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Email:
editor@jurisperitus.co.in
Website:
www.jurisperitus.co.in

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EDITORIAL TEAM

ABOUT US

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

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

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

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

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

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ADVANCES IN LGBT RIGHTS IN THE LAST DECADE

-SIDDHARTH KUMAR

Not for nothing did the great German thinker, Johann Wolfgang von Goethe, had said "I am what I am, so take me as I am" and similarly Arthur Schopenhauer had pronounced, "No one escapes from their individuality". In this regard, it is profitable to quote a few lines from Fredrich Nietzsche: -

"The individual has always had to struggle to keep from being overwhelmed by the tribe. If you try it, you will be lonely often, and sometimes frightened. But no price is too high to pay for the privilege of owning yourself."

This is the price of owing yourself as being homosexual in India is considered a taboo, immoral and a disgrace to one's family, community and culture. Social stigma still looms large over the LGBT community in India, but in recent years significant social and legal progress has been made, to demarginalize and integrate the LGBT community to the mainstream Indian society.

INTRODUCTION

Homosexuality means sexual interest in and attraction to members of one's own sex. The term gay is frequently used as a synonym for homosexual; female homosexuality is often referred to as lesbianism.[1] People who fall under such category are referred as belonging to the LGBT+ community. It stands for Lesbian, Gay, Bisexual, Trans etc. the plus means other sexual orientations on the spectrum of sexuality. Human sexuality is complex.[2] The acceptance of the distinction between desire, behavior and identity acknowledges the multidimensional nature of

[1] The Editors of Encyclopædia Britannica, *Homosexuality*, Encyclopædia Britannica (Oct. 13, 2020, 7:25 PM), https://www.britannica.com/topic/homosexuality.

[2] Drescher J, Byne WM. Homosexuality, Gay and Lesbian Identities and Homosexual Behaviour. In: Sadock BJ, Sadock VA, Ruiz P, editors. Kaplan and Sadock's Comprehensive Textbook of Psychiatry. 9th ed. Philadelphia: Lippincott Williams & Wilkins; 2009. pp. 2060–89.

sexuality.[3] Gay usually refers to romantic relationship between two men, lesbian between two women, bisexual meaning being attracted to both men and women. Just identifying yourself as gay or lesbian has severe consequences, A recent study found that one of the major factors that results in the stigmatization of LGBT people is parental reaction towards homosexuality.[4] Prince Manvendra Singh Gohil, whose coming out story is well-documented in the media and runs the Lakshya Trust that works for HIV/Aids prevention in the LGBT community said "I know of someone who got a sudden rush of inspiration from a TV program and decided to come out to his family. It didn't work. He lost his home, his job, everything. I always tell people to be fully aware of their own reality. Be financially prepared. Detach a bit from your family both emotionally and financially before you plan to take this step."

LEGAL RECOGNITION

Supreme Court legalized the homosexual relations in its landmark judgement by striking down Section 377 of the Indian Penal Code.[5] It marked a major step forward for LGBT rights and opened the door for further progress for the civil rights movement. On 6 September 2018, the court delivered its unanimous verdict, declaring portions of the law relating to consensual sexual acts between adults unconstitutional.

Further legal and social changes are needed for LGBT individuals to gain full acceptance and equality within Indian society. However, the judgement transcended the LGBT issue with the

[3] Sathyanarayana Rao T S, Jacob K S. Homosexuality and India. Indian J Psychiatry 2012(2020, Oct. 13);54:1-3. https://www.indianjpsychiatry.org/text.asp?2012/54/1/1/94636.

[4] Rashmi Patel, *Being LGBT in India: Some home truths*, Mint [Oct.13,2020,8:02PM], https://www.livemint.com/Sundayapp/sAYrieZdZKEybKzhP8FDbP/Being-LGBT-in-India-Some-home-truths.html.

[5] Navtej Singh Johar & Ors. v. Union of India, (2018) 10 SCC 1.

implication of protection for all minorities and introduced for the first time in South Asia the idea of sexual citizenship.[6]

While the judgement decriminalised same sex relationships it did not recognise same sex unions or marriages. Same-sex marriages are not legally recognised in India nor are same-sex couples offered limited rights such as a civil union or a domestic partnership. There were no explicit legal safeguards against discrimination against LGBT relationships until 2019 when the Transgender Persons (Protection of Rights) Act was adopted [7] to provide for protection of rights of transgender people, their welfare, and other related matters. On 22 April 2019, the Madras High Court, the high court of Tamil Nadu, ruled that the term "bride" under the Hindu Marriage Act, 1955 includes trans women.[8] Specifically, it directed the authorities to register a marriage between a man and a transgender woman. This is the first judgment in India where the right to marry under Article 21 of the constitution has been affirmed for transgender persons and holding that 'bride' under the Hindu Marriage Act would cover transgender persons who identify as women. It affirmed the inclusion of intersex/transgender persons who identify as women, within the definition of 'bride'.

Though considerable changes have occurred, many steps are needed to fully enfranchise the LGBT community with the basic human rights against the prejudices of the society at large in India. LGBT people are banned from openly serving in the Indian Armed Forces.[9]

LGBT RIGHTS ACROSS THE GLOBE

[6] Geetanjali Misra (2009) Decriminalising homosexuality in India, Reproductive Health Matters, 17:34, 20-28, DOI: 10.1016/S0968-8080(09)34478-X.

[7] Transgender Persons (Protection of Rights) Act, 2019, No. 40 of Parliament, 2019(India).

[8] Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, dated 22-04-2019.

[9] Dutta, Amrita (7 September 2018). "Indian Army is worried now that men can legally have sex with other men". *The Print*.

Notably across the world LGBT rights have seen large expansions and legalization most particularly in western countries of the Americas, Western Europe and East Asian countries like Taiwan and Japan. LGBT rights are a divisive issue and have only achieved mass appeal only in the last decade. United States is the leading voice when LGBT rights are concerned. American culture the leads other western and developed countries in respect of social and cultural spheres and thus, plays a very important role in expanding LGBT rights across the globe and here in India.

The US Supreme Court in legalized same sex relationships in 2003 in Lawrence v. Texas[10], the Court struck down the sodomy law in Texas in a 6–3 decision and, by extension, invalidated sodomy laws in 13 other states, making same-sex sexual activity legal in every U.S. state and territory. However, just legalizing same sex relationships did not afford basic rights to LGBT community as 14 states either have not yet formally repealed their laws against sexual activity among consenting adults or have not revised them to accurately reflect their true scope in the aftermath of Lawrence v. Texas. Often, the sodomy law was drafted to also encompass other forms of sexual conduct such as bestiality, and no attempt has subsequently succeeded in separating them.

US Supreme Court finally in Obergefell v. Hodges[11] legalized same sex marriage in the US, the Court held in a 5–4 decision that the Fourteenth Amendment[12] requires all states to grant same-sex marriages and recognize same-sex marriages granted in other states.

CONCLUSION

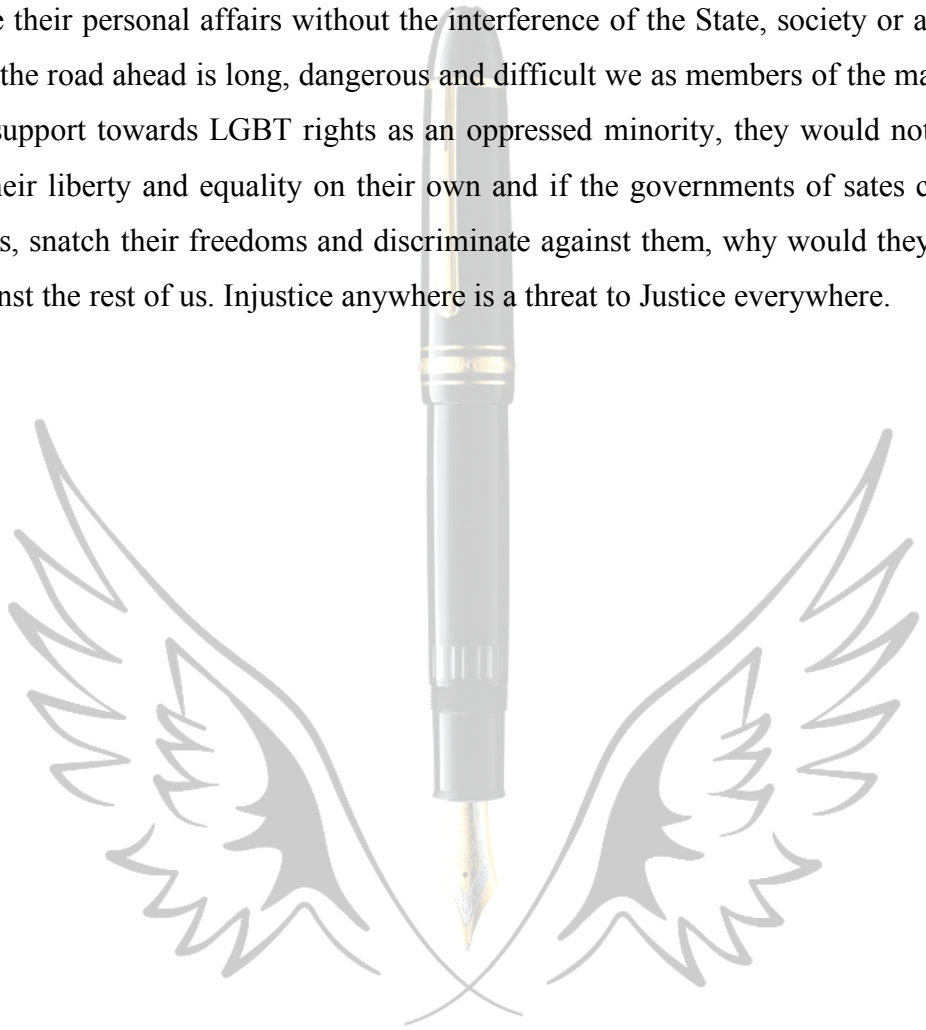
In conclusion LGBT rights are a major part of the civil liberties movement ongoing today and they form a vital part of the right to privacy as their cause has mostly been linked to freedom

[10] Lawrence v. Texas, 539 U.S. 558 (2003).

[11] Obergefell v. Hodges, 576 U.S. 644 (2015).

[12] U.S. CONST. amend. XIV, § 1.

to manage their personal affairs without the interference of the State, society or anyone else. Although the road ahead is long, dangerous and difficult we as members of the majority must give our support towards LGBT rights as an oppressed minority, they would not be able to achieve their liberty and equality on their own and if the governments of sates can infringe their rights, snatch their freedoms and discriminate against them, why would they not do the same against the rest of us. Injustice anywhere is a threat to Justice everywhere.



BAN ON ACID ATTACK

- MAHITHA LALL

INTRODUCTION

An acid attack is the throwing of acid on the face or body of some other strain in order to kill them, torture them or to disfigure them. In India there are nearly 1, 483 acid attack took place. And 1,500 acid attack took place in India in every five years. Which is a wider amount. An acid is just a liquid. But this liquid not only eat up the skin but also kills the respect of that women. It is observed that in India till now there are majorly only women or girl acid survivor. It means that no male victim has been recorded as an acid survivor. The most commonly use of acid for assault is sulphuric acid and nitric acid. The consequences which acid survivors tolerate is social-distancing with the federation, scarring with their facial expression, and if this acid is in huge quantity then they may lose their permanent vision power along with other social and economic problems. Although, acid attack took place all over the cosmos as a casual offense. And among them, United Kingdom has highest acid attackers as compared to other federation. The rate of acid attack is increasing with the time. As per 2013 basis, more than 3, 512 Bangladeshi people were attacked by acid.

ACID SURVIVORS

India has provided with some strict allocation to deal with acid attacks. But there is no use of such allocation to be implemented. The feel of an acid survivor pain can't get end on encouragement. Who gives them that encouragement to get up start a new life? Is there anyone who spend their earnings on their respect, on their enchantress? Is there anyone who can turn their pain in bad dreams? Actually, the thing is those acid survivors think their pain as their hallucination. They can't tell their situation to anyone. They can't get anyone who respect them and love their face. They become all alone. Their pedigree, their relatives treat them as a special person. They think they are aliens. Their dreams, their expectations from life, drizzle through the puddle. Which can't come back. And if it comes, there is no glimmer in it. They lose their

paragon forever with a chalice of an acid. They trust that if no one is with them, if neither the trial court nor the high court, neither the parliament nor the police listen them. They trust that the apex court will listen them. And will give them their virtue and will provide justice to them. But supreme court can pass the dates. Even the acid survivors want that their day should pass sooner and should come to an end soon. But the accent has no sympathy for them. The rhythm leisure with them. Their life has no interest in them. Or it can be said, they don't have interest in their lives anymore. There is no entertainment provided by the government, the NGO's, the youtubers etc. for their depression. But can entertain those who are depressed by exams, by job, by family situation, with relationship. For such strain this depression is hardly inconsequential. The acid survivors have to go through these depressions for rest of their esse. Sometimes, it is to be wondered that the strain of this federation has no time for anything. Neither for job, neither for maintaining their family relations and neither to assert someone. But they have cadence to click photo of an acidic women crying in the street asking for assertion. They are only the ones who say corruption has crossed the extend. They are damn worthless to utter a word about corruption. Another thing to wonder about is, there are two sorts of strain residing in this cosmos. There are one who promote corruption embracing sexual harassment, acid attack, abortion and another endless offensive act. And the second one who want that this corruption should get an end. According to them, it is the gold stage of corruption. They are realistic. Let them be realistic. They should not get abusive in front of everyone. They are reputed strains who don't ever did a mistake. Who don't ever do corruption? If those are reputed then who are those who give bars to ease their work? Who are those who throw acid on a women face trying to outrage her respect? Who are those who do sexual assault embracing acquaintance rape as well? The answer for these questions is silence. Apart from being silence what can the busy strain of this cosmos expect. They can expect a chalice of tea in every offensive exertion. On one side a man sits with a chalice of tea at his accommodation reading newspaper and on the other side a girl has been attacked by a chalice of acid. Isn't it good to listen? Obviously not. The man sitting with a chalice of tea will also say this is not good happening. The thing is, it is shame on that man who say this is not a good happening in this

cosmos. But the true certitude stated this. There is shame on the strain of this cosmos who only utter. We don't want speech here. We neither want a developing country. We want JUSTICE. Justice to all acid survivors. Justice to all sexually assault women. Justice to all dowry women. Can anyone give them their respect, their paragon, their existence, their happiness. The person who gives them this, his words, his speech, his imperium to improve the federation is needed. And we would like to listen them. It is observed that acid attack mostly happens due to love failure. But, throwing acid on a girl face if she ignores or say no is not the actual sign of love for that girl. If a girl betrays a boy, acid attack took place with that girl. If a girl ignores a man, acid attack took place with that girl. If a girl says no to a man, acid attack took place with that girl. If a girl slaps a man who tease her in public, acid attack took place with that girl. A question arises here is that what a girl should do to protect her from all such man? The answer to this question is again silence. The answer to this question is to be silent. If a man is teasing you, be silent. If a man is harassing you, be silent. If a man is trying to throw acid, be silent. And let those man do all these with you. The federation needs this. It is an attraction. People love flowers, when we see one, we look at it and then we adore it. We don't pluck them and drop them and stomp on them. Acid attack is such a menace. Next comes acid attack for money. It has become a business. We have forgotten our moral values and have started assimilating money, no matter what the consequences be. By hook or by crook everyone wants everything before time. We talk about women empowerment. We say men and women are equal. Then why does a girl feel uncomfortable coming out of her house at night? Why does a girl have to look back every time she takes a step forward making sure she is not followed by anyone? We talk about justice and moral values. But we never adhere to it.

BAN ON ACID

Acid attack is one of the dangerous violence happening. And it is to be observed that United Kingdom is one of the highest in acid attack in this cosmos. And the fourth country which is highest in acid attack is India. But certainly, the government of India has provided with strict laws and regulations to tackle with acid attacks. The question arises here, why acid can't be

banned? The answer to this question may be, some people of the federation envisage that acid is used for cleaning purpose in the bog. But they never think that this acid destroys someone else pedigree, their respect and their enchantress. And the government in general is true, can't even assert the acid survivors from acid and can assert the nation for cleaning purpose. Because cleaning of the environment is one of the major uses for the biodegradable development. And so, the government under some pressure by the increase in acid attack, has regulated the selling of acid attack. But does it show any consequences? Yes, the consequences were in 2017, 13 acid attacks took place in Kerala and 58 acid attacks took place in Uttar Pradesh. And brings under the fourth country in acid attack. The question comes in my wit, that if plastic can be completely banned for saving biodegradable nature. Then why can't acid can be banned? Are women not a part of nature. Do they don't have their respect? That this cosmos silently watches their innocence of being quiet. Or they are forced to be quiet. Government, this people, this federation, this court, only watch their silence. They have sympathy on what happened with them. But no one have curtesy to assert them for their justice. Strike for two days, and silence for rest of the esse is the damn true certitude of each and every strain having chill puff.

BEGINNING OF ENVISIONED REFORMS: ARE THE NEW FARMERS' LAWS TAKING OFF THE BURDEN OR IMPRUDENTLY GIVING A BIT MORE?

- CHAKSHU PUROHIT

THE REFORMS IN THE FARMING SECTOR

With the aim to introduce a shift in the paradigm in the farming sector of India, the parliament has enacted two laws and has amended one law with an aim to combat the plight of the Indian farmers. Being specific, the three new enactments are-

1. The Farmers' Produce Trade and Commerce (Promotion and Facilitation), Act
2. The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services, Act
3. The Essential Commodities (Amendment), Act

These changes aim to change the very method of how farmers are used to selling their crops each harvest. With an aim to eliminate the middle men and the state control over the decisions of the farmers, the government has introduced farming agreements[13] whereby the farmers will be able to sell their crops directly to the corporations, companies or anyone they wish to without paying any fee.

The government has said these reforms will accelerate growth in the sector through private sector investment in building infrastructure and supply chains for farm produce in national and global markets. They are intended to help small farmers who don't have means to either bargain for their produce to get a better price or invest in technology to improve the productivity of farms.[14]

[13] The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services, Act, 2020 Sec. 2(g)

[14] Everything you need to know about the new farm laws, Indian Express, 19/10/2020, available at https://economictimes.indiatimes.com/news/economy/agriculture/everything-you-need-to-know-about-the-new-agriculture-bills-passed-in-lok-sabha/articleshow/78183539.cms?from=mdr

But not everything is fine with this move of the government because opposition parties including one of its own allies along with the farmers have been protesting relentlessly. Next, will be the perusal of data that why or why not should we appreciate the changes brought by the Government of India-

THE DESIRED EFFECTS

a. <u>The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020</u>

The farmers and the buyers will be able to execute agreements before the production of the farm produce. The farmers will be able to pitch better price as they will be able to sell outside the state government controlled Agricultural Produce Market Committees (APMC) i.e. outside 'mandis; the same was suggested by Competition Commission of India as "In agriculture, APMC laws and the pricing policy to be reviewed to remove competitive bottlenecks for the benefit of the farmers."[15] Previously, if any famers sold outside the APMC, they were charged 'market fees', this concept is now removed by the new acts.

The opaqueness created by the cartels formed by APMC agents will be removed and hence, the price mechanism will be fair and transparent. These agents will no longer be able to use the beneficial position for benefitting themselves and charging multiple taxes and cess and increasing the farming costs.

Benefit will also be gained by introduction of online space[16] for the farmers to sale and purchase their produce without any association of intermediaries. In the absence of any middlemen, this enables the farmers to sell their produce at the best price available in the market.

[15] The Competition Commission of India, Annual Report 2009-10 Pg. 22
[16] The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, Section 2(a).

b. The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services, Act, 2020

The act provides for **Contract Farming**[17] i.e. agreements of farmers directly with the retailers, companies, Agri-firms, etc. to produce the crops at a predefined price, quality and quantity. The registration of the same is mandatory. Hence, farmers will be able to earn some fixed income. There were apprehensions that the Minimum support price will be removed but here it is important to note that nothing has been said about this in the laws and recently, the government has rather increased the MSP for six rabi crops.

Unlike approaching civil courts that would take leaps of time, the farmers can directly approach the sub-divisional magistrates who have the power to resolve their dispute within 30 days.[18] These contracts will also be linked with the State or Central credit or insurance schemes thereby eliminating the risk factor and presence of high-interest charging money lenders.[19]

The sponsors[20] are not allowed to acquire any ownership in the produce and cannot do any permanent changes in the lands of the farmers.[21]

c. The Essential Commodities (Amendment), Act, 2020

The act omits commodities such as cereals, pulses, oilseeds, edible oils, onions and potatoes from being the essential commodities.[22] The hovering of worries about too much regulations and interferences will be removed thereby inviting private investors. The relative freedom will welcome private investments in the field of agriculture and the necessary capital, infrastructure will be coming in.

[17] Supra Note 1.
[18] The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services, Act, 2020 Section 14.
[19] The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services, Act, 2020 Section 9
[20] The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services, Act, 2020 Section 2(o).
[21] The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services Act, 2020, Section 8.
[22] The Essential Commodities (Amendment) Act, 2020 Sec. 2 (1A)(a).

However, relentless protests have been witnessed after the enactments of these acts and the same is owing to some serious drawbacks which the said acts invite. It is necessary to look at the lacunas the said acts possess thereto in them.

THE UNDESIRED EFFECTS

Whenever a change upsurges, the ripples create chaos and a possibility of a new stillness.

It is undoubted that the middlemen created some hardships for the farmers, yet they were also a source of information, inputs and credit to the farmers. It should be upon the farmers to choose.

This act creates a totally separate structure of trading. It leaves farmers to the brutal hands of the capitalists naked with vulnerabilities. Although, promise is made to give more freedom to the farmers, it rather seems that freedom is given to the private capitalists to purchase agricultural-products at a cheaper price with no one over their head to regulate or oversee.

Who would save the farmers from a situation wherein they are made to sign unfavourable contracts with little or no knowledge of the terms of the contracts as formulated by big corporate houses with unintelligible liability clauses? Opposition contends that even before, the farmers were able to sell outside APMC by paying a certain fees or cess.

The farmers in no case can be subjected to prolonged litigation in the name of overall development of the farming industry in case the sponsors do not perform their part of the contract. With farmer suicides at its highest, no chance could be taken.

The **bargaining power** of the farmers will be so low as compared to the companies that they might end up treated as scapegoat and forced to accept any price for their produce however low it may be.

Drastically shifting from the goals of green revolution, the farming sector of the country will be moving into the hands of a few persons with deep pockets. Those companies will be the ones deciding which crop to be grown- depending upon the export value and marketability of the same. What yield more profits will be given more preference to what is required for the Indian stomachs. Does this not sound like turning back of colonial capitalism?

Agriculture being a part of the state list, the acts is an overt attempt to take the legitimate power of the state government to regulate the same. This is a clear situation of blot on the federal structure of India. With power being centralized, the states will have no power to protect farmers in instances of oppression or violations of rights.

THE BOTTOM LINE

Every new law brings with it possibilities of favourable change and consequences of bad implementation. The present case is not an exception. Accepting all the benefits that these new laws might bring, what cannot be tolerated is the image of **a simple man in white dhoti arguing with a suave man in suit about not having known the terms of agreement earlier.** In no case can we subject our farmers to the money-driven intentions of the capitalists. What has to be seen is that these companies will not be likely to contract with small or medium land owning farmers but only with farmers with large land holdings. What about the farmers with scattered or less land holdings? Who will save them? Without any known agency like the Mandis, where will the farmer go?

Maybe, the problem always was the mala fide acts of the middlemen and how to make sure that transparency is ensured. Rather than addressing the main problem, the laws seem to create more issues by adding one more branch that is ready to take advantage from the innocent. The problem yet remains the unawareness and lack of education in the rural India. The only thing added is another reason why we need our farmers to be able to read and write- to protect themselves from the tyranny of ready-to-contract men!

Our farmers died of hunger, of being unable to pay back loans, now we cannot let a situation emerge where our farmers die fighting litigations!

The day we make our farmers sit outside courtrooms, will be the day we forget the least bit of humanity among us!

IBC AND ITS ROLE IN INDIA'S REAL ESTATE LANDSCAPE

- SHREYANSH BHANSALI

Real estate sector in India has seen a radical rise because of robust demand, attractive opportunities, increasing investments and policy support. “India Brand Equity Foundation and initiative of Ministry of Commerce & Industry” in its Indian Real Estate Industry Report (July, 2020) predicted India’s real estate sector to reach $1 trillion by 2030 and it will contribute to 13% to the country’s GDP. The major policy that drives the real estate industry is ‘THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 (RERA)’, it was introduced with the objective of regulating and promotion of the real estate sector with transparency as its focus also to protect the interest of the homebuyers and to establish speedy redressal form.
The Insolvency and Bankruptcy Code 2016 (IBC), was ordered to solidify the laws identifying with reorganization and insolvency resolution of corporate, organization, firms and people in a period bound way.

Field of Real Estate has been viewed as the most useful pathway for financial specialists in India. In the course of recent years, the real estate industry sunk into a wreck of inadequate and postponed conveyances. Investors were debilitated to put resources into land because of postponement in the fulfillment of tasks and proposition draining their investments. The land and real estate business was famously uncontrolled and crumbled. There was an absence of administrative instrument which had made real estate segment fragile. IBC appeared in 2016 and has been revised over and over from that point forward. The Insolvency and Bankruptcy (Second Amendment) Act, 2018, had included 'allottees' inside the meaning of 'financial creditors'. This change had made postponements in conveyance of projects actually 'exorbitant' for organizations and companies dealing in real estate. Subsequently, they challenged the said amendment, whose legality was at that point maintained by the Supreme Court.

The sanctioning of the Insolvency and Bankruptcy Code, 2016, (IBC) alongside the Real Estate (Regulation and Development) Act, 2016 (RERA) has introduced another period of more tight guideline for the Indian land and real estate area. Both these assemblies have fortified the hand of homebuyers, giving them various discussions to get equity and justice.

THE IBC (SECOND AMENDMENT) ACT, 2018

Homebuyers were not included in the definition of Financial Creditors in the original Act, which deprived the individual allottee's to initiate insolvency proceedings, this position was changed after the introduction of The IBC (Second Amendment) Act, 2018 which added the following:

"*(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing"*

Insertion of this clause paved the way for allottee's to initiate insolvency proceedings against the builder/firm/organization which deals in real estate. The IBC permits both operational and financial creditors to initiate insolvency proceedings against the corporate debtor. The "Financial Creditors" have two major rights to vote for, a) On resolution plan of the insolvency of the company or b) ON liquidation of the company where there is no resolution plan.

Homebuyers also knows as "allottees's" who are now considered as financial creditors easily implied that even if single allottee who was disillusioned by the delays being caused, effortlessly inferred that regardless of whether it is a single allottee, who was disappointed by the deferrals being caused, can submit a bankruptcy application and the same application got acknowledged, the developer/firm/organisation would need to go through the whole indebtedness measure of the insolvency process. The IBC (Second Amendment) Act, opened up conduits of petitions by homebuyers. Between June, 2018 and November, 2019 in excess of 1800 cases were recorded by homebuyers. An indebtedness insolvency application can be given for 'default' in the obligation to be reimbursed. The courts consistently held that the deferral in giving over the land and real estate venture will add up to default under the IBC.

Truth be told, in the choice of Emaar MGF, the court held that the developer/firm/organisation should repay the cash of the homebuyer, if the previous doesn't hand over the venture inside the concurred timetable.[23] Its relevant to specify that beforehand, in *"**Nikhil Mehta and Sons (HUF) and Ors. Versus M/s AMR Infrastructures Ltd. ("AMR Judgment")**"* dated July 21, 2017, the NCLAT had seen that financiers who had been guaranteed a 'guaranteed return' by land and real estate developer/firm/organizations would fall under the classification of "financial creditor" as the monies payable to them would fall under the meaning of an "debt" as characterized under Section 3(11) of the IBC.

This amendment was challenged by the real estate companies, the Supreme Court in the judgement of ***"Pinoeer Urban Land and Infrastructure Limited and Anr. v. Union of India"***[24] in this judgement the court said that;

Like other creditors, be it banks and monetary organizations, or others, all people who have progressed monies to the corporate indebted person ought to reserve the option to be on the Committee of Creditors. Henceforth The Amendment Act to Insolvency and Bankruptcy Code, 2016 made according to a report arranged by the Insolvency Law Committee dated 26th March, 2018 doesn't encroach Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.The RERA is to be perused amicably with the Code, as revised by the Amendment Act. Remedy that are agreed to allottees are subsequently simultaneous remedies, such allottees being in a situation to benefit of Consumer Protection Act, 1986, RERA and the Code.

The amendment knowingly created hardship for the developers/firms/organisations working in real estate sector but unknowingly also created hurdles and hardships for homebuyers. As the amendment gave power to single individual to initiate insolvency proceedings, all the homebuyers got enmesh into it. Additionally, on the off chance that an organization is going through a resolution process, at that point a moratorium is forced, which implies that every

[23] Alka Agarwal Vs. Parsvanath landmark Developers Pvt. Ltd. (IB)-1229(PB)/2018 and Neeraj Gupta Vs. Emmar MGF Land Ltd. (IB) – 1403(PB)/2018

[24] WRIT PETITION (CIVIL) NO. 43 OF 2019

other argument or suits against the corporate debt holder will be remained stayed. On the off chance that the indebtedness insolvency process takes long, at that point, the homebuyers who were not engaged with recording the said indebtedness insolvency application will stall out without an actual remedy.

THE IBC (AMENDMENT) ACT, 2020

This Act has acquainted extra prerequisites for homebuyers who can elicit the indebtedness insolvency proceedings. This Act expresses that an insolvency resolution can be set off by homebuyers just when either 10% of the homebuyers or 100 homebuyers, whichever is less, start an application against the land and real estate builder/firm/organization. This has come as a significant alleviation to land and real estate builder/firm/organizations and is additionally significant from the perspective of hindering silly applications for insolvency resolution.

Force Majeure and IBC

"No default by real estate developer if possession delayed due to reasons beyond control", NCLAT held this judgment in the case of ***Navin Raheja v. Shilpa Jain and others.*** The facts of this case were that the respondent booked a flat with the appellant and under the buyers agreement it was stated that if the corporate debtor cannot fulfil the timeline of providing the flat in 36 months, an amount of INR 7 per square feet would be chargeable every month for the entire period of delay. The delay was not caused by the Corporate debtor as he had completed the constructions and it was in the hands of the authorities to issue completion certificate which was the cause of the delay and every other part of the buyers agreement was fulfilled but the occupation certificate delay was not foreseeable also after the delay the appellant got the certificate and gave the possession to the respondents. The NCLAT decided that as per clause 4.4 of the agreement the construction were subject to force majeure conditions and delay in grant of occupancy certificate is not in the hands of the company and in such cases the company is entitled of extension thus the insolvency proceedings under S.7 of the IBC is fraudulent and was with malicious intent and additionally, if the deferral was inferable from

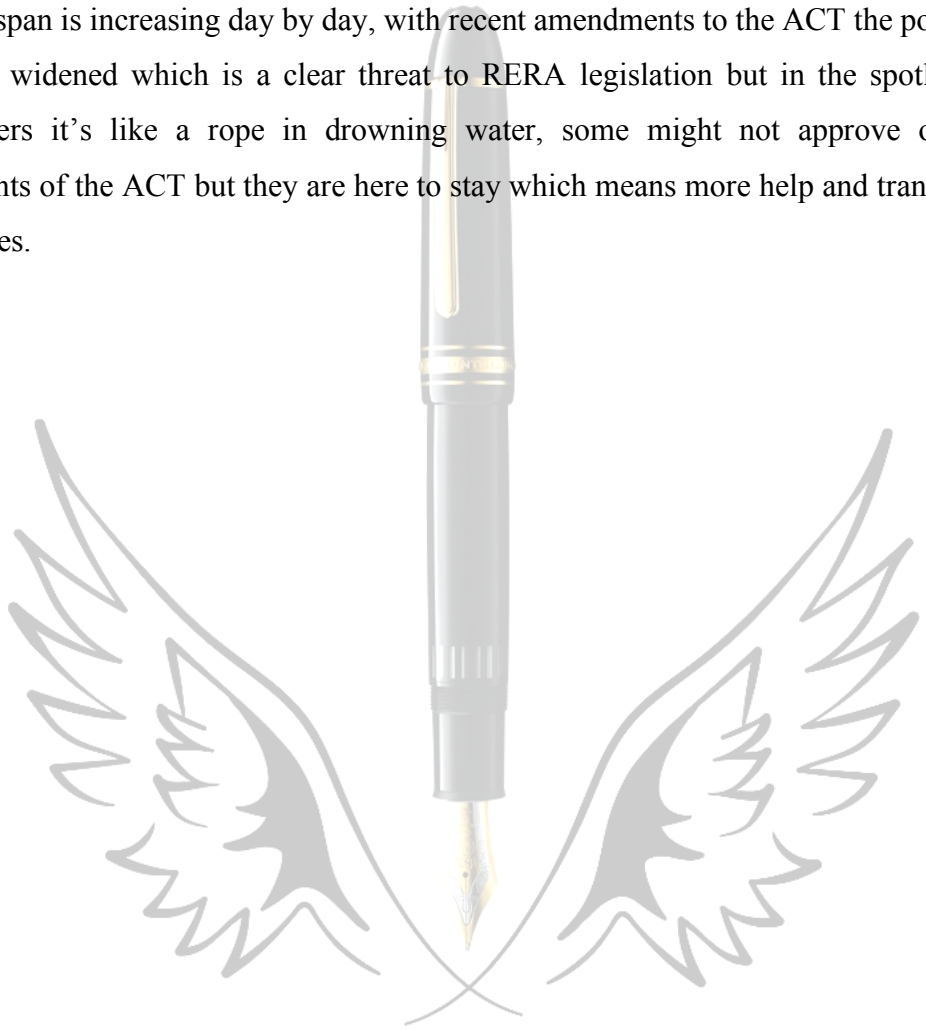
force majeure and not to the issue of the Corporate Debtor, it couldn't be claimed that the Corporate Debtor had defaulted in conveying the ownership.

RERA IN CONFLICT WITH IBC

RERA is the essential enactment which manages delays in the land and real estate division. It orders land and real estate developers to get an obligatory enrolment and furthermore visualizes punishments, in case of deferral in conveying of ventures. In any case, with homebuyers currently having the option to start bankruptcy procedures under IBC, RERA may get side-lined. Having two enactments managing a similar issue, may create turmoil. It might likewise support forum shopping and increment the weight of authorities under RERA just as NCLT. IBC is for the reasons for settling insolvent builder/firm/organizations. Aside from the mathematical edge, a course of events for delay, the sum paid to the developer/firm/organisation ought to likewise be thought of. Section 238 of IBC states the overriding effect of IBC over other acts. The IBC perceived homebuyers to ensure their privileges in any event, when a leaser, other than a homebuyer, conjures indebtedness procedures against the builder. It might be in light of a legitimate concern for homebuyers to move toward the National Company Law Tribunal just (under IBC) when the promoter neglects to resolve default under RERA or where RERA isn't dynamic and inactive. NCLAT in ***Rajesh Goyal v. Babita Gupa & Ors***. of practicing and giving a wide translation to the "Inherent Power" presented under Rule 11 of the NCLAT Rules 6, outperforms the soul of RERA and a similar will engage the appointed authorities of Tribunal to recognize or not follow the arrangements of RERA in future cases. Hence, it could be reasoned that because of proactive methodology of the Tribunals built up under IBC, the effect of RERA is gradually and bit by bit being weakened and questions between Flat purchasers and developers are unreasonably enhanced and favoured by the IBC.

CONCLUSION

IBC wingspan is increasing day by day, with recent amendments to the ACT the powers under IBC have widened which is a clear threat to RERA legislation but in the spotlight of the Homebuyers it's like a rope in drowning water, some might not approve of the new amendments of the ACT but they are here to stay which means more help and transparency to the allottees.



MEN IN THE INVISIBLE GOLDEN CAGE

- SINDHUJA D. & SUNITA CHOUDHARY

INTRODUCTION

The Indian society is well known for gender discrimination. But, it's not only women who always faces discrimination, men, too are its victims. It's a common episode to hear about injustice done to women but what about injustice done to men? It is that men do not face injustice or is it that the society don't pay any heed to injustice done to them? The answer is crystal clear, it's the society that is least concerned about the sufferings of men. The society has developed a preconceived notion that only women can be victims of discrimination and injustice. It's a very rare episode to hear about male rape and harassment but, that doesn't mean they don't fall victims to them. It simply means that the society is ignorant enough to not acknowledge the fact that men's suffering nothing less than women. There are numerous NGO's and organisations that fight for rights of women but there is not enough such organisation that fight for rights of men. The society clearly holds gender bias against men in certain cases.

SEXUAL ASSAULT AND RAPE

When it comes to rape and sexual assault, most of the people are ignorant to the fact that both of these crimes are gender neutral and are committed against both male and female. The society doesn't understand that both of these crimes are equally harmful against both female as well as male. The society only cares when these crimes are committed against the female and when it comes to the male they are least concerned.

The Male adult who experienced sexual assault undergoes the feelings of shame and self-doubt. They continuously feel and believe that they should have been "strong enough" to combat against the preparator. The male victim feels so ashamed because of the incident that they do not come forward for any medial or legal assistance. Continuous feeling of shame, self-doubt and embarrassment, eventually leads to depression among male victims. When a young boy

faces sexual abuse, the impact on him and the consequences are bit serious as compared to the adult victims. After going through sexual abuse, the child is prone to the problems like confusion regarding their sexual orientation, difficulty in the intimacy, they may become drug addict and may experience nightmares & flashbacks. One large study, conducted by the U.S. Centres for Disease Control, found that the sexual abuse of boys was more likely to involve penetration of some kind, which is associated with greater psychological harm.[25] Both the adult and teen victims are most likely to undergo depression which affects their mental health and even though they can't be blamed for the incident still they tend to develop a sense of guilt in their mind. In looking at the child sexual abuse specifically, the Indian government did find in 2007 that, of surveyed children who reported experiencing severe sexual abuse, including rape or sodomy, 57.3% were boys and 42.7% were girls.[26] Male rape victims never comes forward to disclose the incident due to the guilt and shame and most importantly they are afraid of what the society will say. When it comes to law the Section 375 of Indian Penal Code, clearly states rape as something which can be done to a woman by a man. There is no provision in for adult male rape victims. Although boy child victims come under the protection of Children from Sexual Offence Act 2012, current rape laws in India leaves completely neglects a large portion of male victims, who are afraid to come forward due to fear of the society and lack of legal help.

ACID VIOLENCE

Whenever we hear a news regarding an acid attack, the first thought that crosses our mind even without reading the news is that a guy must have thrown acid on a girl's face. But we fail to understand is that though women are surely more in number when it comes to acid attack

[25] *Myths and Facts About Male Sexual Abuse and Assault,* 1IN6, (Aug 26, 2020, 02:13 PM), https://1in6.org/get-information/myths/

[26] Ramesh Lalwani, *India's law should recognise that men can be raped too,* SCROLL.IN, (Aug 26, 2020, 02:40 PM), https://scroll.in/article/676510/indias-law-should-recognise-that-men-can-be-raped-too

victims, men, too have suffered immensely. "Men constitute 35% of the total number of all victims," says Rahul Varma, national director and chief executive officer of NGO, Acid Survivors Foundation India. [27] A study on acid violence shows that women mostly are attacked by the men they have rejected but men are attacked for a number of reasons like jealousy, rivalry, property disputes, scorned lovers and family issues. The reason behind attack on both men and women may be very different, but the trauma and damage they suffer are same. When it comes to collecting funds, its way easier for women victims as compared to men for whom it's harder than we can imagine. The reason behind this lay in the fact that acid attack is solely viewed as a crime against women, as a result they tend to get more sympathy. There is no doubt that acid knows no gender but to ignore the fact that men, too are victims would be a complete injustice to those who are suffering and struggling day and night just to live a normal life.

MEN IN THE STEREOTYPICAL SOCIETY

Just like women, men, too faces many stereotypical things throughout their life. A large portion of these men who suffer due to stereotypical norms continue to endure while very few tries to break these norms. The few who tries to break these norms get nothing but more suffering in exchange and are called with words like gay by the society. Such thinking starts from the very childhood when parents gives dolls to the girl child while cars to the boy child to play. When a boy says that he likes pink colour or wants to play with dolls, the look he gets from the people forces him to suppress his real self. According to the society, men don't cry even when they are suffering and should not show their emotional side. An informative set of studies from 2015 finds that when male (but not female) leaders ask for help, they are viewed as less competent, capable, and confident. And when men make themselves vulnerable by disclosing a weakness at work, they are perceived to have lower status.[28] The society expects the men to looks good

[27] **Namita Bhandare**, *Acid violence knows no gender,* LIVEMINT, (Aug. 21, 2020, 11:27 AM), https://www.livemint.com/Politics/nsFOWQPFyWWVNoTMknCekK/Acid-violence-knows-no-gender.html

[28] David M. Mayor, *How Men Get Penalized for Straying from Masculine Norms*, HARVARD BUSINESS REVIEW, (Aug 27, 2020, 01:06 PM)

and presentable but they are not allowed to groom themselves. The people in the society expects more from men as compared to women. Nowadays, its normalized when a woman works outside just like man but when a man does household chores like woman he's criticised. When a woman tries to do man's work she's praised but its total opposite if a man tries woman's work. Even in workplace when the man asks for others help while doing work, he is considered to be an incompetent but, for woman it's not the case. According, to the society's prospective men should be self-sufficient in all his work. Men are considered as chance taker who can take advantage of any women when there are such circumstances. When a girl tried something, which is meant for men according to the society she is considered to be a role model for other women because she breached the stereotypical society but when a man does this thing this so-called matured society will blame him. Nothing is meant for men and nothing is meant for women in this world. This stereotype makes men more depressed which eventually leads more male suicide rate, mental problems and gets addicted to alcohol and drugs.

CONCLUSION

Even in this 21st century the society pretends to be blind when something happens to men. No one is asking for the society to praise men but at least they should pay attention to the bad things that are happening to them. The people of the society don't understand that the pain feels same for both women as well as men. The men are suppressed by stereotype norms so badly that they are afraid even to show their true selves. The society has to give up their thinking that men always have to stay strong even when they are hurting badly inside. Crimes like harassment, acid violence, rape and other such crimes are gender neutral and equally harms both the genders. Also, there should be more organisations to support and promote men's rights. The society should give up old believes and should believe in equality.

MEDIA TRIAL

- SHIV A. CHHATRALA & SALONI PRADHAN

INTRODUCTION

Media is the 4th pillar of Democracy - a mirror of society as they say. They hold immense power to generate mandate, mould public opinion. People's perception of any event nowadays is inevitably influenced by the media. What if the Media overcomes the boundary of viewpoint and starts giving judgment? Describing the impact of media coverage on people's reputation by creating a perception of guilt and shame irrespective of any verdict by the judiciary is termed as a Media trial. However, their misguided forays into trials have led to the doubts, whether the freedom of the press[29] that has been bestowed by the Constitution is being misused in the form of media trials, that basically shun the tenet that a person is innocent until proven guilty. There is no legal system where the media has any right to try a case on public television or take upon themselves to declare judgement in any case.

CAUSES OF MEDIA TRIAL

Media trial has often led to impediments in investigations, building a strong public opinion against the accused before the case is tried by the legal system, in such cases verdict is declared with negligible room for hearing the other side of the story. Such case instances are the 2008 Aarushi Talwar Murder case (Ghosh, 2017), Uma Khurana case, sexual assualt case against Tarun Tejpal, AK Ganguly case, Khursid Anwar Suicide case, Sankararaman murder case, Sunanda Pushkar death case. (Nath, 2020)

The media has been given the credit for cases like the Bijal Joshi Rape case and Nitish Katara Murder Case, where convicts would have been gone unpunished if not for media intervention,

[29] Freedom of Press given in Article 19, Part IV of the Constitution of India

Media also served and influence the judicial system to re-investigate cases like the Jessica Lal Case (2010), accused were acquitted by court initially in this case. (Nath, 2020)

Media trial has a continuous tussle with the freedom of speech, Justice Venkataramiah in the Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India (1984) has stated that freedom of the press is the heart of social and political intercourse, and also justified the role of the press as the public educator. In contrast to this, it has been noted with many case instances that the media likes to sensationalize the cases in which women, Children, or any celebrity is involved. The most recent example of this is Rhea Chakraborty v. The State of Bihar, 2020 (Sushant Singh Rajput Death Case). [30]
(Media Trials in India)

MEDIA TRIAL VS. FAIR TRIAL

According to Harry Browne, a fair trial takes place when every assumption can be challenged. Indian Constitution through its Articles 14, 19, 20, 21, and 22 delivers fair trial as a part of life and personal liberty. When a journalist decides to publish anything which conflicts the fair trial then the journalist may be liable for contempt of court. Media trial forms a strong public opinion which pressurizes lawyers not to take up the cases of the accused since he/she has already been proven guilty by the media. The media dragging the alleged offender through the mud, even if they are found not guilty, does irreparable damage to reputations. In Jasleen Kaur v. Saravjeet Singh (2015). Saravjeet Singh was proven innocent 4 years after he was accused of verbal harassment and a slew of other allegations. The Press ran a slander campaign that eventually led to him losing his job and reputation, being labelled '*Dilli ka Darinda'*. It led to long lasting damage, yet no media house received flak. (The Logical Indian, 2019)
Journalists have often claimed that media trials have helped uncover scams. The Media is the linchpin of our democracy, it is supposed to act as a catalyst to convey authentic information

[30] Media Trials in India, Nath K. 2020 List of media trials and media implications in India

and should not hinder the legal structure in any way. 'Journalists are people as well and have an assessment on the various events happening in the society', this statement is always subject to debate, journalists instead of spreading prejudices, can question the various aspects of the event till the fair trial of any case or event is completed instead of conducting a separate trial and declare the verdict. The right to free press should be used for the public interest for whom the news is being served, and shouldn't be used for the press itself to get the limelight.

POSSIBLE LEGAL AID AGAINST MEDIA TRIALS

There is no specific legal recourse a person can take against a media trial being conducted against them. However, some of their options are:

1. Defamation suit: Both civil and criminal defamation suits can be filed. Section 499 and 500 of the Indian Penal Code deal with criminal defamation. Both libel and slander, i.e. print format of defamation or verbally (gestures and sign language counts too).

Other possible remedies can be the content code system developed by the Information and Broadcasting Ministry in 2007. (Lawyered Team, 2020)

2. Injunction: This is in order to compel or restrain person(s) from a particular act. In this case, a court order restraining the broadcasting or printing of case related material while the investigation is on. They could be gag orders, limitations orders or an order to restrict specific case related material. For instance, in Navin Jindal v. Zee Media Corporation (2015), a demand for pre-telecast stay on Zee News broadcast regarding coal blocks that allegedly defamed Navin Jindal, was made. (Indian Kanoon, 2017)
3. Under Section 14(1) of the press council Act, 1978 PCI can censure any news organization if it commits any professional misconduct. But this does not involve any harsh punishment rather it demands only an apology if proven guilty, this shows that the ineffectiveness in preventing the prejudices by the media. Although PCI has framed journalistic norms which suggests that a publication house should comment on any

judicial verdict with great caution, these norms are not enforceable. The Cable Television Networks (Regulation) Act 1995, states that no program should be carried in the cable service which contains defamatory, false, which is likely to encourage violence or contain anything against the maintenance of law and order.

ETHICAL ISSUES

The Press Council of India has issued Norms of Journalistic Conduct to serve as a guideline and ethical marker for journalists in India. It is expected to be an ethical compass for journalists to maintain.

Section 41 (iv), Right of Reply states that Freedom of Press involves the right of the reader to know all sides of a story/issue. Judgement is supposed to be left for the reader. Similarly, Section 41 (v), puts forward that the media is not a prosecutor in any investigation and, *" ...should be guided by the paramount principle of a person's innocence unless the alleged offence is proved beyond doubt by independent reliable evidence and, therefore, even within the constraint of space, the material facts should find space in the rejoinder so that the public, as the ultimate judge of any matter, is guided by the complete and accurate facts in forming its opinion."* (Press Council of India, 2019,)

Section 43 of the Norms directly addresses Trial by Media, citing the judiciary and media to be complimentary pillars, however, one should not be doing the job of the other. This means, a person is entitled to the privilege of being presumed innocent until proven guilty by the court of law. The media rendering judgements and pronouncing an accused guilty only colours the investigation and hinders a fair trial. (Press Council of India, 2019,)

Personal and unrelated details about the suspect/accused may also hinder the system. Several news channels displayed bank statements and documents that were part of the investigation in Sushant Singh Rajput's case. In doing so, Rhea Chakrabarty's personal phone number was unwittingly displayed alongside, leading to dire repercussions, threats etc. to Rhea's number. While Rhea has been found guilty in NCB's drug charges, the claims of media houses that she murdered Sushant Singh Rajput are unfounded and unsupported by evidence.

CONCLUSION

In Indian democracy, people have the right to get information, the individuals have the right to be protected and defended in a criminal case. In a conflict between a fair trial and freedom of speech, the fair trial should be upheld. The judiciary and the media have to supplement each other and not supplant. In the criminal justice system, the presumption by any accused of being innocent should not sacrifice at the cost of freedom of speech and expression. Jeremy Bentham once said "where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the surest safeguard against dishonesty." It is in this context media trial arises. There is no definitive '*Laxman Rekha*' between expressing a viewpoint, reporting information, and passing a judgment. On freedom of press and the corruption of the judicial process, Punjab High Court in Rao Harnarain vs. Gumori Ram stated; "liberty of the press is subordinate to the administration of justice, the only duty of the media is the reporting and not the adjudication of cases." It is a journalist's ethical and moral responsibility to present each and every facet of a story/issue, especially if it is in public interest. Bias is inherent, it would be unfair to say that an individual does not have an ounce of bias in them. However, when it comes to journalism, facts and evidence should be the basis of reports, ensuring that an investigation or fair trial is not coloured or prejudiced by the media coverage a particular case receives. A trial by media, relying on circumstantial evidence and gossip/unchecked facts amounts to obstruction of justice.

PLASTIC BLOCKAGE AND FLOODING – ANALYSIS AND SOLUTIONS

- KUSHAGRADHI BISWAS

"Plastics in all forms – straws, bottles, packaging, bags etc.- are all choking our planet. We must find ways to reduce and eventually eliminate single-use plastic products."- Governor Jerry Brown.[31]

The issue of plastic is a major concern in today's society. From India to Indonesia, Philippines to Pakistan,[32] the problem of plastic waste is something that has affected many countries environmentally as well as economically. Yet, does plastic only harm environmentally? How does that environmental harm damage the society economically? Not only that, how does society see the problem of flooding due to plastic pollution and mismanagement?

Home to as many as 1.3 billion people, it is normal to see many streets and localities of India being extremely congested, crowded and dirty. On observing such congested localities, one will usually opine that it is either due to lack of space or the unaffordability among the vast majority of the Indian population to buy quality accommodation. It is agreeable that the lack of space is a major problem in many cities but it is also realized that the issue of choked drains also contributes to the place getting dirtier especially after rains. Before understanding what causes such kind of blockage in drains, one needs to know some facts and statistics. India generates about 9.46 million tonnes of plastic waste annually, out of which 40 percent remains uncollected and 43 percent is used for packaging, most of which that is a single-use one.[33]This uncollected form of plastic waste ends up in drains and *nullahs* of localities, that eventually

[31] *Governor Brown Issues Bold statement In Signing First Wave of Plastic Pollution Reduction Bills,* Californians Against Waste, (September 20,2018), https://www.cawrecycles.org/recycling-news/3p93l3t3k8plh8tctw6a23y4t5fjsz.

[32] Jason Gooljar, *Top 20 countries ranked by mass of mismanaged plastic waste,* Earth Day, (April 6, 2018), https://www.earthday.org/top-20-countries-ranked-by-mass-of-mismanaged-plastic-waste.

[33] PTI New Delhi, *India generates 9.46 million tonnes of plastic waste annually,* The Hindu Business Line,(August 30,2019), https://www.thehindubusinessline.com/news/science/india-generates-946-mn-tonnes-of-plastic-waste-annually/article29299108.ece

chokes and paralyses the drainage system. Yet, do the choked drains only wear a dirty look and let out a bad smell? Well, it's a clear No.

Only one quick massive downpour at any point of the day can show the negative impact of choked drains on society. As it obstructs the flow of water and dirt along the drains, it triggers flooding and even at times water gushes into the nearby low-lying houses and residential areas, causing a mess and this becomes an issue for many of the residents. In Noida, heavy rains triggered severe water-logging and resulted in rain water entering sectors 28,29, 31,34 and 12 and it was said that the irrigation drain caused water-logging as it remained choked with plastic and silt.[34] In Jodhpur area of Kolkata, several areas and almost all arterial roads were waterlogged and the ground floor of a particular apartment in that locality found itself submerged and the KMC officials informed that the plastic bags ended up completely choking the drainage outlets.[35] Such events thus prove the potential of plastic bags in paralyzing the drainage system. It can even cause electrocution when water gets directly electrified. We are also aware that a famous gastroenterologist of Mumbai Dr, Deepak Amrapurkar lost his life in a waterlogged street.

With all such events that happen due to a heavy downpour, one realizes that plastic waste mis-management is a major social problem of today's society. Now, before coming to the solutions and ways to minimize the plastic problem, one needs to understand why is plastic being used. Plastic is used as it is versatile, hygienic, flexible and highly durable.[36] Apart from daily use, plastics is used in transportation industry and the seating, paneling, surface covering and

[34] Vinod Rajput, *Noida Waterlogged as authority scrambles to clean main drain,* Hindustan Times, (July 21, 2020,23:39 IST), https://www.hindustantimes.com/noida/noida-waterlogged-as-authority-scrambles-to-clean-main-drain/story-aMQNRkQzmJGhhOp81gAshJ.html

[35] TNN, *Plastic ,defunct pumps leave new areas flooded,* The Times Of India, (August 1, 2018, 12:24 IST), https://timesofindia.indiatimes.com/city/kolkata/plastic-defunct-pump-leave-new-areas-flooded/articleshow/65225023.cms

[36] *Plastics application*s, British Plastics Federation, https://www.bpf.co.uk/plastipedia/applications/default.aspx#:~:text=Plastics%20is%20versatile%2C%20hygenic%2C%20lightweight,baby%20products%20and%20protection%20packaging.

instruments respectively.[37] The informal and unorganized economy also use plastic as it is affordable, cheap and easy to use.

Before coming to the aspect of what initiatives government, ruling authorities or administrators need to take, one has to realize that is WE- the common people that needs to have the awareness about the problem and find possible solutions in mind. Keeping this philosophy in mind, a survey was conducted by myself by preparing a questionnaire. The ones who took part in the survey reside in various corners of the country. From villages to small cities to tier-1 cities and the capital of the country, each participation brought a new perspective. It was revealed that 86.7% of them not only know that plastic bags of proper thickness can be reused but also they do have a perspective about other solutions to this plastic problem also. Solutions that were provided ranged from replacing plastic in packaging activities to proper disposal of plastic, and even included ideas like mass awareness and initiatives by the authorities to clean up places affected by plastic pollution, use of biodegradable products and use of products like jute, natural fibre cloth and other polymer material can be done the last but not the least – reuse, reduce and recycle respectively. According to the participants, when asked about alternatives to that of a plastic bags, it was revealed that 13.3 % consider cloth bags and jute bags as good alternatives respectively, and out of the remaining 73.4%, solutions ranged from use of paper bags, bags made of natural cloth and bamboo and also use of paper cloth hemp bags was also suggested. The survey also revealed that 66.7% of the participants believe that plastic in the drainage system is a major cause for massive flooding.

On studying the survey, it has been well-understood that plastic mis-management is a pan-India problem and has affected all corners of the nation. On thinking about the solutions, it is agreed that jute bags can be a good alternative instead of plastic. Jute is highly durable and it can be used a number of times, does not threaten neither the environment nor the hygiene, and

[37] Todd Johnson, *The Many uses of plastics,* ThoughtCo., (July 17,2019), https://www.thoughtco.com/uses-of-plastics-820359

is biodegradable, long-lasting and decomposes within a stipulated period of time.[38] Government and ruling authorities ought to implement policies in sectors like education, entrepreneurship and innovation respectively. To be precise, the government needs to organize and reward individuals and people who take up initiatives and steps. When these people are respected and rewarded by the higher authorities, then only new changes can happen in society. In UK, local governments help families in recycling by offering incentives like cash prizes and shopping vouchers.[39] Entrepreneurs, enterprises and innovators who are specifically working on the plastic problem need to be identified, rewarded and provided with investment and guidance. Innovators who figure out solutions need to get their knowledge and solution well-patented so that it can be used to generate royalty and also contribute to the economy.Students who own small-scale startups that are working on the plastic problem need to be given proper guidance in finding out investors. Schools need to innovate in its ways of teaching and take new initiatives like inviting environmentalists and scholars who are working in the field of plastic problem and disposal. This can in turn make the young minds aware of this problem. Only lectures will not do. Rather, during vacations assignments related to preparing research reports on plastic and its solutions need to be given. This can be a great opportunity for them to learn and grow. One needs to give them the opportunity to explore and find out on their own. The local authorities ought to do regular checks on the drainage facilities and deploy people in cleaning up the drainage system regularly. This can not only solve the plastic problem but also prevent other deadly diseases like Dengue. It also prevents water backflow in sinks and toilets.[40] The drainage systems need to be upgraded and improved. China in 2013 announced

[38] Admin, *Advantages of using plastic bags instead of jute bags,* Puspa Jute Bags, (September 22,2017,11:10 AM), https://www.puspajutebags.com/advantages-using-jute-bags-instead-plastic-bags.
[39] WION Edge, *How countries around the world reward citizens for recycling,* WION, (October 27, 2016,7:44 AM IST), https://www.wionews.com/edge/how-countries-around-the-world-reward-citizens-for-recycling-7997.
[40] Info Glue, *5 Reasons why you should clean your drains regularly,* InfoGlue, https://infoglue.org/5-reasons-why-you-should-clean-your-drains-regularly/#:~:text=When%20you%20clean%20your%20drains,backflow%20in%20sinks%20and%20toilets.

the upgradation and it aimed for coping up with heavy rain and stopping floods from developing.[41]

Massive change in the society is not always brought by laws and policies. Rather, initiatives and new ways adopted by common people on their own at times creates a path for change and development. It is this wave of change that gears up the nation for a change in law and policies. Similarly, the plastic problem can be solved by society. That can initiate a path of newer and innovative laws and policies.

[41] Express Solutions Group, *Compare drainage systems around the world,* Express Drainage Solutions, https://www.expressdrainagesolutions.co.uk/advice-centre/interesting/drainage-system-compares-rest-world/.

RAPE LAWS IN INDIA – A MIRAGE OF DETERRENCE

- SUBHALAKSHMI JENA

Sexual assault, a common phenomenon against woman in our country involves a number of ways where a man engages in sexual activity with a woman by violating her right to privacy and posing a threat to her modesty. Rape being the most heinous crime is a sexual assault where a man has unlawful intercourse with a woman against her valid consent. The very origin of the word "Rape" in Latin means to "snatch" or "carry off". The rape cases in our country has increased manifold. The concept of rape has long been considered a crime under the purview of the Indian Penal Code. Section 375 of the Indian Penal Code has defined rape elaborately mentioning the circumstances where sexual engagement with a women would be considered to be an offence.

Statistics reveal that 2 women get raped every hour and 1 girl of age below 10 gets raped every 10 hours in our country. There have been numerous cases where an elderly woman or a girl in her diaper gets raped within the 4 corners of her home. Cases where the victim's cloth was not intimidating at all led to the outrage of her modesty by someone she knew very well. This proves that the barbaric act isn't limited to any specific age bar, clothing style, strangers or the dark corners of lonely streets. This act of outraging a woman's modesty not only leaves her body in pain but also tears her soul apart into pieces. Her journey of pain and agony doesn't end with the act. In fact the act is itself a beginning of the stigma that she is to face forever in her life, the very same process of stigma that will never end. The act leaves her struggling throughout her entire personal and social life where she falls prey either to the "Pity factor" or "questionable glances". The concept of rape has become so common to us that despite of finding rape incidents in everyday newspapers, the outrage within us overflows only when something more barbaric gets highlighted.

And what is more barbaric gets decided either by the political parties or the media persons. If sex is just a mere humanly desire, then why is outraging a woman's modesty without her valid

consent seen as an easy target to satisfy the hunger for sex ? Are our rape laws efficient enough to create a fear or a consciousness in the minds that a woman's modesty belongs to none but her ? The answers to these questions were not easy until the Nirbhaya's case revealed all the loopholes in the legislation of Indian Penal Code and the Criminal Procedure Code, our judiciary system and the social mind-set.

Man is a combined community of both good and bad which has in turn pulled the blinds of law on the society. Keeping the anomalies of the framing of laws by our legislation in mind, the deficiencies in the definition of rape has raised many questions amongst judges on matters of consent and conduct of victim. An ample number of cases involve the question of raping a girl of "easy virtue". Merely because the victim is of easy virtue, her claim to the outrage of her modesty can't be thrown overboard. The incomplete extension of the ingredient Consent has left marital woman to the merciless hands of forceful sexual experiences. In the Mathura case, the Supreme Court acquitted the two accused because the girl didn't cry for help and her helpless silence was taken as her implied consent. Section 375 of the Indian Penal Code has been silent on the concept of rape being extended towards the male and transgender community. Though latent in today's period, male rapes have been existing since ages. Thus, the definition of Section 375 is silent on not being gender neutral.

The judicial loopholes revolve around innumerable pits. Rape being a non-bailable offence, accused often manage to get bail and come out of jail. Best example could be taken in the Unnao Rape Case where the accused were out on bail and committed another heinous crime by burning her alive. Though granting bail is a discretion power of the court, but it does more harm to the victim than benefit to the accused. The proceedings are too slow in administration of justice that either the victim loses her zeal in getting justice or the cases finally conclude in the acquittal of the accused. The conviction rate of accused is at a very low rate of 26% in our country which is in itself a silent slap to the victim who despite of facing all the social stigma maintains a hope for getting justice. Cases needs to be solved within a stipulated period of time so as to increase the conviction rate thereby bringing terror in the mind of culprit. Moreover a law without sanction lacks in it's validity. Reforms need to be brought into effective handling

of such highly sensitive cases where each and every extension of court hearing for the victim takes the form of a long journey towards justice. After all justice delayed is justice denied. The judiciary needs to wake up to have a glance on the grammar that needs to be followed and the entire setup that needs to be built. Law needs to engage itself in the shoes of the victim.

The very same Unnao Case puts an alarming question on the effectiveness of the police personnels in giving adequate attention to the safety of a victim. Investigations aren't carried out on time leading to the loss of evidence that disappear with passage of time such as vaginal swaps, forensic reports, victim statement, sperm on victim's cloth and in crime spot. This calls for a better investigation to impart a proper direction to the trial of the case. Rapes have been committed in moving vehicles which in turn is another question on the alertness of the traffic personnels of our country. Moving a step ahead in this direction, Mission Shakti by the Government of Uttar Pradesh is an applauding step taken in bringing more lady police personnels on duty and an additional cherry to the mission is that of the usage of local language by women in dire need for help. Such steps in increasing number of lady officers on duty would help a woman comfortable enough to share their plights.

The demand for death penalty to rapists might be supported by some and might be put down by some. Law being the chief legal instrument to prevent crime in the society, a demand for stringent legal provisions instead of death penalty should be encouraged. The main motive of law is to bring the victim's life back on track rather than focussing how to completely wipe out the existence of the accused. No country has claimed yet that death penalty has an impact on decreasing the number of rape cases. Remedies such as NGOs who can receive such calls from the victim and walks with her on the path of justice and leads her mentally, physically and emotionally to a new dawn of her life. The motto of such remedies should be to make her stronger as compared to what she was on the day of being raped.

Despite of national uproar, Justice Verma Commission, multiple Parliament debates, stringent laws, no rapist has the fear of the rape laws in India. So what is the point of having such legal system where the provisions can't create fear in the mind of the culprit ? Instead of categorizing the victim and the accused under religious or casteism heads, the political parties and the media

should lean towards imparting justice to the victim and making the offender pay the price of such barbaric act. We as a nation, as Judiciary, as a society have failed to protect our daughters. We

have failed to lighten the lives of the victim and also in taking steps to prevent such occurrences in the future. There are anomalies in our legal system and that needs to be amended. Drafting of rational laws with proper sanction is the call of the day. Monitoring the system and walking the journey with the victim breaking all the social stigmas that has been unnecessarily raised against her would be the first and foremost step towards filling some of the potholes on her path towards a normal life. Our legal system is vague and silent in particular issues, on the other hand certain laws that have been drafted strictly lack adequate enforcement. The legal system has failed to deter the mentality of such people who think they can get away by harming the modesty of a "being". Thus, Surety of punishment rather than Severity of punishment can bring a wave of deterrence in the minds of people who roam around having no fear for the legal system.

IMPORTANCE AND FUNCTIONALITY OF SUSTAINABLE DEVELOPMENT GOALS 2020

- SARANSH SHARMA & SAURAV RAJSINGH

INTRODUCTION

Sustainable Development in its literal meaning states an expression of development that fulfils the needs of the present generation without compromising the growth of future generation. For the implementation of the Sustainable Development a set of goals was created in the year 2015 which are known as Sustainable Development Goals.

Sustainable development goals which are also known by the name of SDG's were created by the United Nations General Assembly. Sustainable Development Goals are the part of resolution 70/1, of the United Nation General Assembly, the 2030 agenda. There are total 17 Sustainable Development Goals to provide a better world for the people and our planet by year 2030. These 17 goals covers all the different aspects of the society including poverty, health, education, sanitation and gender equality.

Remarkably all the members of the United Nations states in 2015 gave their consent to these goals. These Sustainable Development Goals are a call for action by all the countries whether poor or rich or middle-income to promote prosperity while protecting the environment. It is well established by now that ending poverty is directly proportional to the economic growth. Other than poverty, a range of social needs including health education, equality and job opportunities were also recognised as relevant areas for the growth of an economy.

In the layman's term – gender equality means equal rights and status for both men and woman across all the sectors of the society including participation in various decision making opportunities. The decision made by women or men shall be equally valued or favoured. Primary objective of the Sustainable Development Goal is to provide woman and girls, equal

rights and opportunities everywhere in the society and they shall be able to live their life is free of any violence or discrimination. woman's equality and empowerment is not just confined to the Sustainable Development Goal 5 but it is integral part of all the remaining 16 goals. Every Sustainable Development Goal is inter-dependent upon one another and they cannot be read or implement in isolation of other goals.

WHY IS THIS IMPORTANT

Gender equality is not only a fundamental human right but a necessary foundation for the peaceful and sustainable world. Exclusion of women from economic and social development – would mean missing half of the population outside the scope of opportunity to participate in building prosperous societies and economies. Right to education, work and participation in the social and economic decisions is not just for the benefit of the woman, but for the society at large. By investing in the growth and development of the woman, we not only make progress on the Sustainable Development Goal 5, but also gain on alleviation of poverty and fuel peace, justice and sustainable economic growth. This goal aims at eliminating any type of inequality or violence against women in public and private sphere. It also substantiate The equal rights of woman in economic sources and access to ownership of property.

MILLENNIUM DEVELOPMENT GOALS

Sustainable Development Goals are the successor of the Millennium Development Goals. The United Nations Millennium Development Goals are eight goals that were agreed by 191 United Nations Member states to achieve by the year 2015. The declaration on the United Nation Millennium Development Goals was signed in the year 2000 with the commitment of the world leaders to combat poverty, hunger, illiteracy, environmental degradation and discrimination against the woman.

Each Millennium Development Goal originated from the declaration have specific targets and indicators. MDGs provided for powerful method of global mobilisation to achieve various social priorities worldwide. Through consolidating these priorities into set of eight goals and

establishing time of justice. Millennium Development Goals promote global awareness, social feedback and political accountability.

As per the Bill Gates – these Minimum Development Goals are a type of global report card against the poverty from the year 2000-2015. Purpose of this report card is to improve the performance of the countries in the specific areas mentioned in the Millennium Development Goals. The progress of these goals varies from country to country, region to region and goal to goal. Some countries have focused upon the overall growth of this Millennium Development Goals while others have focused upon specific targets.

SHORTFALL IN THE MILLENNIUM DEVELOPMENT GOALS

The shortfall in achievement of the Millennium Development Goal is regrettable and deeply painful for lower income people. There was an operational senior as official development assistance by the rich countries have not been kept. Still progress against the poverty, hunger and disease is notable among the policy maker and civil societies. Millennium Development Goals played an important role in curbing the global poverty and to continue its operational existence beyond 2015, states agreed to create an updated version of these goals by the name of the Sustainable Development Goals.

One of the main target of the Millennium Development Goal - 3 was to ensure that gender equality is achieved across the world, and particularly in most developing countries where the culture is cemented. The development of post millennium development goal framework earlier and first debate concerning sustainable development goals took place in Rio de Janeiro at 2012 UN conference labelled as Rio +20 Summit.

On September 2015, United Nations adopted the development agenda of 2030- *'Transforming Our World'*, which provides for 17 goals in as many as 169 targets. Most of the goals are continuation and expansion of the millennium development goals that were not properly

implemented. The idea of sustainable development goals has quickly gained ground because of the growing urgency of sustainable development for entire world. Therefore it can be interpreted that sustainable development goals represent the new framework taking over its predecessor -minimum development goals.

SUSTAINABLE DEVELOPMENT GOAL – 5 TARGETS.

World recognised the need and importance of gender equality and women empowerment in the Millennium Development Goals, however due to lack of proper implementation and not so favourable results, UN adopted Sustainable Development Goal 5 - Gender Equality.

Implementing new legal framework for woman development in the society is crucial to end gender-based discrimination prevalent across the globe.

TARGETS

1. Eliminating all forms of discrimination against women.
2. Eliminating violence, trafficking, sexual and other exploitation against the woman in the public and private sphere.
3. Abolishing child marriage and female genital mutilation.
4. Social protection policy is to recognise and value unpaid care and domestic work.
5. Ensuring effective and full participation of the woman and equal opportunities for leadership at all levels of decision-making in political and public life.
6. Ensuring universal access to the sexual and the productive health.

SUSTAINABLE DEVELOPMENT GOAL 5 AND WORLD

If we look at the current situation of implementation of SDG-5 across the world, the picture is not very bright. Bangladesh, one of the developing nations has only 36.4% women participation in labour force in comparison to the male counterpart which stands at 83.3%. This disparity

can be reduced by creating more income generating employment for the women and also improving their accessibility to political and social protection.

In the Federal Democratic Republic of Ethiopia, the urban as well as rural women are lagging behind in the field of property, political and judicial rights. It is quite evident from the fact that women farmer who account for more than 75% of the total farm labour in Ethiopia, merely holds actual ownership rights in 18.7% of the total agricultural holding. The Sustainable Development Goal Fund is using a multi-dimensional approach to create gender sensitive agriculture extension service and it is also trying to develop the cooperatives along with initiating more women-owned agribusinesses.

If we shift our focus towards the Palestinian territory, the Sustainable Development Goal Fund Joint Programme is working towards improving the livelihood of the women residing the Palestinian Territory. This joint programme is trying to create women owned and run Micro, Small and Medium Enterprises which will preserve their agricultural product and help them turning it into saleable as well exportable products. Additionally this programme is trying to protect the local production and establishing more benefits and incentives for the women cooperatives.

SUSTAINABLE DEVELOPMENT GOAL -5 AND INDIA

India is one of the most active member of the United Nations and it has made its valuable contribution in the drafting of the Sustainable Development Goals. With regards to the SDG – 5 India has achieved gender equality at primary level of education and is moving fast towards achieving parity at all education level. In contrast to the education level, the participation of the woman in Indian politics is not very encouraging. As per the January 2018 data- The proportion of seats in the Lok Sabha (Lower House of the Parliament) has reached only 5.1% and 9% in the Rajya Sabha (Upper House of the Parliament).

Other than political participation – India is also facing the increasing violence against women. A baseline study revealed that in the capital of India – New Delhi, 92% woman had experienced some form of sexual violence in public places during their lifetime. Shockingly 1/3rd of the crimes against the woman are committed by their husband or close relatives. Ending violence against the women have always been a national priority of the Government of India which there is your nails with the United Nations sustainable development goals.

Various national initiative like *Beti Bachao Beti Padhao* (save the child daughter, educate the child daughter) aims at providing equal opportunities in education for girl child in India. With regards to female employment and empowerment of the adolescent girls the *Sukanya Samriddhi Yojana* and *Janani Suraksha Yojana* has been the initiatives taken by the Indian Government for their commitment to gender equality and Sustainable Development Goal - 5.

There are other types of discrimination which women have to face in the society. For instance, as per the study of Clean Cook Stoves in South East Asia on '*Gender and Livelihood Impact'* Highlighted that approximately 374 hours every year or spent by women for collecting firewood. This time could have otherwise been utilised in production or education work. To counter this problem, Indian government launched the *Pradhan Mantri Ujjwala Yojana* to provide clean cooking fuel in the form of LPG. (Liquefied petroleum gas)

Poor sanitation facility at home and public places also affect the woman disproportionately. There are two major causes behind the same. First- Poor Infrastructure for sanitation and menstrual hygiene. Secondly- Lack of awareness among the women about the ill effects of going to toilet in open area. *Swachh Bharat Abhiyan* has been India's latest response to this prevalent issue. The underlying objective of these schemes and policies is to empower women and provide them legal and constitutional safeguards.

DRAWBACK OF THE SUSTAINABLE DEVELOPMENT GOALS

After the end of 20th Century, the United Nations realized that there is a need to protect our Earth from the existing as well as upcoming challenges. United Nations Developed the 8 Millennium Development Goals (MDGs) which were aimed at developing the whole world by focusing on 8 specific challenges. The primary intent behind the MDGs was to end the world's poverty and providing a sustainable environment for everyone.

The target that were laid down in the MDGs were supposed to be achieved by 2015. Although many of the countries tried to hit a lot of prescribed goals, but still there were quite a many shortcomings. The United Nations then realised the need to modify or upgrade these Millennium Development Goals and finally in the year 2015, replaced these MDGs with the new set of Sustainable Development Goals (SDGs). These goals were more ambitious in nature as they were increased to 17 from the existing 8 goals. Under the SDGs, the prescribed deadline to achieve these 17 Goals is year 2030. This massive project has support of more than 190 Member States along with proactive Civil Societies.

These new SDGs continued the development work of MDGs such as reducing the extreme poverty and hunger. In furtherance to that, now the prescribed goals are more clearer along with a holistic approach. For example, instead of Sustainable Environment, now we have new goals which talks about changes in climate, life beneath water, and clean energy. Other than these modified goals, now we have some additional goals as well which were not part of the Millennium Development Goals like reducing the inequalities to curb the wealth gap, which is getting wider and broader worldwide.

Development is visible in few past years, like Brazil is now investing more on their "Bolsa Familia Programme", which is a social welfare programme that was initiated to reduce the poverty. Low Carbon Economy Fund has been created in the Canada with an initial budget of 2 billion CAD in December 2016. More and More people, specifically the younger generation is being educated about the relevance and importance of the SDGs. It is quite obvious that this young generation will be the main people in the upcoming future to deal with prescribed SDGs. However, every coin has two aspects and same is the case with development of SDGs. Despite of all the good, there are quite a few problem with the SDGs as well. For instance, when an

annual conference was conducted at the 2018 High Level Political Forum to discuss the progress of the SDGs, an NGO Major Group also hosted a parallel event to discuss the problem with the current Sustainable Development Goals. This parallel event was attended by the various representatives of the participating member states and civil societies.

One of the primary drawback that has been brought up again and again is that SDGs are voluntary in nature. There is no binding force behind the same. Although many of the states have promised to achieve the SDGs, there are no checks or consequences if they do not achieve these targets. Till date, Russia and United States of America have performed the poorest in achieving the prescribed SDGs. The reason for the same could be, that there is no incentive for the countries who have achieved these SDGs. It is completely left for their wish and wisdom to achieve these goals.

Second reason for the poor implementation of the SDGs, is the fact that corruption is rampant is the developing and poor nations. It is to be taken into consideration that these SDGs were aimed to uplift the poorer and weaker nations. For the overall development of the world, it is important that such poor nations are provided the benefit of positive discrimination. For this very reason, huge funds are provided to the poor nations to achieve the SDGs, but such funds were never been properly utilized. They were mostly mismanaged and were used for the personal and private uses. However, it is not correct to put all the blame on the poorer and low income countries. Even in case of Developed Nations, the fund is being mismanaged but with a different strategy. Malpractices such as Tax Evasion and Money Laundering hurts a lot of revenues of these major nations. Every year, more than 1.2 trillion dollar is lost due to such malpractices.

