, Consumer Welfare, Overlapping Provisions

INTRODUCTION

The concept of Unfair Trade Practice (UTPs) encompasses trade practices that employ unfair methods or deceptive practices in order to promote the sale, use, or supply of goods or the provision of services. These practices are prohibited by statutory law or have been recognized as legally actionable through court judgments.

Misrepresentations can pertain to any attribute of a product or service, whether tangible or perceived. As a result, legislation aimed at outlawing unfair trade practices typically incorporates a broad provision as well as more specific measures that target prevalent forms of misrepresentation.[216]

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[216] Buik, Carl, "Dealing with Unfair Trade Practices", Addis Ababa, May 2008, source: http://www.circ.in/pdf/CPS-06- Unfair_Trade_Practices.pdf.

Unjust trade practices comprise a wide range of torts, many of which entail economic harm resulting from deceitful or unethical behaviour. The potential legal arguments that may be invoked encompass allegations such as the misappropriation of trade secrets, unfair competition, false advertising, palming off, dilution, and disparagement. The user's text is too short to be rewritten academically. At the global scale, the World Bank and the Organisation for Economic Cooperation and Development (OECD) Model Law enumerate the subsequent trade practices as being unjust.[217]

The following trade practices are deemed unfair on a global scale by the World Bank and the Organization for Economic Cooperation and Development (OECD) Model Law.[218]

- "Distribution of false or misleading information that is capable of harming the business interests of another firm";
- Distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, and suitability for use, or quality of goods ;
- False or misleading comparison of goods in the process of advertising ;
- Fraudulent use of another's trade mark, firm name, or product labelling or packaging; and
- Unauthorized receipt, use or dissemination of confidential scientific, technical, production, business or trade information".

EVOLUTION of UNFAIR TRADE PRACTICES (UTPS)

The growth of UTPs in these legal frameworks began when it was felt that consumers needed to be protected against tactics used by business and industry to deceive or trick them, as well as from false or misleading advertising and other similar unfair trade practices.

The Monopolies and Restrictive Trade Practices Act was passed in 1969 after the Parliament had considered the Monopolies Inquiry Commission's report, which had revealed the concentration of economic power in the hands of a small number of powerful industrial companies. This power bloc emerged during a period of strict centralized supervision over

[217] Pham, Alice (2007), "Competition Law in Vietnam: A Toolkit", CUTS HRC, Hanoi, source: http://www.cutsinternational.org/HRC/pdf/Vietnam_Toolkit.pdf.

[218] World Bank & OECD, (1999), "A Framework for the Design and Implementation of Competition Law and Policy",Washington D.C.,

corporate capital raising, industrial licensing, etc.5 By amending Sections 36A through 36E6 in 1984, the MRTP Commission added Part B on "Unfair Trade Practices" and their regulation.[219]

Following the inclusion of Unfair Trade Practices (UTPs) in the Monopolies and Restrictive Trade Practices (MRTP) Act, the Government of India (GOI) initiated the establishment of a high-level committee, chaired by Justice Rajindar Sachar (referred to as the Sachar Committee), with the purpose of evaluating and proposing necessary modifications to the MRTP Act based on the knowledge and insights acquired through its administration and implementation.

The Sachar Committee proposed the inclusion of a distinct section inside the MRTP Act that would outline and define several forms of unfair trade practices. This addition would enable consumers, manufacturers, suppliers, traders, and other market participants to easily recognize and identify banned behaviours. As a result, measures pertaining to Unfair Trade Practices were incorporated into the MRTP Act in 1984.[220]

The 1984 amendment introduced the establishment of the Director General of Investigation and Registration (DGIR), an independent body. The DGIR was intended to collaborate with the MRTP Commission and had the authority to investigate claims of restrictive or unfair trade practices as outlined in Section 36A of the MRTP Act. Upon receiving a complaint or acting on its own initiative (suo moto), the DGIR was empowered to bring the matter before the MRTP Commission (MRTPC). The MRTPC, established under the MRTP Act, would then evaluate the necessity of initiating an inquiry.[221]

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[219] T.Rampappa, Competition Law in India: Policy, Issues and Developments 13(Oxford University Press, New Delhi, 2nd edn., 2012).

[220] "Report of the High-Powered Expert Committee on Companies and MRTP Acts, 1977" Ministry of Law, Justice and Company Affairs, Government of India, New Delhi, August, 1978, Committees and Commissions in India, 1977, Volume 15, Part B.

[221] Unfair Trade Practices and Institutional Challenges in ndia An Analysis, http://www.cuts-ccier.org/pdf/Unfair_Trade_Practices_and_Institutional_Challenges_in_India-An_Analysis.pdf

on its own initiative (suo moto), the DGIR was empowered to bring the matter before the MRTP Commission (MRTPC). The MRTPC, established under the MRTP Act, would then evaluate the necessity of initiating an inquiry.[222]

In order to address the increasing demands of liberalization and globalization, as well as establish a more effective framework for overseeing business practices and resolving conflicts, the Indian government established a committee on Competition Policy and Law in October 1999. This committee, headed by Mr. S.V.S. Raghavan, was tasked with the objective of shifting the legal emphasis from restraining monopolies to fostering competition, in alignment with global standards.

According to the findings of the Raghavan Committee, the MRTP Act has certain limitations in its scope and is lacking in several aspects. These deficiencies prevent the realization of maximum advantages from emerging economic prospects and hinder the ability to effectively address the problems posed by liberalization, privatization, and globalization policies. In accordance with the recommendations put out by the Raghavan Committee, the government proceeded to revoke the Monopolies and Restrictive Trade Practices (MRTP) Act, so paving the way for the enactment of the Competition Act in 2002. The establishment of the Competition Commission of India (CCI) took place on October 14, 2003, in accordance with the provisions of the Competition Act. at accordance with the recommendation, it was determined that all pending cases at the Monopolies and Restrictive Trade Practices Commission (MRTPC) would be moved to the Competition Commission of India (CCI) for adjudication at their current stages.

POSITION OF UTPs IN CONSUMER & COMPETITION LAWS

After the implementation of the Competition Act, 2002, as recommended by the Raghavan committee, a separate chapter on UTPs was added to the Consumer Protection Act, 1986. This was done because the committee believed that the Competition Act should not be burdened with UTPs. Therefore, this was given effect under the Consumer Protection Act, which already dealt with unfair trade practices.

"The Consumer Protection Act governs the relationship between a manufacturer or producer and a consumer, whereas the Competition Act governs the relationship between manufacturers

[222] R.N.P. Chaudhary, Consumer Protection Law: Provision and Procedures 20(Deep and Deep Publications,New Delhi, 2005).

and producers. Both are concerned with market distortions, which should be determined by the interaction of supply and demand. Anticompetitive practices, such as price fixation or exclusionary practices, distort the supply side by limiting supply and increasing prices. Unfair trade practices, such as deceptive or misleading advertising, distort demand by creating the impression that a product or service is more valuable than it actually is.

"The distinction between 'per se' and 'rule of reason' cases is maintained in the Competition Act. In terms of "per se," the only thing that matters is whether the act or practice took place; it is not necessary to look into how the act or practice actually affected the market or the motives of those who took part in it. Because the behavior or practice may have both negative and positive impacts, the court must apply a test of the totality of the circumstances to determine whether the challenged activity fosters or suppresses market competition. It is required to demonstrate negative market impacts.

Unfair or discriminatory business practices come under the first category of misuse of a dominant position under the Competition Act. Therefore, only when the business is in a dominating position can unfair trading practices be covered by the Competition Act.13

According to the Consumer Protection Act, complaints can be made about any unfair business practices or restrictive business practices used by a trader or service provider and leading to loss or damage, product faults, or service deficiencies for the complainant.

COMPLAITS AND RELIFE

The Competition Act, 2002 is a piece of Indian legislation that tries to encourage and maintain market competition as well as stop anti-competitive behavior. According to this Act, people and companies can make complaints about anti-competitive activity, and the Competition Commission of India (CCI) is in charge of handling these complaints and making sure that the market is free from distorted competition. Here is a summary of complaints and remedies available under the 2002 Competition Act.

1. Complaints

Any person or organization that suspects a violation of the legislation governing competition may submit a complaint to the CCI. Anti-competitive agreements, abuse of a dominating position, and combinations (mergers and acquisitions) that could have a negative impact on competition are all subject to complaints.

1.1. Type of complaints

The following main categories apply to complaints:

1.1.1. Anti-Competitive Agreements:

These encompass agreements that impose limitations on competition, such as cartels, arrangements for fixing prices, bid-rigging, and market allocation.

1.1.2. Abuse of Dominant Position

If a dominating firm engages in tactics like predatory pricing, denying competitors access to the market, or unjust discriminating acts, complaints may be made.

1.1.3. Combinations

A planned merger or acquisition may be the subject of complaints if it could significantly lessen competition in the relevant market.

2. Relief

Depending on the CCI's conclusions, relief may be given to rectify anti-competitive behavior and bring back market competition. Included in relief are:

2.1. Cease and Desist Orders

The CCI has the power to compel parties to stop engaging in anti-competitive conduct and refrain from adopting agreements or practices that limit competition.

2.2. Penalties

If infractions are discovered, the CCI has the authority to fine those responsible. The purpose of penalties, which can be severe, is to serve as a deterrent.