Other major drawback with the SDGs is the linguistic differences among the countries. United Nation only operates with six languages. These languages include Arabic, English, French, Mandarin, Russian and Spanish. It is for this reason many of the counties where such language is not spoken by the majority of the population, will find it difficult to translate the SDGs. There is a need for additional efforts and time to make translation and educate such population. Lastly there is no enough statistical data to provide the clear result with regards to the effective

implementation of the SDGs. Most the countries lack departments which are specifically meant to monitor the achievement of SDGs and show data to indicate the progress in relation to these goals.

CONCLUSION

Although every participating member state along with their proactive civil societies are working hand in hand to achieve the prescribed goals of the SDGs, it definitely is not an easy battle. There are still lot of things which can be done differently and additionally to make these SDGs more achievable. Often the collaboration and alliance between the countries to achieve a common target (like in this case – SDGs) is viewed with suspicion because of the fact that most of the time bigger countries try to bully the smaller nations. However, keeping aside all the differences and suspicions, Sustainable Development Goals shall be achieved whole heartedly and with mutually efforts, for the reason that no country can grow alone in this world without the support of each other. It is therefore, of utmost importance that all the states shall come together and work for mutual development.

If we talk specifically about the SDG – 5, it is evident that many countries have made structural changes to their policies to protect the rights of the women. There are few legislations which are specifically made to protect the civil rights of the women. However, poor implementation of such laws and lack of political will is one of the major causes that we are not seeing favorable results as of now. There is a need to create awareness among the people and educate them.

No doubt, that Millennium Development Goals were a great start to a good cause and now Sustainable Development Goals are a way forwards with more states and civil societies becoming part of it. There is ample amount of resources now available to work with. Since, the year 2000, more than 50 millions lives had been changed for betterment and the credit for the same can be attributed to these MDGs and SDGs. Flaws are always intrinsic when we make a move to create a change. However, this doesn't mean that we shall not make a move. It simply means that we need to invest more time and efforts to achieve our set goals.

CRITICAL ANALYSIS OF HUMAN RIGHTS VIOLATION AND REFUGEE CRISISBY DRACONIAN INDIAN LAWS

- SIDHARTH SETHUNATH & SAFAL TOM

ABSTRACT

Human Rights as a concept developed recently, however its roots lie in traditions and documents of several cultures. World War II acted as a catalyst to properly document and validate conventions that promote and shield human rights ascertain inalienable rights that each member of the human society is entitled to. Throughout much of history, folks non-inheritable rights and responsibilities through their membership in a very group–a family, indigenous nation, religion, class, community, or state. Most societies have had traditions just like the "golden rule" of "Do unto others as you'd have them do unto you. "The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Koran (Koran), and also the Analects of Confucius are five of the Oldest written sources that address queries of people's duties, rights, and Responsibilities. Additionally, the Inca and Aztec codes of conduct and justice and an Iroquois Constitution were Native American sources that existed well before the eighteenth century. In fact, all societies, whether in oral or written tradition, have had systems of correctitude and justice similarly as ways that of tending to the health and welfare of their members.

In India, the human, rights defenders faced immense challenges, as well as whimsical arrest, detention, and prosecution as a way of silencing them whereas freedom of expression was expurgated with Draconian laws. Countless indigenous forest inhabitant families were vulnerable with forced eviction. Girls weren't adequately protected against sexual and violence, harassment, and discrimination. There was a heavy lack of responsibility for murders and different attacks disbursed by vigilance man mobs against many individuals who supported their spiritual, ethnic, caste, and gender identities.

In my work, I hope to offer better clarity of the state of human rights and refugee crisis in India.

INTRODUCTION

Human Rights violative laws have been enacted and came to be seen from the establishment of East India Company and there for these acts that created the authority not accountable for their basic human rights are often derived back from the colonial era from 'Bengal Regulation III' 1818, 'Defense of India Act' 1915, 'Anarchical and Revolutionary Crimes Act', is popularly known as *Rowlatt Act* and Section 124 A of Indian Penal Code the seditious infringement charges that have its root from 'Treason Act 1795'. However, because of these acts, the colonial rule all over India was able to have an authoritarian power on the citizens.

These legislations always had to constantly face high levels of criticism, but they were never had been taken into account of the officials who wanted to continue the relentless powers and wanted to dictate the nation. By the end of World War II, the establishment of the United Nations 'UN' and the Universal Declaration of Human Rights 'UDHR' was adopted by the *General Assembly* to provide the fundamental right to individuals during the after math of *World War II* which witnessed the *Holocaust* the catastrophic human rights violation of the 20 the century.

For the first time in the history, the world came together and agreed for a document and a forum globally, that marked out all humans as being free and equal, regardless of sex, color, creed, religion, or other characteristics. The thirty rights and freedoms set out in the 'UDHR' include the right to be free from torture, the right to freedom of expression, the right to education, and it includes civil and political rights, like the rights to life, liberty, and privacy. It conjointly includes economic, social, and cultural rights, like the rights to social insurance, health.[42]

The constitution of the Republic of India while framing its constitution ensured these rights were ensured to its citizen who was facing a protracted amount of suppression by the colonial

[42] UN History of the Document, https://www.un.org/en/sections/universal-declaration/history document/index.html#: -text=The Universal Declaration of Human Rights, which was%2 Adopted by, of the Second World War.

rule and through fundamental rights it had been projected and enforced through *Fundamental Rights*. Although these were enforced and amended in times the impact las been hardly satisfactory. And their implementation of new legislation which was the new born of these parent laws.

However, India continued to host a large population of refugees who were treated well. What is the requirement of ratifying a law, when you are already fulfilling your duty was the question behind the India's objection whereas some experts in the field of South Asian Relations are of the opinion that India in any case is bound by this principle because it is contained in the 1984, Convention against torture, to which India is a signatory.

India is home to diverse groups of refugees, ranging from Buddhist-Chakmas from the Chittagong Hill Tracts of Bangladesh, to Bhutanese from Nepal, Muslim-Rohinygas from Myanmar, large populations of Tibetans and Sri Lankan Tamils and small populations from Afghanistan, Somalia, Sudan and other sub Saharan-African countries. According to the 'UNHCR' factsheet, there were 209,234 refugees, asylum seekers and "others of concern" in India in 2016. The 'UNHCR' financially assisted only 31,600 of them.

But there is sudden shift in the situations with the upcoming and implementation of the 'NRC Bill'. The paper also explains the impacts of the NRC Bill and after effects of the same in the context of the lives of the refugees after NRC Bill. Internal security, change in demographic status, over population and its direct impacts on the GDP are some of the minor areas briefed by the paper.

HUMAN RIGHTS

The basic structure of human rights is based on the following principle:

- **Universal: -** they belong to all of us – everybody in the world
- **Inalienable: -** they cannot be taken away from us
- **Indivisible: -** they cannot be treated in isolation
- **Interdependent: -** they are dependent on one another
- **Non-Discriminatory: -** they should not be respected with prejudice

According to the human rights treaties the government are the primary body to ensure these rights are being protected, but the scope and responsibility doesn't end there. It is the duty of the civil society and other various organization to ensure that these rights and duties are being followed in a country for the welfare of its citizen. In order for the development of a modern welfare society all these bodies have to work together for the promotion and for ensuring of these rights and duties.

'UDHR' states that *"Every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedom and by progressive measures, national and international, to secure their universal and effective recognition and observance".*[43]

Ratification of treaties by a country or government makes them to obliged under the laws and to take appropriate action to ensure these rules and regulation according to the treaties or convention are being upheld and ensured. The government must respect the laws and make sure that they don't violate this law by intruding into the basic rights under the law, they also have to protect them and fulfill their rights to upheld the human rights law for a prosperous nation.

HUMAN RIGHTS VIOLATION

Human Rights defenders faced *Brobdingnagian* challenges to pursue their activities, including whimsical arrest detention, and prosecution as a method of silencing them. The revocation of Article 370 and 35A of the Constitution then, there has been a regular upward shove in human rights violations, however, Kashmiri no longer the only instance of this through the Republic of India.[44] Over 19 lakhs of the population from Assam are removed and were in the catastrophe of statelessness, as a result, they all were alienated been from the (NRC), To add to the current

- [43] UN. OHCHR, "What are Human Rights?"

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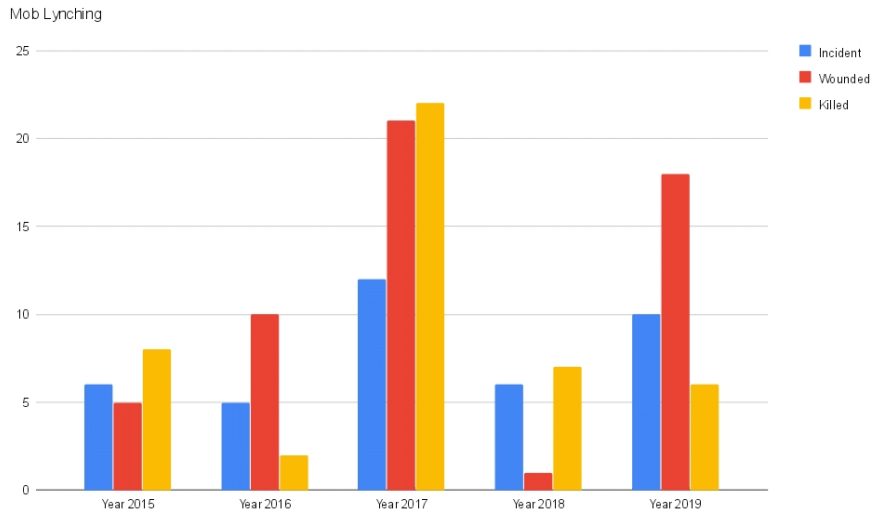
[44] Rifa Fareed, *UN report on Kashmir calls for probe into human rights violations,* ALJAZEERA (Jul. 08, 2019), https://www.aljazeera.com/news/2019/7/8/un-report-on-kashmir-calls-for-probe-into-human-rights-violations.

catastrophe scenario the Citizenship Amendment Act (CAA), which has been criticized for its exclusion of Muslims led to a nationwide protest.

Immeasurable hate crimes against Muslims and other religious groups ethnic groups, including Dalits and Adivasis as well as caste and gender-based crimes occurred in the country and several were carried out by vigilante groups and mobs. Violent attacks included persecution and also the statistics of the rate of execution extremely high.



The marginalized society is the ones who are being got targeted at the hands of the offenders and the officials being mere spectators. The crime pattern shows that the marginalized society is in grave danger as there is no proper maintenance of law and order to ensure their human rights and to up bring them. Then there are set laws which are being used for various motives but all of these are clamping down the basic human rights and violating and putting them in a grave dangerous manner.

Maria Arena who was in the chief panel of European Union said that protests over the Citizenship Amendment Act have led to *"arbitrary detentions and an unnecessary loss of life"*. She said that journalists and peaceful critics were being arrested under *"draconian counter-terrorism and sedition laws"*, adding that the authorities were targeting human rights activists. *"Marginalized communities, religious minorities, particularly Muslims, a vocal and vibrant*

civil society and critics of government policies have been under increasing pressure for a long time".

Progressive International an international civil societal body has commented that *"The use of the investigating agencies to target dissenting political ideologies in India has been a disturbing trend. The two separate cases of the Delhi riots 2020 and the Bhima-Koregaon incident 2018, have cast a wide net and included public figures known for their decades of social, political and democratic work being criminalized and accused under anti-terror and national security laws"*.

PREVENTIVE DETENTION ACT, 1950, (PDA)

CRITICISM:

The (PDA), 1950, was legislation which was the first of its kind stringent to being Inducted in Free Independent India after a century long colonial era which infringed millions of vital human rights. The law had an enormous role to play throughout the country to preserve law and order in the state. However, the law was scarcely used as a means to preserve law instead it was used as a means to deter political dissent by those in power and have led to massive police brutality throughout the country the judiciary has always been in support of the law, where most of the civilized countries across the globe never enacted such laws or gave assent to such legislation.

ARMED FORCE (SPECIAL POWER) ACT, 1958, (AFSPA)

CRITICISM:

In the late sixties, there was a movement been taking place in the eastern part India popularly known as *Separatist Movement* due to the blooming *Naga* insurgency government had to implement new legislation called (AFSPA), It gave the security forces an immense amount of powers which violated the human rights of the people and this has led to innumerable cases of rape, murder and torture of naive human souls. The law had many basic issues like it did not define the distributed area and cannot be under judicial review once it has been declared as a

distributed area. The law bluntly overrides Section 41 CrPC and also Article 21 of the constitution. The act merely paved the way for more inducts to the militant group as the law was not able to give it's the true essence and to maintain peace and stability.

A serious percentage of violation and crimes was reported from the part of security forces and was observed by the Supreme Court in the *Naga Peoples Movement of Human Rights vs Union of India* and the committee report submitted by *Jeeven Reddy Committee* was put aside by the government and another committee was formed *Santosh Hegde Committee* According to the report of the committee "*five out of six kings were encounters fabricated by both the Assam Roles and the Manipur Police The committee also reported the use of disproportionate force and intron of security forces in areas which are not notified as deathbed areas Even the local en found to be encroaching its domain in using lethal force thus mitting the unity granted to security forces"*.

MAINTENANCE OF INTERNAL SECURITY ACT, 1971. (MISA)

CRITICISM:

The draconian law has already been taken its inception and been incredibly helped the government to subdue the voices. As the (PDA), got lapsed and new law came into the force with just a name change and more power to detention (MISA), 1971 was legislated after the lining of the (PDA), Misuse and authoritarian implementation of force were used by the government in power all around the nation by horse human rights denial.

There were massively repressed around the nation and activist, students, political leaders across the nation were put behind the bars without trial and brutally tortured for protesting against the government.

Censorship was imposed by the government on the press due to which the reports of the acts were very much scrambled, there was an immense restriction on major political patient. cineraria and other forms of arts. The loss of millions of went unreported and the tortured by the security personnel were piled up high as there was no one to question it up and the violation of human right was at its peak after the Independence of Republic India.

JAMMU AND KASHMIR PUBLIC SAFETY ACT, 1978, (PSA)

CRITICISM:

The law was introduced by the former chief minister of Jammu and Kashmir Mr. Sheik Abdulla in 1978 to curb the excessive timber smuggling. The (PSA), which was as soon ostensibly brought us an outstanding measure to detain humans who pose a severe and impending chance to security, continues to be used as a choose to the crook justice system. Authorities use the PSA to detain humans suspected of criminal offences towards whom does no longer have enough admissible tools to detain people.

Further, regressive amendments to the Act in 2018 have additionally led to detainees being held in prisons far from their homes, in violation of worldwide human rights standards. Detainees are frequently no longer provided with all applicable substances involving their detention, and shroud of secrecy surrounds the functioning of the Advisory Board, which is mandated to assess the instances of administrative detention below the (PSA), Unlawful detention and torture and different ill-treatment additionally continue to be enabled with the aid of the (PSA),.[45]

Supreme Court Bench headed by Justice Sanjay Lai "*You should address us on two issues What is the maximum period for which a person can be detained and what is your proposal and how long do you propose to continue the detention"* the court was hearing the *Habeas Corpus* petition filed by the daughter of *Mehabooba Mufti.*[46]

Many other prominent leaders were under house arrest and detention for more than 6 months when the bifurcation of Jammu and Kashmir took place. Internet was shut for more than a year

[45] Gorky Bhakshi, *What is Public Safet Act of Jammu and Kashmir: All you need to know*, Jagrangosh (Feb. 07, 2020) https://m.jagranjosh.com/current-affairs/farooq-abdullah-booked-under-psa-know-what-is-public-safety-act-1568696075-1.

[46] A Vaidyanathan, *How Long Can Mehabooba Mufti Be Detained, Supreme Court Asks J&K*, NDTV (Sep. 29, 2020), https://www.ndtv.com/india-news/how-long-can-mehbooba-mufti-be-detained-supreme-court-asks-jammu-and-kashmir-administration-2302559.

due to security reasons and still, the authority hasn't taken any major steps to bring things back to normal. Severe violation of human rights has been taking place in the valley since years and the 40% youth which comprise the population in the valley is facing severe mental and physical torture and are alienated from the rest of the world and media restriction is also being prevailing.[47]

NATIONAL SECURITY ACT, 1980, (NSA)

CRITICISM:

(NSA), the detention orders are ambiguous and do not honestly communicate the crime as a result, like a violation of (UAPA), this imprecise definition approves the government to arrest protesters and human rights defenders in India delaying the giving sincerely cause. The detained person not entitled to any legal aid.[48]

To create matters worse, the grounds of detention are frequently no longer communicated to the person or woman detained in violation of Article 22(5) of the Constitution of India and additionally the International Covenant on Civil and Political Rights, to which India is additionally a signatory.[49]

Moreover, the National Crime Records Bureau (NCRB), which collects crime data in India. doesn't include cases under the National Security Agency as no FIRS are registered in Jan 2019, Uttar Pradesh 3 persons beneath NSA were arrested in connection with an alleged cow-slaughter case.[50]

Dr Kafeel Khan who was booked under IPC 153A 1538 and 505 (2) by (NSA), for hate speech in Aligarh University during the (CAA), protest and was kept in detention for around 7 months without any proper evidence against him. The Allahabad High Court quashed his detention and

[47] Rifa Fareed, *Key Kashmir political leaders arrested by India since August 5,* ALJAZEER, (Aug. 17, 2019) https://www.aljazeera.com/news/2019/8/17/key-kashmir-political-leaders-arrested-by-india-since-august-5.
[48] Simran Kashyap, *Explained: What is National Security Act*, oneindia, (Jan. 19,2020), https://www.oneindia.com/india/explained-what-is-national-security-act-3017152.html.
[49] ICCPR www.treaties.un.org.
[50] Saurab Sharma, *Indian state uses draconian law to detain those accused of killing cows,* Reuters, (Sep. 11, 2020), https://www.reuters.com/article/us-india-crime-idUSKBN2621HC.

said "*Neither detention of Kaleel was under (NSA), 1980 nor extension of detention are sustainable under the eyes of the law"*.[51]

(NSA), has been used as a tool by those in the power to shut the mouth of those who speak against the regime. The dilemma has turned into an awful manner in the last 6 years. As of (NCRB), report of 2017 and 2018, there have been more than 1500 people detained under the act were 563 are still in custody and the rest of them were released Madhya Pradesh and Uttar Pradesh makes up 90% of these cases. Detention laws like (NSA), are adopted so sparingly without any sufficient proof to curb the liberty of the accused.[52]

TERRORIST AND DISRUPTIVE ACTIVITIES ACT, 1987. (TADA)

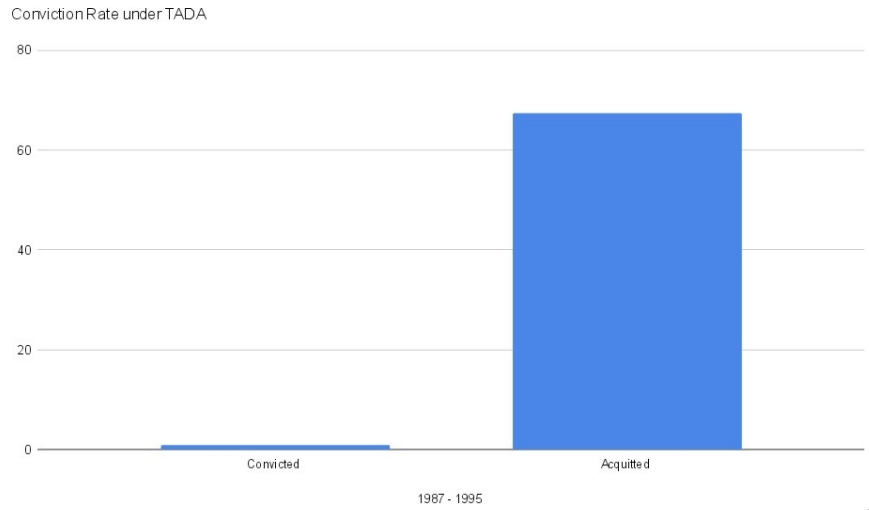
CRITICISM:

Due to the growing insurgency in Punjab popularly known as Khalistan Movement, a new law was enacted. The law gave the government and the security forces enormous power to suppress the agitators across the nation.[53]

The legislation violated the international standard of fair trial as the trails were done in secretive manner and identity of the witness secret Instead of the judicial magistrate, the detainees can be brought before the executive magistrate who is an administrative officer or an official of the police.

The law was widely manipulated by the security officers and weaponized against the minorities across the nation and massive amount of violation was reported and the statistic of the conviction rate tells us the legislation was failure to maintain peace. The percentage of conviction was merely 1% and the rest of the were acquitted.

[51] Omar Rashid, THE HINDU, (Sep. 2, 2020)
[52] Rana Sakil, THE NEW INDIAN EXPRESS, (Sep 21 2020).
[53] Unlaw Activities Prevention Act, www.mha.gov.in.



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UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967, (UAPA) AND SEDITION LAW

CRITICISM:

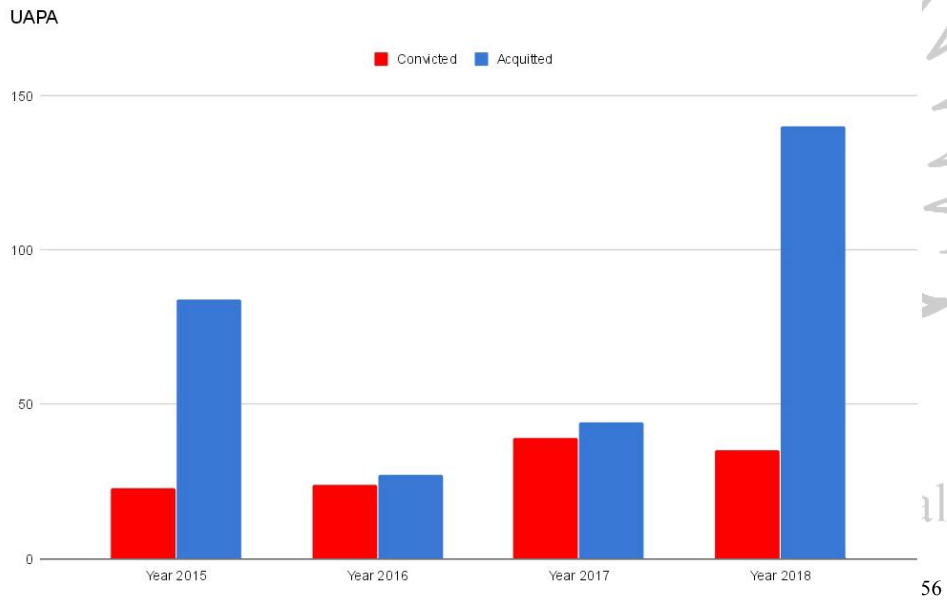
According to the legislation, any unlawful activity is an act of terrorism. Broad discretion in the law had made quite a variety of types of legit public protests towards authorities excesses or inactions over the years are represented as terrorist things beneath below this legislation.

Unlike the traditional legal guidelines of India, humans can be held in detention except for the cost for up to a hundred and eighty days or perhaps greater below the UAPA, below the worldwide standard of the period of detention. Until 2019, only membership to both unlawful associations and terrorist organizations was a criminal offence beneath the (UAPA).

This was once challenged during a series of instances before the Supreme Court of India, which noted that "*criminalization of mere membership of an organization constitutes an unreasonable limitation on the right to freedom of association, till such membership leads to or incites violence"*.

[54] National Crime Record Bureau, www.ncrb.gov.in

In July 2019, in an unprecedented flip of events, the ambit of (UAPA), was expanded and it was amended for permitting the authorities to designate a character as a terrorist besides trial.[55] Besides being in absolute violation of worldwide human rights regulation and also the Constitution of India, this modification opened the floodgate to more harassment of human rights defenders and activists. (UAPA), has turned out to be a tool for the government to keep the suspect in jail for a protracted period of time. According to the National Crime Records Bureau, in 2018, over 93 of cases under (UAPA), has been pending before the courts whereas the conviction rate only 27% this means that anti-terror trials seldom outcome not often convicted. Add to this, the strict bail provisions below the (UAPA), and sluggish investigatory method the law even more draconian.



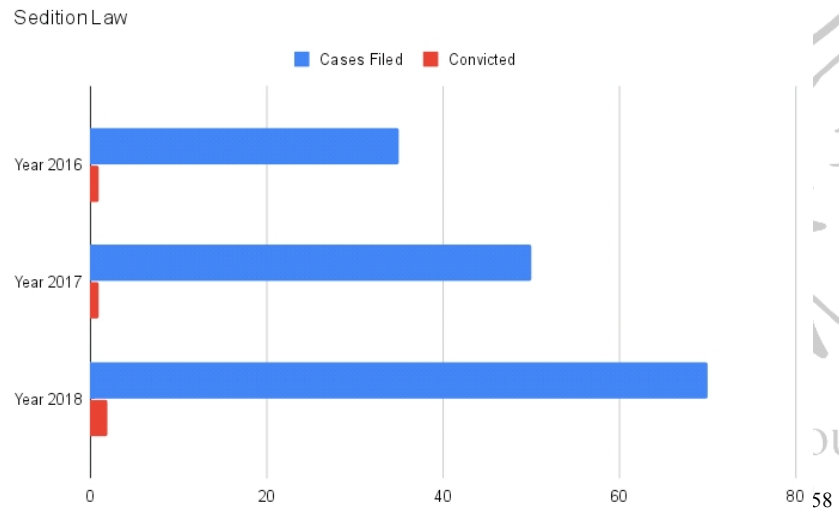
[56]

(UAPA), in recent time has been subjected to creating panic among people who speak against the government. In the recent 4 years, (UAPA), has been charged on various scholars and students across the nation whoever speaks or raise voice against the government. This stringent

[55] Ruchi Taneja, *UAPA Amendment Bill 2019: All You Need To Know About Anti-Terror Bill,* NDTV, (Aug. 2, 2019), https://www.ndtv.com/india-news/uapa-bill-2019-all-you-need-to-know-about-anti-terror-bill-2079395.
[56] National Crime Record Bureau, www.ncrb.gov.in.

law is used as a spear by the government to halt the actions of the agitators. One of the major shortcomings shows that in the reason time the conviction rate is very low as it's been used to charge people without proper evidence.[57]

Sedition was inducted to repress the independence struggle movement the dark contrast of the law is that, though it was abolished in Britain in 2009 country and the legislation still prevails in a country who fought against these laws and colonial regime. The National Crime Records Bureau data shows that the seditious charge is being manipulated to impose the draconian law on the human rights activist, political leaders and students who are being vocal and protesting against the regime. From the pre independence case of The *Queen-Empress vs. Bal Gangadhar Tilak* till the *Kanhaiya Kumar* case the dilemma lingers with injustice and freedom of expression.



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This is despite the judiciary's consistent upholding of every citizen's right to fairly and justly criticize the inactions and inadequacies of the Government. The Supreme Court of India, in a landmark judgment of *Kedar Nath Singh v. State of Bihar (1962)*, had ruled that citizen has a right to say or write whatever he likes about the Government or its measures, by way of

[57] THE WIRE Apr. 27, 2020 www.thewire.in
[58] NCRB.

criticism or comment so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.

Mahatma Gandhi in 1922, after being charged with sedition by the British Government for an article published in the local magazine had said "*Section 124the A under which am Supply charged is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of a citizen"*.

Aseem Trivedi vs State of Maharashtra (2012), the court observed that "*A citizen has right to say or write whatever he les about the Government, or its measures by way of criticism or comments, so long as he does not incite people to violence against the Government established by law or with the intention of creating public order*". [59]

Sedition laws or laws, in general, are legislation which has to be evolved over time and the laws cannot be stick on to the past for mere benefits India even after being independent for 73 years has don't repeal the law on sedition as ruling parties still use it as a weapon of suppressing dissent. There are several discussions relating to the removal of the act as its Colonial Law that was utilized by the British on Indians throughout the independence struggle India has been a recent witness to the unprecedented use of the violation law throughout lockdown once the law was accustomed to mute voices questioning the failure of the government and lack of preparation whereas, imposing internment.[60]

RIGHT TO TRUTH AND SUPPRESSION OF TRUTH

It was during the 10970's the Right to Truth gained its importance due to the mass human rights violation in the Latin America, it attained the legal scope was thus established on the basis of *Inter-American Court of Human Rights* and other courts. Manuel v. Ecuador 1995, was the first case were right to truth was litigated for the very first time, when the commission asserted that the Ecuador has violated its duty to provide truth and justice to the victim's family. In 1998 the commission observed in the case of against Chile for its mass killings and violation of human rights that *"every society has the right to know the truth about past events, as well*

[59] Sara H, *Aseem Trivedi v. State of Maharashtra*, HOMEGROWN (Feb. 18, 2016), homegorwn.co.in.
[60] THE HOOT, (Mar. 18, 2015), asu.thehoot.org

as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetitions of such acts in future".

Former General Secretary of United Nation Mr. Bankee Moon said that *"knowing the truth offers individual victims and their relatives a way to gain closure, restore their dignity and experience at least some remedy for their losses".*[61]

Additional Protocol I to the Geneva Conventions, of 12 August 1949, gives the scope and basis of the right to the truth. In terms of the human rights violations for which the question of the right to the truth arises, international human rights bodies have recognized the right to the truth in cases of gross violations of human rights. In particular enforced disappearances, extrajudicial executions and torture and serious violations of 'IHL'. This is supported by the jurisprudence of international and regional human rights bodies and courts.[62]

The importance of Right to Truth is a matter of concern as there have been mass number of extra judicial execution, missing of peoples in the Kashmir valley and in the North Eastern India in the name internal security issues. There has been a recent onslaught of NGOs and other human rights organization for critiquing the government stance on human rights issues and disclosing the humiliating violation of human rights in Kashmir and Delhi Riots.[63]There has been a recent shutting down of major human rights organization in India due to frequent intervene by the law enforcement departments and other central forces by the legislation of 'FCRA Law', the operation of human rights organization would be into tremendous deterioration as the clauses in the legislation makes it impossible for the functioning of such institutions.[64]

[61] *Right to truth what is and why does it matter,* Enough Project, https://enoughproject.org/blog/right-truth-what-it-and-why-does-it-matter.

[62] UNDOG, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement.

[63] Sameer Hasir, The New York Times (Sep. 29, 2020).

[64] Haripriya Suresh, The NEWS Minute, (Sep. 22, 2020).

NON-RATIFICATION OF THE REFUGEE CONVENTION, 1951

There is no doubt about the fact that India was under severe pressure and has faced immense criticism for the non-ratification of the Convention. But India has been seen very sensitive to this issue and always played the game of diplomacy and tackled the pressure for the ratification of the convention. One of the most reasons for the non-ratification by India is the undeniable fact that the confirmation can mean bigger obligations obligatory on India to provide additional rights and privileges to its refugees. This can be out of the question for a poor and developing country like India that struggles to provide basic amenities for its own population.

We have been facing the matter of infiltration and terrorist act from our neighbors ever since partition that the Western nations fail to acknowledge or perhaps take into account as a haul. The policy-makers believe that if India ratifies the convention, this drawback can increase manifold and there'll be no legal mechanism to differentiate between an infiltrator and a real refugee. This argument stems from the assassination of P.M Rajiv Gandhi by a Sri Lankan national who came to India as a refugee. Such peculiar and sophisticated problems don't seem to be mentioned anyplace within the convention that threatens our national security and sovereignty. It's conjointly contended that the convention was written way back in 1951 and also the protocol in 1967, most of the provisions are obsolete as they fail to accommodate the up-to-date challenges.

A large number of people migrate to India in search of opportunities which increase the burden on the economy. Geopolitical issues are also a major concern as India's history with its neighbors is part of the dark era which began with the partition of 1947, so as a result the ratification my make it difficult for India to take any stern action to prevent infiltration and terrorism. So, India is adamant regarding the convention and the talks regarding the same is leading nowhere.

LAWS GOVERNING REFUGEES

We have a number of domestic legislations in force to deal with refugees. India draws no distinction between a "foreigner" and a "refugee". And this gives rise to a plethora of problems which will be highlighted subsequently. The laws are:

- Passport (Entry into India) Act, 1920.
- Passport Act, 1967.
- Registration of Foreigners Act, 1939.
- Foreigners Act, 1946.
- Foreigners Order, 1948.

The Passport (Entry into India) Act, 1920 and The Passport Act, 1967makes no distinction between genuine refugees and other categories of foreigners like economic migrants, tourists and students. As a result, the refugees run a big risk of arrest by immigration authorities and illegal deportation in the absence of a valid passport.[65] Penalty should not be imposed on refugees because they may leave in turmoil not have the time to get a passport issued. In most of the countries, access to passport offices may not be possible due to distance and lack of infrastructure.[66] Once the refugee enters the Indian Territory, they may get valid passports and identity cards if the public interest criteria is fulfilled.[67]

But so far only Tibetan refugees have been issued valid passports. The reason for their "privileged treatment" is that their political and spiritual leader too resides in India and they have their parliament on the Indian soil. Some scholars criticize because it hampers the sovereignty of India. The reasoning may be that in order to protect national interest, no refugee is given the fundamental right to freedom of movement or issued an identity card. Also, it causes trouble for refugees to open bank accounts, obtain ration cards or rent accommodation because they have no identity.

This is contradictory in nature because the constitution does not guarantee freedom of movement but the administration may give this right based on a case-to-case analysis imposing

[65] Bimal N Patel, *India and International Law*, (2005 edn), Martinus Nijhoff Publishers, 2005.
[66] Article 31 of the Refugee Convention.
[67] Section 20 of the Passport Act, 1967.

reasonable restrictions. This clearly violates the equality principle as all refugees should be treated alike on Indian soil. The Registration of Foreigners Act, 1939 empowers the Central Government to make rules for foreigners. Where and whom to report, provide proof of identity and registration certificate.[68] This law should not be applicable to refugees as they have already suffered at the hands of their Government and these burdensome technicalities add to their agony.

Furthermore, the power of Central government is used in an arbitrary manner to harass genuine refugees and there are no checks to curb this power. The Foreigners Act, 1946 places some more restrictions on refugees like defining whom to meet and the routes only through which they can enter the country.[69] One of the biggest criticisms of this act is that the authorities have "unlimited power" to arrest and detain any foreigner on mere suspicion for non-compliance under this act. Though the court tried to restrict this power by stating that in order to penalize, there should be actual contravention of provisions.[70]

Unfortunately, more and more refugees continue to be detained on frivolous grounds and they are not released for long durations. Lastly the Foreigners Order, 1948 authorizes the State government to "grant or refuse" a foreigner entry into the Indian territory on grounds like invalid passport, unsound mind, public safety or is detected suffering from a "loathsome" disease. The civil authority can refuse permission if the formalities are not fulfilled under the Foreigner Act.

This rule is malefice and arbitrary because the condition of a refugee is different and he deserves to be treated on compassionate grounds having the human rights perspective. Common parlance is that most of the refugees are detained in transit areas, prior to their entry in India. These transit areas are mainly airports, sea coasts or land specifically earmarked for

[68] R. J .S. Tahir (eds.) Ragini Trakroo Zutshi, Jayashree Satpute, Md. Saood Tahir: Refugees and the Law, 2edn, HRLN, 2011, pp 78

[69] Ibid, pp 79

[70] *Kallan Khan v. State 1961 (1) Cr. LJ 584, para 13*

this purpose and they are treated as "International Zones" where the domestic law does not apply.

In this scenario, a refugee can only seek administrative remedies and not legal remedies as he is deemed to not have entered the territory of India officially.[71] When such a case is handled by bureaucrats or custom officials, they lack legal knowledge and competence which poses a great danger of deportation and ultimately persecution of the refugees. This leads to violation of principles of nonrefoulement.

The Indian Penal Code makes no distinction between nationals, refugees or foreigners.[72] A refugee may be penalized for cheating, fabricating documents and forgery.[73] Often, the concerned authorities are inconsiderate to the compelling factors of refugees and the genuine reasons why they don't possess valid documents. According to the researcher, IPC should not be applicable to refugees at all.

PRINCIPLE OF NON-REFOULEMENT

According to this principle, no country shall deport, expel or forcefully return the refugee back to his original territory against his will or if there is a reasonable threat to his life, liberty and freedom.[74] This is definition is not absolute, it is subjected to the scrutiny of "national security" and "public order". There is enough evidence and State practice to conclude that principle of non-refoulement binds all states as it is a part of customary international law and no opposition to the same has been found. India abides by this rule explicitly through various case laws.

In the landmark case of *Ktaer Abbas Habib Al Qutaifi v Union of India*[75], the Gujarat High Court upheld the principle of non- refoulement under the wide umbrella of Article 21 of the Indian Constitution and decided not to deport the two Iraqi nationals to their original country

[71] R. J .S. Tahir (eds.) Ragini Trakroo Zutshi, Jayashree Satpute, Md. Saood Tahir: *Refugees and the Law*, 2edn, HRLN, 2011, pp. 137.
[72] Ibid, pp. 85.
[73] 416, 420, 463, 464 of IPC, 1860.
[74] Article 33 of the 1951 Refugee Convention.
[75] 1999 Cri LJ 919, para- 3.

as long as they had a fear for their life and liberty. Instead, they were handed over to 'UNHCR' in India. In another case, a stay order was passed on deportation of Burmese refugees on similar grounds.[76]

We can simply comprehend that non-refoulement principle is a peremptory norm and isn't hooked into the approval of any accord or convention for its application. This principle comes into force as shortly because the refugee is unwilling to travel back to the parent country as a result he fears a "threat to life." However, there are mass violations of this principle, wherever despite the threat; State passes an inaccurate order for deportation citing unwarrantable and featherbrained reasons.

In most cases, it's up to the whims, and fancies of the government. Whether to stay an expatriate to throw him back to his country wherever he cannot escape death and torture. In these cases, individual criminal responsibility ought to be obligatory, and also the persons ought to be impeached. One of all the criticisms that despite being a customary international law and utmost importance, non-refoulement principle is often profaned by the western countries, and still manages to flee with clean hands. Once a refugee is forcefully sent back, factors just like the diplomatic relations between the host country and also the original country, the economic dependency, and international pressure are liable for it.

Lastly, this principle Geneva convention, refugee convention and additional protocol of 1967. Currently we only have the Refugee and Asylum (Protection) Bill, 2009. The model law clearly defined the rights and duties of refugees and protection to be given to them by the State. India can thus be considered in a paradoxical state- on one hand it refuses to ratify the already existing Refugee Convention and on the other hand, it does not pass its own independent legislation. To top it all, it continues to allow large influx of refugees from all across the globe to enter India.

National Human Rights Commission, State Human Rights Commissions and Human Rights Courts have been established in India under the Protection of Human rights Act, 1993. As per

[76] *Malvika Karlekar v. Union of India* Supreme Court Case 1992, Crl. WP No. 243 of 1992.

this act, they have the powers of a civil court and can *suo moto* inquire into any petition; interfere in the judicial proceedings protecting the party from human right abuse, study treaties and prepare reports.[77] They have been actively involved in the protection of refugees since inception. In 1994, the NHRC gave directions to the Govt. of Tamil Nadu to provide immediate medical treatment to Sri Lankan refugees who were put in camps.

But how far did the refugees receive medical aid is a debatable issue as most of it is just on paper. In the year 1995, a PIL was filed by the 'NHRC' on behalf of the "Chakma" refugees who hailed from Bangladesh way back in 1965 and were residing in Arunachal Pradesh. The 'NHRC' founded that the State Government is acting in accordance with the AAPSU (All Arunachal Pradesh Students Union) and threatening Chakmas. The Supreme Court intervened with the liberal interpretation of law to suggest that refugees are the "class apart" from foreigners and they are to be protected under Article 21 of the Indian Constitution and they cannot be evicted from their domestic households. The court emphasized that the State is under an obligation to protect the life and personal liberty of every human being thus abiding the principle of non-refoulement.[78]

This case also highlights the issue of local agitation. India has been a witness to many clashes between the refugees and the locals. The main contention of the local population is that refugees have more facilities despite being outsiders. They have better access to amenities like medical facilities, food, water, education, financial assistance and protection than the local population of that particular State. After the Rajiv Gandhi assassination, India became hostile to Sri Lankan refugees and atrocities were committed upon them despite their protected status. The government was also responsible for forceful repatriations thus violating the principles of nonrefoulement.

NHRC proposed a model law for refugees under the guidance of Justice PN Bhagwati in 2000 but unfortunately that has not seen light till this date. It also proposed changes in the outdated

[77] Article 12 and 13 of the Protection of Human Rights Act, 1993.
[78] *National Human Right Commission v State of Arunachal Pradesh,* Supreme Court of India 1996, AIR 1996 SCC 1234.

Foreigners Act, 1946 which deprives refugees' rights as guaranteed under the Geneva convention, refugee convention and additional protocol of 1967. Currently we only have the Refugee and Asylum (Protection) Bill, 2009. The model law clearly defined the rights and duties of refugees and protection to be given to them by the State. India can thus be considered in a paradoxical state- on one hand it refuses to ratify the already existing Refugee Convention and on the other hand, it does not pass its own independent legislation. To top it all, it continues to allow large influx of refugees from all across the globe to enter India.

CONCLUSION

Human Rights violation through the legislation of draconian laws can be seen in India a country which is a member of the United Nations and the international regulation is never been maintained by the authorities in power. Though the repressive and detention laws were introduced by the British in India the dark contrast is these laws are still prevailing and the government in power have relentlessly used it throughout its course of action with innumerous times.

The evils which we tried to broom out from the nation is getting embedded in the minds of people and are creating a sense of hatred towards others and leading to a basic denial of rights. The government in power is using all the authoritarian legislation to quell reality, Immediate action by civil society through acknowledgement and awareness programs should be a way out of this.

Human Rights are the basic principle of the country and it has to been maintained as it paves the basic structure of the constitution. A prosperous environment with healthy legislation, equal freedoms, the patience to listen to the critique and also to discuss out the problem to accomplish a promising outcome is the part of a healthy modern democracy.

The recent trends with the upcoming of NRC and Citizenship Amendment Bill has brought several controversies to the light as the refugee status was questioned especially when some of the citizens protected by the Indian Constitution became refugees overnight. Also, when the

discrimination by the Government of India on the basis of religion was a daring act and will always remain as dark spot in the history of the world's largest democracy.

Domestic law is needed in India to ensure that all refugees are given basic protection. Without that, refugee rights are not righting in the real sense, they are simply privileging at the hands of the administration. Special provisions guaranteeing protection to women and children should be made because in the Indian society, crimes against women (rape) and children (child trafficking) are at its peak. This will even be in consonance with India's obligations below CEDAW and UNCRC.

India could be a major power in Asia, thus it's an inclination to "dominate" over different nations. In such a case drafting a South Asian Refugee convention is going to be of great significance to make sure refugee protection. The convention is often written by specialists from all countries highlighting their specific problems with reference to the refugees based on the understanding of every nation. During this approach, the convention can reflect the background of each country.

"*No one is born hating another person because of the color of his skin or his background or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love for love comes more naturally to the human heart than its opposite*"

- Nelson Mandela

SINGAPORE MEDIATION CONVENTION: A BOOST TO THE INTERNATIONAL MEDIATION REGIME

- IRA KUMAR

ABSTRACT

While mediation emerged as one of the appealing dispute resolution alternatives owing to its simpler and amicable approach to justice, as opposed to the complex traditional route of litigation, the question of enforceability of the settlements, especially in international commercial mediation has kept the people from fully realising the potential of mediation as a favoured ADR mechanism, hindering the growth of mediation globally.

This paper seeks to analyse the impact of the Singapore Mediation Convention on the global mediation regime. It looks into the purpose leading to the introduction of this Convention. It further examines the scope of the Convention by looking into mediated settlements to which the Convention applies, settlements excluded from the ambit of the Convention, the formalities to be satisfied etc. Through this examination the paper seeks to establish the legal framework provided by the Convention while highlighting the uncertainties which need to be addressed. The paper further highlights the implications of this Convention. It concludes that while this Convention is a much-needed boost for the future of international mediation, it still remains to be seen how the states adopt the Convention, strengthening the existing legal framework, both domestically and internationally, paving way for more people to avail the benefits of this method of dispute resolution.

I. INTRODUCTION

The Singapore Convention on Mediation or the United Nations Convention on International Settlement Agreements Resulting from Mediation is much in news for being lauded as a milestone for cross-border dispute resolution. From entering into force from 12 September, 2020, the Singapore Convention on Mediation is now being looked up to as the guiding light

towards the development of international trade and the growth of international commercial mediation.

Providing for an efficacious legal framework that is congenial and structured, the Convention seeks to change the mediation landscape globally by not just promoting mediation as an effective way of resolving commercial disputes but also by making the enforcement of cross-border commercial mediated settlements possible. The Convention has started strong with 53 signatories and 6 parties ratifying it till date.[79]

Apart from the existing conventional methods of resolving disputes, this Convention especially highlights mediation as an alternative to litigation for settling commercial disputes. Mediation has gained acceptance as one of the alternate methods of dispute resolution where the parties in dispute are assisted by a mediator in arriving at an amicable settlement that is agreeable to both parties, this win-win settlement ensuring that a conductive relationship between them continues. The voluntary, confidential and interest-based approach of this process further adds to its value.

The Convention offers a stable and harmonious solution for international commercial disputes in the form of a legal framework that caters to the interest of all states with varied legal and economic backgrounds, and promotes mediation as an alternative to the traditional legal recourse of litigation, highlighting its benefits like cost-effectiveness and the amicability of the settlement.

II. PURPOSE OF COMING INTO BEING OF THE SINGAPORE MEDIATION CONVENTION

What Led to The Singapore Mediation Convention?

[79] *Singapore Convention on Mediation enters into force*, THE HINDU BUSINESS LINE, (Oct. 2, 2020, 10:30 AM), https://www.thehindubusinessline.com/economy/singapore-convention-on-mediation-enters-into-force/article32586701.ece

The biggest impediment to the wide acceptance of mediation as a legal recourse especially in international disputes has been the absence of a legal framework for enforcing the settlement reached through mediation. Before the Singapore Convention on Mediation came into force, any party aggrieved by the breach of the mediated settlement could only bring into force the settlement agreement as a contract, by going back to litigation or arbitration depending upon the chosen method of re-course in any case of breach of settlement. Only after obtaining either the court's judgment or arbitral award from arbitration proceedings, could the same be enforced. Further issues which plagued the enforcement of the mediation settlement were the jurisdictional issues. In cross-border cases, where the agreed method of legal re-course on breach of mediated settlement took place in a jurisdiction other than that of the aggrieved party's, the enforcement of the court's judgment or the arbitral award, from the re-course, in another jurisdiction posed a challenge[80].

This lack of a mechanism addressing the international enforcement of mediated settlements acted as an obstacle for wide acceptance of mediation as a legal re-course. Parties were reluctant to engage in mediation because even after investing a significant time in reaching a mediated settlement, in case of any breach, even a successfully mediated agreement loses its value as its enforcement ultimately led the aggrieved parties back to either court proceedings or arbitration[81]. Despite mediation having certain advantages like faster and low costs, amicable settlement, confidentiality etc. the lack of easy international enforceability still made it a less favourable method of dispute resolution[82].

While there existed other international legal frameworks like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[83] (New York Convention, 1958) and

[80] Joachim Delaney, *Singapore Mediation Convention*, BAKER MCKENZIE, (Oct. 2, 2020, 10:30 AM), https://www.bakermckenzie.com/en/insight/publications/2019/08/singapore-mediation-convention

[81] International Institute for Conflict Prevention and Resolution (CPR), UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 62nd Session, Feb. 2, 2015, 15:00-18:00, (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/b62a662a-2fa7-452b-9b04-9c4587c4e032

[82] Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements,* 19 PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL (2019)

[83] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958.

the Hague Convention on Choice of Court Agreements[84] which make the international enforcement of dispute resolution methods easier by providing internationally legitimate mechanism, a gap existed for international mediated disputes. The New York Convention established arbitration as the more preferred form of alternate dispute resolution by providing for the enforceability of the arbitral awards in the signatory states. This Convention internationally legalised arbitration which resulted in a boost in resorting to arbitration for international commercial disputes[85]. Taking a cue from the international acceptance of arbitration as an effective alternate to traditional litigation, supporters of mediation proposed a legal framework that would provide the much-needed boost for mediation like the New York Convention did for arbitration.

The Singapore Convention aims at boost imperatives for the parties in dispute to seek mediation as an alternative to traditional dispute resolution methods. It seeks to promote incentives for recourse to mediation in international commercial disputes resolution.

III. SCOPE OF THE SINGAPORE CONVENTIO ON MEDIATION

Article 1 of the Singapore Convention defines the extent of the legal framework. All mediated settlements of an international commercial dispute, not falling under the exclusions provided, are covered under the Convention.

A. 'Mediated'

The Convention defines mediation as a process where the parties seek an amicable, non-confrontational approach to the settlement of the dispute, facilitated by a mediator, who merely

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[84] Convention On Choice Of Court Agreements, 2005, HCCH, (Oct. 2, 2020, 10:30 AM), https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

[85] Carrie Shu Shang & Ziyi Huang, *The Singapore Convention in light of China's Changing Mediation Scene*, SSRN ELECTRONIC JOURNAL (2020), (Oct. 2, 2020, 10:30 AM), https://www.researchgate.net/publication/339996386_Singapore_Convention_in_Light_of_China's_Changing_Mediation_Scene

assists them and does not have any authority to impose any solution on the parties.[86] By adopting a broader definition of the term, the Convention seeks to bring under its umbrella all types of processes, and places 'mediation' and 'conciliation' on the same pedestal[87].

The ultimate objective of promoting mediation as a form of dispute resolution is reflected in the broad meaning attached to the term. Irrespective of the formality of the process of mediation, all processes, structured or informal, before a mediator resulting in an amicable settlement of dispute are covered under the scope of the Convention. The formal character of the mediated settlement is guaranteed through the requirement of it being in writing and signed by the parties[88]. Further, the rationale behind the mediation process is irrelevant for the application of the Convention[89].

Thus, it is observed that as long as the parties in dispute reach an amicable settlement as a result of the mediation process, facilitated by the mediator, the settlement is considered 'mediated' under the Convention.

B. 'International'

The international aspect of the mediated settlements is dependent on the identity of the parties in dispute. The settlement is deemed international if the parties have different places of business, in separate states. If they operate their businesses from the same state, the settlement would still be deemed 'international' if the state of business is different from the state in which 'substantial part of the obligation' under the settlement is performed, or if state connected to the subject-matter of the settlement agreement is different from the state of business[90]. If a

[86] Singapore Convention on Mediation, Art. 2(3).

[87] U.N. Comm'n on Int'l Trade Law, Report of Working Group II (Arbitration and Conciliation) on Its Sixty-Third Session, U.N. Doc. A/CN.9/861 (2015)

[88] Switzerland and the Russian Federation, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 20, 2016, 9:30-12:30, (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/f5c9b0ea-5f54-4158-a198-d0ea83b3c9a3

[89] European Union, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 12, 2016, 14:00-17:00, (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/16f5401a-84d4-407a-a63b-06511666b2d9

[90] Singapore Convention on Mediation, Art. 1(1)(b)(i) & (ii).

party has multiple places of business, the place having the relevant nexus to the mediated settlement shall be deemed as the place of business.

The 'international' character is not dependent on the origin state of the mediation process. Unlike the New York Convention, origin states of settlements are identified for the arbitral wards, this Convention's scope has no link with the seat of mediation or state where the relief is sought.[91] This interpretation of the term 'international' provides that the mediation process and the settlement are not limited by the domestic laws of the origin state to be covered under this Convention. They are included under the scope of this Convention even if certain domestic legal sanctions are violated by them.

C. 'Commercial'

Only commercial disputes fall under the ambit of the Convention. Unlike the New York Convention, the term is not defined in this Convention. However, a similar interpretation of the term is proposed.[92]

D. Exclusions from Ambit under the Convention

i) Nature of Disputes

Regardless of the other requirements, if a mediated settlement is for a dispute arising from any personal, family or household transaction by a party, it is not included under the ambit of the Convention. Further by specifically mentioning consumers, consumer disputes were left out of the scope of the Convention.[93]

Further, sensitive disputes from family law, inheritance and employment laws were excluded from the scope of the Convention to avoid over-lapping jurisdictions with the Hague

[91] *supra* note 4

[92] Israel, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 7, 2015, 14:00-17:00, (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/fddff329-92fc-4e86-8031-96f7b0f9586d

[93] Canada, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 64th Session, Feb. 2, 2016, 15:00-18:00, (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/78856852-7d27-4057-b645-c81666d0f33b

Conference on Private International Law[94] and avoid situations where the parties might be on unequal bargaining footing.

ii) Settlements from mediation enforceable as Judgments and Awards

It was to avoid the situation whereby the parties were afforded two routes of seeking relief for the same mediated settlement as this issue was already provided under the Hague Conference instruments, mediated settlements enforceable as judgments were excluded from the Convention[95]. Mere involvement of a judge did not exclude a mediated settlement. The settlement to be enforceable as a judgment should have been approved or ratified by a court. This 'approval' however covered only situations where the parties sought court's ratification and did not seek any relief. This did not include situations where the enforcement of the mediated settlement was sought before a court in case of a breach as it would defeat the purpose of t his Convention.

The exclusion of arbitral awards applies only to those mediated settlements that are not just enforceable but also recorded as arbitral awards. While the overlap in case of settlements enforceable as judgments was not a necessity, the overlap with the New York Convention by not excluding settlements enforceable as awards would have further resulted in gaps in the framework[96].

E. Formality Requirements

Article 4 of the Convention provides for a minimum standard of formal requirements to be adhered to by the parties seeking relief based on the mediated settlement.

[94] Hague Conference on Private International Law, *Family Agreements Involving Children*, HCCH, (Oct. 2, 2020, 10:30 AM), https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-ofagreements

[95] European Union, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 64th Session, Feb. 2, 2016, 15:00-18:00, (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/35633c76-b3fd-4a5e-acd6-c34f2783c6cb

[96] Intervention of the Chair, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 66th Session, Feb. 8, 2017, 10:00-13:00, (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/708ce97b-d27a-4c4b-9e9e-7b5a6ee13ee4

The mediated settlement agreement should not only be in writing but also signed by the parties. For electronic settlement agreements, certain existing standards like the 'UNCITRAL electronic commerce instruments' may be adhered to. Further, to determine the identities and the intentions of the parties to the electronic settlement, an appropriate method has to be used. A specific requirement of providing proof that the settlement was in fact a result of the mediation process is required to avoid any fraudulent cases[97]. While the most common evidence of mediation would be the sign of the mediator on the agreement, issues like being mistaken for a party, ensuring party's autonomy, reluctance of lawyer mediators from incurring legal and ethical obligations from drafting the agreement etc. have paved way for the alternative of mediator's signature on another document validating the occurrence of the mediation process.[98]

If an institution was involved in administering the mediation, it may attest to validate the process[99]. Any other alternate evidences like evidence of payment of mediator and agreement to mediate may also be provided in cases where the other three evidences are not available[100]. The Convention provides an exhaustive list of formalities so that no inconsistencies in the existing standards act as an obstacle to parties seeking relief. Any additional requirements by the competent authority may only be made to adhere to the formalities listed under the Convention[101].

F. Refusal of relief

While Article 1 and 4 of the Convention lay down the scope of the Convention, Article 5 further provides situations where a state Party to the Convention may refuse the relief sought by denying enforcement of the mediated settlement. While most of the grounds for refusal to grant

[97]Singapore Convention on Mediation, Art. 4(1)(b)
[98] Intervention of Canada, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 9, 2015, 9:30-12:30, , (Oct. 2, 2020, 10:30 AM), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/62da59e8-138e-4226-9753-0ea15c3b706f
[99] Singapore Convention on Mediation, Art. 4(3)
[100] Singapore Convention on Mediation, Art. 4(1)(b)(iv)
[101] Singapore Convention on Mediation, Art. 4(4)

relief have to be raised by the party against whom the relief is sought, some grounds may also be taken up by the competent authority of the Party state like relief being contrary to the public policy and mediation not a suitable alternative resolution method for the particular subject-matter as per laws of the Party state[102].

The grounds listed are exhaustive and not mandatory.[103] The opposing party may rely on grounds like they were under some incapacity like intoxication, or the settlement was null and void, subsequently modified and not final, or if the obligations under the settlement are unclear, already performed, breach of standards applicable to the mediation by the mediator or failure to disclose facts raising objections to the mediator's impartiality, which if provided the settlement would not have been possible.

Through these grounds for refusal, the Convention prevents anyone from taking undue advantage of mediation mechanism. The Working Group II by providing that the list is exhaustive and that the state Parties could not themselves enquire into the grounds of refusal unless issue is raised by the relief opposing party, ensured a speedy enforcement process.

While this Article reflects on the forward-looking approach of the Working Group II in apprehending the possible conflicts which may have defeated the purpose of the speedy resolution method of mediation, the language in the Convention leaves room for certain uncertainties.

Under Art. 5(1)(e) relief may be refused if certain standards applicable to the mediator are breached without which the settlement would not have been reached. However, it is uncertain as to what 'standards' apply to mediation process and the mediators and what constitutes a 'breach' of these standards. Because there does not exist a uniform global standard for international mediation, domestic standards and codes may result in different enforcement

[102] Singapore Convention on Mediation, Art. 5(2)(a)&(b)

[103] interventions of Canada, Norway, and the Chair, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation), 63rd Session, Sept. 10, 2015, 9:30-12:30, , (Oct. 2, 2020, 10:30 AM), https://conferences2.unite.un.org/carbonweb/public/uncitral/speakerslog/6a94b1c8-31e4-44ba-9345-bb106caa53a2

outcomes across varying jurisdictions. There are also uncertainties regarding the standards applicable to ensure the integrity of the person conducting different dispute resolution phases in a hybrid-dispute. Hybrid disputes which result in a settlement agreement under this Convention would raise questions regarding the standards applicable to people in the process[104]. Further under Art. 5(1)(f) uncertainties regarding what would constitute a 'justifiable' doubt on the independence of the mediator exist.

G. States Restrict Convention Scope

Through reservations, the state Parties may limit the scope of the Convention[105]. They may restrict the applicability of the Convention to mediated agreements where they themselves are a party. Or may apply the Convention only to the extent as agreed by the parties.

All these provisions in the Convention operate together to provide a framework for the applicability of the Convention to international commercial disputes. However, it is yet to be seen how the uncertainties in the Convention are met or are addressed. It is expected that a uniform standard would be proposed by the Singapore judiciary, providing further clarification regarding the existing uncertainties.

IV. IMPLICATIONS OF THE CONVENTION

The Singapore Convention on Mediation has been widely welcomed as an instrument addressing the issues of enforcement of international mediation settlements and effectively promoting mediation as a means of dispute resolution for international trade.

Promoting Mediation as a dispute resolution method and enforcement of mediated settlement: By providing a uniform and harmonised framework, the Convention provides the cross-border businesses incentives to seek mediation as a legal re-course for international

[104] Alison FitzGerald & Thomas Hatfield, *The Singapore Mediation Convention: An update on developments in enforcing mediated settlement agreements*, INTERNATIONAL ARBITRATION REPORT (2019)
[105] Art. 8

disputes. The framework has afforded the parties a greater certainty regarding the future of mediated settlements and their enforceability.[106]

While litigation is popular as the widely accepted traditional legal recourse, the alternative dispute resolution techniques like arbitration, conciliation, mediation etc. are still relatively new and unfamiliar with the people. However, the issues plaguing the traditional justice delivery system like expensive and complex proceedings, backlog of cases resulting in delay of justice etc. have pushed people to other alternatives for dispute resolution.

While arbitration owing to its stable international framework has emerged as a preferred alternative dispute settlement mechanism, it is slowly moving towards litigation with the increasing delays and the costs. In this scenario, there is a need for a dispute settlement method that is devoid of complex procedures, that is cost effective and offers durable and speedy justice.

Mediation perfectly addresses the anomalies in the other existing dispute resolution methods by providing for a speedy, cost effective, simpler procedure which encourages a non-confrontational approach to dispute resolution with more autonomy to the parties and guarantees the privacy of the parties to dispute. With these advantages of mediation, the Singapore Convention on Mediation seeks to change the future of mediation by promoting it as an effective remedy for international commercial disputes[107].

Promoting Business: Not only does the Convention promote mediation and provide for an effective enforcement mechanism for mediation settlement agreements, it also encourages international trade and helps foster international economic relations. By providing a swift and stable method of resolving commercial disputes, the Singapore Convention boosts the "*ease of*

[106] *Singapore Convention on Mediation comes into force*, THE HINDU, (Oct. 2, 2020, 10:30 AM), https://www.thehindu.com/business/singapore-convention-on-mediation-comes-into-force/article32589671.ece

[107] Alok Vajpeyi & Gauri Bharti, *Singapore Mediation Convention: A New Light at The End of The Tunnel?,* MONDAQ, (Oct. 2, 2020, 10:30 AM), https://www.mondaq.com/india/trials-appeals-compensation/834510/singapore-mediation-convention-a-new-light-at-the-end-of-the-tunnel#_ftn21

doing business" of the Party states. Now a more amicable, cost effective and speedy approach may be taken for cross-border disputes and no recourse to litigation or arbitration is required for the enforcement of the settlement.

V. CONCLUSION

There is little doubt that the Singapore Convention on Mediation has emerged as the much-needed light in the dark scenario of international commercial disputes settlement process owing to the complexities, delays and the costs attached with the process. Not only does it provide for an effective method of dispute resolution, it further cements the certainty in the method of mediation by establishing a uniform legal framework addressing the previously existing gaps in the enforcement of mediation agreements.

While the Convention on Mediation does provide incentives to international businesses to shift to mediation as a legal recourse, the success of the Convention lies in its wide adoption by the state Parties. So far, it has received a positive response from major leading states like China, United States, India etc. However, it is to be seen how the signatories ratify the Convention and provide for a legal framework for mediation along with their domestic laws and the Model Laws.

This Convention does that for mediation what the New York Convention has done for arbitration. It has established mediation as an attractive legal recourse perfectly balancing the amicable nature of the process while at the same time affording a "bite" to it.

One of the biggest challenges to mediation is the immaturity in the existing mechanism for mediation among the states. There is a need for these states to adopt the Model Laws developed by the Working Group II along with the Convention to provide a supported legal framework for both international and domestic mediation dispute resolution.

LEGAL SHIELDS AGAINST THE CRIMES OF HONOR

- **SHARDA PATIDAR & SURBHI DADHICH**

ABSRACT:

Indian culture is a multicultural and pluralistic one where a lot of beliefs and conviction normalize the human life of the citizens. In a patriarchal society, women are deemed as a carrier of honor of the family. This discernment is so well ensconced that any attempt by women to emphasize their rights is seen as an assault on the cultural standards of the community and is strappingly countered. And these contradictory activities taken by the family in the name of honor is recognized as Honor Killing.

This article endeavors to highlight the legal provisions to embark upon the crime of honor killing. The preliminary part gives a side glimpse of what is honor killing and which acts are deemed dishonorable by the society or family. Certain actions of individuals and acts may become grounds for him or her to be killed by his or her own family, particularly by male family members or the society. The subsequent part illustrates an assortment of legal provisions in the Indian Constitution, which can be utilized to impede these honor killings in the country. These laws can be employed as an instrument to put behind bars the Khap Panchayat members who give orders of killing individuals for honor's sake. The final part delineates the international provisions associated to the honor crimes to which India is a signatory member.

Keywords: *Crime, Honor killings, Rights, Law, International provisions*.

"Cruelty against women is an expression of traditionally disproportionate control relations between men and women, which have escorted to ascendancy over and prejudice against women by men to the impediment of the full progression of women…."

Meaning and Concept: 'Honor killing' also recognized as 'customary killing' is the killing of a family or kin member by one or more family associates where the executioners,

fundamentally the community at wider range, believes that the victim through his/her acts has brought shame to the family honor. Thus, here murder is a type of eradicating exercise. It purges the tarnished community with the blood of the deviant member. The communal norms at times call for the death of the aberrant person in order to reinstate the sacredness. The more vicious the killing, the more complete the refurbishment of the family's honor. So, victims are inclined to be strangulated, knifed or hacked to death. Violence has a tendency to enhance the purity to be bestowed. Measures like, hacking, burning or strangling prevails among communities. Only those whose hearts are already brutal could possibly acknowledge this kind of violence in their community.[108] These killings result from the surveillance that defence of honor authenticates killing a person whose actions dishonors their family or clan or community.[109] In other words, it can be interpreted that the defence mechanism has to be vicious enough to intimidate the other members of the community.

Amnesty International 2001 illustrates honor killing of a woman by a male relative not as an individual act of brutality, but as a crime which is combined, planned, sociologically foreseen, and socially endorsed by the family and community concerned. It also asserts that the establishment of honor is intolerant; women are not given a prospect to defend themselves. Their family members have no other communally acceptable alternate than to eliminate the blemish on their honor by attacking them. [110] Frequently the words 'honor killings' and 'honor crimes' are used as suitable terms to illustrate the acts of sadism caused to the young couple who aims to marry or have married against the wishes of the society or their family members.

Girija Vyas, the former Chairperson of the National Commission for Women, had considered honor killings as infringement of the Fundamental Rights in the Constitution of India while arranging the draft of **'The Prevention of Crimes in the Name of 'Honor' and Tradition Bill, 2010**. These rights comprised the right to life, and liberty which and if largely interpreted the right to corporal veracity as well as the right to select whom to associate with. The

[108] Robin Grille, Parenting for a Peaceful World146 (Longueville Media, Australia, 2009).
[109] Shobharam Sharma, "Honour Killing in India: Need for Deterrent Action", Lawz 15- 18 at 15 (February, 2011).
[110] Azad Kumar, Honour Killings; Global Perspective 11 (Saad Publications, Delhi, 2014).

limitations enforced by the parents to stop girls from using their choice also result in curbing of freedom to movement and expression.

LEGAL ASPECTS OF HONOUR KILLING

Constitutional Violation- Indian Constitution has been the fundamental document and directing force which vests abundant of rights to its citizens. Honor killing infringes few such stipulations in the Constitution thus, divergent to the basic rights of people. Such rights are:

- Article 14(Right to equal opportunity)
- Article 15(1) and (3) (Prevention of discrimination on basis of religion, race, caste, sex or place of birth)
- Article 17(Elimination of Untouchability)
- Article 19(1) (Freedom to words and expression) and
- Article 21(Right to life and individual freedom).[111]

Most of the honor killings straightforwardly focus on women and only some on men and thus, escort to gender violence. The freedom of articulating a women or men's choice is restrained and this containment further escorts to such killings thereby contravening the fundamental rights of that person. And the executors use religion or caste as justification for "dishonor" thereby, trying to authenticate such killings. This act is absolutely divergent to the Constitution. The Directive Principle of State Policy (DPSP) nevertheless not enforceable can be deemed for fine governance of the Country.

- Article 39(a) grants the State to ensure that all citizens are endowed with passable means of livelihood. But honor killing dispossess the life of the woman in majority of the cases.

[111] Dr. Pandey,J.N., Constitutional Law of India. Allahabad: Central Law Agency, 2015.

- Article 39 (e) and (f) provides for the State to guarantee that the childhood and youth are protected from mistreatment and against growing and material desertion.[112] Whereas due to this habitual practice of honor killing, many young married couples are browbeaten of their life and are placed in a vulnerable situation. Hence, it is the duty of the State to guard such vulnerable people and shield their lives against this malevolence practice.

National legislations

- **Indian Majority Act, 1859**: Right to marry is a lawful right endowed by Article 21 and under Section 3 of Indian Majority Act, 1857; an individual who is the citizen of India accomplishes age of majority after achievement of 18 years. An individual who is major, desiring to get married to an individual of other caste or inter community marriage is not forbidden by law and any honor killings commenced on this ground is illegal.
- **Special Marriage Act, 1954**: The purpose of this Act is to grant a special form of marriage for citizens of India as well as for Indians living in foreign nations. The marriage is solemnized irrespective of caste, devotion or faith of the intending parties to marriage. But the habitual practice of honor killing done divergent to this perception, amounts to defiance of this Act, since the registration procedure is an elongated one and there is probability of the couple being subjected to brutality during such period.[113]
- **Protection of Human Rights (Amendment) Act, 2006**: This Act grants the security of human rights of every person and constitution of Commissions and Courts for

[112] Bhagwati, Rule of Law and Human Rights in India, Universal Law Publishing Co., 2011.
[113] Anand Mishra, Honour Killings: The Law it is and the Law it ought to be, Manupatra.

securing the relevant objective. In spite of such legislation, still there is pervasiveness of honor killing practices leading to momentous defiance of human rights.[114]

- **Domestic Violence Act, 2005**: Under this Act, if a woman is averted from marrying the person of her choice, it amounts to emotional exploitation of the woman.

LEGISLATIVE REFORMS

The Government of India has also measured honor killing as the most monstrous and grave crime against individuals, principally women. Consequently, a variety of legislative reforms have been commenced and taken by the government to forbid the executors and thwart honor killings. In 2009 for the first time, a discussion was commenced in the Rajya Sabha to avert the honor killing and in which all members from different parties sustained the demand of separate law. Afterwards, the subject was referred to the Ministry of Law which in 2010, came up with a set of commendations called "Indian Penal Code and certain Other Laws Amendment 2010".

Through this recommended draft, it was proposed to bring amendments in Section 300 and 354 of IPC and Section 105 of the Indian Evidence Act, where the burden would be on the members of khap panchayats and family members to establish their innocence. In sec 300 of IPC, the government aimed to establish honor killings as the fifth clause [115] which at present classifies 'murder' under the four categories. So, the government is ready to grant rigorous punishment

[114] Puneet Kaur Grewal, Honour Killings and Law in India, IOSR Journal of Humanities and Social Science, Vol.5, Issue 6, 2012.

[115] The proposed fifth clause says, "If it is done by any person or persons acting in concert with, or at the behest of, a member of the family or a member of a body or group of the caste or clan or community or caste panchayat (by whatever name called) in the belief that the victim has brought dishonor or perceived to have brought dishonor upon the family or caste or clan or community or caste panchayats". In the explanation given for the clause, the proposal says that "dishonor" and "perceived to have brought dishonor" will include "acts of any person adopting a dress code which is unacceptable to his or her family or caste or clan or community or caste panchayat". The murder for choosing to marry within or outside the 'gotra' (sub-caste) or caste or clan or community against the wishes of one's family or caste or clan or community will also come under the ambit of the honor killings. Killing somebody for engaging in sexual relations which are unacceptable to the community or caste panchayat or family will also fall under it. Externment of a person in the belief that he or she has brought dishonor will also be punished with imprisonment t of either description for a term which may extend to two years or with fine or with both.

for those coddled in honor killing and formulating it as a specific offence under the Indian Penal Code, and the whole Khap panchayat regulating such killing would also be put on trial for the abetment of the crime and the obligation would be on the accused to prove his or her innocence while usually the burden is on the state to ascertain the guilt of the accused. More significantly, the planned law places the burden of proof on the accused, thus making them accountable to establish their innocence in the occurrence of death taking place due to their acts.

The Union government also aims to eliminate the obligatory 30 days notice period for the solemnization of marriage under the Special Marriage Act, 1954 so as to shield the lives of the young couples who have the courage to go for inter-caste or inter religion marriage against the desires of their family members. All through the notice period of 30 days, the couple gets susceptible. So, the steps need to be taken to simplify and accelerate registration process. On the other hand, Khap panchayats have been insisting on an amendment in the Hindu Marriage Act to assert same *gotra* marriages unlawful but the government has declined to abide by the requirement of this Khap panchayat.

Further, there is a suggested amendment in the section 105 of the Indian Evidence Act, 1872 which grants that; Burden of proof is on the members of khap panchayats and family member to establish their innocence. But the Draft bill was relentlessly condemned as lots of infirmities were found in draft. It was disparaged on the basis that the ministry suggested a piecemeal approach as the draft compacted only with the crime of honor related murder and not of any other kind of torment which are visage by the young couples. So, the disparagement regarding the limitations of the proposed draft further amplified the disinclination on the part of government to pass the law.

In 2010, the official cell of the All India Democratic Women's Association (AIDWA) which was led by Kirti Singh in discussions with various women's associations and individual members of the society outlined comprehensive law entitled " The Prevention of Crimes in the Name of Honor and Tradition Bill, 2010" which describes honor crimes in relation to contraventions of the rights of couples explicitly the right to pick his or her marriage partner

.The bill also delivers precautionary measures and punishments of diverse degrees and guarantees the accountability of the police and organizational authorities. The bill was shored up by the National commission of women,[116] and then headed by Girija Vyas, which gave a similar named bill to the government.

The NCW's activism has added extensively towards the reduction of the honor killing in the rural regions of North India. The National Commission for Women (NCW) in 1990 attended to the subject of honor killings among numerous ethnic groups in North India. "The Prevention of Crimes In The name Of Honor and Tradition Bill" 2010 had considered honor killings as atrocious and brutal. The acts of the parents of the girls to prevent her from exercising her preference also effect in curtailment of her liberty to movement and expression. A legitimate consent to marriage is also an indispensable prerequisite under the law. The provisions of the bill affirms that anyone killing or causing damage for exercising their right of choosing a partner will be guilty and shall be punishable with the punishment stipulated in the Indian Penal Code.[117]

- Section 4 and 5 of above stated bill shapes that anyone harassing (both mental and physical) woman or her partner or anyone fixed with them shall be punished with an imprisonment for a minimum tenure of one year and an utmost term of ten years and shall also be legally responsible for punitive fine and any person stirring to harass or to murder the couple or their family members shall be liable to be punished with a term of imprisonment up to two years and by punitive fine.
- Section 6 affirms that if any person / persons/ including a body of persons, known by any name, lauds or overtly supports or aggravates, the persecution or killing or any

[116] The National Commission for Women (NCW) is a statutory body of the Government of India generally concerned with advising the government on all policy matters affecting women. It was established to provide the Constitutional and legal remedial legislative measures, and facilitate redressal of grievances as well as advise the Government on all policy matters affecting women.

[117] Section 3 of the bill states that All persons including young persons and women have the right to control their own lives, a right to liberty and freedom of expression, and a right of association, movement and bodily integrity. They have a right to choose their own partners in marriage or otherwise and any action to prevent the exercise of these rights shall amount to an offence under the provisions of this Bill.

kind of violence against either couple or any family member of them, he or they shall be liable to be punished by with a term of imprisonment up to two years and with punitive fine.

- Section 7 of the bill presents that the burden of proof would on the accused.
- Section 8-10 of the bill authorizes magistrates to forbid/prevent the commission of such offences and further disallow the meeting of any persons or body of persons likely to talk about the commission these offences and also stipulates punishment for violation of these orders as well. All officers of the government are obligated and empowered to provide aid to the police in the implementation of the provisions of this bill or any rule outlined under it.
- In 2012, the Law Commission of India put forward its 242nd report alongside "Prohibition of Unlawful Assembly (Interference with the Freedom of Matrimonial Alliances) Bill, 2011". As per the law commission ,the intention is to deal with behavior jeopardizing life and liberty of persons in matrimonial associations as there has been augment in illegal terrorization by self - appointed bodies for bringing stress against *Sagotra* and inter-caste, and inter-religious marriages between two compliant adults in the name of sustaining the honor of family, caste or community and in a number of cases, such groups have for a while optioned to threats and brutality even killing which by in itself is an offence under Indian Penal Code, yet, it is indispensable to prohibit assemblies which accumulate to denounce such alliances. Thus, the suggested legislation aspires to thwart the crime and to hamper the aggravation of violence through such congregations and is proposed to lay out definite provisions and punishments against such assemblies with accumulation to other offences under the Indian Penal Code.
- The Commission has also given its vision regarding the amendment and establishing a clause in Section 300 of the Indian Penal Code (murder) to bring 'honor killings' under the realm of this section. The commission is of the scrutiny that such an amendment will pointlessly create bewilderment and provisions which are previously given under

IPC are adequate for preventing the crime. The aim of this draft legislation is that there must be bar on the congregation for denouncing the adult young person's marriage according to their choice. The Law commission has suggested the legislation to thwart the acts which are jeopardizing the life and liberty of those couples who are having intent to marry or are married.

1. The recommended bill comprises that there should be a threshold bar against any congregations at any time for the intention of denouncing an intended marriage or the demeanor of the young couple and for taking actions against those couples. Such type of meetings shall be treated as unauthorized and every member holding, systematizing or every member participating in such assembly shall be taken as a member of illegal assembly either directly or indirectly and shall be liable to be punished with a sentence of minimum of six months and maximum one year and fine up to ten thousand rupees. (Section 2).
2. The acts of imperilment of freedom including social boycott, aggravation, terrorization, etc of the couple or their family members shall be comprised as an offence .The least punishment is one year and maximum up to two years and fine expanding to twenty thousand rupees. Two sections are recommended to be initiated, i.e., Section 3, which makes punishable the acts imperiling freedom. The other Section, i.e., Section 4 deals with criminal intimidation by the members of unauthorized assembly or others to secure compliance with the unlawful assessment of the assembly. Such acts of criminal intimidation which are liable to be punished under the general law, i.e., the Indian Penal Code have been exclusively initiated for the intention of meting out higher punishment to those members of illegal assembly.
3. According to section 6, every person taking part in an illegal assembly shall be supposed to have aimed to obligate or abet the commission of offences.
4. It is presented in the bill that the provisions given under the bill are without intolerance of the provisions of Indian Penal Code. As such there is no overlapping

with the provisions of the common penal law. An additional thing is that the criminal offences other than those exclusively within the suggested bill are punishable under the common penal law. For example, if a person who is a member of the illegal assembly has committed or abetted the commission of an offence of grievous hurt against the couple who is in target or one of them or even their relatives, the IPC provisions will be attracted. So, Section 5 which has been included intends to clarify all such things.

5. Apart from these, Section 8 has been recommended to authorize the District Magistrate or the SDM to take precautionary measures and also a compulsion is inflicted on them to take notice of any information given to them by the marrying couple or their family members and to give needed security to them. These officials are made accountable for the breakdown or omission for not taking essential measures or steps to thwart unauthorized assembly or to give security to the couple who are under target.
6. Section 9 of the intended bill states that the offences shall be tried by a Court of Sessions in the District headed over by the Sessions Judge or Additional Sessions Judge as informed by the High Court.
7. Section 11 additionally grants that the offences are cognizable, non-bailable and non-compoundable. In 2017, a private member bill has been initiated in the Rajya Sabha by M.P., Shri V. Vijayasai Reddy, titled "The Prevention of Crimes In the name of Honor and Tradition And Prohibition Of interference With The Freedom of Matrimonial Alliances Bill, 2017". The draft proclaimed and distinguished the young individuals as well as women to have the right to decide their own partners in marriage. According to the draft bill, no person is permitted to accumulate at any point of time, to denounce any marriage which is not forbidden by the law. The bill also declares that if any person or group of persons found engaging in intimidating or jeopardizing the freedom of any individual, then it will be a punishable offence. The draft has given in detail about what is comprised within the domain of the term

"Endangerment of Liberty" in explanation clause of section 6. According to section 11 of the draft bill, it is contained that the burden of proof will be upon the accused to establish that he has not committed any offence under the provisions of drafted bill. So, it can be scrutinized that if some special law is passed, it can bring out more lucidity in the law and such a thing can grant more aid to law enforcement agencies, those who are to scrutinize the matter or arbitrate the case.

INTERNATIONAL LAWS AND THEIR APPLICABILITY

Human rights are enjoyed by every individual irrespective of his or her nationality, race, sex, religion etc without unfairness. There is sturdy democratic freedom in India where human rights to all citizens are certified by the Indian Constitution.[118] Human Right is not about the riches of the country or world but about the dignity of each and every person in the society.[119] The habitual killing of the people i.e., the homicides done in order to abide by the norms of their culture is an absolute defiance of human rights.[120] This crime also infringes the Universal Declaration of Human Rights, 1948. The Universal Declaration of Human Rights is not a lawfully binding mechanism but has a greater convincing value.

- Article 1 and Article 2 of the Convention affirm that "all human beings are born liberated and equal in self-esteem and rights."
- Article 3 affirms that" every person has right to life, freedom and safety".
- Article 5 confers the "right to be free from torment or malicious, brutal and or degrading treatment".
- Article 16 converses about the choice of marriage given to men and women of full age devoid of any restraint due to race, nationality or religion.[121]

[118] Paras diwan and Payush Diwan, Human Rights and Law, Deep and Deep Publication.
[119] Mahendra R. Singh, Human Rights in Indian Tradition: An Alternative Model, NUJS Law Review, Vol.2, Issue 2, 2009.
[120] Rashika Bajpai, Killing in the name of Honour: Blatant violation of human rights, Journal on Contemporary Issues of Law, Vol.2, Issue 6, 2016.
[121] Universal Declaration of Human Rights, 1961.

But honor killing takes away the self-esteem and life of the person and influences the person's freedom of preference of marriage. Such practice subject the person to brutal and atrocious treatment. Hence, honor killing comprise momentous disrespect to universal human rights and defiance of fundamental rights guaranteed in Constitution. India is a signatory to United Nations Convention on eradication of all forms of Discrimination against Women and has also ratified it. It has a lawfully binding commitment to take actions to finish all form of practices of honor killing and guarantee all discriminations against women in matters concerning to marriage and family relations are eradicated, as a state party to the Convention. Though there are provisions of CEDAW and an assortment of human rights provisions to eradicate violence against women, persons prolong to be the victims of slaughter in name of honor.[122]

CONCLUSION

Separate laws not only fetch the individual in its area but also the cluster or assemblies as well who directly or indirectly engage in the commission of crime of honor killings. But by passing the separate law, it cannot be said that the crime of honor killing can be exterminated by itself. No doubt specific law can transport change but existing laws if made harsh and effectively made applicable, can result in better situations. Furthermore, there is an ominous need to modify the mindset of the individuals in society. In India, even after passing tough laws against dowry, it is still widely rampant. Additionally, the mechanisms of cooperative responsibility included in the bill can bother even those members who do not sustain these irrational restrictions and also can be misused for malevolent agendas. The approach or attitude modification among people is very indispensable to address a variety of problems haunting India. But the implication of law cannot be undermined. Therefore, special law and behavioral modification in society should go hand in hand against honor Killings.

[122] Jeyasanthi. V et.al, Honour Killing: A National Outcry, College Sadhana- A journal for bloomers of research, Vol.6, Issue 2, 2014.

FEMINISM IN 21ST CENTURY

- RICHA KANSAL

ABSTRACT

In the 21st century where all women have the right to vote and where 47% of the labor force is made up of women, many people believe the battle for gender equality has been won- but they could not be further from the truth. Mainly feminism means social, economic, political equality of the sexes. Feminism as its core is about equality of men and women, not sameness. So many people offer up the argument that women are not same as men so there can't be equality, as they have different physical capabilities, but here the issue about the rights and equal access to opportunities. The main aim of feminism as to highlights women's rights, which many believed to be under threat. Probably the greatest political and a social revolution of the last century is the feminist revolution. The aim of my article is to focus on issues such as sexualisation of girls, domestic violence against men, the gender pay gap, birth control and to address why feminism is still a useful and necessary lens through which to absorbing critique the world. Many considered feminism of women issue, a fight to be fought by placard holders –but many people forget the fact that feminism is fight to be fought for the children who are socialized into a patriarchal society. Numerous feminist movements and ideologies have developed over the years and represent different viewpoints and aims. Some forms of feminism have been criticized for taking into account only white, middle class and college- educated perspectives. This criticism led to the creation of ethnically specific or multicultural forms of feminism, including black feminism and intersectional feminism.

FEMINISM IN 21ST CENTURY

Women passed through many problems, barriers to become an important member in the society. In the past, women did not have any rights and they are mistreated and neglected by the men. By the coming of the feminism the role or a status of the women has changed

completely. Feminism plays very important for development of the status of the women in the society. Feminism means social, economical and political equality of the sexes. Feminism is described as a movement. Feminism is a belief that women should have the equal or same rights and opportunity as men. Feminism is a set of the movement which works for the women's rights. Feminism is to treat women in equality. Feminism doesn't means women rights, rather it means that men and women both should be treated equally in the society and there should not be gender discrimination between them. Feminist seeks to achieve equality and social rights for in some areas i.e. education, employment, economic. These feminist movement organized campaign for the protection of the women rights, girl child and women from sexual harassment, rape, violence whether it is done within the home or outside the homes, as because of the feminist campaign there was improvement in the women rights in several areas and in several societies like right to vote, right to own property the right to equal pay for equal wages, Right to hold public office, right to gets maternity leave etc. feminism is a philosophy which claims that men and women must have equal rights in all the field of the life.

"Women need feminism because there are women who suffers injustice"[123]

Examples of feminism

1 Black Feminism: Black feminism means that the rights and equality of the black women. As women in every place suffered, raped, killed but no one suffered the pain as it was suffered like a black women. Black women implies as the lower class of women. That is the main reason, black women started revolt against the indiscrimination which was done on them. But the Womanism[124] established a new space for the black women to express their wishes and dreams.

[123] Zara Huda Faris stated

[124] A form of feminism that acknowledges women's contribution to society.

2 Muslim Feminism: Human being are equal whether they are black or white, men or women. The idea of equality emerged in Muslim by the coming of the Islam, before the Islamic rules Muslims trying to remove the rights of the women which were given by the god to women and wants to make them as servant. The Islamic feminism is one of the most powerful movements of feminism in the world, as it emphasized the important role of the women in the society.

"MEN ARE FROM EARTH, WOMEN ARE FROM EARTH
DEAL WITH IT"[125]
"LIFE IS NOT A COMPETITION BETWEEN MEN AND WOMEN
IT IS A COLLABORATION"[126]

The history of feminism in India can be divided into three phases:

1 The first phase: It began in mid 19th century where male European colonists began to speak out against the social evils of Sati.

2 The Second Phase: It began in 1915, where Gandhi ji incorporated women's movements into the Quit India Movement and independent women's organization began to emerge.

3 The Third Phase: It began at the time of post-independence, which has focused on the fair treatment of women in the work place and they should be pay equally as per their work and they also get political rights.

FEMINISM IN 60S AND 80S CENTURY

In the 60s and 80s century, feminism mainly focuses on radical feminism and women's liberalization movement. This century of feminism were also known as second wave

[125] George carlin
[126] David Alejandro Fearnhead

feminism. Feminist activities and thoughts began in USA in 1960. It quickly spread across the western world i.e. Europe, Australia, and the America, with the aim to increase the status of the women and to equality of the women in the society.

This feminism also drew attention to the issues related to sexuality, family, reproductive rights, domestic violence, marital rape and this also brought changes in the custody laws and divorce law. While the first wave feminism of the 19th and 20th century focused on the women's legal rights, especially the right to vote but the second wave feminism of the women's rights movement touched on every area of women's experience including politics, sexuality[127], etc.

There was some important movement or events which work for the development of the women's rights. In the 1940, Simone de Beauvoir [128] examined the notion of women in the patriarchal society and in 1949 she went for conclude "The Second Sex". This book was published in America in 1953.

After that in 1969, US Food and Drug Administration approved the "combined oral contraceptive pill" approved the birth control pill, which freeing women from the restrictions of pregnancy and childbearing. As this helps is for making marriages stronger by removing the fear of an unwanted pregnancy and improving the health of women.

In the year 1963, Betty Friedan published his book "The Feminine Mystique" and in the same year president John F. Kennedy's presidential commission on the status of women released its report on gender inequality. This report recommended some changes in the inequality by providing paid maternity leave, education, etc. In the 1963, Betty Friedan conduct a survey on women by using her old classmates and this survey revealed that the women who played a role at home and workforce were more satisfied with their life compared to the women who stayed home. The women who stayed showed feeling of sadness and as per this survey she concluded that many of these unhappy women had immersed themselves in the idea that they should not have any ambitions outside their home.

[127] Any activity solitary, between two persons, or in a group that induces sexual arousal.
[128] French writer

"The problem That Has No Name"[129]

The report which is given by the presidential commission on the status of the women spoken about the discontent of the women especially for the housewives which shows feeling of the sadness and led to the formation of local, state and federal government women's group along with many independent feminist organizations. The movement achieved many legal victories such as the "Equal Pay Act of 1963", "Title VII of the Civil Rights Act of 1964 and so on. Friedan hypothesizes that women are victims of false beliefs requiring them to find identity in their lives through husbands and children. This causes women to lose their own identities in that of their family.

In the year 1966, Friedan would be called as organization's first president as he found the "National Organization for Women". By this organization, her aim to pressure the equal employment to use Title VII of the 1964 Civil Rights Act to enforce more job opportunity among American women. There were some most significant legal victories which were achieved from the movement such as Women's Educational Equity Act of 1972, the Equal Opportunity Act of 1974, and Pregnancy Discrimination Act of 1978 and so on. However, these changes towards the rights of women usually considered as the greatest success of the women's movement. Friedan sets the specific goals for the development of the women "Equal Rights Amendment", a proposed constitutional amendment guaranteeing equal rights for women.

In the year 1967, freeman started movement which she called as "Voice of the Women's Liberation Movement" and it spread all over the country. Many of the women in the west side group organized other feminist movement for the women's right. In 1977 National Women's Conference given an opportunity to the Women liberation movement to address their issues.

By the early 1980s, it was analysis that the women had their rights and there were succeeded in changing the social attitudes towards gender roles.

[129] Betty Friedan

FEMINISM IN 21ST CENTURY

After many movements, In the 21st century women have right to vote but 47% of the women is work as labor force, many people believes that they won the battle for gender inequality but they don't. Actually, the main issues such as sexualisation of young girls, domestic violence against men, and the gender pay gap, birth control and so on.

Many people consider that the feminism is a women issue but the feminism is fight to be fought for children who are socialized into a patriarchal society. Within a patriarchal society, 18% of the boys who suffers abuse in the hands of their girlfriends and 119,000 men who filed report for the abuse[130] are told to put up with it, which effectively makes the situation far worse and far more hazardous for the victims.

In the US, congress is taking an issue of female reproductive rights under the Affordable Care Act. The main reason behind to decrease premarital sexual activity in the society. In contrast, the true effect of repealing mean that women would face a 60% higher risk of developing cervical cancer and greater risk of developing HIV and AIDS, 31% increased risk of premature and low weight births, and maternal mortality rates could triple.

In the 60s and 80s women achieved a revolution in western world and created a vision of women and girls in the society. Today, women play a very important role in the society after participation in the social and economic activities. In the 21st century also there is need of feminism like in an Islamic. Islamic fundamentalism threatens women in over all the pay. As in Islamic there is a dominance of men over the women. In this women have no right to do any work as per their wishes they also do as there husband says or boyfriend or father etc. Islamists have denied women their essential dignity and humanity. Islamic fundamentalism is a fascist political movement which aims to spread dominance in the world.

In the year 2015, Muslim activists issued a declaration of reform in the support of the women rights. "We support equal rights of women, including equal rights to inheritance, witness, personal law, education, employment and also stated that the men and women have equal rights

[130] Mankind,2017

in mosque, boards, leadership and all spheres of society". This declaration was announced after the founding of the Muslim Reform Movement. There are some platforms who speaks for the rights of the women such as sister-hood is an international platform for the voice of the Muslim heritage, Sisters in Islam is a civil society organization who work for the promotion of the women rights within the frame of the universal human rights. It mainly make policies that discriminate against women, Muslim Women's Quest for Equality filed a petition in 2016 against the practice of the Triple talaq.

The exponential growth of the sex trade in over the world is also threat to the dignity and survival of women and girls. Sex trafficking is a modern form of slavery for many girls, especially those girls who are poor and uneducated which resulted in the increasing of prostitution. Feminists have been hampered in their response to this threat because there are divisions within feminism about the nature of prostitution. Millions of victims of trafficking are involved in the sexual activities and they are dying of AIDS. It recognizes that prostitution is inherently harmful.

New age feminism has also addressed the issues of LGBT community; they fight for the acceptance of lesbians, gays, bisexuals, and transsexuals in society.

INDIA

In India, rape, domestic violence and body shaming is a common scene but now the women have realized their importance by uplifting their status in business, technology, arts, research etc. and they are equal to the men.

On 16 December 2016, in Delhi, a gang rape of a 23 year old girl by the six men on a moving bus. As people came out on the streets and protested against the government. Anger spilled out on the streets, literally. India witness changes the situation in the way people generally reacts such incidents of violence against the women. In this situation social media plays a very important role for those who can't attend the protest they show their anger on the social media such as Facebook, twitter, and so on. The women's movement in India and feminist activists continues fights for the protection of the women in the society.

Feminism was became an issue when a video directed by Homi Adajania, featuring Deepika Padukone, "MY CHOICE", was released by Vogue India on You tube. There was many video on the internet of the women empowerment but there was many people who against the video on the social media and those who are against the video challenged the validity of choice feminism. Here Choice Feminism means that women can make her own choices independently and the she makes is a feminist statement on her parts.

Let it be my choice to marry, or not to marry
To have sex before marriage, to have sex out of marriage, or to not have sex
My Choice to love temporarily, or to lust forever
My Choice to love a man, or a woman.[131]

Many people against the idea of sex outside the marriage which is imply radical feminism and it is rejected by all of in the society. But the idea and a message for make the video is neglected by people. This video mainly implies the individual choices.

So we can say that India too, is witnessing a new wave of feminism in the 21st century.

ACHIEVEMENT IN SOCIETY BY FEMINISM

The feminist movement has made various changes in the western society such as equal pay, right to abortion, right to own property, right to get education, and so on. There were various achievements in the society for the improvement of women rights by the feminist movements such as

1. 1893: states begin to grant women the right to vote
2. 1903: A union is formed for working women
3. 1916: women gain access to birth control
4. 1963: congress passes the equal pay act
5. 1972: brings equal opportunity to education
6. 2013: ban on women in combat is lifted

[131] "My Choice" You tube, 28 March 2015

7 2003: sabarimala issue

8 2015: shani shingnapur temple and so on.

ANTI- MEN FEMINISM

Feminist doesn't means that all men are evils. It only talks about the gender equality. The feminist agenda is not about women rights. It is all about equality. But feminist doesn't means a person who hates men but it means that person who believes that people should have equal rights in the society. The main aim of the feminist is to create a society there is no gender discrimination. There are some myths:

1 Being a feminist it doesn't mean that all men are rapist.

2 Being a feminist it doesn't mean that all men are evil.

3 Being a feminist it doesn't mean that you blame all the men of the society.

Feminism thinks it is bad that hundred of the men involving in the sexism but it don't mean that all men of the society are evil. Men are involving in sexual activity because they have been taught to behave or think in the same way. Men and women can work together to create a better world for future generations.

The survey, conducted by Abacus Data, asked men a wide range of questions about their careers, relationships, fears and emotions, and the results surprised me.

For example, 75 per cent of men believe their partner's career is as important as or is more important than their own; 87 per cent either didn't care or preferred their boss was a woman; 79 per cent believed in equal rights for women. While 57 per cent were raised to think "being physically tough" is what it meant to be a man, 64 per cent now believe "being fair" is more important.[132]

The *Chatelaine* survey reveals men are far more aware, sympathetic and helpful than the caricature of the "typical man" that dominates our conversations about gender equality. It

[132] Released by Chatelaine Magazine

shows that each generation has become more supportive of equal rights than the previous. As a result, men are no longer just a potential ally of women; the vast majority of them are already there.

In 2018, men of all ages and all across the country, married or single, educated or not, are far more feminist than ever before.

RECENT CASE FOR MISUTILIZATION OF THE FEMINISM:

The recent case happened in Amity University where the girls wrongly blame for the harassment to the boys. The girls in the FIR said that Harsh, Madav, and devkar molested her. According to the girls these boys threatened them and said that not to come to college otherwise there face will be disfigured. On the other hand boys told the girls to remove their car but incidentally they both came to an argument after that the girls threaten them in dire consequences. After that police investigate the matter and completed dismiss such information that the boys molested the girls. So in this case it shows that the girls misuse the rights which are given to them by the government.

CONCLUSION

This research paper enlightens me that feminism is an idea, belief or movement who work for the development of the women's right. Feminism is a fight for the bruised men, sexualized girls, LGBT people and other minorities. In the other words it a fight for the all. Feminism in India is a set of movement aim at defining, establishing, and defending equal political, social, and economic rights and equal opportunity for women in India But this concept is be criticized by the girls, as we can see through an example that recent case happened in Amity University. Despite the process made by the feminist movement living in modern era still face many issues of discrimination. India's patriarchal culture has made the process of gaining land ownership right and access to education challenges. Basically stating the concept of feminism "it is not only about shutting things down. It's about claiming your pleasure". The notion that feminism is just a women's issue, an issue for angry, man-hating women needs to be abolish.

INDIA ON NEW HORIZONS: SECTION 377

- **THOMAS MALIEKEL**

PRELUDE

Laws are an expression of the social, political & economic scenario of a given territory at a particular time frame. Very often, laws are implemented at the will of a sovereign who may not be looking out for the welfare of the subjects but rather impose unnecessary legislation to satiate a religious or political ambition. There is no scope for these draconian laws in today's modern and evolved society as they hamper the right to live freely and enjoy the blessings life has to offer. Section 377 of the Indian Penal Code, 1860 is an example of such a draconian law which has no place in modern society[133]. This provision made consensual sex between two homosexual adults a crime punishable by law. 6th September, 2018 was a landmark day for the Indian Judiciary and LGBTQ (Lesbian, Gay, Bisexual, Transgender and Queer) rights. The Apex court opined that Section 377's application to consensual intercourse between two homosexual adults as "*irrational, indefensible and manifestly arbitrary*"[134]. However, the same provision is said to be in force regarding any sexual relations with a minor, animal (bestiality) and rape[135]. With this insight, the purpose of this article is to examine what more should be done to alleviate the plight of the LGBTQ community, how a traditional and orthodox India and coexist in a symbiotic relationship with the new gender roles, gender identifications, relationships and how the country and the authors thoughts will express how the country and community should maintain impartiality while we forge through unchartered territory with regards to our society.

GOVERNMENT AND MY SEXUALITY

[133] THE INDIAN PENAL CODE, NO. 13 of 1860, INDIA CODE). § 377
[134] Malika Bhagat, *Section 3777 second anniversary: Call for celebration, but miles to go,* HINDUSTAN TIMES, (2nd September 2020, 10:00 PM), https://www.hindustantimes.com/more-lifestyle/section-377-second-anniversary-call-for-celebration-but-miles-to-go/story-Yff3lob0PhvFYoe1dS6WkL.html
[135] Navtoj Singh Johar vs. Union of India (2016) 7 SCC 485.

"Sexpionage" is the active investigation into an individual's sexual exploits and sexual orientation by governmental agencies to hold him/her ransom as releasing of such information may be damaging to the reputation of the person. It is important to keep in mind that matters regarding morality are subjective and differ from community to community. An individual engaging in a particular sexual activity may fear the consequences of the said information being released as that activity is considered as taboo[136]. The reason why individuals who concealed their homosexual identity in India is because in the hinterland, it is still considered as taboo. Hence, often political parties exploit this taboo in order to garner votes. The government intervention into any sexual activity should only commence as soon as the element of consent terminates or if consent was never present. This should be the case whatever the sexual orientation maybe. Side note adultery maybe considered as a consensual sexual relation and was decriminalised in *Joseph Shine V. Union of India*[137], however the author firmly believes that if an eminent person, especially one in the field of politics engages in adultery, this matter should be a governmental concern. Same reasoning as the United States provides is because political figure heads are looked up to by many and their actions may influence many citizens. This should hold true in India too.

MATRIMONY AND SAME SEX COUPLES

One of the core tenets of marriage according to the Hindu, Christian and Islamic scripture is to provide a sexual partner to the spouse. Homosexual couples too have sexual needs that need to be satiated. The sexual requirement itself is full grounds to allow the right of marriage to same sex couples. An individual being a homosexual does not make her/him barbaric, cultureless and uncouth as conceived by the orthodox class. These homosexual people, just like anyone else would want to walk down the aisle or tie the knot. By not granting marriage rights, these

[136] Mini Anthikar Chiiber, *A story teller not a scholar,* THE HINDU, (3rd September 2020, 10:00 PM), https://www.thehindu.com/life-and-style/author-amish-on-wht-inspired-him-to-write-the-book-legend-of-suheldev/article32530283.ece

[137] Joseph Shine v. Union of India 2018 SCC OnLine SC 1676

couples are forced to co-habit in a "live in relationship". The social acceptance of such a relationship in any place in India apart from the metros was captured beautifully in the Bollywood blockbuster, *Luka Chuppi.* The infamous police protection to the same sex Haryana couple as they received threats from their respective community only proves that live in couples lack the protection of the matrimonial status[138]. Marital status brings a whole host of privileges such as hereditary rights. Indian legislation has countless marriage Acts, an additional Act conferring legal status to same sex marriage will only do the country a great deal of good[139]. Regarding parentage, it is well aware that adoption has been the primary mode of child procurement for these couples and adoption laws have been relaxed to facilitate this. Where the author would like to assert his stance is in the matter of using unproven and nascent technology to fuse the two gametes (Haploid sex cells) of the same sex partners to create an offspring from their DNA. The science behind this is yet to be successful and leading to a number of congenialities but even in a successful instance there are a plethora of matters regarding this as it goes against very core of natural biology. The preamble of India mentions we are a welfare state hence India is empowered to promote adoption especially since there is a rampant issue of child abandonment. It should be stressed that more proven scientific methods such as IVF are not off the table as they use both male and female gametes hence there is no chance for any genetic mutations or unseen DNA combinations to occur. But any couple of India be it heterogenous or homogenous should have a desire to adopt a child and help eradicate this social issue.

NEW ORDEALS

[138] Express News Service, *HC tells Mohali SSP to protect lesbian couple*, THE INDIAN EXPRESS, (5th September 2020, 5:00 PM), https://indianexpress.com/article/cities/chandigarh/hc-tells-mohali-ssp-to-protect-lesbian-couple-6517822/

[139] Poorvi Gupta, *Same Sex marriage gets a push in India, but some in queer community feel other rights require more urgent attention,* FIRSTPOST, (5th September 2020, 4:00 PM), https://www.firstpost.com/india/same-sex-marriage-gets-a-push-in-india-but-some-in-queer-community-feel-other-rights-require-more-urgent-attention-8592451.html

Sexual Harassment- workplace harassment has been the social evil which society has been trying to eradicate through numerous efforts. However, it is standard belief that sexual harassment is only limited to heterogenous couples. Same sex harassment does occur and the public should be elucidated about this[140]. India is country that is synonymous with the heinous crime of rape, this horrendous evil has damaged the ambitions and dreams of numerous women. These women who could have gone on to live powerful and ambitious lives. Rape also affects males. One out of every 33 males in the United States have been raped. With no exact statistic, it is generally believed by experts that the number is much higher. It is important to note that male rape here is committed by other males in most cases. The most common example is the rape of a male prisoner by another male prisoner. It is scientifically proven that the chance of Sexually Transmitted diseases spreads greater in homosexual males due to the nature of anal sex. In fact, the landmark judgement, *Navtoj Singh V. Union of India*[141] facts were about distribution of condoms to male inmates in Tihar jail. Now regarding the criticism that inclusion of male in the penal code definition of rape trivialises rape, there are points to substantiate and counter this. As eloquently said in numerous cinemas, "there are only two types of people on Earth, Good and bad." There will always be elements of a given section looking forward to exploiting a cause for their personal gain. In a predominantly patriarchal society like India maybe the inclusion of male rape will get the attention of a larger spectrum of people on this matter. People who are more likely to commit this horrendous act. However, keeping in mind the dismal condition of women safety in India, the status quo should prevail and a priority should be given to dealing with women's rape as it occurs in significantly higher numbers. This is not an attack on gender but a struggle against injustice and evil. These have no gender.

HOW TO DEAL WITH THE OPPOSITION?

[140] Samir Shukla, *Homosexuality needs laws for its interactions with non-homosexuals,* TIMES OF INDIA (4th September 2020 12:00 PM), https://timesofindia.indiatimes.com/blogs/science-nomad/homosexuality-needs-new-laws-for-its-interactions-with-non-homosexuals/

[141] Navtoj Singh Johar vs. Union of India (2016) 7 SCC 485.

It is important to understand the meaning of institutionalised thinking and rationale. When an individual has been shown a particular school of thought since childbirth, with no alternative and no mode to reason, does this make them horrendous people when suddenly proposed with a completely new ideology and they vehemently oppose it? This debate has been an ongoing and interesting one with matters like sexism, racism and homophobia. Indeed, this way of thought may be completely preposterous but the only way to deal with it is by dialogue and discussion and not social media name calling a random and powerless citizen. Keep in mind, eminent persons and leaders are not included in this subject as there is a completely different onus on them. It is the common man/ woman that makes the bulwark of society and by education and awareness is how to deal with it. There will definitely be individuals who refute any trace of homosexuality but some people cannot be reasoned with. Education, awareness and elucidation are the three pillars to fight homophobia. Now, the beauty of Indian democracy is at least on paper, we all have free will. These are strictly the authors views but if a heterogenous individual is not comfortable with viewing homosexual contents or vice versa, they shouldn't be penalised for it by calling out on social media other drastic methods. No one has the right to refute a homosexual person their right to existence. The very essence of democracy is that different factions of society live in harmony with their respective views but with regards to homosexuality in India, we still have not attained this equilibrium and must strive for this balance.

CONCLUDING REMARKS

Humans are emotional beings; we make efforts and do things for the people we love. For a very long-time, love was a narrow-minded concept. As Indian society progress into the future, let this nation always strive for the universal truth which is "love thy neighbour as thy self". Actions should be implemented and decisions should be made keeping in mind the changing needs of society but always remembering the ideals of our ancestors. The law should always have one foot in modernity and one foot in tradition, through this way we get an ideal body of rules and a society that is truly free of any prejudice

MERGERS & ACQUISITION – A SHORT NOTE ON SIGNIFICANCE OF BUSINESS VALUATION

- PRANEETHA MANGU

ABSTRACT

The primary aim of any business enterprise is to maximize its profits and to diversify. Business combinations like Mergers & Acquisition are essential features of corporate structural changes and are the fastest way of expansion. In corporate finance, the term M&A is commonly used for all the purchase, sale, and combination of companies and their parts or subsidiaries which involves exchange of assets and liabilities. Though M&A seem to be two words of the same coin there is still difference between them and especially the economic outcome is discrete. Mergers can be defined as the sequence of two companies to form one, on the other hand, Acquisition can be defined as takeover of one company by the other. Once the company decides on merging with or acquiring the other company, the next essential point is to check the value of the target company. The following content is a short note on the importance of valuation of a business enterprise in a merger or acquisition.

Keywords: *Profits, Merger, Acquisition, Target Company, Valuation.*

INTRODUCTION

In today's dynamically changing business environment, increasing competition, interminably demanding market share, fluctuating profit margins, variations in customers preferences and tastes and rapid development in technology businesses have directed mergers and acquisitions (hereinafter referred to as "M&A") as a tool of growing faster. Globally, M&A have grown radically in the recent times. M&A propounds the companies' high opportunity to grow rapidly and become successful. M&A can be called as a combination of two or more companies that involves exchanging of their assets and liabilities to become a single company. When an

acquiring company decides to acquire the target company the next step is the valuation of the target company.

Valuation process involves analyzing the value of assets and value of liabilities in order for the acquiring company to pay the sum to the target company. One of the most precarious rudiments of M&A is the valuation process as the success of M&A depends on the fair value of the companies. An appropriate and correct valuation of the company that is being targeted is very necessary for the stability and growth of the acquiring company. To disperse a value to an entity is even more problematic for the reason that one can monitor the corporate reserves even by moderately owning them.

In a M&A, the financial aspects of the transaction are crucial. It epitomizes the exact value of the asset and are evidently based on the benefits that shall accrue in terms of business gains, such as upsurge in productivity and boosted dividend-paying capacity of the merged entity. Given that the complete exercise is built on assumptions, one habitually ends up paying an excessive price for a target, merely because one is too optimistic in presuming synergistic benefits. The result of an enthusiastically resilient valuation is that one may overemphasize the value creation aptitude of the merged entity.

CONCEPT OF MERGERS & ACQUISITION

M&A is one of the foremost facets of corporate finance world. The key rational behind M&A usually accorded is that two independent companies communally produce additional value contrasted to being on an individual stand. M&A influences virtually every single industry, from technology firms and banking, to industrial manufacturers and healthcare organizations. M&A contracts are also contemplated to be the most prominent profile component of investment banking activities. Merger can be stated as the tool where two or more companies lose their legal status and combine to form a new company which involves the transfer of their assets and liabilities or may agree to combine to form anyone of the existing company. Whereas acquisition is stated as a tool where one company gains the majority share of the other company.

The motive of the acquiring companies also changes based upon their acquiring reasons and such reasons are: -

1. To increase the size of the company
2. To attain larger economies of scale
3. To acquire advanced technologies
4. To acquire greater market share
5. To pool more capital
6. To minimize competition or regulate price with better stability
7. For research and development
8. To attain specialization or to attain better human resource
9. For diversify
10. To operate globally by removing the hindrance of place, language, or human resource.
11. To increase growth
12. To complement each other

NEED AND IMPORTANCE OF VALUATION

Valuation is time and again deemed as an ideal deal issue, in combination with financing, deal structuring, timing and tactics. For the buying hand, inappropriate valuation can result in overpayment for the target and vice versa, inappropriate valuation can also cause the target to accept a price below the shareholders anticipated. Both instances will have a poor effect not only on investors, but also on staff, customers, and other associated parties whose interest is directly impacted by the value loss produced by the strategic goals and synergy of the deal.

The valuation process is tricky as each and every company is distinct and there is presently no specific best way of valuing a company. The valuation of a company may possibly be imperiling to numerous exterior factors, predominantly in the perspective of M&A, reliant on the nature of every M&A deal. Accurate valuation also goes with experience and entails perhaps in copious assumptions, whose modifications even in minor quantity can ensue significantly on the valuation themselves.

Numerous techniques exist to disembark at the coveted value of target. Reliant on the industry, nature of company, phase of company growth, structure of deal expected, strategic plans for the target, private or public status and other concerns, different valuation techniques will be used. Copious methods of valuation are accessible. However, the option of a distinct method depends on the parties involved in the process. When the intention of estimate process is to sell business, then the procedure should accurately regulate a fair market value.

Valuation is an extremely complex process. One must keep the rationale of valuation in mind, all through the valuation process. The procedure of valuation manages many objectives, such as the following;

a) Imminent sale of the firm
b) Finishing pertinent legal proceedings
c) Undertaking estate devising
d) Clearing shareholder's disagreements
e) Boosting additional capital

METHODS OF VALUATION

Beyond the standard valuation methods, one needs to contemplate the following factors while valuing a business entity[142]:

(a) The nature of business and its operating history
(b) The stage of evolution of the target company, i.e. whether the target is a profitable company or is in the early stage of technology development, etc.
(c) The industry/sector dynamics
(d) The economic outlook and market sentiments
(e) The book value and financials of the entity
(f) Sources of bias in valuation
(g) Market value of other entities engaged in similar business

[142] Rajinder S. Aurora, Kavita Shetty & Sharad R. Kale, Oxford Higher Education's Mergers & Acquisition, September 2011 (1st Ed.).

(h) The entity's earnings and dividend – paying capacity.

There could be a range of valuation estimates for the same company depending on the entity and the purpose for which the valuation is being done. In each case, the valuation estimates may differ. Broadly, there would be two major estimates of values: standalone value and restructured value. Under the standalone value estimation, the value of the target is determined on a standalone basis without considering any internal, external, or financial restructuring improvements. On the other hand, under the restructured value estimation, all improvements and estimates pertaining to the company's restructured value are incorporated.

There are three basic methods of valuation[143]:

(a) ASSET-BASED VALUATION –

1. Asset-based valuation involves estimation of the value of corporate assets, as if they have been with the bidder. The assets that are valued include the net fixed assets, intangible assets, investments, current assets, and all third-party liabilities.
2. While valuing the fixed assets, each sub-class is considered and the value of all individual assets under each sub-class is estimated. Examples include real estate, plant and machinery, furniture and fixture, buildings, and vehicles.
3. While valuing investments, the value of every investment is estimated either at their realizable value or its current yield. Investments are valued under the categories of listed securities, unlisted securities, inter-corporate deposits, and other investments. Current assets such as stocks and receivables are also estimated at their realizable values.
4. The entire valuation exercise is carried out by valuing all the assets and liabilities at their revised value or at their current yield.

(b) EARNING-BASED VALUATION –

[143] Rabi Narayan Kar & Minakshi, Taxmann's *Mergers Acquisitions & Corporate Restructuring*, Strategies & Practices, September 2017 (3rd Ed.).

1. In this method, the future maintainable earnings (FME) of the target company are estimated after adjusting the extraordinary items, if any, such as seasonal fluctuations, contingent payments or receipts, any concessions or penalty in the past years, or any non-recurring items such as profit or loss from sale of assets, or profit or loss from treasury function.
2. This method assumes that FME will continue to be available to the business till its survival, which is assumed to be infinite, based on the principle of going concern.
3. The value of the business is arrived at using the principle of present value of perpetuity, where FME represents the perpetuity value of the business.

(c) MARKET-BASED VALUATION –

1. This method of valuation involves comparison of the target company's market variables and other comparable with that of the industry. The value so arrived at is termed as market-based valuation.
2. The most used variables are as follows:

(a) Price/earnings
(b) Price/sales
(c) Price/assets
(d) Any other quantifiable variable in relation to market price per share (such as price/cash earnings per share, price/operating profit per share, etc.)
(e) Variables for different periods (such as highest, lowest, and current)
(f) Fundamentals factors such as earnings, assets, or capital employed, whichever is found appropriate.

3. Once these variables have been calculated, appropriate weightage is assigned to each variable to arrive at the weighted average multiplier, for calculating the market capitalization of the target company.

There are other variants of these methods[144]:

[144] Id.

(a) BOOK VALUE APPROACH – The accuracy of this approach depends on whether the net book values of the assets are closer to their market values or not. If the difference between the two values is wide, the value of the company becomes unrealistic and vice versa.

(b) STOCK AND DEBT APPROACH – This method is followed when the securities of a company are publicly traded. Here, the value can be obtained by merely adding the market value of all its outstanding securities.

(c) DIRECT COMPARISON APPROACH – This method assumes that similar assets sell at similar prices. As such, one can ascertain the value of an asset by checking the price of a comparable asset in the market. This principle is commonly applied while dealing with assets such as land and building.

(d) DISCOUNTED CASH FLOW METHOD – Discounted cash flow represents the present value of the expected cash flows generated through an asset, which are discounted at a discount rate that reflects the risk involved in earning these cash flows[145]. It is the most preferred and acceptable method of valuation at present. The main reason behind its popularity is that it is based on fundamentals of time value of money (the value of money changes over time) and gives weightage to the future prospects of the business rather than on its historical performance.

SUPREME COURT'S OPINION ON VALUATION

The law on the issue has been well established by the Supreme Court in *Mafatlal Industries*[146] case where it was held that once the exchange ratio of the shares of the transferee company to be allotted to the holders of shares in the transferor company has been worked out by a familiar firm of chartered accountants who are connoisseurs in the arena of valuation and if no error can be pointed out in the said valuation, it is not for the court to substitute its exchange ratio,

[145] Methods Of Valuation For Mergers And Acquisitions, University of Virginia, (September 26th, 2019, 8.45pm), https://faculty.darden.virginia.edu/simkop/f-1274.pdf.

[146] *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* - (1996) 4 Comp LJ 124 (SC) (India).

exclusively when the equivalent has been accepted without baulk by the prodigious majority of the shareholders of the two companies or to say that the shareholders in their communal wisdom should not have acknowledged the said exchange ratio on the ground that it will be detrimental to their interest[147]. In the *HLL* case Supreme Court held that the court's obligation is to satisfy that the valuation was in accordance with law and the same was carried out by independent body.

IMPACT OF VALUATION IN M&A

Whenever an enterprise is thinking of taking an organization then at that time it tries to value the benefits which it will be getting after acquiring the same. In this manner it tries to evaluate the worth of the company which it is planning to acquire and whether the price or cost of such acquisition or merger shall be done or not based upon their opportunity cost or whether the same money if invested elsewhere could give the company more benefits or not. The various factors which influences an enterprise or company to merge or acquire are potentiality of the target company or its resources, intellectual property of the company, location of the company where it is operating, market maximization if possible after the merger, to attain greater economies of scale, if the target company is a sick unit and therefore the acquiring company can get lot of benefits because of its dominating position and on the other hand the sick unit is also ready to sell its unit happily as it wants funds urgently.

Value can impinge on the supplier or consumer's ability to agree a price at which the deal can be processed. For both parties, appropriate valuation scrutiny plays an imperative role in different steps, vacillating from opt for the ideal partners (buyer or seller) from the list, enclosing price expectations, setting strategies for the array of acceptable bids, gauging the offers and, for the array of acceptable bids, gauging the offers and, most prominently, parleying the final purchase price.

[147] *Hindustan Lever Employees Union v. Hindustan Lever Ltd.* – (1994) 4 Comp LJ 267 (SC) (India).

The various valuation methods which are used by the acquiring company at the time of evaluation are the following[148]: -

1. Accounting Ratios
    a) Profitability ratio – these are calculated to check the profitability or return of the company.
    b) Market value ratios – these are calculated to know how highly enterprise is valued by the investors. These includes price earnings ratio, divided yield, market to book ratio.
    c) Leverage ratio – it is calculated to know how heavily the enterprise is in debt.
    d) Efficiency ratio – to know how efficiently the firm is utilizing its resources.
    e) Liquidity ratio – to know how easily the firm can generate cash by examining current assets.
2. Discounted Cash Flow Evaluation – The acquiring firm should appraise merger as a capital budgeting decision, following the DCF approach.
3. Evaluation of Goodwill
4. Replacement cost – The value which is derived after taking in account the depreciated replacement cost of plants and buildings other assets in business combinations.
5. Fair Value – Fair value of the real estate property or land based upon prevailing market situations.

VALUATION & DUE DILIGENCE

In the business context, due diligence indicates to the meticulous investigation procedure by an investor or his advisors for the target company's business. It entails investigation of the assets and liabilities of a company or business. Further, it obscures investigation into compliances with the innumerable regulations affecting the operation of a company or business. The need for carrying out due diligence procedure evolves from the legal concept

[148] Rajinder S. Aurora, Kavita Shetty & Sharad R. Kale, *supra*.

"*caveat emptor*[149]". Thus, it is expected from the acquirer/ investor etc. to take utmost care to examine various aspects of the prospective target company. Derisory due diligence can lead to catastrophe of M&A as it is the crux of the complete stratagem.

Business valuation of a company can be regarded as a part of financial due diligence. Financial due diligence entails crucially probing the target legal company's historical, current, and potential operating outcomes as divulged/discharged/achieved from the following sources[150];

(a) Audited financial statements
(b) Unaudited financial information
(c) Financial information with stock exchanges and regulators regulation
(d) Tax returns
(e) Cash flow statements etc.

Financial due diligence determines whether business accounts are trustworthy and assess real situation of assets, liabilities, and tax risk. Companies implicated in acquisitions or mergers must make certain that all the data provided to the other party is precise so that they pay correct price for business. Due diligence will aid to pinpoint the genuine financial and strategic condition of the business. It is also an instrument which supports an investor to realize other vital information about a business, which will help a buyer or investor to pay the actual price for the assets and liabilities he is taking over.

CONCLUSION

Valuation is one of the utmost imperative aspects in the achievement and the preservation of the success of M&As. This study has analyzed an array of valuation methods and concentrated on their demerits and merits. The focus of the study was the DCF method that affects the value of an organization contemplating its future performance, rather than the current and past performances, and which aids to find a much more precise and pragmatic value than the other

[149] The concept Caveat Emptor means that let the buyer beware, which means that the buyer before buying the product shall know all the details about the product.
[150] Rajinder S. Aurora, Kavita Shetty & Sharad R. Kale, Oxford Higher Education's *Mergers & Acquisition*, September 2011 (1st Ed.).

methods. The precise estimate of the synergy to be acquired from the M&A performs a crucial role in the fortitude of the exact value.

There have been several cases where mergers result in failure as the extremely optimistic expectations are not recognized at the end of the merger. However, pessimism about the synergy to be generated by the merger is an impediment to a potentially successful merger. If the synergy of the merger is established using different scenarios (e.g. optimistic, pessimistic, the most likely), this will decrease estimation errors. The researcher recommends that individuals should use manifold methods to determine on business value and give a weight to each method contemplating the conditions of the company, country, and market.

LABOUR REFORMS AND RIGHTS OF WORKERS: REDEFINING A NEW ERA

- KETKI TUSHAR KULKARNI

ABSTRACT

Rights have always been a beacon of light amidst all adversities. They are considered to be the basic tenet for formulation of law and policy. With the advent of globalization and advancement in technology, the recent trend has witnessed debates revolving around utility of human labour and has raised pertinent questions regarding their safety and security. In a world full of vast discrepancies, with the growing instances like inhuman working conditions, suspension of labour laws in some parts of the country, denial of salaries and increasing unemployment has further added to the concern regarding those responsible for the plight and those affected by the same. Therefore, an urgent need is felt to mainstream the rights of workers in the light of recent labour reforms introduced by the government.

Starting from the earliest statute of Trade Dispute Act, 1929 to the recent labour codes presented by the government, the main focus has always been to maintain a healthy industrial relation by safeguarding the interests of workers. However, due to the multiple regulations and burdensome nature of laws, the government of India introduced a more simplistic nature of laws governing these labour relations. Even though these new reforms are a step towards redefining a new era, there is a huge threat concerning labour laws enshrining worker's rights. It is argued that these reforms are pushing even more people into the informal sector, hence, driving down wages and eroding working conditions.

This paper argues that India should adopt a refreshing approach by harnessing the use of technology and other state and non-state actors by creating a strong infrastructure for the purpose of implementing these labour reforms without impeding the rights of workers. The executive, legislature and the judiciary by acting as a strong facilitator and enabler will help us

to achieve a balance. This understanding is reached after analysing the rights ensured to workers in the light of labour reforms.

I. INTRODUCTION

With the advent of COVID-19 pandemic haunting the entire world, India has witnessed an everlasting impact on mass unemployment, poverty and hunger. In such a constantly changing environment which is driven by changing customer needs and is enabled by digital technology, the only thing that can be said regarding the current situation is that we live in a world of "VUCA"[151] where the only thing which is constant is "change".[152] As the economy is relentlessly trying to revive in the post lockdown era, the conditions in the informal sector are continuing to worsen. A recent report released by the International Labour Organisation (ILO) has highlighted that around 40 crore workers in India mainly from the informal sector are at risk of falling deeper into poverty.[153] The enduring economic inequality has brought a huge burden on maintaining complex relationships between the workers, employers and the government, therefore, a strong need is felt to shift from an outdated traditional system of the economy to a gig economy.

Since independence, the constitution of our country has ensured the basic fundamental right to all citizens, industrial laws in this country have evolved tremendously and have also observed increased awakening of the workers for determining their rights, terms of employment and conditions of labour. With the growing claims of unfair dismissal, breach of contract, wages, and discrimination on the grounds of sex, race, age and equal pay highlighted a need for an institution dealing solely with industrial disputes. Industrial Tribunals are independent judicial

[151] Nathan Bennett and G. James, What VUCA really means for you, Harvard Business Review, (2014).

[152] The acronym "VUCA" was introduced in the late 1980's by the US Army war college in the post-cold war time in order to understand what was happening in the world and to navigate the time post-cold war where the acronym stands for; Volatility, Uncertainty, Complexity, Ambiguity.

[153] D. Raja, More than ever, the rights of worker, vulnerable need to be secured, May 1, 2020, https://indianexpress.com/article/opinion/columns/may-day-coronavirus-international-labour-day-india-lockdown-migrant-workers-6387859.

bodies given under Section 2(r) of the Industrial Disputes Act, 1947 that hear and determine cases concerning employment.

However, with the growing awareness amongst the labour workforce, the multiplicity of complex labour regulations and the cumbersome nature of compliances acted as a barrier for their growth and development in this sector. Rigid labour laws and over- regulated nature of the sector acted as a prime barrier to enable the workforce to enjoy their rights. With the instances following the lockdown concerning states like Uttar Pradesh, Madhya Pradesh etc. suspending the labour legislation, harassment by employers at the workplace, denial of salaries, loss of employment focuses on an urgent need to safeguard the rights of workers.

Even though the new labour reforms introduced in the form of labour codes are trying to make doing business easier in India by introducing a range of worker rights[154], there is a huge threat concerning labour laws enshrining worker's rights as these reforms are pushing even more people into the informal sector, hence, driving down wages and eroding working conditions.

Therefore, the study of industrial jurisprudence in light of the rights of workers helps in finding solutions to the threats possessed by recent labour policy changes. It even helps one to put the law in proper context by considering the needs as well as requirements of the working population.

II. ORIGIN AND DEVELOPMENT OF INDUSTRIAL JURISPRUDENCE

The history of labour legislation in India is naturally interwoven with the history of British colonialism. The labour legislation enacted by the British was primarily intended to protect the interests of their employers. The earliest statute to regulate the relationship between employer and his workmen was the Trade Dispute Act, 1929. Provisions in this Act were made to restrain rights of workmen regarding strikes and lockouts. However, in this statute, no machinery was provided to take care of disputes. Further, there was no provision for any adjudicatory mechanism as a result; original colonial legislation underwent substantial modifications in the

[154]Amir Khan, Promise and Pitfalls of new labour deal, September 30, 2020, https://www.livemint.com/news/india/promise-and-pitfalls-of-new-labour-deal.

post-colonial era. A strong need was felt by the Ministry of Labour and Employment to protect and safeguard the interests of workers in general and those who constitute the poor, deprived and disadvantaged sections of the society. As a result, the Industrial Disputes Act, 1947 was brought into force on 1st April 1947 repealing the Trade Disputes Act 1929. This act ensured fair wages and fair working conditions in return of the fullest co-operation of labour for uninterrupted production and higher productivity as part of the strategy for national economic development. Due regard was given to maintain a healthy industrial relation by enforcing labour laws in the central sphere.

The Industrial Disputes Act, 1947 was considered to be a charter to the industrial law as it provided machinery for regulating the rights of the employers and employees for investigation and settlement of industrial disputes in a peaceful and harmonious atmosphere. It was for the first time an adjudicatory mechanism for redressal of disputes was created in the form of Industrial Tribunals and Labour Courts. Considerable importance was given to the collective bargaining system through negotiations, mediation and, failing that, by voluntary arbitration or compulsory adjudication by the authorities created under these statutes with the active participation of the trade unions. Industrial tribunals were considered to be torchbearers for upholding principles of justice.

However, due to the multiple regulations and burdensome nature of laws, the government of India introduced a more simplistic nature of laws governing labour relations. It was through the recommendation of second labour commission, the government consolidated twenty- nine labour legislations into four labour codes dealing with industrial relations, social security, occupational safety, health and working conditions. The basic aim behind introducing these codes was to promote a transparent and simplified system of laws which suits the contemporary requirements of the business environment.

Firstly, the Industrial Relations Code is introduced to regulate classification of workers, provisions for registration of trade unions, unfair labour practices, lay-offs and retrenchment

and resolution of industrial disputes[155]. It subsumed three legislations namely the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947. Secondly, the code on wages is introduced for easy fixation of wages by subsuming the Equal Remuneration Act, 1976, Payment of Bonus Act, 1965, Minimum Wages Act, 1948 and Payment of Wages Act, 1936. Thirdly, the social security code is introduced for providing social security to employees at the workplace. It compiled nine social security legislations into one single code like for instance Employees' Compensation Act, 1923, Maternity Benefit Act, 1961, Payment of Gratuity Act, 1972, Employees' State Insurance Act, 1948 etc. Lastly, the code on occupational safety, health and working conditions is also introduced to ensure safety standards and basic minimum rights of having a decent working condition for the labourers.

The transformation of the labour legislations witnessed in India can definitely be considered to be one of the most crucial examples of adjusting with the changing trends towards ease of doing business by balancing with the needs as well as rights of workers.

III. INDUSTRIAL JURISPRUDENCE AND RIGHTS OF WORKERS

Even though the constitution of our country has ensured the protection of basic rights for all, the declaration of these fundamental rights is meaningless unless there is an effective mechanism for its enforcement. Justice is considered to be the rice and ether of law. It lays down the basic tenets for the existence of law. Austin in his jurisprudence also mentioned that there can be no law without a legislative act. Justice is not only a requirement for courts or tribunals rather it applies to those who are responsible for the fair play in action. In the case of India, a just and fair social order cannot be achieved in the absence of a process of law.[156]

With the instances of the central government and state government's decision to restart the economy in callous working conditions is in direct contradiction to the rights enshrined in the

[155] Atul Sharma and Shyam Sunder, Labour Reforms sans human face, October 28, 2020, https://indianexpress.com/article/opinion/columns/labour-reforms-strikes-trade-unions-economy-manufacturing-factories.

[156] A Vaidya, Industry and Industrial disputes: A judicial trend, (2009), https://shodhganga.inflibnet.ac.in205.pdf.

legislation. Industrial tribunal acts as an effective redressal body by protecting the rights of workers and maintaining industrial relations in the workplace. Industrial tribunal being a quasi-judicial body has also played a very important role in safeguarding the rights of workers. There are multiple rights that a worker should be ensured with like: the right to a safe working environment, right to fair pay, minimum wages, plus overtime for any hours, right to a workplace environment etc. The Supreme Court of India and High Courts under various parameters of constitutional philosophy has also played a unique role through power of judicial review by upholding the rights of workers and expanding the scope of principles of social justice.

The Supreme Court in its recent decision of addressing the constitutionality of the notification passed by the Gujrat government held that right to life cannot be deemed to be contingent on the mercy of their employer or the state.[157] The notification was held to be violative of Article 21 of the constitution and against principles of social and economic justice laid down under Article 38, 39, 42 and 43 of the constitution of India.[158]

The court under its various pronouncements has upheld the rights of workers. The Supreme Court in D.K. Yadav v. J.M.A Industries[159] held that the right to life enshrined under Article 21 includes the right to livelihood and therefore termination of the service of a worker without giving him reasonable opportunity of hearing in unjust, arbitrary and illegal. The procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and so it must be right, just and fair and not arbitrary, fanciful or oppressive.

The right to health of workmen has been recognised as a part of the right to life in several judgments. The court in Occupational Health and Safety Association of India vs Union of India held that the workers exposed to hazardous conditions are required to be provided with PPE kits with a detailed provision for cleanliness, ventilation, overcrowding, drinking water,

[157]Nikhil Erinjingat, Recognizing Indian laborers as humans, JURIST – Student Commentary, October 26, 2020, https://www.jurist.org/commentary/2020/10/nikhil-erinjingat-labor-india

[158] Id.

[159]D.K. Yadav v. J.M.A Industries, 3 SCC 258 (1993).

latrines and urinals all of which surely become more important during a global health pandemic.[160]

In PUDR vs Union of India,[161] the Supreme Court held that laws protecting contract labour and inter-state migrant workmen were intended to ensure basic human dignity; violating these laws would violate the right to life guaranteed under Article 21 of the constitution. Further, the Court held that "forced labour", prohibited by Article 23, included not just physical force but also the threat of imprisonment or fine. In PUDR, the Court also noted that no one would willingly work for less than the minimum wage without some force or compunction and that compunction could include hunger or poverty.[162]

Justice Krishna Iyer in the case of *Indian Express News Papers Pvt. Ltd., Vs Indian Express News Papers Employees Union*[163] said that

"Industrial jurisprudence is not static, rigid or textually cold but dynamic, burgeoning and warm with life. It answers in emphatic negative to the biblical interrogation. The Industrial Tribunal of India in the areas unoccupied by precise block letter law, go by the constitutional mandate of social justice in the claims of the little people"[164].

However, every right comes with its duties. Indian constitution under part four lays down certain duties to prevent the misuse of fundamental rights. The Directive Principles of State Policy ensures that the operation of the economic system does not result in the concentration of wealth and effective provision for securing the right to work. The state is also responsible for ensuring a decent standard of life. Any legal changes framed by the government should meet the basic constitutional standards to survive in such a dynamic environment.

The rights of workers have been particularly protected by providing industrial adjudication of unfair discharges and dismissals and ensuring reinstatement of illegally discharged workmen.

[160] Arundhati Katju, Changes proposed to labour laws are unconstitutional, May 19, 2020, https://indianexpress.com/article/opinion/columns/migrant-crisis-relaxation-in-labour-laws-india-trade-union-coronavirus-arundhati-katju.

[161] PUDR v. Union of India, AIR 1473 (1982).

[162] Id.

[163] Indian Express News Papers Pvt. Ltd. v. Indian Express News Papers Employees Union, I LLJ II (1978).

[164] Sharth Babu and Rashmi Shetty, Social Justice and Labour Jurisprudence (2010).

These matters being a subject matter of industrial disputes can be investigated and settled with the aid of the machinery provided under the act in place.

IV. LOOPHOLES

Though several judicial pronouncements have upheld the basic rights guaranteed to workers, the paradox that persists on account of several legislative reforms and governmental policies remains unanswered. It is generally assumed that the state's actions and policies are focused on reviving the economy. However, the issue in India does not have to do much with the implementation of such laws[165]. The issue rather revolves around the fundamental rights of a worker to decent working conditions and the right to work with dignity. Unfortunately, the guardian of fundamental rights, the Supreme Court has also delivered several decisions to protect the rights of these labourers but all in vain.[166]

The labour reforms introduced by the government in the form of a unified labour code are a step forward to mitigate the complexities proposed by several labour legislations. But then the problem is not in the absence of law or legal recognition; rather it is the lack of political will which is the cause of a problem.

The Industrial Relation Code framed by the government is designed to encourage negotiations between employee and employer on an individual basis and thereby reducing the role of collective bargaining by labour unions.[167] But the trade unions have argued that such codes are not labour friendly as there is a clear attempt to diminish the role of collective representations by forming unions. Hence, violating their fundamental right guaranteed under Article 19(1) (c) of the constitution. Further, the hire and fire regime introduced in the Industrial Relations Code is also heavily criticised to be against the basic rights of the employees as there will be a virtual

[165] Nikhil Erinjingat, Recognizing Indian laborers as humans, JURIST – Student Commentary, October 26, 2020, https://www.jurist.org/commentary/2020/10/nikhil-erinjingat-labor-india.

[166] Id.

[167] Atul Sharma and Shyam Sunder, Labour Reforms sans human face, October 28, 2020, https://indianexpress.com/article/opinion/columns/labour-reforms-strikes-trade-unions-economy-manufacturing-factories.

ban on worker's right to strike and even collectively agitate for their grievances and demands.[168] Even though the code has given enormous flexibility to employers, it has pushed the labourers into insecurity ultimately resulting in lower productivity and efficiency.

The social security code introduced in the parliament has subsumed about nine labour laws is also not averse from criticism. It has been understood for long that social security been influenced by the International Labour Standards Social Security (Minimum Standards) Convention, 1952, which emphasised on measures that help workers in contingent times. It identified namely nine branches of social security, which includes: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivor's benefit by defining their minimum standards as well[169]. While the organised sector somehow ensures these components, the inadequacy becomes prominent in case of unorganised sector. According to Women in Informal Employment: Globalizing and Organizing (WIEGO), around 50 million domestic workers including women in India are unable to avail of any social security and insurance benefits due to the basic fact that the labour code on social security does not cover households.[170]

If we are to believe in the current factual position, around 85% of the workforce in India is engaged in the unorganised sector with almost negligible social security. The share of unorganised sector is highlighted from the Global Hunger Index where India was ranked 94th in a list of 107 countries. Further, India has also ranked 151 among 158 countries as per Oxfam's Commitment to Reducing Inequality Index (CRII) report indicating a lower level of earning, weak labour rights and inadequate social security.[171]

[168] Id.
[169] Id.
[170] Jagriti Chandra, Rights of Domestic workers in focus post lockdown, October 18, 2020, https://www.thehindu.com/news/national/rights-of-domestic-workers-in-focus-post-lockdown/article.
[171] Ritwika Mitra, More woes for Modi government, October 9, 2020, https://www.newindianexpress/nation/2020.

While a gig economy seems to be a rescue to averse the effects brought from this pandemic, a strong need is felt to protect the rights of workers. Given the contraction of the economy by 23.9 per cent in the first quarter, a demand push, not wage decline, is what is urgently needed to spur the economy. [172] With the growing dependency and use of technology in automation and manufacturing sector has also impacted the demand for labour hence forcing them to go into the informal sector.

With the growing instances of migrants and workers demanding human working conditions, it proposes a great responsibility on the legislature, executive and the judiciary of our constitution. The judiciary through the judicial review is responsible for the protection of basic human rights; the legislature and executive are responsible for formulating and implementing legislation for protection from an escalation of the human rights violations of the labourers. In a parliamentary democracy like India where the line between executive and legislature is so thin, the failure on part of the legislature to act to protect the minimum working conditions and standards of the workers and executive to prevent violation of a fundamental right is quite detrimental. The action of the legislature and inaction of the executive is the main cause of concern for protecting the rights of the workers.

V. CONCLUSION AND SUGGESTIONS

In a dynamic environment like that of India, driven by digitalisation, big data, artificial intelligence, robotization, financial crisis, and shift in global power, the relations between capital and labour is very critical from the point of view of poverty, illiteracy, and ignorance of the majority of workers in the unorganized sectors. Even though the legislature by its incessant amendments has kept in mind the social nature of the labour legislation, industrial tribunal along with the other judicial bodies have acted to the best of its capacity to keep intact the basic human rights applicable in this sector.

[172] Atul Sharma and Shyam Sunder, Labour Reforms sans human face, October 28, 2020, https://indianexpress.com/article/opinion/columns/labour-reforms-strikes-trade-unions-economy-manufacturing-factories.

A closer study of the industrial jurisprudence framed from the past several years highlights that the traditional labour law regime draws a distinction between employees or workmen, and independent contractors. The former enter into a defined relationship with their employer. The latter is deemed to negotiate their terms with the one willing to hire them. Under labour law, only the first category of workers is entitled to access the entire range of labour rights neglecting the second category of citizens.[173] Therefore there is an urgent need to shift from the traditional system of the economy to a gig economy for protection of rights of workers becomes very important. The recently introduced labour codes are a step towards having a systematic labour regime with simplified legislation governing the rights of workers.

The code has attempted to make a shift from a complex system of laws to a more simplified version. The code has dropped several traditional provisions of multiple legislations such as the traditional test of employment is no longer made applicable. The code has also dropped the provisions relating to temporary accommodation of workers near the worksite. A new journey allowance has also been added to the list. Thus, to promote a transparent and simplified system to suit the contemporary business environment and facilitate ease of doing businesses without compromising labour welfare, the government has brought in these series of labour law reforms.

Even though these reforms are subject to criticism, India should adopt a bottom-up approach wherein the focus should be on the coordinated efforts from all the states to ensure the protection of human rights of all. Further, carefully drafted laws should be put into place by underlying both the procedural rights for having an option for collective bargaining as well as the substantive right of ensuring minimum wages and a decent standard of living to the workforce in general.

An integrated approach should be adopted by all the machinery wherein the technology should be embraced in such a manner so that transparency in actions is ensured by educating both the state and non-state actors. The government should act as a strong facilitator and enabler for

[173]Gautam Bhatia, Devise a new labour law regime for gig economy for workers, September 22, 2020, https://www.hindustantimes.com/analysis/devise-a-new-labour-law-regime-for-gig-economy-workers/.html.

building a strong infrastructure by keeping in mind several best practices formed through several judicial pronouncements for ensuring justice.

RAWLSIAN THEORY OF JUSTICE AND NET NEUTRALITY IN INDIA

- ISHAAN GOEL

I. INTRODUCTION

Equal access to the internet is imperative in today's world because of the significant impact it has on our daily lives. For this, the principles set out under 'Net Neutrality' norms argue that access to the internet should be provided in a manner that is equal to all without any discrimination. Here, John Rawls's "Justice as fairness" framework becomes relevant as it provides an egalitarian interpretation of rights of people in a liberal society and ensures that inequalities are handled in the most equal way possible. Therefore, this paper analyses the net neutrality debate in India, particularly the Facebook's condemned 'Free Basics' scheme, and also India's current position on net neutrality in light of Rawls's "Justice as fairness" framework in light of justice as fairness framework. The paper concludes that the Free Basics scheme was violative of Rawls's principles of justice as fairness and that the current position of India is in conformity with Rawls's principles, solidifying the net neutrality norms in India.

II. JUSTICE AS FAIRNESS AND THE INTERNET

With the technological revolution in the 21st century, the internet has become one of the most essential commodities that humans depend upon. It not only just provides us with information but also has become the most widely used service for communicating with others. The Internet allows people from all over the world to express their views to the widest possible audience[174] and has also been used for creation of many important political movements.[175] The Supreme Court of India has held[176] that the right to free speech and expression over the medium

[174] Amit M. Schejter & Moran Yemini, *Justice, and Only Justice, You Shall Pursue: Network Neutrality, the First Amendment and John Rawls's Theory of Justice,* 14 Mich. Telecomm. & Tech. L. Rev. 137, 158 (2007)
[175] *Id.* at 170-171
[176] Anuradha Bhasin and another v. Union of India and others, (2020) Indlaw SC 21 (India)

internment is also covered under the provisions of Article 19(1)(a)[177] and 19(1)(g)[178] of the Constitution of India.

Due to this remarkable status the internet has achieved in our social, economic and political lives, it is imperative that access to it is distributed in such a manner that it is available equally to the widest number of people possible. To make distribution of such nature possible, Rawlsian Theory of Justice, primarily the "justice as fairness framework", must be used as it can provide a base of norms and principles to govern the distribution of access to the internet.[179] John Rawls describes "justice as fairness" as a framework that is applicable to political, social, and economic frameworks of the society rather than just to human morality, meaning that it is intended for a real-world application rather than just being a theory.[180]

Justice as fairness is guided by two core principles.[181] First is "equal basic liberty," and second is a combination of the "opportunity principle" and the "difference principle."[182] Under the first principle, every individual should have an equal right to "most extensive scheme of basic liberties" such as freedom of speech and assembly' free of person, freedom of thought, etc.[183] The second principle is that any arising social and economic inequalities must be treated in such a manner so that such treatment is (a) to everyone's benefit, called the difference principle and (b) attached to positions and offices open to all, called the opportunity principle.[184]

A similar implementation to justice as fairness for access to the internet can be found in the notion of 'net neutrality' which stands for open and equal access to the internet for all.[185] Under the norms of net neutrality, the Internet Service Providers ('ISPs') must not discarnate

[177] INDIA CONST. art. 19, cl. 1., sub. cl. a.
[178] INDIA CONST. art. 19, cl. 1., sub. cl. g
[179] Johannes M. Bauer & Jonathan A. Obar, *Reconciling Political and Economic Goals in the Net Neutrality Debate* 30 The Information Society 1, 6 (2014)
[180] John Rawls, *Justice as Fairness: Political Not Metaphysical.* 14, no. 3 Philosophy & Public Affairs 223, 224-225 (1985)
[181] LEIF WENAR, JOHN RAWLS (Edward N. Zalta ed., Stanford Encyclopedia of Philosophy 2017)
[182] Michael Anthony Lawrence, *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 Brook. L. Rev. 673, 678 (2016).
[183] JOHN RAWLS, A THEORY OF JUSTICE 53 (rev. ed. 1999).
[184] *Id.*
[185] Bauer, *supra note* 7, at 1

on any criteria while providing access to the internet.[186] The network and the information passing through it should be neutral to all and any type of data passing through it should be treated equally.[187] This is clearly in conformity with the first principle of "equal basic liberty" as equality of access is the main principle. The issues arise when we consider the second principle and deal with the creation and implementation of inequalities for the disadvantaged people, as will be discussed in the following case study.

III. INDIA'S FIGHT FOR NET NEUTRALITY

Net Neutrality in India gained the most attention when Facebook announced its Free Basics campaign in 2015[188] which was a rebranding of "internet.org", launched in 2013. It was a "zero-rated service" in a differential pricing modal of services or in other words, it promised to provide access to some services over the internet for free, but those services would be selected by Facebook and not the consumer.[189] Many people reacted negatively to the scheme by arguing that it is against the norms of net neutrality as it will create a divide in access to the internet.[190] Several complaints were filed with the Telecom Regulatory Authority of India ('TRAI') forcing it to launch a consultation process with the public and Facebook.[191] In 2016 TARI banned all differential pricing schemes from ISPs including the "zero-rated services".[192] In 2018, TARI mandating that an amendment for terms of various license agreements

[186] A.K. Bhargava et al., *NET NEUTRALITY DoT Committee Report,* Department of Telecommunications (2015)
[187] *Id.*
[188] Revati Prasad, *Ascendant India, digital India: how net neutrality advocates defeated Facebook's Free Basics* 40(3) Media, Culture & Society 415, 415-416 (2018)
[189] Subhayan Mukerjee, *Net neutrality, Facebook, and India's battle to #SaveTheInternet,* 1 Communication and the Public 356, 358 (2016)
[190] *Id.*
[191] Anita Gurumurthy & Nandini Chami, *Internet governance as 'ideology in practice' – India's 'Free Basics' controversy, Internet Policy Review*, 5 Alexander von Humboldt Institute for Internet and Society 1, 3 (2016)
[192] Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, No. 2, The Gazette of India, Extraordinary Part iii, Section 4 Telecom Regulatory Authority of India Notification (India), Section 3

governing the provision of Internet services to incorporate the principles of non-discriminatory treatment of content by ISPs but with appropriate exclusions and exceptions.[193]

IV. ANALYSIS OF NET NEUTRALITY IN INDIA THROUGH A RAWLSIAN LENS

Facebook tried to aggressively defend its position on the "Free Basics" scheme by holding that Free Basics will provide internet access to the disadvantaged people of the society. Facebook's CEO, Mark Zuckerberg, argued in one of his posts that "...arguments about net neutrality shouldn't be used to prevent the most disadvantaged people in society from new opportunities."[194] Facebook seems to be using a utilitarian argument that even though such a scheme will violate the norms of net neutrality, it is more important that the disadvantaged people should gain free access to the internet. It is not wrong to argue that policies should be made to benefit the least advantaged people but if Free Basics is looked at through the lens of Rawlsian justice as fairness then some key issues arise relating to the second principle of justice as fairness.

Firstly, Free Basics is against the opportunity principle which states that all citizens must be given equal opportunities for them to achieve equal standing in society.[195] Under Free Basics, as discussed above, the customers will only have limited access to services on the internet and they would not even have the right to choose the service they want. Therefore, they would not have access to all the opportunities available on the internet. The consumer's right to choose will also be violated because the services to be provided will be chosen by Facebook and not the consumer himself.

Secondly, Free Basics would also violate the difference principle which holds that inequalities in a society are acceptable only when they lead to benefit for everyone, particularly to the least

[193] Regulatory Framework on 'Net Neutrality', 2018, Ministry of Communications Department of Telecommunications Networks & Technologies (NT) Cell, Regulation 3.2 1
[194] Gurumurthy & Chami, *supra note 19,* at 7
[195] Lars Lindblom, *In Defense of Rawlsian Fair Equality of Opportunity,* 47 Philosophical Papers 235, 237-242 (2018)

advantaged.[196] Rawls has put a great deal of emphasis on the 'every party' aspect of the principle.[197] He stresses that every single party involved must gain from such differentiation.[198] The zero-rated service under Free Basics would mean that Facebook would be able to unfairly incentivise customers to use its sponsors' services as data charges will not be levied on the user while using such services. This would be detrimental to services that are not associated with Facebook as the users will have no incentive to use such services. Additionally, local ISPs and start-ups dealing with the distribution of the internet will, under no circumstances, be able to compete with a scheme that gives access to the internet for free. Therefore, such a scheme will not be able to benefit every party involved.

According to Rawls, justice as fairness is an answer to problems of utilitarian theory. He says that the theory of justice avoids the justification of unfair inequalities based on benefits outweighing the disadvantages.[199] Rawls sets the parameters at which such inequalities can be made so that these not only benefit one section of the society but everyone present in it. Under the norms of net neutrality, the internet should be open to all and all the legal content should be equally accessible to all. The Free Basics scheme creates many inequalities and Facebook seems to justify it based on utilitarian grounds. Limited access to the internet under Free Basics would violate the justice as fairness framework set by Rawls as it fails to ensure that equal opportunities on the internet are made available to all and it also fails to ensure that every party involved is benefited.

The 2018 regulation[200] is a perfect example of net neutrality norms that are in line with Rawls's principles as it bans all discriminatory practices by ISPs for access to the internet including all zero-rated schemes.[201] It also mandates that all service providers must incorporate the

[196] Gilbert Merritt, *Justice as Fairness: A Commentary on Rawls's New Theory of Justice*, 26 Vand. L. Rev. 665, 670 (1973)
[197] John Rawls, *Justice as Fairness,* 67 No. 2 The Philosophical Review 164, 167 (1958)
[198] *Id.*
[199] *Id.* at. 168
[200] Regulatory Framework on 'Net Neutrality', *supra note* 21
[201] *Id.* Regulation 3.1

principles of non-discriminatory treatment of content.[202] This satisfies the first principle of justice as fairness as this would mean that every person has equal access to all the services over the internet without any discrimination. The regulations also do provide for "appropriate exclusions and exceptions"[203] called the "specialized services" which are services optimised to special tasks where it is absolutely necessary to have such a service to meet the requirement.[204] These services are only allowed when they are not offered as a replacement for internet access services[205] and it is not detrimental to the availability and overall quality of internet access services.[206] This exception satisfies the second principle of justice as fairness as it ensures that equal access to the internet is not hampered in providing access to the internet and no party involved is at a disadvantage.

CONCLUSION

It is more important than ever before that people are given equal and non-discriminatory access to the internet and the net neutrality norms are based exactly on these principles. Therefore, we must protect and practice these norms. Facebook's Free Basics scheme violated these norms in India and was met with a strong backlash by the public forcing TRAI to ban such zero-rated services from ISPs. Internet is a platform where people can express themselves to the whole world and limiting access to it violates the right to free speech and expression. When Rawls's justice as fairness framework is applied to the Free Basics scheme, it is made clear that such a policy is not just and fair to all the people involved and is solely based on the utilitarian justice meaning that it is defended on the grounds that detriment to one party is outweighed by the benefit to another. In this respect, the current regulations on net neutrality in India follow Rawls's principles of justice as fairness and set a strong net neutrality regime in India.

[202] *Id.* Regulation 3.2
[203] *Id.* Regulation 3.2.1
[204] *Id.* Annexure-1, Table 1
[205] *Id*. Regulation 3.3.5(i)
[206] *Id*. Regulation 3.3.5(ii)

REVIEW OF ESTABLISHED PROCEDURE IN CASES OF CHEQUE DISHONOUR

- PRAKET SINGH BASUR & VISHESH CHANDHOK

INTRODUCTION

Cheques have widely been utilized as a payment instrument and post-dated Cheques are regularly used in numerous transactions in professional life. A post-dated form of Cheque is given to deliver a certain accommodation of flexibility of time to the Cheque drawer. Consequently, it becomes essential to ensure that the Cheque drawer does not misuse this facility provided to him.

Negotiable instruments as defined in the N.I. Act[207] include, promissory notes, Cheques, bills of exchange etc. Chapter XVII covering Section 138 to Section 142 was introduced with the objective to increase belief in the ability of banking processes and increasing reliability on these instruments employed in day to day corporate dealings. If a party as a mode of deferred payment draws a Cheque for settling dues and such cheque is accepted by the payee who has confidence that he will for sure on the due date get his payment, then such payee shall not suffer because of default in payments.

The penal regulations enshrined in Sections 138 to Sections 142 of the Act are provided to ensure that duties assumed by issuing Cheques as a method of payment are respected. Cases for dishonor of cheques can be undertaken by the method provided in the Section 138 of the N.I Act.

SECTION 138 APPLICABLE ONLY WHEN THE FOLLOWING INGREDIENTS COMPLIED WITH:

- A cheque must have been issued by a person for transfer of money to another for the repayment of any legally enforceable debt or other legal obligations;

[207] Negotiable Instruments Act, 1881

- Within a time frame of 3 months from the issuing date such Cheque should've been put forward to the bank for making payment;
- That the bank with sufficient evidence has dishonored the cheque and therefore returned unpaid, which may be because of inadequacy of balance in the account or that it outdoes the total sum categorically decided to be paid through that account due to an agreement signed between the bank and the holder of the account ;
- A demand with respect to the payment of the due amount was clearly made by the payee by setting forth a notice in written form to the drawer within a period 30 days from the return of the unpaid cheques as informed by the bank ;
- No payments have been made by drawer within the time span 15 days of after the delivery of written notice sent by the payee.
- A complaint should be filed within a period 30 days after the expiration of 15 days of notice period.