2.3. Agreement Modification

Where an agreement is determined to be anti-competitive, the CCI may change or alter it to comply with the legislation on competition.

2.4. Divestiture

The CCI may mandate the sale of assets in order to protect competition in circumstances of mergers or acquisitions that undermine the market.

2.5. Injunctions

The CCI has the authority to issue injunctions to stop parties from engaging in anti-competitive behaviour while an investigation is ongoing.

2.6. Combination Approvals

The CCI may accept a combination with or without a number of conditions if it is confident that it won't harm competition.

3. Leniency Program

The Competition Act also has a provision for leniency, under which parties engaged in cartel activity may receive lighter punishments or immunity in return for helping the CCI detect and prosecute the cartel.

It's crucial to remember that the Competition Act of 2002 contains measures for the protection of informants and confidentiality, and that the CCI conducts its investigations in a fair and open manner. The Act's objectives include enhancing competition, safeguarding consumers, and advancing economic efficiency in the Indian market.

INTERNATIONAL COOPERATION BETWEEN COMPETITION AUTHORITIES AND CONSUMER'S REPRESENTATIVES

One domain in which consumer protection and competition policy and law intersect is the realm of cartels, particularly those characterized by hard core practices such as price manipulation, market division, restriction of quantity or supply, and collusion in bidding processes. In various competition jurisdictions, these four categories of horizontal agreements are widely regarded as per se anti-competitive and are outlawed.

The Competition Act of 2002 establishes that agreements falling into the four aforementioned categories are deemed to have a significant negative impact on competition and are hence forbidden. The execution of such an agreement would render it null and void, so exposing the parties involved to potential fines. In the context of cartels, the penalties imposed would amount to three times the profits or ten percent of the turnover for the whole duration of the cartel's operation. The aforementioned line of reasoning is founded upon the notion that engaging in such methods exclusively benefits the individuals or entities responsible for these agreements, while simultaneously leading to inefficiencies that negatively impact all other participants in the market, such as consumers and competitors.

International cooperation plays a crucial role in addressing cross-border cartels, given the prevalence of international cartels that operate across multiple jurisdictions. The complex nature of these cartels makes it challenging to establish evidence of collusion without the collaboration and assistance of competition authorities from various countries.[223]

VARIOUS COMPONENTS OF UTPs

There are various components of UTPs according to the Consumer and Competition Laws which can be stated as follows:

1. **CONSUMER LAWS**

[223] the interface between competition and consumer policies, http://www.oecd.org/daf/competition/prosecutionandlawenforcement/39831238.pdf

An unfair trade practice means a trade practice, which for the purpose of promoting any sale, use or supply of any goods or services, adopts unfair method or deceptive practice. Unfair trade practice can be categorized as under-

- False representation
- False offer of bargain price
- Free gifts offer and prize schemes
- Non-compliance of prescribed standards
- Hoarding, destruction etc.

2. COMPETITION LAWS

Under the Competition Act, unfair or discriminatory trade practices fall under the category of:

- Anti-Competitive Agreements
- Abuse of Dominant Position and
- Regulating Combinations

Therefore, unfair trade practice will fall within purview of Competition Act only when the enterprise is in dominant position or have indulged in making anti- competitive agreements and combinations.

AUTHORITIES AND AGENCIES FOR UNFAIR TRADE PRACTICES

The following are the authorities and agencies for Unfair Trade Practices in India:

1. CONSUMER PROTECTION ACT, 2O19

1.1. **Central, State, & District Consumer Protection Councils –** Under S.3 The Central Government shall establish a Central Consumer Protection Council, under S.6 The State Government shall establish a State Consumer Protection Council and under S.8 The State Government shall establish a District Consumer Protection Council to render advice on promotion and protection of consumer rights under this Act, within the state and within the district respectively.

1.2. **Central Consumer Protection Authority -** The Central Government shall establish, a Central Consumer Protection Authority to be known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class.

1.3. **District Consumer Disputes Redressal Commission -** A District Consumer Disputes Redressal Commission is a place in a district where a consumer can lodge a complaint if he is misguided or deceived by any service provider or trader. District forum is the

lowest consumer court in the hierarchy of redressal forums under **Sec. 28 of Consumer Protection Act, 2019.** District commissions can entertain all the matters where the value of services or goods, but does not exceeds Rs. One Crore.

1.4. **State Consumer Disputes Redressal Commission -** State commissions have been established at the state levels by virtue of **Sec. 42 of Consumer Protection Act, 2019**. State commission is next, after district commissions in the hierarchy of consumer dispute redressal forums. State commissions can entertain all the matters where the value of services or goods exceeds Rs. One Crore, but does not go beyond Rs. Ten Crore.

1.5. **National Consumer Disputes Redressal Commission -** A national consumer dispute redressal commission is established by the central government under **Sec. 53 of Consumer Protection Act, 2019**. It is considered as an apex court, because it oversees the functioning of the state commissions and district forum also. National commissions can entertain all the matters where the value of services or goods exceeds Rs. Ten Crore.

1.6. **Supreme Court –** If any person is not satisfied with the Judgment given by national commission can make appeal under **Sec. 67 of consumer Protection Act, 2019** in the Supreme Court. An appeal can be made with the Supreme Court against the order of national commission within 30 days from the date of order and this period can be extended if it is satisfied that there was sufficient cause for not filing it within that period. Supreme Court entertains the appeal only when the appellant has deposited 50% of that amount in prescribed manner.

1.7. **Consumer Mediation Cell –** If any person wants to settle their matter through Mediation the State Government shall establish a consumer mediation cell to be attached to each of the District Commissions and the State Commissions of that State and The Central Government shall establish a consumer mediation cell to be attached to the National Commission and each of the regional Benches under **Sec. 74 of Consumer Protection Act, 2019.**

CONCLUSION AND SUGGESTION

"There is strong commonality between competition policy and law on the one hand and consumer protection policy and law on the other. An effective competition policy lowers entry and exit barriers and makes the environment conducive to promoting entrepreneurship, which also provides space for the growth of small and medium enterprises and consequent employment expansion".

"Competition law concentrates on maintaining the process of competition between enterprises and tries to remedy behavioral or structural problems in order to re-establish effective competition on the market. The consequence of this is higher economic efficiency, greater innovation and enhancement of consumer welfare. Thereby the consumer experiences wider choice and greater availability of goods at affordable prices".

"On the other hand, the consumer protection policy and law are primarily concerned with the nature of consumer transactions, trying to improve market conditions for effective exercises of consumer choice". "The two disciplines focus on different market failures and offer different remedies, but are both aimed at maintaining well-functioning, competitive markets that promote consumer welfare. The two disciplines are mutually reinforcing. Thus, in my opinion the Competition Laws should specifically demarcate as to what amounts to unfair trade practice as there in Consumer Laws as both the legislation aims at consumer welfare"

INVESTIGATION OF CYBER–CRIMES IN THE LIGHT OF DIGITAL EVIDENCES

- PRASHANT BHADU[224]

Abstract

New innovations, new inventions, and numerous more technological advances are happening in the modern digital world. Computer–based technology is used to improve modern living everywhere, including in government, business, and education. companies, *etc*. It guarantees productivity and efficiency. On the other hand, 'excessive dependence' on technology is what leads cybercriminals to utilise computers and the Internet to engage in illegal and unethical acts. For all Indian investigating authorities, gathering and compiling digital evidence from computers and other IT–based devices is the most difficult task. The majority of our country's technical workers lack the competence, specialised knowledge, and skills needed for digital evidence investigation and collecting.

India has emerged as a preferred hub for cybercriminals nowadays, particularly hackers and other malicious individuals who utilise the internet as a weapon for their crimes. Cyber–spamming, hacking, cyber stacking, including stealing, phishing, *etc*., are among the emerging trends in cyber–crime. It is now necessary for the Indian Police to remodel and change its investigative techniques in order to successfully prosecute cyber–crimes in India. Indian law enforcement and criminal investigations are still conducted using the antiquated methods of information extraction, information collection, and forced confessions. The police force still lacks training in contemporary criminal investigation techniques, which call for specialised knowledge of how to manage and use extremely advanced technologies.

Keywords: Forensic, Digital, Investigation, Electronic Evidence, *etc*.

1. Introduction

The old methods of evidence generation and collection are challenged and threatened by technological innovation. The ephemeral and fragile character of digital evidence makes it difficult to use. The internet's weak design presented inherent challenges for gathering and preserving digital evidence. Due to a lack of sufficient technical–legal knowledge and expertise in gathering such evidence contributed to an increase in cyber–crime in India. The employment of investigative and analytical tools to gather, identify, examine, and create evidence or

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information that has been magnetically encoded or stored is another way that cyber forensics is evaluated. Cyber forensics' major goal is to conduct a structured investigation while preserving a chain of documented evidence in order to determine the precise details of what occurred on a computer and who the genuine accused is. The cyber analysts take on this work by recovering electronic evidence in accordance with the standards of evidence and making it admissible in court through the use of the proper forensics' tools and technological expertise. When working with digital evidence, cyber analysts perform four main tasks:

1) Information Verification.
2) To Collect Information and Preserve Observations.
3) Be Clear on the Information.
4) Indian Legal Framework and Digital Evidences.

India and the rest of the globe are fascinated by technology. Everyone has an equal opportunity to use and access information, preserve data, and assess Internet usage thanks to the "Digital India Information and Technology Campaign". Electronic data storage, e–commerce, and electronic forms of communication have become more prevalent as a result of the e–revolution. It raised the issue of how present IT laws and regulations of evidence for both criminal and civil procedures need to be changed. The proliferation of digital information and the cybercrimes associated with it forced Indian law to include a legal provision for the use of digital evidence.

With the aim of extending beyond computer–explicit crime, digital and electronic forms of evidence have become a ubiquitous component of cyber investigations. Regular interaction with digital devices across all facets of life generates what is known as 'digital exhaust', which can provide important hints about the relationships, location, and target of both victims and accused parties. It could be difficult to pinpoint the location of the computer or cell phone used to create the digital evidence. Video game consoles, navigation systems for vehicles, and other networked gadgets may also hold extremely crucial information. Similar to this, online user profiles that are not physically connected to a crime scene can yield crucial details about offline activities. A criminal investigation's lifetime includes many intersections, one of which is the identification and storage of digital evidence.

The IT Act, 2000 and its modifications were built on the model law for electronic trade provided by the United Nations Commission for International Trade Law [UNICITRAL], which is also necessary for a successful prosecution. Advocates, justices, and other judicial

system players must work together to synchronize their efforts.[225] Digital evidence may now be accepted under the IT Act of 2000 amendment.

2. Electronic Evidence's Beginnings

The expression 'computer evidence' was first used by the FBI in 1984. In 1991, the term 'computer forensics' was created. India passed the Information Technology Act, 2000 in 2000 to handle matters pertaining to cyber law.

2.1. Meaning of Electronic/Digital Evidence

Electronic piece of evidence, which is defined as "*any evidence of evidentiary value that is either preserved or conveyed in electronic form*, *includes digital evidence*, *audio files*, *digital video*, *cell phones*, *and digital fax machines*."[226] This definition comes from the Act of 2000. Any probative information saved or sent in digital form, which a person may utilise in Court at trial. It is an information of probative value which is stored or transferred in binary form[227] is another definition of e–evidence or digital evidence.

The definition of 'evidence' has been broadened to include information stored in digital devices such as e–mails, digital pictures, ATM transaction logs, word processors, histories, text messengers, spreadsheets, web browsers, computer memory, computer printers, computer back–ups, digital video content or audio files, mobile data, virtual games/multimedia, *etc*.[228] There you have it, then:

a) All types of digital storage devices are included.
b) It contains all types of digital data that have been stored.
c) It merely limits itself to pertinent material or information.

2.2. Location of Electronic/Digital Evidence

The evidence is typically stored on hard drives or discs. Both volatile and non–volatile data are stored on the hard drive. While non–volatile data is saved or preserved in the system's hard drive, volatile data may be lost whenever we shut down or turn off the computer. These proofs can be discovered on the hard drive in a variety of formats, including files saved or created by the user, such as spreadsheets, images, videos, audio files, or document files, emails, or

[225]. Law Enforcement Cyber Centre, International Association Chief of Police, Cybercrime Investigation: Available at https://www.iacpcybercenter.org/officers/cyber-crimes-investigations/. last accessed on 5th November, 2022.

[226]. Basha K.N. [2009], ***Detection of Cyber Crimes and Investigation***, available at www.tnsja.tn.nic.in. last accessed on 5th November,2022.

[227]. Dubey V. [2017], ***Admissibility of Electronic Evidence: An Indian Viewpoint***, Vol. 4[2], Int. J. Forensic Res., at pp. 58–63.

[228]. Seth Karnika, ***Evidentiary Value of SMS, MMS and E–Mail***, available at http://www.karnikaseth.com/evidentiary-value-of-sms-mms-and-e-mail.html. last accessed on 9th November, 2022.

calendars, files protected by the user using encryption or passwords, and files produced by the computer. Log files, secret or backup files, and other data storage areas, such as meta data, digital evidence that has the disadvantage of being more voluminous, easily modifiable, difficult to erase, potentially more expensive, and more immediately accessible.

2.3. Indian Law defines Evidence

According to Section 3[a] of the Indian Evidence Act of 1872, e–records now qualify as 'evidence'. There are two sorts of evidence available: **oral** and **written**. The electronic record is now included in the updated definition of documentary evidence for the court's consideration. The term 'e–record' is defined as follows under Section 2[1][t] of the Information Technology Act of 2000:

"*Data*, *records*, *or data generated*; *images or sounds stored*; *received*; *or sent in electronic format*; *microfiche produced by computer*."

2.4. Digital Evidence's Primary or Secondary Nature

The Indian Evidence Act of 1872 states that we may prove the information in the papers either using primary or secondary evidence. In accordance with Section 62, 'primary evidence' is "*whenever the document itself is presented for the Court's review*". Furthermore, Section 63[2] defines 'secondary evidence' as "*copies compared with such copies*, *including authorized copies made from the original by mechanical processes that in and of themselves establish the accuracy of the copy*".

It is evident that data in the phone logs is housed in enormous servers that cannot be readily transferred and produced in the Court.[229] Therefore, a witness who can acknowledge the certifying officer's sign and or speak to the facts based with his own experience may present printouts produced using a mechanical device from computers and servers and certified by an authorized agent of the service provider company as evidence. Accordance with Section 65–B of the Information Technology Act requirements. Under the other sections of the Evidence Act 8, introducing secondary evidence is not prohibited.

According to 2[1][t] of the Information Technology Act, "*an* '*electronic record*' *is any data*, *record*, *or data generated*, *image or sound saved*, *received*, *or transferred in an electronic form*, *or a microfilm or microfiche produced by a computer*."

2.5. Tools used in Digital Forensics are Categorised

The tools used in digital forensics can be divided into several groups:

a) Internet analysis tools.

[229]. *State v. Navjot Sandhu* AIR 2005 SC3 820.

b) Database forensics tools.
c) Data and disc capture tools.
d) E–mail analysis software.
e) Mobile device analysis tools.
f) File analysis tools.
g) Registry analysis tools.
h) Mac OS analysis tools.
i) Network forensics tools.

A lengthy list of the most popular tools for cyber forensics is also available. These are listed below:

a) Forensics by X–Ways.
b) SIFT, the SANS Investigative Forensics Toolkit.
c) Clear Sight.
d) XRY: a tool for mobile forensics.
e) HELIX3, a live CD–based digital evidence programme, was created for incident response.

Framework for Digital Forensics:

a) Open Computer Forensics Architecture [OCFA].
b) Computer Aided Investigative Environment [CAINE].
c) Forensic Laboratory.
d) Volatility.
e) Computer SCOPE.
f) Toolkit for Coroners.
g) Forensic Suite for Oxygen.
h) Massive Extractor.
i) Xplico: Open–Source Network Forensic Analysis Tool.
j) UFED Cellebrite.
k) EnCase.
l) Database Recon.
m) Detective Kit.
n) Red–Line Mandiant.

#Hash Values, a Practical Tool for Analysing, Discovering, and Authenticating Digital Evidence:

In both criminal and civil trials, electronic evidence is becoming increasingly important. The current updated law sets new guidelines for the detection and protection of digitally stored data. The use of 'hash' values [or hash algorithms] as a vital instrument for research, discovery, and authentication of digital evidence is now something that is crucial to comprehend.

2.6. What #Hash Value Means

According to the Court handbook, the word 'hash value' refers to "*a unique identification number that can be assigned to a file*, *a set of files*, *or a segment of a document*, *according to a standard statistical method applied to the attributes of the data set*". The likelihood that any two pieces of data will have the same hash value, regardless of how similar they may appear to be, is about one in a billion thanks to the most widely used algorithms, such as MD5 and SHA. 'Hashing' is a technique used to verify the validity of an original data collection, much like the Bates stamp used in the manufacturing of paper documents. Various stages of the electronic evidence process involve the usage of #Hash values:

1) A hash value is employed in the computer forensic investigation procedure to make sure the analysed copy has not been altered. The original hard drive will be given a hash value. According to recognised methods, a picture of the original is created. To protect the integrity of the original during the forensic investigation, the image is used. Before any investigation, the imaged copy is given a hash value. The copy is handled the same as the original if the values are the same. The integrity of the copy is questioned if the values are different. A third value is frequently taken at the conclusion of the forensic examination. The original hard disc, the imaged hard drive taken before the inspection, and the imaged hard drive taken after the examination must all have matching hash values.
2) It is possible to authenticate evidence presented in court using #Hash values. When original electronic documents are created, hash values can be added to provide them unique properties that allow for their authentication.

The following modes of proof, admissibility of digital evidence, and legislative measures taken in this regard can be examined and analysed under the following heading:

2.6.1. Admission of Statements/Facts

The term 'admission' encompasses assertions made orally, in writing, digitally, or in documents that may draw conclusions about any pertinent or important fact. Even while Section 22–A of the Act once more precludes oral acknowledgment about the contents of electronic documents, the issue at hand is determining their legitimacy.

2.6.2. Statement included in the Electronic Record

A statement or record may only be presented as evidence under Section 39 of the Evidence Act of 1872 if the court finds that doing so is necessary to fully appreciate the circumstances surrounding its formation. When a statement is accompanied by evidence indicating it is a part of a bigger statement from a conversation, a different document, a book, a series of letters, or other materials, it is said to be supported.