PROCEDURE ESTABLISHED TO DEAL WITH MATTERS DEFINED IN SECTION 138:

i. Within a time span of 30 days of dishonoring of such cheque through registered post a legal notice is required be directed towards the drawer with all relevant facts included in it. The drawer is provided a period of 15 days to make the payment to the payee, if the payments are successfully made then the matter is settled. If the payments are refused, then within a time span of 30 days from the date of expiry of the 15 days specified in the notice a criminal case may be filed by the complainant in consideration with section 138 of N.I. Act as a legal remedy, against the drawer, with the concerned magistrate court within the appropriate jurisdictions.

ii. The complainant himself or an authorized agent on his behalf should be present before the court and provide significant details for initiating the case. If the court is contented and deduces that there is enough matter in the complainant, then summoning order shall be issued to the accused to be present before the court.

iii. If the summons were served but even after that accused abstained from appearing before the court, then a bailable arrest warrant can be produced by the court to procure his presence. But if even after the execution of bailable arrest warrants, the drawer abstains from appearing, then a non-bailable arrest warrants may be issued by the court. Even after the execution of non-bailable arrest warrants, the accused abstains from appearing before the trial court, then the trial court shall be requested to proceed with proclamation proceedings as given u/s 82 of Cr.P.C. to procure his presence. In the proclamation proceedings, a notice is published in a wide circulating newspaper by the court with details about the case such as, the court's name and the specific time and date of appearance in the court. If the accused chooses not to appear on the particular dates so fixed, then the trial court shall be constrained to declare him a proclaimed offender, attach his properties and direct the SHO of a police station to initiate the registering a FIR u/s 174-A of IPC against the proclaimed offender.

iv. On appearance before the court the accused (drawer) can seek for a concession of regular bail by furnishing bail/surety bonds to the satisfaction of the trial court if he surrenders before the court. The reason of enforcing submission of bail or surety bonds is to ensure that in an event of non-appearance, the accused be punished by forfeiting the bond submitted as a cost to the state for compensating the efforts made by the state in procuring his presence.

v. After the accused is released on bail, notice of acquisition is served upon the accused. Thereafter he has to justify to the court as to why the submissions regarding facts of the case given by the payee shouldn't be trusted and the need of his cross examination. Depending upon the justification given by the drawer it is up to the trial court to decide that the matter be treated as a summary trial or not.

vi. The evidence of the complainant will be concluded first, thereafter the a statement of the accused will be recorded under Section 313 CrPC, wherein the accused is asked if he wants to submit any evidence in his defense.

vii. The accused should to be provided with a chance to present evidence in support of his version of facts. He should also in addition to the evidence be given an opportunity to present witnesses in his support. The accused and the witnesses presented by him will have to face cross-examination from the complainant's side.

viii. The last stage of the hearing is the arguments stage after which the court will pass the judgment. If the court adjudicates that the accused is innocent and not legally responsible then the only legal remedy left with complainant is to file an appeal.

ESSENTIAL CONDITIONS FOR EXISTENCE OF CRIMINAL LIABILTY UNDER S. 138 OF NEGOTIABLE INSTRUMENTS ACT

There are three essential ingredients for it to become a punishable offence and fulfill the criteria of law.

(i) The Cheque should have been presented before the bank for disbursement of payment within a time limit of 3 months starting from the issuance date or within the validity period whichever ends earlier.

(ii) The payee has sent a written notice to the drawer demanding the due amount after the said cheque has been dishonoured by the bank. This notice demanding the due amount of money has to be sent to the drawer before the period of 30 days limit from the date on which the bank gives him the information of return of the cheque by the bank without payment.

(iii) The issuer of the cheque has been unsuccessful in providing payment of the money due to holder in due course/payee of the Cheque before the end of period of fifteen days of receiving the said notice sent by such holder/payee.

If all the above-mentioned conditions and enlisted under proviso of section 138 can it be an offence by the cheque drawer.

MSR Leathers vs. S. Palaniappan.[208]

SENTENCE

The Extent of the sentence provided by S. 138 of the act is a maximum of two years Imprisonment or penalty which can be upto twice the due sum promised by the cheque or even both of the prescribed punishments. Also, it needs to be mentioned; that the authority drawn from Section 357(3) CrPC, under which the court can compel the drawer to make payment of compensation, is enforceable in addition of sentence under 138, if the verdict of penalty is not passed. Moreover, a sentence can be passed under 64 IPC and under the procedure of recovery established by S. 431 Of the CrPC to compel the guilty to pay the fines obligated by the court. In, "Meters and Instruments (Pvt.) Ltd. v. Kanchan Mehta",

It was held that: "The purpose of the provision of S. 138 was defined as both punitive and compensatory. The intention behind this law was to safeguard that the petitioner received the due amount of cheque through compensation. Although trial under Section 138 could not be treated as civil cases for recovery of due sum, the structure of the provision, which provides for punishment with imprisonment or with fine which could be upto to two times the due amount of the cheque or to both, made the object of this legislation unambiguous".[209]

WHERE TO FILE A CASE FOR S. 138 OFFENCES?

A new sub-section to section 142 of the act was added through an amendment. It is as follows- The new amendment creates a new sub-section 142(2) which says that, an offence of section 138 of the act has to be only tried/inquired into by a court which enjoys the local jurisdiction in two situations:

[208] (2013) 1 SCC 177
[209] (2018) 1 SCC 560

(a) The cheque being delivered for payment from an account, in bank's branch where the payee/holder in due course, in either case, keeps the account, is located; or

(b) The cheque being presented for payment by the payee/holder in due course, through any other method than through an account, the drawee bank's branch where the drawer maintains the account is located."[210]

The need to insert a new section arose due a judgment of the Hon'ble Supreme Court, in the case of, "D. R. Rathod versus State of Maharashtra"[211] which had set the law concerning jurisdiction in the cases of cheque dishonour. It was opined that the local jurisdiction of courts for cases of cheque dishonour is restricted to the court within whose local jurisdiction the offence was done, which in the current situation is wherever the cheque is dishonored by the bank on which it is drawn.

Due to this judgment of the SC, there were various representations by the stakeholders, including industry and financial associations to the government, expressing worries about the wide effect this ruling makes on the corporate interests as it will offer excessive safeguard to defaulters at the expense of the distressed complainant; will give a widespread disregard to the practice of 'Payable at Par cheques' and would snub the present circumstances of the process of clearing of Cheques with the introduction of CTS (Cheque Truncation System) where clearance of Cheques is done through images of Cheques using electronic banking systems they are not actually required to be taken to the issuer branch in physical form but are resolved by the service branches of the drawee and payee banks between themselves; will substantially give rise to a huge backlog of cases covering numerous cheques drawn on bank(s) at different places; and following it is unfeasible for a single window agency with clients settled throughout the nation.

In order to resolve these problems and to settle law on the said offence, an amendment was passed in the year 2015, through which the issues regarding jurisdiction were finally settled.

[210] Ins. Act 26 of 2015, s. 3, (w.e.f. 15-6-2015).
[211] Criminal Appeal No. 2287 of 2009

PRESUMPTION AS TO NOTICE BEING SERVED

In the case "N. Parameswaran Unni v. G. Kannan"[212], It was settled that, "It is clearly provided for in Section 27 of the G.C. Act[213] and Section 114 of the Evidence Act,[214] that if notice has previously been sent once through registered means like post by appropriately addressing the said Cheque to the drawer, it is assumed that notice has been already served". However, the drawer is at authority to rebut this presumption.

WHAT HAPPENS IF DEFENDANT/ACCUSSED REFUSES TO RECEIVE NOTICE?

Supreme Court has in a series of cases settled that a notice being sent through registered postal means and is reverted with an statement by the postal service, which says - "declined" or "not present in the house" or "house sealed" or "shop shut" or "addressee out of station" or "intimation served, addressee unavailable", it will be assumed by law that the notice is served duly by the complaining side; N. Parameswaran Unni v. G. Kannan.[215]

IF NOTICE NOT RECEIVED WITHIN A PERIOD OF 15 DAYS,
THE DRAWER MAY MAKE PAYMENT AFTER RECEIVING SUMMONS.

Drawer claiming non receipt of notice sent to him by post, may, within a period of 15 days after receiving the summons sent by the court relating to the complaint u/s 138, and he pays his dues as specified in the Cheque and informs to the court of such payments within a period of 15 days after receipt of summons (with receipt of a duplicate of the complaint along with summons) and, therefore, the complaint shall be rejected.[216]

C.C. Alavi Haji v. Palapetty Muhammed, In "Interpretation of Statues by Maxwell - The provision contained in the proviso to Section 138 of the Act gives that the payee has the legal

[212] (2017) 5 SCC 737
[213] General Clause Act, 1897
[214] Evidence act 1872
[215] (2017) 5 SCC 737
[216] (2007) 6 SCC 555

responsibility for making a claim by sending a notice. The emphasis in the proviso is on the requirement to make such a demand. It is the only approach for making such claim which the law provides for. Once it is posted his sides of duties are over and the rest depends on what the drawer does or does not do."[217]

PRESUMPTION UNDER S. 139

In , "Basalingappa v. Mudibassapa[218], If it is held valid that the cheque was drawn, Section 139 initiates a presumption in favor of the Cheque holder that the cheque has been received for legal discharge, either in part or completely , of whichever statutorily enforceable debt, due or any other liability,

In the case of; "Laxmi Dyechem v. State of Gujarat[219] The said presumption is rebuttable undoubtedly at the hearing of the case, while it'll not be completely correct to conclude that the complainant doesn't have to prove his side of the case and the burden is completely on the complainant,

Presumption under Sec. 139 has relevance with Sec 118 which gives presumption of consideration, date on the instrument, acceptance time period, etc.

REBUTTING THE PRESUMPTION

If a defendant has to challenge the legal presumption made by Section 139, the amount of evidence required for it to be disproved is that of "preponderance of probabilities". Consequently, if a doubt can be built by raising a probable defense by the accused in relation to the legality of that enforceable debt, such action can be unsuccessful. Reliance can be put on the complainants submissions of evidence so as to raise defense and it is also possible that no evidence need to be presented by him in some cases.

[217] Ibid
[218] 2019 SCC OnLine SC 491
[219] (2012) 13 SCC 375

By, Rangappa v. Sri Mohan, It was concluded that "The significance of introducing section 139 of the act as an illustration of reverse onus provision presented in continuance of the legislative objective was to better Negotiable instruments act's credibility . Although Sec. 138 provides for a strict criminal legal action as a remedy to the cheque bouncing cases, the presumption relating rebuttal provided by Sec. 139 is a way to avert unjustified postponement in the passage of legal action. However, it shall be noted that the wrong considered punitive by Section 138 can rather be labeled as a regulatory wrong since the default of regarding cheque is mostly in the type of a wrong of a civil nature whose influence is typically limited to the private parties doing trades. In such situations, the assessment of proportionality guides the creation and understanding of reverse onus provisions and the accused cannot be compelled to present an excessively extreme standard of evidence.

Due to lack of convincing reasons, reverse onus provisions typically levy an evidentiary onus of proof and not a persuasive onus. With this in view, it is an established situation that when presumption has to be rebutted by a defendant ……..`preponderance of probability' is the usual proof for execution it. Therefore, if the defendant is capable to produce a probable defense thus creating a doubt relating to the presence of a statutorily enforceable debt, the prosecution will fail., The defendant may use all/some the submissions made by the petitioner so as to form a defense and it is possible that in certain cases the defendant may not need to submit proof proving his side of the facts"[220]

"Since the appellant had no money lending business license, it can't be supposed that there was any legally applicable liability of the respondent….. Once an Act asserts that a specific transaction is illegal, it can't be legalized so as to determine any different legislation. The objective of Section 138 is to enforce only statutorily enforceable debt of the defendant which

[220] Rangappa v. Sri Mohan, (2010) 11 SCC 441

is absent in the case…. Consequently, there weren't any statutorily enforceable obligation against the defendant."[221]

WHO IS LIABLE WHEN COMPANY ISSUED CHEQUE IS DISHONORED?

When the individual who has committed the wrong of Cheque bouncing is a Company who is considered as a separate legal person, how can it be punished, especially by imprisonment? The Directors are employed as the controller and administrator of the matters of a Company. Hence, the Directors shall be legally responsible for the wrongs done by the Company.

Directors can be held accountable if a company is guilty of Cheque dishonour, under the Section 141 of the Act. This Section provides that all persons who had the custody and control of the operations of the Company and who were answerable for all its trade, during the period that offence took place will be liable, along with the Company. Liability can also be enforced on even the managers, secretaries, or officers of that Company in matters concerning the offence of Cheque bouncing if it was committed due to the consent or negligence of such persons.

PROCEDURE IN THE CASE OF DIDHONOUR OF A CHEQUE ISSUED BY A COMPANY:

1. Legal Notice**:** If a Cheque is reverted unpaid by the bank, the Payee/Holder in due course must send a legal written notice making firm demand of the due amount to the drawer company. Such legal notice must specify the exact amount of money which is to be recovered from the Company, and should also convey the fact that the Company will be prosecuted for a case of cheque dishonour if it fails to provide the payment within 15 days. It is suggested that the payee gets the draft of the notice scrutinized by

[221] M/s. Krishnam Raju Finances, Hyderabad v. Abida Sultana 2004 (1) ALT (Crl.) 474 (A.P)

a lawyer specializing in Cheque bouncing cases before directing it to the Company.

2. Filing of Complaint**:** If the Company still fails to pay the said amount of the Cheque, or revert back to payee within a period of fifteen days from the day of receiving the legal notice, the payee must then file the complaint in a court of suitable jurisdiction with the assistance of a lawyer, within a specified period of 30 days.
3. It must be precisely specified in the complaint; In what way and In what manner was the accused Director involved and was in charge and accountable for the conduct of the day to day workings of the Company at that very time when the Cheque was dishonored. However, the Supreme Court held that in some circumstances, as given below, one need not specifically inform the duties to be discharged by the accused in the complaint:

- In the cases where the person under trail is the Managing Director or a Joint Managing Director of the Company
- And such accused Director has signed that specific Cheque while representing the Company

When and if it is established that the company is guilty in the case, and it is ascertained that the Director was responsible for the business of the Company, he will have to undergo all the punitive actions as directed by the Court.

SITUATIONS WHEN DIRECTORS ARE NOT LIABLE

The Director should never be held answerable for the conduct of the Company if he is capable to prove the following:

- That when this legal wrong was committed he had no information regarding it, and
- That he applied due diligence, or
- That there was evidence beyond doubt, that due to the directors ongoing illness, he was not involved in the proceedings
- That the complaint was made in harmony with Section 138 or 141 of the Act, or

- That he had resigned from his post, before the offence was committed by the company.

A person cannot be held liable just because of him being responsible everyday working of the company's business. Hence, the reasons for holding a person guilty of a Cheque bouncing case cannot only be established on the fact that he is a Director of a Company.

The complainant could be reimbursed not just the cheque amount by twice the amount so as to cover the expenditure relating to interest and experts costs. Section 357(1) (b) Cr. P.C. specifically established mechanism for payment of fine due to any harm or losses caused due to the offence, through the means of compensation.

Where fine is not imposed, compensation can be, In "R. Vijayan vs. Baby & Anr" the according to this judgment; defendant submits that the S.29 & 357 of the CrPC S. 138 of the Act should be interpreted harmoniously and should complement each other; and its benefit would be that compensation may be provided even in cases under section 138 of the Act to meet the loss endured by such dishonor and that if it could not be granted for any reason, fine could be imposed upto twice the due amount of cheque"[222] awarded under Section 357(3) Cr.P.C. to the person who suffered loss. Sentence can also be awarded due to the dishonor. The purpose of the legislation is not just penal but also to force them to make people honor the negotiable instruments and cheques".

WHO CAN FILE A CASE WHERE COMPLAINANT IS A COMPANY?

In the case of: - S.B. of Travancore vs. M/s Kingston Computers (I) Pvt. Ltd.[223]

The Hon'ble Supreme court held that,

The respondent could not present any evidence Shri Ashok K. Shukla was selected as a Director of the corporation and that a resolution was passed by the B.O.D. of the corporation to authorize Shri A.K. shukla to file suit on behalf of the company against the appellant. In absence of any express resolution passed by the Board of directors of the company, to permit Shri RK shukla

[222] (2012) 1 SCC 260
[223] (2011) 11 SCC 524

to delegate his powers of filing suit on behalf of the company against another person; the letter of authority issued by him describing himself as the CEO and delegating his power to initiate legal proceeding on behalf of the company, becomes meaningless and is nothing more than just a scrap of paper.

We can deduce from this judgment that the director presiding over the proceedings on the account of the company should be legally authorized to take action on account of the corporation and the documents which he is producing in front the court should be able to satisfactorily prove to the court that he is actually authorized for the same.

CAN A TRIAL COURT ORDER INTERIM COMPENSATION?

UNDER WHAT PROVISIONS OF LAW AND WHETHER SUCH LAW IS RETROSPECTIVE OR PROSPECTIVE IN NATURE?

In the case, "G.J. raja vs. T. Surana; The SC shed light on the Section 143A of the Act, that it shall not have a retrospective effect.

Section 143A of the act reads that the court has the power to direct payment of interim compensation in favour of the complainant throughout the case is pending. This section was introduced through an amendment made in the NI Act in 2018.

It was, however, provided that the compensation amount shall not go beyond the limit of 20 Percent of the due sum of the unpaid Cheque. The order pronounced by the Supreme Court made it clear that the provision of section 143A shall be only applicable to cases filed after the 2018 amendment to the NI act.[224]

[224] AIR 2019 SC 3817

The order was passed by the division bench of the Hon'ble Supreme court with constituting of Justice U. U. Lalit and Justice V. Saran in "G.J. Raja versus T. Surana". Raja had appealed against the Madras high court order which had directed him to make payment of compensation on interim basis in a Cheque bounce case.

PROSPECTIVE OPERATION: 143A N.I. ACT.

G.J. Raja Vs. Tejraj Surana: In the critical examination, S.143A was established to be operational prospectively and the legal requirements of said Section can be practically used only when offence described under S.138 of the Act has been committed after section 143A was instituted in statute. Accordingly, the orders given by the Courts of appropriate jurisdiction have to be set aside. In relation to the interim order of the Court, the amount so provided by the Complainant, shall be recompensed to the Complainant with all the interests accumulated thereon within a time period of 14 days from the date of passing such order.

CAN AN ACCUSED BE PUNISHED FOR DISHONORING A DEBT LEGALLY BARRED BY TIME?

In, C.Varkey V. T.Thomas, In the decision of the High Court of Kerala there was an opportunity to talk about the law and quoted: "After the expiring of the limitation period, nothing short of an express assurance providing a fresh limitation period; Insufficiency of the implied promise ."

In dismissing a special leave petition The Supreme Court spoke thus: - "the penal provision under S.138 of the Negotiable Instruments Act is not attracted in the cases where an accused has issued a cheque for a debt barred by limitation of time. On the particulars of the case as provided on account and the definite provision under S.138 of the N.I Act the Verdict of the lower Court as relied upon by the High Court is unassailed. Therefore, the Special Leave Petition is dismissed."

In P.K Jain V. R.Malhotra the High Court of Delhi, held that, the two cheques which are the subject matter of this complaint related to discharging of all liabilities relating to debt derived from the agreement which debt had come to be a time barred. Enforceability of such debt becomes illegal according to S. 138 of the NI Act. Thus all the complaints and proceedings originating from it shall be quashed.

The High Courts of Andhra Pradesh, Bombay, Kerala in the cases of Girdhari Lal Rathi, Ashwini Satish Bhat and Sasseriyil Joseph being in agreement with the law laid by the apex Court while dismissing order of the special leave petition to Appeal have correctly decided the law by stating that a Cheque in relation to a debt barred by time on being dishonored can't form the foundation of a criminal prosecution under S.138 of the N.I. Act. The decision of the High Court of Kerala in Division Bench RAMAKRISHNAN, in Single Bench RAMAKRISHNAN and of the High Court of Karnataka in H. NARASIMHA RAO being in the teeth of the Supreme Court order quoted earlier in this essay do not provide the correct law in the case of a criminal prosecution related to a Cheque being dishonored for a for a debt barred by time.

POST-DATED CHEQUES AS SECURITY

In those circumstances where the inquiry as to whether Cheque of post-dated nature being dishonored which had been provided for recompense as an installment for a loan also labeled as "security" in loan agreements comes under the ambit by S.138 of the NI Act was brought up by Dipak Misra and A.K. Goel, JJ, they held that Section 138 of the act covers the liability existing because of dishonoring of cheque.

The Court elucidated that the questions relating to a post-dated Cheque is for "liability or debt being discharged" depending on transactions nature. This Section may be attracted only if the amount has become legally recoverable or the debt or liability still exists on that date.
With respect to the case facts, the agreement of the loan recorded that those cheques of post-dated nature for the loan installment payments were given as security.

The Agreement's specific provision which is to be adjudicated is that "The loan in addition to other fees such as interest, and other fees, redemption, expenditures and other dues will be secured by providing of Post-dated Cheques towards making payments of installments of principal of loan total in pursuance with decided repayment schedule and payments of interest outstanding thereafter."

While interpreting "security" which is written in the abovementioned clause of the agreement in question; the Court opined that the said expression means that the Cheques are drawn in respect of repayment of installments. The installments become outstanding because of this agreement right from the time the loan is provided and the installment becomes payable. If a loan was provided and the installments under it become payable as per the agreement on the date mentioned on the cheque, the dishonour of such cheque would be accountable under S.138 of the act; Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited.[225]

CONCLUSION

The laws relating to instruments of negotiable nature are not of any one nation; but are the laws of the world in general, as, they comprise of "definite principles of equity and practices of trade which common sense of justice have recognized to standardize the dealings of traders and seafarers in all the countries of the civilized world open to free and fair trade". The plummet in moral values, even these instruments like cheques, started to lose their credit worthiness by not being honored on presentment. And with the express upsurge in business and trade usages of cheques have also amplified and so did the cheque dishonoring disputes. It is a crime in India to issue a dishonored cheque. But we barely see any person being penalized for bouncing

[225] 2016 SCC OnLine SC 954.

of cheques. People are discouraged from having confidence bank cheques. This is because courts in India are appallingly overworked with such cases.

Legal specialists are undisputedly of the opinion that the current scheme of criminal jurisprudence is fated to be unsuccessful if the buildup of cases is not considerably reduced. Lately, the Indian Law Commission proposed the idea of "plea-bargaining" – pre-trial negotiations amongst the defendant and the plaintiff in which if the defendant decides to plead guilty for the charges put against him he would get some concessions in exchange as a quid pro quo, by taking a lenient view by the courts, particularly in cases of lesser gravity.

Such approaches need to be thought on and developed to so as to deliver speedy respite to individuals and therefore increasing the faith on the Indian banking system. The worth of cheques, chiefly among the business community, has been significantly improved since the institution of this new Chapter XVII concerning to penalties in case of dishonor of certain cheques for inadequacy of funds in the accounts. Thus it helps with inculcating of trust in the efficiency of banking operations and trustworthiness in transacting business on instruments of negotiable nature. It is to improve the acceptability of cheque in payment of liabilities by making the drawer accountable for penalties in case of dishonoring of cheques due to inadequate arrangements made by the drawer with satisfactory safeguards to avert harassment of authentic drawers.

INDIA- AN ASSURED ABODE FOR LEGAL OUTSOURCING

-ANANYAA JHA

"Master your strengths, outsource your weaknesses." – **Ryan Khan**

Outsourcing can be defined as a business process of contracting out to a third-party company any services or practices in which they excel. The functions are farmed out to the firm that has been hired to perform them owing to their specialisation in the field. With globalisation, most of the companies are engaging in outsourcing in some form, mainly the job being outsourced is not a part of the core business of the company. Even though outsourcing has been a much older concept, yet it made a significant jump from the backburner to the frontier in the 21st century. With the world coming together under the same global umbrella, some foreign markets are lucrative for outsourcing with its lower labour pay scale as compared to domestic outsourcing. Therefore, relocating to a foreign country a particular business function becomes highly advantageous. The process is undertaken for various reasons from cutting down on cost and saving time to having increased efficiency and more reliability on the work outsourced, given the nature of the term "outsource" in order to gain better results. The widely known types of outsourcing are Business Process Outsourcing (BPO), Information Technology Outsourcing (ITO), Knowledge Process Outsourcing (KPO), Professional Outsourcing which deals with specialized, professional services, having under its ambit a number of professions, accounting, legal, administrative duties amongst others.[226]

LEGAL OUTSOURCING

The term "Legal Process Outsourcing" was a media invention which has made a shift to "Legal Outsourcing". The reasoning that follows is that the word "process" indicates standardized,

[226] http://www.legalservicesindia.com/article/2358/Legal-Outsourcing.html#, Last Visited at 11 PM 0n 6th August, 2020.

systematic, and easy-to-recreate tasks which are no brainer and can be performed with bare minimum formal education and miniscule professional training, as is in the case of BPO. However, most firms operating in this industry have since recognised LPO as a misnomer for the offshoring industry providing legal services as it demands brain-storming and professional legal knowledge, encompassing within its ambit legal research and analysis, or drawing up contracts, patent application, drafting complaints, or legal briefs. Outsourcing legal work to an outside counsel has been a part and parcel of the legal community for hundreds of years. In every nook and corner of the world outsourcing of legal services work can be found, however, off-shoring is a recently developed concept, opening a brand new worldwide legal horizon, where services can be rendered by firms situated outside the country, providing services at a cheaper cost because of lower labour rates or better-suited economic conditions meanwhile maintaining the required standard.

Legal Outsourcing can be explained as a practice of a corporate legal department or a law firm acquiring legal services from an external legal support services firm or an outside law firm. The practice of legal outsourcing has been a part of the legal field since the 1950s, however, there was limited usage and was confined only to patents. Later on, legal companies to squirrel their money used back door firms for varied legal work, widening the scope of legal outsourcing. When the provider of the legal services is based in another country, such practice is called offshoring as mentioned earlier, these include an array of legal activities excluding areas requiring personal contact or face-to-face appearance (when court mandates in-person appearance or face-to-face negotiations). When the service provider is established in the same country as the acquirer of the legal services, agency work as well as other requiring physical appearance such as court attendance can be obtained. The tasks are performed by attorneys and paralegals who have expertise in the field by making use of industry standard databases such as Westlaw and Lexis-nexis. The service providers' delivery processes will have to showcase a certain level of maturity because it is will be the benchmark to decide the value obtained from these services. Alongside exercise adequate control on the operations to ensure security of data and fulfil client's expectations of the quality of work that is delivered.

Legal work outsourcing to India was established by Bickel & Brewer in 1995, the first firm to do so, I&A International, in Hyderabad. Its domain was creation of searchable databases and legal documents digitalization and moved on to recruiting lawyers who would engage in review of documents presented in lawsuits. Legal outsourcing to India had seen a slow growth-rate in the initial decade owing to the concerns of lawyers and clients over the ethical and legal ramifications of fulfilling the legal task in India. The first company to have offshored its in-house legal work in India was GE, in the year 2001. Since then a lot of firms have stepped into this arena in some form or another. Generally, US or US based companies have been outsourcing their legal work to the Indian legal professionals' market.

SERVICES PROVIDED

There's plethora of legal services which the Indian based legal outsourcing firms and individuals are providing to companies domestically and internationally. The key services being offered include but aren't exhaustive: legal research, litigation documents, patent analytics and patent renewals, management of contract, review of documents, deposition summaries, digital content search, trademark search and watching. The services offered can be clubbed under either manpower intensive functions which comprises of tasks like reviewing documents, legal transcription, indexing and legal coding, document conversion etc. or under high-value services such as case law and statutory research, conducting due diligence activities which include financial, legal and technical analysis of companies before mergers and acquisitions, and drafting of contracts as well as review of contracts, also, general and patent related legal research services like patent portfolio management and assessment of patents etc. Legal outsourcing has predominantly been witnessed in countries that had prior footing of the business process outsourcing mechanism. So, the providers have preferred Philippines, India, Canada, USA, Latin America to establish their business due to the added advantage of being BPO service providers. Moreover, the geographical location in proximity to the target client markets have come up as a new front for offshoring legal work owing to reasons such as having cultural ties with each other, time zone similarity, related laws etc. The legal outsourcing

markets in the Asia Pacific region seems to be the dominating location as huge amounts of outsourcing is done by firms in UK and US to countries including India, China, Sri Lanka, Philippines. India has especially garnered attention by the corporate legal departments globally who are amongst the major clients providing work in this field to Indian firms and individuals. Sri Lanka is emerging as a competitor to the Indian markets, obtaining advantage of its powerful economic infrastructure, its legal system based on the English common law framework (British law), along with online freedom.

KEY CONSIDERATIONS FOR LEGAL OUTSOURCING

- The first and foremost essential factor among companies worldwide is cost saving but not compromising on the quality of work as cost-saving at the expense of standard reduction would not provide any edge, rather it would result in losses. Indian LPOs providers have built a cost-effective way out without lowering the quality i.e., maintaining the required standards and at times, even surpassing them, thereby providing a practical and profitable approach than the in-house teams in certain scenarios. While maintaining balance between the cost-and-quality of the work, there are various additional advantages that offshore located service providers are able to deliver to their clients.

- The second consideration relates to the time difference between the United States, United Kingdom and India, and India has an upper hand in comparison to other neighbouring countries as its workforce population is enormous with a huge number of English-speaking and college-educated work candidates. US and India have different time zones, when there is night-time in US, India has day-time, facilitating attorneys in US to instruct his counterpart in India, before the US attorney leaves the office, they assign tasks like research on legal issue or other drafting work which would be completed overnight by Indian legal service providers and be present on the table in US in the early hours of the day, thereby reducing the workload and following a time-

efficient system. The more bureaucratic legal paperwork can be offshored along with other run of the mill jobs as they often prove to be tedious and time-consuming for US law firms, but by utilising the outsourcing services of other firms they can focus on their area of specialization and deliver highest-quality results. Having over 1100 law schools in India with approximately 60,000 students graduating every year, the country has no dearth of English-speaking lawyers to employ. The methodologies of dispute resolution and the Indian litigation process are well grounded in the constitution of the largest democratic republic in the whole world.

- And the last but not the least reason lies in the English fluency of the citizens of India and their brainpower, which provides a solid reason why Indian lawyers are capable to handle the work outsourced to them. The legal framework in India is based on the Common Law system of Britain, owing to the influence of the British colonial rule, which also ruled over the United States and had an impact on its early constitutional history. The Bar Council of India (BCI) Rules of Legal Education in India of 2008 and the draft rules of 2019 laid down that English shall be the medium to impart legal education in the country, English is also the language of the Appellate and Supreme Court of India, the proceedings and legal opinions are delivered and written in English.[227] The UK legal system is well-pervasive amongst various Indian Laws, making Indian lawyers familiar with UK law regime.

INDIA AT THE GLOBAL FOREFRONT OF LEGAL OUTSOURCING INDUSTRY

The legal outsourcing industry in India has boomed in the last two decades, especially after the 2009 global financial crisis which left the US economy in a faltering state with the US legal fees increasing at a steady pace.

- There are various advantages which can be attained by firms using legal outsourcing services from another party. The key advantages are enumerated as-

[227] www.lawyered.in/legal-disrupt/articles/courts-india-divided-english-common-language/, Last Visited at 4 PM on 15th August, 2020.

Increased Cost-Savings. Every organisation would want to achieve lucrative outcomes for their work. Outsourcing legal services can reduce the cost from 30% to 50% for the corporate legal department or the law firm depending upon the kind of legal task that they've outsourced, relying on the lower cost market of countries such as India, Sri Lanka, where cost-cutting is achievable even while maintaining the desired quality.

High Standard Legal Services. Outsourcing legal work hasn't proved to be a poor decision because the quality required is maintained and at times a more enhanced work is delivered at a lower price, since many organisations providing such service have fully licensed lawyers handling the tasks rather than mere legal secretaries or paralegals. The lawyers have appreciable calibre making it possible for them to impart high quality legal services.

Time Efficient Due to Time Zone Differences. North America and Europe based clients have the opportunity to use the time zone difference to their added advantage of being time efficient by getting the work done within 24-hours. The day-time distinction makes it feasible to outsource work during the night-time and have it on their desk by morning hours, utilizing the day hours of the country where the work is outsourced. India has a distinct time zone in comparison to US and Europe adding to its value in the legal outsourcing Industry.

Increased Efficiency. The firms where legal work is outsourced to often have a team of attractive economical or budget-friendly professionals along with specializing in specific software that are designed to streamline and automate recurring work, especially such services that involve substantial amounts of documents and paperwork.

Optimize Expensive Resources. With legal outsourcing to the rescue, corporate legal departments and law firms are able to utilise the costly resources to devote undivided focus on high margin figure generating tasks, since the market costs are high and if high-priced resources are provided for repetitive work then the profit margin would suffer. Time-consuming and redundant tasks of handling legal paperwork and documents are outsourced to make room for the legal firms to dedicate their attention and efforts to their core competencies paving way to excel in the legal field.

Flexibility. Outsourcing work to legal service providers frees up space in law firms and corporate legal departments as they do not need to employ a large number of full-time or even temporary in-house workforce for trivial or recurring tasks or even to handle the ups and downs during the workflow because they can easily engage with another legal provider on a need basis and get the job done through the channels of outsourcing allowing much required flexibility and cutting down on costs without lowering quality.

Benefit of Expertise. The law firm outsourcing the task can engage another firm which has expertise in the work being outsourced that otherwise lacks in the in-house counsel. This would increase the quality of the work and provide better results.

A favourable economic stage and a stable political climate provides a sound environment for the growth of the legal outsourcing industry. India made a mark in this front amongst the various global contenders to be chosen along with few others for its superior and advanced technology offering to the outside seekers of legal services.[228]

- Every good thing entails a little bit of bad, since outsourcing work comes with a lot of key advantages, it also has its fair share of disadvantages. The various hindrances that may be brought about due to offshoring work are:

Obstruction by Local Laws. A very common deterrent to offshoring legal work are the local laws of the country where the firm operates where the work is being outsourced to. Many countries have a heavy set of rules and regulations concerning data protection and other privacy laws & since the legal accountability and responsibilities have to be equally shared between the legal service provider and the one who's outsourcing the work which in turn opens the latter to an increased share of liability & to ensure that no civil penalty occurs of that specific country. Hence, any legal firm or corporate legal department would have to conduct an intensive research before offshoring their work to any particular country to foresee any avoidable hindrances relating to the local laws of that country.

[228] www.indialawjournal.org/archives/volume6/issue_1/article6.html, Last Visited at 6 PM on 18th August, 2020.

Unprincipled Standards. Another drawback of outsourcing legal work to a different country lies in the fact that the firm proving the legal service may not adhere to the required ethical standards. In some countries, law firms may not be bound to follow the ethical code of conduct which in turn can harm the buyer of the legal work. The legal profession is governed by a set of rules as to who is authorised to practice as a lawyer and how lawyers have to control and supervise any non-lawyer or another lawyer who are employed under them or they engage with to ascertain that they follow and do not disobey the professional rules of conduct of the legal profession. But given the time zone differences due to the geographical remoteness of the two legal firms can bring about complications in the process.

Confidentiality Concerns. Another criticism of engaging an outside firm to provide legal services is the possibility of breach of privacy of the client. In outsourcing legal works the paramount importance is given to client confidentiality. The attorney-client privilege is a legal privilege that protects confidential communications between an attorney and his client, it cannot be disclosed even in a court of law as it is exempted from the same. The client may waive the privilege but his or her attorney cannot. However, another exception that exists is when either one of the parties divulges confidential information to an outside or a third party, the privilege no longer stands. The risk of confidentiality breach becomes inherent when information is being transmitted via the internet and through possible unsecured networks between the legal outsource provider and corporate legal department or law firm clients.

Dispute Management. Another major issue to arise while outsourcing legal work to a firm is how to approach and settle disputes if they arise. It is another contingency which needs to be taken proper care of prior to outsourcing the tasks. In case a dispute arises, it is better for both the parties to agree beforehand to the geographical location where the case should be filed when the legal service provider is operating from a different country. The system of dispute settlement should be agreed by both the parties in an oral or written agreement to not cause a hassle afterwards. To avoid problems in the future it is in the interest of both the parties to clearly lay down all crucial legal aspects relating to outsourcing and settlement of disputes system.

- A few ways through which India can better itself in this LPO sector are:

Well-devised outsourcing contract.

In the Indian legal market, there exists caveats which can be reduced by strict observance to basic rules like conducting appropriate due diligence, a well-agreed upon outsourcing contract and proper planning, particularly with regard to safeguarding sensitive information and controlling intellectual property. A well-drafted contract should as per the circumstance be able to identify and address risks and provide pragmatic and real preventive measures to safeguard confidentiality of data outflow.[229]

LEAP FROM KNOWLEDGE TO SKILL DEVELOPMENT.

In the Indian economy, it is a crucial step to encourage India's large knowledge class to carry out high end skill projects, judgment and leap towards an analysis-based service provider. This would ultimately raise the value of the Indian legal service providers and open fresh avenues for business, as apart from routine paperwork it could provide varied services as well.

SUSTAINABILITY.

Many LPO providers establish firms however within a short span of time have to retire from the game. The first and foremost consideration is to survive only then can any business thrive further in the future. To do so the service provider needs to continuously serve added value to its clients work as well as remain financially stable.

Section 59 of Limited Liability Partnership Act, 2008 provides for law firms to establish their business within Indian boundaries. These firms will play the role of consumers as well as producers of the trained force with the capability of addressing the legal support needs of corporations globally.

CONCLUSION

[229] www.indialawjournal.org/archives/volume6/issue_1/article6.html, Last Visited at 5 PM on 20th August, 2020.

The concept of outsourcing and off-shoring are not new concepts in India. After the huge success of BPO in the country, India is witnessing a boom in legal process outsourcing with a number of legal firms from every nook and corner of the world choosing India as their preferred destination for outsourcing their legal services. India is expanding its reach worldwide in this segment and has an upper-hand in terms of the number of human resources and the expertise available.

STUDY THE EDUCATION IN SCHOOLS

- MANTU ACHARJEE & DR. DEEPOM BARUAH

ABSTRACT:

It advocated two languages at middle level, English and Hindi al the end of Junior Basic Stage, subject to the principle that no two languages to be introduced in the same year. The commission recommended the use of mother tongue or the regional language as medium throughout the secondary stage and teaching of two languages at higher secondary stage, one being mother tongue or regional language. Organisation of School Education In respect of pattern of school education the commission recommended that education of the child should start after four or five year period of primary or junior basic education. With the middle or senior basic or junior secondary stages of three years and higher secondary stage of four years. Religious instruction was admitted only on voluntary basis with the consent of parents and outside the regular school hours. Text Books Commission recommended constitution of a high power committee with a view to improve the quality of Text Books. The members of the Committee from various fields reached the position of higher dignitaries and it is to be stated that various textbooks doesn't prescribe and choice to several schools in the society. The responsibility to maintain and provided books in Government libraries lies to Central and Government State-funded schools within the territory of India. There is a disparity in the educational system which run by state governments which is should be homogenous rather than heterogeneous.

KEYWORDS: textbooks, Commission, Consent, admitted, religious, instruction, society and Education.

OBJECTIVES:

(i) To study the history of education in India

(ii) To study the commission reports of India

(iii) To study the delivery of ECCE in India

(iv) To study the literacy and numeracy in Indi

HISTORY OF EDUCATION IN INDIA

The curriculum of ancient education was limited to mere religious texts. The princes were taught the warfare education in addition to polity and social education. Craft work mainly related to agriculture was a by product knowledge and not based on scientific lines as it is taught today. The aim of education was essentially spiritual as quoted by Dr.Alterkar", "The objectives of education in ancient India were worship of God, a feeling for religion, formation of character, fulfilment of public and civic duties, an increase in social efficiency or skill, and the protection and propagation of national culture. These objectives and ideals took an individual along the path of spiritual development.

The education was essentially spiritual in nature. Buddhism and Jainism which were considered as two sects of Hinduism rather than independent religions, did not alter the religious nature of education and simply enriched the religious curriculum of education The medieval education period in India is the period corresponding to the medieval period in history, dominated by the Islamic rulers. In the beginning the Islamic invasions were for loot and plundering but later they settled' and had peaceful rule during which conversion to Islam and propagation of Islamic education was undertaken. Islamic education was purely religious in nature and limited itself mostly to the teaching of Koran.[230] The Islam invaders were mostly Persian speaking people and when they came into contact with the Hindus who were mainly Hindi speaking, 'Urdu' language was e evolved which is a mixture of Hindi and Persian. This education was imparted in Maktabs, Madras's and Mosques.

The main aim of education was Islamic propagation. The Islamic education was not organised and had no universal system.[231] One of the aims of education was to uproot the Hindu culture and traditions. The Islamic orthodoxy is still considered as anti-education as a result of which we still find the high illiteracy among the Mohammadan population. As a result of Islamic

[230] Jain, M. (2018). Public, private and education in India. *School Education in India*, 31–66. https://doi.org/10.4324/9781351025669-2

[231] https://shodhganga.inflibnet.ac.in/bitstream/10603/127683/13/11_chapter%202.pdf

invasion and Islamic education, there was disturbance and dislocation in the Indian educational system of Pathshalas, Maths, Temples and Gurukulas, but it was not to a large extent. The arrival of the Europeans in India paved the way for modern education based on the scientific inventions in Europe".

The system of grant-in-aid was recommended for private efforts in the field of education. Indeed, by many the Despatch is considered as the 'Magna Carta' for Indian education, which laid the foundations of the present educational system.

REPORTS SUBMITTED BY THE COMMISSION FOR EDUCATION

The Indian University Commission (1902)

"In the beginning of 20th century the first attempt in education by Britishers was made by Lord Curzon the then Governor General of India by appointing the University Commission in 1902 to enquire into the conditions and prospects of the Universities in British India.[232] It mainly dealt with university education making the following recommendations".

1. "Reorganisation of the administration of universities and the territorial jurisdiction of each university to be defined".
2. "Strict and systematic supervision of the affiliated colleges by the university, and the imposition of more exacting conditions of affiliation".
3. "Proper attention to the conditions under which students live and work provision of adequate literary facilities etc.

National Council on Education (1906)

The N.C.E. was organised in 1906 for propagation of education in the whole country. It aimed to impart, not only literary but scientific and technical education also. The NCE advocated education through the medium of vernaculars and English as a compulsory subject. It also recommended preparation of text books in Vernaculars, promotion of Physical and Moral

[232] Report of the Indian Education Commission; resolution by the Govt. of India

education. Religious education without religious rites and practices, synthesis of Western and Indian thought and philosophy. The aim of NCE was to spread education out of Bengal also and during 1905-6 it was a revolutionary ideology for young Bengal.

The Hartog Committee Report (1929)"

"The Hartog Committee was appointed in 1929 and it covered all levels of education and made valuable observations about the then system of education. At the primary level it observed that wastage and stagnation was a big hurdle in mass literacy mission. For secondary education the committee recommended diversion of boys to industrial and commercial concerns at the end of middle stage and introduction for rural pursuits in curriculum of vernacular schools it also stressed for improvement in the training and service conditions of secondary teachers".

Due to paucity of highly trained and competent staff for assistance to local bodies for educational administration, the committee recommended that suitable checks should be imposed upon the local bodies and that larger powers be assumed by the Provincial governments. However the committee did not give consideration to the contributions, these local bodies were able to make to the progress of elementary education by bringing in additional resources and helping to create public awakening.

University Education Commission (1948-49)

"In free India the University Education Commission (1948-49) was appointed in Nov. 1948 by the Government of India under the chairman ship of Dr. S. Radhakrishnan. It was to report on Indian University Education and suggest improvements and extensions that may be desirable to suit present and future requirements of the country. The commission not only covered university problems like admission, standards of teaching, discipline, courses of study, research in education examination system, medium of instruction, rural education, agriculture education, teacher salaries, etc. but also gave recommendations in respect of organisation of the secondary education. The commission report was criticised on (he ground of non

progressive for restricting admissions to 3,000 at the residential universities and the recommendation of less working days".

"But the criticism seems not be far sighted and now it appears that if the recommendations of the commission went' followed, we would not have invited much of the problems of today. It was a right step towards quality education and would not have created the large number of university educated unemployed youth. More over the problems of indiscipline and finance of the university education would not have arisen. The secondary and elementary education in which we are still far behind our goals could have been given more attention.

Report on Religious and Moral Education (1960)

The Govt, of India appointed a committee to make a detailed study of the entire question of religious and moral instruction in educational institutions. The committee defined religion as etymologically meaning to be something that helps to bind man to man (religare, to bind) and to be constituted of four parts":

1. "Personality of the founder-dealing with the greatness and holiness of the founder of the faith".
2. "Genesis - Seeking to give an account of the creator and the Universe created by him".
3. "Ritual - Prescribing some outward forms which the followers adopt and follows".
4. "Ethical Code - Telling what is right and what is wrong. It gave various suggestions for teaching of Moral Values at different stages of education but could not give clear and concrete curriculum and procedure for the moral education by including religious element. It excluded Hinduism from the concept of religion but could not advise on how to treat it or basis of Moral Education. It also failed to elaborate the concept of "Dharma" enunciated in Hindu Philosophy. Due to the increase in fissiparous tendencies in the country after independence and the general fall in moral values, lower achievements in literacy, compulsory Basic Education, Women Education and Science Education the Govt, of India called for inquiries and reports from various committees like Emotional Integration Committee (1961), Committee on the Pre-

Primary Education in Mysore State (1961), Committee for Co-Ordination and Integration of Schemes Operating in the field of Physical Education, Recreation and Youth Wellare (1959-61), Indian Parliamentary and Scientific Committee (1964) and Committee to look into the causes for Lack of Public Support, Particularly in Rural Areas for Girls Education and to Enlist Public Co-Operation (1964-65)". These committees gave valuable recommendations for improvement in the various fields but somehow or other things remained the same either on account of non-implementation or paucity of concrete programme given by the recommendations.

The National Education Policy 1986

In the wake of various commission and committee reports and a general dissatisfaction among the public over the educational system not meeting the needs of the fast changing society, the Ministry of Education, Govt, of India prepared an approach paper entitled "challenge of education a policy perspective", the approach paper envisaged total transformation or restructuring of the educational system of the country as a whole for swapping changes in different facts of the nation and to pilot the nation in the 21st century which will absolutely be the century of science. It was to be implemented from the academic session 1986.[233]

"The main characteristics of the National Education Policy (NEP) 1986";

Universalisation of Elementary Education

"The policy laid great emphasis on the Universalisation of elementary education. It stipulated for the qualitative improvement along with quantitative expansion. It suggested a concrete policy in reference to financial aspect and the requirements to be met with".

Non-formal education

"The policy proposed major and effective steps for adult and continuing education with involvement of all private and voluntary agencies like libraries, clubs, industrial and

[233] National Education Policy 1986; Programme on action 1992

commercial undertakings and educational institutions at all levels. It considered literacy necessary for economic and social development".

Secondary Education

"The proposal considered the role of secondary education as very important in national development. Due to expansion of secondary schools, the pupil-teacher ratio adversely affected and so the qualitative aspect. This aspect (qualitative) was to be improved by providing minimum facilities to every secondary school. This included provision of laboratories, libraries, teachers and playgrounds facilities etc. The unethical practices by students and teachers like mass - copying, paper leakage, tempering with results, coaching etc. was due to the faulty exam system and politicization of education institutions.

EDUCATION PROVIDED IN SCHOOLS

Various global studies have also revealed longer-term impacts: quality preschool education is strongly correlated with higher incomes and rates of home ownership, and lower rates of unemployment, crime, and arrest. In terms of the growth of the national economy, it has been estimated that the development of a strong ECCE programme is among the very best investments that India could make, with an expected return of `10 or more for every `1 invested. In summary, it is recognised that investment in ECCE gives the best chance for children to grow up into good, moral, thoughtful, creative, empathetic, and productive human beings. Studies tracking student learning outcomes clearly demonstrate that children who start out behind tend to stay behind throughout their school years. At the current time, there is a severe learning crisis in India, where children are enrolled in primary school but are failing to attain even basic skills such as foundational literacy and numeracy". "

A major part of this crisis appears to be occurring well before children even enter Grade 1. Far too many 6+ year olds are entering Grade 1 with very limited ECCE. Furthermore, far too many children are enrolling in Grade 1 before the age of 6, due to a lack of any suitable pre-primary options; these are often the children that remain the most behind in primary school and

beyond.[234] In fact, during the academic year 2016-17, over 70 lakh children were enrolled in Grade 1 prior to the age of 6 (Unified District Information System for Education (U-DISE) 2016-17). This tragic deficiency in grade school-preparedness is particularly marked between advantaged and disadvantaged groups".

This is because students from more advantaged families have greater access to role models, print awareness, language fluency in the school language, and strong learning environments at home, in addition to better nutrition, healthcare, and of course access to pre-school education. Investment in ECCE has the potential to give all young children such access in an engaging and holistic way, thereby allowing all children to participate and flourish in the educational system throughout their lives. ECCE is perhaps the greatest and most powerful equaliser. For all these reasons - from brain development to school-preparedness, improved learning outcomes, equality and justice, employability, and the prosperity and economic growth of the country - India absolutely must invest in accessible and quality ECCE for all children.

DELIVERY OF ECCE IN INDIA[235]

It is important that children of ages 3-8 have access to a flexible, multifaceted, multilevel, play-based, activity-based, and discovery-based education. It also becomes natural then to view this period, from up to three years of pre-school (ages 3-6) to the end of Grade 2 (age 8), as a single pedagogical unit called the "Foundational Stage". It is necessary, therefore, to develop and establish such an integrated foundational curricular and pedagogical framework, and corresponding teacher preparation, for this critical Foundational Stage of a child's development. At the current time, most early childhood education is delivered in the form of

[234] Government of India, Education for All towards quality with equity in India, Pub.:2014

[235] Vikaspedia(2020), Overview of Early Childhood Education, retrieved from https://vikaspedia.in/education/teachers-corner/early-childhood-education/overview-of-early-childhood-education#:~:text=Early%20Childhood%20Care%20and%20Education,for%200%2D3%20year%20olds.&text=Early%20Primary%20Education%20Programmes%20as,for%206%2D8%20year%20olds.

Anganwadis and private pre-schools, with a very small proportion coming from pre-schools run by NGOs and other organisations".”Where well supported, the Anganwadi system of pre-primary education, under the aegis of the Integrated Child Development Services (ICDS), has worked with great success in many parts of India, especially with respect to healthcare for mothers and infants.[236] These centres have truly helped support parents and build communities; they have served to provide critical nutrition and health awareness, immunisation, basic health check-ups, and referrals and connections to local public health systems, thus preparing crores of children for healthy development and therefore far more productive lives.

Anganwadis are currently quite deficient in supplies and infrastructure for education; as a result, they tend to contain more children in the 2-4 year age range and fewer in the educationally critical 4-6 year age range; they also have few teachers trained in or specially dedicated to early childhood education. Meanwhile, private and other pre-schools have largely functioned as downward extensions of primary school. Though providing better infrastructure and learning supplies for children, they consist primarily of formal teaching and rote memorisation, with high Pupil Teacher Ratios (PTRs) and limited developmentally appropriate play-based and activity-based learning; they too generally contain teachers untrained in early childhood education". "They generally are very limited on the health aspects, and do not usually cater to younger children in the age range of 0-4 years. A recent "Early Childhood Education Impact" study (2017) undertaken by Ambedkar University, Delhi, showed that a significant proportion of children in India who completed pre-primary education, public or private, did not have the needed school readiness competencies when they joined primary school.

Thus, in addition to problems of access, quality related deficiencies such as developmentally inappropriate curriculum, the lack of qualified and trained educators, and less-than-optimal

[236] BWEducation (2020), what is Lacking In India's 'Early Childhood Care and Education' System? retrieved from http://bweducation.businessworld.in/article/What-Is-Lacking-In-India-s-Early-Childhood-Care-and-Education-System-/22-02-2020-184548/

pedagogy have remained major challenges for many if not most existing early childhood learning programmes". The Policy therefore focuses on developing an excellent curricular and pedagogical framework for early childhood education by NCERT in accordance with the above guidelines, which would be delivered through a significantly expanded and strengthened system of early childhood educational institutions, consisting of Anganwadis, pre-primary schools/sections co-located with existing primary schools, and stand-alone pre-schools, all of which will employ workers/teachers specially trained in the curriculum and pedagogy of ECCE.[237]

The numerous rich traditions of India over millennia in ECCE, involving art, stories, poetry, songs, gatherings of relatives, and more, that exist throughout India must also be incorporated in the curricular and pedagogical framework of ECCE to impart a sense of local relevance, enjoyment, excitement, culture, and sense of identity and community.[238] The traditional roles of families in raising, nurturing, and educating children also must be strongly supported and integrated. In particular, family leave policies that afford women and men the ability to tend to their children in their earliest years of life are critical in enabling families to fulfil these traditional roles.

LITERACY AND NUMERACY IN INDIA "

Teachers have explained the extreme difficulty they currently face - due to the sheer size of the problem today - in covering the mandated curriculum while also simultaneously paying attention to the large numbers of students who have fallen vastly (often several years) behind. It is imperative to address this crisis head on and immediately so that basic learning can be accomplished in schools and so that all students may thereby gain the opportunity to obtain an education of quality. If action is not taken soon, over the next few years the country could lose

[237] *ibid*

[238] Anisha Singh, NDTV(2018), Early Childhood Education In India And Why It's Important, retrieved from https://www.ndtv.com/education/early-childhood-education-in-india-and-its-impact-1812769

10 crores or more students - the size of a large country - from the learning system and to illiteracy. The country simply cannot allow that to happen - the cost is far too great - to crores of individuals, and to the nation. Attaining foundational literacy and numeracy for all children must become an immediate national mission. Students, along with their schools, teachers, parents, and communities, must be urgently supported and encouraged in every way possible to help carry out this all-important target and mission, which indeed forms the basis of all future learning. [239]

Teacher capacity also plays a central role in the attainment of foundational skills. Currently, few teachers have had the opportunity to be trained in a multilevel, play-based, student-centred style of learning that, according to extensive ECCE research (see P1.5), is so important for students in early grade school, particularly in Grades 1 and 2. Children naturally learn at different levels and paces during their early school years; however, because the current formal system assumes from the very beginning a common level and pace for all, many students start to fall behind almost immediately. A further factor in the crisis in many areas relates to **teacher deployment"**.[240] "One aspect of teacher deployment (or lack thereof) - which sometimes forms a barrier to play-based, multilevel, and individualised learning - is the PTR, which in some disadvantaged areas, often exceeds 30:1, making learning for all much more difficult in these areas. Another aspect of deployment contributing to students falling behind involves the language barriers that often exist between teachers and students when teachers are not from the local area.

CONCLUSION

Some of the barriers hampering the improvement of quality in higher education are listed below:

[239] *ibid*

11 Government of India, Education for All towards quality with equity in India, Pub.:2014

1. The students who complete their study of UG¬ and PG programme do not have much employability in job market.
2. Present society demands interdisciplinary¬ knowledge which is one of the most missing features in the present higher education system. Curriculum remains more or less stagnant for¬ number of years, whereas the changes and trend in the society take place in quick succession.
3. Development of quality and visionary¬ approach always begins with top level of management but it is not adequately found in the head of the institute, management of the colleges or University chair persons.
4. Single yardstick of experience in the¬ performance evaluation without any accountability loses the motivation of teachers and eventually the quality of education gradually deteriorates. Conventional and not well-organised classroom teaching accompanied by weak¬ presentation skill adversely affect the interest of the students.
5. Commercialisation of higher education¬ particularly by self-financed collages to earn more and more money is the cause of providing fewer infrastructures to the students and inadequate facilities and incentives to teachers. Interest and aptitude base selection of career¬ is unfortunately not seen in teaching profession.
6. For the new recruiters, fixed pay has largely¬ affected the quality of education imparted to the young minds of the country. This leads to loss of motivation and enthusiasm and keeps them away from teaching profession.
7. Research work is one of the factors in¬ knowing the real life happening and problems. This is lacking on account of heavy workload in routine teaching work. In fact motivated teachers are the real designers of employable generation who enters the job market with skill to solve real life problems. The hard fact of poor reading habit of the¬ teachers, teachers just go to classes to teach with stereo type teaching pattern, using the same material for years and years.

8. This deprives the students of the basic training to face the real world. No autonomy in work or little space of time¬ to work in creative manner, can't give a chance to search for new knowledge. Even competent teachers are deprived of this sort of academic freedom to mould the future career of students.

Improving the quality of school education, the School Standards & Evaluation framework, known as 'Shaala Siddhi' has been developed by National University of Educational Planning and Administration (NUEPA)[241], to enable schools to evaluate their performance in a more focused and strategic manner and to facilitate them to make professional judgments for improvement.

[241]NEUPA, retrieved from https://www.mhrd.gov.in/national-university-educational-planning-and-administration-nuepa

CHANGES IN THE CONSTITUTION OF INDIA

- DANISH KHAN & NAZMIN SULTANA

Abstract:

The one thing which is common both of them is that-the concept of Human Rights has emerged almost at the same time when the Chapter on Fundamental Rights in our Constitution was being drafted. An interesting aspect of Human Rights is that the nomenclature of most of these rights overlaps with the nomenclature of our Fundamental Rights. The Fundamental Rights which have been specifically enumerated in Part III of the Constitution are Enumerated Rights. The situations to which they are relevant are expressly laid down in detail. But in addition to the Enumerated Rights, there are rights which are not specifically declared in the Constitution as such, but are inferred from the rights already documented in the written Constitutions or the Statutes; they are not themselves expressly coded or enumerated among the explicit wording of the law. A few other unenumerated rights which are the result of judicial interpretation of the enumerated rights or the other Constitutional provisions are the following-

1. Right to live with human dignity

2. Right against sexual harassment at workplace 3. Right against rape

4. Right to reputation

5. Right to livelihood

6. Right to shelter

7. Right to social security and protection of family

8. Right against honour killing

9. Right to Health

The legitimacy to the institution of Judicial Activism arises from the failure of the Executive and Legislature in performing the duties assigned to them by law and the responsibility assumed by the court to come to the rescue of the unfortunate persons who are in need of public assistance.

Keywords: Public, Legislature, Duties, Judicial Activism, Protection and Executive

Objectives:

(i) To examine the role of the judiciary while protecting the Fundamental Rights; especially the Rights of the individuals to Life and Personal Liberty and the Rights

(ii) To study various norms of Constitutional interpretation, judicial creativity, scope and effect of judicial review in respect of Fundamental Rights

(iii) To expound the concept of Development of Constitution and the methods which the legal systems of the present day have prescribed for changing the existing status of law

The Judiciary while protecting the Fundamental Rights

The term Human Rights denotes the rights provided by International Human Rights Law which is different from the Constitutional Law of our country which provides for Fundamental Rights. Of course, the background to the concept of Human Rights is different from what it is in relation to our Fundamental Rights. Apart from this basic difference, there are certain other things which distinguish Human Rights from Fundamental Rights. The one thing which is common to both of them is that-the concept of Human Rights has emerged almost at the same time when the Chapter on Fundamental Rights in our Constitution was being drafted. An interesting aspect of Human Rights is that the nomenclature of most of these rights overlaps with the

nomenclature of our Fundamental Rights. For example- the Right to Life, the Right to Personal Liberty, the Right to Equality, the Right to Freedom of speech and expression etc Thus, the creator of Human Rights is International Law and the Creator of Fundamental Rights is the national Constitution.[242]

Legal systems of the nations are not the same with regard to the enforcement of the precepts of International Law. While some countries treat the rules of International Law as part of their system of Constitutional law; others treat the two as different entities and expect the national governments to adopt suitable legislation to enable their enforcement by the national courts. Such an enabling legislation helps the courts to enforce the precepts of International Law.[243] Further, the precepts of International Law urge upon the national governments to adopt suitable legislation at the State level. In India, the Parliament has enacted the Human Rights Protection Act by which it has established a Human Rights Commissions at the Union and the State levels and empowered them to address the grievances of the people when they seek the enforcement of Human Rights.

This is in addition to the traditional system of courts which has the responsibility of enforcing the Fundamental Rights of the individuals. The problem which usually arises with regard to enforcement of rights is that- the Human Rights are of a wider perspective and the individuals invoke the precepts of Human Rights either in support of Fundamental Rights or Human Rights as independent rights being relevant to the situation and being wider in scope than the Fundamental Rights. The Human Rights have an inspirational value; therefore, whenever any Fundamental Right is discussed in a research study like this, a reference is made to the precepts of the Human

[242] *The Constitution of India*. (2012). Lucknow: Eastern Book.
[243] Mahajan, V. D. (1995). *The constitution of India*. New Delhi: S. Chand & Company.

Rights. The researcher has followed this method compulsorily in respect of several of the matters relating to Fundamental Rights in our legal system.

THE CONCEPT OF ENUMERATED RIGHTS & UNENUMERATED RIGHTS

The Fundamental Rights which have been specifically enumerated in Part III of the Constitution are Enumerated Rights. The situations to which they are relevant are expressly laid down in detail. But in addition to the Enumerated Rights, there are rights which are not specifically declared in the Constitution as such, but are inferred from the rights already documented in the written Constitutions or the Statutes; they are not themselves expressly coded or enumerated among the explicit wording of the law.

The alternative terminology used in respect of the rights not expressly mentioned in the Constitution but are inferred from the terminology used in the Constitution are known as Unenumerated Rights. They are also known as 'implied rights' or 'background rights'. The significance of Unenumerated Rights is that- the infringement of the Rights once declared as rights capable of being enforced is of the same value as the Enumerated Rights. In some Constitutions, there is a specific reference to such rights and their recognition for the purpose of enforcement.[244] For example, in United States of America, the Ninth Amendment to the United State's Constitution protects against Federal infringement of unenumerated rights. The text reads as: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". The Supreme Court of the United States has also interpreted the Fourteenth Amendment to the U.S. Constitution to protect against state infringement of certain unenumerated rights including the right to send one's children to private school and the right to marital privacy. In Australia, Implied rights are the political and civil freedoms that necessarily underlie the actual words of the

[244] *ibid*

Constitution, but are not themselves expressly stated directly in the Constitution. Since 1990s, the High Court has discovered the rights which are said to be implied by the very structure and textual form of the Constitution. 198 In Ireland, Article 40.3 of the Irish Constitution refers to and accounts for the recognition of the unenumerated rights. The Supreme Court is often the main source of such rights, such as the right to bodily integrity, the right to marry and the right to earn a living, among others.

In the Republic of China, Article 22 of the Constitution of the Republic of China guarantees unenumerated freedoms and rights of the people that are not detrimental to social order or public welfare, now in effect in Taiwan. While in some countries, the Constitution itself allows the Courts to enforce the rights not specifically laid down in the Constitution. In certain countries, however, it is not so provided, as in India, the Courts through their exercise of Judicial Activism draw inference from the rights which are expressly provided and try to protect the interests of persons by expanding the scope of the well laid down rights.[245] The Constitution does not put an embargo on the rights of an individual to be recognized by the Courts as unenumerated rights. By now, quite a good number of fundamental rights have been innovatively interpreted by the courts, such as, the right to include in themselves right to shelter, right to clean environment, right against unnecessary interference by state etc. Article 21 is a right which has remained unamended since inception, but the environmental jurisprudence has flourished from interpretation of Article 21 on the premise that clean environment is basic requirement of life.[246]

A few other unenumerated rights which are the result of judicial interpretation of the enumerated rights or the other Constitutional provisions are the following-

[245] *Constitution of India*. (2000). New Delhi: Govt. of India.
[246] Kaur, G. (2006). *Fundamental rights*. New Delhi: Shree & Distributors.

1. Right to live with human dignity

2. Right against sexual harassment at workplace 3. Right against rape

4. Right to reputation

5. Right to livelihood

6. Right to shelter

7. Right to social security and protection of family

8. Right against honour killing

9. Right to Health

10. Right to Medical care

11. No right to die

12. Right to life

13. Sentence to death - rarest of rare cases

14. Right to get pollution free water and air

15. Right to clean environment

16. Right against noise pollution

17. Right to know or right to be informed

18. Right to personal liberty

19. Right to privacy

20. Discourse of dreadful diseases

21. Right to privacy and subjecting a person to medical tests

22. Right to privacy - women's right to make reproductive choices

23. Right against illegal detention

24. Article 21 & prisoner's rights

25. Right to speedy trial

26. Right to fair trial

27. Right to bail

28. No right to anticipatory bail

29. Right against hand cuffing

30. Right against solitary confinement

31. Right against custodial violence

32. Death by hanging not violation of Article 21

33. Right against public hanging

34. Right against delayed execution

35. Right to write book

36. Right against bar fetter .

The Balancing of Rights the interpretation of rights belonging to two different individuals or two different entities, the method followed by the courts in India has been to balance the competing interests. The system of balancing is an American concept and is followed in India as part of the interpretative process. The Courts do not condemn or nullify the right of one person or entity, if a similar interest is there provided by law in respect of another person. For example- the 201 right to freedom of speech is provided by the Constitution for the individuals, but this freedom is subject to public order, public decency, public health and morality which means other segments of society, particularly the State have their interest which needs to be protected side by side with the right of the person guaranteed to him in the Constitution or the Statute. The law enforcement officials, when called upon to enforce the right of an individual to his freedom of speech, must protect it by balancing the particular right with the interest which the law has provided for in favour of the other person.

The doctrine of Judicial Review

The principles embodied in the Constitution and the notion of justice to which we subscribe as a free nation based on our national philosophy and historic traditions constitute the supreme law of the land. The situation arising from historical background to which a brief reference has been made above, what we find is that there is Judicial Review as part of the Constitutional system of our country. According to the provisions of Constitution, which accommodated this concept parliamentary sovereignty is subject to Constitution of India, which includes judicial review. In effect, this means that while the parliament has the power to amend the Constitution, the amendment so made by the Parliament 99 would be valid under the framework of the Constitution itself. So much so any amendments which pertain to the federal nature of the Constitution must be ratified by a majority of state

legislatures also and the Parliament alone cannot enact the change of its own. Further, all amendments to the Constitution are also open to a judicial review. Thus, in spite of the Parliamentary action, the amendment would be subject to the principles embodied in the Constitution, with the result that the Constitution itself would remain supreme.

The institution of Judicial Review, today, is one of the basic features of the Indian Constitution. An important thing about this concept is that there are several by-products of this concept which have added to the majesty of the concept and they need to be referred to when we take up the study of Judicial Review; the context of any matter related to the Constitution of our country. The practical utility of Judicial Review is that- by exercising this procedure, the Court examines the validity of the action of the Executive and the Legislative institutions in the light of the fundamental principles of the Constitution and sets aside the action if the same is in contravention of the said policies. Since the Constitution itself does not contain detailed procedures about Judicial Review, the principles that have developed through the initiative of the courts form part of the Constitutional system of the country.[247]

This chapter has the object of investigating into the nature and scope of Judicial Review and the principles that have developed as its offshoots in the Constitutional system of our country. The effort of the researcher in this has been to see how the Courts have exercised the power of Judicial Review and 100 how the principles of Judicial Review have operated in relation to the policies of the government relating to amendment of the Constitution and the laws relating to the socio-economic justice of the people. Before discussing any of the above things in detail, the researcher considers it necessary to highlight the ideals of the Constitution of India which act

[247] Sathe, S. P. (2003). *Judicial activism in India*. Delhi: Oxford University Press.

as the fundamental principles of Justice and guide the courts in examining the validity of the actions of the legislature, the executive and the judiciary.[248]

The methodology followed therefore in presenting the discussion by dividing the material in three separate sections as follows: Fundamental Principles of the Constitution of India deals with the fundamental principles of the Constitution of our country, such as the Principles of Justice, the Theory of Constitution, the Fundamental Rights, the Directive Principles of State Policy, the Principle of Federalism and the Principles of Natural Justice. The importance of these principles is that the Courts exercise their power of Judicial Review on the touchstone of these principles.

DEVELOPMENT OF CONSTITUTION AND RELATED MATTERS

The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties. Justice Blackstone has remarked that the intention of a law is to be gathered from the words, the context, the subject matter, the effects and consequence or the reason and spirit of the law. He goes on to justify the remark by stating that words are generally to be understood in their usual and most known signification and not so much regarding the propriety of grammar. As their general and popular use, that, if words happen to be dubious, their meaning may be established by the context or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject-matter, with reference to which the expressions are used; that the effect and consequence of a particular construction is to be examined, because, if a literal meaning would involve a manifest absurdity, it ought not to be adopted; and that the reason and spirit of the law, or the causes, which led to its enactment, are often the best exponents of the words and limit their application.

[248] Sorabjee, S. J. (1999). Introduction to Judicial Review in India. *Judicial Review, 4*(2), 126-129. doi:10.1080/10854681.1999.11427060

Where the words are plain and clear, and the sense distinct and perfect is arising on them, then, there is generally no necessity to have recourse to other means of interpretation . It is only, when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office.[249] There may be obscurity as to the meaning, from the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words, and the apparent intention derived from the whole structure of the instrument, or its avowed object. In all such cases, interpretation becomes indispensable.

Then, Justice Story highlights the rules, which in his view are relevant to the interpretation of the Constitution of United States of America". "He says, "... In construing the Constitution of the United States, we are, in the first instance are to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also The Rules of Interpretation viewed in its component parts.[250] Where its words are plain, clear, and determinate, they require no interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, then, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument . Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less, than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for

[249] CONSTITUTIONAL DEVELOPMENT IN INDIA. (n.d.). Retrieved October 16, 2020, from http://static.upscportal.com/files/upsc2012/igp/csat-paper1/IGP-CSAT-Paper-1-Polity-Indian-Polity-&-Governance-Constitutional-Development-in-India.pdf

[250] Ubale, S. (2016, January 01). Constitution of India - Constitutional Development. Retrieved October 16, 2020, from https://www.slideshare.net/sourabhubale/constitution-of-india-constitutional-development

controversy; and the argument from inconvenience will probably have different influences upon different minds.

Whenever such questions arise, they will probably be settled, each upon its own peculiar grounds and whenever it is a question of power, it should be approached with infinite caution and affirmed only upon the most persuasive reasons. In examining the Constitution, the antecedent situation of the country and its institutions, the existence and operations of the state governments, the powers and operations of the confederation, in short all the circumstances, which had a tendency to produce or to obstruct its formation and ratification, deserve a careful attention. Much also, may be gathered from contemporary history and contemporary interpretation to aid us in just conclusions . Contemporary construction is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase or to expound an obscure clause; and in proportion to the uniformity and universality of that construction and the known ability and talents of those, by whom it was given, is the credit, to which it is entitled. It can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its limitations; it can never enlarge its natural boundaries".

Judicial Legislation: By judicial legislation is meant the work of the courts in the form of their decisions on a contentious issue. By such decisions, the courts add to the body of the law and consequently add new rights and remedies in favour of the individuals or entities or modify the procedure that has to be followed by the Executive, Legislative or Judicial branches of government in regard to any matter. A good number of techniques have been developed by the Courts in the exercise of their function of judicial legislation.[251]

The Courts, where Constitutional litigation takes place apply a variety of methods to interpret the Constitutional provision, which is in issue . The method adopted by the courts in

[251] Shashni, A. (2013). Beneficial Interpretation in Welfare Legislation: Study of Judicial Decisions in India. *SSRN Electronic Journal*. doi:10.2139/ssrn.2298771

interpreting the Constitution, in most of the cases, is different from the method adopted for interpreting a statute or a legal instrument. The lawyers presenting the case for interpretation assert that the proper method would be to consult the Constitutional text.

Conclusion

The researcher has found that there are certain inadequacies in the provisions of law. The Constitution does not convey, in adequate, the message about the nature and scope of the rights of individuals. It is necessary that the terms used in the Constitution are to be redefined, so that, there is or will be no difficulty in understanding the nature and scope of the law on a given subject and nobody exceeds the authority enshrined in the provisions of law. The courts are finding it difficult to cope up with the work, particularly the Apex Court, which deals with so many matters referred to it, by so many courts. In order to relieve the Court; of the heavy work which is falling off their hands, it is necessary to distribute the work among the Divisions of the Court, particularly by organizing the Divisions on the basis of geographical location, so that without much difficulty, the clients may approach the courts and seek redressal of their grievances.[252]

The term 'Constitutionalism' is not a collection of superior principles over and above the document called the 'Constitution'. In fact the terms 'Constitution' and 'Constitutionalism' have the same meaning and may be used interchangeably. But what more is understood by the term 'Constitutionalism' is the commitment of society to the broad principles of the Constitution with a strong determination to achieve the ideals enshrined in the Constitution. Therefore, in the very beginning of this enquiry the researcher has highlighted the essential elements of 'Constitutionalism' and pointed out how the framers of the Constitution displayed their commitment to the theory of the Constitution.

[252] Sathe, S. P. (2003). *Judicial activism in India*. Delhi: Oxford University Press

COMPETITION LAW IN INDIA: A PROGRESSIVE LEGISLATION

- SWARNITH SATYA PRASAD

I. ABSTRACT

The welfare of the consumers in the society is backed by competition in trade which is predominantly dominated by the producers and sellers. The consumers need the protection that can be backed by a law. The different kinds of monopolistic and restrictive practices were first noticed under the Monopolies and restrictive trade practices Act, 1969 (MRTP Act) which directly dealt with promotion of competition in trade. This Act was never taken seriously by the then existing governments.

The existence of the commission under the MRTP Act was a quasi-judicial body which had contributed to a greater extent in the field of promotion of competition in trade. The working was greater but the execution remained at stake, which indeed led to the introduction of the Competition Act, 2002 which goes on to provide certain provisions to restrain abuse of dominant position, prohibition of anti-competitive agreements. In this paper, an attempt has been made to figure out the progression of the competition law in India.

II. LITERATURE REVIEW

The importance of competition in an increasingly innovative and globalized economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organization of production[253]. The MRTP Act was the operative competition law of India until it was repealed in the year 2009. A discussion of the MRTP Act is important at this juncture to (a) determine the context in which Indian legislature enacted new competition legislation (b)

[253] http://old.unipr.it/arpa/defi/furse_ch01.pdf

the kind of cases that were brought under MRTP Act and finally, (c) to understand the competition law jurisprudence painstakingly developed over the last four decades by the Supreme Court and the MRTP[254].

Articles 38 and 39 of the Constitution of India[255] provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political. The Competition Act is drafted, as are most of the competition laws in the world, in fairly general terms and is not limited to regulation of commercial acts of private parties. The Competition Act prohibits or regulates (A) Anticompetitive agreements (u/s 3 of the Act) (B) Abuse of dominant position (u/s 4 of the Act) (C) Combinations (u/s 5 & 6 of the Act).

The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions (Raghavan Committee). Which was examined and left a recommendation to the then government to repeal the MRTP with a new formulated Act which is matching the standards of other developed nations.

In re-drafting its competition laws, the Indian government chose to adopt a competition enforcement regime inspired by the laws that have matured within developed nations. The Competition Act borrows statutory language from competition law in the western world and thus benefits from the evolution of antitrust enforcement that has occurred over the last century. The introduction of the new Competition Act, by the legislative body has in fact been an effective measure which has been adopted by the system in order to facilitate more efficiency and effectiveness.

[254]http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf

[255] Article 38 and 39 of the Constitution of India is part IV of the Constitution, referred to as Directive Principles of State Policy (DPSP).

III. INTRODUCTION

A situation in the market in which entities or sellers independently strive for the buyer's interests in order to achieve an objective such as sales, profit, market share, can be defined as a competition in the commercial world. The reverse position of monopoly is ascertained as competition. Usually one eliminates the other or reduces much of the influence of the other which depends on the level of impact on the market. A larger number of suppliers or producers acting independently determines an existence of competition. A significant number of times the sellers or/and producers act in concert with the formation of cartel and at certain times they also throw reactions to other's market conduct without an existence of an agreement in place in order to get the benefits desired after achieving a particular result. Increase in the price of the product in the same time or slashing the prices independently[256] would be a great example. Based on the question that is in existence there is an option for the existence of scope for the competition that is prevalent on the features and facts that exist at that particular instance. The extent of the competition in the market depends on various factors such as the structure of the market, the behavior of the entity in the case of seller/s. and also the mindset of the customers who exist in the buyers' market. There are higher chances where in the market's structure might be a perfect one and also be effective.