2.6.3. Admissibility of Electronic/Digital Evidence

Evidence can be presented only about facts that are in issue or there pertinent, but no other facts, states Section 5 of the Evidence Act of 1872 limited mandate. The Court alone has the power to decide whether or not specific facts or objects are admissible, as stated in Section 136 of the Evidence Act of 1872. After the Information Technology Act of 2000 was passed, Section 65–A and 65–B of the Evidence Act of 1872 were added. An electronic copy's information may be demonstrated in line with Section 65–B, as allowed by Section 65–A.

In accordance with Section 65–B, regardless of anything contained on if the conditions outlined in Section 65–B[2] through [5] are met, an electronic record, be it contents of a document or documented copies in electro–optic or magnetic media produced by a computer, is deemed to be a document and is admissible in court without additional proof of the production of the original.

2.6.4. Electronic Records are Admissible under Section 65–B

The following criteria must be met for a computer output to meet the requirements of Sub–section [1]:

When the computer was frequently used to store or process data for any normal tasks being carried out at the time by user with the required authorisation to the computer, the information was created by the computer.

Information of the kind that is contained in the electronic record and that is produced from it was routinely coded and entered during the aforementioned time as part of the aforementioned operations; the majority of the above said time was spent with the computer in good working order; if not, any time it was not in good working condition or was not in use during that time had no bearing on the accuracy of the electronic record's contents; and the information in the digital records replicates or derives from certain sources. Data that was input into the computer during the execution of the aforesaid operations.

If computers were frequently used for a period of time to perform the task the act of preserving or data processing for any activity described in Sub–section [2] Clause [a], during that time, whether by several computers working together; by various computers running successively; by many computer configurations running successively.

For the purposes of the section, each computer utilised for that reason during the same time period shall be deemed to be a single computer, and references to computers in this section must be understood in that context. In any other way involving the operation of consecutively during that period, one or more computers or one or more computer combinations, whatever order.

In any process where a statement is to be offered as evidence pursuant to this section, a certificate accomplishing any of the following, that is,—naming the electronic document that includes the assertion and detailing the creation procedure; supplying details on any machinery used to create that electronic copy that may be required to prove that a computer created it; resolving any issues that the circumstances outlined in Sub–section [2].

Proof of any matter indicated in the certificate shall be in the form of a declaration claiming to be made by a person having authority over the administration of the tasks or the operation of a connected device, as applicable. To the best of the author's understanding and belief, any statement made in accordance with this subsection must be accurate and true.

Information will be deemed to have been provided to a computer if it is provided to the computer in any form suitable, whether indirectly or directly, with and without human interference by the use of any suitable instruments; the data, if duly provided to that computer, shall be considered to have been provided to it in the course of those activities, regardless of whether it is provided to a computer operated outside the course of the activity conducted out by any official with the specific intent of it being kept or processed for those purposes; whether a computer output was produced manually or automatically with the correct tools, it is still thought to have been made by a computer.

The role of the court is to infer one fact from another. It is not permissible to classify generally relevant or admissible facts as 'proven facts.' It is entirely a topic for the judge's consideration and investigation. In any trial, all the facts, things, incidents, and transactions cannot be supported by a true account of the events or the circumstances in which they occurred. In that case, the Court may presumptively rely on specified facts, things, or truncations of these under Section 114 of the Indian Evidence Act of 1872 or other pertinent sections of other statutes. A number of judicial presumptions relating digital evidence are introduced by the amendment to the Evidence Act. Which are:

- E–records purporting to be agreements: Section 84–A guarantees the presumption of a lawfully concluded contract if the parties digitally attached their signatures.

- Electronic Gazettes: Section 81–A deals with the presumption of authenticity for an electronic record or an official gazette published in accordance with a law, assuming the record is in electronic format and has been made with due care.
- The Court may presume that a secured e–record has not been amended after acquiring its secured status at a certain moment in time, in compliance with IT Act of 2000 Section 85–B. Unless it can be proven otherwise. To the extent permitted by Section 15 of the IT Act of 2000 and Section 85–C of the Indian Evidence Act of 1872, it is assumed that when a subscriber adds a secure digital signature to an electronic document, he intends to sign or authorise it.
- A digital signature certificate's contents are presumed to be true in accordance with Section 8 of the Evidence Act of 1872, with the exception of any information that was not verified at the time the certificate was approved.
- E–mails and other electronic messages: Section 88–A concerns the assumption of the message's authenticity rather than its sender. It is assumed that an email forwarded by a sender to an addressee via an email server conforms to the email entered into the sender's computer for transmission.
- Presumption regarding a five–year–old electronic record: Section 90–A deals with the presumption that a digital signature on a document that was produced from proper custody and claims to be five–year–old or has been shown to be so was added by the signatory or another authorised representative of the signatory.

The updated definition of 'banker's book', which now contains a disc, floppy disc, or other electro–magnetic device printer of data, is as follows:

'Bankers' books' refers to all books and records, including day–books, cash–books, account books, and other documents used in the bank's regular business, whether they have been kept in written form or are kept on microfilm, magnetic tape, or any other type of mechanical or electronic data gathering device, either on–site or off–site, including one with a backup or disaster recovery site for both. This definition is found in Section 2[3].

The Act's Section 2[8] permits the purchase of a certified copy of an electronic record. Section 2[8] defines 'certified copy' as when a bank's records:

"Include data outputs from discs, tapes, or other magnetic information storage devices, along with a print of the entry or a copy of the output alongside the certified statements required by Section 2–A.

Any printout of any entry in the books of a bank stored on microfilm, magnetic tape, or other electronic or mechanical data retrieval mechanism, obtained by a mechanical or other process

which, by itself, ensures the accuracy of the printout as a copy of such entry and which also contains the certificate necessitated by Section 2–A."

The Banker's Book Evidence Act of 1891 was further changed in Section 4 to permit the admissibility of e–evidences. It reads:

"A certified copy of any entry in a banker's book will be recognised in all court actions as prima facie evidence of the presence of such entry, subject to the restrictions of this Act. In every circumstance and to the same extent that the official entry itself is currently acceptable under law, it will likewise be accepted as proof of the things, transfers of money, and accounts therein documented, but not in any other way."

Modifications made to the Indian Penal Code of 1860:

After the passage of Schedule One of the Information Technology Act of 2000, numerous Sections and modifications were added to the Indian Penal Code, 1860. Intentionally preventing the production of documents or other records before the court and fabricating false records, including electronic records, were among the modifications that dealt with production of documents, summons, and fabrication of evidence, false entry, and false statement. The sections of the Indian Penal Code, 1860, are as follows:

- Section 172: Evading serving of a summons or other process by fleeing.
- Section 173: Intentionally blocking publication or serving of a summons or other process.
- Section 175: Intentional failure of a person legally required to deliver a document or electronic record to do so to a public servant.
- Section 192: Fake proof that has been created.
- Section 193: Punishment for providing false evidence or creating it.
- Section 204: Destruction with intent to prevent production as evidence of a paper or electronic record.
- Section 463: Falsification of evidence and documents.
- Section 465: The cost of forgery.

3. Judicial Implications of Digital Evidence through Judicial Pronouncements

In the case of *Jagjit Singh v. State of Haryana*,[230] the Haryana Legislative Assembly's Speaker dismissed a member for defecting. The extent to which this was the case was highlighted in the judgment's paragraph number 25, which underlines how The Supreme Court of India viewed

[230]. [2006] 11 SCC 1.

the digital form of evidence, which was presented as internet news transcripts sites including Aaj Tak, Zee News, Haryana News, *etc*.

3.1. Calls that have been Intercepted and their Admissibility

An appeal was filed against the conviction rendered following the 13th December, 2001 Indian Parliament Attack in the case of *State [NCT of Delhi] v. Navjot Sandhu*,[231] the Apex Court accepted the evidence of cell phone calls and location tracking information in this case.

3.2. Video Conferences' Value as Evidence

In *State of Maharashtra v. Dr. Prafulla B. Desai*,[232] key questions in this case were whether a witness could be examined through video conference. The Apex Court noted that a live e–testimony of a witness can be taken with the appropriate care and caution thanks to advancements in science and technology that allow for live dialogue with visibility with someone who uses that facility, whether they can or cannot be there in person.

In *Abhinav Srivastva v. California [Data Protection Law]*, *often known as the AADHAR* case: In order to provide some Aadhaar–enabled services, the UIDAI is tasked with acting as the AUA [Authentication User Agency]. They use ASA [Aadhaar Service Agency] to access data from the CIDR.

The Accused was aware of the security flaws in the Android app for booking doctor/hospital appointments, or 'e–hospital' for short. In order to provide e–KYC services to consumers, he created his own mobile app that can connect to an e-hospital app at the backend. Only those with access to the user's registered mobile number can view the demographic data generated by the e–KYC. This offence relates to unauthorised contact with the AUA and the provision of authentication and e–KYC API services in an unauthorised manner. The foregoing was deemed a violation of Section 29[2] of the Aadhaar Act, 2016 and the provisions of the Information Technology Act, 2000.

3.3. Findings and Seizure

In State of Punjab v. Amritsar Beverages Ltd.,[233] established the best approach for the cops in such a situation was to create hard disc copies or obtain a hard copy, with the signatures and official seal on it, and also provide a copy to the dealer or the concerned person.

3.4. On Storage Devices, Deleted Files

[231]. [2005] 11 SCC 600.
[232]. AIR 2003 SC 2053.
[233]. AIR 2006 SC 3911.

The Apex Court made a significant observation in the decision in the case of *Dharambir v. Central Bureau of Investigation*,[234] that even if the hard disc was erased to restore it to its initial state as a blank hard disc, it would still grab data indicating that any text or file in either format had previously been stored on the device but was later deleted. Software tools can be used to pinpoint the exact moment when these hard disc alterations took place. In that respect, even a hard drive that has never been used before would have some data on it and so be considered to be an electronic record.

3.5. SMS and its Provable Value

The High Court of Bombay, Maharashtra, found that the Messages sent from the accused to the victim in *Rohit Vedpaul Kaushal v. State of Maharashtra*,[235] are certainly covered by Section 67 of the IT Act and are, thus, admissible.

3.6. Value of IP Addresses as Evidence

The case at hand is *Sanjay Kumar Kedia v. Narcotics Control Bureau and Ors.*,[236] the court found that "*the Xponse Technologies Ltd and Xponse IT Services Pvt. Ltd. was running an online pharmacy and dealing with prescription medications like phentermine and butalbital, not just providing network services, will not be granted immunity under Section 79 in this case*".

3.7. Evidence–Building Potential of E–mail

The key issue on the court's agenda in *Nidhi Kakkar v. Munish Kakkar*,[237] was whether or not the email text that was presented to the Court was acceptable as evidence.

After comparing the provisions of the Evidence Act of 1872 and the Information Technology Act of 2000, it was determined that if a person produced text of information created using a computer or another digital device, it should be acceptable as evidence if sufficient evidence was presented in a manner governed by the Evidence Act. The printed copy that the wife produced and included the text of was deemed admissible in the case.

3.8. Intermediary's Responsibility for Pornographic or Restricted Contents

The Apex Court stated in the seminal case of *Avnish Bajaj v. State*,[238] that a website runs the risk of containing the information that such things were in fact obscenely offensive attributed to it in the absence of adequate content filters that can recognise the words in the inventory or

[234]. [2008] 148 DLT 288.
[235]. Criminal Application No. 1879 of 2007, decided on 11th September, 2007.
[236]. [2009] 17 SCC 631.
[237]. [2011]162 PLR 113.
[238]. [2005] 116 DLT 427.

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the sexually explicit content that were being offered for sale or exhibition. Strict guidelines must be put in place due to the advent of the internet and its potential for widespread usage in the instant transmission of pornographic content.

4. Conclusion

Crime has a negative impact on both the economy and society as a whole. Criminal activity has its roots in the evolution of humans. Cybercrimes are the most recent category to be recognised. In direct proportion to a nation's socio–economic progress and growth, cyber–crime multiplies and rises. The Internet's widespread use and the digitization of everyday economic functions have made human dependence on technology unavoidable. In reality, technical malfunction or unavailability causes processes that would have previously been inconsequential or routine to become agitated.

For instance, even grocery stores allow their customers to use technical services like card swipe machines, and the availability of these devices determines the shop's popularity and sales, whereas before cash was the main method of payment for items. It is virtually impossible to imagine a world without technology. Digitization is a prominent method for influencing the economy's overall growth. Every system has flaws of its own. Some of the frequent points of attack and concern for the cyber systems include taking advantage of such flaws and then social engineering the components for one's own gain, *i.e*., by exploiting computer and human limitations and getting around passwords and security measures in the form of authentications. Cyber–crime is on the rise, and the most vulnerable groups—such as women, children, and marginalized groups—are its primary victims. Due to lack of exposure and education, the weaker classes are more likely to fall victim to the criminal cycle. The criminals possess a special ability to use a human invention and creation that would otherwise be beneficial to society—computer technology and expanded infrastructure for improved information among classes—to manipulate the contents on networked computers for their illegal and ulterior purposes, damaging the equilibrium of society and creating an imbalance.

Two critical areas that have become incredibly important in the investigations of contemporary technology crimes are cyber forensics and e–discovery. E–discovery and cyber forensics are essential to any inquiry into a cyber–crime. India is progressing in terms of the admissibility and appreciation of digital evidence, as seen by these legal reforms and the courts' favourable attitude toward these issues. However, if it wants to keep up with advancements around the world, it still has a way to go.

RESTRUCTURING INTERNATIONAL INVESTMENT ARBITRATION IN SYNERGY WITH ENVIRONMENTAL LAW: TOWARDS GREEN INVESTMENT

- DR. SUMAN MAWAR[239]

Abstract

The relational dynamics between investment arbitration and environmental law has been a subject of discussions among legal fraternity incessantly. The absence of precedential value in IIAs and umbrella defence mechanisms creates a vulnerable situation for host states pertaining environmental concerns. Deliberations initiated with Methanex v. USA[240]and Myers v. Canada[241]. Researchers endeavour to analyse counter claims in arbitration decisions in Roussalisv. Romania[242], Burlington v. Ecuador[243]and Perencov. Ecuador[244]. The fear of regulatory chill wherein the developing countries restrain from using regulatory measures for its citizens due to the fear of incurring heavy compensation liabilities against large powerful MNCs also creates a situation of risk for efficient balancing of seemingly bipolar environmental and investment concerns.[245] The wide gap now in existence, in balancing investment agreements with environmental concerns requires IIAs to be restructured in ways that environmental jurisprudence can be incorporated in public policy concerns when dealing with expropriation and Fair and Equitable Treatment (FET) clauses along with other instruments in such agreements.

Keywords: Arbitration, Environment, Green Investment, International Investment.

I. Introduction

The interplay between Investment Arbitration and environment had been a subject matter of widespread debates and discussions over many years. In order to promote the ambit of free trade, the developing countries are always found at the receiving end, forced to compromise

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[240]*Methanex Corporation* v *United States*, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345.

[241]*SD Myers Incorporated* v *Canada*, Order, 2004 FC 38, (2004) 244 FTR 161, IIC 252 (2004).

[242]*Spyridon Roussalis*v. *Romania*, ICSID Case No. ARB/06/1, Award,7 December 2011.

[243]*Burlington Resources Inc.* v. *Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims (7 February, 2017).

[244]*Perenco Ecuador Ltd.* v. *The Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August, 2015).

[245]EngoboEmesh, AkuaAboah, HamidehBarmakhshad, "Towards a Coherent Framework for Achieving Environmental Sustainability in Investment Decisions: Reflections on Rio +20 and Judicial Conference" 221 (2012-2013).

the principles of sustainable development giving due emphasis to environment protection along with economic development. The debate centred around this area is often focussed on the aspect as to whether a country can improve its environmental standards through Investor State Dispute Settlement mechanisms specifically designed to cater to this aspect.[246]

The Charter of Economic Rights and Duties of States pertinently lays down that the state has "full permanent sovereignty, including possession, use and disposal, over all its wealth and natural resources".[247]Environment law and Investment law can be categorised as two branches which have conflicting perspectives regarding the sovereign state's claim over natural resources. The international environment law perspective focusses on the equitable sharing of resources, the investment arbitration perspective focuses on the relinquishment of certain sovereign rights through Bilateral Investment Treaties (BITs) and investment agreements attracting FDI. It is a recent trend as seen in the Columbia's Model BIT, 2017 which specifically incorporates a reaffirmation to uphold investment and policy measures in accordance with the Environmental standards.[248] This could be more of an initiation stage for the future global environmental standards included in treaties.

From recent instances it could be said that non-commercial issues have also become an essential part of investment arbitration in implementation as well as development stages. The point which the researchers would like to put for through the paper is that if investment tribunals permits the states to bring counterclaims against investors regarding environmental aspects, it would encourage the investors to follow environment standards and norms.[249]

II. Analysing the legal perspective

Tracing the History

The disputes have mainly happened when the environment policies of the government has negatively impacted the economic aspects of the investor. In these cases, there exists a situation

[246]Rudolf Dolzerand& Christoph Schreuer, Principles of International Investment Law-Nature, Evolution, and Context of InternationalInvestment Law (Oxford Publications, London, 2008).

[247] Charter of the Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50, *available at:* https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf (last visited on March 1, 2019).

[248] Columbia Model BIT 2017, *available at*: https://www.mincit.gov.co/temas-interes/documentos/model-bit2017.aspx (last visited on Aug. 22, 2019).

[249]Kate Parlett and Sara Edward, "Protection of the Environment in Investment Arbitration – A Double-Edged Sword, *Kluwer Arbitration Blog,* 2017, *available at:* http://arbitrationblog.kluwerarbitration.com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/. (last visited on Aug. 22, 2019).

of direct conflict between the government policies and investor requirements in regard to assets.