Existence of a perfect market is ideally not possible, however, there are chances only in certain cases where the customer sovereignty on the adherence of conditions, which is an existence of certain buyers and sellers who are acting without any collusion within them, perfect communications about selling and buying prices and perfect mobility by the entry of new sellers. A place like a market should remain as an access to everyone at similar levels, which brings a point that there can't be any one independent player who influences the market place. The aim of having a law is for the purpose of having an effective competition, by eradicating collusion. In such cases an entry of a new entity is easier than during the existence of a perfect competition which makes it extremely hard for a player to mark his presence in the market

[256] Re Hindustan Times Ltd. (1979) 49 Comp Cas 495.

place among those who are already in existence for over a period of time. Usually the behavior in the market of a seller is seen by various acts that are performed such as inducements in the prices, innovations or services. The prevalence of competition in the market place isn't in existence in order to protect the small scale businesses which are seeking entry, whereas, it is to protect the interests of the consumers. This has been the outlook of the law in existence. There are higher chances where entities or individual business persons tend to indulge in anti-competitive practices, which indeed doesn't provide for a fair competition between competitors in the existing market. The complete eradication of competition in a market will only result in the monopolistic existence of a company or an individual.

IV. AIM

The aim of the paper is to analyze Progression of Competition Law in India.

V. OBJECTIVE

The objective of this paper is to analyze the advancements in the Competition law in India.

VI. SCOPE

The scope of this paper is restricted to the scenario about Progression of Competition Law in India. As to how the Legislature play a role in enhancing the mentioned subject.

VII. FOREIGN JURISDICTIONS

One of the first countries in the world to recognize the danger caused by the giants in the field of competition was the United States of America. Due to this early recognition of a probable issue, the first legislative measure was taken in the year 1890 by enacting the Sherman Act, 1890[257]. Section 1 of this Act declares trusts, etc. in restraint of trade to be illegal and prescribes penalty by providing that, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Any person who is involved in the act of engaging in a contract or in

[257] This Act was supplemented by the Clayton Act,1914 and the Federal Trade Commission Act,1914.

a combination or conspiracy will be declared to be an illegal act and shall be deemed to be guilty of a felony and on conviction they shall be punished with a fine that doesn't exceed ten thousand dollars for a corporation and if it is a person the it shall be three fifty thousand dollars or imprisonment not beyond three years or both, which is as per the discretion of the court that will adjudicate the said matter before it.

By taking a look at section 2 of this Act it can be observed that monopolizing a trade felony and prescribes penalty by providing that each person who shall monopolize or attempt to monopolize or combine or conspire with other person or group of persons, to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty and on conviction, they shall be punished with fine not crossing beyond ten million dollars for a corporation and if it is a person then it shall not exceed three fifty thousand dollars or an imprisonment not exceeding three years or both which is as per the discretion of the court.

To understand the scope of section 1 of the Act, The Supreme court of USA applied the per se rule of illegality which mentions that there is no requirement of proof if the restraints on trade were illegal, thus there is no proof require to judge[258]. When there is an existence of restraint in cases, there is only a requirement of that and there is no other additional proof which has to be accompanied in order to judge the said matter[259]. Due to the ongoing development in this field of law, there was an introduction of another rule which is known as the ancillary restraint test which is to judge the illegality, which brought in a change where these restraints were out of the purview of section 1. Later the literal method of interpretation was brought down and introduction of the rule of reason was brought in, in order to access the illegality, which was clarified by Judge Brandeis[260].

The framework for figuring out and dealing with restrictive business practices and abuse of dominant market position is contained under the United Kingdom's Competition Act, 1998. The main objective behind this enactment is for the prohibition of agreements or practices

[258] United states v. Joint Traffic Assn., 171 U.S. 290 (1898).
[259] Northern pacific railway v. United States, 356 U.S. 1 (1958)
[260] Chicago Board of Trade V. United States, 246 U.S. 231 (1918).

restricting competition and free trade between various different entities. Another well-known commonwealth country which has essentially worked on the competition part of legislation is Australia under the Competition and Consumer Act, 2010 which covers the relation between suppliers, retailers, wholesalers and the consumers. Fair trade and competition is at the top most level of concentration which is aimed to be achieved by this particular enactment.

VIII. ROLE OF INDIAN LEGISLATIVE

The Indian government for the purpose of studying the role of the growth industrial sector brought into force about six committees. One among them were:

1. In 1966 R.K. Hazari Committee was brought into place for the industrial planning and licensing policy.
2. The industrial licensing policy inquiry committee in 1969. This committee had failed to bring the required changes in the economic growth.
3. Report of the enquiry committee amendment committee in 1957.
4. Report of the committee on controls and subsidies in 1979.

One of the most important committee's that played a vital role were:

Monopolies Inquiry Commission

The chairman of this committee was a retired judge of the Supreme Court of India to figure out and enquire into the effect and longevity of concentration of economic power and prevalence of monopolistic and restrictive trade practices and also to come up with opinions in the nature that supports the public interest. The Committee selected about a thousand companies which were belonging to about seventy-five business houses where their assets summed up about five crores. The overall value of these companies were rupees two thousand six hundred crores with a paid up capital of rupees six hundred crores. In the year 1963-64, these companies and the business houses had a paid up capital and assets in the corporate sector excluding government and banking companies were estimated to be about rupees thousand four hundred crores and rupees five thousand five hundred crores respectively which amounts to forty-six percent of total assets and forty-four percent of the total capital of the corporate sector.

Hoarding, creation of artificial scarcity of goods of mundane use like oils, grains, etc., resale price maintenance resulting in killing the competition and also increase in the prices which were some of the practices that were found out by the committee. These practices were common among retailers, producers and wholesalers. These were done generally by withholding future supplies or reducing the rate of discounts. Practices such as tie-up agreements, boycott arrangements, discriminatory accounts payment were some of the trade practices practiced.

Certain non-legislative recommendations were also made by this committee where reconsiderations were asked to be made in the industrial licensing system to create a smoother surface for the new comers into the field of business and also to increase the public sector. A recommendation was also made to introduce a quasi-judicial governing body to prevent monopolistic and restrictive practices. Due to some of these recommendations made by this committee, led to the formation of the Monopolies and Restrictive Trade Practices Act, 1969 and also the MRTP commission was set up in 1970, however, the commission was given only an advisory authority. Except in restrictive practices.

There were two main problems faced by the Indian government since the day of Independence The two major problems that the Indian government predominantly faced is industrial and agricultural development in the country in order to attain self-reliance and secure social and economic justice with equitable distribution of material resources of the community to ensure that the wealth concentration and productions means in the hands of a few individuals or business houses which would lead to a common detriment.

Articles 38(1) and 39 of the Constitution of India provide: “Art 38. State to secure a social order for the promotion of welfare of the people. – (1) The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political. Shall inform all the institutions of the national life.

Article 39. Certain principles that are to be followed by the state. – The state shall, in particular, direct its policy towards securing- (b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

Since the independence of the country, various governments have come out with different measures that are executive backed. Like Industrial policy resolution of 1948, the industrial policy resolution of 1956, expansion of public sector enterprises, protection of small scale and cottage industries and followed by the five year developmental plans.

IX. RESTRICTION IN TRADE PRACTICES UNDER THE MRTP ACT

The MRTP Act was the first enactment in India which brought some changes in the area of competition by bring in various measures. One such measures is the restrictive practice which is defined under section 2(o) of the MRTP Act. Which goes on to define that a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular-

(i) Which tends to obstruct the flow of the capital or resources into the stream of production, or

(ii) Which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods and services in such manner as to impose on the consumers unjustified cost.

The Act's main objective as mentioned above is to promote competition by the means of controlling restrictive practices where there can be a prevention, restriction in the competition. The significance of the mentioned definition is that the definition by itself is exhaustive in nature[261]. The trade that is taking place, in order to term it as a restrictive practice there has to an existence of prevention, distortion or lessening of competition in any manner. The term probable in itself hints that there has to be an element of prediction that has to exist in order to figure out the trade practice in competition[262]. The various restrictive practices discussed by the MRTP Act are also mentioned under the existing Competition Act, 2002.

[261] RRTA v. TELCO, (1976) 46 Com Cas 470.
[262] Ibid, 7

Tying agreements: By means of an agreement where a sale is made with which another good is also stocked and is tied with the primary good which leads to a tie-up in sale which is mentioned under section 2(o) of the MRTP Act. An instance where the supplier insists to the dealer that a particular good must be stocked up of a desired quantity amount to tie-up sale and restrictive trade practice[263]. The tying arrangements are considered a bad practice for a reason that the tied up product might lack the desired quality, highly priced and in the end it is of a nature that benefits the seller and the end user.

Discriminatory discounting: Any method or type of agreement which is used to grant or allows for a concession or benefits, which includes allowances, rebates or credit which amounts to restrictive trade practice. The payment of bonuses to the wholesalers and retailers at various different rates was held as a restrictive trade practice[264].

Refusal to deal: There can be an effect in competition if there is a refusal of one or more number of people refuse to deal with another. This refusal can be done by a person or a group by means of quoting a higher price for a desired product. This practice as such will lead to a restrictive trade practice.

While the exemption from the MRTP Act granted to trade unions of employees and co-operative societies is legitimate, there can be no justification for that part of section 3 of that Act excluding the application of the Act, in respect of government companies, undertakings owned or controlled by the government and undertakings owned by corporations established under a central or state Act, unless the central government by notification otherwise directed. This had a limited scope with regard to restrictive trade practice.

There was very little information under provisions of section 4(2) of the MRTP Act to the effect that it would not apply in the banking sectors and also insurance companies. Also, the commission was location oriented which sat only in the National capital, Delhi and failed to reach other regions in the country. This decreased the working frequency of the commission.

[263] RRTA v. Bata India Ltd, (1976) 46 Comp Cas 441.
[264] RRTA v. Carona Sahu Ltd, (1976) 46 Comp Cas 431.

In order to have an economic liberalization and also to pen up the trade to competition the MRTP Act had to be replaced with a new Competition Act. The central government by now had realized that the existence of the MRTP Act is not helping or guiding in the process of achieving a social and economic change in India. It was during the late 1991s that the role of World Trade Organization was such that it was in a move to change the economic environment. Considering the establishments of the WTO, the Ministry of Commerce, Government of India set up a committee to discuss on Trade and Competition policy. They mentioned that there is a need to have an appropriate competition law to protect fair trade and also to check anti-competitive practices.

X. THE COMPETITION ACT, 2002

Upon considering the recommendation by the Expert Group, considering the need for a new competition law, the Government of India appointed a high level committee on competition law to advise a new competition law to the country. This committee is commonly known as the Raghavan Committee. Among the various measures adopted by the Government of India with regard to new industrial policy, the government went ahead to scrap the MRTP Act, which indeed was considered a major development in the industrial sector of the country.

The committee that was appointed submitted a report in the year 2000 advising for a new competition law in line with global advancements. Based on the report by this committee the Competition Act enacted by the parliament came into force after receiving the assent of the president in the year 2003.

The committee observed the methods adopted to increase competition and suggested that:

"Although significant steps have been taken to increase competition in various sectors of the economy, a number of important things need to be done that are essential for a competition policy. There is a need for a competition law tribunal or otherwise known competition commission of India which will act as a watchdog of the competition policy. It will enhance

the introduction of the required changes in the policy environment and once again this is done, it will perform a proactive advocacy function for the competition.[265]"

This consideration was well received by the then Government of India in a positive manner wherein after consultations with various related associations, the Government went ahead to enact the new Competition Law, 2002.

The Act almost goes around the happenings mentioned under sections 3,4,5 and 6 which deals with anti-competitive agreements, abuse of dominant position, combination and the regulation of combinations.

Upon doing a comparison between the MRTP Act and Competition Act the following can be observed; The MRTP Act was more of a procedure based enactment while the Competition Act was result oriented. The MRTP Act had a reformist and behavioral based approach while the new Act was punitive based. Lastly, the Competition Act has extraterritorial application when compared to that of the MRTP.

Anti-competitive agreements

Section 3 to 6 of this Act aims at the reduction of anti-competitive trade practices and also promotion of competition in business. The provisions 3 (1) and clause 2 of the Act says that an agreement to be void if there is an inclusion of production, distribution, storage or control of goods or provision of services, which likely has an effect that is appreciable which results in adverse effect on the competition and their associations, where such association have been prohibited from entering into such type of arrangements. The said provision mentions for a reason to analyze the actual adverse effect on competition in the said relevant market[266]. Sub-section 3 declares that, certain actions causing an adverse effect on competition prohibited under sub-section 1 and is declared void under sub-section 2. Section 33 of MRTP Act declares that, tie-in arrangement, exclusive supply arrangement, refusal to deal and resale price maintenance and also other agreements which deal with production, supply, storage, sale or

[265] Report of High Level Committee on Competition Policy and Law, Government of India, para 2.9.7.

[266] Competition Commission of India v. Coordination Committee of Artists and Technicians of WB Film and Television, AIR 2017 SC 1449

provision of services or trade in them were to be treated as violation of sub-section 1, only when same causes or was likely to have an adverse effect on competition.

Abuse of dominance

Section 4 (1) of the Competition Act, talks about, the abuse of dominant position by an enterprise or group. Considering an enterprise to have a dominant position in the relevant market, means, its ability to operate or function without depending on its competitors and consumers. There are certain points mentioned under sub-section 2 with regard to abuse of dominance position. They are, predatory pricing, which means, the sale of goods or provision of services at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition; restricting or limiting production of goods or provision of services or technical or scientific development, relating to goods or services to the prejudice of consumers; indulging in practice which results in denial of market access; contracts which results in acceptance of supplementary obligations by other parties which have absolutely no connection with the contract; or by making use of dominant position in one market to enter into another.

Combination-

Combination that is likely to cause an appreciable adverse effect has been declared in violation under section 6 of the Competition Act. Under section 5, the term combination has been defined. The Competition Committee's approval is required for any proposed agreement relating to a combination.

Adjudicatory Authority-

The Central Government under the Competition Act has established the Competition Commission of India where there exists a chair person and two to six members are to be appointed from a panel of names given by a selection committee consisting of the Chief Justice of India, the Ministry of Corporate Affairs and the Ministry of Law and Justice and two experts who are professionals in the field of Economics, Business, Commerce etc. the CCI's duty is to, enhance and sustain competition in India, protect the interests of consumers and to eliminate

practices which have adverse effect on competition. It has wide powers to pass orders in the matters which are violated as per the provisions of the Competition Law.

The appeals from the CCI will be heard by the National Company Law Appellate Tribunal which is mentioned under section 53N of the Competition Act.

XI. CONCLUSION

To foster industrial growth in India there was a major change brought about from the introduction of the MRTP Act to Competition Act which was most likely an outcome of liberalization. The existence of many inaccuracies in the MRTP Act left a large number of people confused and hence it was never enforced in a serious manner. The High Courts and Supreme Court in many of the cases has highlighted the inaccuracies in the working of the commission established under MRTP because, it never had the power to make decisions in areas which dealt with concentration of economic power and also monopolistic trade practices. Overall, the commission never worked at its full capacity. These inaccuracies led to, the then Government of India to introduce a new competition policy which is in consonance with the World Trade Organization. As per the recommendation of the Raghavan Committee, the Competition Act was brought in which predominantly dealt with anti-competitive agreements, abuse of dominant position and regulation of combinations. The abolition of the Competition Appellate Tribunal is not known and the same powers has been given to the NCLAT which specializes in the field of Company Law. Since, the areas of specialization varies, a separate tribunal has to be introduced to acknowledge the competition cases that might arise in the future.

IS CONSUMER REALLY THE KING IN INDIA: CHALLENGES AND POSSIBILITIES?

- DR. AMIT KASHYAP & MR. PARTHIK CHOUDHURY & MRS. SHASHI BALA

ABSTRACT

Right from birth each and every one of us becomes a consumer but people hardly know about the rights and responsibilities they have as a consumer. There is a great need for awareness regarding consumer rights, responsibilities and the grievance handling machinery among people of all age groups. This paper aims at knowing the awareness level of students regarding the same and also spread awareness in the attempt. The protection against exploitation and unscrupulous activities of the manufacturers and traders provided by law is equal for each one of us. Then why is it that the Consumer Protection Act, 1986 is included in the Higher Secondary and Degree syllabus of Commerce stream only? This paper intends at putting forward the suggestion of the inclusion of Consumer Protection Act. So as to help to build a nation of responsible citizens who can lead a secured life, away from the evil intentions of traders. After all, an aware consumer is a safe consumer and consumer is really a king.

The consumers are most disadvantaged part of the market and are in that the litigation for common man is costly and time consuming and hence getting justice disadvantageous due to the non-fortification of their rights they are suffering from lots of undersigned elements such as misleading advertisements, underweight goods, unsatisfied services etc. Subsequently the battle for consumer protection has to be fought by many consumer associations, agencies and Non-governmental associations. After that a major breakthrough came during 1986 when the parliament of India passed a law for consumer protection Act, 1986. Three tier quasi-judicial machinery was set up at District, state and national levels with a view to provide speedy and simple redress to consumer dispute.

The objective of the consumer courts is to ensure speedy justice to the consumers against various malpractices and negligence without involving any cost, as no court fees are charged.

Consumer's court has been set up as special court, as it was expensive and time consuming to get justice through civil court.

Keywords: Consumer; Consumer Protection; Exploitation; Grievances; Redressal; Consumer Rights; Consumer Responsibilities; Awareness.

I. INTRODUCTION

"If you make customer unhappy in the physical world, they might each tell six friends. If you make customers unhappy on the Internet, they can tell six thousand friends."
Jeff Bezos

The golden rule for every businessman is that there is only one boss or king-the customer, who can fire everybody in the company simply by spending his money somewhere else. The greatest assets of every business either physical or digital are its customers. Consumer is the nucleus round whom all business activities revolve as the planets do around the Sun.[267]The concept of consumer protection has its deep roots in the rich soils of Indian civilization. Indian Jurisprudence absorbs within its ambit ample of legislations for the protection of consumers in physical commercial transactions. However, the Internet has brought a new 'e-revolution' in which the nature of commercial transactions has become highly advanced and sophisticated. On the one hand, Information and Communication Technology is transformational tool which has opened the doors of cyber world for physical world; on the other hand, a shift from physical world to virtual world has introduced novice hurdles for consumers and sellers.[268]Hence, Consumer rights are the rights given to a "consumer" to protect him/her from being cheated by salesman, manufacturer, and shopkeeper. The consumer protection laws are designed to ensure

[267]D. Himachalam, *Consumer Protection in India*, The Associated Publishers, Delhi, 2006, p.1.
[268]Gagandeep, *Indian Jurisprudence on Consumer Protection in E-Commerce: A Critical Study* (Ph.D. Thesis), Chapter-VII, p. 282.

fair trade competition and the free flow of truthful information in the marketplace.[269] The rules are designed to prevent companies that involve in fraud or defined unfair practices from obtaining an edge over competitors and may give additional protection for the weak and those unable to take care of themselves. The consumer protection laws are a form of government regulation which aims to protect the rights of consumers.[270]The consumer rights are an integral part of our lives like the consumerist way of life. We have all made use of them at some point in our daily lives. Market resources and influences are growing by the day, and so is the awareness of one's consumer rights. These claims are well defined, and there are means like the State, consumer courts and the voluntary organizations that work towards safeguarding it. While we like to understand more about our rights and make full use of them, and the consumer liability is an area which is still not demarcated, and it is hard to spell out that all the responsibility is that a user is supposed to shoulder.

The consumer movement is as old as the trade and commerce in India. In Kautilya's Arthtashastra, there are references to the concept of consumer protection against exploitation by the business, little weight and measures, adulteration, and punishment for these offenses. However, there was no organized and systematic movement safeguarding the interests of the consumers.[271]

In the initial years when welfare legislatures like the consumer protection Act did not exist, the maxim Caveat emptor (let the buyer beware) governed the market deals. With the arrival of the 20th century due to fast industrialization and multifaceted development in India after the Independence. There seemed a spate of consumer goods and services in the Indian Market, which has almost transformed the link between the customer and the dealer. Otherwise, the technological progress in the area of media started flooding of advertisements of goods and

[269]Ms. Kiran Chaudhry, *Consumer Protection and Consumerism in India*, ZENITH International Journal of Multidisciplinary Research Vol.1 Issue 1, May 2011, p. 1.
[270]*Ibid.,* at p.2.
[271]See also:http://employmentnews.gov.in/NewEmp/MoreContentNew.aspx?n=Editorial&k=154, accessed on: 15th February, 2020.

services which has finally worsened the grim situation. Lack of consumer awareness, illiteracy, poverty, etc. further resulted in the exploitation of consumers.[272]

Awareness of consumer rights varies in different regions in the country. It is destitute especially among the people in rural and distant areas of the country. As opposed to the developed countries, the level of consumer knowledge in such a vast country with a large population like India is many moderates. The origin of economic inequality lies in low levels of literacy and ignorance. Till date, consumers are not able to state their rights and on several occasions are abused by the trade and industry service providers. Preserving and promoting the welfare of consumers has thus become one of the major concerns.

Globalization and Liberalization of trade and business have resulted in many products and services being available to the customers. Growth in the economy has led to an increase in the purchasing power of the poor section, which is the largest lot of the population. That has necessitated giving high priority for the protection of the consumers and promotion of responsible consumer movement in the country.[273]

The present technological growth and complexities of the seller's techniques, the presence of a vast army of intermediaries and unethical and untruthful advertisements have aggravated the situation of consumer exploitation.[274] The consumer has to be conscious of his rights and play a key role. The success of consumerism is an active function of consumer awareness and to avoid exploitation consumer must become knowledgeable.[275]

II. GOVERNMENT INITIATIVES:

Consumer movement is a socio-economic movement which seeks to protect the rights of consumers to the goods purchased and services availed. The government has accorded high

[272]Dr. Durga Surekha, *Consumers' Awareness about Rights and Grievance Redressal*, 2010, pp. 8-9.
[273]Report of the Working Group on Consumer Protection Twelfth Plan (2012-17), p.15.
[274]Dr. Durga Surekha, *Consumers' Awareness about Rights and Grievance Redressal*, 2010, p.19.
[275]*Ibid*., p.21.

priority to protect consumer interests better. The Department of Consumer Affairs has initiated some measures to promote a responsible and conscious consumer movement in the country. Such standards include the use of multi-media drive for raising consumer awareness and encouraging consumers' engagement through the efforts of Government and Non-Governmental Organizations and others.

The primary objectives of the consumer protection program are:-

(i) To create suitable regulatory and legal mechanisms which would be within the easy reach of consumers and to cooperate with both Government and Non-Governmental Organizations to protect and to promote the welfare of the customers?

(ii) To include and motivate various sections of society including consumer groups, women and youth to participate in the program.

(iii) To create awareness amongst customers of their rights and obligations, motivate them to advance their rights so not to agree on the nature and the examples of goods and services and to ask redressal of their disputes in consumer fora if required.

(iv) To educate the consumers as to be aware of their rights & social responsibilities.[276]

III. CONSUMER RIGHTS:

The importance of consumer rights lies in their enforceability, which in turn depends primarily on the level of consumer knowledge and information. In other words, it is not just to have dynamic consumer laws in the country. There must be an equal thrust on the upbringing of all citizens on the consumer rights free to them and the mechanisms through which these rights if violated can do adjusted.

[276]Department of Consumer Affairs, Annual Report, 2011-12, p.51.

The rights of a user which are being asked to be protected and promoted to the legislative command available under the Consumer Protection Act, 1986 inter-alia include:

(a) The right to be protected against marketing of goods and services which are hazardous to life and property;

(b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be to protect the consumer against unfair trade practices;

(c) The right to be assured, wherever possible to access to variety of goods and services at competitive prices;

(d) The right to be heard and to be sure that the customer's interests gained the attention of proper forum;

(e) The right to seek redressal on unfair trade practices or the restrictive trade practices or illegal exploitation of consumers; and

(f) The right to consumer education.[277]

Among all these rights, it is the right to consumer education that can be said to be of supreme importance, since this is the gateway to which all the rights can be secured. An aware consumer not only protects his rights but also induces efficiency in the economy which enables a country to become globally competitive.[278]

IV. CONSUMER AWARENESS:

In the world of information technology, the Government can spot the deficiencies by creating awareness through consumer affair programs. The Department of Consumer Affairs in the Government of India is the focal point for various activities by the groups. To make the consumers conscious of market realities as well as the rights of the users and the way in which they can educate themselves and also enforce their rights. Accordingly, the "*Jago Grahak Jago*" campaign has become immensely popular and is now being used by several Departments

[277] *Op.cit.*, Report of the Working Group, p.65.
[278] *Ibid.*, p.66.

to communicate with consumers.[279]The increase in consumer awareness has driven manufacturers and traders to guarantee quality service to customers. Resultant to that plenty of cases filed in National and State Commission have come down from a total of 13,25,96 in the year 2020 to 11,15,97 in the year 2020 upto 29th February, 2020. Similarly, some cases filed in District Consumer Forums have also come down from 43,01,258 to 39,59,149 during the same period.[280]

V. Legislative Measures On Consumer Protection: Consumer Protection Act, 1986:

One of the most striking verdicts in the field of consumer protection/consumer campaign in the nation has been the enactment of the Consumer Protection Act, 1986. This Act has done necessitated because of the well-organized sectors of manufacturers, traders and service providers. With the knowledge of the market and manipulative abilities often venture to abuse the customers. In spite of the presence of various provisions of different laws for preserving their interests. Further, the increase in population has resulted in huge pendency and delay in the disposition of suits in the civil courts. Therefore, the Consumer Protection Act, 1986 was passed to protect the interests of consumers better. It is one of the most progressive and far-reaching components of the consumer protection law in India.

The Salient Features of the Act are as Follows:

(i) The Law provisions are for setting three-tier consumer dispute redressal machinery at the national, state and district levels.

(ii) It refers to all goods and services.

(iii) It includes all sectors, either private, public or any person.

(iv) The Law provisions for the relief of a particular type and including for compensation to the consumer as suitable.

[279]Department of Consumer Affairs, Strategic Plan, 2011-15, p.13.
[280]Retrieved from: http://ncdrc.nic.in/stats.html, on dated 29.02.2020.

(v) The Act also renders for fastening up of Consumer Protection Forums at the Central, State and District levels, which are instructional bodies to promote and protect the rights of the consumers.

(vi) The provisions of the Act are in adjunct to and not in derogation of the terms of all other law for the time being in force.[281]

Consumer Protection Act has been in service for about 34 years. Some deficiencies and shortcoming in respect of its functioning should come to light thereby asking revisions on three times, and still leaving scope for further improvements.

VI. CONSUMER GRIEVANCE REDRESSAL:

Users require a second and expeditious grievance redressal mechanism to assure that manufacturers and service providers are liable for the price and quality that the customers are entitled. Accordingly, it is necessary to provide several methods of grievance redressal including those which are available with the provisions of the Consumer Protection Act.[282]

Consumer Protection Act, 1986 enables the ordinary consumers to secure less expensive and often speedy redressal of their grievances. The Act mandates the establishment of Consumer Protection Council at the Centre as well in each States and District, including a view in promoting the consumer awareness. It also provides for a three-tier composition of the National and State Commissions and District Forums for the quick resolve of consumer disputes. Today, there are 610 District Forums, 35 State Commissions with the National Consumer Disputes Redressal Commission (NCDRC) at the apex **(Annexure-I)**. The provisions of this Act cover "goods as well as services." The goods are those which are manufactured or produced or sold to consumers through whole sellers and retailers. The services are for transport, telephone, electricity, housing, banking, insurance, medical treatment, etc. If the consumer is not satisfied

[281] *Op.cit.*, Report of the Working Group, pp.15-16.
[282] *Op.cit.*, Strategic Plan, p.12.

with the judgment of the District Forum, then he can do appeal to the State Commission and against the order of State Commission a user can do appeal in the National Commission.[283]

As per data made available by NCDRC, out of 53, 77,474 cases filed in consumer fora at the three-tier level since inception, **(Annexure-I**) have taken 48,89,465 cases (almost 90.92%).[284] To ensure speedy disposal of cases, the State Government urged avoiding any delay in appointment of President and Members in Consumer Fora. To dispose of the dire situations, Circuit Benches from National Commission frequently visits the State. So far National Commission has held Circuit Bench sitting at Hyderabad, Bengaluru, Chennai, Pune, Kolkata, Ernakulum, Ahmadabad, and Bhopal. Some of the State Commissions also kept Lok Adalats for speedy disposal of the cases.[285]Under the scheme of "Strengthening Consumer Fora" (SCF), financial assistance implies to the States/Union Territories for enhancing the infrastructure of the building as well as non-building assets [286]**(Annexure-I)**.

Scheme of Computerization and Computer Networking of Consumer Fora (CONFONET) did start in March 2005. Under this scheme, the Consumer Fora at all the three tiers throughout the country were to be fully computerized to enable access from information and quicker disposal of cases. The project is being implemented by the National Information Center (NIC) on a turnkey basis. The scheme has remained spread through 11th Plan period with a total cost about Rs.25.69 crores. As the year 2011-12, an amount of Rs.0.75 crores has been released to NIC for activities to do start under CONFONET Project in the XI Plan.[287]

VII. CONSUMER PROTECTION (AMENDMENT) BILL, 2011:

[283]http://www.NCRDC.nic.In, site accessed on dated: 3-12-2014.
[284]Retrieved from: http://ncdrc.nic.in/stats.html, on dated 29.02.2020.
[285]Lok Sabha, Unstarred Question no. 3928 dated 18.12.2012.
[286]Rajya Sabha Unstarred Question no. 2498 dated 17.12.2012.
[287]*Op.cit*., Annual Report, 2011-12, p.54.

The Consumer Protection Act was amended earlier thrice by Act no. 34 of 1991, Act no. 50 of 1993, and Act no. 62 of 2002 respectively. The amendment established in 1991 was mainly to incorporate prerequisites for the quorum of District Forum for appointing persons to preside over State Commissions/District Forums. In case of absence of President to enable the court function uninterruptedly.[288]In 1993, the Law was amended again to greet the inadequacies in the area of the principal Act. It intended to plug loopholes and enlarge the scope of areas covered and interest more power to the redressal agencies under the[289]. In 2002, Act was amended again to help quicker disposal of complaints, intensifying the capability of redressal agencies, empowering them with more powers, streamlining the procedure and widening the scope of the Act to make it more functional and effective.[290]

As a pro-active action, in July 2004 a Working Group was set up to examine the provision of the Act and consider a relevant amendment to make the Act more meaningful, functional and vibrant. Some proposed changes did report to all State Governments, concerned Central Ministries, and NCDRC in July 2006. Revised proposed changes were re-circulated in 2009 and the light of the observations taken on the draft plan. The Department of Consumer Affairs in discussion with the Ministry of Law and Justice formulated "Consumer Protection (Amendment) Bill, 2010. In the meantime, some recent new remarks of the Department of Financial Services did receive on the proposed sections regarding unfair trade practices and unfair contract. These changes were got approved by the Ministry of Law and Justice and formed part of the draft proposal of Consumer Protection (Amendment) Bill, 2011. The Bill did introduce in Lok Sabha on 16.12.2011. The Bill did refer to Standing Committee on Food, Consumer Affairs and Public Distribution on 26.12.2011.[291]

[288]See also, J.S. Panswar, Navin Mathur and Darshana R. Dave, *Consumerism Global and Indian Perspectives*, 2006, p. 94.
[289]Consumer Protection Amendment Bill, 1993.
[290]*Op.cit.*, Report of the Working Group, pp.16-17.
[291]26th Report of Standing Committee on Food, Consumer Affairs on Consumer Protection (Amendment) Bill, 2011, pp.1-2.

The Committee Report did introduce in Lok Sabha on 19.12.2012. The primary aims of the proposed law are:-

(i) To widen the scope and amplifying the provisions of the Act.

(ii) To help quicker disposal of complaints.

(iii) To justify the qualifications and procedure of selection of the Presidents and Members of Consumer Fora.

(iv) To strengthen penal provisions/enforcement orders of Consumer Fora.[292]

The Standing Committee Report on above Bill observed that a cooperative approach between Central and State Governments would result in the consistent implementation of consumer protection laws and rules across all jurisdictions. The Committee also recommended Ministry to implement consumer-related programs and policies in close coordination with the State Governments in the interest of consumers. There is the need for an update regarding the quality of goods and standards of services provided to customers so as to adhere to the international standard as stressed time again. It also draws attention towards the high need to spread awareness. To train the consumer about their rights as provided under the Act. Committee recommended that Consumer Fora should be given the power to grant vindictive costs of not less than five times of the damages or compensation awarded to the aggrieved consumer by the defaulting Companies.[293]

VIII. PROSPECT ROADMAP:

As per the Strategic Plan of the Department of Consumer Affairs, the vision is to protect the rights and interests of consumers, to spread awareness about consumer rights, duties and

[292] *Ibid*. pp.5-8.
[293] *Ibid*. pp.10-11.

responsibilities and to promote consumer welfare by strengthening consumer movement in the country. Active participation of State Governments, academic and research institutions, schools and voluntary organizations will be sought to create a vibrant consumer movement in the country. Strict parameters regarding consumer products will be developed and enforced along with regular monitoring of prices to ensure the sovereignty of consumers.[294]

IX. 12TH PLAN STRATEGY AND IMPLEMENTATION PLAN:

(i) The consumers need a cheap and fast grievance redressal mechanism to assure, so companies and service providers are liable for the price and quality and what the customers are entitled so? Accordingly, it is necessary to provide several methods of grievance redressal including those which are available by the terms of the Consumer Protection Act.

Thus, mediation or in-house grievance redressal should do tried, but without giving up the right of the consumers to obtain proper relief:

(ii) The amendment of Consumer Protection Act to make it more useful and attuned to lessen the overload of trials.

(iii) Currently, there has been derogation or poaching on the field from Consumer Protection Act in any of the areas due to the laws passed by the Courts. Such loopholes in the Act should do provided through appropriate amendments to the Act and Rules.

(iv) Digitalization and Networking of consumer fora over the country so that consumers can file complaints and access their case status online.

(v) Setting up counseling and a mediation mechanism at the pre-litigation step and to lessen the burden of consumer courts and settle disputes through out of court settlements.

(vi) Provision of adequate infrastructure to Consumer fora so as to make them function effectively.

[294] *Op.cit.*, Report of the Working Group, p.24.

(vii) Moving from manual system to computer-based system to bring in more efficiency and transparency.

(viii) Provision for monitoring the performance of functioning of District Fora by developing dynamic MIS Reports on the accomplishments linked to total no. of cases registered/settled and other related specific signs.

(ix) The provision of funds for the annual maintenance of component hardware items like computers, UPS, and replacement of UPS batteries, etc. are under the Scheme on Strengthening Consumer Fora.[295]

X. CONCLUSION:

Invariably, consumers are a vulnerable lot for exploitation, more so in a developing country with the prevalence of mass poverty and illiteracy. India too is no exception to it. Instances like overcharging, black marketing, adulteration, profiteering, lack of proper services in trains, telecommunication, water supply, airlines, etc. are not uncommon here. From time to time, the government has attempted to safeguard consumer's interests through legislations and the CPA 1986 is considered as the most progressive statute for consumer protection. Procedural simplicity and speedy and inexpensive redressal of consumer grievances as contained in the CPA are really unique and have few parallels in the world. Implementation of the Act reveals that interests of consumers are better protected than ever before. However, consumer awareness through consumer education and actions by the government, consumer activists, and associations are needed the most to make consumer protection movement a success in the country.[296]

[295] *Op.cit.*, Report of the Working Group, p.27.

[296] Ms. Kiran Chaudhry, *Consumer Protection and Consumerism in India*, ZENITH International Journal of Multidisciplinary Research Vol.1 Issue 1, May 2011, p. 11.

The landscape of the consumer justice system in our country appears to be bright given the proactive policy, schemes/programs adopted by the Government. However, the existing drive and direction need to make improvement by taking different courses for redressal. There is a desperate need for the State Governments to provide priority to Consumer welfare and to tackle up themselves to meet the challenges thrown up by the market economy. Involvement of trade and industry, civil society organizations and above all consumer are vital for the prosperity of consumer welfare in the years to come.[297]

Annexure 1

Total Number of Consumer Complaints Filed / Disposed since inception Under Consumer Protection Law

(Updated on 29.02.2020)

Sl. No.	Name of Agency	Cases Filed since Inception	Cases Disposed of since Inception	Cases Pending	% of total Disposal
1	**National Commission**	**132596**	**111597**	**20999**	**84.16%**
2	State Commissions	943620	818719	124901	86.76%
3	District Forums	4301258	3959149	342109	92.05%
	TOTAL	**5377474**	**4889465**	**488009**	**90.92%**

Source: National Consumer Disputes Redressal Commission,

[297] *Op.cit.*, Report of the Working Group, p.37.

PRISON ADMINISTRATION

- ARANTA YADAV & NIYATI PATHAK

ABSTRACT

Human rights in simple language can be categorized as fundamental rights where every man or woman living in any part of the world has the right to be born as a human being, with the necessary rights to full development and human dignity. Human rights are based on human dignity and worth. Indian courts have always respected and exercised human rights as a human right by nature or as enshrined in the Constitution or as the rights of an Indian person in private policy. [298]An important part of the administration of justice in any State is the prison. It is an institution where people who are imprisoned for serious crimes or deprived of their rights are deprived of their freedom for the purpose of making a difference. However, the data show that the prisons are the firms where criminals are executed as a result of the State's ongoing crime.

KEYWORDS

Imprisoned Women, Human Rights, International Declaration of Human Rights, 1948, ,punishment, imprisonment, prison administration.

INTRODUCTION

Prison

Prison is a place where people commit crimes and face criminal charges, especially criminal cases. used under normal or

Special orders from the State Government for the detention of prisoners, and include foreign and opposition groups. [299]Indian prisons, whose administration is a state of affairs covered by item 4 of the national list in the seventh edition of the Indian Constitution. The management

[298]. Gurbax Singh (1996). Comment on the Protection of Human Rights Act, 1993; Jaipur: Dominion Law Depot., 246 pages.
[299] Ibid

and administration of prisons is under the control of the State Government and the Prisoners Act of 1894 and the State Prisons Regulations.

Central Government provides various laws and regulations to the State Government regarding the proper management and security of prisons. The Supreme Court of India, with its various rulings involving the administration of prisons, has set 3 broad principles for the proper administration of prisons in India. Installation:

• The person inside the prison is not a stranger

• A person has the right to enjoy all human rights within the prison

• There is no reason to increase the suffering that has been imprisoned [300]

The Supreme Court also addressed various issues within prisons such as overcrowding, inadequate access to health facilities and other inmates' facilities, and the lack of free assistance available under the provisions of the Indian Constitution.

PRISON ADMINISTRATION IN INDIA

We all know that the crime rate in India is growing at a rapid pace. But there are not enough resources in the various prisons in our country to house such a person at least by providing good accommodation in prisons. Although there are some laws and regulations regarding prisons and administration, many of them are not enforced because of conditions in Indian prisons. According to various studies, about 80% of inmates are underrepresented, and the balance of 20% includes people convicted of various crimes as well as women incarcerated. The current situation in many prisons is that prison authorities cannot meet the needs of inmates. In view of such a situation, it can be said that it leads to serious violations of the fundamental rights of prisoners.

While we look at the judgments in various cases related to prison administration, we understand the general fact that in such cases, prisoners experience harassment and abuse from various parts of the prison authorities. One of these cases is Neena Rajan Pillai v. Indian Union where Mr. Rajan Janardhan Mohandas pillai, a prominent Singaporean businessman, died in Tihar

[300] A. Reynaud. Human Rights in Prisons (Strasbourg: Council of Europe Pub., 1986) 22.

prison. In this case, the Court ruled that there was a clear violation of the fundamental rights of the deceased from prison authorities, and that this resulted in the death of the deceased. The court also ruled that in such cases where emergency assistance is needed for prisoners, the necessary arrangements can be made without delay or else it could lead to a violation of the right to life under Article 21 of the Constitution.

Various committees were set up by the Government to deal with internal prison problems such as the All India Committee on Prison Reform, the Komla Committee and the Krishna Iyer Committee, which oversaw the rehabilitation and rehabilitation of prisoners and the proper management of prisons.

APPOINTMENT OF VARIOUS COMMITTEES

With the internal planning of the Modern Prison Procedure, and for the purposes of imprisonment, various Commissions and Committees were appointed and in their recommendations included the Indian Penal Code, 1860; The Prisons Act of 1894 and the Prisons Act of 1900 were passed which are the current laws pertaining to Indian prisons. After the First World War, the All India Jail Manual was established in 1919-20. In its archives, it seems that the departure of former deportation stations was made and accepted for the purpose of converting prisoners.

As to the report of the above Committee of 1919-20 it can be said, “laid the foundation stone of the present system of prisons in India.” The human need for prisons is evident worldwide at the frontier of freedom. After freedom the thinking and movement of prisoners' rights grew stronger. It is well known that a criminal should be treated as a victim of social ills, a person who needs treatment rather than punishment. The Mulla committee recommended that prison conditions should be improved by making adequate arrangements for food, clothing, sanitation, ventilation, etc.

DETERRENCE RULE OF MEDIEVAL PERIOD

During the Middle Ages, bans were a major law of criminal justice involving torture and ill-treatment of prisoners. Today, to some extent, the main purpose of the prison is to protect all criminals who commit crimes. However, it is suspected that the ban did not work well. While you think arrests can be quick and reliable for all offenders, the high rate of repetition of released criminals raises a serious question about the effectiveness of the anti-corruption approach. According to the theory of prevention it is the best way to prevent crime as it aims to separate criminals from society and cripple them to commit crimes again. When it comes to revenge, preventing and imprisoning the reform process seeks to bring about a change in the attitude of the wrongdoer in order to rehabilitate him as a law-abiding citizen.

RETRIBUTIVE THEORY OF PUNISHMENT

In post-independence India the main purpose of imprisonment is to convert, to reduce as little as possible. In this regard Judge V.R. Krishna Iyer included:

The return idea has expired and is no longer valid. Preventing change and transformation are the main social goals that make deprivation of life and freedom seem like a form of punishment. [301]Transformation and renewal are a challenge to the acceptance of the concept - a vision developed by our cultures and traditions. On the legal side it is a war to protect the community of the neglected and forgotten sector - prisoners - whose basic rights are enshrined in our Constitution - the right to justice, freedom and humanity. According to Justice V.R. Krishna Iyer, justice should be merciful and that in sentencing the defendant should be kept in mind the financial fine.

ROLE OF VARIOUS LAWS IN PRISON ADMINISTRATION

Various Laws, Rules, Rules, Charts and Regulations have been developed, passed and enacted at national and international level to protect the fundamental rights of prisoners, including

[301] Rajendra Prasad v. U.P. Status, AIR 1979 SC 916.

prisoners. Fundamental rights depend on the development of a growing need where the dignity and worth of each prisoner is earned with respect and protection. Human rights and fundamental freedoms allow prisoners to grow up and take advantage of their physical, mental, moral, and spiritual needs. At the International Standard in 1948, an organization was formed in the form of the Universal Declaration of Human Rights. This document provides the basic legal principles that should be used to protect the rights of prisoners and the state. Amnesty International's treaties have contributed to human rights violations by enacting the Minor Rules for the Treatment of Prisoners. At National level the Constitution of India under Part III provides for the protection of the fundamental rights of prisoners. Cruel and inhuman treatment is therefore a constitutional prohibition.

LEGAL PERSPECTIVE

The terms "prison" and "prison" are used interchangeably in India, perhaps indicating the fact that no significant effort is made to distinguish "corpses," as those awaiting trial are known as The terms "prison" and "prison" are used interchangeably in India, perhaps indicating the fact that no significant effort is made to distinguish "corpses," as those awaiting trial are known as prisoners. The separation of the burial of prisoners is required by a decision of the Supreme Court of India, but this decision is not considered valid[302].

India's leading legal rights lawyer M.H hoskot v. State of Maharashtra, 1978, 3 SC 544. Provides that the respondent "will be provided with legal assistance wherever justice is required" free of charge if the respondent is unable to pay. Although the Court's view, by Justice Krishna Iyer, clearly lists bail proposals as one of the situations in which justice "is almost impossible" without legal aid, free legal aid is not available at this time in India. The Legal Services Act of 1987, although enacted, has never been implemented and applied to this writing more than three years later.

[302] Ram Ahuja (1969),Women who break the law in India, Meerut, Meenakshi Publication.

"Section 20 (3) of the Constitution states that no person may be compelled to testify against him. In addition, sections 25 to 27 of the Testimony Act protect against this risk. Section 25 provides that no confession made to the police shall be proved by the respondent. Section 26 provides that no confession made by any person while in police custody shall be used as evidence against him. However, Section 27 provides that where any truth is found as a result of information obtained from a police investigator, many such details, whether or not it is the same as an admission of guilt or not, as are clearly related to the facts obtained,

One of the victims of the misconduct and punishment was a man named Ram Chandra. He was arrested in 1952 for boarding a train without a ticket and spent 30 years in Bihar prison awaiting trial. The police had forgotten about him. To prevent his case from being opened by a liberation movement, and to be released on the orders of a high court judge, he will be remanded in custody until now. The victim was interrupted by an "incomplete request for money." In his view of the Supreme Court, Judge Krishna Iyer wrote that the ruling was: "Bribery in a pagan setting is rampant in the prison itself."

The detention of children in Tihar prison led to a court decision, Sanjay Suri v. Delhi 1987 (2) SC 276. Judge Ranganath Misra noted in his previous case that the courts had found "alarming conditions as there are still young prisoners.

RIGHTS OF PRISONERS:

There is no provision in the Constitution for the rights of prisoners. The SC therefore accepted the role of activist and interpreted Articles 14, 19 and 21 as part of III and Articles 38, 39, 39A and 42 in Part IV to clarify the various rights granted to prisoners.

The study of the various rights of prisoners, described in the first court during the time of Maneka Gandhi can be done under four headings:

TORTURE:

There is no provision in the Constitution for the rights of prisoners. The SC therefore accepted the role of activist and interpreted Articles 14, 19 and 21 as part of III and Articles 38, 39, 39A and 42 in Part IV to clarify the various rights granted to prisoners.

The study of the various rights of prisoners, described in the first court during the time of Maneka Gandhi[303].

SC while abusing the Charter of Unremunerated Rights' i.e., Art. 21, led by Francis Caralie v. The superintendent, Delhi [304]states that "there is a provision in Art. 21 rights to protection from abuse and harassment". In other words, a convicted man is not reduced from one person to another to be sentenced to prison. [305]

This practice is evident in Sunil Batra v. Delhi Administration[306]where it is maintained that keeping a man 'under the death penalty' in solitary confinement is a violation of Art. 21 and that bar ties should not be worn for long periods of time without reason.

In Sunil Batra v. Delhi Adminstration, [307]SC has set five goals. First, convicted offenders should be separated from detained prisoners. Second, working hard is not a chore. Hard work under S. 53 of the Indian Penal Code should be given a personal description. Third, juvenile delinquents should not be offended by older prisoners. Fourth, visits by family members of the prisoner should be well received. Finally, cables should be allowed only if secure storage is not possible.

RIGHT TO SPEEDY TRIAL:

The leading case of Hussainara Khatoon v. The State of Bihar[308] stated that if convicted prisoners remain in prison longer than their maximum sentence, their detention is maintained. wrong and violates Art.

[303] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[304] AIR 1981 SC 746.
[305] Sunil Batra (I) v. Delhi Administration, AIR 1978 SC 1675.
[306] Ibid. See also, Prem S. Shukla v. Delhi Administration, 1980 Cri. LJ 930. - Handcuffs may not be used regularly or are easy for the keeper.
[307] AIR 1980 SC 1579.
[308] AIR 1979 SC 1369. See also Kadra Pahadiya v. State of Bihar, AIR 1981 SC 939.

To improve this, it also recognized that the right to immediate examination is an integral part of the fundamental right to life and liberty enshrined in Art. 21 and the courts have great power to direct the state to take appropriate action such as establishing new courts, appointing more judges, and so on.

RIGHT TO LEGAL AID:

It was held in the Hussainara Khatoon's Case (II)[309] which was entitled to free legal aid as provided under Art. 39-A is described in Art. 21 because this procedure does not provide the defendant with legal services, due to his poverty he cannot afford a lawyer and, as a result, he has to appeal without legal aid will not be considered a fair and reasonable procedure and therefore, he is breaking the law. "

The Court further stated that "the State cannot protect adequate infrastructure resources for its failure to provide free legal aid, as it is its duty to do so."

The principle set out in the case of Hussainara Khatoon is further strengthened by Ranchod v. State of Gujarat [310]where it is held that due care should be taken in providing competent legal aid lawyers. In the case of Khatri v. State of Bihar,[311] it was argued that legal aid should not be provided only at the beginning of the trial, but should be provided when the person is brought before a magistrate for the first time.

Lastly; in order for these cases to ensure the justice of the prisoners, comes the case of Suk Das v. Union Territory of Arunachal Pradesh[312] acting as an employee of the Magistrate or Judge of Session to inform the defendant of his or her case the right of attorney at the expense of the State.

RIGHT TO COMPENSATION:

[309] AIR 1979 SC 1369. See also AIR 1979 SC 1377 and AIR 1979 SC 1819.
[310] SPIRIT 1974 SC 1143.
[311] AIR 1981 SC 928.
[312] EMOYENI 1986 SC 991.

In the famous case of Bhagalpur Blinding [313]the question to which the Court referred was whether the Court could prevent the State from acting wisely. Can it provide compensation as a means of relief when the State has already violated human rights to life?

The Court has ruled in favor of a strict constitutional order that it is useless and will definitely build new tools and remedies, therefore, it can pay for it.

This view of the Court is strengthened in the cases of Rudul Shah v. State of Bihar[314] where the Court granted Rs. 35,000 / - as compensation for illegal imprisonment for 14 years. It states that "under Article 32 the SC may pass a compensation order in the form of compensation which may be one of the most effective measures where the SC can prevent serious violations of fundamental rights by the authorities."

RIGHTS OF UNDER-TRIALS AND DETENUES FOR SEPARATE TREATMENT

A little trial and 'protection' requires a different treatment because no case can be guaranteed for this. Protected prisoners are simply kept in prison as a means of protection and not as a form of punishment. But the prison system, especially in our country, has not been able to achieve its goals. Trials under trial and detention are often treated as prisoners and kept together. As the book says: the same houses as those bound. These latter people have a small loss in their quest for sexual gratification by the attack, because they have to spend their time anyway. As things stand now, without a doubt sex is the most important issue in the life of a prison inmate. There is a great need to use the furlough program to fix, men with a good record show good manners if they can let the weekend go back home with their families and relatives: Therefore, there is a need to provide a special environment for those responsible for 'testing' and acceptance. In the case of Sunil Batra [315]the Supreme Court discussed the problems prisoners are expected to face. Justice Krishna Iyer criticized the practice of arrest and detention and responded with the following words:

[313] 1982 SCC (2) 195
[314] AIR 1983 SC 1086. See also Sebastian Hongray v. Union of India AIR 1984 SC 571.
[315] 1978 SC 1675.

Prosecution, not innocent until proven guilty, is sent to prison, by corrupt criminals - a violation of a prison sentence that violates the property inspection recorded in Article 19 and justice in Article 21 at home for a new disease. We hear from tocsins that reforms in prisons are a constitutional obligation and that neglect can lead to serious court actions. Judge Krishna Iyer condemned the practice of aggravated robbery with aggravating circumstances.

According to various reports the Apex court issued guidelines and guidelines to ensure that certain minimum standards are maintained in respect of female prisoners and their children in R.D Upadhyay v. State of Andhra Pradesh and Ors. [316]

(1) The arrest of women should be done only by girls.

(2) A child should not be considered minor or guilty while in prison with his or her mother. Such a child has the right to food, shelter, medical treatment, clothing, education and entertainment as a right.

(3) If a female prisoner is suspected of being pregnant at the time of admission or at any time thereafter, the female medical officer must report to the supervisor. Before sending her to prison, the relevant authorities must ensure that the prison in question has the basic maternal and childbirth requirements.

(4) If possible, provided that partial or parole is granted to a prisoner who is expected to be released from prison. Only exceptional cases pose a serious risk to the safety or conditions of the same definitions of cemeteries that can be denied by this institution.

In Shri Ram Murthy v. State of Karnataka[317] the Supreme Court has reviewed almost all cases involving the rights of prisoners determined by them and the various high courts. Nine major problems affecting the prison system were reported in Court, namely, overcrowding, delays in cases, abuse and mistreatment, neglect of health and hygiene, malnutrition and inadequate

[316] 2007 (15) SCC 337, 360, 49, AIR 2006 SC 1946. Judgment issued on 13-04-2006.
[317] 1997 1 SCJ 172.

clothing, poor prison facilities, lack of communication, facilitation of prison visits and prison openings. The Court issued the following orders in this regard.

(1) To take appropriate action upon the recommendations of the Indian Law Commission in its 78th report on the issue of "detention of prisoners."

(2) Reflect on the Mulla Committee's recommendation on pardon and take appropriate action.

(3) Deliberate violation of the new prison law will replace the sentence of the Old Indian Prison Act, 1894. We understand that the National Rights Commission has prepared a draft of all statements from India, which may replace previous discussions in the Act. at national level This conference also took place in 1995. We see that all countries should try to amend their laws if any, in line with all the Indian views on this.

(4) Consideration of the introduction of freedom of communication.

(5) Take the necessary steps to arrange a visit to the prison.

The Protection of Human Rights Act, 1993 states that only those Human Rights are enshrined in the Constitution and are not recognized by an Indian court. The Indian court in implementing Article 21 of the Constitution on prisoners already has many rights in favor of prisoners for the purpose of converting and returning prisoners. Rights appear in various court declarations, which can be transferred to:

(a) Freedom of Speech and Freedom of Speech.

(b) Counseling Rights: Legal Aid.

(c) Human Rights: The Right to Human Dignity.

(d) Copyright reserved for Bar-binders, solitary confinement and hand wrapping

(e) Rights to know Reasons for Punishment.

(f) Rights represent abuse.

THE PROBLEM OF NON-IMPLEMENTATION:

The role of the well-known SC activist in protecting the rights of various prisoners has undoubtedly changed the Indian legal system for prisoners. A study of multiple SC sentences

after the case of Maneka Gandhi [318]revealed that a prisoner is a person with basic rights and that SC is a rights activist.

Theoretically, the above proposition can undoubtedly be accepted. However, the deplorable state of India's prisons and prisons raises doubts about the decisions of SC activists. Are SC decisions, simply 'Paper Tigers?'

It is alleged that the SC prisoners' rights guidelines could have been compiled by a senior official who required various decisions such as' Paper Tigers'.

This fact of the activists who judged the SC has been reduced to the dust of effective change that was reflected in the decisions of the SC itself. In the case of Khatri.[319] The SC expressed its regret that the decision in the Kesion case was not taken in the Bihar region. Continuation of Veena Sethi's v. State of Bihar[320] points out that the requirement of Khatoon's case to have the same list of charges against other free prisoners was not followed, as a result of which prisoners illegally remain in prison at various times ranging from 19 to 37 years. In fact, in the Patna High Court case where the Chief Justice ordered the authorities to provide a list of convicted prisoners and part of their court. [321]

The reality of SC activism to be reduced to a tool for making unsuccessful change is reflected in SC decisions itself. In the case of Khatri. The SC expressed its regret that the decision in the Kesion case was not taken in the Bihar region. Continuation of Veena Sethi's facts v. State of Bihar [322]points out that the requirement of Khatoon's case to have the same list of charges against other free prisoners was not followed, as a result of which prisoners illegally remain in prison at various times ranging from 19 to 37 years. In fact, in the Patna High Court case where the Chief Justice ordered the authorities to provide a list of convicted prisoners and part of their court.

[318] SPIRIT 1978 SC 597.
[319] SPIRIT 1981 SC 928.
[320] AIR 1983 SC 339.
[321] Ashok Singh, former I.G. Prisons (Bihar). 17 Bailey Rod Patna-800001, personal interview, October 1993.
[322] SPIRIT 1980 SC 1579.

This shows that the manager is not willing to use SC decisions to get prison rights.

Second, it was sometimes the Government that destroyed the party in that situation. The decision was not made by the proper authorities of each State. As a result, the Sunil Batra [323]case against the Delhi Administration will not apply to the Bihar region and in the next case the Bihar government cannot hold a grudge. For example, in the case of Sunil Batra, the Court ruled that no one should be detained for extended periods of time. But after the trial of Kadra Pahadiya, [324]the convicted children were forced to work in chains during the day outside the prison. The Government did not stop swearing. This reflects the unequal application of SC decisions and the limited scope of Article 141 of the Constitution.

It has been found that the need for prisoners without sentences is based on where they live. Prisoners are allowed to meet with their family members only once for 40 nights as required by the Prison Act, 1894. The number of meetings has never been improved. Both findings are contrary to Sunil Batra's case. It was also found that no special arrangements were made for the provision of mental health services as required by Rev. Gissuddin v. State of AP . Prisoners are allowed to write four letters, all of which are examined. No library space is available in most prisons in India. Apart from this, the legal aid site was not provided with the lower stages of the process. It is interesting to note that this is contrary to the direction given by the Khatri Case. This reflects the inefficiency of the authorities in carrying out the decisions given to them directly.

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[324] SPIRIT 1981 SC 939.
[325] SPIRIT 1977 SC 1926.

site was not provided with the lower stages of the process. It is interesting to note that this is contrary to the direction given by the Khatri Case. This reflects the inefficiency of the authorities in carrying out the decisions given to them directly.

This last point continues the reinforcement received by Shamona Khana at Tihar prison in Delhi. [326]It was found that there were three times as many prisoners as on January 4, 1993. Of this, 90% were under probation. This overcrowding combined with inadequate water, unsanitary conditions, inadequate health care, and malnutrition led to inmates living in inhumane conditions that resulted in the deaths of 153 people between 1988 and November 1992. This appears to be a violation of Art. 21 as set the case for Sunil Batra and Francis Coralie [327]However, it is unfortunate that despite these rulings, violations of the rights of prisoners occur at Tihar Jail.

CONCLUSION

The study examined the current status of prisoners of women's rights and in this way investigated the fact that there are many vacant positions in the sector. So in the case of proposals a humble effort is made to improve in this area and these suggestions if properly followed can be successful. Since many inmates are in this group, they can be easily rescued with advice. They have the ability and ability to work hard, job details and small business methods can be explained and the necessary help can be passed on to them through the prison services community. The measures can be used for free and compulsory education for girls and provide adult education for older women. Moral, ethical and ethical rhetoric is periodically scheduled to change inmates' views that crime does not pay. Most inmates are married, and counsel can be given to members of the prison family to treat a woman with dignity and respect when she returns from prison. Rural communities should be made aware of the negative effects

[326] Shamona Khanna (1993). "Tihar Prison: Preview of the Prison Wall", Cooperative Attorneys, 8.3 (April 1993).

[327] SPIRIT 1980 SC 1579, SPIRIT 1981 SC 746.

of crime and its negative impact on families. It is also provided for in the constitution of the National Rights Commission, in accordance with the broad principles and framework provided for in the Act.

IMPACT OF SUSPENSION OF INSOLVENCY AND BANKRUPTCY CODE

- SHAMBHAVI SINGH & MUSKAN SINHA

ABSTRACT

The 2016 Bankruptcy and Bankruptcy Code is significant legislation that consolidated and regulates framework governing the restructuring and liquidation of companies, individuals, etc. It is considered one of the biggest economic reforms near GST. From its implementation, it faced various obstacles but with the continuous effort of the government ,renouncing reforms and the role of the judiciary in interpreting the complex code, the provisions have saved the purpose of the code and it is also considered a successful law creation But given the pandemic situation caused by the spread of Covid-19, the government of India to protect the interests of corporate debtors facing financial crises among the pandemic has delivered the Insolvency and Bankruptcy (Amendment) Ordinance, 2020 to started the process of resolution of corporate insolvencies due to non-compliance pledged by a corporate debtor for six months. Government attempt to respond in a timely manner a pandemic case is worth praising, but that amendment could only provide a temporary relief. Temporary relief can be beneficial in the short term but can create problems later. An attempt was made to critically analyze the provisions, laws, whether such an amendment would help corporate debtors deal with money and the difficulties they face due to the pandemic or its impact would create more problems.

INTRODUCTION

The clock has repeatedly saved corporate borrowers. On 24th September, the government banned the suspension of bankruptcy proceedings for another three months until December 24, just an hour before the rest were about to expire. It suspended the corporate insolvency resolution process under the Insolvency and Bankruptcy Code (IBC) in June. By ordinance, article 10A was inserted, pending operations in articles 7, 9 and 10 and, in fact, preventing

insolvency proceedings for default of debt that arise as of March 25, 2020 for six months. extended up to a maximum of one year.[328]

With Thursday's relief, all corporate defaults between March 25 and December 24 are permanently removed from IBC's radar. Predictably, it did not inspire creditors and critics, who believe such a ban encourages willful breaches in favor of permanent protection. Furthermore, they argue, the measure removes IBC's basic justification for a saddle-back creditor approach rather than a debtor-in-control regime. This is because sections 7 and 9 allow the respective financial and operational creditors to initiate the resolution process, while section 10 facilitates the voluntary insolvency of companies. With all three now suspended, concerns have been raised about the unintended consequences and whether the IBC is of great benefit to users.

Billions of dollars have been stalled in unprofitable ventures. The IBC came as a beacon of hope to release the money. It allowed some of these companies (where the assets were at least of high quality) to run profitably again. While investors raised valid concerns about extending time frames well beyond the stated mandate, empirical data showed that the IBC is the most effective resolution framework to date.

Additionally, Covid has created and will create a vast pool of turbulent assets around the world. Investors will naturally be drawn to jurisdictions where there is certainty. One opinion is that all the good assets in India have already been taken in the first phase and there may not be too many sensitive racked assets left. This ignores the fact that a pre-Covid "good working asset" could now become a "good NPA".

The suspension clearly prevents two things: the company's garage sale driven by low valuations led by the pandemic and the NCLTs from being plagued with cases. Also, around the world, bankruptcies are likely to increase, perhaps pushing the government towards a bombshell approach. However, creditors can act against defaulters through debt recovery courts, civil courts, and even the Sarfaesi Law.

[328] https://lawschoolpolicyreview.com/2020/06/27/the-ibc-amendment-ordinance-2020-a-well-stuffed-cushion-against-the-economic-blow/

In addition, insolvency proceedings against personal guarantors are not suspended, so banks can demand securities in the cases they deem appropriate to avoid the accumulation of dead borrowers, who dominated the balance sheets of the banks that led to the recent NPA crisis . Importantly, banks must follow risk-based supervisory processes to ensure the timely identification of risks. The objective of the IBC is to avoid problems in a recession in a business cycle, but in its effort to save value on credit assets, the government should avoid worse systemic problems.

AMENDMENTS BROUGHT BY IBC

The Ministry of Justice introduced the Insolvency and Bankruptcy Code (Amendment) Act of 2020 (the Amendment Act), on March 13, 2020, which gave retroactive effect to this amendment as of December 28, 2019. By amending Section 5 (15) of the IBC, the Government was authorized to declare any debt as interim financing. In other words, "intermediate financing" is defined as any financial debt raised by the resolution professional during the period of the insolvency resolution process and any other debt that may be reported.

The notable features of the amendment are as follows:

- The Central Government has increased the minimum default for the purposes of Section 4 of the IBC (which specifies the minimum default for insolvency and liquidation matters) from INR 1 lakh to INR 1 crore.
- Section 7 has also been amended by increasing the amount of minimum default to initiate a CIRP. Through the amendment, certain additional requirements for CIRP filing were added for some financial creditors, i.e. real estate adjudicators and holders of securities or deposits represented by a trustee or agent. The request presented by this group of financial creditors must be presented jointly by 100 of said creditors or 10% of their number, whichever is less.

- Section 14 has also been amended by making the corresponding payments for the use or continuation of any license, permit, fee, concession, registration, authorization or concession or similar right during the moratorium period and then the license, permit, fee the concession, registration or compensation shall not be suspended or terminated due to insolvency. Second, a moratorium will not apply to such transactions, agreements or arrangements notified by the Central Government in consultation with the financial sector regulator or any other authority.[329] Finally, if the IRP and RP consider that any good or service is necessary to preserve the value of the corporate debtor and to manage its operations as a going concern, then the supply of those goods and services will not be interrupted. in any case, subject to IRP or RP making payments with respect to said essential supply.
- The Amendment further introduced the provision of Section 32A into the Code. This provision establishes that the responsibility of a corporate debtor ceases for a crime committed before the beginning of the corporate insolvency resolution process, and the corporate debtor will not be prosecuted for said crime from the date the Judicial Authority approves the plan of resolution pursuant to Section 31, if the management or control of the corporate debtor has changed to someone that was not the result of the resolution plan. (a) the originator or management or control of the corporate debtor or a related party of such person; or (b) a person with respect to whom, on the basis of the material in its possession, the competent investigating authority has reason to believe that he acted or conspired to commit the crime, and that a report or complaint has been presented or presented to the legal authority or the corresponding court. The provision also establishes that no action will be taken against the property of said Corporate Debtor considering the amount. Subsequently, the Insolvency Bankruptcy Board of India (IBBI), by notice dated March 29, 2020, amended the Regulations of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for

[329] https://ibclaw.in/all-about-the-moratorium-under-ibc-including-judicial-pronouncements/

Corporate Persons) of 2016 granting certain break. Consequently, Regulation 40C was inserted, which provided that the lock-in period will not be counted to calculate a schedule for any action that, due to such lock, could not be completed in relation to the CIRP.

REASONS FOR SUSPENSION OF IBC

The reason for suspending the IBC for one year was that it may not be possible or desirable to conduct ongoing sales during the pandemic. Buyers may not be available on the market. Alternatively, there may be an oversupply of similar assets in the market due to industry-wide factors, driving the price of those assets down.

- In India, there are currently three ways to restructure debt, viz. Reserve Bank of India (Prudential Asset Resolution Framework) 2019 Guidelines ("Prudential Framework") 1, which provide new guidance for lenders on the resolution of stress assets and offer an out-of-court restructuring option.

- Second, the IBC, which could be used for restructuring under the auspices of the National Court of Company Law.

- Third, a liquidation plan under the Companies Act 2013 could also be used for debt restructuring through the NCLT.

Now that the IBC will be suspended, only companies would have the first and third avenues, as mentioned above, of debt restructuring.[330]

[330] https://www.business-standard.com/article/companies/resolution-professionals-latch-on-to-older-cases-new-restructuring-windows-120062501391_1.html.

Like the entire world India is also facing economic loss, no doubt in the coming times the stress in the Indian economy is going to rise and so are the defaults. Though, the governments are taking necessary steps to tackle the current situation which has shattered the economic condition. On June 5, 2020 President of India notified Insolvency & Bankruptcy (Amendment) Ordinance 2020, in furtherance to the economic measures released by the Ministry of Finance to relive the corporate debtors of the financial stress and to backing the Indian Businesses jolted by the onset of Covid-19. The ordinance suspends these articles on the grounds that the pandemic has created uncertainty and stress for companies for reasons beyond their control. The nationwide lockdown to disrupt normal business operations in such circumstances made it difficult to find enough applicants for people in distress/default business. The said Ordinance, 2020 has now been superseded by the Insolvency and Bankruptcy (Second Amendment) code 2020 notified on September 24, 2020. Suspension of Insolvency proceeding under section 7,9 & 10 of the code for six months has now been further extended for a period of three months to protect the defaulting corporate entities. The ordinance suspends these sections on rationale that the pandemic has created distrust and stress for business for apprehension beyond their control and the nationwide lockdown has added disruption of normal business operations, in which case it would be difficult to find a sufficient number of applicants for solutions for a troubled or bankrupt business.

The primitive legislative aspiration behind the Second Amendment Act of 2020 is to impede the viable firms from the distress of insolvency amidst the bizarre pandemic. FM's statement also limited the power to evacuate Covid-19-related debts from the definition of "default" in order to open insolvency proceedings under the Code. The amendment has promulgated a suspension on commencing insolvency proceedings against all defaults emerging post March 25 (from when the lockdown was in force) for a period of six months (which is now further extended upto three months). This eradicates the uncertainty over what constitutes ‘Covid related defaults’, as it would otherwise have been a burden to draw a distinction between specific Covid led defaults and others. The Ordinance shields a director or partner of the corporate debtor from proceedings being initiated against them for wrongful trading, relating

to a default during the Specified Period. However, this does not mean that a board should endure running business of the company and incurring debts if it has no possibility of recovery of the business. The suspension of an IBC is considered a relief measure, but the fact is that the IBC process not only provides for the reactivation of the corporate debtor, but also provides for all stakeholders of the corporate debtor in a time bound manner. The suspension of IBC will not prevent creditors from continuing to recover their principal, but the alternative measures chosen by creditors may not be at the heart of the protein of the IBC process. Moreover, those mechanisms may not lead to an adequate resolution of stress which is the need of the hour during this economic downturn. Another aspect to consider is that the disincentive effect typically obtained by lenders by threatening IBC action would no longer remain leading to at least some mala fide gaming of the system.

With these reforms in place, it will be a boost for debtors who are really suffering, however, there may be some unscrupulous debtors that such a change would only mean more time to avoid legal process.

During the amendments, various cases will be initiated for the recovery and execution of the charges under the other available statutes.

ALTERNATIVE LEGAL REMEDIES

After the suspension of Insolvency Bankruptcy Code the creditors can turn to other legal remedies to address the defaults. The most prevalent sufficed avenue in this scenario would probably be the Prudential Framework for Resolution of Stressed Assets issued by the Reserve Bank of India on 7 June 2019 or the 7 June framework. This framework is pertinent to commercial banks, large non-banking financial companies, all India term financial institutions, small finance banks and in one key respect, asset reconstruction companies. This constitutes a wide spectrum of creditors who are likely to be the source of credit administered to corporate. The creditors who cannot avail the benefit of the 7 June framework may look to other

alternatives in case of default. The recovery would calculate whether the creditor has the asset of security in relation to the loan provided.

The Securitization and Reconstruction of Financial Assets and enforcement of Securities Interest Act, 2002 also acknowledged as the SARFAESI Act is the alternative and most favored means to enforce security but admittance to it is confined to a selected group of creditors. Foreign portfolio investors may take the perk of security enforcement outlines of the SARFAESI Act if lent under secured debentures. Creditors who do not have the benefit of the SARFAESI Act or are unsecured and operational creditors with unpaid operational debt have the choice of litigating or arbitrating to seek the recovery of their debt as per the dispute resolution mechanism envisaged in their contract. Needless to say, with both of the choices, the time period for recovery is long while the capital remains locked.

Another competent alternative remedy, though traditional, accessible with the financial creditor/Operational creditor to file a civil suit under order IV of the civil Procedure code, 1908 for recovering the defaults rising by the corporate debtors. However, it is significant to acknowledge that these types of mechanisms are lag and time consuming, owing to the massive backlog of cases pending in the traditional court infrastructure of the country. Further under order XXXVII of the code the operational/Financial creditor have the remedy to file the Summary Suit in case where creditors have undisputable case of default and express incompetency of corporate debtor in paying off its liability then creditors can approach to the civil courts for Summary suit under the given provision of law. Unlike traditional method of recovery of debts, a summary suit is a more rapid and viable choice available to the creditors to retrieve the debt raised by corporate debtors.

Another important step taken by the government of India is the enactment of Commercial Courts Act, 2015 attempted to cover a broad range of disputes within commercial disputes. The Financial/operational creditor has the lawful right to commence legal proceedings against Corporate Debtor for the recovery of debts. The exclusive definition of 'Commercial dispute' under section 2 (1) (c) of the Act wherein the Financial creditor and operational creditor is included. By invoking the provisions of summary Judgement under Order 13A of the Civil

procedure code, 1908, The financial/operational creditor have the privilege to expedite the proceeding under the said Act. Furthermore, the creditor too has the redresses to file Summary Commercial Suit under Order XXXVII of the Code of Civil Procedure, 1908 read with Commercial Courts Act, 2015.

However, the commencement of proceedings under the Commercial Courts Act, 2015 endured from inefficiency, which is not related to efficiency of the remedy but thoroughly associated with the economic essence of this legal remedy. To initiate a commercial lawsuit, the plaintiff, i.e. creditor in our case, is needed to pay ad valorem court fees, as specified under the Court Fees Act, which is relatively 1% of the value of the suit. The said amount is apparently on the surpassing side for a financial/operational creditor, when compared to that in remedy applicable under the IB Code. Thus, such a financial blockade might act as disincentive for many corporate creditors to avail this legal remedy.

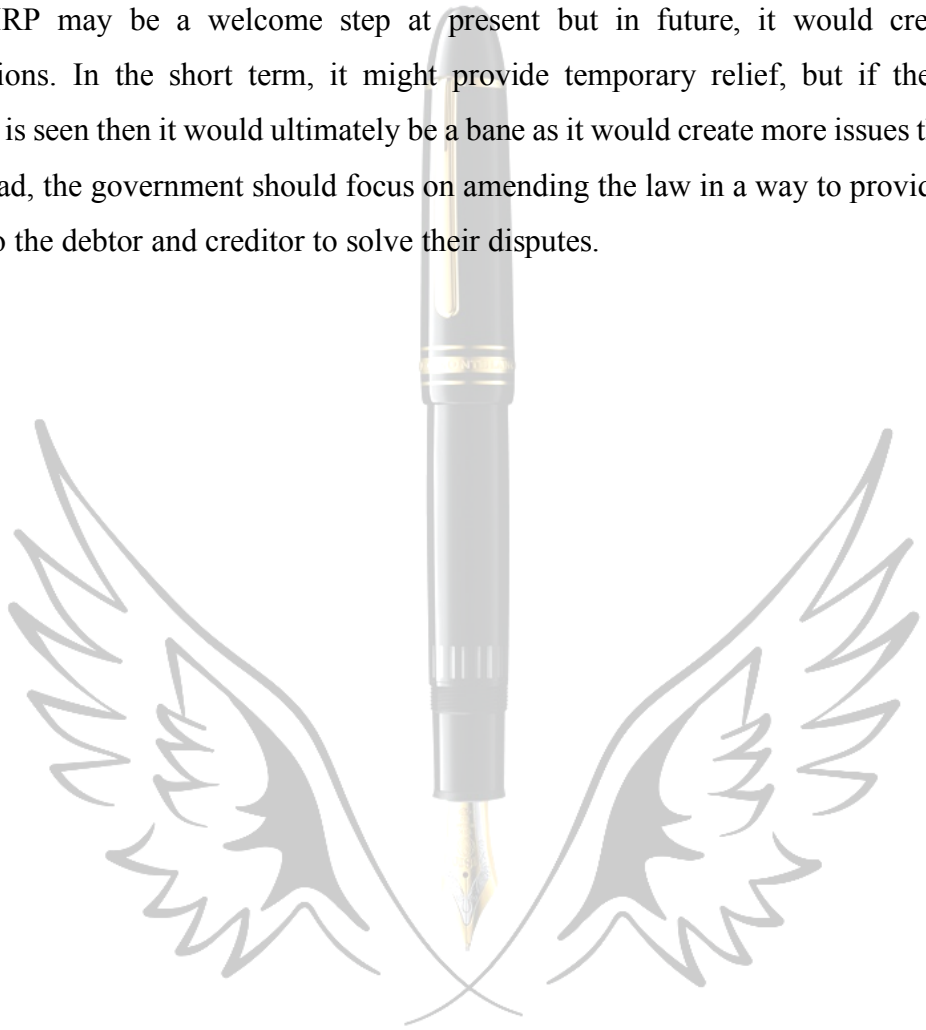
Additionally, the binding condition of Pre-Institution Mediation under Section 12A of the Act, for commercial disputes not having any urgency, might act as an obstruction for the creditors in their course to retrieve the debt from debtors.

CONCLUSION

IB Code has affirmed to be an acknowledged legislation and the go-to structure for creditors for attaining results. We are invading in an interesting time when defaults are going to thrive without the recourse to IBC. It remains to be seen whether the alternative mechanisms will be able to satisfy and will be adequate to shore up investor sentiment. The promulgated Ordinance pursues to administer an adequate breathing space to Indian businesses which are affected by the pandemic. While there is a slight chance that debtors may be misusing the suspension for defaults during the specified time period other than the pandemic.

Nevertheless, it was crucial for the government to provide relief to businesses which have been severely impacted by the pandemic and continue to stumble under the global crisis. Hence, it is a step in the right direction. However, there is ambition for further fine-tuning, impact-based clarifications, and objective oriented stimulus or immunity. Thus, the embargo on the initiation

of the CIRP may be a welcome step at present but in future, it would create several complications. In the short term, it might provide temporary relief, but if the long-term viewpoint is seen then it would ultimately be a bane as it would create more issues than solving few. Instead, the government should focus on amending the law in a way to provide a healthy window to the debtor and creditor to solve their disputes.