The bilateral investment treaties and provisions of regional trade agreements provide the basis of legal claims between state and investors by laying down the state's prerogative to arbitrate.[250] So, in most cases, the analysis of the text of investment agreements is the best alternative to decide between foreign investment and environment concerns regarding natural resources. A close observation of the international investment treaties would reveal the fact that most of the BITs does not contain environment concerns. However, such references could often be found in Free trade agreements.[251] Environment concerns in BITs became more prevalent after 1980s.[252] It shall however be noted that the implications of the same rely precisely on the countries and the custom and context of the incorporated provision.[253]

Such provisions reflects three main themes starting with the recognition of environment protection as a treaty objective, progressing through the rights of states in regulating environment matters and ensuring the duty of each state to enforce and promote environment protection measures.[254] Another common area where we can find the references of environment protection is in the preamble of various treaties. An apt example of this could be found in the preamble of the 2012 US Model Bilateral Investment Treaty which laid down the objective of the treaty as:

""Desiring to achieve these objectives in a manner consistent with theprotection of health, safety, and the environment."[255]

The preamble of the treaties becomes relevant in the backdrop of Article 31 (1) (2) of the Vienna Convention on the Law of Treaties which states that it provides background on the objective and purposes of the treaty.[256] Apart from the aforementioned two categories of

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[250] *Daimler Fin. Servs. AG* v. *Argentine Republic*, ICSID Case No.ARB/05/1, Award, 168 (Aug. 22, 2012).

[251] Christina L Beharry and Melinda E Kuritzky, "Going Green: Managing the Environment Through International Investment Arbitration" 30 *American University International Law Review* 384 (2015).

[252] *Ibid.*

[253] *Ibid.*

[254] Katheryn Gordon, Joachim Pohl, Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact finding Survey", OECD Working Papers on International Investment 2014/01, *available at: https://www.oecd-ilibrary.org/docserver/5jz0xvgx1zlt-en.pdf?expires=1583731287&id=id&accname=guest&checksum=F8D3DD92BB4A80562076E9A929783574*(last visited on September 1, 2019).

[255] 2012 U.S. Model Bilateral Investment Treaty, Treaty Between The Government Of The United States Of America And The Government of [Country] Concerning The Encouragement And Reciprocal Protection Of Investment, *available at:* https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

[256] Vienna Convention on the Law of Treaties 1969, art. 31(2), *available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf*(last visited on September 1, 2019);

Anthony Aust, *Modern Treaty Law and Practice* 336 (Cambridge University Press, United Kingdom, 2000) Richard Gardiner, Treaty Interpretation 186 (Oxford University Press, London, 2nd edition, 2008)

provisions incorporated, the third scenario deals with the right of the contracting parties to deal with environment concerns. The scope of these provisions differ widely and range from exceptions, exclusions and also carve outs. For instance, the article 20 of the GATT (General Agreements on Tariffs and Trade) except measures for concerns regarding "human, animal, or plant life or health" "concerns exhaustible natural resources"[257] or "protection of national treasures of artistic, historical or archaeological value".[258]

Jurisprudential analysis

The reasonableness of measures for environment protection had always been analysed by the tribunals by focusing on various key issues. In the case of *S.D Myers Inc* v. *Canada,*the export of the compound polychlorinated biphenyl was designed to benefit the hazardous waste disposal industry.[259] The measure was however held to violate Canada's obligations under North American Free Trade Agreement under the aspect of nationality-based discrimination.[260]

In the case of *Tecnicas Medio ambientales Tec med S.A.* v. *United Mexican States*[261], the court examined whether the Mexican government's decision to not renew the permit to operate a landfill to the company due to environment concerns is a reasonable decision or not. However, the tribunal in this case refused to accept the claims of the government and said that the refusal to grant permit is disproportionate considering the economic loss incurred upon the investor. From this, the approaches of the tribunal on a case to case basis varies from each other.

In the case of *Glamis Gold, Ltd.* v. *United States*[262],the challenge was regarding Canada's mandatory landfilling which the tribunal did not consider. An entirely different approach was taken in the case of *Chemtura Corp.* v. *Canada*[263]where the court declined to consider if the chemical involved in production poses a threat to human health and environment. the decisions of the courts in this regard has never been uniform and this poses a threat to environment and sustainable development goals. In another case of *Urbaser*v. *Argentina*[264], the tribunal held that the investor is bound by the international human rights obligations concerning water.

[257]Bilateral Investment Treaty Between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore, art. 18(e),*available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1755/download (last visited on September 1, 2019).

[258] Agreement Between Japan and the Republic of Peru for the Liberalization, Promotion, and Protection of Investment art. 19(1)(f),*available at:*https://www.mofa.go.jp/region/latin/peru/agree0811.pdf (last visited on October 10, 2019).

[259]*Supra* note3.

[260]*Ibid.*

[261]*TecnicasMedioambientalesTecmed S.A.* v. *United Mexican States* ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 19 ICSID Rev.FILJ 158 (2004).

[262]*Glamis Gold, Ltd.* v. *United States*, UNCITRAL June 8, 2009.

[263]*Chemtura Corporation* v *Canada*, Award, IIC 451 (2010).

[264]*Urbaser*v *The Argentine Republic*, ICSID Case No. ARB/07/26.

It is quite clear that the environment concerns were raised in the tribunals by the claimants and respondents alike in many cases. But there is a limited number of cases wherein the claims are analysed comprehensively by the court. This is because the tribunals often finds themselves placed in a dilemma wherein they have to decide the claims as well entertain counter claims overcoming the jurisdictional challenges that are existing in the current scenario.

III. Counterclaims in Investment Arbitrations

Counter claims are often seen as a mechanism used to regulate the relationship between investor's rights and the regulatory as well as sovereign power of the states. The tribunals have always found difficulty in entertaining counter-claims because of the fact that these treaties are inherently asymmetrical in nature.[265] In the case of *Roussalis*v. *Romania*[266], the court did not entertain the counterclaim of the respondent as there was no consent from the part of the investor. The rationale of the court was that counterclaims fall outside the purview of the tribunals jurisdiction and what could be made applicable is the language specifically laid down in the bilateral investment treaty.[267]

Other than the jurisdictional claims another problem regarding the application of counterclaims was that it should have a close and factual connection with the primary claims that were raised in the case. In the case of *Burlington v. Ecuador*[268] and *Perenco v. Ecuador*[269], counterclaims were raised by Ecuador regarding the breach of environmental law by investors polluting soil and groundwater. The tribunals however held that Ecuador was curtailing the investor to benefit from the investment. But it did recognise the fact that Burlington and Ecuador had a role to play in the deterioration of the Ecuadorian amazon. The tribunal also made the following observations:

Proper environmental stewardship has assumed great importance in today's world. The Tribunal agrees that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental damage caused by the investor's activities and such a claim is substantiated, the State is entitled to full reparation in accordance with the requirements of the applicable law. The Tribunal further recognises that a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities

[265] *Hesham T. M. Al Warraq*v. *Republic of Indonesia,* UNCITRAL, Final Award,15 December 2014.
[266] *Supra* note4.
[267] *Supra* note4.
[268] *Supra* note 5.
[269] *Supra* note6.

If counter claims should be used to further the goals of sustainable and eco-friendly development in the nearer future, then steps should be incorporated to lay down explicit provisions in the BITs and agreements so that the tribunals can per se take such claims. In the absence of such provisions, the courts would have to ponder on the jurisdictional claims too. This could ensure that the investors would invariably be held responsible for the environmental damage it causes to the host state. Such a development would help the developing states also to further economic development without compromising on their environmental aspects.[270]

For instance, Article 47 of the ICSID Convention specifies counterclaims. The other arbitration rules such as ICC Rules, LCIA Rules, and the UNCITRAL Rules of 2010 also gives the option of seeking counter claims to respondents.[271]

IV. Challenges before the Tribunals

The bipolarisation of International Investment Agreements under Bilateral Investment Treaties has created a major setback to the goal of international community advocating integration of sustainability with development. The rift is ever-widening given the plethora of cases where the host states and investors remain ignorant of the risk potential posed by raising environmental concerns in an investment dispute.

The first major issue is the inconsistency of tribunals in adjudicating the 'legitimacy' of claims related to environmental concerns in the absence of any acceptable precedents standard in international investment arbitrations. Also, this points out to the fact that the gravity of environment concerns advocated by the host state to the tribunal may be easily dwarfed in-front of an economic claim by an investor in an investment dispute as happened in *Santa Elena* v. *Costa Rica*[272]. The land development investment project was in this case, expropriated by the Costa Rican government under the premises of international obligation to save the wildlife and habitat of the region for environmental concerns. The dispute arose as to the amount of compensation paid in relation to the expropriation.

It was consequently held by the tribunal, with utter disregard to environmental concerns that the compensation payable would be the same irrespective of the international environmental

[270]Jesse Coleman and Kanika Gupta, *India's Revised Model BIT: Two Steps Forward, One Step Back?,* Investment Claims (10 September, 2017), *available at:* http://ccsi.columbia.edu/files/2017/10/Investment-Claims_-India%E2%80%99s-Revised-Model-BIT_-Two-Steps-Forward-One-Step-Back_.pdf. (last visited on June 1, 2019).

[271]Rule 40(1) of the ICSID Arbitration Rules; Article 5 of the ICC Rules; Article 4 of the UNCITRAL Rules 2010; Article 2 of the LCIA Rules; Articles 4.1(b) and 25.2 of the SIAC Investment Arbitration Rules 2017.