ELECTION COMMISSION: THE UNOFFICIAL PILLAR OF INDIAN DEMOCRACY

-SPARSH SHARMA

ABSTRACT

We are nearing the 75th anniversary of our independence, and one thing that has become an integral part of Indian democracy is a regular process of elections both at the central and state level. Election Commission of India (ECI), the body responsible for conducting elections in India, has done a commendable job in these years. At the time of independence when India declared that all the citizens will be granted the right to vote and First Past the Post system would be adopted to elect representatives, eyebrows were raised around the globe. It was contended that in a country with a huge illiterate population this experiment would be huge failure. But the Election Commission, created by Article 324(1) of the Constitution had different plans. 1st general elections in India were a grand success. After an experience of about seven decades it can be said that in a country where some form of elections take place in every two months, the ECI has performed its work excellently. People generally don't acknowledge the work performed by ECI, but the truth is that it has made an invaluable contribution in making Indian democracy stronger.

The Constitution provided for a strong Election Commission, which was to be independent of any sort of legislative intervention, just like the judiciary. Questions have been raised over its credibility over the last decade or so, though most of them were politically motivated. Thus, undoubtedly it can be said that the ECI has done the task assigned to it in a brilliant manner up till now and has acted as an unofficial pillar of Indian democracy, working tirelessly for the proper conduction of the greatest extravaganza of any democratic system, i.e., elections.

KEYWORDS: *Indian Democracy, elections, Constitution.*

INTRODUCTION

Let's just turn the clock to 1950, India had gained freedom three years ago and now it was necessary that the first democratically elected government must come into existence. But it was a tricky task. There were several questions like who will supervise the election procedure? How people will cast their votes? etc. These questions were relevant as well because at that time majority of the Indian population was illiterate.

The answers to all the above questions were clearly laid down in Part 15 (under the heading 'ELECTIONS') of our Constitution running from articles 324 to 329. Article 324(1) clearly states that:

The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution [331]*** *shall be vested in a Commission (referred to in this Constitution as the Election Commission).*

Thus, for the supervision of the entire process of elections the Constitution provides for an independent autonomous body, to be known as the Election Commission. The Election Commission, being an independent autonomous body is free from executive intervention just like the Supreme Court and High Courts. It consists of a Chief Election Commissioner and such number of other Election Commissioners as the President may fix from time to time. Also it is the President who appoints them.[332]

In January 1950, the Election Commission of India (ECI) was set up and Sukumar Sen became the first Chief Election Commissioner. Originally ECI had only a Chief Election Commissioner, but this underwent a change on the eve of the 1989 general elections, when two additional Election Commissioners were appointed by the Congress government. With this ECI became a multi member body. Though, they had a short tenure which ended on 1st January

[331] The words "including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to parliament and to the Legislatures of States" omitted by the Constitution (Nineteenth Amendment) Act, 1966 s. 2 (w.e.f. 11-12-1966).

[332] The Constitution of India, art. 324(2).

1990. Later on, in October 1993, the government issued an ordinance (which later became an Act)[333] which provided for the appointment of two Election Commissioners. Since, then the ECI has worked as a three member commission, with its decisions being taken by a majority vote.

The need of turning ECI into a multi member body can be better understood by the following statement of the Supreme Court in ***S.S.Dhanoa v. Union of India***.[334] The apex court held that: *"When an institution like the Election Commission was entrusted with vital functions and was armed with exclusive and uncontrolled powers to execute them, it was both necessary and desirable that the powers were not exercised by one individual, however, wise he might be. It all conformed to the tenets of democratic rule."*

THE FIRST HURDLE

The first step is always the hardest. Same was the case with the ECI in 1950 when it was assigned the job of organizing the first general elections of the country. Holding an election required delimitation (the process of drawing boundaries of the electoral constituencies) which was not easy in a large country like India. Also Preparing the electoral rolls was a difficult task, as at that time there were about 17 crore eligible voters.

But ECI overcame all these obstacles. Over three lakh officers and polling staff were trained to conduct the elections. Finally the elections were held from October 1951 to February 1952. More than half of the eligible voters turned out to vote in these elections. The first general elections were a huge success. The Hindustan Times held that 'there is universal agreement that the Indian people have conducted themselves admirably in the largest experiment in democratic elections in the history of the world." The ECI crossed its first hurdle successfully.

[333] Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Act, 1993 (w.e.f. 04-01-1994)

[334] AIR 1991 SC 1745.

JOURNEY SINCE THEN

Since the first general elections, a lot has changed. The ECI has faced a lot of difficult situations, like conducting elections in states affected with militancy (Assam, Punjab, or Jammu & Kashmir). It had to face many problems in holding elections in states like Bihar and Bengal, where elections used to be full of violence, though now by and far peaceful elections are held in these states. Carrying on elections in naxal prone areas has always been a challenge for ECI, but generally with assistance from the local administration elections have been conducted in these areas quite efficiently. New innovations have been introduced by the ECI from time to time in the electoral process. According to me, the most important innovations that are introduced by the ECI in the Indian electoral system are the Model Code of Conduct for the candidates, voting through Electronic Voting Machine (EVM) and introduction of NOTA option on voting machines. Dealing with each of them separately is must.

1. **MODEL CODE OF CONDUCT**

For the first time ECI issued Model Code of Conduct in 1971, for the 5th general elections. Since then it is revised time to time and issued in every election. This Code of Conduct lays down certain guidelines for the candidates. They are expected to follow these guidelines during the election period, but this rarely happens. The Code lacks any statutory basis, having only a persuasive effect. It is violated quite frequently by the candidates and political parties. But still it has its importance, because in the light of this Code the voters are able to ascertain that what sort of behavior they must expect from the candidates during election campaign.

2. **ELECTRONIC VOTING MACHINE (EVM)**

Nowadays the Electronic Voting Machine ,i.e. the EVM, is one of the major bone of contention between the government and the opposition, but ,keeping that aside, one must understand that EVM has a major role in the conduction of free and fair elections in India. The sole intention of the ECI behind the introduction of EVM in India was to minimize the chances of malpractices in the casting of votes.

For the first time, as an experiment, EVMs were used during the Kerala State Legislative Elections in 1982.[335] Although this was challenged in ***AC Jose v. Sivan Pillai.***[336]. Later on the Representation of People Act was amended in 1988 by the Parliament. By the virtue of section 61 A of this Act, ECI was empowered to use voting machines instead of ballot papers. The reliability of EVMs has been challenged in a number of cases. But mostly decisions have been made in favour of EVMs. All by-elections and state elections in the year 2003 were conducted by using EVMs. And later on they were used for 2004 general elections. Since then EVMs have been used for elections.

3. NOTA

In 2009, ECI expressed its wish of introducing a 'None of The Above' (NOTA) button on EVMs. Finally, Supreme Court passed a landmark judgement in ***People's Union for Civil Liberties v. Union of India,***[337] on 27th September 2013, declaring that citizens of India have the right to negative vote by exercising the None of the Above (NOTA) option in EVMs. Later in November, 2013 NOTA was introduced for the first time in five state elections. Since then it has been in use.

REFORMS IN ELECTORAL PROCESS

Election Commission has done a commendable job till now, but nothing can be absolutely perfect. There are still numerous flaws in the election process. An experience of almost seven decades has given rise to many suggestions which are aimed at reforming the electoral system. A long history of elections has shown us that money and muscle power are the two things who are the root cause of the origin of almost all flaws in our electoral system. So suggestions regarding the development of a mechanism for controlling the use of these two things must be given attention on a priority basis. A lot of suggestions address the issue of party funding. Lack of interest shown by the political parties in this regard, has been generally criticized. It is

[335] https://eci.gov.in/voter/history-of-evm/
[336] AIR 1984 SC 921.
[337] (2013) 10 SCC 1.

believed that non-disclosure of the sources that provide funds to political parties at the time of elections has given rise to the use of black money for manipulating the electoral process. According to a study conducted by the Association For Democratic Reforms (ADR) the total declared income of national and regional parties between 2004-2005 and 2014-2015 was Rs. 11367 crores. Of this about 31% was from known sources and an astonishing 69% (about Rs. 7,800 crore) from unknown sources. Numerous committees have been formed to seek a solution for this problem, one of such committees was the Vohra Committee, which held in its report that:

"The various crime Syndicates/Mafia organizations have developed significant muscle and money power and established linkages with government functionaries, political leaders and others to be able to operate with impunity."

The only way of solving this problem is that a law must be made, by which the functioning of the political parties may be regulated or the ECI must be conferred with some special powers, by the virtue of whom it can compel the political parties to function in a transparent manner.

The use of black money in elections, has promoted rich individuals with criminal background to contest and eventually win elections. According to a report of ADR,[338] regarding the 2019 general elections, out of the total winning candidates 43% had criminal cases pending against them. Now, how can one expect that such kind of people will take this country forward? To stop the entry of criminals to our sacred Parliament something needs to be done. Barring those candidates from contesting elections who have a criminal background or any criminal case pending against them is a step that shall be taken as soon as possible. Thus, it can be said that electoral reforms are the need of the hour.

CONCLUSION

[338] https://adrindia.org/content/lok-sabha-elections-2019

It has been a journey from 17 crore voters to 90 crore voters, from ballot paper to EVM and from Sukumar Sen(1st Chief Election Commissioner) to Sunil Arora(Present Chief Election Commissioner). In short it has been a long journey. Since 1952, seventeen general elections and numerous state elections have been successfully conducted by the Election Commission. Every time ECI faced a different challenge, but ultimately it was able to overcome that challenge.

On the whole it can be said that ECI has been a successful body, but there is always a room for improvement. Its past is glorious but its future is full of challenges. Today the reputation of the ECI is at stake. In recent years, it has become a major punching bag of the opposition, who criticize it on almost every issue. Serious allegations on its functioning are made by them. The Election Commission was, as conceived by the Constitution, to be an independent body just like the judiciary, free from any sort of legislative intervention. Whether this has really happened or not is a matter of debate, but still in the light of the allegations made by the opposition, one cannot neglect the contributions made by ECI in making Indian democracy stronger by providing a simple and stable electoral system.

Regular elections are an important part of any democratic system as a democratic government is a government of the people, it is necessary that people must be provided with an opportunity, at regular intervals, to elect a government of their choice. ECI has ensured free and fair elections in India over the years, despite of limited resources. It has worked tirelessly to enable the citizens of India elect their representatives, in turn making Indian democracy stronger. Everyone knows, Legislature, Executive and Judiciary are the pillars of democracy in India. But keeping in mind the efforts made by the Election Commission, it is fair enough to say that it is as an unofficial pillar of Indian democracy

NEED OF PROFESSIONAL ETHICS IN LEGAL PROFESSION

- SONAL GUPTA & ADITYA RASTOGI

ABSTRACT

Professional Ethics (Legal) can be considered as the Rules and Principles that govern the conduct of advocates in the Legal Profession. It emerged to construct fairness and impartiality in the Indian Judicial system. Professional ethics can be considered to be the universally applicable and adhering principles since they are natural in nature and teaches ethical code of conduct to be followed in the profession. The shape of legal professionalism in varying societies is determined by their necessities due to ongoing disputes. The emerging changes and exigencies often create a challenging situation towards the legitimacy and credibility of existing practice of legal profession in India, and that's where the need for Professional ethics comes into existence in order to counter such challenging situations because ultimately what is ethical is many times justified in nature.

Professional ethics and legal profession go hand in hand, in other words professional ethics determine the nature and authenticity of the legal profession. It is the guiding force and hence, frames the boundaries of the legal practice as a profession. We can say that professional ethics decide the extent of legality and provides the society with the sense of trust and confidence over the judicial system and law as a profession in India.

This paper is going to cover the origin of professional ethics in legal profession. Along with that it is going to stress more upon the need and nature of professional ethics in profession of law and also the problem as to why even after such a strong foundation the credibility of judicial system and legal profession in India is under question.

KEYWORDS - *Legal Profession, Ethical, Professional Ethics, Professionalism, Code of conduct, Exigencies*

1. INTRODUCTION.

Conduct of human beings has always been a struggle. As we got civilised, we started inducting some values and beliefs in regard to our conduct. Still we do not precisely know what may be right or wrong, what may be acceptable behaviour or not.

With each passing day new developments are taking place and new ethical issues are emerging. There are only a few professions that are considered noble like doctor, teaching and law is one of them.

Lawyers play a very special role for the welfare of the society but at the same time it is expected that they maintain their conduct according to societies expectations. For this legal ethics i.e. standards of profession conduct were introduced to serve the expectations. Any deviation from these standards has a bearing on the society.

Ethics are not only required to regulate the behaviour but also to maintain the honour and dignity of the legal profession and also to administer justice.

Legal profession which was once called a noble profession is now losing its value, in practice and needs significant changes in its system to survive.

2. MEANING AND SIGNIFICANCE OF PROFESSIONAL ETHICS.

The term ethics can be construed as the custom or the code of conduct. It is basically based upon the moral science. Professional ethics are the principles which are majorly concerned with the human behaviour and their conduct. Thus, ethics are required to distinguish and differentiate between the right and the wrong in a profession. These principles are required to govern the moral act and the morality behind the same. Advocates are the face of the Indian Judicial System hence; it is required to define the boundary of an act which in turn can ensure the action being ethical or unethical.

Whenever there are questions regarding as to what is ethical or not, it refers to the certain pattern of conduct which is decided and laid down by the professional ethics in the legal profession. Practice of law as profession is noble in nature and hence, expected to be free of every kind of illegality and malafide conduct, which in turn is decided and protected by the professional ethics. Ethics is not something new as a concept, rather it won't be wrong to say that every single act of human being is bound by certain obligations. The term ethical means something bonafide in nature so, it is very important to define the limitations and boundaries of as to what is bonafide and upto what extent. Legal profession does not consider the good of only an individual but it is more concerned with the good of the society as whole and that is how legal ethics are framed. We can say that whatever is legal has to be ethical in nature. Professional ethics is a combination of rules and moral principles which form a backbone of the law practiced as a profession with a noble vision.

The spectrum of what is right and what is wrong is huge in nature and whenever there is a dispute to distinguish between the same ethics plays the major role. The question is what is the connection between ethics and professionalism. The profession is noble until it is in connection with the ethics hence, we can say that it is the professional ethics which make the law as a noble profession. Professional ethics play a vital role in raising one's moral consciousness when we talk about legality and illegality in term of legal profession. There is fine line between the right and wrong which is opaque but, it's the ethics which define this line for advocates in the world of law as a profession. Professional ethics also ensure the value clarification of the individual practicing law as profession and maintains the authenticity of this profession.

Law is a profession of certainty and truth so it is very important to maintain the very essence of this profession. Ethics help the courts to analyse the moral arguments. Morality of any argument may vary from person to person depending on the cultural and ethical belonging of that individual hence, it is very important to draw a basic and common guideline which binds everyone in one single thread and assess the moral truth of the facts and the disputes. Legal professionals seek the moral good through the means of professional ethics. The depth of what

is right and wrong is something which is beyond the concept of debate of legality and authenticity, so it has to be well decided by code of ethics to govern the profession.

3. NATURE OF PROFESSIONAL ETHICS.

Ethics is natural in nature, which occurred and exists since time immemorial although it wasn't framed as a code of conduct but it is practical. Professional ethics is absolutely based upon the philosophical values and ideas which form the backbone of legal profession in India. Ethics is majorly concerned with the concept of 'Right and Wrong' and visibly defines the fine line between the same. The study of professional ethics is decided and is distinguished by the natural sciences or, the normative sciences. It is not even art of conduct; the main vision of legal profession is doing justice. Professional ethics provide the individual with the art of thinking and morality. The study of ethics in the field of legal profession helps to acquire the knowledge upon the legality of the conduct of the advocates and all the other people associated with the profession. Professional ethics is an end result of series of views compiled together which form the basis of legal profession. There is no visible scope of testing the credibility of the term ethical in the professional ethics since it is natural in nature and not human made, so the applicability in itself is much expected in a wider sense.

4. CASE STUDY.

The Bar Council of Maharashtra vs. M.V. Dabholkar and Ors.[339]

Decided on: 03 October 1975

There was allegation of misconduct against over a dozen advocates according to the testimony recorded by the State Disciplinary Committee were that the respondents positioned themselves at the entrance of the Magistrate's Court, watchful of the arrival of potential litigants.

[339]The Bar Council of Maharashtra vs. M.V. Dhabolkar and Ors., 1976 AIR 242, 1976 SCR (2) 48 (India)

They snatched away briefs from litigant, fought with each other and even tore cloths in grim competition, and in various ways showed grave misconducts in soliciting business.

The matters were taken up in appeal before the Supreme Court and were considered together. The Bench observed "with deep sorrow" that a lawyer should scrupulously observe the norms of professional conduct and etiquette provided in Rule 36 of the Bar Council of India Rules made in this behalf and be worthy of the confidence of the community and not behave with doubtful scruples and strive to thrive on litigation.

The court also regretted the low standard of enquiry conducted by the State Council prolonged for 8 years by clubbing together 16 cases and trying them together though the charges in each case were different and by misconstruing Rules 36 (which prohibits soliciting work by circulars, advertisement, touts, etc.) as rendering advocates amenable to disciplinary jurisdiction of they have : (i) solicited work (ii) from a particular person (iii) with respect to a case, and holding that "mere attempts to solicit is nothing."

Justice V. R. Krishna Iyer noted for his unconventional approach and iconoclastic spirit speaking about the profession of law said, "the canons of ethics and propriety for legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business. Law is no trade, briefs no merchandise and so the leaven of commercial competition or procurement should not vulgarise the legal profession."

Canvassing for professional work in any manner is prohibited by Rule 34 of the Bar Council of India Rules. Even a signboard or a name plate should be of a moderate size.

The Learned Registrar High Court Calcutta Original Side vs. S. Kakrania[340]

Decided on: 25 August, 2020

Advocate Shiv Ratan Kakrania of a law firm took a screenshot of the virtual court proceedings and published it on LinkedIn, expressing his happiness to have obtained an injuction. The

[340] The Learned Registrar High Court Calcutta Original Side vs. S. Kakrania, CC 23 2020 (India)

publication of the screenshot of the virtual court proceeding without the Court's permission led the court to initiate a contempt proceeding.

The advocate posted the screenshot of a hearing, saying, "We are #happy to #share that we managed to obtain a #Ante- #Arbitration #Injunction (ICC Arbitration) in a matter before the Calcutta High Court".

The Bench raised three issues:

(i) a screenshot of Court Proceeding has been taken which is equivalent to a photograph of a Court Proceeding, without the leave of this Court.

(ii) The screenshot was published in a personal web page of a website called 'Linked In' about two months ago without the leave or knowledge of this Court.

(iii) an insinuation may be evident from the aforesaid writing on the page in question seen with the screenshot.[341]

The Bench also took an offense of the use of the word "managed" in regard to the decision of the court.

The Single Judge took a suo moto contempt proceeding against the advocate, requiring him to explain his conduct.

Mr. S. Kakrania filed an affidavit and tendered an unconditional apology accepting that the publication without the Court's permission was incorrect.

The Hookah Case

Senior Advocate Rajeev Dhawan, who was representing six Bahujan Samaj Party MLAs whose merger with the Congress in Rajasthan is being challenged by the BSP and a BJP MLA[342], was seen smoking hookah during the ongoing virtual court proceeding,

[341] Mehal Jain, *Taking Screenshot Of Virtual Hearing Equivalent To Clicking Photo Of Actual Courtroom Proceeding: Calcutta HC Initiates Contempt Against Advocate,* LIVE LAW (Aug. 26, 2020, 05:29 P.M.), https://www.livelaw.in/top-stories/taking-screenshot-of-virtual-hearing-actual-courtroom-proceeding-calcutta-hc-initiates-contempt-against-advocate-161990.

[342] *Smoker in Rajasthan HC? Senior Advocate Puffs Hookah in Virtual Hearing, Judge Says 'Not at This Age'*, NEWS 18 (Aug. 14, 2020, 10:01 A.M.), https://www.news18.com/news/buzz/smoker-in-rajasthan-hc-senior-advocate-puffs-hookah-in-virtual-hearing-judge-says-not-at-this-age-2785697.html

No contempt case was initiated but Justice Goyal advised Dhavan that he should quit smoking at his age as it is injurious to health.

Improper Uniform during Hearings

During the times of pandemic when the hearings are taking place virtually, a lawyer who was to argue a bail application appeared in a vest in the Rajasthan High Court.

Justice Sanjeev Prakash Sharma observed "Even in the video-conferencing, the decorum of the court is required to be maintained. The Advocates Act provides for lawyers to wear their uniform while pleading the case for their clients," the Judge observed in his brief order.

5. THE PROBLEM.

The need for professional ethics is simple, to regulate the conduct in the profession. The need was fulfilled when the Advocates Act, 1961 came and Bar Councils were set up. The need though has been largely fulfilled but what still remains is the execution.

In today's date lawyers are seen as businessman, with big houses and luxury cars. Many are also seen as future politicians since they have a better understanding how the democratic system functions.

The Bar councils which were developed to regulate the behaviour generally remain silent on important issues or speak what the advocates in power have in mind. They hardly speak for the advocates at large.

Lawyers in today's date are exploiting their clients like anything. Every Council knows what is going on in their jurisdiction but chooses to remain silent. Because of this the it leaves a poor impression on the students who are studying law of this profession. They have no interest in learning the ethics but only want to earn money and become rich lawyers.

The problem is not of the upcoming breed of lawyers but of the institution that executes the conduct of advocates, which has generalised the misconduct of advocates and also has failed to ensure the execution or, implementation of rules laid down by the Bar Council of India and the Supreme Court of India. One of the problems which is to be considered is with respect to

the morality behind the thought process of the advocates due to changed culture and societal practices.

6. SUGGESTIONS.

An advocate in a legal profession often faces a dilemma to considerably distinguish between as to what is ethical and what is not, and that's where the need of professional ethics is much required in a written form.

Although Bar Council of India has laid down the principles of conduct and etiquettes but still in the current scenario it is becoming common to see advocates not performing their duties and regulations they are bound by. The above-mentioned cases clearly state that there is some loophole which is making the legal profession a little less authentic and viable. The debatable consideration is that what might be the reasons behind such failure. Every rule framed by the Bar Council of India has tried hard to cover up every possible aspect through which an advocate may cross the boundary of an act being ethical or authentic, which is then governed by code of professional ethics which is surely laid down under Advocates Act, 1961 and by the Supreme Court of India. The solutions to the above-mentioned problems even though may seem to be generic in nature but are the only possible one's to counter the issues:

(1) Setting up of executive and implementing body – Even though we have rules framed to govern the conduct of the advocates, there lies the major requirement of the executive and governing body or authority to look after the implementation of the rules laid down by the Bar Council of India to ensure and bind the act of lawyers. This body will also be responsible to keep a check upon the conduct of advocates to ensure that it is ethical and bonafide in nature and is not violative of any rules and framework which acts as the guiding source to the actions of advocates.

(2) To maintain the very essence of morality – India is the hub of diverse cultures followed by the tremendous creative and ethical ideas and beliefs hence, it is extremely important to maintain the same throughout the passing years. Since, legal profession is the one which is believed to be much inspired by the moral and the cultural values of the country, it becomes

the necessity to maintain the very essence of the same. Legal profession and the rules governing the same are inspired by the moral values and cultural practices followed since time immemorial. And if the morality is lost in other words it can be construed that the reason to believe that law is a noble profession can also be predicted to be vanished in the upcoming days. Thus, to ensure the valid conduct of the advocates and the complete judicial system we need to work upon to preserve the morality of this profession.

(3) Limit and reduce the practice of generalisation – Law is a noble profession and it has no space for generalisations specially when it comes to the conduct of the legal professionals. Advocates as earlier stated are the face of the Indian Judicial System and hence, it is very important to supervise the legality of the act of the advocates much closely. The implied sense of legal is justice for a prudent man and it is the duty of legal professionals to ensure that this construction of meaning in a wider sense should be maintained in the society. The legal profession was practiced to deliver justice and to punish the accused and no matter what changes the surroundings goes through the basic idea behind practicing law as a profession should remain untouched and same.

7. CONCLUSION.

Professional Ethics are nothing but the code of standards which maintain the conduct and etiquettes in the legal profession. The aim is for the members in the legal profession to practice them in their life, be it in court or be it outside.

Lawyers are not only expected to be well aware of their rights and obligations but are also expected to be thorough with their ethical obligations, especially those which have been explicitly laid down. A good advocate is one who could easily distinguish between right and wrong without any hesitation, in the professional conduct. This is very much necessary to maintain the honour of this noble profession.

To maintain the nobility of the legal profession there is a need of comprehensive rules and regulations which can govern the conduct of the advocates and keep a check upon them. Legal profession can change with changing time, in terms of the laws in force but, the basis of this

profession needs to be static and stable. The professional ethics lays down the guidelines for the legal professionals and ensures the justified, legal and ethical behaviour of advocates.

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INTERNATIONAL CRIMES AND INTERNATIONAL CRIMINAL COURT

- SHILPI S. GAUTAM

INTRODUCTION

International Criminal Law has been an emerging area of discipline and is still developing through the work of international criminal courts and tribunals for the past two decades. This very new form of law is a result of conjunction and cooperation from the major legal systems in the world which are combating core of the international crimes. The emergence of international criminal law is since the proceedings of the subsequent of World War II. International Criminal Law magnets on the four main constituents of International Law history. Firstly, the nineteenth-century prohibitions against piracy, secondly, the regulations of slavery and the slave trade, thirdly, the once theological and secular theory of just war, and lastly, International Humanitarian Law (IHL) also called "law of war".[343]

As Dan-Cohn has stated that, International Criminal Law had conduct rules without consistent enforcement of the rules (rules guiding officials to impose the conduct rules)[344]. Talking about the history of the International Criminal Law, it was very noticeable by the greater and greater invasions into arenas which were historically the exclusive province of the sovereign states. Hence, International customs progressively govern the treatment a state can legally accord on its people and others under its jurisdiction and acts like these are also increasing the subject of the International inquiry, criticism as well as criminal prosecutions.

DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

[343] Beth Van Schaack & Ron Slye, *Santa Clara Law Santa Clara Law Digital Commons* (2007), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1629&context=facpubs.

[344] Beth Van Schaack & Ron Slye, *Santa Clara Law Santa Clara Law Digital Commons* (2007), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1629&context=facpubs.

International Criminal Law is the set of international norms and rules which have been designed for mainly two purposes. Firstly, to forbid certain sorts of conduct namely war crimes, genocide, crimes against humanity, torture, the war of aggression, and secondly, to punish those who are engaged in these conducts and hold them criminally liable. International Criminal law is a branch of public international law (PIL) and substantive law is one limb of the International Criminal Law. The substantive of law suggests which acts are prohibited, following the consequence the doer may face or can be held accountable for their commission, they also set out the subjective elements necessary for such acts to be categories as criminalized, as well as the conditions under which the doer of those crimes may however not to be held criminally liable and the circumstance under which the state must, as per international norms, bring the person accused of those crimes to the trials. These crimes have been defined along with the series of international conventions and agreements, starting from the first Hague Conventions during the end of the 19th century, as per which the rules for military conduct during wartime were established.

International Crimes have been gradually developed through ages and so is the category of these crimes. Primarily, only war crimes were punishable during the late nineteenth century. The new categories of crimes developed since World War II. The new categories of international crimes come into picture during the year of 1945 while the statutes of the Nuremberg and International Military Tribunal for the Far East in the year, 1946, which were crimes against humanity and crimes against peace also known as the war of aggression. Followed by genocide in the year 1948, and thereafter by torture as a distinct crime in the 1980s, recently claims are been made that international terrorism has been also criminalized with subject to certain conditions[345] but, the claim stands controversial.

INTERNATIONAL CRIMES

[345] Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan & Christopher Gosnell, *Cassese's International Criminal Law* (2013).

The crime of genocide - In the year of 1948, after the Nazi Holocaust ended, The United Nations General Assembly accepted the text of the Genocide Convention. Today the United Nations genocide convention has 142 member states. The convention has nineteen provisions and has also outlined how member states are o deal with the crime of genocide and can place great prominence on how to punish it, in the inclusion of several provisions which refers to criminal law and the accountability of the individuals[346].

The text treasured what was a new international agreement then by defining and condemning the crime of genocide[347]. The crime of genocide is defined in the Rome statute of the international criminal court under article 6 as the acts were done to destroy, wholly or partly, national, ethnical, racial, or religious group. These enumerated acts include Killing members of the group, causing serious harm physical or mental to members of the group, intentionally causing physical destruction in whole or in part on the group. Enforcing measures with intention to prevent the births within the group, forcefully transfer of children of a group to another group[348]. The definition of genocide accomplishes one thing clear, it states crime and establishes the individual's accountability of those committing the act of genocide. The crime of genocide is committed against a group, even if it includes harming individuals. The crime requires that the wrongdoer have a very specific intension to cause harm or to destroy the particular group physically, biological, or any way possible while committing the act.

War crimes – The crime of war crimes represents the serious violations of the customs, laws of the war, and serious violations of international humanitarian law that may put persons or groups to danger or may breach important values for which the committers can be held criminally liable on an individual basis. Such crimes are derived mainly from the Geneva

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346 Martin Mennecke, *The Crime of Genocide and International Law*, https://www.niod.nl/sites/niod.nl/files/International%20Law.pdf.

347 (*International Criminal Law*)

348 International Criminal Court, *Rome Statute of the International Criminal Court*, https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

Conventions of 12th August 1949 and additional protocols I and II of 1977, along with the Hague Conventions of 1899 and1907. Under Article 8 of Rome statute, it defines war crimes, its states crimes such as wilful killing, causing great suffering or serious injuries to body or health, torture or any sort of inhuman treatment which also includes any kind of biological experiments, unjustified destruction or appropriation of property by military necessity and carried out unlawfully and wantonly. Serious violations of the customs and laws applicable in international armed conflict, within the established structure of international law. Offenses committed against protected persons as defined in the Geneva Convention, people living under refugee camps. Almost all violent incidents mentioned or listed from the year 1996 onward fall within the scope of armed conflict, whether internal or international[349].

There are four different kinds of war crimes defined by Oppenheim: firstly, violations of recognized rules and laws of warfare by the enemy armed forces, if conceded out without orders about which he further explains as war crimes committed when only without an order of the aggressive governance concerned. If those acts were committed by the orders given, the state could have the possibility to reprisals against the committing state but the individuals cannot be prosecuted for the war crimes. Secondly, hostilities committed by individuals not by the member of the enemy state or by their armed forces. These were punishable because the individual does not enjoy any sort of privileged treatment of members of armed forces. War crimes have also been defined by Bluntschli, where he states that "war crimes, but because they very violative in nature and are recognized rules regarding warfare, but because of the enemy state has the right to consider and punish them as the acts of illegitimate warfare". Thirdly, espionage war treason and plundering can be prosecuted because the doer of these acts was not protected by immunities granted to armed forces in the war. In espionage and war treason, since they are committed by the armed forces, not in uniform, and lastly marauding because it's was mainly committed by the soldiers who have left their respective corps[350].

[349] United Nations, *United Nations Human Rights, Office of the High Commissioner*, https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf.

[350] Oona A. Hathaway, Paul K. Strauch, Beatrice A. Walton & Zoe A. Y. Weinberg†, *What is a War Crime?*, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1695&context=yjil.

Crimes against humanity – Crimes against humanity have been described under article 7 of the Rome statute it has been defined what crimes against humanity mean and who can be held accountable for the crime against humanity. This states that the notion includes crimes like murder, rape, extermination, persecution, and other inhumane acts of the similar nature committed against any national population, or oppressions on the political, racial, or religious grounds whether or not in violation of domestic laws of the state where perpetrated[351]. World poverty, manmade natural disasters, terrorist attacks have also been marked as crimes against humanity. These crimes have the potential to damage international peace. To determine the occurrence of crime against humanity it should involve either large scale of violence in a manner to the number of victims or its extension over a broad widespread, or a planned systematic kind of violence.

The crime against humanity is distinguished from the crime of genocide and the war of crimes even though these three crimes have a lot of elements similar but, yet stand completely different from one another. Genocide, where require the intention of the committer to destroy a national, ethnical, religious, or racial group meaning a specific target group whereas crime against humanity does not need a specific target group. The attack can take place on any civilian population, regardless of its association or identity. In addition to that genocide requires proof of a specific discriminatory tendency in proving these specific crimes targeting a particular group, whereas crime against humanity demands a general intent to harm or attack the civilian population. The difference between the crime against humanity and war crimes are of the elements of the crime. For War crime to occur the number of common elements is required to establish the occurrence of the war crime, such as the action took place in the framework of and was allied with international armed conflict, here, victims were protected under more than one of the Geneva Conventions of 1949. Whereas, crimes against humanity require the

[351] International Criminal Court, *Rome Statute of the International Criminal Court*, https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

existence of neither armed conflict nor the knowledge that armed conflict has taken place, and also crimes against humanity could be directed against any civilian population[352].

- Torture – the crime of torture includes acts causing severe physical or mental pain on any person. Such harm or such suffering is caused by or at the instigation of or by the consent or compliance of a public official or any other person acting in an official capacity and such harm or suffering is not only inherent or incidental to lawful sanctions. Torture is different from the ordinary crime of assault because of the element of necessity in the torture of the acting of the person to be in an official capacity. The 1998 international criminal court statute includes torture as a crime against humanity or war crimes.

The crimes of aggression – It took about twenty years for the international community to grant the international criminal court the power to arraign the crime of aggression, more than seventy years later after it was first arraigned at the postwar tribunals. The crime of aggression was initially included in the subject matter jurisdiction of the international criminal court in, 1998. The United Nations has given the definition of aggression which was agreed and accepted upon on the 14th December 1974. The united nations define the crime of aggression as "The initiation or execution with planning, preparation by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which from its characteristics, significance and scale, it constitutes a manifest violation of the Charter of the United Nations"[353]. Crimes such as bombardment by the armed forces or us of any weapons by a state against the territory of other states, blockade of the coasts or ports of a state by armed forces of other armed forces, attacks by armed forces of a state on the land, sea or air force, on

[352] Nyman Gibson Miralis, *LEXOLOGY* (2019), https://www.lexology.com/library/detail.aspx?g=a4697e49-4074-4d6e-a9c1-d52587ee8710.

[353] Coalition for the International Criminal Court, http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression#:~:text=The%20crime%20of%20aggression%20means,manifest%20violation%20of%20the%20Charter.

another state[354]. The prosecuting for the crime of aggression includes holding the state leadership criminally liable for the state acts during and before armed conflicts.

The one idea which still stands controversial is whether the leaders can and should be held accountable for their state actions. Under article 8, it has been further defining what may constitute as an act of aggression and it states as the attack or the invasion by the armed force of a state of the territory of other state military or any military occupation, conversely temporary, resulting from such attack or invasion, or any seizure by the use of force of the territory of other state or part thereof. The crime of aggression has been controversial since the very beginning and its insertion in the Rome statute is one of the primary irritants in the conflicted relationship between the United State and the international criminal court. Through 2010, review conference in Kampala, the state parties to the international criminal court reached the agreement on the both; definition of aggression and the international criminal court's jurisdiction over it, and this jurisdiction to be activated upon the agreement after the 1st of January, 2017.

The jurisdiction of the international criminal court over the crime of aggression can be triggered by three ways: by the reference of the state party, secondly, by the reference of the Security Council and lastly by the independent action of the international criminal court itself.

INTERNATIONAL CRIMINAL COURT (ICC)

All these International crimes have been prosecuted by the international criminal court (ICC), which was established by the Rome Statute of the international criminal court (1998) and is based in The Hague. The court has been set-up to deliver justice against serious crimes concerning international communities and large groups when the national courts fail or are unable to deliver the appropriate justice not to replace the national criminal justice systems. The Court holds jurisdiction over the crimes of very serious nature which concern the

[354] International Criminal Court, *Rome Statute of the International Criminal Court*, https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.

international community as a whole, these crimes are mainly, genocide, crimes against humanity and war crimes committed after 1st of July, 2002 and the crime of aggression as of 17th of July 2018, which have been defined under the Rome statute and has only prospective jurisdiction. The court can prosecute matters only when the national justice systems don't carry out the proceedings or when they fail to carry out such required proceedings than only the International criminal court comes into play. This fundamental principle is known to be the principle of complementarity[355]. International Criminal Court is an independent international organization as it has taken birth from an international treaty and not by United Nations (UN), and which was signed by 121 states over which the International Criminal Court performed its original jurisdiction. The jurisdiction of the International Criminal Court extends to the crimes that have taken place after 1st July 2002, which were committed either in a state that has ratified the Rome statute or by a national of such state. The Court handles prosecutions between the individuals and not groups or states specifically. Around 120 countries had signed the agreement and about more than 100 countries had ratified the treaty. As far as the matter of jurisdiction is concerned which seems to be tricky but, is not. By agreeing to the Rome Statute, a state submits itself to the jurisdiction of the International Criminal Court under the crimes mentioned in the statute. In matters concerning states which are not the party to Rome Statute may decide to accept the jurisdiction of the ICC or a condition where the situation is referred to the prosecutor by the United Nations Security Council, whose resolutions are binding on all UN member states and will work accordingly.

[355] International Criminal Court, https://www.icc-cpi.int/Publications/ICCAtAGlanceENG.pdf.

ROLE OF INFORMATION TECHNOLOGY IN STOCK MARKET

- VAISHNAVI AIYER

INFORMATION TECHNOLOGY IN INDIA

Information technology in India is an industry consisting of two major components: IT Services and business process outsourcing (BPO). The sector has increased its contribution to India's GDP from 1.2% in 1998 to 7.5% in 2012. According to NASSCOM, the sector aggregated revenues of US$100 billion in 2012, where export and domestic revenue stood at US$69.1 billion and US$31.7 billion respectively, growing by over 9% Information technology is playing an important role in India today & has transformed India's image from a slow-moving bureaucratic economy to a land of innovative entrepreneurs.

The IT sector in India is generating 2.5 million direct employment. India is now one of the biggest IT capitals of the modern world and all the major players in the world IT sector are present in the country.

The major cities that account for about nearly 90% of the sector's exports are Bangalore, Chennai, Kolkata, Hyderabad, Trivandrum, Noida, Mumbai and Pune. Bangalore is considered to be the Silicon Valley of India because it is the leading IT exporter. Exports dominate the industry and constitute about 77% of the total industry revenue. However, the domestic market is also significant with a robust revenue growth. The industry's share of total Indian exports (merchandise plus services) increased from less than 4% in FY1998 to about 25% in FY2012. According to Gartner, the "Top Five Indian IT Services Providers" are Tata Consultancy Services, Infosys, Cognizant, Wipro and HCL Technologies.

RECENT DEVELOPMENT

The economic effect of the technologically inclined services sector in India— accounting for 40% of the country's GDP and 30% of export earnings as of 2006, while employing only 25%

of its workforce—is summarized by Sharma (2006): "Today, Bangalore is known as the Silicon Valley of India and contributes 33% of Indian IT Exports. India's second and third largest software companies are headquartered in Bangalore, as are many of the global SEI-CMM Level 100 Companies." Numerous IT companies are based in Mumbai, such as TCS (among India's first and largest), Reliance, Patni, LnT InfoTech, Myzornis Corporation and i-Flex.

Thiruvananthapuram (Trivandrum), the capital of Kerala state, is the foremost among the Tier II cities that is rapidly growing in terms of IT infrastructure. As the software hub of Kerala, more than 80% of the state's software exports are from here. Major campuses and headquarters of companies such as Infosys, Oracle Corporation, IBS Software Services and UST Global are located in the city. India's biggest IT company Tata Consultancy Services is building the country's largest IT training facility in Trivandrum—the project is worth INR10 billion and will have a capacity of 10,000 seats. The completion of the facility is expected in 2014 or 2015.

INDIAN SECURITIES MARKET

PRIMARY MARKET

The primary market is that part of the capital markets that deals with the issue of new securities. Companies, governments or public sector institutions can obtain funding through the sale of a new stock or bond issue. This is typically done through a syndicate of securities dealers. The process of selling new issues to investors is called underwriting. In the case of a new stock issue, this sale is a public offering. Dealers earn a commission that is built into the price of the security offering, though it can be found in the prospectus. Primary markets create long term instruments through which corporate entities borrow from capital market.

Features of primary markets are:

- This is the market for new long-term equity capital. The primary market is the market where the securities are sold for the first time. Therefore, it is also called the new issue market (NIM).
- In a primary issue, the securities are issued by the company directly to investors.
- The company receives the money and issues new security certificates to the investors.

- Primary issues are used by companies for the purpose of setting up new business or for expanding or modernizing the existing business.
- The primary market performs the crucial function of facilitating capital 19 formation in the economy.
- The new issue market does not include certain other sources of new long-term external finance, such as loans from financial institutions. Borrowers in the new issue market may be raising capital for converting private capital into public capital; this is known as "going public."

SECONDARY MARKET

The secondary market, also known as the aftermarket, is the financial market where previously issued securities and financial instruments such as stock, bonds, options, and futures are bought and sold. The term "secondary market" is also used to refer to the market for any used goods or assets, or an alternative use for an existing product or asset where the customer base is the second market (for example, corn has been traditionally used primarily for food production and feedstock, but a "second" or "third" market has developed for use in ethanol production). Stock exchange and over the counter markets.

With primary issuances of securities or financial instruments, or the primary market, investors purchase these securities directly from issuers such as corporations issuing shares in an IPO or private placement, or directly from the federal government in the case of treasuries. After the initial issuance, investors can purchase from other investors in the secondary market.

The secondary market for a variety of assets can vary from loans to stocks, from fragmented to centralized, and from illiquid to very liquid. The major stock exchanges are the most visible example of liquid secondary markets - in this case, for stocks of publicly traded companies. Exchanges such as the New York Stock Exchange, Nasdaq and the American Stock Exchange provide a centralized, liquid secondary market for the investors who own stocks that trade on those exchanges. Most bonds and structured products trade “over the counter,” or by phoning the bond desk of one’s broker-dealer. Loans sometimes trade online using a Loan Exchange.

MONEY MARKET

As money became a commodity, the money market became a component of the financial markets for assets involved in short-term borrowing, lending, buying and selling with original maturities of one year or less. Trading in the money markets is done over the counter and is wholesale. Various instruments exist, such as Treasury bills, commercial paper, bankers' acceptances, deposits, certificates of deposit, bills of exchange, repurchase agreements, federal funds, and short-lived mortgage-, and asset-backed securities. It provides liquidity funding for the global financial system. Money markets and capital markets are parts of financial markets. The instruments bear differing maturities, currencies, credit risks, and structure. Therefore, they may be used to distribute the exposure.

The money market consists of financial institutions and dealers in money or credit who wish to either borrow or lend. Participants borrow and lend for short periods of time, typically up to thirteen months. Money market trades in short-term financial instruments commonly called "paper." This contrasts with the capital market for longer-term funding, which is supplied by bonds and equity.

The core of the money market consists of interbank lending—banks borrowing and lending to each other using commercial paper, repurchase agreements and similar instruments. These instruments are often benchmarked to (i.e. priced by reference to) the London Interbank Offered Rate (LIBOR) for the appropriate term and currency.

ROLE OF IT IN STOCK EXCHANGE INFORMATION

TECHNOLOGY'S ROLE TO REGULATE STOCK MARKET

In the 21st century the business world is marked by drastic changes. These changes are paced by continuous innovations in computer & telecommunicating technologies. The choice of a relevant IT is a crucial decision as it is bound to have a long term & lasting impact on the future

of the enterprise. Up-gradation of technology helps in increasing productivity, reducing cost & in improving total quality. IT is being helpful & has a great impact in business.

- IT can help to identify the critical areas for competitive advantage of business organization.
- Competitive advantages may be achieved by various techniques with the help of IT.
- Decision-making and operational control by managers has been improved by IT.
- IT can help in maintaining the changing relationship with customers, suppliers, trials, potential new entrants, etc.
- IT in business results in reducing decision making time, monitoring the competitors and better control on transaction.
- IT can be used as innovation in functioning of the complete business system during strategic business planning. emergence of global financial system.

INFORMATION TECHNOLOGY (IT) SHAPING INDIAN STOCK MARKET

Traditionally stock trading is done through stock brokers, personally or through telephones. As number of people trading in stock market increase enormously in last few years, some issues like location constrains, busy phone lines, miss communication etc start growing in stock broker offices. Information technology (stock market software) helps stock brokers in solving these problems with online stock trading. It is an internet-based stock trading facility. Investor can trade shares through a website without any manual intervention from stock Broker. In this case these online stock trading companies are stock broker for the investor. They are registered with one or more Stock Exchanges. Mostly online trading websites in India trades in BSE and NSE. Installable Software Based Stock Trading Terminals and Web (Internet) Based Trading Applications are two different type of trading environments available for online equity trading.

ROLE OF DEMAT

In India, shares and securities are held electronically in a Dematerialized (or "Demat") account, instead of the investor taking physical possession of certificates. A Dematerialized account is

opened by the investor while registering with an investment broker (or sub-broker). The Dematerialized account number is quoted for all transactions to enable electronic settlements of trades to take place. Every shareholder will have a Dematerialized account for the purpose of transacting shares. Access to the Dematerialized account requires an internet password and a transaction password. Transfers or purchases of securities can then be initiated. Purchases and sales of securities on the Dematerialized account are automatically made once transactions are confirmed and completed.

GOAL

India adopted the Demat System for electronic storing, wherein shares and securities are represented and maintained electronically, thus eliminating the troubles associated with paper shares. After the introduction of the depository system by the Depository Act of 1996, the process for sales, purchases and transfers of shares became significantly easier and most of the risks associated with paper certificates were mitigated.

BENEFITS

The benefits of demat are enumerated as follows:

- Easy and convenient way to hold securities
- Immediate transfer of securities
- No stamp duty on transfer of securities
- Safer than paper-shares (earlier risks associated with physical certificates such as bad delivery, fake securities, delays, thefts etc. are mostly eliminated)
- Reduced paperwork for transfer of securities
- Reduced transaction cost
- No "odd lot" problem: even one share can be sold
- Change in address recorded with a DP gets registered with all companies in which investor holds securities eliminating the need to correspond with each of them separately.

- Transmission of securities is done by DP, eliminating the need for notifying 27 companies.
- Automatic credit into demat account for shares arising out of bonus/split, consolidation/merger, etc.
- A single demat account can hold investments in both equity and debt instruments.
- Traders can work from anywhere (e.g. even from home).

Benefit to the company

The depository system helps in reducing the cost of new issues due to lower printing and distribution costs. It increases the efficiency of the registrars and transfer agents and the secretarial department of a company. It provides better facilities for communication and timely service to shareholders and investors.

Benefit to the investor

The depository system reduces risks involved in holding physical certificates, e.g., loss, theft, mutilation, forgery, etc. It ensures transfer settlements and reduces delay in registration of shares. It ensures faster communication to investors. It helps avoid bad delivery problems due to signature differences, etc. It ensures faster payment on sale of shares. No stamp duty is paid on transfer of shares. It provides more acceptability and liquidity of securities.

Benefits to brokers

It reduces risks of delayed settlement. It ensures greater profit due to increase in volume of trading. It eliminates chances of forgery or bad delivery. It increases overall trading and profitability. It increases confidence in their investors.

THE EVOLUTION OF STOCK MARKET TECHNOLOGY

Technology has contributed to a bang and a crash at the London Stock Exchange and created an invisible world where billions of pounds changes hands in milliseconds. But with EU red tape altering the financial sector's landscape, technology's evolutionary journey at the London Stock Exchange is far from over.

Nestling in Paternoster Square in the shadow of St Paul's Cathedral, the London Stock Exchange, which makes its money through charging investors fees for trading shares and selling market data, is a technology pacemaker.

For a trading venue, the faster and more efficiently it can carry out a deal and the more up to date information it can store and retrieve, the more attractive it is to investors. These investors want to buy or sell shares quickly, to prevent changes in price during the transaction. Accurate market data is also important for investors to make informed choices.

Share trading took centre stage almost 300 years after share prices were published twice a week on a 10-by-4-inch sheet of paper and distributed from Jonathan's Coffee-house in London. The year 1986 saw what is known as the financial sector's Big Bang.

It was the end of October 1986 when the Stock Exchange Automated Quotation system replaced the trading floor. This screen-based quotation system was used by brokers to buy and sell stock rather than meeting face to face.

TECHNOLOGY'S MAJOR IMPACT

The shortening of the period between a trade being initiated and complete, or the reduction of latency as it is known, is the ultimate aim of any stock exchange worth its salt.

The Big Bang of 1986 did this and more. "It brought significant benefits to both institutional and private investors, with private investors gaining low-cost independent access to the market through the proliferation of new services," says Robin Paine, chief technology officer at the London Stock Exchange.

Cheap and efficient trading is what securities traders wanted and that is what they got. Volumes transacted saw unprecedented increases, with the average daily number of trades going through the ceiling.

The trading floor where dealers met remained, and was used in emergencies while the technology was in its infancy. However, this soon became a thing of the past as electronically-generated trading volumes rose unabated.

Just before the Big Bang's meteoric impact, the average number of daily trades at the London Stock Exchange was 20,000, amounting to about £700m worth of shares changing hands. After the introduction of automated trading the figure went up to a daily average of 59,000 trades a few months later.

In 1987 the London Stock Exchange was transacting as much business in a month as it did in a whole year before 1986, with an average daily value of £1bn. Today, the average daily number of shares traded is 566,000, with an average daily value of £16.6bn.

These figures would be impossible to reach without technology that can reduce the time taken to complete a deal and handle massive volumes.

"Without technology, exchanges could not accommodate the increased transaction flows that are generated both by the proliferation of end investors, and by electronic trading, algorithms and low latency," says Bob McDowall, analyst at TowerGroup.

But the technological transformation was not plain sailing. No major technological advance with such a deep impact on how an industry operates can be introduced without a hitch.

This was no exception, and the stock market crash of 20 years ago that saw share prices plummet was more than a hitch, and was partly a result of the immaturity of the new technologies introduced in the Big Bang.

Trading in certain stocks could not be stopped and spiralled out of control. Eventually stocks across the world lost billions of pounds in value, and the London Stock Exchange lost 23% of its value in a single day.

McDowall says that although technology and the automation of selling did not cause the 1987 crash, technology did contribute to the velocity of the fall in share prices. "The technology at that time lacked refinement to react to a wider range of factors beyond the share prices themselves," he says.

Technology went through a quick facelift after the City woke up the morning after 1987's Black Monday.

McDowall said the exchange had to introduce circuit breakers very quickly into the markets. These limited the velocity at which share prices could fall, before a halt was called to trading in the particular stock.

Algorithmic trading

These circuit breakers became more important with the proliferation of algorithmic trading. It is not humanly possible to manually transact the number of trades done on the stock exchange today. To reach these levels there must be a certain level of automation. Hence computers are today initiating many trades using algorithms.

Algorithmic trading, or "algo trading" as it is known in the financial sector, relies on computer systems to buy shares automatically when predefined market conditions are met.

This method of trading is the future, says Paine. "The markets will continue to be further digitised with the proliferation of algorithms set to increase. About half of all volume on the exchange now is electronically generated and we believe this trend will continue."

The rest is generated by manual intervention where traders submit orders using an interactive screen.

Jonas Rodny, senior communications manager at the Nordic Exchange, said although it is difficult to be precise about levels of algorithmic and automated trading at the exchange, these are responsible for a significant amount of transactions.

"Our assumption is that both algorithmic and automated trading are growing very rapidly, currently accounting for at least a fifth of the overall trading volume on the Nordic Exchange and possibly quite a lot more," he says.

The Nordic Exchange was created in 2006 by integrating the exchanges in Stockholm, Copenhagen, Helsinki, Iceland, Tallinn, Riga and Vilnius. OMX operates the Nordic Exchange and has a technology arm that develops technology for the exchange as well as licensing technology out to others.

The London Stock Exchange

Given the technological advancement in the 1980s and the resulting metamorphosis of the London Stock Exchange, it is no surprise that the company takes technology so seriously.

In 2003 the exchange instigated its Technology Roadmap, and after four years the exchange's all-singing, all-dancing core trading platform Tradelect was launched.

Since its July launch the platform has set record after record in terms of the volumes and the values traded. In August this year the exchange processed a record £17.62bn of transactions in one day on Tradelect.

But there is no time to sit back and watch in a sector where technological innovation can so dramatically impact a company's financial performance.

Constant innovation is essential if the exchange is to be able to compete with an increased number of trading venues. To this end the London Stock Exchange's Technology Roadmap II has already been initiated.

Rodny said the Nordic Stock Exchange's heritage is built on technological innovation, and the challenges it faces are twofold. Exchanges need to be able to provide sufficient latency to support more regular and faster trading, which allows investors to take market opportunities more quickly.

"The other key challenge arises from the fact that the continuous increase in volumes puts further constraints on capacity, not just at exchange level, but along the entire transaction chain," says Rodny.

The future of European exchanges

Recent forces driving innovation at the exchanges across Europe stem from the European Union's Markets in Financial Instruments Directive (Mifid). This piece of pan-European red tape has introduced more competition in the stock trading sector.

Mifid has compelled EU nations to remove what is known as the concentration rule that states that all trades must go through local exchanges. This has been the case for some time in the UK, but now it is happening across Europe and will inevitably lead to the creation of more alternative trading and reporting venues.

Two projects known as Boat and Turquoise have been created to offer trade reporting and execution facilities, respectively, on the back of Mifid. Turquoise was set up by Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, Merrill Lynch, Morgan Stanley and UBS as an alternative trading venue, while Boat was developed by a consortium including many of the above-mentioned banks to offer a trade reporting venue.

KPMG consultant Lee Epstein says Mifid has opened up the stock trading and reporting sector to new players because it becomes more attractive for them to be able to work across Europe. "Before this you had so many different rules across Europe it was difficult," he says.

A fragmented market

He says the introduction of alternative trade execution and reporting venues following Mifid will fragment the market, and technology will be important to differentiate venues.

Nemone Wynn-Evans, head of market development at UK-based exchange Plus Markets, says innovation will focus on succeeding in an increasingly fragmented market which increases competition and introduces new challenges.

"The impact of fragmentation and the lowering of transaction costs will mean huge volume increases in transaction data, and in particular market data," says Wynn- Evans.

Technical innovation is required to be able to use all this data to optimise trades, she says. "The challenge of data volumes is not just an issue for investors, but also for surveillance functions and regulators."

Plus Markets, which is a Recognised Investment Exchange in the UK, is currently installing new trading and market surveillance technology in conjunction with OMX to expand its stock coverage and enable algorithmic trading.

McDowall agrees that continuous innovation is essential. "It is an important factor if it provides business innovation combined with greater efficiency, speed of execution and reduction in costs."

Rodny says innovation around speed, capacity and flexibility are important. "Capacity to take care of the increased volumes, speed in order to provide algo trading and flexibility to be able to integrate trading across asset classes and across markets."

So in a computerised environment where high speed, high volume trading is critical, technology has a strong hand to play.

Add to this the need to retain massive amounts of data and be able to access it efficiently and you have a boardroom that appreciates the value of technology and will not shy away from investing in it.

The London Stock Exchange is an example of how a centuries-old organisation can meet today's business challenges through an acute focus on technology innovation.

STOCK TRADING AND INFORMATION TECHNOLOGY REVOLUTION

Information technology has made a tremendous development in respect of our approach at a mass level. It opens the door of several avenues as well as has brought in several threats, which should be analyzed carefully. Due to development in technology, the information can be transferred from one place to another in very short span of time, earlier which required lot of time. Transfer of large information and storing capacity for a long period also has some draw backs, inherent in the process itself. For example, manipulation of message is very easy and it requires small level of technical literacy. It is also observed that master in a subject may not be many times able to express his views effectively as compared to a person having less knowledge of subject but more computer literacy, who can make better presentations. Here, the knowledge part of the core subject has been compromised with proficiency with technology. Whole economy of the world is very much dependent upon the technological advancement. This increased competition in each segment of the market. The Internet makes the stock exchange accessible in the global market. Being more accessible will give them the opportunity to pick up a bigger market share, and give them a greater market value. There has been a migration from a Screen based trading system for government securities to an order matching system so as result in better price discovery and more transparency in the market

related transactions in government securities Negotiated Dealing System (NDS)- which has been in use for many years now, has been enhanced to provide for changing market and regulatory requirements. Clearing Corporation Of India Ltd., (CCIL) as a fully IT enabled entity providing for electronic transaction processing as well as reporting has enabled the market to grow in depth and coverage as well. Use of the Multi-Lateral Net Settlement Batch facility for effecting the settlements arrived at by various clearing systems (such as the Stock Exchanges), through the RTGS mode Pilot projects entailing the use of Multi Application Smart cards have not only yielded satisfactory results; their usage for financial inclusion has opened up new vistas for their wide spread use across the country. Use of credit transfer based RTGS transactions by brokers, constituents etc. pertaining to the funds leg of secondary market transactions. To provide an interactive and user friendly service, banks and financial institutions have adopted the most recent technological trends. Queuing at banks is a thing of the past; now-a- days customers can enjoy various facilities at the doorstep of their banks and at other locations. Phone banking and SMS banking services can also keep customers updated with the status of their money, investments and offer an array of additional services.

TRENDS AND OPERATIONS IN SECURITIES MARKET

Year 2010- 11 belongs to activities in primary market -which witnessed record number of Initial Public Offerings (IP0s)/ Follow-on Public Offerings (FPOs) and new debt issues (Non-Convertible Debentures/ Bonds) including the biggest ever IPO of Coal India which came out with issue size of Rs. 15,199.4 crore in October 2010. In debt segment, State Bank of India, the country's largest bank, came out with debt issues in multiple trenches which were subscribed by investors multiple times. Secondary market segment showed signs of recovery of Indian corporate from global financial crises witnessed in 2008. The recovery phase was clearly reflected in substantial increase in average market capitalisation, revenues and profit after tax of top 500 listed companies at NSE and BSE. With growth in domestic demand being intact, Indian companies also showed significant improvement on export front in 2010-11 despite the fact that the global economy is still recovering from financial crises. The cumulative

value of exports for the period from April, 2010 to March 2011 to US $ 245.8 billion (Rs. 11,18,822.8 crore) as against US $ 178.7 billion (Rs. 8,45,533.6 crore) registering a growth of 37.5 per cent in Dollar terms and 32.3 per cent in Rupee terms over the same period last year. During 2010-11, Foreign Institutional Investors (FIIs) made record investments of Rs. 1, 46,438 crore in the Indian market (equities and debt combined) surpassing the previous high of 2009-10 net investments of Rs. 1, 42,658crore. This reflects their confidence in Indian securities market and better growth potential of Indian Securities Market.

Installable Software Based Stock Trading Terminals

These trading environments require software to be installed on investor's computer. This software is provided by the stock broker. This software requires high speed internet connection. These kind of trading terminals are used by high volume intraday equity traders.

- Orders send directly to stock exchanges rather than stock broker. This makes order execution very fast.
- It provides almost each and every information which is required to a trader on a single screen including stock market charts, live data, alerts, stock market news etc.

Web (Internet) Based Trading Applications

This kind of trading environments doesn't require any additional software installation. They are like other internal websites which investor can access from around the world through normal internet connection such as:

- Real time stock trading without calling or visiting broker's office.
- Display real line market watch, historical data, graphs etc. Investment in IPOs, mutual funds and bonds.
- Check the trading history: demat account balance and bank account balance at any time.
- Provide online tools like market watch, graphs and recommendations to do analysis of stocks.
- Place offline orders, for buying or selling stocks.
- Set alert to inform you certain activity on the stock through email or sms. Customer service- through email or chat.

CONCLUSION

- Companies come to the stock market in a variety of different ways and for a variety of reasons.
- As a private investor, you can sometimes get an allocation of newly-issued shares, but often the issue will be confined to institutional investors. With internet shares, and the movement towards direct online IPOs, this may change for the better.
- Most of the time you will be trading in a company's ordinary shares on the secondary market.
- Companies issue other types of share - notably preference shares, convertibles, and warrants - and even if you don't own them, they may have an effect on your dividend entitlement if they dilute earnings.
- A scrip issue is designed to improve marketability of ordinary shares, and does not dilute your ownership.
- A rights issue is designed to raise more money for the company, and existing shareholders will be invited to buy first. You have a choice about whether to exercise your rights, but if you do not, your ownership may be diluted.

CONSERVATION OF BIO-DIVERSITY IN INDIA

- SIDDHANT NARAYAN & DASARI NIKHIL CHOWDARY

ABSTRACT

Bio-Diversity we know it means restoration, protection and management to achieve sustainable benefits for the present and future generations. This research paper aims to tell about the importance, the major threats and challenges, the legislature and executive measures for conservation of Bio-Diversity in India, the Role of Judiciary and the suggestions for the Government.

CHAPTER-1
INTRODUCTION

Today, we know that human beings are the most important species on the planet earth. The growing of science and technology, human beings are becoming more and more powerful, because of the growing needs of human beings, natural resources are depleting.[356] They want the land because of which deforestation, bio-diversity loss and changes in the ecosystem are some of the demand that is increasing in humans. After all this conservation of Bio-Diversity came into picture. It basically means conservation, restoration, protection and management of Bio-Diversity to achieve sustainable benefits for present and future generations.

The main objectives of conservation of Bio-Diversity is:

- To protect and preserve the species.
- To ensure sustainable management of the eco-system.
- Restoration and prevention of ecological processes and life support system.

[356] S. Priyadarshi, Bio-Diversity Conservation in India, Your Articles Library (Oct.1, 2020, 9:56 AM), https://www.yourarticlelibrary.com/essay/biodiversity-conservation-in-india/42781

The Bio-Diversity is important for three main and most important reasons: -

1. For the protection of wildlife and keeping it for future generations, so that they do not become a distant memory.

2. To protect the earth from the harm that is caused due to human activities.

3. The most important reason for the protection of human health so as to prevent the emergence of new diseases and for the production of medicines that we rely upon. [357]

CHAPTER-2
INDIA'S BIO-DIVERSITY: MAJOR THREATS AND CHALLENGES

Bio-Diversity has always been there and threat to this diversity has been mostly related with humans and with natural resources. The threats for loss of Bio-Diversity is listed below: -

1) Increasing Human Population

Increase in the human population is main cause of Bio-diversity loss in India. Deforestation, poaching, pollution, land use/ cover changes are some of the issues that arise due to the increasing population leading to loss of bio-diversity.

Human population is increasing at a rapid rate, and at such large scale that the other species are not able to keep up with them. The use of fuel, fodder, natural landscapes for agriculture which eventually leads to loss of Bio-Diversity.

[357] 3 Reasons why conservation is important, Pure Leisure (Oct. 1, 2020, 9.59 AM), https://www.pure-leisure.co.uk/3-reasons-why-conservation-is-so-important/

2) Deforestation and fragmentation

These are considered to the main causes of bio-diversity in India. Deforestation is of two types: Conversion of forest land for other land uses and decrease in the tree's due to the cutting of selective tree species.

Fragmentation is a process where the land is divided into parts that increases the problem. The fragments prevent the natural migration of species which lead to starvation and degradation of the habitats.

3) Increasing use of natural resources

The need for wild plants and animals is important for survival of human beings. When the population was not much in earlier times then people used primitive methods, people could harvest plants and animals in a sustainable manner.

Now as human population is increasing at a rapid rate, there has been an increase in the number of killing animals. This leading increase in the human population has led to almost complete depletion of large animals.

4) Change in Climate

Change in the climate is one of the reasons behind the loss of genes, species and critical ecosystems services.

5) Natural Calamities

Natural calamities like flood, cyclones, landslides etc. are some of the reasons for the loss bio-diversity in India.

6) Energy Resources

The use of various forms of energy like fossil fuel (crude oil, coal and natural gas), biomass energy, nuclear energy etc. have direct impact on the biodiversity. Development and utilization of these fossil fuel tends to change the climate and with growth in human population it tends to have loss in bio-diversity. Development of hydroelectricity makes water storage necessary in highlands, due to which large areas under forests and grasslands are submerged under water.[358]

CHAPTER-3

[359]LEGISLATIVE AND EXECUTIVE MEASURES FOR CONSERVATION OF BIODIVERSITY IN INDIA

The requirement for protection of natural resources and their sustainable use has been clearly depicted in the Indian Constitutional Framework. The part IVA of the constitution, specifically Article 51 A – Fundamental Duties binds each and every citizen of the country to protect and improve the natural resources and environment such as fresh water bodies, lakes, forests, wildlife, all the flora and fauna. Article 48A- Directive principles of state policies specify the state's role in protecting the natural resources and environment.

[358] Ajit Medhekar, Causes of Bio-Diversity Loss in India, Biology discussion (Oct. 1, 2020, 1:10 PM), https://www.biologydiscussion.com/biodiversity/7-causes-of-biodiversity-loss-in-india-explained/4497#:~:text=Major%20threats%20to%20biodiversity%20not,erosion%20or%20loss%20of%20biodiversity.

[359] Vaish Associates Advocates, Environment Laws in India, Mondaq (Aug. 29, 2020, 10:04 AM), https://www.mondaq.com/india/waste-management/624836/environment-laws-in-india#:~:text=Some%20of%20the%20important%20legislations,Control%20of%20Pollution)%20Act%2C%201974

Various environmental protection laws existed even before the country got its independence. Notwithstanding, the genuine push for placing in power a very much created system came simply after the UN Conference on the Human Environment (Stockholm, 1972). After the Stockholm Conference, the National Council for Environmental Policy and Planning was set up in 1972 inside the Department of Science and Technology to set up an administrative body to take care of nature related issues. This Council later advanced into Ministry of Environment and Forests (MoEF).

MoEF was set up in 1985, which today is the apex managerial body in the nation for controlling and guaranteeing ecological protection and sets out the lawful and administrative system for the equivalent. Since the 1970s, various condition enactments have been set up. The MoEF and the pollution control boards ("CPCB", i.e., Central Pollution Control Board and "SPCBs", i.e., State Pollution Control Boards) together structure the administrative and regulatory center of the sector.

ACTS INTRODUCED FOR PROTECTION OF ENVIRONMENT IN INDIA:

1)The National Green Tribunal Act, 2010

2)The Air (Prevention and Control of Pollution) Act, 1981

3)The Water (Prevention and Control of Pollution) Act, 1974

4)The Environment Protection Act, 1986

5)The Hazardous Waste Management Regulations, and so on.

[360]The National Green Tribunal Act 2010:

The National Green Tribunal Act, 2010 (No. 19 of 2010) (NGT Act) has been introduced with the objectives to provide for establishment of the National Green Tribunal (NGT) for the effective and speedy disposal of cases relating to environmental protection and conservation of forests and other natural resources and enforcing any legal right relating to environment

[360] The National Green Tribunal Act 2010, (Aug. 30, 2020, 11:00 AM) Green Tribunal, https://greentribunal.gov.in/sites/default/files/act_rules/National_Green_Tribunal_Act,_2010.pdf

and giving relief and compensation for damages to persons and property and for connected maters.

The Act received its approval from the President of India on June 2, 2010, and was enforced by the Central Government vide Notification no. S.O. 2569(E) dated October 18, 2010, with effect from October 18, 2010. The Act foresees establishment of NGT in order to deal with all environmental laws relating to air and water pollution, the Environment Protection Act, the Forest Conservation Act and the Biodiversity Act as have been placed in Schedule I of the NGT Act.

The Air (Prevention and Control of Pollution) Act, 1981:

The Air (Prevention and Control of Pollution) Act, 1981 (the "Air Act") is enacted to provide for the prevention, control and abatement of air pollution and for the establishment of Boards at the Central and State levels so as to maintain the integrity and enforce the law.

To counter the issues related with air contamination, certain air quality norms were set up under the Air Act. The Air Act looks to prevent air contamination by disallowing the utilization of polluting fuels and substances, as by controlling machines that cause air contamination. The Air Act enables the State Government, after counsel with the SPCBs, to pronounce any region or territories inside the Sate as air contamination control zone or regions. Under the Act, building up or working any modern plant in the contamination control zone requires assent from SPCBs. SPCBs are additionally expected to test the air in air contamination control territories, investigate contamination control gear, and assembling measures.

[361]The Water (Prevention and Control of Pollution) Act, 1974:

The Water Prevention and Control of Pollution Act, 1974 (the "Water Act") has been sanctioned to accommodate the anticipation and control of water contamination and to keep up or reestablish healthiness of water in the nation. It further accommodates the foundation of

[361] Hspcb, THE WATER (PREVENTION & CONTROL OF POLLUTION) ACT, 1974 (Sep 1, 2020), HSPCB, https://hspcb.gov.in/Water%20Act,%201974%20Relevant%20provisions.pdf

Boards for the counteraction and control of water contamination so as to do the aforementioned purposes. The Water Act precludes the release of contaminations into water bodies past a given norm, and sets down punishments for rebelliousness. At the Center, the Water Act has set up the CPCB which sets down norms for the anticipation and control of water contamination. At the State level, SPCBs work under the course of the CPCB and the State Government.

Further, the Water (Prevention and Control of Pollution) Cess Act was enacted in 1977 to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. This cess is collected with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974. The Act was last amended in 2003.

[362]The Environment Protection Act, 1986:

The Environment Protection Act, 1986 (The earth Act") accommodates the assurance and improvement of condition. The Environment Protection Act sets up the structure for considering, arranging and executing long haul necessities of ecological security and setting out an arrangement of rapid and satisfactory reaction to circumstances compromising nature. It is an umbrella enactment intended to give a structure to the coordination of focal and state specialists built up under the Water Act, 1974 and the Air Act. The expression "condition" is perceived in an extremely wide term under s 2(a) of the Environment Act. It incorporates water, air and land just as the interrelationship which exists between water, air and land, and individuals, other living animals, plants, miniature life forms and property.

Under the Environment Act, the Central Government is enabled to take measures important to ensure and improve the nature of condition by setting guidelines for emanations and releases of contamination in the air by any individual carrying on an industry or movement; controlling the area of industries. Every now and then, the Central Government issues warnings under the

[362] India Code, The Environment Protection Act, 1986, (Sep 1, 2020), India Code, https://www.indiacode.nic.in/bitstream/123456789/4316/1/ep_act_1986.pdf

Environment Act for the assurance of naturally sensitive regions or issues rules for issues under the Environment Act.

In case of any non-compliance with the Environment Act, or of the rules or directions under the said Act, the violator will be punished with imprisonment up to five years or with fine up to Rs 1,00,000, or with both. In case of continuation of such violation, an additional fine of up to Rs 5,000 for every day during which such contravention continues after the conviction for the first such failure or contravention, will be imposed. Further, if the violation continues after a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years.

HAZARDOUS WASTES MANAGEMENT REGULATIONS:

Hazardous waste means any waste which maybe physical, chemical, reactive, toxic, flammable, explosive or corrosive in nature, and causes danger or is likely to cause danger to health or environment, whether alone or when in contact with other wastes or substances.

There are several laws that directly or indirectly deal with hazardous waste management. Some of the concerned legislations are the Factories Act, 1948, the Public Liability Insurance Act, 1991, the National Environment Tribunal Act, 1995 and rules and notifications under the Environmental Act. Some of the rules dealing with hazardous waste management are as follows:

1)[363]Hazardous Wastes (Management, Handling and Transboundary) Rules, 2008, introduced regulations for manufacture, storage and import of hazardous chemicals and for management of hazardous wastes.

2)[364]Biomedical Waste (Management and Handling) Rules, 1998, were introduced for proper disposal, segregation, transport, etc., of infectious wastes.

[363] NPCB, Hazardous Wastes (Management, Handling and Transboundary) Rules, 2008, NPCB, (Sep 2, 2020), https://npcb.nagaland.gov.in/wp-content/uploads/2016/03/HWM-2008.pdf

[364] DHSR, Biomedical Waste (Management and Handling) Rules, 1998, DHSR (Sep 2, 2020), http://dhsr.hp.gov.in/sites/default/files/Biomedical_waste.pdf

3)**Municipal Solid Wastes (Management and Handling) Rules, 2000**, aim at enabling municipalities to dispose municipal solid waste in a scientific manner.

4)E - Waste (Management and Handling) Rules, 2011 have been informed on May 1, 2011 and happened from May 1, 2012, with essential goal to lessen the utilization of dangerous substances in electrical and electronic gear by determining limit for utilization of unsafe material and to channelize the e-squander created in the nation for earth sound reusing. The Rules apply to each maker, shopper or mass customer, assortment focus, dismantler and recycler of e-squander engaged with the production, deal, buy and handling of electrical and electronic gear or segments as point by point in the Rules.

5) Batteries (Management and Handling) Rules, 2001 arrangement with the correct and powerful administration and treatment of lead corrosive batteries squander. The Act requires all producers, constructing agents, re-conditioners, merchants, sellers, salespeople, mass customers, buyers, associated with make, preparing, deal, buy and utilization of batteries or segments thereof, to conform to the arrangements of Batteries (Management and Handling) Rules, 2001.

There are others laws protecting environment in India:

1)[365]The Wildlife Protection Act, 1972: This act was enacted for effectively protecting the wild life of the country and to control poaching, smuggling and illegal trade in wildlife and its components. This Act was amended in January 2003, punishment and penalty for the offences under the Act have been made stricter. The Ministry has proposed further amendments in the law by introducing more stringent measures to strengthen the Act. The objective is to provide protection to the listed endangered flora and fauna and ecologically important areas.

[365] Legislative Gov, The Wildlife Protection Act, 1972, Legislative Gov, (Sep 3, 2020),

2)The Forest Conservation Act, 1980: This act was enacted to help protect the country's forests and groves. It strictly controls and regulates the use of forest land for non-forest purposes without the prior approval of Central Government.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, recognizes the rights of Scheduled Tribes and other traditional forest dwellers over the forest areas inhabited by them and provides a basic structure for the same.

3)Public Liability Insurance Act, 1991: This was enacted with the motto to provide for compensation to victims of an accident which happened as a result of handling any hazardous substance. This Act applies to all owners associated with the production or handling of any hazardous chemicals.

4)Coastal Regulation Zone Notification:

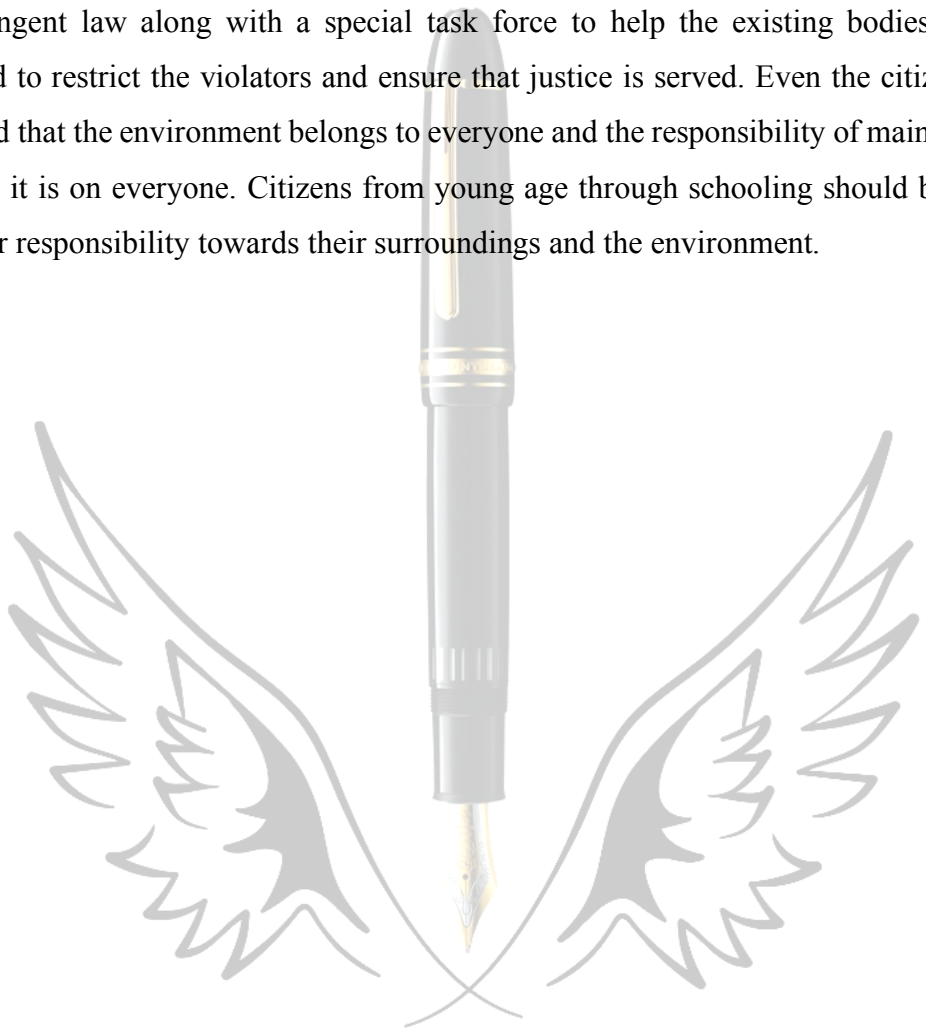
The Ministry of Environment and Forests issued the Coastal Regulation Zone Notification vide Notification no. S O. 19(E), dated January 06, 2011 with the motto to ensure livelihood and security to the fishing communities and other local communities living in the coastal areas, to conserve and protect coastal stretches and to promote development in a sustainable manner based on scientific principles, taking into consideration the dangers of natural hazards in the coastal areas and sea level rise due to global warming.