[272]*Compañía del Desarrollo de Santa Elena SA* v *Costa Rica*, Final Award, ICSID Case No ARB/96/1, IIC 73 (2000).

obligation being cause for expropriation. The analysis of the above case in conjugation with *Peter A. Allard* v. *Government of Barbados*[273] will perhaps complete the picture. Allard in this case was the investor who acquired estate property in Barbados under Canada-Barbados BIT for the purposes of eco-tourism as a sanctuary. With the later failure of South-Coast Development Plant and Government's lax attitude in closing the sluice gate resulted in drastic environmental degradation of the nearby areas to the sanctuary, Allard initiated arbitration proceedings under Canada-Barbados BIT under breach of FET (Fair and Equitable Treatment) , FPS (Full Protection and Security) clauses and expropriation. The tribunal however, refused to draw any nexus to the closing of sanctuary and the government failure to protect and regulate the environment, further refusing to recognise any cross-jurisdictional issues.

Mataclad v. *Mexico*[274] was another dispute where Mataclad initiated investment proceedings against Mexico under minimum standards of treatment and expropriation, winning the case ultimately against state regulatory action for environmental concerns. The irony of legitimate expectation in an investment treaty against the regulatory action by host state as raised by investor for claiming awards could be conversely applied against the investor too. Shouldn't environmental concerns of host state not be a similar legitimate claim against the investors who engage in environmentally hazardous investments?

In the same dimension is how state action loses grounds of legitimacy when even after recognising crucial environmental concerns in line with international obligations to save environment, the tribunals cannot help but consider such cases to be simply mundane issues of fact and law to be decided for between the parties. This was the case of Marion Unglaube v. Costa Rica[275].

Almost always clauses of Expropriation, FET, MFN, FPS are used by investors to initiate arbitral proceedings against host states with regard to BIT violations. However, to see a change in this trend, if we look at the case of *Methanex* v. *U.S.A*[276]., we find how tribunals actually considered the concern of host state to phase out MTBE a legitimate ground for state action and denied to ensue expropriation charges against host state regulatory action.

Similar is the case of *Mesa Power Group LLC* v. *Canada*[277] wherein the state actually won the case wherein a FIT (Feed in Tariff) Programme was challenged by Mesa to be discriminatory

[273] *Peter A. Allard* v. *The Government of Barbados*(PCA Case No. 2012-06).
[274] *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No. ARB(AF)/97/1.
[275] *Marion Unglaube* v. *Republic of Costa Rica* ICSID Case No. ARB/08/1.
[276] *Supra* note2.
[277] *Mesa Power Group* v *Canada*, Award, PCA Case No 2012-17, IIC 776 (2016.

as the programme required certain specific domestic component parts as its regulatory provisions for Ontario Electric System, a renewable energy initiative.

Putting this in perspective to another case of *Windstream Energy LLC* v. *Canada*[278], we find another situation where state practically halted an investment project on the precincts of scientific studies of the effects of energy project on the surrounding ecosystem. Arbitration proceedings were initiated on the pretext that the project was no longer left economically viable due to state regulatory action which amounted to expropriation. The state actually lost the arbitration but not on the grounds of expropriation but due to the breach of fair and equitable treatment clause of NAFTA due to lack of follow up and delays in scientific assessment.

In *Chemtura* v. *Canada*[279] dispute, the phase out of a product already banned by several countries, Lindane was initiated by Canada, later challenged by Chemtura on every possible ground of expropriation, MFN, FET, FPS and minimum standard of treatment. However, recognising the ban on Lindane and the phase out initiated by Canada on the same lines, the tribunal did not hold the state guilty and held that no substantial deprivation of property had taken place to lead to expropriation.

Undeniable is the fact that when tribunals lead on to determine the standards of conduct in compliance with international legal standards, it becomes an imperative question as to whether is it the host state to determine the question of appropriateness of sovereign regulatory measures or is it up to the tribunal to determine which alternative form of regulatory compliance norm would be more effective means of public policy in synergy with international legal standards, while determining an arbitral award. The fear of regulatory chill is evident in such cases where the risk of complying with environmental concerns and international environmental obligation may as well be in detriment to national interest, considering the possibility of claims by investors in an arbitral proceeding. The situation can be well conceived in reality through *S.D Myers* v. *Canada*[280] dispute.

Investment arbitration and sustainable development machinery are still two seemingly parallel lines that hardly seem to intersect. The goals of sustainable development seem farfetched given the fact that the financial resources to achieve effective sustainability are mostly channelled through investment projects. The risk of BITs falling within the trap of various investor claims is further because of the broad provisions circumscribing investment projects which are later often used by investors to initiate arbitration. The clauses may even extend beyond the

[278] *Windstream Energy LLC* v *Canada*, Award, PCA Case No 2013-22, IIC 896 (2016).
[279] *Supra note* 25.
[280] *Supra* note3.

domestic law boundaries and sometimes even break through sovereignty in situations of weak regulatory mechanism and poor enforcement in environment related matters. Many countries such as India have formed a revised BIT model (like Model BIT 2015) which have for the first time introduced sustainability and tried to provide a broader regulatory ground of action to the government in order to address environmental concerns. It is here that we recognise the need to have a broad line of consensus to revisit and restructure investment arbitration in synergy with addressing environmental concerns.

A predictable framework mechanism to deal with environment concerns in relation with International Investment Agreements is thus the need of the hour[281].

V. Extending scope of investment agreements to a multi-stakeholder approach

Before we understand International Investment Arbitration solely from the perspective of Investor-State perspective, it is important to appreciate the growing state-state perspective to Investment Arbitration as has been a recent global trend, increasingly substituting ISDS with SSDS.[282] The players are not restricted in an investment arbitration agreement and thus, in fact constantly changing. Thus, it is implicit to discuss that there may be a situation where the social cost of an investment becomes more important that an interest based or profit based or risk based assessment. At this juncture, we must understand what incorporates this social cost. Let us take for instance the environmental impact assessment policy we currently have for any developmental project. It certainly recognises the need for a 'public hearing' as an important and indispensable component of project assessment. Thus, the important dimension will of course include the component of public hearing and the component of government regulations specifically designed to incorporate and implement on ground environmental protection regulations. This regulation will include a variety of other aspects such as the respect for human rights and labour laws, something which the Netherlands Model BIT specifically incorporates. [283] This might be one way the upcoming BITs may consider while they try to synchronise the investments and environment.

[281]EngoboEmesh, AkuaAboah, HamidehBarmakhshad, "Towards a Coherent Framework for Achieving Environmental Sustainability in Investment Decisions: Reflections on Rio +20 and Judicial Conference" 215 (2012-2013).

[282] Nathalie Bernasconi-Osterwalder, "State–State Dispute Settlement in Investment Treaties", *International Institute for Sustainable Development* 1 (October 2014).

[283]The 2019 Dutch Model BIT: Its remarkable traits and impact on FDI, available at: http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/ (last visited on August. 3, 2019).

The component of Corporate Responsibility and Civil Society Role may also be indispensable with the new regulations in place, which although are currently soft laws but do have the capacity to be major pillars of ensuring human rights and environmental considerations in businesses and corporate practices, one of them being the Working Group on Business and Human Rights[284]. It will be interesting to see how these recent changes work in conjunction when the pressure groups play a responsible role as well to ensure accountability.

The complications start when these new found multi-stakeholder approach needs to be incorporated in an International Investment Agreement. What will be the desirable clauses as incorporations and what must a nation omit to ensure that the ISDS mechanism works well while balancing the environmental concerns. The point is when the nations incorporate a set of principles in the preamble of their Model Agreement, they must necessarily support it with necessary changes in the terms and conditions that determine expropriations and the standards that determine the Full Protections and Security of investments along with the comparative standards of Fair and Equitable Treatment clause. The risk profile of intended investment will have to be balanced with the profitability and this risk and return equation of assets involved in an investment agreement will have to incorporate the much neglected and scarcely considered' social and environmental cost' of a project. This new found cost will only find substance once we hold the multi-stakeholder approach to evaluate the market value of an investment asset and its adjoining property, which may perhaps be a natural reservoir of resources.

Varying interests and concerns of this approach will require a multi-dimensional understanding of the scope and ambit of Investments and the Agreements which facilitate the, thus, with the changing global practices and continuously omitted investment clauses such as the MFN, FET, FPS and indirect expropriations along with the umbrella clauses, the road to a multi-stakeholder approach becomes more and more challenging to address concerns least considered as concerns such as the environment.

VI. Restructuring International Investment Arbitration

It perhaps is difficult to ascertain the paradoxical situation as to how sustainability has been confused with economic growth when it comes to the Rio +20 Declaration using 'sustained

[284]Working Group on the issue of human rights and transnational corporations and other business enterprises, *available at*: https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx (last visited on August.3, 2019).

economic growth' interchangeably with sustainable development[285]. Also, not to forget the very narrow scope to bring in the 'alien' concept of investment in the domain of environmental concerns in just a single principle 271, shows how Rio +20 has been a disappointing failure in this regard[286]. To understand what could possibly be a way forward, let us look backward to the failed attempt to create a Multilateral Investment Agreement (MIA) to address the environmental concerns of investment laws. Based on a three point pillar mechanism, MIA made an attempt to move in line with both Agenda 21 (using natural resource base for socio-economic development for sustainable development in conjugation with environmental concerns) and Rio +20 declaration[287]. In this respect both the polluter pays principle and the precautionary principles were used in derivative form to integrate investment with environment in BITs doing away with the vague provisions of sustainable development in NAFTA[288].