CHAPTER-4

CONCLUSION

A clean and safe environment is a basic right for every citizen of the country and is also their responsibility. Various laws have been introduced by the government of India in order to protect the rich diversity of flora and fauna. There were laws for environmental protection even pre-independence but they were made much stringent after the introduction of constitution. However sometimes these laws are violated by MNC ‘s and other small companies, thus a

much stringent law along with a special task force to help the existing bodies should be introduced to restrict the violators and ensure that justice is served. Even the citizens should understand that the environment belongs to everyone and the responsibility of maintaining and protecting it is on everyone. Citizens from young age through schooling should be educated about their responsibility towards their surroundings and the environment.



WHITE COLLAR CRIME

- YASHWANTH A S

INTRODUCTION:

The most influential criminologist of the 20th century and also a sociologist, Edwin Hardin Sutherland, for the primary time in 1939, defined white collar crimes as "crimes committed by people that enjoy the high social rank, great repute, and respectability in their occupation". The five attributes of the given definition are:

- It could be a crime.
- That is committed by a very important person of the corporate.
- Who enjoys a high social station within the company?
- And has committed it within the course of his profession or occupation.
- There could also be a violation of trust.

Related to the company sector, white collar crimes are defined as non-violent crimes, generally committed by businessmen and government professionals. In simple words, crimes committed by folks that acquire important positions during a company are called white collar crimes. Statistics are showed that 4,000 crores worth of trading was dispensed using duplicate PAN cards. Maharashtra showed a rapid increase within the number of online cases with 999 cases being registered. The report also mentioned that around 3.2 million people suffered a loss due to the stealing of their card details from the YES Bank ATMs which were administered by Hitachi Payment Services.

Advancement in commerce and technology has invited unprecedented growth in one in every of the kinds of white collar crimes, referred to as cybercrime. Cybercrimes are increasing because there's only a bit risk of being caught or apprehended. India's rank on Transparency International's corruption perception index (CPI) has improved over the years. Almost all societies have certain norms, beliefs, customs and traditions which are implicitly

accepted by its members as conducive to their wellbeing and healthy development. Infringement of those cherished norms and customs condemned as anti-social behaviour. Thus, many writers have defined 'crime' as anti-social, immoral or sinful behaviour. However, in line with the legal definition crime is any type of conduct which is asserted to be socially harmful during a state and intrinsically forbidden by law under pain of some punishment. Crime is defined as an act or omission, which is unlawful, illegal or infringes provisions of law and which is punishable by law.

The generalization of such phenomena and also the incorporation of facts concerning illegal behaviour of the upper classes into theories of crime causation could be a product of recent effort. The speeches and publications of Edwin Sutherland culminating in his 1949 study not only gave the name "white-collar" to the current new area, but stimulated widespread research and, not incidentally, caused a fur or in criminological circles concerning the appropriateness of this idea as a legitimate focus of research and theory. White-collar criminality has become a world phenomenon with the advance of commerce and technology. Like every other country, India is equally in grip of white-collar criminality. The explanation for an unlimited increase in white-collar crime in recent decades is to be found within the fast developing economy and industrial growth of this developing country. Sutherland's influence is clearly evident in federal legal code today. Many federal offenses prosecuted under the label of "white-collar crime" are regulatory, instead of true crimes, requiring no proof of criminal intent. Under this conception of "crime," white-collar offenders could also be sent to prison for harmless mistakes or accidents. The result is the criminalization of productive social and economic conduct, not thanks to its wrongful nature but thanks to fidelity to an extended is credited class-based view of society.

CHRONOLOGICAL BACKGROUND:

Popularly called the Carrier's case, it absolutely was the primary case of white collar crimes which was documented within the year 1473 in England. During this particular case, the agent was entrusted with the responsibility of the principal to move wool from one place to a

different. The agent was found guilty of stealing a number of this wool. English Court after this case adopted the doctrine of 'breaking the bulk' which implies that the Bailee who was given the possession of products tried to interrupt it open and misappropriate the contents. However, the expansion of commercial capitalism has taken criminality to the subsequent level. The bourgeois institution dwells into committing such crimes out of greed and misery to possess and to be able to attain more. In 1890 in America, the Sherman Antitrust Act was passed, which made monopolistic practices illegal. The penalties imposed on offenders of white collar crimes in Great Britain and also the adoption of competition or antitrust laws by other countries weren't as sweeping because the Sherman Act.

Classification of White Collar Crimes:

Theoretically, various white-collar crimes may broadly be classified into four major categories as follows:-

• Ad hoc crimes: they're also called personal crimes because during this category of white-collar crimes, the offender pursues his own individual objective having no face to face contact with the victim. Hacking on computers, master card frauds non-payment, etc. are common types of impromptu white-collar crimes.

• White-collar crimes involving a breach of trust or breach of religion bestowed by a personal or institution on the perpetrator. Trading, financial embezzlements, misuse of funds fictitious payrolls, etc. are common illustrations of this sort of white-collar crimes.

• Individuals occupying high positions or status who commit crime attendant, and in furtherance of their organizational operations constitute this category of white-collar crimes. People occupying high position commit such crime, not because it's their central purpose, but because they individually find a chance within the course of their employment to earn quick money or gain undue advantages by using their power or influence. Example of such crimes is fraudulent doctor's bill claims, fake educational institutions, issuance of pretend mark sheet/certificates, etc.

• White-collar crimes may be committed as an element of the business itself. Violation of

trademarks or copyrights, law or competition law, etc. the violation of name and other corporate crimes are white-collar crimes of this sort.

TYPES OF WHITE COLLAR CRIME IN INDIA:

• Bank Fraud: To interact in an act or pattern of activity where the aim is to defraud a bank of funds.

• Blackmail: A requirement for money or other consideration under threat to try and do bodily harm, to injure property, to accuse of against the law, or to show secrets.

• Cellular Phone Fraud: The unauthorized use, tampering, or manipulation of a mobile phone or service. this could be accomplished by either use of a stolen phone, or where an actor signs up for service under false identification or where the actor clones a sound electronic serial number (ESN) by using an ESN reader and reprograms another cell phone with a sound ESN number.

• Computer Fraud: Where computer hackers steal information sources contained on computers such as: bank information, credit cards, and proprietary information.

• Counterfeiting: Occurs when someone copies or imitates an item without having been authorized to try and do so and passes the copy off for the real or original item. Counterfeiting is most frequently related to money however also can be related to designer clothing, handbags and watches.

• Legal Profession: The instances of fabricating false evidence, engaging professional witness, violating ethical standards of bar and dilatory tactics in collusion with the ministerial staff of the courts are a number of the common practices which are, truly speaking, the white collar crimes very often practiced by the legal practitioners.

• Money Laundering: The investment or transfer of cash from racketeering, drug transactions or other embezzlement schemes so it appears that its original source either cannot be traced or is legitimate.

White Collar Crime in India:

White collar criminality has become a world phenomenon with the advance of commerce and technology. Like every other country, India is equally within the grip of white collar criminality. The recent developments in information technology, particularly during the closing years of the 20th century, have added new dimensions to white collar criminality. There has been unprecedented growth of a brand new type of computer dominated white collar crimes which are commonly called as cybercrimes. These crimes became a matter of worldwide concern and a challenge for the enforcement agencies within the new millennium. Due to the precise nature of those crimes, they'll be committed anonymously and much removed from the victims without physical presence.

Further, cyber-criminals have a serious advantage: they will use engineering to inflict damage without the danger of being apprehended or caught. It's been predicted that there would be simultaneous increase in cyber-crimes with the rise in new internet sites. The areas plagued by cyber-crimes are banking and financial institutions, energy and telecommunication services, transportation, business; industries etc. in India.

Law Commission 47th Report:

In its 47th report, the Law Commission said that since a company doesn't have a organic structure, no pain will be inflicted upon them as a punishment. A company doesn't have a mind which will be accused of guilty intent and so new penalties should be created to punish them for his or her illegal and wrongful acts. The Commission found that the penalty for the corporation would be to experience a curtailment in their reputation. Which they be called a disgrace. The commission said that not only the administrators or managers should be punished but the corporation similarly. The people should be able to link the offence with the name of the corporation also.

India could be a country that's faced with various problems on a significant level, like that of starvation, illiteracy and health issues on an outsized scale. Moreover, India is that the second largest populated country within the world, and administration of the mass becomes an issue. Despite having stringent laws, the administration often fails in implementing them, as keeping

control such an oversized number of individuals becomes difficult. In such circumstances it's very likely for white collar crimes to flourish.

The Report by Santhanam Committee:

The Santhanam Committee was the primary body to acknowledge the intensity of the crimes committed by the people of high social standards, which was acknowledged by the 29th report of the Law Commission released in 1972. Santhanam Committee in its report on the Prevention of Corruption has talked about the explanations behind the prevalence of white collar crimes in India.

The technological advancement and development in scientific temperament has been assigned because the major reason behind the expansion of white collar crimes. These large numbers with advanced disposition is being regulated by only a couple of elite who form the monopoly. The requirement of this technologically and scientifically advanced era is to form these masses adhere to the principles laid down by the elites to conduct them. Those that fail to try to so finish up becoming the offender of white collar crimes.

APPLICATION OF MEN'S REA:

Socio economic offences includes to grasp the extent to which the practice is justified, to understand the extent the judicial practice of provision into statutes coping with such offences and knowledge of most appropriate and justified response to such offences. Also, there are number of issues involved in socio economic offences- vicarious liability, situational liability in statutory offences etc. There are number of offences within the Indian legal code (IPC), that there's no element of provision required. Such offences mainly include national interest but even then it's observed that the courts apply malice aforethought in such cases furthermore. In a developing country like India, constraints of economic resources have necessitated the imposition of certain social controls to push planned development with the enforcements of the provisions of licensing, controls, regulation, laws and policies etc.

In certain cases it's must to impose the provisions strictly and impose the liabilities to the offenders for disobeying and violation of the standards of behaviour. However the imposition of such strictness altogether the cases regardless of its individuality is questioned on grounds of justification. The criminalization of productive social and economic conduct is seen from the national and societal interest.

Some Cases of White Collar Crime:

• **Exempt Securities Scam:**

Exempt securities scam refers to the selling of securities by an organization without filing a prospectus. This offence is committed against wealthy folks that are persuaded to speculate in an exceedingly business.

The offenders pitch a fraudulent investment as exempt securities. A fake promise is formed to the victim that the business would go public. These scams involves a good risk and cause you to lose all of your investments.

It was in 1992 when an Indian stockbroker, Harshad Mehta, was held guilty with the maximum amount as 27 charges released against him for having committed various financial crimes under the securities scam of 1992. Harshad had been accumulating huge wealth through massive stock manipulation facilitated by the employment of faux or worthless bank receipts. The Bombay judicature, in addition because the Supreme Court of India, held him guilty for being an element of an enormous financial scandal involving 4999 crore rupees. This scandal had taken place against the largest exchange that's the Bombay exchange (BSE). After having lived in jail for 9 years Harshad Mehta dies in 2001.

• **Double Dip Scam:**

The one that has already been a victim of a scam is probably going to become a victim again. And when it happens, it's called a double dip scam. The offender within the first instance can store the data of the victims and pass away to other such offenders, thereby assisting them in

making money fraudulently. The case may additionally be that the primary offender calls you again and you pour out your grudge from the primary fraud that you just became a victim of. The scammer then offers you to recover your money reciprocally for a tiny low fee.

One would again lose one's money during this way.

Unveiling the double dip scam going down within political parties, the India Today has published a report back in 2016 when politicians were found to possess converted back money into white money for 40% commission. The political parties were found double-dipping as brokers for undeclared wealth. There politicians wont to do the business of converting black money into white in around their offices in Ghaziabad, Noida and Delhi. Such varieties of situation where politicians take pleasure in wrong practices are quite common for the politicians enjoy powerful position which comes with various powers, they have an inclination to govern things and make illegal profits, which are basically the cash purported to be used for public welfare. And ultimately it's the people who suffers the foremost.

MEASURES TO BE TAKEN:

• The top investigating agencies of the country just like the Central Bureau of Investigation, the Enforcement Directorate, the Income-tax Department, The Directorate of Revenue Intelligence and therefore the Customs Department, needs strengthening, by way of implementing strong regulating policies. The Central Vigilance Commission should monitor the working of the officials sitting at top positions and also cross-check their works, so on ensure transparency within the system.

• As the strategy of commission of such white collar crimes is advancing, so should the training of the investigating officials. It often happens that ageing officers are well experienced to know the character and techniques, but don't seem to be ready to utilise the technology for tracking the suspect. This happens thanks to lack of coaching. So, every investigating officer must be trained in such a way that, regardless of how complicated the case is, they'd be able to easily resolve it.

• To uproot the existence of such crimes, it's important to incorporate strict laws into the system.

Less amount of fine and shorter period of imprisonment makes it very casual for the offenders to commit such crimes.

• Fast track courts and tribunals should be set all told the parts of the country for the first disposal of those cases.

• The tribunal should be given the ability to fine or imprison someone who has been held guilty. Such measures would lower the rates of occurrence of white collar crimes.

• The electronic and medium should be utilized within the right thanks to spread awareness about white collar crimes. The final people must bear in mind of such crimes which they're happening everywhere, from a little cafe to big multinational companies.

Also, they have to bear in mind of the remedies they might seek just in case they become victim to such crimes.

• Stringent laws and hefty fine and long run imprisonment should be to the offenders for committing such crimes. And for this to happen, the Indian legal code, 1860 should be amended and include provisions for the white collar crimes. For instance, the IPC could have a separate chapter addressing white collar crimes.

• The government may establish a separate body which might verify the matter of crimes and criminality prevailing within the country. The independent body may be named because the National Crime Commission. Since their entire work would be related only to the crimes and would be an independent body, it could work more efficiently towards reducing criminality within the country.

CONCLUSION:

To prevent wrongdoing, you would like to grasp issues that will be developing below the surface. Yet it's often difficult to understand what varieties of problems are slipping through compliance processes (like hotlines) and other internal controls. The survey data can help company's better estimate the particular amount of misconduct within the organization—and the quantity that's not being reported. Ultimately, this type of modelling will help senior leaders get a clearer picture of the integrity issues and violations that otherwise would probably never

come to their attention. White collar crimes have two surprising features, first, that they're non-violent crimes, though the criminals have the tendency to realize control or have a way of entitlement, and, second, that they're committed by people within the higher profession. However, these crimes also are committed by poorly paid underlings, although the mastermind behind the commission of such crime can be an expensive person enjoying the next status in his occupation. White collar crimes are often committed due to peer pressure or are obsessed with the culture of the corporate. As our society is growing towards modernity and therefore the world is experiencing new technological advancement, the speed of crime is additionally increasing at a faster rate. Particularly the expansion in white collar crimes has been enormous. From the health profession to educational institutions, these crimes are being committed everywhere. The cases of online fraud also are increasing at an alarming rate. India, as a developing nation, has faced difficulties in leading its economy towards growth due to these crimes generally and corruption specifically.

The government must make laws that are strict enough to scale back the commission of such crimes and also the system should be specified not only there exist laws giving strict punishment to the accused but also eliminate maximum cases in a very moment. If not done so then people will soon lose complete faith within the system, as these crimes are committed by folks that should act as a job model for the society.

INTERNATIONAL ARBITRATION: A DISPUTE RESOLUTION MECHANISM FOR INTERNATIONAL FINANCIAL DISPUTES

- SHELAL LODHI RAJPUT & YASHIKA GUPTA

INTRODUCTION:

Financial Institutions are corporations which serve as intermediaries of financial markets, dealing with financial and monetary transactions such as deposits, investments, loans and currency exchange. This includes financial sectors like banks, insurance companies, trust companies etc. For Example: EXIM Bank, SIDBI, NABARD are a few financial institutions in India.

To steer away from the tedious and traditional process of litigation, many international traders, institutions including financial institution are tilting towards international arbitration which provides an ameliorating method of dispute resolution. Arbitration is a process where the disputing parties consensually appoint a neutral third party, called 'arbitrator', who acts as a judge and renders decision after detailed hearing. In India the process is governed by Arbitration and Conciliation Act, 1996 which is based on UNCITRAL Model Law.

HISTORICAL BACKGROUND

Historically, financial or banking institutions were more resistant towards arbitration. But in recent years and in particular after the world economic crisis of 2008, arbitration is being favored by these institutions as a means of alternative dispute resolution. The crisis culminated with the collapse of Lehmen Brothers in September 2008 followed by Wall Street bailout, along with denting in subprime lending market in US. 2008 financial crisis brought an unprecedented wave of claims by and against financial institutions, as well as among financial institutions. It was known to be the worst recession before coronavirus recession, in the world economy.

In order to explore the relevance of international arbitration in resolving disputes of financial sector, the author has dealt with the advantages, disadvantages and the role of arbitration in financial transactions. The author has also discussed brief about some reports and guidelines in this context. Lastly, the author has concluded while highlighting the impact of current pandemic situation on international arbitration.

BENEFITS OF ARBITRATION

"Arbitration is justice blended with charity."

-Nachman of Breslov

Some of the leading features of arbitration transpired to be advantageous for resolution of finance and banking disputes. Following are those features:

1. **ENFORCEABILITY:** Article 3 of the New York Convention 1958 states that *"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."* As of now, there are 164 countries that are signatory to the convention, thereby making the enforceability of foreign awards feasible and economic in most countries, unlike judicial decree.
2. **EXPERTISE OF ARBITRATORS:** In litigation the judge may or may not have an expertise in the financial sector, while in arbitration the parties are allowed to choose arbitrator(s) who is well equipped to the knowledge of the question in dispute. This would help in efficient adjudication of the case. As the number of cross border financial transaction grows more effective, neutral and well organized system of dispute resolution is needed. Hence, lack of expertise and confidence is another reason why national courts are not favored over arbitration.

3. **PROCEDURAL FLEXIBILITY:** Most of the financial institution would want a methodical and defined procedure for their corporate transactions. Hence, procedural flexibility, including selection of arbitrator, venue, seat of arbitration, language, presentation of evidence etc, is another feature of arbitration which entices financial institutions.
4. **FINALITY OF AWARD:** Article V of New York Convention and Section 5 of Arbitration and Conciliation Act 1956 limits the scope of judicial intervention in arbitration. Also, the Amendment act of 2015 limited the power of appeal. Nonetheless, there are provisions available in Indian Law for challenging arbitral award, but they are restricted to domestic cases. According to ICC Commission Report on 'Financial Institutions and International Arbitration', a financial institution expressed that if the losing party has access to appeal mechanism would rob the process of its finality. However, some financial institutions desire to include appeal mechanism as a part of arbitration.
5. **CONFIDENTIALITY:** Confidentiality is frequently considered one of the determining factors for financial institutions for preferring arbitration to litigation which is usually open for public. Albeit its advantages, it is considered undesirable for certain banking activities which requires high level of standardization. Also, lack of binding precedents due to lack of transparency is considered as a disadvantage in arbitration.

LIMITATIONS OF ARBITRATION

1. **SUMMARY JUDGEMENTS:** Summary Judgment procedure (where the claimant party can ask for a quick judgment without full hearing and allows speedy disposition of case in open and shut cases) is often available in litigation unlike in arbitration. However, international arbitration tribunals, such as SIAC, are progressively moving to do away with this drawback.

2. **CONSOLIDATION:** Usually judicial hearings allow addition of a third party to litigate for effective and expedient disposition of cases. This feature of litigation helps in delivering consistent judgments; moreover it is sometimes economical as well. Absence of this attribute is another disadvantage of arbitration. However, Article 10 of ICC Rules allows consolidation in arbitration process.
3. **EXPENSIVE:** Though arbitration is usually cost effective, it can sometimes be as costly as litigation. The fees of lawyers, advisors, and tribunal and sometimes fees of arbitral institution can turn out to be dear.
4. **INTERIM MEASURES:** As per ICC report, some financial institutions prefer those places as venue where they could easily access courts for getting interim measures. The limited power of arbitration institutions for grating interim reliefs causes financial institutions to turn towards litigation for dispute resolution. However, some international institutions such as ICC are now providing emergency arbitrators to consider applications for interim relief.

INTERNATIONAL ARBITRATION IN PARTICULAR FINANCIAL TRANSACTIONS

- **DERIVATIVES:** Traditionally, London and New York were the most preferred court jurisdictions for agreements concerning derivatives, however, now arbitration is seen as a reliable alternative. Common disputes arising out of derivatives include: (1)the valuation of the derivative position is wrong; (2)the financial institution mis-sold the final product to the customer; (3)financial institution breached the duty to care it owed to the customer; (4)that the transactions are invalid and unenforceable under the specific provisions; (5)the financial institution made a misrepresentation.
- **PROJECT FINANCE:** Project Finance has become an attractive technique for financing infrastructure projects in developing countries in last few years. This raises various legal issues with it. Sponsors of the projects prefer international

arbitration and by far have been successful in dealing with these issues. International Arbitration is considered effective in situations, like (1) loan documentation where currency risk exists, so long as the debt suit is inside the regulating country; (2) where the borrower's default is the direct result of off-taker's failure to honor its obligations, where the off-taker is the government.

- **INVESTMENT ARBITRATION:** The important questions that arises investment arbitration is whether debt claims qualify as an investment or not. An example where such issue arose is in the case of *Fedax v. Venezula* and *Ablacat v. Argentina* , the case was discussed under Article 25 of ICSID Convention. According to ICC Report 'Investment treaties typically refer to banking and financial instruments, and their increasing relevance appears to be one of the most important causes of the growing interest in arbitration in banking circles.'
- **MERGERS AND ACQUISITIONS (M&A):** M&A often involves complex issues, including (1) determining whether the condition precedent has been fulfilled or not; (2) disputes related to price adjustments; (3) disputes arising during interim period, etc. These issues require high level of confidentiality and hence attract international arbitration for resolution.

REPORTS AND GUILDELINES

- **P.R.I.M.E FINANCE ARBITRATION RULES:** P.R.I.M.E Finance (Panel of Recognized International Market Experts in Finance) Arbitration Rules are parallel to revised rules (in 2010) of UNCITRAL Model Law and in light of Cooperation agreement between PCA and P.R.I.M.E Finance. It is based in The Hague. The rules are especially drafted for cross border financial disputes and the institution has extensive panel of arbitrators, expert in financial sector. The award delivered by the institution is enforceable in more than 140 jurisdictions. P.R.I.M.E Finance also allows disclosure of awards in public, if both the parties agree to do so. This

initiatives and provisions of P.R.I.M.E have attracted international financial institutions towards arbitration of resolving disputes.

- **ISDA ARBITRATION GUIDE 2013:** The 2013 ISDA Arbitration Guide provides guidance on the use of an arbitration clause with an ISDA Master Agreement and includes a range of "ISDAfied" model arbitration clauses for various arbitration institutions and seats around the globe. It has been recently updated in 2018. This demonstrates the growing interest of financial institutions in arbitration.
- **ICC REPORT ON FINANCIAL INSTITUTION AND INTERNATIONAL ARBITRATION:** This is an exhaustive report released by International Chamber of Commerce, which analyzed the behavior of financial institution towards arbitration. It report is based on two years of surveying financial institutions round the globe, moreover it collected data from about 13 arbitral institutions. Hence, making the report a coherent and reliable source. It lays down advantages and disadvantages of international arbitration as perceived by different financial institutions. In this survey it was found out that approximately 69% of the banking and finance sector shows strong support for arbitration, however, less than one-fourth of general counsel listed arbitration as their most preferred option.

CONCLUSION

International Arbitration is highly flourishing mechanism of dispute resolution in recent times. Financial institutions neglect International arbitration is a myth now, as they have been increasingly adopting arbitration since 2008. The spurt in the cases related to finance registered in various international arbitration institutions has confirmed it. Financial institutions seem to get benefitted with the increased use of arbitration.

The Global financial crisis of 2020 triggered by coronavirus may lead to increased financial disputes once the health crisis is abated. This indicates towards growing number of international financial disputes in international arbitration tribunals along with some challenges for the arbitration centers.

The highly contagious nature of the virus has forced the governments of almost all the countries to restrict every kind of movement. In this situation, like courts, various arbitration institutions are also conducting virtual hearings. In addition to the shift to online platforms, the tribunals have, on a case-by-case basis and subject to the circumstances of any particular dispute, adjourned some hearings for a later date or have extended timelines for written submissions or witness statements. While the institutions must meet some key requirements for virtual hearings, for instance, accessibility of online platforms to the parties, using reliable technology, etc. New technologies might substitute physical hearings for atleast a few years. Nonetheless, in my opinion amicable settlements involving mediation might win the race in this unprecedented situation.

However, to maximize the value of arbitration, financial institutions must seek timely recommendations and advice of various experts, committees etc throughout the process.

"The development of doctrine of international arbitration, considered from the standpoint of its ultimate benefits to the human race, is the most vital movement of modern times."

-William Howard Taft

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SOLUTION TO FINANCIAL CRISIS- THE INSOLVENCY AND BANKRUPTCY CODE

- MEDHIYAA RAMESH

1.INTRODUTION

Everything is about giving and receiving. Don't expect to receive, if you're not willing to give is a very well-known quote and is often used. However, it is more applicable and truer the other way around. It is very difficult to trust the people around you and share valuable things, information etc. But when it is done, the reciprocation is very important, and the receiver must do what he's ought to do. It's no different with money and lending, especially money being a very essential matter. When money is being lent to an organisation or company, it is the due responsibility of the company to return the money back with interest irrespective of whether the lending authority is a financial, or an operational one. But the real question is, what happens when the company is not able to return the money back? when the company is incapable of affording that money, when the company has drowned into insolvency?

This is when, Corporate Insolvency Resolution comes into play. This mechanism is solely for reviving the corporate debtor and the company from its state of insolvency at the same time, provides for a means for the creditors to get the money back. When a default has been committed by a debtor and is incapable of returning the money back owing to insolvency , either the debtor himself or the financial/operational creditors can step in and apply for corporate insolvency Resolution process to the National Company Law Tribunal as according to section 7,8, and 10 .

Section 7 of the insolvency and bankruptcy Code indicates the basic procedure and permission for creditors to initiate the process when default occurs.

"7(1) A financial creditor either by himself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor

before the Adjudicating Authority when a default has occurred."[366] While section 8 and 10 deal with the same but with reference to an operational creditor and financial creditor respectively. The conditions to be satisfied for evoking this provision are three in number. The first criteria are the default and the threshold limit for the default. If there is a default and if the maximum limit for the threshold has exceeded, then an application for the insolvency resolution can be filed before the National Corporate Law Tribunal by the financial creditors. In Bank of India vs Tirupati Infra Projects[367] limited the only condition that was asked for was the presence of a default in the case. However, the judgement for the same is still pending and has not been finalised yet.

The next one is pertaining to the completeness and accuracy of the application. Many times, applications have been rejected owing to this reason. This was the reason for the application even in the landmark case, Era Infra Engineering Ltd. V. Prideco Commercial Projects Pvt Ltd[368].

The third condition is the mandatory provision of a notice to the Debtor. It is also the duty of the NCLT to provide a notice to the other party irrespective of whether a notice has been sent by the party filing an application.

2. CHARACTERISTIC FEATURES

- The process can be initiated by any of the stakeholders, be it the creditor, debtor, or the employee for the betterment of their capacities and provision of security.
- If the application for the procedure is approved, the committee of creditors through the IRP (Interim Resolution Professional) can take full control over the management, dispute resolution and affairs of the company. It can make informed decisions regarding the revival or liquidation of the company.

[366] Section 7 of the Insolvency and Bankruptcy Code 2016
[367] NCLT, New Delhi Principal Bench C.P.No.IB- 104(PB)/201
[368] Company Appeals (AT) (Ins) 31 of 2017

- In case of revival, the COC can look out for companies/ firms that would be interested in buying this particular company.
- This mechanism is an appropriate, beneficial solution for both the debtor and the creditor.
- Companies or debtors whose management has been transferred figure out a way for repayment out of fear of losing the company and assets.
- The creditors being bestowed with control over management and affairs of the debtor company, establishes power and provides them with a sense of security.

3.PROCEEDURE

- The National Company Law Tribunal has the complete right and freedom to accept, acknowledge or reject the application within 14 days of submission of the application by the creditors and a notice must be provided to the parties at least 7 prior to the next step in case of rejection to provide the parties a chance to rectify the same. In finquest Financial solutions Pvt Ltd v. Ballarpur Industries Ltd[369] the application was set aside and rejected owing to mistakes and an opportunity for rectification was allowed.

- The National Company Law tribunal shall then declare moratorium and appoint an interim resolution professional for a duration not exceeding thirty days from the date of appointment and also allow for public announcement that includes the declaration of the name and address of the corporate debtor, the authority to which the corporate debtor has registered.

[369] Sec 7 C.P.(IB) No.2915 of 2019

- The National Company Law Tribunal shall appoint a committee of creditors only for this purpose. The committee shall be constituted only once, solely for this purpose. The board of Directors, and other members in the company shall lose their powers during that particular Period.

- The decisions shall be taken by the committee should and will be based on votes, a minimum of 75% of voting share of financial creditor is a mandate.

- An Information Memorandum is prepared by the resolution professional for devising a resolution plan by the Resolution professional. After the submission of the resolution plan, the application must be approved by 75% of the financial creditors.

- The plan is then finally submitted by the resolution professional to the National Company Law Tribunal which has the complete discretion to either accept or reject the application. If the application is accepted, then it comes into force immediately and is binding on all the creditors, shareholders, members, etc.

4)THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT ACT 2020)

The Act that was instituted in 2016 gave a detailed view about the insolvency procedure/mechanism and was very appropriate /effective in its enforcement and functioning. However, there were a few faults and defects in the mechanism that had to be rectified, a few additions had to be made to bring about a complete, error- free mechanism. The Amendment includes having a minimum threshold for incorporating the resolution process, appointment and functioning of interim/ resolution professional, rights of the corporate debtor, parties related to the corporate debtor, duration of the entire proceeding etc. The amendment was done with the sole objective of easing the financial stress and burden on the financial debtors and creditors in the current scenario with the COVID-19 and the lockdown restrictions.

4.1 PRE- AMENDMENT AND POST AMENDMENT ANALYSIS

1) EXTENSION OF TIMELINE - Previously, the entire insolvency resolution process was spanned over 330 days, but with the new amendment and the changes made to it, a total period of
280days and nothing more than that is allowed for the completion of the entire process.

2)INSTITUTION OF THE RESOLUTION PROFESSIONAL- Section 5(12)of the Act defined the "insolvency commencement date" as the date of admission of an application for initiating corporate insolvency resolution process by the adjudicating Authority under sections 7, 9 or section 10 as the case may be "[370]

"insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be" and the same subclause was struck down. Thus section 6 that has no meaning without section 5(1) has become redundant. This means that the resolution professional is brought into force on the day the resolution process is instituted.

3)RIGHTS OF THE CORPORATE DEBTOR- The Amendment made it very clear and specific that a corporate debtor can initiate insolvency resolution proceedings on another corporate debtor if need be. This particular right was very vague and unclear until recently. Furthermore, any licenses, trademarks provided by the government shall be terminated owing to insolvency but the default in the payment of the current dues for the use of such grants should not be stopped.

4)MINIMUM THRESHOLD: The Amendment held that if an allottee wants to initiate a resolution , then the rule is that , a minimum of 100 allottees of the same construction project must file an application together or 10% of the total allottees of that particular project. This was enforced with an objective to reduce the number of cases filed by homebuyers and real-

[370] Section 5(1) of the Insolvency and Bankruptcy Code 2016

estate owners. The previous Act made it possible for any person to file charges or initiate proceedings against any financial debtor who committed any default in payment amounting to 1 Lakh or more. This thus led to the sharp increase in the cases. A total of about 1828 had been filed by a single real estate owner[371].The major motive of this provision was to restrict the number of cases and to ease the dispute resolution with respect to real estate issues.

5)COMMITTEE OF FINANCIAL CREDITORS – The committee comprising of financial creditors should not include creditors related to the corporate debtor or creditors in close connection to the corporate debtor in any manner whatsoever This is to eradicate nepotism ,bias prejudice and pave way for a fair decision making process.

6)APPOINTMENT OF THE RESOLUTION PROCESS-The responsibility of the resolution professional extends and continues until the resolution plan is approved by the court or in case of winding up, until a liquidator has been appointed. Pre-Amendment, the resolution professional's job and duties ended when the plan was approved by the adjudicating authority indeed. The resolution professional was no longer called upon.

7)PROTECTION AND IMMUNITY AGAINST OFFENCES – The offences committed by the corporate debtor right before the insolvency process will not be taken into account and the corporate debtors have protection against the same. This was introduced as 32A in the act. The Amendment also restricts charges with regards to immoveable property, confiscation, seizure etc.

5) IMPACT OF THE AMENDMENT

*The dispute resolution process will become more streamlined and organised because of the admission of the resolution professional on the day of the commencement of the insolvency professional. The duration of the entire process would also be drastically reduced since the resolution professional would be a fixed body that will be functioning more efficiently with time limits and deadlines.

[371]Dr Binoy J.Kattadayil, Insolvency and Bankruptcy Code (Amendment Act) 2020 Analysis, International Journal of Educational Multidisciplinary Research .

*The reduction in the total duration of the process i.e. 280 days has made the procedure a time bound one, making it more beneficial and convenient for the creditors. This reduction can help the creditors in moving past the issue as quickly as possible.

*The clearance provided to a corporate debtor to initiate a resolution procedure against another corporate debtor lightened the burden on the creditors and debtors. It also helped address the main issue, hindrance and resolve that.

* The number of cases filed for initiating the insolvency procedure would dip, but on the other hand, cases for mediators and advocates would increase by a great margin.

*The adjudication and the justice giving mechanism will function more smoothly and fairly, eliminating the elements of bias, prejudice and favouritism with the induction and application of the selection criteria for the appointment of the financial creditors committee.

The above mentioned are some of the impacts that the amendment will have henceforth, and it is best to avoid these effects by taking appropriate measures prior to the insolvency.

6) CONCLUSION

All the drawbacks and flaws in the act was rightly noticed and rectified through an amendment of the Act. The amendment brought about a lot of changes to protect the interests of the financial creditors, but not particularly the financial debtors. Measures to save and stop the financial debtors from drowning into a financial crisis could be introduced and exercised. Further, reduction in time – span of the entire process could also be done while maintaining efficiency. Another major change would include reducing the number of allotees required to file an application. Hundred allotees or applicants are a little too much and almost impossible to gather for the mere purpose of filing an application.

These small yet powerful, practical and operational reforms coupled with its successful implementation would make the whole process nothing less than perfect!

A CRITICAL ANALYSIS OF THE AYODHYA VERDICT ON THE ESSENTIALITY OF MOSQUES

- **NABEELA JAMIL**

In what can be seen as a blot on the Indian democracy —our politics since decades has been revolving around the issue of Babri Masjid-Ram Janambhumi. In September, 2018, Supreme Court took decision on another controversial Ayodhya related matter—the question of revisiting *Dr. Ismail Faruqui's* case.

THE ISMAIL FARUQUI'S CASE: BACKGROUND

The case in question, *Dr. M. Ismail Faruqui and Ors.* Vs. *Union of India and Ors*[372] goes back to 1994 when Dr. Ismail Faruqui filed a petition in the Supreme Court challenging the validity of land acquisition by the Centre in and around Babri Masjid under the Acquisition of Certain Area at Ayodhya (ACAA) Act, 1993, on the ground of immunity of mosques from the acquisition, freedom of religion and right to practice of the religion. S. 7 of the ACAA Act was questioned on the ground that it placed restriction to pray in the disputed area on Muslims while permitting the other community to pray.[373]

In a majority judgement, a five-judge bench decided in favour of the land acquisition. The Constitution Bench held that places of religious worship like mosques, churches, temples *et cetera* can be acquired by the State under its sovereign power of acquisition. It had ruled that acquisition *per se* does not violate Articles 25 and 26 and that the offering of prayer at every location would not be an essential or integral part of a religious practice unless the place has a particular importance or significance for that religion so as to form an essential or integral part thereof. The part of the judgment that caused controversy was the observation made in Para 82 of the Judgment where the Court observed, "A mosque is not an essential part of the practice

[372] AIR 1995 SC 605.
[373] A. Faizur Rahman, *The essentiality of mosques*, THE HINDU, Aug. 07, 2018.

of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere, even in open."

In a dissenting opinion which struck down the entire ACAA Act as unconstitutional, Justice S.P. Bharucha and Justice A.M. Ahmadi placing reliance on Article 15 of the Constitution that debars the state from discriminating against any citizen on the ground of religion highlighting S. 7(2) of the Act observed, "(it) perpetuates the performance of *puja* on the disputed site. No account is taken of the fact that the structure thereon had been destroyed in a most reprehensible act. The perpetrators of this deed struck not only against a place of worship but at the principles of secularism, democracy and the rule of law..." Justice Bharucha observed, "the land acquisition around Babri Masjid in the name of public order was impermissible under constitutional principle of secularism as devotees of the majority religion used force to storm the place of worship thereby disrupting the public order".

THE ISSUE

In 2010, deciding upon the main dispute, the three-judges bench of Allahabad High Court in its judgment divided the disputed land into three parts—one for Ram Lalla—the deity, another for Nirmohi Akhara—the Hindu party and third for the Muslim party—U.P. Sunni Central Waqf Board. Consequently, appeal against the judgment was filed in the Supreme Court. During the proceedings, reliance was placed on the controversial observation of the *Ismail Faruqui's* judgment. The contention that as Muslims can perform prayer anywhere and as the Babri Masjid is of no particular significance to the Muslim community, *Mecca* and *Medina* being called the only places of religious significance to Muslims—the disputed land must be given to the Hindu community because of its particular significance. This reference to the verdict of *Ismail Faruqui* was criticized by the Muslim litigants and it was contended that the *Ismail Faruqui's* judgment also played a significant role in the disputed land being divided into three parts by the Allahabad high court judgment. Thereupon, demand for reconsideration of

the *Ismail Faruqui* judgment by a larger bench reached before a five-judges bench of the Supreme Court.[374]

THE APEX COURT'S VERDICT

The primary contention of the appellants to pray for reconsideration was that the essential practice of a religion requires a detailed examination and the *Ismail Faruqui's* case did not refer to any material and is devoid of any detailed examination before making the controversial observations in Paragraphs 78 and 82. It was submitted that in the *Ismail Faruqui's* case the bench was of lesser strength to that of the seven judges bench that laid down the broad test of essentiality in *The Commissioner, Hindu Religious Endowments, Madras* Vs. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[375] and hence sufficient grounds for reconsideration arise. In *Shirur Mutt* case, it was held that the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. This view was expanded further by the Supreme Court in *Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami* Vs. *The State of Tamil Nadu*[376] where it was observed that the essential practices are the practices which regarded by the community as a part of its religion.

Nonetheless, the Hon'ble Supreme Court by a 2:1 majority refused to refer the 1994 judgment for re-consideration to a larger bench. The majority judgment which was delivered by Justice Ashok Bhushan for himself and on behalf of the outgoing Chief Justice of India Justice Dipak Misra denied reconsideration of the *Ismail Faruqui's* judgment. It held that the questionable observations made in the *Ismail Faruqui's* case were strictly in regard to the acquisition of land and is not relevant to the title suit of appeal against the Allahabad High Court judgment. It was further held that the power of acquisition by the state is subject to the

[374] *M. Siddiq* Versus *Mahant Suresh Das & Others* (Civil Appeal No(s). 1086 610867 OF 2010).
[375] 1954 SCR 1005.
[376] AIR 1972 SC 1586.

freedom of religion and right to practice of the religion and hence it can only be restricted where the religious place is of a particular significance and forms an essential part of the practice of such religion. "The use of "particular significance" in *Ismail Faruqui* judgment is only in the context of immunity from acquisition", the Court observed.

Justice Abdul Nazeer in his dissenting opinion left subsequent question of laws, like whether an essential practice can simply be decided by the *ipse dixit* of the court without a detailed examination of the beliefs and practice of the faith in question and whether the test for determining of essential practice is both essentiality and integrality, to be referred to a larger bench. The questions as to whether Article 25 of the constitution only protect belief and practices of particular significance and question of comparative significance of religious practices were also raised. Justice Nazeer also agreed to the contentions of the Muslim litigants that the questionable observations in *Ismail Faruqui* had influenced the 2010 Allahabad High Court verdict.

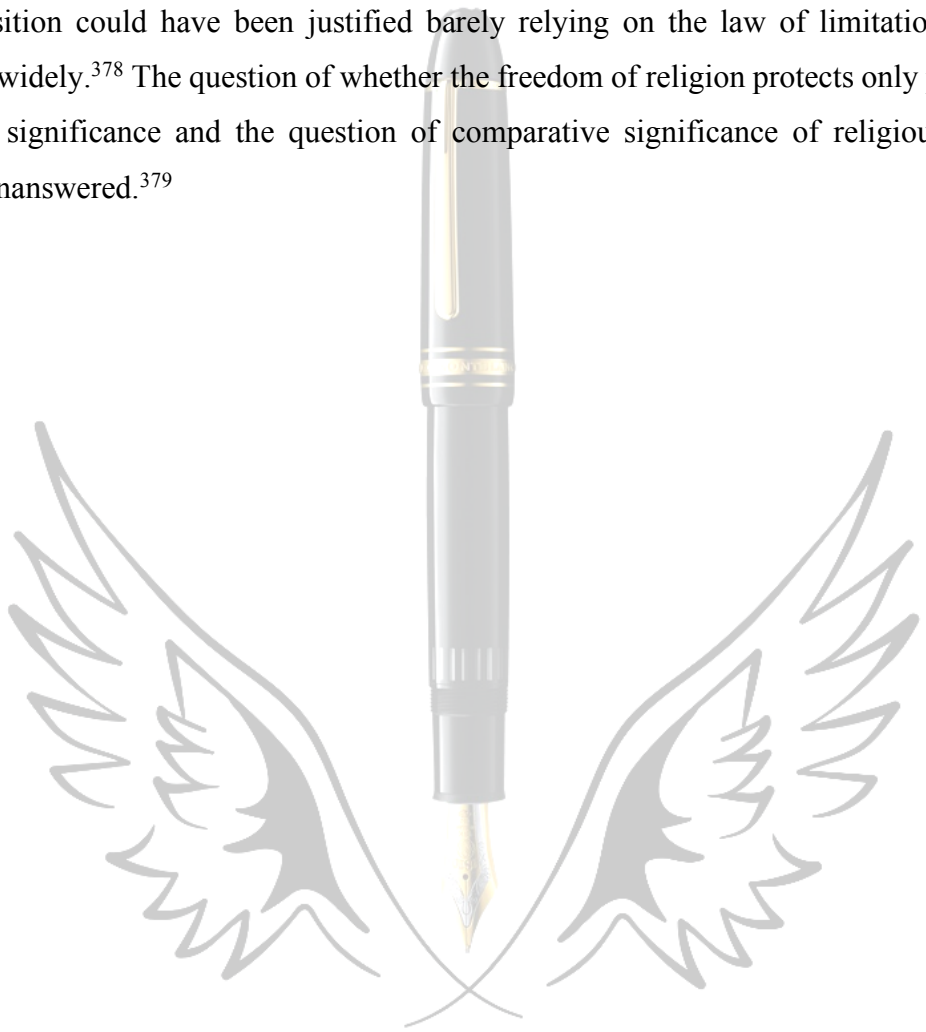
NO CLOSURE

The controversial observations in the *Faruqui* judgment, though held to be interpreted strictly in relation to land acquisition, have been called in negation of a secular republic's mandate to preserve the sanctity of places of worship as it might fuel other Ayodhya like matters in future.

In circumstances where *namaz* in public spaces is being banned[377], the question of the essentiality of mosques and whether the essential religious practice can be determined without detailed examination of religious tenets, as happened in the *Faruqui's* verdict, becomes more significant. Moreover, the venturing of Court unnecessarily into theological territory where

[377] Police ban namaz on roads across Uttar Pradesh, HINDUSTAN TIMES, Aug. 14, 2019, *available at:* https://www.hindustantimes.com/cities/police-ban-namazon-roads-across-uttar-pradesh/story-sYMb1A4iZHD43Y65bwz1vL.html (Last Visited on Oct. 15, 2020).

the acquisition could have been justified barely relying on the law of limitation has been criticized widely.[378] The question of whether the freedom of religion protects only practices of particular significance and the question of comparative significance of religious practices remains unanswered.[379]



[378] *supra* note 2.
[379] Faizan Mustafa, *Ayodhya case: Understanding the 'essentiality doctrine' and its implications*, THE INDIAN EXPRESS, Sep. 28, 2018.

FORCE MAJEURE V. FRUSTRATION OF CONTRACT

- AKANSHA SINGH

ABSTRACT

The article discusses 'Force Majeure' and 'Frustration of Contract' the provisions relating to both of them, the emergence and origin of these rules as well as their differences and whether they fit in the current scenario or not. The object of this article is to provide a better understanding on these topics, hence most of the parts are explained. Given the seriousness and uncommon nature of events, which is causing issues currently due to COVID-19 for companies, businesses and everyone, all the problems they are going through because of unlike kind of events, this article talks about whether a particular event falls under Force Majeure or under frustration of contract and if they don't, then the reasons are provided for it.

Keywords : Unforeseeable, Events, Contract, Impossibility

INTRODUCTION

The literal meaning of 'Force Majeure' is greater force it has been adapted from french language and it's basically an act of God for which no person can be held liable , it is inevitable in nature and also that it cannot prevented from happening , such events where there's no possibility left to stop it from taking place for instance tornado , cyclone and other natural disasters as well as hurricane or armed conflict.

On what grounds we can say that a particular event is an act of God as mentioned below

1. Unforeseeable
2. Unavoidable
3. Not known to the parties who have been in the contract.

Force Majeure clause if mentioned in the contract of the parties , it protects the party later on from any kind of financial accountability for its failure to carry out contractual obligation , if such an event takes place through the ongoing process of their contract. However when we talk about Indian Contract Act , the Contract Act 1872 doesn't define 'Force Majeure' although it talks about 'Impossible Act' which also means an act not possible to perform due to some inevitable events. However according to Black's Law Force Majeure is "An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g. Floods and hurricanes) and acts of people (e.g. Riots, strikes, and wars) - Also termed force majesture; vis major; superior force (1) Superior or irresistible force. (2) an event or effect that cannot reasonably be anticipated or controlled."[380]

But if Indian parties want Force Majeure Clause in their agreement , they can add that rule , but it can't be implied , it has to be expressly mentioned in the contract.

Now , if we look at the current scenario, the very first question that arises is **'Is COVID-19 (SARS-CoV-2) will be covered under this Force Majeure'?**

Force Majeure hardly covers pandemic. It covers natural disasters , however finance minister of India clearly addressed people about the relationship between Force Majeure and COVID-19 he clarified that the disturbance in supply chain is because of Coronavirus and hence it certifies as a Force Majeure. Therefore businesses and companies call on Force Majeure clause.

FORCE MAJEURE CLAUSE WOULD ALSO NEED TO PROVE:

That the Coronavirus pandemic has disturbed the execution of the contract as identified by the pertinent clause in the contract. In this situation, the wordings of particular clause is considered significant. The Force Majeure relevant clause describes the threshold. If the performance of

[380]https://www.lawyered.in/legal-disrupt/articles/force-majeure-and-frustration-contract/

the contract is disturbed due to supervening impossibility, (supervening conditions) the Force Majeure can be claimed successfully, but if the Supervening Impossibility put a stop to the execution of the contract as 'onerous' then usually it depends on the wordings.

That the Coronavirus pandemic was an efficient reason for the non - performance of the contract. However, it is relevant to point out, if there's an alternative way to execute the contract then, the contract should be performed no matter how onerous or costly it is.

OUTCOME OF FORCE MAJEURE

1. Resolution probability high (parties won't face many problems)
2. Misuse of 'Force Majeure' : It's a possibility that businesses or companies might use this pandemic to skip their payment. However there's also a probability of companies facing fake allegations that they in the name of pandemic, purposefully escaped performance of payment or performing contract.

WHAT IF THE CONTRACT DOESN'T INCLUDE FORCE MAJEURE CLAUSE?

In such cases Section 56 of Indian Contract Act 1872, comes into picture. Section 56 talks about **'Frustration of Contract'**. The supervening impossibility or doctrine of frustration was at first became familiar with the English Courts in the matter of **Taylor vs. Caldwell in 1863**. The contract of frustration means when parties made a contract but later on it becomes impossible to execute such contract due to such conditions where the performance of contract is beyond the control.[381] It is an unforeseeable event and either party is not liable for the non-execution of the contract. Hence these contracts are known as Frustration of Contract.

Taylor vs. Caldwell

[381]https://www.mondaq.com/india/contracts-and-commercial-law/654334/frustration-of-contract

Music Hall & Surrey Gardens was rented by Caldwell & Bishop to Taylor & Lewis, the music hall was destroyed due to fire and no party was responsible for the destruction of the hall. The court said that 'the defendant wasn't aware of the circumstances that took place and the act was unforeseeable, so the defendant is discharged from any kind of accountability of non-execution of contract and hence the contract is frustrated and his failure to carry out the contract isn't breach of contract. Also the court said that the thing on which the contract was based on didn't exist anymore, so it can't be executed anymore'.[382]

PROBLEMS THAT OCCUR DURING ESTABLISHMENT OF FRUSTRATION OF CONTRACT

It is actually very difficult to prove that a particular contract is frustrated, there's always a lesser hope of resolution in situations relating to frustration of contract. Even in severe matters, it is very difficult to constitute frustration. The supervening impossibility is applied within narrow interpretations. For the party to claim frustration, they are required to show that in the specific contract, they never agreed to be accountable for the events which are universally different circumstances.[383] The court doesn't think in its discretion to certify the terms and conditions of the contract, because at the time of making of the contract such circumstances never existed and it was unforeseeable. According to the experts it is easy to prove force majeure then that a contract is frustrated.

"SECTION 56 IN THE INDIAN CONTRACT ACT, 1872"

"56. Agreement to do impossible act. - An agreement to do an act impossible in itself is void. Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the

[382]https://www.google.com/amp/s/www.casebriefs.com/blog/law/commercial-law/commercial-law-keyed-to-lopucki/performance/taylor-v-caldwell-2/
[383]https://www.claytonutz.com/knowledge/2005/november/what-is-a-frustrated-contract

promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

"Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

Illustrations

(a) "A agrees with B to discover treasure by magic. The agreement is void:"

(b) "A and B contract to marry each other. Before the time fixed for the marriage,. A goes mad. The contract becomes void."

(c) "A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy, A must make compensation to B for the loss caused to her by the non-performance of his promise."

(d) "A contracts to take in cargo for B at a foreign port. A‟s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared."

(e) "A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void."[384]

DISTINCTION BETWEEN FORCE MAJEURE AND FRUSTRATION OF CONTRACT

When we talk about doctrine of frustration, probability of either party to execute its obligations within contract is related to the happening of a situation/event subsequent to the performance of a contract, the particular event wasn't contemplated during the performance of the contract

[384]http://legislative.gov.in/actsofparliamentfromtheyear/indian-contract-act-1872

where as in matters relating to Force Majeure, parties decide to add Force Majeure Clause in the contract prior to the performance of a contract, which would help parties later to deal with unforeseeable events. To invoke and apply doctrine of frustrations requires the whole subject matter so that the court can understand the reason to destroy a particular contract and can come up with a decision to free the parties of their accountability. Doctrine of Supervening Impossibility renders the contract and contractual obligations void. "Frustration of a Contract is a test dehors of contractual provisions and is the end result of events arising after the contract was executed."[385] Whereas force majeure is contractual obligation added to the documents of a specific contract contemplating an event and the outcome is such that there can be a situation that results in non happening of execution of contractual obligations, hence the rights of parties until such circumstances continues and doesn't absolutely justify parties from executing their contractual obligations. Usually, where Force Majeure circumstances is not specifically mentioned under contract the affected party can go for the doctrine of supervening impossibility, if the matter is opposite and the particular circumstance is covered as force majeure event within the contract, doctrine of frustration can't be automatically claimed.

FORCE MAJEURE AND CORONAVIRUS

Looking at the wordings of the provision relating to Force Majeure the party seeking to claim a force majeure will have to prove :

The Coronavirus pandemic and the outcome of it comes under the scope of force majeure clause, reason being that it is expressed referring or that the pandemic or may be because the pandemic is more similar language in force majeure clause.

[385]https://www.google.com/amp/s/m.economictimes.com/small-biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/amp_articleshow/75152196.cms

Given the seriousness and uncommon nature of current events, it might be usual 'sweep up' language and it'll cover the pandemic, except the language used in the remaining part of the force majeure clause is administered at a distinction type of circumstance altogether.[386]

Coronavirus affected the execution of the contract to that extent in a specified way by the force majeure. For instance "*If a force majeure clause stipulates that it will be triggered if a force majeure prevents performance of the contract, this is likely to require that performance is physically or legally impossible. By contrast, a requirement that the specified event should hinder or delay performance of the contract sets a lower bar. In either case, the fact that it has become more expensive to perform a contract is, without more, unlikely to be sufficient.*
It has taken reasonable steps to mitigate the impact of Covid-19 on performance of the contract. In particular, a problem caused by Covid-19 is unlikely to be beyond the control of a party if it could have taken steps to resolve it."[387]

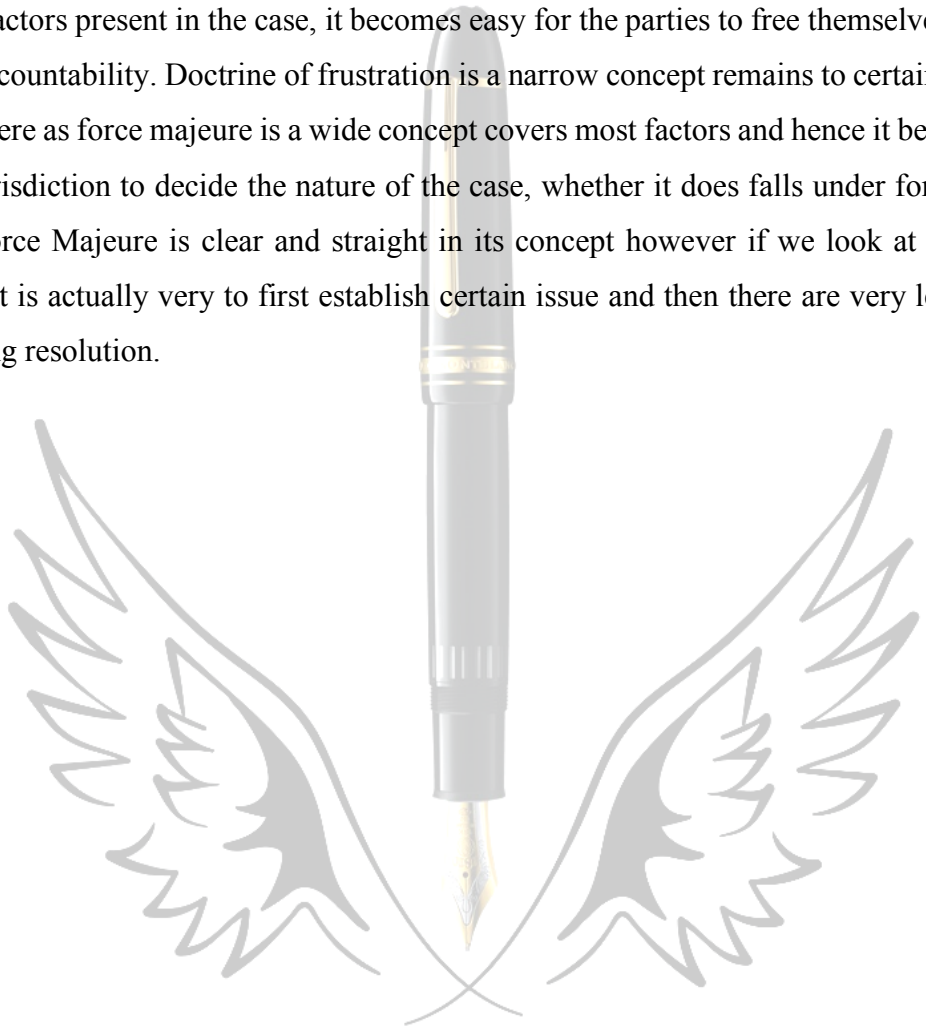
Coronavirus was the only reason of the relevant party(s) failure to execute the contract. If there is any other reason for the non execution of the contract and it doesn't fall under the force majeure clause, this rule is not going to apply in such cases. Similarly a force majeure clause is not going to be triggered if coronavirus has prevented single method of executing the contract however alternative ways of execution still exist. [388]

CONCLUSION

The Force Majeure is more safe provision than doctrine of frustration, because it is very difficult to establish a frustration in a certain case in courts where as if you have all the force

[386]https://www.macfarlanes.com/what-we-think/in-depth/2020/force-majeure-and-frustration-in-the-context-of-covid-19/
[387]https://www.macfarlanes.com/what-we-think/in-depth/2020/force-majeure-and-frustration-in-the-context-of-covid-19/
[388]https://www.macfarlanes.com/what-we-think/in-depth/2020/force-majeure-and-frustration-in-the-context-of-covid-19

majeure factors present in the case, it becomes easy for the parties to free themselves from any kind of accountability. Doctrine of frustration is a narrow concept remains to certain portion of events where as force majeure is a wide concept covers most factors and hence it becomes easy for the jurisdiction to decide the nature of the case, whether it does falls under force majeure or not. Force Majeure is clear and straight in its concept however if we look at frustrations contract, it is actually very to first establish certain issue and then there are very less chances of claiming resolution.



VIABILITY OF THE CODE ON SOCIAL SECURITY, 2020

- MADHAVI TEWATIA

ABSTRACT

The government of India, recently rolled out the Code on Social Security, 2020. The Second National Commission on Labour, in its recommendation had mooted the idea to be bring the laws relating to social security in one single umbrella. The new Code seeks to establish Social Security Organisations, which would encompass representatives from the labour as well as government sector. The Code also lays rest to legal conundrums by lucidly laying down events in which a worker under the Act would be entitled to receive compensation. It also brings the unroganised sector under the purview of law. Such a paradigm shift entails huge transitional costs as well as qualified workforce. Through this research paper, it is the endeavor of the author to bring to the fore the viability of this new legislation. The research has been conducted through secondary materials such as legislative texts, legislative reports, conventions, books and articles

Keywords: Code; Compensation; Labour, representation; Social; Security;

I. INTRODUCTION:_ Social Security is a basic human right which encompasses a series of benefits for its beneficiary. These benefits exist in the form of healthcare support, education support, maternity relief, pension plans to name a few. It is a measure of pre-empting the workers from falling into poverty by providing them with financial and health care assistance[389]. A Nation State is bound by its international as well as domestic obligations to provide a robust Social Security framework, the same is underscored by international

[389]International Labour Standards on Social security, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm , (last accessed on 2nd October, 2020 at 10:00hrs).

covenants,[390] the constitution[391], national reports[392], as well as by the International Labour Organisation[393] ("**ILO**").

The objective of the Code on Social Security, 2020 (hereinafter "**The Code**") is twofold: Amalgamation & Consolidation. To reduce the redundancy in law, the Code has amalgamated nine legislations and to prevent any overlapping effect it has consolidated those laws into a Code. The Labour law is a benevolent piece of legislation, therefore it was incumbent on the legislators to retain the basic principles of welfare and benefits.[394]

II. MAJOR CHANGES IN THE CODE

- **The definition of social security:** connotes a series of measures for protection to be afforded to employees, unorganised workers, gig workers and platform workers to ensure access to health care and to provide income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner by means of rights conferred on them and schemes framed, under this Code.[395]
- **Consolidated Statutes:** The Code will subsume the following nine acts namely:

(i) The Employees' Compensation Act, 1923;
(ii) The Employees' State Insurance Act, 1948;
(iii) The Employees Provident Fund and Miscellaneous Provisions Act, 1952;
(iv) The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959;
(v) The Maternity Benefit Act, 1961;
(vi) The Payment of Gratuity Act, 1972;
(vii) The Cine Workers Welfare Fund Act, 1981;

[390] The Universal Declaration of Human Rights, 1948; International Covenant on Economic, Social and Cultural Rights, 1976
[391] Article 39, The Constitution of India, 1950.
[392] Second National Commission on Labour, 1999.
[393] Equal Remuneration Convention, 1951.
[394] Ninth Report, Parliament Standing Committee,2020.
[395] Section 2(78), The code on Social Security, 2020.

(viii) The Building and Other Construction Workers Welfare Cess Act, 1996; and

(ix) The Unorganised Workers' Social Security Act, 2008.

- **Structural changes**: It seeks to set up Social Security Organization's namely

1. **Board of Trustees of The Employee Provident Fund to be known as the Central Board**[396]:

Members:

A member body comprising of 1 chairperson, 1 Vice Chairperson and the Central Provisions Fund Commissioner will be the *ex officio* Chairman. It will have:

- Five officials from the central government
- Maximum 15 representative from states
- 10 representatives from employees of establishment duly appointed by CG
- 10 persons representing the employees in establishment
- Tenure to be prescribed by the Central government

Committees: Power to appoint Executive Committee from amongst the members of the Central Board to assist the Central Board in performance of its functions[397]
notified by CG

Responsibility: Primarily will be responsible to framing pension to following beneficiaries: superannuation, nominee, retirement, permanent total disablement, widow(s).[398]

- Frame Employees' Deposit Linked Insurance Scheme for dispensing life insurance schemes to the persons under this chapter.
- **Setting up of a Provident fund**, wherein the employer's contribution will be 10% of payable wage per employee (hired directly or indirectly), employee's contribution will

[396] Section 4(1)(a), The Code on Social Security, 2020.
[397] Section 4(3), The Code on social Security, 2020.
[398] Section 15, 47, The Code on Social Security, 2020.

be equal or more than the employer's contribution.[399] The employer shall not breach the threshold limit fixed in this section. Any modification on this threshold will be notified by the authority but shall not exceed 12%.

- establish a Pension fund, wherein the Employer will contribute sum not exceeding eight and one-third per cent. of the wages or such per cent. of wages[400] as well contributions by employers specified by the Scheme as well as sums as and when specified by Parliament.
- Deposit-Linked Insurance Fund to be established wherein the employer's contribution will be not exceeding 1% of wages for all such persons for whom he is an employer of.
- Contribution towards administration expenses of the scheme: to be given by the employer not exceeding one fourth of the sum which he is obligated to pay under this clause.

2. **Establishment of Employees' State Insurance Corporation to be called The Corporation**-

A member body comprising of 1 chairperson, 1 Vice Chairperson and the Director General will be the *ex officio* Chairman. It will have:

- One representative from each state and Union Territory
- Ten persons representing employees of establishment and ten persons representing employers of establishments
- Two representatives from medical profession
- Legislators: two from Sabha, one from Rajya Sabha
- **Committees:** Standing committee to carry out the work of the Corporation, submit cases for consideration and all other matters connected herewith. A

[399] Section 16(1)(a), The Code on Social Security, 2020.
[400] Section 16(1)(b), The Code on Social Secrurty,2020

Medical Benefit Committee to assist the corporation and the standing committee

- **Responsibility:** Set up an Employees State Insurance Fund which will be under the administration of the Corporation.

Use of the fund : for medical treatment and attendance to insured persons. To establish and maintain hospitals, dispenseries and other related medical faciitly to the insured person, Every employee to be insured. The rate of contribution by each employer and employee will be specified by the govt. Contribution shall fall on the last day of wage period. Benefits: payments in Schedule for a Insured person as per the norms set by the chapter. Scheduled payment to a woman in the event of sickness arising out of pregnancy, confinement, premature birth of the chid, or miscarriage. Disablement dependants eledest surving member of the fam

3. Social Security boards for Unorganised Workers:

i. National Social Security Board for unorganised sector:

Composition of the member body-

- Chairperson: Union minister of Labour and employment
- Vice chairperson: Secretary, Ministry of Labour and Employment
- Director General Labour Welfare, as Member Secretary, *ex officio*
- Forty members appointed in the following manner-

A. Seven representatives of unorganised sector
B. Seven representing of employers of unorganised sector;
C. Seven representing eminent persons from civil society
D. Three parliamentarians: 2 from Lok Sabha, one from Rajya Sabha
E. Ten officers representing central govt. Ministries and Departments
F. Five officers representing the State government
G. One member representing the Union Territories

- It will be responsible for performing recommendatory and advisory function for the kind of schemes by the legislation. It will also be responsible to monitor the welfare schemes.

ii. <u>State Unorganised workers social security board:</u>

Composition of the member body-

- Chairperson: State Minister of Labour and employment as *ex officio*
- Vice chairperson: Principal Secretary/ Secretary (Labour)
- One member from the Central Government representing Union Labour ministry
- Thirty-one State nominated members-
  A. Seven representatives of unorganised sector
  B. Seven representing of employers of unorganised sector
  C. Two members of State Legislative Assembly
  D. Five eminent persons representing Civil society
  E. Ten representative of concerned State Government Departments
  F. Member Secretary as notified by the State
  G. Tenure: three years
  H. Shall meet atleast once a quarter

<u>4. Constitution of State Building Workers' Welfare Boards:</u>

<u>Members:</u>

- One chairperson nominated by State govt.
- Secretary, will be the Chief Executive officer
- One member nominated by Central government
- Maximum fifteen nominated members by the State govt. with a rider: Equal representation of state government, building workers and one woman
- **<u>Functions</u>**: Dispersion of benefits to the beneficiaries

(i) In relation to death and disability

(ii) For people who have attained the age of sixty years

(iii) Premium to Group Insurance Scheme

(iv) Frame educational schemes for children of beneficiaries

(v) Meet medical expenses of major ailments for dependants as well

vi) Frame skills development and awareness schemes

vii) Transit or hostel facility

viii) Other schemes

III. VIABILITY OF THE CODE:

The Code extends its application to both organised and unorganised sector, a feature absent in the erstwhile legislations[401]. It is spread across fourteen chapters covering almost all the aspects as listed other legislations. The Code establishes Social Security Organisations in order to put these sectors into a single unified umbrella. These Organisations functions on the basis of member body system with members and a chairman/ Chief Executive Officer. At the helm of the organisation is the Chairperson who is responsible for proper administration as well implementation of the schemes and members are responsible for putting forward the views of stakeholders. Most of these organisation are present at the State and Central level. Their working mechanism is explicated chapter wise, each dealing with the manner of appointment, resignations, disqualifications of the members. In addition to this, each chapter mandates setting up of a funds to be utilized for the purpose of the scheme. It further lays down the contours of the contribution which is expected from the employer and employees to be paid in furtherance of the scheme.

One of the most important features is that it lays rest to the legal conundrums which were a result of the legislative inconsistencies. For instance, it defines the events when a worker will be deemed to be in the course of employment for the purpose of insurance scheme, a matter

[401] Preamble, The Code on Social Security, 2020.

which was largely left for the courts to decide. It further stipulates the employer to pay the EPF, insurance and other benefits to an indirect employee (hired by a contractor). To maintain balance of interest the employer can recover his dues from the contract pursuant to the specific provision under the applicable chapters. Although the Code confers its applications to a large number of work force, it comes with its own exceptions such as for the EPF it exempts those establishments such as Cooperative societies, or those under State or Central government which have their separate rules. In furtherance of this,

Further, it also has a separate provision to work in tandem with the Insolvency Code, 2016 to enable workers to have a charge on the assets of the establishment and priority payment under the waterfall mechanism. [402] It also has a detailed provision on the employer's insolvency and the rights of the workers under section 87 of the Employees Compensation chapter. Section 109 delineates responsibility of Central and state government to frame schemes on the specific subject matters. The central government schemes maybe wholly or partly funded by the Centre or funded by sources under the CSR. It further, sets up a helpline number to assist in information dissemination, filing, registration of workers and their enrolment. Unorganised workers are required to be registered as per the requirement set out in the section. The National Social Security Board will be the regulator for gig and platform workers. It also established a member body system allowing five representatives from the gig and platform workers to form part of the body.

One of the pitfalls of the regulatory mechanism is that it under represents the industry which it seeks to remedy. As a corollary, a large part of the workforce takes a back seat in terms of representation when compared to that of government representatives. Second, a lot has been left for the governments to frame and specify, it is apparent that the legislators have drafted a basic framework, which leaves the thresholds, rules, regulations and other matters in limbo. Third, this Code was important from the point of view of the unorganised sector. The poor drafting and selective inclusion of the unorganised sector defeats the purpose of this

[402] Section 19, The Code.

codification. Fourth, this transitional shift requires a robust infrastructure and a work force well versed with labour laws. The executive machinery is beset with infrastructural challenges. While there is enough law for everyone, there is not enough money for implementation. For instance, the law under different subject matter establishes various task forces, protection schemes however, these policies do not transform into the real world. Therefore, for the current social security code to be viable it has to ensure swift transition from bureaucracy and a robust infrastructure.

IV. CONCLUSION

The Code on Social Security is a step towards securing equity and ensure transparency by use of technology. Labour law has a ***tripartite character*** which governs the relationship between an employer, employee and the government agencies.[403] The consolidation process is a welcome change since it unifies the law relating to social security in one umbrella. The Code is heralded as a new, organised India, the one compliant with its international obligations. However, a spate of other legislations has brought to the fore, the need for a robust infrastructure and a quality workforce well conversant with the labour law. The need is to address the problems of all the stakeholders coupled with proportionate representation, to make this code viable, otherwise its existence would be *ad nauseam.*

[403] International Labour Organistion: About, , https://www.ilo.org/global/lang--en/index.htm (last visited Oct. 01, 2020).

TORT OF PASSING OFF

- PRAGATI GILDA

ABSTRACT

The object of trade mark is to make the goods of a manufacturer or trader known to the public as his and thereby enable him to secure profit from the reputation which he may build up for his goods by efforts. Protection of trade mark is necessary not only for the trader but also for the benefit of the purchasing public against fraud and misrepresentation. The registration of a trade mark under the Trade Marks Act, 1999 confers a statutory right upon the traders which is far more extensive than common law rights[404] and affords a convenient means of protecting those rights against infringement. Action against infringement of trade mark has been made a statutory right under the above- mentioned act whereas the action against passing off of trade mark has only been recognized by the same act. The researcher aims at analyzing the law relating to passing off of trade marks. It also aims at bringing out or recognizing its want of being a statutory right. The researcher also aims at analyzing the difference between passing off and infringement of trade marks by analyzing the literature and case laws pertaining to the same. The paper will also cover the laws relating to same (passing off and infringement of trade marks).

Key words: Trademarks, action of passing off, infringement of trademarks, misrepresentation, Trade Marks Act 1999, goodwill.

INTRODUCTION

The term passing off is selling one's own goods under the simulation that they are the goods of another man. Passing off occurs when a trader attempts to pass off his goods by misrepresenting them so as to make the consumers believe that the goods are same as that of

[404] In common law, the reputation of a business can be protected by an action of passing off.

another. In simpler words, it occurs when a party presents his goods and services as the goods and services of someone else. For instance, using a mark of 'Colgate' on a tooth paste with a similar get up to pass it off as 'Colgate'.

The substantive law of passing off is based on common law. It is not defined under the Trade Marks Act of 1999. Before the legislation of trade mark, the trade marks were governed by the principles of common law. Currently, the registered trademarks are protected under the said act. However, the unregistered trademarks are also protected as the act provides for an action of passing off remedy.

Passing off is based on the principle that "a man may not sell his own goods by posturing that they are the goods of another man"[405]. The object of the action of passing off is to protect the goodwill of the plaintiff. In other words, passing off is the right to protection of goodwill in business against misrepresentation by another and preventing likelihood of damage arising from such misrepresentation. Today it is applied to many forms of unfair competition where the action of one-party causes damage or injury to the goodwill associated with the action of another party. It has also been equated to unfair competition by misrepresentation.

LITERATURE REVIEW

1. Name of the book: Business and corporate laws

   Author: Harpeet Kaur

   Chapter: Trademarks Act 1999 [passing off] page no. 387-379

In the chapter of Trademarks Act, 1999 there was a small section covering passing off. The section stated the five elements which are applied to prove the claim against passing off successfully. The researcher would not state the five elements in brief as they have already been stated below in the paper in the analysis section. The section of passing off also covered the case of Durga Dutt Sharma v. N. P. Laboratories[406]. This case laid down the distinction

[405] N.V. Dongre v. Whirlpool corporation (1996) 5 SCC 714
[406] AIR 1965 SC 980

between infringement and passing off of trade marks. However, the book did not cover the background or the case in which the five elements were stated which is the Advocaat case.

2. Name of the book: Winfield and Jolowicz on Tort

Author: James Goudkamp

Chapter: Passing Off (pp. 19-072 and 19-091)

The chapter explains in brief about passing off. However, the researcher has covered the part of remedies from the section. The injunction is an important remedy in passing off cases. in addition, damages may be granted in respect of losses to the claimant or, in the alternative, an account on profits made by the defendants from the passing off.

3. Name of the journal: Growth of Intellectual Property Law and Trade Marks[407]

Author: Rahul Chakraborty

The paper states in brief about the trademarks, the history of its legislation in India, infringement of trade marks, passing off, case laws relating to same. The case of Yahoo Inc v. Akash Arora was also covered. In this case, the domain name Yahooindia.com was passing off the trade mark of 'Yahoo!'. Hence, an injunction restraining the use of domain name was granted.

4. Name of the journal: Passing off, Goodwill and False Advertising: New Wine in Old Bottles[408]

Author: Suman Naresh

The research paper states the essentials which are required to be proved by the plaintiff to successfully claim the action against passing off which were restated in the advocaat case by Lord Diplock. For instance, the term Quai timet (under the essentials) means 'because he fears

[407] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335874

[408] Naresh, Suman. "Passing-Off, Goodwill and False Advertising: New Wine in Old Bottles." *The Cambridge Law Journal*, vol. 45, no. 1, 1986, pp. 97–125. *JSTOR*, www.jstor.org/stable/4506830. Accessed 9 Feb. 2020.

or apprehends'. In legal terminology it has been defined as an action by which a person may obtain an injunction to restrain or prevent some act being done which could cause damage.

5. Name of the journal: Passing off by Misdescription[409]

Author: Peter Russell

This paper states about the Advocaat case in which the five elements were stated. In this case, the plaintiff produced a drink called Advocaat made from eggs and brandewijn spirit. The drink was sold in England. The defendant produced a drink from eggs and fortified wine which they called 'Old English Advocaat'. The plaintiff was granted an injunction restraining the defendants from continuing to use the name "Advocaat".

6. Name of the journal: Foreign traders and the tort of passing off: The requirement of goodwill within the jurisdiction[410]

Author: Ng Siew Kuan

This paper states the elements which were sated in the landmark case of Reckitt and Colman Ltd v. Borden Inc. firstly, the plaintiff must establish a goodwill due to which the consumer buys the products. Secondly, he must demonstrate a misrepresentation by the defendant to the public. Thirdly, the need to show the damage or the likelihood of damage.

RESEARCH METHODOLOGY

[409] Russell, Peter. "Passing off by Misdescription." *The Modern Law Review*, vol. 43, no. 3, 1980, pp. 336–340. *JSTOR*, www.jstor.org/stable/1094878. Accessed 9 Feb. 2020.

[410] Kuan, Ng Siew. "Foreign traders and the law of passing-off: The requirement of goodwill within the jurisdiction." *Singapore Journal of Legal Studies*, 1991, pp. 372–409. *JSTOR*, www.jstor.org/stable/24865808. Accessed 9 Feb. 2020.