Looking at the possibility of creating an IIA similar to MIA advocating a situation of no compromise with the obvious and crucial environmental concerns could be confronted with the same questions as did the NAFTA Article 1114(2)[289] which advocated that host states, when it comes to investment concerns, must not lower their bars to attract investments in contravention to their public policy objectives. The questions were raised as to the truly 'green nature' of such 'not lowering of standards' in absence of any reasonable grounds and specific mention of such recognised standards of state action in this regard. The important questions are: Whether not lowering of standards is a viable alternative for developing countries already burdened with financial constraints and whether even if they do exercise their sovereign regulatory functions in this regard, will they be strong enough to advocate the said grounds in investment agreements through ineffective compliance standards. Perhaps 'not lowering standards' in conjunction with commercial viability of a project holds better ground to address this concern. Non-binding agreements that provide for normative guidelines give neither the means nor any form of effective standards to deal with legitimate environmental concerns. Agreed there are

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[285] *Ibid*.
[286] *Ibid*.
[287] John Wickham, "Towards a green multilateral investment framework: NAFTA and the search for models" 12 *Georgetown International Environmental Law Review*, 617-646 (2000).
[288] *Ibid*
[289] NAFTA: Foreign Trade Information System, *available at*: http://www.sice.oas.org/trade/nafta/chap-111.asp (last visited on July 1, 2019).

> Article 1114(2) Environmental Measures- "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement".

reasons to consider that strict regulatory mechanism towards environmental concerns may sometimes indeed be counter-productive to both investor's viability in pursuing the project and host state's benefits derived therefrom. Also, the fact that revising all older BITs to make them 'green' would also be completely undesirable exercise; we need to understand that a case by case standard of visiting environmental concerns in every investment decision will definitely not be in furtherance with our objective towards 'green investments'.

One way of finding a way forward is to use article 31 of Vienna Convention of the Law of Treaties enlisting general rule of interpretation as an instrument, particularly including within "good faith' in International Investments Agreements (IIAs). Moving a direction forward in synergising, there must be an attempt to incorporate investment agreements that include environmental concerns in their operative part. The expropriation clause is notoriously used in major investment disputes to initiate proceedings and the tribunal's decisions in numerous cases in this regard has clearly shown that investment arbitration is directed towards protecting the interests of investors, irrespective of the kind of investment made and the reason attached to the specific expropriation. In the recent BITs undertaken, environment has become a part of important exception to treaty clauses[290], sometimes even surfacing as important sub-components of the treaty in an attempt to synergise investment to environmental aspects[291]. With a lack of precedents standards in investment arbitration and a more case by case basis approach, the BIT components should be such that domestic laws find a place while negotiating an investment agreement, giving more level playing field for host states, thus addressing policy challenges. These exceptions may as well protect the host state from claims such as the standards of treatment under Fair and Equitable Treatment clauses by providing a regulatory space for the host state such that the standards of comparison fall in line with the expected framework for addressing public policy concerns in relation to a specific investment without creating a rift of implementation by using a similar framework in another BIT to form a ground for claim. The issues of sovereignty of the host state while also addressing trans-boundary harm to environmental concerns should be an important incorporation of any further BIT as this will directly address the domestic laws in compliance to which further IIAs will be initiated. The issues of transparency must also be addressed concerning the fact that any investment project development should comply with specific environmental standards in relation to the investment

[290] Viz. Switzerland-Mexico BIT and Belgium-Luxembourg Economic Union - Mozambique BIT; Chazournes, Laurence, Environmental Protection and Investment Arbitration: Yin and Yang? *AnuarioColombiano de DerechoInternacional*. 10 (2017) 381.

[291] As has been in case of FITs wherein foreign investment has been incorporated in green energy projects to create a possible synergy like in case of *Windstream Energy LLC* v *Canada.*

and an Environmental Impact Assessment (EIA) Report submission prior to the initiation of investment projects will ensure this compliance.

At this juncture it is important to also look back at the way arbitration tribunals have been handling environmental concerns of host states when it comes to claims raised by the investors against such public policy initiations. As noted above, 'expropriation' clauses are generally used as a means to bring in these claims with regard to assets which were forcefully 'nationalised' creating a need for 'adequate compensation'. The fault lies in the way ISDS has become a tool against the environmental regulations rather than acting as a shield for it. The conundrum however, is the fact that how do we balance the ISDS mechanism in such a way that the host state may be able to protect its legitimate environmental concerns and the investors also do not loose grounds for holding their investments in the pretext of false and subversive public policy claims. This is an important and difficult impasse and a generalised mechanism may not be the solution. However, what we realise at this juncture is that it is perhaps the time that International Arbitration Courts and Tribunals realise that investments need to comply with certain standards which would have no negative implications over environment, no longer considering the environmental issues as 'less weighty' that other considerations such as Free and Equitable Treatment and Most Favoured Nations. In other words, the researchers believe that expanding the ambit and weight of 'sovereign responsibility' will go a long way in protecting our investments.

Information dissemination is of absolute necessity while undertaking investments and a global standard of viable information dissemination in this regard will be of great value in exploring the realm of investment. How we achieve this necessary pre-condition to facilitate future green investments will to a great extent depend on the way we deal with the present opaque form 'information secrecy' when it comes to declaring the kind of investment agreements a nation has undertaken and any further implications it may uphold for the nation, in specific regard, the terms and policy considerations that go into an arbitration agreement. Even with a lot of deliberations in this regard, the secrecy of investment arbitrations have often been a matter of debate and a problem that doesn't seem to end even with the ICSID, 2006 procedural reforms which, could not create much of a difference in the global investment realm in regard to achieving greater transparency.[292]What considerations go into making an amicable settlement are determining factors when we look back at the 'history of Environmental clauses in

[292] Sergio Puig, The Social Cost of Secrecy in International Investment Arbitration, Kluwer Arbitration Blog, *available at*: http://arbitrationblog.kluwerarbitration.com/2015/11/18/the-social-cost-of-secrecy-in-international-investment-arbitration/ (last visited on July 11, 2019).

investment agreements' that we have discussed above. These considerations and secret settlements can have fundamental impact when it comes to important and determining investments vis-à-vis environmental concerns. The implications on public policy, are thus, immense in such a situation. Thus, the initial impasse is to reach a certain level of transparency in ISDS mechanisms with specific procedural considerations in the ISDS mechanism itself.

VII. Conclusion

Lack of explicit provisions in the agreements has led to non-uniformity in international investment agreements. The tribunals often find it difficult to strike a balance between legitimate environment concerns and economic viability of investments thus creating a situation of obvious rift between the bipolar regimes of investments and environment concerns. The jurisprudence of counter claims in investment arbitration is also in a grey area right now because of the conflicting positions taken by courts in different cases. The problem is there is always a case by case analysis of environment concerns in absence of any accepted standards in the form of regulatory operative clauses in IIAs. As we have learned that the endeavour to create multilateral investment agreement utilising the existing NAFTA principles and OECD guidelines has led to an impractical model culminating into a failure. The idea of systematic integration of investment and environment is therefore not a viable one as almost always environmental protection fails to be integrated substantially.

While it seems unlikely that a model multilateral investment framework could be manufactured as an instrument to synergise investment and environment concerns, there are certainly aspects wherein integration is possible like including exceptional clauses and incorporating environmental concerns in the operative sections of agreements. Both transparency and non-compromising standards could be some pillars that would prevent legitimate environment concerns to be addressed as 'mundane issues of fact and law' by tribunals.

Investment projects in the renewable energy realm have shown the possibility of creating viable green investments by incorporating FIT (Feed in Tariffs) in investment agreements, empowering investors to commercially exploit such investments ; also giving the host states premises to exercise regulatory provisions addressing public policy concerns in this aspect. It has been observed that sometimes, even when a dispute under ISDS machinery rests in favour of the host state, the litigation costs are so immense that the benefits derived from winning the claim for regulatory purposes is far surpassed by the costs incurred. Thus, the set up balancing

structure in conflict clauses can play an instrumental role in this aspect, edging out the gaps in investment-environment conflict. Possibly, this can also address the aspect of regulatory chill. It is crucial to develop a baseline of international standards of environmental protection within the regulatory domain in consideration to the problems faced by developing countries since we have learned that they are more susceptible to regulatory chill, given the need to compromise with international standards. Unless a system of reference incorporating risk factors associated to most vulnerable domains in developing countries is not developed, the risk of environmental degradation with every new BIT based investment project will never be completely addressed as these are the standards which will ultimately measure the authenticity of any claim or counter-claim by the host states. Article 1131 of NAFTA[293] in this aspect shows how interpretation made by tribunals with reference to dispute resolution may restricted on such international standards which correspond to this baseline approach.

Sometimes the answer to legitimate expectation must not only come from the point of view of investors who engage in environmentally detrimental projects but also from the host states which have the right to expect foreign investment projects that work in synergy with public policy domain's sensitive realms viz. environment and sustainability.

[293] Deals with governing law under clause (1) and (2) having a binding effect on tribunals, *supra* note 16.