The type of research that will be used is doctrinal. Doctrinal research is based or conducted on secondary or the existing data. The researcher collected data from secondary sources such as journals, books. The researcher relied on existing data such as journal article, books. The rationale behind the choosing of doctrinal research is that the topic being theoretical in nature, the researcher opted for the same. It focuses on case laws. The research question is the difference between infringement and passing off of trademarks and can the tort of passing off be made a statutory remedy Hence the researcher opted for doctrinal research.

ANALYSIS

The section of passing off is depended upon the simple principle that a person is not to sell his goods (or) services under the pretence that they are those of another. Accordingly, a misrepresentation achieving such a result is actionable. In another case five elements were stated which were to be applied for the success of the claim against passing off. The elements of a cause of action that were set out loud by Lord Diplock in the case of Erven Warnink v. Townend & Sons Ltd. (Advocaat case)[411] are:

a. A misrepresentation
b. Made by trader in course of trade
c. To prospective customers of his or ultimate consumers of goods and services supplied by him
d. Which is calculated to injure the business or goodwill of another trader
e. Which causes or threatens to cause actual damage to a business or goodwill of the trader by whom the action is brought.

The elements were restated and reduced to three in the case of Reckitt and Colman Ltd v. Borden Inc[412] by Lord Oliver. The elements which are often referred to as the 'classical trinity'

[411] In Advocaat, the defendant sought to sell, as Old English Advocaat, a drink made out of eggs and fortified wines. The plaintiff's drink, like that of all other Dutch producers, was made of eggs and brandewijn spirit which was named as Advocaat. The plaintiff was granted an injunction restraining the defendants from continuing to use the name "Advocaat".
[412] (1990) 1 All E.R. 873

of passing off are the goodwill owned by the claimant, misrepresentation by the defendant and the likelihood of damage to that goodwill. Mere confusion that does not lead to sale is not sufficient.

These elements are being applied to prove the action of passing off. The representation must be such as to cause confusion in the public mind between the claimant's goods or business and the defendant's goods or business. A common form of passing off involves copying or imitating the claimant's registered trade mark.

Goodwill of the business or the trader is the most important aspect of passing off. Goodwill is an intangible asset of the business which the company establishes in the minds of the consumers by the goods and services provided by them. It also refers to the consumers' desire to purchase the goods because of the association with the mark. The action of passing off lies when there is a possibility of damage to the goodwill of the trading activity. The basis for passing off is the misrepresentation of the product or goods and services by the defendant as that of the plaintiff. The representation must be such as to cause confusion in the public's mind between the claimant's goods and the defendant's goods which is calculated to deceive. However, above all the plaintiff needs to prove misrepresentation on the part of defendant which led the public to believe that his goods or services are of the plaintiff. The plaintiff must also establish that he has suffered or is likely to suffer damage to the goodwill due to the act of misrepresentation by the defendant.

The question that arises is why the action of passing off is required when the trademarks are protected under the trade marks act, 1999 by the action of infringement. The answer to this question is simple that the action of infringement is available only to registered trademarks. The action of passing off, on the other hand, provides protection to unregistered goods and services. However, the most important point is that the remedy for both the actions is same. A trademark which is not registered cannot be infringed. An action of infringement is based on the exclusive right to the use of a trade mark in relation to certain goods conferred by

registration on the trader of the mark. Section 28 (1)[413] of the Trade Marks Act, 1999 covers the action of infringement of trademarks. To claim the action of infringement, the registration of trade marks is compulsory. It is a statutory remedy. Section 27[414] of the Trade Marks Act, on the other hand, covers the action of passing off. Passing off is not specifically mentioned but section 27 (2) states that passing off proceeding can take place for an unauthorized use of an unregistered mark. Section 134 (1)[415] refers to the jurisdiction of courts to try suits of passing off arising out of the use of any trade mark. Section 135[416] specifies the remedies available in respect of passing off arising from the use of a trade mark. In India, the process of trademark registration is very lengthy and complex. This discourages or restrains the trader from registering their trade mark which eventually restricts them from claiming an action of infringement. Hence, the only remedy left with the traders of unregistered trademarks is the claim against passing off.

CASE LAWS

The case of Reckitt and Colman Ltd v. Borden Inc. is also known as the Jif lemon case[417]. Reckitt and Colman were selling lemon juice using a container in the shape of a lemon. Eventually, the public identified the lemon juice container with the Jif name on it. On the other hand, Borden sold its concentrated lemon juice in its lemon shaped container under its own brand name called ReaLemon. It was popular in the US market. In 1975, Borden entered the UK market. By the end of 1980, ReaLemon has 25% of the total lemon juice market in the UK. In 1985, Borden began selling its juice in the lemon shaped container in the UK. Hence, Reckitt and Colman filed a suit to stop the American company. The suit was successful in the lower court. However, the decision was challenged by Borden on house of lords. The plaintiff had applied to register the Jif lemon as a trademark, the application would have been rejected by

[413] https://indiankanoon.org/doc/667743/
[414] https://indiankanoon.org/doc/1580823/
[415] https://indiankanoon.org/doc/969470/
[416] https://indiankanoon.org/doc/114856/
[417] *See Supra* note 8.

the registrar because a mark that is a symbol of the goods and services it promotes does not qualify for registration. If it is registered it would prevent others from using a symbol of a lemon to sell lemon or lemon juice. Thus, Reckitt and Colman could only resort to passing off claim in their fight against competition from Borden.

In the case of Yahoo Inc v. Akash Arora[418], the plaintiff is the owner of the trade mark "Yahoo!" and domain name "Yahoo.com", which are very well known. The defendants adopted the trade mark or domain name "Yahooindia.com". a suit was filed by the plaintiff for passing off. The said word "Yahoo" has acquired distinctiveness and is associated with the business of the plaintiff. The use of trademark or domain name "Yahooindia.com" will lead to passing off of the business of the plaintiff. The prayer of plaintiff was disposed of and an injunction restraining the defendant to use the impugned mark was granted.

In the case of Durga Dutt Sharma v. Navratna Pharmaceuticals Laboratories[419], the plaintiff is a registered firm called the Navratna Pharmaceuticals Laboratories and prayed against the defendant to restrain him from selling, dealing in any preparations containing the term Navratna. The firm applied for registration of the words 'Navratna Pharmaceutical Laboratories'. The defendant was selling Navratna Kalpa. The firm opposed the usage of the word Navratna. It was held that the word was associated with pharmaceutical products. Thus, the mark was rightly registered and the plaintiff was entitled to protect invasion of his right by seeking an injunction from the defendant.

CONCLUSION

Passing off is a civil wrong which causes the other party to suffer losses. It is done by a trader in course of employment by misrepresenting his goods to the consumer as the goods of another party which would cause damage to the goodwill of other party. It deals with unregistered

[418] 1999 PTC 201 (Del)
[419] *See Supra* note 3.

trademarks. The elements which are to be proved by the plaintiff for the claim of action of passing off are goodwill of the plaintiff, misrepresentation by the defendant and the damage or likelihood of damage to the goodwill. Infringement action is a statutory remedy and prevents the rights of the registered trademarks from being exploited by the unauthorized users. The law relating to the same is well settled. But, on the contrary, the law of passing off is a non-statutory remedy. Even the act deals with the procedural aspect. Under the present law, passing off is a tort and the intention of the defendant does not matter. By the action of passing off, the law aims to protect the unregistered firms and their trademarks. This clearly indicates the intend to safeguard even the smallest of traders. Presently, the action of passing off is very cumbersome, tiring because the courts follow the decisions of the English courts. Moreover, if the plaintiff fails to prove the goodwill, in spite of being injured by the actions of the defendants, he would not be able to claim an injunction. If the law is made a statutory remedy then there would be a concrete set of principles that can be followed by the courts. Hence, if the action of passing off being a statutory remedy would be a feasible idea both from the perspective of the court and the plaintiff.

ABORTION LAWS IN INDIA: ISSUES OF AUTONOMY AND LEGALITY

- ASHWIN GUPTA

ABSTRACT

Mrs. X wanted to terminate her pregnancy in the 26th week because her foetus was detected with a severe brain abnormality called Anencephaly. Abortion being illegal in India after 20 weeks of pregnancy she decided not to go through harassment in courts and get a legal exemption. She carried the baby for her full term went through a lengthy and stressful labour and gave birth to a child which died in a few minutes.

Mrs. Y in the 18th week of her pregnancy was told by her doctor that there were chances her child had a serious brain tumour. A test called the Amniotic Fluid Test was recommended but it would have taken three weeks to get the results. When she was about to cross the 20th week of her pregnancy she decided to abort the foetus and when the reports came out it was detected that the foetus had no major anomaly leaving Mrs. Y with the shock of terminating her pregnancy for no reason

These are not hypothetical situations neither these are speculations. These are stories of real women who went through these very painful experiences, which led them to file cases in the Hon. Supreme Court demanding to change the Medical Termination of Pregnancy (MTP) Act 1971.

Abortion is a topic that is completely painted black and white. In a perfect world, everyone has access to contraceptives and knows about safe sexual intercourse and there are no unwanted pregnancies either, but we do not live in a perfect world. The terms 'pro-life' and 'pro-choice' are themselves deceptive. Anti-abortion activists have given themselves the tag of 'pro-life' because they are talking about the life of the foetus. These activists fail to understand the risk these women face who are forced into an at-risk pregnancy or illegal abortion due to inaccessibility to a legal abortion. The pro-choice terminology is also quite misleading since

most women who opt for an abortion do not do so out of choice but due to various socio-cultural or medical factors.

In this paper, raising important gender, health and ethical issues are elucidated through a recent legal case in India.

KEYWORDS: Abortion, law, women, freedom, choice, India.

RESEARCH METHODOLOGY

Regarding the methodological approached, the present study can be classified as a descriptive study

AIM

- To critically analyse the Laws of Abortion in India with respect to Medical Termination of Pregnancy Act, 1971.
- To study the how the laws in other countries have changed about time.
- To analyse how stringent and strict are the laws in India
- To critically study the role of the Hon. Supreme Court in formulation of Abortion Laws in the country.

LITERATURE REVIEW

Seema Sapru in her research paper elaborated the need of change in Abortion laws in India. Through his research he made it clear that for new policies to be implemented effectively, they need to be backed by political will and commitment in terms of adequate resource allocation, training and infrastructure support, accompanied by social inputs based on women's needs.

Edward Winchard in his research talks about sexual disorders and gender identity disorders and their relation to abortion in so far as they can be the basis of abnormalities in sexual behaviour to the extent that behaviour is regarded contrary to the law.

John Richards in his research elaborated about increasing awareness and dispelling misconceptions about the abortion law amongst providers and policymakers. There is a need

to enhance awareness of both contraceptive and abortion services, especially amongst adolescents, within the larger context of sexual and reproductive health, integrating strategies and interventions within value systems and family and gender relations.

Sheila Darpan in her research described the mental and physical trauma a mother has to go through once an abortion is done she illustrates that undergoing abortion is not an easy process and it causes trauma not only to the mother but the family as well

Swati Dutt talks about the aftermath of baby which is born and is not normal or is a special child. She talks about how a special child is the centre of attention every time and is always shown pity. Further, she describes how some parents are ashamed to even let these children out of the room because it is an embarrassment for them

Sahana Sen in her research describes how the 20-week timeline does not make sense, and the reasons why it should be extended to a minimum of 26 weeks. She cites the judgements of the Hon. Supreme Court and proves her point, that sometimes it so happens that the nature of the foetus is known only after the 20-week time frame.

Vidhi Rajgaria in her paper describes certain tests, like the Amniocentesis Test(ACT) which is done only after the 20-week timeline is over. So, if the tests to check as to the health of the foetus is fine or not is known after 20 weeks, how can the law stop a woman from terminating her pregnancy.

Karls and Richard in their paper describe how abortion should be allowed as a matter of right and choice. If a woman can get a child into this world without the permission of the world, then why does she need to ask the law if she can terminate her pregnancy.

Ratan Zaveri in his paper opposed the view and said that the 20-week timeframe is just fine, for a woman to decide if she should terminate her pregnancy or not. He opposed any ammendments to the Medical Termination of Pregnancy Act and described how the act was for the protection of children and how Right to Life is involved once a woman decided to terminate her pregnancy.

INTRODUCTION

Before 1971, Abortion Laws in India were premised on the 1861 British Penal Code. To circumvent the criminality clause around abortion The Medical Termination of Pregnancy Act (MTP) was passed in 1971. Yet the law continues to render women's right to choose. Being hemmed in procedural niceties and legal formalities have hindered in permitting abortion, resulting in the death of a mother or the foetus and sometimes both. Although there are technological advancements in the medical field, the laws have remained stagnant or for a lack of better word, 'restrictive' Legal resistance to abortion-seeking after 20-week gestation adversely affects women, depriving them of autonomy of choice.[420]

In the recent months, many states within the United States have passed laws that prohibit a woman's access to termination of pregnancy[421]. Nine states have passed laws forbidding abortion early in the pregnancy, often without exceptions for rape and incest. Alabama, criminalised abortion from the moment of fertilisation, and Georgia's heartbeat statute, outlawing abortion at six weeks, declared the 'personhood' of an unborn child. Governor Kay Ivey of Alabama said that the bill is about challenging Roe V. Wade and protecting the lives of the unborn, because an unborn baby is a person who deserves love and protection. [422]

'Alabama is not the only country which has put a blanket ban on termination of pregnancy. A plenty of states in the United States have introduced "heartbeat bills". This bill basically forbids the termination of pregnancy as soon as the doctors are able to detect the first heartbeat of the foetus. These laws have not come into force yet and abortion is still legal in the United States. The reason these laws are being introduced is to provoke the Supreme Court to give a ruling or maybe overrule the Roe V. Wade judgement"

The Parliament of Ireland voted last year to abolish the procedure of abortion thereby protecting the rights of millions of women in their country? This happened after a woman was

[420] Patel, Tulsi. (2018). Experiencing abortion rights in India through issues of autonomy and legality: A few controversies. Global Public Health. 13. 1-9. 10.1080/17441692.2018.1424920.
[421] (Time. (2019). *https://time.com*. [online] Available at: https://time.com/5591166/state-abortion-laws-explained/ [Accessed 7 Oct. 2019].
[422] Nytimes.com. (2019). *Alabama Governor Signs Abortion Bill. Here's What Comes Next*. [online] Available at: https://www.nytimes.com/2019/05/15/us/alabama-abortion-facts-law-bill.html [Accessed 7 Oct. 2019].

denied to exercise her right to abort her 17-week old foetus after she was diagnosed with blood cancer. The laws that governs Abortion laws in India is the Medical Termination of Pregnancy Act,1971. How different are the laws in India?

Medical Termination of Pregnancy Act, 1971

Last thirty years have seen the liberalization of abortion laws all over the globe. After 1980 the process of liberalization continued worldwide. Today only 6% of the world's population lives in countries where the law prevents abortion[423]. The majority of the countries have very restricted abortion laws, but there are 41% of women who live in countries where termination of pregnancy is available on a women's request. The Shantilal Shah Committee had recommended liberalization of abortion law in 1966 to reduce maternal morbidity and mortality associated with illegal abortion.

Considering the report of the Shantilal Shah Committee, in 1969 Medical Termination of Pregnancy bill was introduced in Rajya Sabha and was given assent by former President V.V. Giri in 1972. Certain sections of the Act were revised in 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available.

The preamble of the Medical Termination of Pregnancy Act, 1971 states *"an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto"*. Termination of Pregnancy or Abortion has been legal in India since 1971, when the Medical Termination of Pregnancy Act was passed. The law aims to reduce illegal abortion and maternal mortality and is quite radicalistic in nature.[424]

In India, Abortion is permitted only before the foetus crosses the 20- week blanket. There is a

[423] Youth Ki Awaaz. (2019). *Indian Laws On Abortion & Reproductive Rights Need Reform | Youth Ki Awaaz*. [online] Available at: https://www.youthkiawaaz.com/2018/05/following-irelands-referendum-lets-talk-about-womens-reproductive-rights-in-india/ [Accessed 5 Oct. 2019].

[424] Sharma, N. (2019). *Why India needs a new MTP Act*. [online] https://www.livemint.com. Available at: https://www.livemint.com/science/health/why-india-needs-a-new-mtp-act-1567317067262.html [Accessed 2 Oct. 2019].

blanket ban on termination of pregnancy after 20-weeks after which permission of the courts are sought.

In 2002 and 2003, the Medical Termination of Pregnancy Act was amended to allow doctors to provide Mifepristone and Misoprostol respectively (also known as the "morning-after pill") on prescription up until the seventh week of pregnancy.[425]

These are the following circumstances under which an abortion is permitted:

- When a woman's life is vulnerable because of a serious disease.
- When a woman undergoes such mental and physical stress that could endanger the life of the foetus or the mother
- There could be substantial risk of physical or mental handicap of the foetus
- There are reports of inborn abnormalities on any of woman's previous kids
- The foetus has been exposed to radiation
- The social and economic status of the woman may affect a healthy pregnancy.
- Failure of a contraceptive device
- The pregnancy is the result of Forced Sexual Intercourse.

Permission:

- A married woman's written consent is adequate and her husband's consent is not required.
- An unmarried woman who is over 18 years of age can also provide her own written consent.
- An unmarried woman who is under 18 years of age has to obtain a written consent from her guardian.
- A mentally unstable woman must provide a written consent from her guardian.

Procedure:

Any hospital can perform a surgery to abort a foetus provided they have a valid license from the appropriate government. A doctor (He/ She) must have the following qualification to perform an abortion:

[425] Cardiosmart.org. (2019). *Mifepristone and Misoprostol for Abortion*. [online] Available at: https://www.cardiosmart.org/healthwise/tw12/91/tw1291 [Accessed 3 Oct. 2019].

- A licensed doctor who has successfully conducted 25 abortions.
- A licensed doctor who has sufficient experience in gynaecology
- A person who has a degree in gynaecology.

LEGAL STATUS

Before 1971: The Indian Penal Code was written in accordance with the British Laws which declared Induced Abortion as illegal and it prescribed punishments for both woman and the practitioner. Basically the law provided illogical punishments for doctors, three years behind the bars with a fine or both and for women, seven years behind the bars with a fine or both. Abortions were allowed, provided that the woman's life is in grave danger. These laws were considered to be draconian as the society was progressing and was free from the clutches of the British. The idea behind this was Population Control which terribly failed, compelling the government to reconsider the law as illegal abortions were taking place and the Courts held the Government responsible for it.

In 1965, the Government of India formed a committee to look into the legal, social, cultural aspects of abortion laws in the country. The report of this committee suggested that the Laws in India are very confined and suggested a complete overhaul in these laws. Eventually it was on the suggestions of this committee that The Medical Termination of Pregnancy Act, 1971 was framed, with flexible rules and unrestricted access.

1971 and beyond: The Medical Termination of Pregnancy Act, 1971 governs the abortion laws in the country. There is blanket ban on abortion after 20 weeks. This 20-week time limit can be categorised into two parts. First, the law permits that the pregnancies which do not cross the 12-week mark could be terminated on the advice of a single doctor. Second, if the pregnancy is within 12-20 weeks, advice of at least two doctors are required to terminate the pregnancy legally. The moment 20-week period is crossed, abortion is not allowed until there are special circumstances, and the permission of the court is sought. The following are what qualifies to special circumstances:

- *"Issue of Mental Health or Physical Abnormality which would affect the foetus;*

- *When the foetus is incapacitated or deformed;*
- *Forced Sexual Intercourse;*
- *When the mother is a lunatic;*
- *When the mother is a girl who is under the age of eighteen years."*

There is something called Medical Ultrasonography Test which helps the parent to determine the sex of the foetus before it takes birth. Sex selective abortion, commonly called female Genocide is practiced in many parts across the country as a girl child is considered as a taboo and there is a desire of a male child amongst the parents. This obviously lead to a drastic increase in the ratio of male to female population. Misuse of the Ultrasonography was surrounded by protest from different states which thereby pressurized the government to make it cognizable offence. Anyone "conducting, helping, advertising" or coercing a woman to conduct PNDT (Pre-Natal Diagnostic Test) would be punished under stringent provisions as provided by the law.

CRITICAL ANALYSIS OF THE LAWS IN INDIA

"Access to abortion is legal in India but with restrictive conditions. The 20-week rule is applied in India, and a woman can terminate her pregnancy up to 20 weeks of conception. The law makes it clear that once the 20-week mark is over the permission of the court has to be sought and if any termination of pregnancy takes place otherwise, it is deemed illegal."

"The law states that any pregnancy under 12 weeks can be terminated solely on the advice of one doctor but the moment it crosses the 12 week marks, opinion of two doctors have to be taken into consideration. The point which has to be emphasized here is that a woman cannot decide by herself that she wants to terminate her pregnancy, the consent of the doctors has to be sought no matter at which week the abortion takes place. The law provides four circumstances for the same which are as follows:"

1. "*If continuation of the pregnancy poses any risks to the life of the mother or to her physical or mental health;*[426]
2. *If the foetus has any severe abnormalities;*
3. *If pregnancy occurred as a result of failure of contraception (but this is only applicable to married women);*
4. *If pregnancy is a result of sexual assault or rape"*.

"The slow turning wheels of justice is the root of troubles for the women in India, who are being misled and manipulated by the Courts and the Government. A pregnant woman neither has to be accompanied by the father nor she has to be accompanied by any family member. The MTP Act given an adult woman the autonomy to decide for themselves which women in this country are unaware about. The consent of the mother is of utmost importance the doctor does not require the consent of any other family member. The women in rural area still think that Abortion is illegal due to the disinterested media and a lack of proper communication structure. Female Mortality rate has seen a splurge in India solely because of this. Poor communications is also why uneducated women across the country buying "over the counter" abortion pills which is strictly prohibited unless prescribed by a doctor. Undoubtedly it has also contributed to illegal abortions which takes place in unhealthy and unsanitary conditions."

Since India is progressing on both technological and healthcare sectors, the Government of India should increase the blanket ban on abortion from 20 weeks to 24 weeks. The doctors and medical experts all across the world have iterated this point a plenty of times that there would be no danger to the foetus.

On 18th September, 2019, the Central Government in a reply to a petition which challenged the Constitutional Validity of Section 3(2)(b) of the MTP Act made it clear to the Supreme Court that ceiling of 20 weeks for abortion cannot be extended and that the state was morally and duty bound as the guardian of its citizens and has the power to safeguard the life of a foetus in the womb once it attains the stage of viability.

[426] Is abortion in india illegal?, QUORA, https://www.quora.com/Is-abortion-in-india-illegal (last visited May 19, 2020).

The culture in India has changed drastically. Abortion is not a taboo anymore, women are divorcees without a sense of social stigma, there are single mothers and many women have live-in relationships. It about time that the laws in India are amended without delay in any procedural formality.

RIGHT TO ABORTION- A REALITY?

According to a project conducted by Worldometers, India has witnessed 36.4 million childbirths since the beginning of this year and about 10.8 million induced abortions[427]. "When a child is born it usually gets support, affection, love and celebration. Abortions usually gets judgement, stigma, stress and punishment. The law provides restrictions which totally constrain and deny women reproductive justice. Some of these restrictions being the 20-week gestation limit and the need for physician's consent."

"The Bombay High Court received a petition which requested permission to terminate a 25-week old pregnancy due to the reports of ultrasound which showed that the foetus that an abnormal heart condition. This was the Niketa Mehta case, which opened the eyes of the leaders and the courts all across the nation. She was denied a premature birth and in the long run endured an unsuccessful labour. It has been a long time since she was denied conceptive equity. The 49-year-old foetus removal law which was last corrected 15 years back to address the difficulties which ruin the entrance to premature birth administrations."

"The Medical Termination of Pregnancy (MTP) Act, 1971 which is liberal in its provisions, legalizes abortion. However, it is not without limitations, and the need to amend it cannot be emphasised enough. The horrific case of the 10-year-old rape victim being denied permission to abort a 32-week-old foetus shook the nation in 2017 and reignited the conversation about the need to address the gaps of the abortion law. This case compelled the Government of India and the Supreme Court to take note of the challenges women face in this country on a routine basis."

[427] Worldometers.info. (2019). *India Population (2019) - Worldometers*. [online] Available at: https://www.worldometers.info/world-population/india-population/ [Accessed 7 Oct. 2019].

"Development on this front stays moderate and unmotivated. As boundaries to get to keep on existing, ladies are constrained to look for fetus removal administrations from inadequate professionals, illicit suppliers or 'quacks', which may regularly bring about clinical complexities and antagonistic wellbeing suggestions. The battles of ladies (and frequently the suppliers of these administrations) don't end here. From the absence of offices, to the inadequate framework and the social shame, cover and conflation of different laws with the MTP Act just add to the difficulties."

"The Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994, and the Protection of Children from Sexual Offences (POCSO) Act, 2012, aim to address, curb and eliminate the practice of sex selection and the increasing incidence of child sexual abuse in the country, respectively."

Under the POCSO Act, "*the providers are under a duty to report any case of under 18-pregnancy to the police. This provision contradicts the confidentiality clause of the MTP Act. Besides the extreme effect of criminalising all sex under the age of 18, it compromises the identity of the girl who wants an abortion and increases the risk of the girl not approaching anyone to avoid reports in the media."*

"Although these regulations are well-intentioned and essential to tackle and counter societal problems, they also impede access to health care, safe abortion facilities, make clinics reluctant, and impinge on a woman's right to privacy. For one reason, campaigners will be vigilant to operate in silos and prevent collateral harm on other, similarly significant problems. It is time for us as a society to recognize 21st century reality that women will have the right to make choices about their sexual and reproductive health. Indeed, in August 2017, India's Supreme Court enhanced the right to choose and put abortion under the fundamental right to privacy."

"The Government has proposed certain amendments to the MTP Act that provide an opportunity for women to exercise their rights. This provision calls for the cessation of abortion after 12 weeks upon request. It further eradicates the challenges encountered by most women by increasing the maximum gestation limit from 20 to 24 weeks for disadvantaged groups such as single mothers and rape victims, eliminating the gestation limit entirely when the foetus is

diagnosed with significant anomalies, and the amount of specialist opinions needed in the second trimester from two to one. The amendment further recommends expanding the physician base for early surgical abortion to involve mid-level non-specialist services – a move that is desperately required to resolve services' dearth in underserved regions. Such amendments to the law would not only improve access to abortion services but also reduce the burden on maternal mortality of unsafe abortions and enable the government to demonstrate its commitment to empowering women."

"Many people believe that abortion is about how the child was pregnant or how contraceptives were used. An abortion is in no way linked to the history of an individual, or her moral or cultural convictions. In the generation of today, the mind set should be that having an abortion is entirely about being a woman who has decided to exercise her right."

THE NIKETA MEHTA CASE

"We have all witnessed on television Niketa Mehta and her husband Haresh Mehta, performing rounds of the hospital and the Mumbai High Court. She had made a plea in the Mumbai High Court, which was rejected later, to accept the courts permission to terminate her 24-week-old foetus. The explanation for the lawsuit was that her unborn child had a congenital heart blockage and a misplacement of the artery. The MTP Act introduced a complete ban beyond 20 weeks on termination of pregnancy. Yet how fair it is to introduce an infant into this universe who only does not require air, water and food, but a pacemaker to live from the moment he / she joins this planet."

"Inadvertently the Bombay High Court denied Mehta 's appeal but what the Hon. Court refused to picture is the image of a child opening his eyes in anticipation, raising his small hands and feet preparing for the world to see. Instead of being turned off to his parents' warm hands, the child is put in a frozen surgery theatre where his frail body is ripped apart by brutal surgical tools only to implant a pacemaker. Isn't it heart breaking for parents, mothers, associated family members to bring a child on the Life Support System into this world? This is nothing more than a good example of a cold blooded assassination."

"When God created this universe, he gave the women the power to give birth, to carry new lives into this universe. The core of a mother is loaded with a wealth of love, caring and devotion to take charge of the fresh life. So much so that if a relationship of selfless affection occurs in the universe, it is between a mother and its child. The moment a mother conceives an infant she begins to feel for her infant in her womb, she caresses it, embraces it, feeds it and nurtures it. So how does the Hon. Court believe that for personal motives a woman who decides to kill her first child does so and suspects her of becoming a murderer. Why was a woman named by the court *'self-centred*' and *'cruel'*? Just because she wanted to end her pregnancy because her child would have to survive his whole life on a pacemaker, is that what is called being selfish? I think that it is looking at the larger picture and making the best choice at the right moment."

"A pacemaker 's life is 5 years, and its price is a colossal 1lac. Parents of the unborn child, Niketa Mehta and Haresh Mehta belonged to the middle class strata of the society. To carry a pacemaker's burden and on top of that high medication costs should have left them powerless in searching for funds and services to have their child survive during their lives."

"If we consider that some institution of charity would assume responsibility for the child and promise to bear all of its medical expenses. Thanks to our 24-hour news channels and endless debates, the unborn child was already famous in the world but the family had to face the emotional and mental trauma. Each parent wishes the fate of their child in golden letters, rewarding them with all the joy and prosperity in their lives. Why would parents be bringing a child into this world when they know that their future is doomed?"

"We have stories of individuals like Stephen Hawkins who did make it big given their physical handicaps so isn't the situation different from a developed world like India in foreign countries? In India, services, incentives, and technologies vary from those accessible in foreign countries. The government insure children with disabilities get the best kind of healthcare. Do the Indian lawmakers take responsibility for such kids? The irresponsible media in India will report the birth of the boy, which the entire world will observe, panic for a moment, and then everybody will forget. No one will come while the infant is in unbearable agony and is having rough

medical treatment. Her parents would be the only people watching him. So, if the couple doesn't want to deal with such a situation and save their child from a cursed future by ending the pregnancy, then why does the law prohibit it? This is clearly a case of destroying kindness and we think parents should really be able to determine what they want to do for their infant." The court did not help the couple, and 10 days after the Bombay High Court verdict, Niketa Mehta suffered a miscarriage which left the infant dead and the mother weak. [428]

"If the law cannot be amended, why not make an exception for humanitarian reasons. It's about time that the Indian government allowed an adjustment to the Medical Termination Abortion Act, 1971. After all, how many Niketa's do we have to see heading to trial every day over such a case? Is it not cynical to see pregnant women rushing about when she would be able to rule herself, relying on a Trial, an anonymous judge to make a decision? The court not only behaved vindictively by denying her appeal, but also prevented all those people who behave professionally and follow the legislation to render exceptions rather than surreptitiously performing the actions."

CRITICAL ANALYSIS ON THE ROLE OF SUPREME COURT IN FORMULATING POLICY DECISION

The Supreme Court has passed numerous decisions regarding abortion freedom in the last few years.

"The laws of abortion in India are governed by the Medical Termination of Pregnancy Act, 1971. The MTP Act specifies that a pregnancy must be discontinued by a licensed medical professional before the 20th week of pregnancy, after evidence that the duration of the pregnancy is either a danger to the safety of the mother or significantly detrimental to her physical or mental wellbeing or whether there is a substantial likelihood that the infant will have severe physical or mental problems when born. Pregnancy caused by rape or by

[428] The Times of India. (2019). *Mumbai abortion case: Niketa Mehta suffers miscarriage | Mumbai News - Times of India*. [online] Available at: https://timesofindia.indiatimes.com/city/mumbai/Mumbai-abortion-case-Niketa-Mehta-suffers-miscarriage/articleshow/3363293.cms [Accessed 7 Oct. 2019].

contraceptive failure would constitute a serious injury to mental health. Abortion is allowed beyond 20 weeks if it is necessary to save the life of a woman in accordance with Section 5. In all cases of abortion after 20 weeks before the Court, the Court shall constitute a Medical Board, an expert committee of medical professionals which shall produce a Report. The Report discusses that, first, pregnancy persistence will trigger significant physical or emotional harm to the mother and, second, if the birth infant will suffer from any intellectual or physical disorders."

"In *Mrs. X vs. Union of India* (2017 SCC OnLine SC 124)[429], the Supreme Court allowed for the termination of a 22-week old pregnancy. This was done after a 7 member Medical Board opined that allowing the pregnancy to continue could gravely endanger the woman's physical and mental health. The Court held that "a woman's right to make reproductive choices is also a dimension of her 'personal liberty' under Article 21 of the Constitution" and that the right to bodily integrity allows her to terminate her pregnancy. Similar judgments were passed by the Supreme Court in other cases where pregnancies were beyond 20 weeks and the fetuses had various medical conditions and anomalies, resulting in a high risk to the fetus and the mother (Tapasya Umesha Pisal vs. Union of India ((2018) 12 SCC 57) [24 weeks][430]; Meera Santosh Pal vs. Union of India (2017 SCC OnLine SC 39) [23 weeks][431]; Mamta Verma vs. Union of India (2017 (6) MLJ 420, 2017 (8) Scale 601, 2017 (4) RCR (Cri) 697)[432] [25 weeks]). In all these cases the Supreme Court referred the matters to a Medical Board and gave its decision based on the opinion of the Medical Board."

[429] AIR (2019). *Mrs. X And Ors vs Union Of India And Ors on 7 February, 2017*. [online] Indiankanoon.org. Available at: https://indiankanoon.org/doc/73782861/ [Accessed 2 Oct. 2019].
[430] Indiankanoon.org. (2019). *Tapasya Umesh Pisal vs Union Of India on 10 August, 2017*. [online] Available at: https://indiankanoon.org/doc/72530975/ [Accessed 3 Oct. 2019].
[431] AIR (2019). *Meera Santosh Pal And Ors vs Union Of India And Ors on 16 January, 2017*. [online] Indiankanoon.org. Available at: https://indiankanoon.org/doc/168661224/ [Accessed 7 Oct. 2019].
[432] AIR (2019). *Mamta Verma vs Union Of India on 9 August, 2017*. [online] Indiankanoon.org. Available at: https://indiankanoon.org/doc/161612603/ [Accessed 7 Oct. 2019].

"In *Murugan Nayakkar vs. Union of India & Ors.* (W.P. (C) No. 749/2017)[433], the Apex Court allowed the termination of 32-week old pregnancy of a 13-year-old rape victim holding, Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed."

"However, in *Savita Sachin Patil vs. Union of India* ([W.P. No.174 of 2017)[434] the Court rejected termination of a 27-week pregnancy. The Medical Board gave a finding that there was no physical risk to the mother but the foetus had severe physical anomalies. The Court then did not permit termination on the ground based on the Medical Board Report."

"In *Alakh Alok Srivastava vs. Union of India* (W.P. (C) No. 565/2017)[435], where the petitioner was a 10-year-old pregnant rape victim with a 32-week pregnancy as well the Court did not allow termination. The Medical Board opined that the continuation of the pregnancy was less hazardous for the petitioner than termination at that stage. During the course of the proceedings, the Court asked the Centre to direct setting up of permanent medical boards in states to expeditiously examine requests for termination post 20 weeks of pregnancy and the Centre issued instructions for the same."

CONCLUSION

"It is argued that women can make a decision on abortion wholly provided they are healthy and have a majority. When a woman's future will be impacted by an abortion, her rights could be curtailed. Any further limitations on reproductive access are uninvited and unwelcomed. It

[433] AIR (2019). *Murugan Nayakkar vs Union Of India on 6 September, 2017*. [online] Indiankanoon.org. Available at: https://indiankanoon.org/doc/11026511/ [Accessed 7 Oct. 2019].
[434] AIR (2019). *Savita Sachin Patil & Another v Union of India & Others on 28 February 2017 - Judgement - LawyerServices*. [online] Lawyerservices.in. Available at: https://www.lawyerservices.in/Savita-Sachin-Patil-and-Another-Versus-Union-of-India-and-Others-2017-02-28 [Accessed 1 Oct. 2019].
[435] AIR (2019). *Alakh Alok Srivastava vs Union Of India on 1 May, 2018*. [online] Indiankanoon.org. Available at: https://indiankanoon.org/doc/140831979/ [Accessed 7 Oct. 2019].

is valid that the choice of a mother to terminate her pregnancy relies on the possible danger to the child's safety or emotional and physical wellbeing. Besides these reasons, various important factors also exist as to why a woman chooses to terminate her pregnancy. The family might not be financially stable to accept an extra in the household. Her pregnancy could come at a period when she wants to adjust her job which needs free time, hard work and commitment. The bond between husband and wife is on the verge of failure and the prospect of marriage is unclear. These factors are all really significant and appropriate, but there is no connection to the Medical Termination of Pregnancy Act 1971. Such Statute can also be found unjust and unequal and contradicts the standards of equal justice set out in Section 14 of the Constitution if read carefully. It is worth mentioning that the MTP Act does not protect the unborn child, and any ambiguous protection it receives under that Act is only a by-product of pregnant women 's protection. The protections and limitations enforced by this Law make it plain that the State's primary aim is to shield a live individual from the hazards that might occur during the pregnancy termination cycle."

"It is the mother's natural duty to provide her infant with the best she can. Such cases may be when a pregnant woman is involved in behaviours that can damage the child because of negligence, carelessness or acts committed by the mother herself. Abortion is a delicate matter and should only be left to the mother's decision. It is also helpful and beneficial to the mother sometimes, when the state or any other voluntary or charity organization willing to look after the baby. The rights of a mother are limited only until the termination of pregnancy. It is also claimed that raising 20 million babies annually will have a larger effect on the nation's social care and economic capital than, estimate, one or five million abortions a year. The law must take care of the liberty of the mother as well as of the unborn. As a hospitable and courteous culture, it is our responsibility to explore ways to help distressed and scared mothers and distressed and neglected children. The law is the law, and it cannot be changed but there is always a scope for an amendment. A draft of The Medical Termination of Pregnancy (Amendment) Bill, 2020 has been cleared from the Lok Sabha and is awaiting its approval from the Rajya Sabha."

It is needless to mention that a new abortion law, is the “need of the hour”

RELIGIOUS VIEWS AND LAWS ON EUTHANASIA IN INDIA

- SWARNIKA SINGH

In Indian philosophy and rituals there has been given a justifiable idea of one's death in accordance of own will (ikchacha mrityu). Veer Savarkar and Vinobha Bhave are the well-known examples of the person choosing to end their lives by refusing the consumption of all-nutrition. Even Mahatma Gandhi supported this notion. Mythology says Lord Rama and his brother took Jalasamadhi in river Saryu near Ayodhya. Primeval history tells that Lord Budha and Lord Mahavir attained death by seeking it. These mythological believe propose that trace of right to Die existed in various religions followed in India. Rishi Dadhichi is also well known to choose his death himself. Nonetheless the name of Bhishma Pitamaha cannot be forgotten who choose his death as per his wish.

Euthanasia has resurfaced as a moral issue which separates society and its roots. It's a contentious topic and from a political and religious point of view, and there are reasons for and against it. Generally all faiths condemn voluntary death. The particular issue that this problem poses is that a man has the right to circumvent the sanctity of life and when faced with the most detrimental situations, wants to end his life. Scholars of all time have tried to justify conceptions of morality rooted in a theistic context. There is this theory called Divine Command Theory which believes that righteousness is somehow entirely reliant on God, and that moral duty comprises of adherence to the commandments of God. This theory contains the argument that morality is fundamentally based on divine orders or persona, and that God dictates or demands the conduct which is morally justifiable.[436] The precise nature for these divine commands depends entirely on the actual faith and beliefs of the specific divine command philosopher but both variations of the theory share the argument that ethics and moral duties essentially rely on God.

[436] "Using the Divine Command Theory in the Assisted Suicide Debate"<https://uniquewritersbay.com/blog/using-the-divine-command-theory-in-the-assisted-suicide-debate/>. Web Accessed 15 Apr. 2020.

Most individuals explicitly associate it with murder because it simply murders and consumes the patient's soul, rather than helping them to experience a natural death. Although, there are also times where the patient is too ill to make the call, which is when the person is directed to make an important decision on behalf of him and he is then entrusted to the judiciary, medical personnel or relatives. Advancing technologies for prolonging life and controlling dying can generate agonizing conundrums. Moral dilemmas aren't things that the average citizen will discuss, at least not on a daily basis, throughout his personal life. Though, from time to time the ordinary individual of society is faced with ethical questions, and how that person decides to deal with his own conundrum will make him question the principles upon which his morals are founded. To some, faith is the spiritual arbiter; to others, the ethical position is decided by science. Nevertheless, it should be remembered that the state of distress is sometimes a determinant of ethical behaviour, since it relates to the individual in regard to their specific social norms. In fact, if a person dies from a terminal and terribly debilitating illness, such as end-stage renal failure, and ultimately has no comfort left, is it ethically correct for someone to end their own lives because they want to do so? While the individual involved couldn't advocate for himself, then the situation gets even more challenging.

Assisted suicides are also addressed in relations of 'mercy killing'. Those who advocate the act are deemed to be compassionate in encouraging the individual with the debilitating terminal disease to die a death with peace and happiness, rather than losing their lives in agony and misery. The concerns around assisted suicide morality are clear. The viewpoint of the dying patient or others taking decisions about the terminally ill patient has to be explored in order to understand the legal repercussions of the case. The most popular theological claim is that humans are God's divine conception, and thus human life is divine by definition. Only God will choose when a human life comes to an end, and committing a euthanasia act or aiding in suicide is behaving against God's will and is immoral.

1. VIEWS ON EUTHANASIA OF BUDDHISM

The followers of this religion hold the conviction that they will all be brought back from the dead after death and observe life over a sequence of years of life entitled 'Samsara' before they can stop desiring and Nirvana is achieved. In accordance with the initially accomplished karma of a person, their state of consciousness at the point of death takes on massive significance when evaluating exactly what sort rebirth is to happen. Under Buddhist dynamics six dimensions of life exist. Somebody's soul will only enter the human world by positive karma. Euthanasia, while it might be regarded a benevolent act, is not seen in Buddhism as an act of selflessness and generosity, but instead as another act of harm veiled as support, that in turn may lead to unnecessary karma. When anyone is dealing with the effects of illness, it may be the consequence of karma, so it is impossible that terminating their existence would end that misery, because the pain caused by karma would accompany them even until demise before its strength ceases.

This is not at all explicit that in every one of the major Buddhist schools, there is unity on values, particularly in this specific matter. If we confine it to Buddhism in India alone, there are major gaps that exist among the Mahayana and the Hinayana principles. We also note more variations as we eventually come to know the Buddhist practices of Tibet, China and Japan. Remarkably, the vast majority of those people are Mahayanists. While the Theravada might certainly be the earliest known Buddhist school, it is very wrong to say that it is the "extremely conservative" if it is supposed to retain theological doctrines that are appropriate or transmitted. In Mahayana Buddhism, Theravada theories and scriptures have no precedence. They depend on the Vinayapi, the monastic judicial case books. Instead of setting out fundamental principles through which specific inferences can be taken, besides, the Vinaya prefers detailed comprehensive list of individual cases and the reasoning stated by the Buddha on them, mostly making it very difficult to see what the ratio of the specific decision could be. It is also necessary to note that violations of monastic practice are entangled in the cases. Thus this could be rightly argued that numerous killing incidents, as well as incitement to suicides, are denounced in the Vinaya as improper practices for monks, constituting Parajika's strict punishment. However this punishment is not 'excommunication for a lifetime'. It is literally

exclusion from the monastic institution and not from the culture of Buddhists. Furthermore, for several other crimes, a monk also could endure a similar death at the hands: sexual abuse, robbery and wrongly alleging supernatural powers. Apparently the unique ethical expectations on the monks are much stricter than on the laymen of Buddhism.[437]

This religion propagates nothing but a compassionate faith, with the intention to eliminate the misery of all living beings. To recognize the values laid in this religion, an understanding of how the two principles connect is important. Compassion is a principle laid down in this religion that reflects how Buddhism reflects medical values that are found in all three schools of Buddhism. While this can be seen as right and proper, it is still not acceptable to perform an act of compassion. Killing another person out of compassion to alleviate the affliction that one suffers through disease or injury is a specific example wherein the individual may feel exonerated for euthanasia to be used. Furthermore, it can establish ambiguities in Buddhism and the Bodhisattva into the violation of lives. Ending a life due to the state of psyche of a sufferer and refusing them medication would become an act of complete abandonment, which would be regarded immoral and unjust when Buddhists have had a firm conviction in compassion towards all sentient beings. This religion suggests that one still needs love even with a compromised bodily entity, including the brain, since they are able of inducing respective sentiments in somebody who cares about them.

As per Buddhist doctrines, those who are in a vegetative state has neither died nor living, however is believed to exist in some sort of mysterious mental condition, and it's a living human. They lose the need to depend on those other aid to sustain their desire to remain alive besides being reinforced with resources to sustain them going for a considerable period of time. Through this, this Religion considers anyone in a medically induced coma as a type of alive, respiring life, since individualism does not acknowledge the quality of what life carries it. While this religion considers this condition of living as impaired, it should address people no differently than ever. Until creation, both animals and humans, as they wait longer in the uterus

[437] Roy W Perrett in, "Buddhism, euthanasia and the sanctity of Life," Journal of Medical Ethics 1996; 22: 309-313

of the mother, possess dignity and should therefore not have their lives taken away from them. Many Buddhists, though, are under the belief that a being who is unaware of his existence of a being, or one lacking in knowledge or wisdom, has no significance, which is highly questionable.

Contending that freewill determines the basic being of an individual in this religion, Louis van Loon notes that perhaps the meaning of human existence ought to be sought in the potential for voluntary decision. Hence, the Buddhist would in theory be in support of 'voluntary euthanasia' given that it worked throughout strictly established limits. While, differing from his views, Phillip Lecso claims from the philosophy of karma that 'if the physician's aggressive interference were to interrupt the full progression of a karmic debt, it will then have to be met again in a potential lifetime. 'His view is that this religion opts for hospice care rather than euthanasia. A particularly significant solution to euthanasia is to transfer anyone who is terminally ill into hospice care to help alleviate physical pain through pain killers that are not meant to end the life, enabling them to die pain free and relaxed. Hospice treatment is intended to help an individual also have something considered "healthy demise." However these two inflections are very distinct, with two very different assumptions. Moreover, the former is only doubtless Buddhist in his account of the living creature; the second poses the issue by refusing to understand that any treatment would have karmic implications.[438]

2. VIEWS OF HINDUISM ABOUT EUTHANASIA

Views of Hinduism are similar to that of the followers of Buddhism. Well into the principles of karma, moksha, and ahimsa the Hindu concepts of euthanasia and suicide are concentrated on. Karma is the net result in an individual's life of right and wrong deeds and then decides the essence of the next life. Continuing persistence of bad karma prohibits moksha, or salvation from the rebirth process, which is Hinduism's primary objective. In this religion, Ahimsa is a basic belief, which means causing no harm to another person. In this religion suicide is usually

[438] Michael Barnes in, "Euthanasia: Buddhist principles," British Medical Bulletin 1996;52 (No. 2):369-375

forbidden on the grounds that it drastically alters the rhythm of the process of death and rebirth and thus produces evil karma. As per Hindu traditions, if a person has committed suicide, he will not go to either the hell or the heaven, but stays as a demonic spirit in the earthly conscience and wanders tentatively until he reaches his real and allowed lifespan. He goes to hell and eventually suffers more seriously. In the end he comes back to life again to accomplish his former karma and continue over from here now. Death puts a spiritual clock in the background of an individual.

From one point of view, a people that help others escape a miserable life and hence that deprivation is doing a charitable act and they are receiving good karma. By prolonging a miserable life a person is carrying out a random act of kindness and thus completes his moral responsibilities. From another viewpoint, assisted suicide delays the rhythm of the rebirth process, resulting in both the practitioner and the patient taking on bad luck. An individual is disrupting the pace of the dying process and rebirth by trying to end a life, even the one filled with misery. That is a terrible thing to do, and the patient's residual guilt will be carried on by someone interested in assisted dying. Termination (euthanasia, murder, and suicide) disrupts with the advancement to redemption of the killed soul. This also brings bad luck to the perpetrator, due to breach of the non-violence concept. Once the soul is reincarnated in another physical existence it must suffer as it had done before as there is still the same karma.[439]

3. VIEWS OF ISLAM ON EUTHANASIA

Allah brings existence, and also has the full ability to destroy it. In other terms, the Quran forbids giving consent to one's own death and could be linked to terminally ill people who submit to the assisted suicide. The research further indicated that death is not man's final end, but the hereafter; thus, a believer does not lose faith when faced with challenges, misery and difficulty, but rather keep hope alive. The research relies on Muslims to guarantee that Islamic bioethics principles are enshrined in all forms of human endeavours. The stance is fiercely

[439] "Hinduism and Euthanasia" ReligionFacts.com. 29 Oct. 2016. Web Accessed 15 Apr. 2020. <www.religionfacts.com/hinduism/euthanasia>

condemned by Islamic law and some religionists. He is perhaps the Creator of life to us, who retains the right to take us at the right moment. They believed that there is still some potential for salvation, no matter how vulnerable a creation of God might be. A Islamic philosopher postulates Islam enshrines the sanctity of creation like other faiths. Nevertheless, Islam believes that humans are the vicegerent of God in this universe and Allah has granted appreciation to humanity by granting them authority and influence over certain things. The followers of Islam are supposed to have confidence, and in their religion it is recommended that they have the values of courage and resilience to meet the hardships of life.

Muslims believe that god gives existence so he has the full right to destroy it. Allah has allocated to every person a definitive period to which nobody can add a second after its termination. To be precise, the Allah has ultimate power over death. Maintaining the sanctity of life can be therefore strengthened as Allah advises: "Take not life that Allah has made holy, except in the name of righteousness". "The vastness of a person's guilt, which intentionally destroys a life except in the pursuit of justice, such as killing or causing havoc in the country, is as if he had murdered the entire people." This indicates that Islamic law specifies the death sentence for all those who conduct heinous offences with a view to maintaining stability, protection and harmony in society. The Prophet Muhammad's custom also forbids the destruction of vulnerable soul. This was stated to have been said by him that, "The worst of the greatest sins is to follow others as partners in service of Allah, to destroy a human being, to make a sweeping declaration to one's relatives, and to give false testimony." A Prophet's follower, Abdrahman Bin Sahr (Abu Hurayrah) also stated that the Prophet himself said: "Whoever chooses death by throttling will begin to throttle himself into the Hell Fire and whoever commits suicide by cutting himself will begin to stab himself in the Hell Fire.[440]

Whenever it is evident that no medication potentially left on the table to heal a terminally ill patient, Islam only recommends that routine treatments including food and supplies will proceed. Withdrawal of all therapies in order to enable the individual to suffer spontaneously

[440] Mahmud Adesina Ayuba in, "Euthanasia: A Muslim's Perspective", Scriptura 115 (2016:1), pp. 1-13

is not regarded homicides. Once a sufferer is confirmed brain-dead by physicians, even cases where there is no movement in the stem of the brain, the patient is presumed dead and no additional support mechanisms are needed. Unless the victim is now clinically dead, stopping such treatment is not considered a suicide. In consideration of this all Muslim scholars consider aggressive assisted suicide as banned (haram) throughout all schools of Islamic jurisprudence. The moment of death is decided by Allah and we will not rush it or strive to accelerate it. Assisted suicide is intended to soothe a terminally ill sufferer's distress and discomfort. Yet as Muslims, through the grace and compassion of Allah, we cannot slip into distress.[441]

It is not acceptable, on this basis and in relation to the assisted suicide mentioned as the query. When eluded in a number of Prophetic records it is regarded a serious offense. It is imperative on practitioners to recognize that in a case which comprises a rebellion to Allah there is also no loyalty to all other men. If a sufferer asks them for that, they are still not allowed to adhere, nor are they [to] harm any human without consent. Allah the all-powerful probably knows that.

4. VIEWS OF CHRISTIANITY IN TERMS OF EUTHANASIA

The Bible gives no clear evidence of assisted suicide, but discusses topics rightly associated to it. This is the preparation of helping someone end up incurably sick, hurting, and in extreme agony of his or her own demise. The steadfastness of the euthanasia is to terminate suffering from enduring. The holy book Bible directs us not to kill. Murder is the illegitimate triggering of death whereas physician assisted death or euthanasia is the authorized taking of life. Basically stating, if a country were to articulate that euthanasia was lawful, then it wouldn't be murder on a human basis. However because cultures also regulate against the Bible on religious matters, just because a community may agree that assisted suicide is nice doesn't mean it is. We are more to oblige Divine than mortal. We've been created in God's likeness, and it is the great almighty who gives us breath, and who also counts our days. That means that almighty is

[441] "Life Support and Euthanasia in Islam", <https://www.thoughtco.com/life-support-and-euthanasia-in-islam-2004331>. Web Accessed 15 Apr. 2020.

the supreme Lord who will decide the day we die. So we are not to subvert the power of Holy Spirit.

Indeed the Bible tells God to be authoritative about birth and demise. Even though the study of this religion does not unambiguously express the opinion on assisted suicide, the history of King Saul's death is enlightening. Saul begged a soldier to execute him, while he lay dying on the ground. However when David learnt about this incident, he demanded the serviceman who had been condemned to demise for "wrecking the anointed of the God." Also if the meaning is not assisted suicide per se, it demonstrates the reverence that we must have for a human being under these horrible conditions.[442]

People of devotion towards Christianity therefore will condemn the current assisted suicide progressive movement effort to enforce these so-called "right to die." There are two explanations why the modern society's effort to create this "freedom" was incorrect. First of all, granting a people the right to die is equivalent to encouraging suicide and the Bible forbids suicide. Man is banned from assassination, and this involves self-murder. In fact, Christians are instructed to serve others just as they love themselves. Underlying assumption in the instruction is both an implication of affection for oneself and respect for others. Hence suicide is not an indication of self-love. This is indeed the simplest self-hating case. Homicide is typically an act of selfishness too. Men kill themselves to avoid suffering and difficulty, sometimes bringing the issues to relatives and friends who have to clean up the mess after the one who died is dead. Second, the so-called "right to die" forbids Lord the chance of operating divinely inside a fractured world and adding prestige to Himself.

LAWS OF EUTHANASIA IN INDIA

This can be determined that in a nation where person's fundamental human rights are still left unchecked, illiteracy is widespread, so much more than half of the country does not have accessibility to drinking water, people are suffering every day from illnesses, and where there

[442] Kerby Anderson in, "Euthanasia: A Christian Perspective", ©1998 Probe Ministries < https://probe.org/euthanasia/?print=pdf> Web Accessed 15 Apr 2020.

is less medical help and treatment, euthanasia and physician-assisted suicide-related problems are insignificant for few. This country is, nevertheless, a nation of diversity through religions, academic status and traditions. The controversy on assisted suicide in India is more complex in this way, as there is still a rule in this country that penalizes who also attempt to commit suicide.

At a conference of its ethics board in February 2008, the Medical Council of India expressed an opinion on assisted suicide: performing euthanasia would involve unethical behaviour. In particular circumstances, the question of removal of supportive equipment for stabilizing cardiovascular functioning even after brain death shall be determined only by a group of specialists and not alone by the attending physician. A panel of doctors should state that the support system is being removed. This panel should consist of the patient's physician-in-charge, the hospital's chief medical officer, and a specialist appointed by the surgeon-in-charge by the hospital staff or in compliance with the provisions of Transplantation of Human Organ Act, 1994.

Euthanasia is a criminal offence in India. The Honourable Supreme Court is of the impression that there is no right to die stated in the right to life guaranteed by Article 21 of the Constitution of India. The court concluded that Article 21 is a provision that ensures the security of life and personal freedom and that the destruction of life can be read into it by no stretch of imagination. Furthermore, different pro-euthanasia groups, the main influential amongst them being the Death with Dignity Foundation, continue to advocate for the protection of the right of a person to choose his own death.

If a physician attempts to kill a patient, the case will assuredly fall under Section 300 of Indian Penal Code, 1860 but this is only so in the case of voluntary euthanasia in which such cases will fall under the exception 5 to section 300 of Indian Penal Code, 1860 and thus the doctor will be held liable under Section 304 of Indian Penal Code, 1860 for culpable homicide not amounting to murder. The non-voluntary and involuntary euthanasia cases would be smashed

into by proviso one to Section 92 of the IPC and therefore be reduced unlawful.[443] Section 309 of the Indian Penal Code deals with the attempt to commit suicide and Section 306 of the IPC deals with abetment of suicide, both of these are punishable offence. Only those who are brain dead can be taken off life support with the help of family members.

On 7 March 2011 a significant development in this area took place. The Supreme Court allowed passive euthanasia, in a landmark decision. Refusing the assisted suicide of Aruna Shaunbag in pity, lying 37 years in a vegetative state in a Mumbai Hospital, a two-judge bench held down a set of strict regulations where passive euthanasia can be allowed via a process supervised by the high court. The court explicitly claimed that the patient's family, friends, or other relatives may make any such appeal to the high court. Upon receiving of such a petition, the chief justices of the high courts will form a bench to determine.[444]

It is definite that death is a sure thing. However, suicide or any medium of assistance to do so is considered abnormal. But there is another point of view in this regard that a person should have a life of dignity and peace. In the absence of it that life becomes miserable. One should not be forced to live in misery and pain which is not bearable and detrimental to the quality of living. If the case is so that the individual has lost in senses and unable to take care of his body, as it happens in state of comma or other chronic disease which is not treatable, that person should be allowed to die if he wishes so. One cannot neglect his agony just on the argument that he is afraid to fulfil his social obligations and that is why he opts to die.[445]

In our country though euthanasia stands illegal but the supreme court allowed passive euthanasia with the provision and specific guidelines which one needs to followed as was held in Aruna Shaunbag case[446].

[443] "Euthanasia and Human Rights - Euthanasia Illegal in India", <http://www.legalserviceindia.com/article/l118-Euthanasia-and-Human-Rights.html>. Web Accessed 20Apr.2020.

[444] Vinod K. Sinha in "Euthanasia: An Indian perspective", Indian J Psychiatry. 2012 Apr-Jun; 54(2): 177–183

[445] Report of Law Commission 0f India on "Humanization and Decriminalization of Attempt to Suicide", Report no 210 Oct, 2008.

[446] Aruna Ramchandra Shanbaug v. Union Of India (2011) 4 SCC 454

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IMPORTANCE OF TIMELINES IN INDIAN PATENT APPLICATIONS

- **PAWAN KUMAR YADAV & KUMAR KARITKEY YADAV**

ABSTRACT

This article analyzes the different provisions provided in the Patents Act, 1970 and the Patent Rules 2003 (amended in 2019) regarding the different time lines during the filing of the patent applications, publication of the applications, examination of the patent applications, reply to the first examination report, foreign filing details, pre-grant opposition, grant of the patent application, post-grant opposition, and renewal of the patent. These time lines are required to be followed at various stages for the grant of the patent applications. The problems faced by the applicant during filing of patent applications and the suggestions to overcome these problems are discussed in details. In certain cases, these time limits must be strictly followed. Further this article focuses on the certain irregularities that may be corrected through petition before controller.

KEYWORDS: Time line, Different types of patent applications, Proof of right, Publication, Reply to first examination report, Pre-grant, Foreign filing details, Post-grant, Renewal

1. INTRODUCTION

The Patents Act, 1970[447] and the Patent Rules 2003[448] (as amended in 2019) provides the different provisions through which patent applications are granted in India. At present, the Act[449] comprises twenty-three different Chapters (I to XXIII) and each chapter deals with the

[447] Act No. 38 of 1970. "The 1970 Act came on the Statute book on 19th September 1970 was after being passed by both Houses of Parliament and receiving the assent of the President. The 1970 Act has undergone three major amendments by: The Patents (Amendment) Act, 1999, Act No. 17 of 1999; The Patents (Amendment) Act, 2002, Act No. 38 of 2002; and The Patents (Amendment) Act, 2005, Act No. 15 of 2005".
[448] Vide S. O. 493(E) dated 2nd May 2003.
[449] Supra note 1.

different aspects/principles that are involved in the grant of patent applications in India. As patent is a territorial right, applicant is required to follow the different procedural time lines provided in the Act[450]. Sec. 159[451] of the Act[452] provides the power to the Central Government of India to frame different rules to regulate and proceeds the intent of the Act in an efficient manner. From time to time, Intellectual Property Appellate Board (IPAB), different High Courts and Supreme Court of India had provided different guidelines, regulations and requirements to facilitate the patent application procedure. Sec. 2(1)(j)[453] of the Act[454] provides the details about the patentable subject matters in India and clearly states that only new products and processes are patentable. Thus there is a requirement to put all the necessary time limits and processes at one place so that a patent applicant did not miss any of them.

2. DIFFERENT TYPES OF PATENT APPLICATIONS

The first step towards obtaining a patent is the filing of the patent application. The Act[455] allows the patent applications with single inventive concept[456] that means one patent application for one patent. The subject matter of the patent applications[4] in India must be: (i) a new product; or (ii) a new process; or (iii) a new product by a new process. The different methods for the same products are considered as spate invention. In India, in section 6 of the Act[457], true and first inventor of any invention can file the patent applications, or the assignee of that inventor, and if the inventor is deceased, the legal representative of that deceased person can file patent application.[458] In India, following different kinds of the patents applications may be filed by the applicant at appropriate patent office.

[450] Id.
[451] Id., s. 159. (*id*) states: "Power of Central Government to make rules- (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act."
[452] Supra note 1.
[453] Id., s. 2(1)(j) states: "invention means a new product or process involving an inventive step and capable of industrial application."
[454] Supra note 1.
[455] Id.
[456] Id., s. 10 (5).
[457] Supra note 1.
[458] Id., s. 6: "Persons entitled to apply for patents."

2.1. ORDINARY APPLICATION

Any patent application which did not claim any priority is known as an ordinary application. Ordinary application can be filed in the appropriate patent office that is situated at the jurisdiction of applicant.[459] Patent applications can be filed either electronically or through physical filing. Ordinary applications could be filed in two ways: (i) Provisional specification; or (ii) Complete specification.

- If the application is filed in the form of provisional specification (hereinafter referred as PS), a corresponding complete specification (hereinafter referred as CS) should be filed 12 months from the date of filing of PS. If applicant had failed to file CS within 12 months, his application will be considered as deemed to be abandoned.[460]
- If same applicant files two or more provisional specification with his/her name, and those provisional specifications follow the single inventive concept, with the opinion of controller, applicant can file one single CS with respect to the all PS but the single CS must be submitted within the 12 months from the earliest PS.[461]
- Applicant can post date the PS up to six months and then within twelve months, a CS must be filed.[462]
- If an ordinary application accompanied by CS is filed, and applicant requests to controller, this complete specification may be treated as PS but such requests must be filed within 12 months.[463]

Every application must specify that the invention is in the possession of applicant and name and correspondence address of true and first inventor must be declared. An ordinary patent application must be filed along with the following documents:

- Details of the application, applicant, and inventors in Form 1.[464]

[459] Id., s. 74: "Patent Office and its branches."
[460] Id., s. 9(1).
[461] Id., s. 9(2).
[462] Id., s. 17(1).
[463] Id., s. 9(3).
[464] Supra note 2; "Forms and fees".

- Application in the form of PS or CS along with drawings (if required) in Form 2.[465]
- Foreign filing details of the same or substantially same inventions through Form 3.[466]
- Declaration of the Inventor-ship through Form 5.[467]
- If a patent agent files the patent application, such patent applications must be accompanied by a power of attorney must be filed in Form 26. Power of Attorney must be submitted under the time limit of three months from the date of filing of the application.[468] If applicant has failed to submit Power of Attorney within given time limit, any time before the patent is granted, a prayer may be done to controller and such irregularities may be corrected.
- If a patent application is submitted through assignee, a proof of right must be filed though assignment or endorsement. Proof of right may be filed by signing the declaration part 12(i) of the Form 1. Proof of right must be submitted to the patent office within the time of six months from the date of filing of the patent application.[469] If an applicant has failed to submit proof of right within said time limit, a prayer may be done to controller any time before patent is granted and such irregularities may be corrected. Proof of right is required in all types of the patent applications that are filed in India.[470]

2.2. PCT/INTERNATIONAL APPLICATION

An international patent application that comes in India via PCT (Patent Cooperation Treaty) bearing an international filing date is called as PCT application or international application.[471,472] PCT application should be filed in India within thirty one months from date

[465] Supra note 1, s. 10.
[466] Id., s. 8: "Information and undertaking regarding foreign applications."
[467] Id., s. 10(6); Supra note 2, r. 13(6).
[468] Supra note 2, r. 135(1).
[469] Supra note 1, s. 7(2).
[470] NTT DoCoMo Inc. Vs The Controller of Patents and Designs, IPAB OA/39/2011/PT/CH (decided on 28 October 2013).
[471] Supra note 1, s. 2(1)(ia).
[472] Id., s. 7(1A).

of priority.[473] In India, date of filing of international patent application is considered as the date of filing of the patent application (PCT application). The abstract, title, description, claims and drawings of the international applications are treated as complete specification in India.[474] During national phase entry in India, applicant may delete a claim, but cannot modify or add extra claims and such amendments should be followed by marked-up copy.[475] The time limit for filing a national phase application is thirty one months and it is mandatory which cannot be postponed due to any reason. If this time limit is crossed, PCT application cannot be filed in India and it would be considered as abandoned.

2.3. CONVENTION APPLICATION

Indian applications bearing a priority from a conventional country is called as conventional application.[476] A convention country[477] is any country or union of countries that is defined in section 133 of the Act.[478] In India, conventional application must be filed within twelve months from the date of earliest priority.[479] Conventional applications must be accompanied by priority application. If the priority application is not in English, it must be translated and the certified copy of its translation verified by affidavit must be submitted to patent office.[480]

If conventional application contains two or more priority document that are cognate and follow single inventive concept, a single conventional application can be filed in time limit of 12 months from the earliest priority date.[481]

2.4. DIVISIONAL APPLICATION

Divisional applications are those applications which are divided out from a parent/main application on the ground that the claims of the parent application contain plurality of the

[473] Supra note 2, r. 4(i).
[474] Supra note 1, s. 10(4A).
[475] Supra note 2, r. 20(1).
[476] Supra note 1, s. 135.
[477] Id., s. 133.
[478] Supra note 1.
[479] Id., s. 135(1).
[480] Id., s. 138(2).
[481] Id., s. 137(1).

inventions and do not follow the concept of single inventive concept.[482] Any divisional application may be filed by an applicant in view of the objections issued by controller or by himself on the ground of plurality of inventions.[483,484] Divisional applications must be filed before the grant of parent application.[29] No new subject matter should be included in the complete specification of the divisional application than the complete specification of the parent application.[485] Divisional application may be filed of any of the convention application, ordinary application, or PCT national phase application.

2.5. PATENT OF ADDITION-TYPE OF APPLICATIONS

"Patent of addition" (hereinafter referred as POA) is an application which contains modifications or improvement made to the CS of the main or parent invention.[486] Patent term for POA is the term for the corresponding regular patent.[487] POA is not granted before the grant of its corresponding regular patent.[488] Patent of addition must be filed on the same date or later to the filing date of the main or regular invention.[489] The application number of the parent invention must be provided in the CS of the POA.

3. PUBLICATION OF THE APPLICATION

After receiving the patent application, patent office provides a unique reference number to the application that depends upon the type of application. All the valid applications which are not withdrawn or abandoned are published by patent office in its official patent journal within the time limit of eighteen months from the date of priority or the filing date, which is first one.[490] Applications in which secrecy directions are issued are not published. If applicant is interested

[482] Id., s. 16(1).
[483] LG Electronics Inc Vs Controller of Patents & Designs, IPAB OA/6/2010/PT/KOL (decided on 10 August 2011).
[484] Bayer Animal Health GmbH Vs Union of India, IPAB OA/18/2009/ PT/DEL (decided on 29 October 2012).
[485] Supra note 1, s. 16(2).
[486] Id., s. 54(1).
[487] Id., s. 55.
[488] Id., s. 54(4).
[489] Id., s. 54(3).
[490] Supra note 2, r. 24.

in early publication, he may file a request for early publication through Form 9 and the application is published as soon as possible.[491] Publication of the patent application includes the priority date, filing date, application number, title, address and the applicant's name and abstract of application.

4. REQUEST FOR EXAMINATION

When patent application is published in its official journal, patent office examines those applications for which request of examination were made.[492] The applicant of the patent application or any other person who is interested can file the examination request. The examination request can be made through From 18 or Form 18A.

- For ordinary applications, convention applications and PCT national phase applications, an examination request should be filed within the time of forty eight months from the date of priority or the date of filing, whichever is first one.[493]
- For divisional applications, an examination request must be filed within the time limit of 48 months from date of the filing of parent application or the priority date of the main application; or within time limit of six months from the date of filing of the divisional application, which is last one.[494]
- If secrecy direction is issued in the application, an examination request can be filed under forty eight months from the date of filing or the priority date of the patent application; or under six months from the date on which secrecy directions were revoked, whichever is later.[495]
- If applicant is a startup, or has selected India as ISA (International Searching Authority) or IPEA (International Preliminary Examination Authority), applicant is entitled to file

[491] Supra note 1, s. 11A(2).
[492] Id., s. 11B(1).
[493] Supra note 2, r. 24B(1).
[494] Id., r. 24B(1)(iv).
[495] Id., r. 24B(1)(iii).

a expedite examination request through Form 18A and usually such applications are examined within 1 month from expedite examination request date.[496]

If applicant or any other person who is interested had failed to file the examination request in given time limit, patent application would as consider as to be withdrawn and such irregularity cannot be corrected in any manner.[497,498]

5. FOREIGN FILING DETAILS

For all the applications which are filed in India, complete details of corresponding foreign applications shall be submitted to patent office within such months till the grant of the patent.[499] The details include filing of new applications, publication of applications, issuance of first examination report, and final decision whether application is granted or refused. These details are provided through Form 3. If applicant has failed to submit foreign filing details within prescribed time limit, a prayer may be done to controller any time before patent is granted and such irregularities may be corrected in prescribed manner.

6. PRE-GRANT OPPOSITION

After the patent application's publication in its official journal, notice of opposition can be filed at appropriate patent office in writing by any person but it should be filed before the patent is granted.[500] The various provisions on which notice of pre-grant opposition may be submitted to the patent office are provided in section 25(1) of the Act[501]. Notice of opposition must contain the statement, ground of opposition and the evidence is support of opposition.

7. REPLY TO FIRST EXAMINATION REPORT

[496] Id., r. 24C.
[497] Nippon Steel Corporation Vs Union of India W.P. (C) 801/2011 (decided on 08 February 2011).
[498] Sphaera Pharma, Pte. Ltd. And Anr. Vs Union Of India W.P. (C) 1469/2018 (decided on 16 February 2018).
[499] Supra note 1, s. 8.
[500] Id., s. 25(1).
[501] Supra note 1.

Applications for which request for examination was made are examined by the patent office to check whether application fulfills the prerequisites of the Act[502], and if there is any legal ground available for objection to patent.[503] Further relevant prior art documents are searched by the patent office and detailed report on patentability is provided along with the relevant prior art documents.[504] This is called first examination report (FER).

When the first examination report (FER) or first objection report is issued by the patent office, applicant had 6 months time from the date of issuance of FER, to comply all the objections of the FER.[505] If applicant had failed to comply all the objections of the FER within prescribed time period, the patent application would as considered as to have been abandoned and this irregularity cannot be corrected in any manner.[506] Applicant had the option of amending the claims, or raising his arguments. If applicant is unable to file his rely within the time period of 6 months and need more time to prepare his written submissions, he should apply for extension of time. This time period may be extended up to three months but applicant should apply for extension of time through Form 4 before the completion of the time limit of six months from FER issuance date.[507]

If applicant fulfills all the requirements and objections of the patent office and no pre-grant opposition is filed, patent is granted and a letter of patent is issued by the patent office.[51] If after reply of the applicant, patent office still found some objections or deficiency in application or there is any pre-grant opposition, a hearing letter is issued which contain all the pending objections. After hearing if applicant fulfills all the requirements, patent is granted.

After grant of the patent, patent office publishes[508] that application is granted and the complete specification along with other relevant documents are open for the scrutiny by public.

[502] Id.
[503] Id., s. 12.
[504] Id., s. 13.
[505] Supra note 2, r. 24B(5).
[506] Supra note 1, s. 21(1).
[507] Supra note 2, r. 24B(6).
[508] Supra note 1, s. 43(2).

8. POST-GRANT OPPOSITION

After the patent is granted and it is published, within 12 months from the publication date of the patent, any person who is interested may file notice of opposition through Form 7.[509] The notice of opposition should be submitted to the controller and the patentee, both. Sec. 25(2) of the Act[510], provides various grounds on which any interested person may file post-grant opposition. After receipt of notice of opposition, within 2 months from the date on which notice of opposition was received, patentee should file a reply statement clearly citing the various grounds of notice of opposition.[511] These time lines must be strictly followed to expedite the disposal of the opposition.[512]

9. Renewal of Patent

After the patent is granted, patentee is required to pay the fees for renewal or maintenance fees to keep his patent in force.[513] For the first two year, there are no renewal fees but before the start of third year, patentee is required to pay the renewal fees.[514] A renewal fee is paid before the expiration of previous year. Payment of fees for renewal did not require any separate form and can be paid by making a request to controller.

For patent of addition, no fee for renewal is required unless the main patent is revoked and the patent of addition becomes an independent patent.[515] If patent is granted after the revocation of secrecy direction, no renewal fee is required for that period for which secrecy directions were enforced.[516]

The period for the payment of renewal fees may be extended up to 6 months if patentee files a request in Form 4 in a prescribed manner.[517]

[509] Id., s. 25(2).
[510] Supra note 1.
[511] Supra note 2, r. 58(1).
[512] Novartis AG & Anr. Vs Natco Pharma Limited, CS (COMM) 229/2019 and I.As. 11304/2019, 11305/2019 (decided on 20/08/2019).
[513] Supra note 1, s. 53(2).
[514] Supra note 2, r. 80(1).
[515] Supra note 1, s. 55(2).
[516] Id., s. 37(3).
[517] Supra note 2, r. 80(1A).

In case applicant had failed to pay the fees for renewal under the given time limit, the patent will be ceased. The patentee can file the extension for six months by paying the late fees or he can apply for restoration of the lapsed patent. The restoration of the patent should be filed in Form 15 within the time limit of 18 months from the expiry of patent.[518] Along with form 15, patentee must provide the details and evidences that the failure to payment of the fees was not deliberate.[519]

10. PROBLEMS FACED BY APPLICANTS

During the filing of patent applications in India, applicants face several problems regarding the time lines of patent applications.

- The first and foremost problem is the strict time lines of request for examination that depends upon the type of application. If applicant had failed to file the request for examination through form 18, applications are treated as deemed to be withdrawn and this irregularity cannot be overcome in any manner. From time to time, Supreme Court of India had clarified that this time line cannot be overlooked and applicants are required to file the request for examination within prescribed time period.
- Second problem that is faced by the applicant is the timeline of the filing of complete specification, PCT national phase application, convention application and divisional application. These applications should be filed within the prescribed time limit otherwise it leads to the loss of the important patents in India.
- Third problem faced by the applicants is the filing of correct foreign filing details through form 3. These details should be filed within six months and if applicant provides any wrong information, it may provide a strong ground for post grant oppositions and it may lead to the revocation of patents.

[518] Supra note 1, s. 60(1).
[519] Id., s. 60(3).

- The filing of duly verified English translation of the priority document and PCT applications is important procedure. If applicant fails to file the English translation, it may delay the grant of patent in India.
- The filing of proof of right within specified time limit is an important procedure. If it is filed after prescribed time period, it is processed with a petition before controller.

11. SUGGESTIONS TO OVERCOME THE PROBLEMS FACED BY APPLICANTS

Applicants should make a proper note sheet about the various time lines during the filing of patent applications in India. Applicants should file all the required documents and forms before its last date. Applicant should seriously follow the various steps during the examination of patent application and file the correct response for each objection of the first examination report within the prescribed time period. Application should provide the correct experimental data in support of his/her patent applications so that the patent examination is not delayed. Government should further amend the patent rules and abolish the foreign filing requirements as these details can be easily obtained by patent office from internet and WIPO.

12. CONCLUSION

To obtain a patent in India, applicant must know the different time lines prescribed in the Act[520], and the Rules[521]. These time lines are regularly updated by patent office through patent rules. Different time lines at the various stage of the patent application should be followed by the applicant. Some irregularities may be corrected through prayer before controller in prescribed manner but application filing, examination request and reply to the first examination report time lines should be strictly followed by applicant. After grant of patent, fees for renewal should be paid within the prescribed time limit. If these time lines are missed, it may cause major loss to the applicant.

[520] Supra note 1.
[521] Supra note 2.

THE DILEMMA IN THE REGULATION OF OVER-THE-TOP PLATFORMS IN INDIA

- **VIKASH KUMAR**

'Over the top' (OTT) platform also referred as 'Online Platform' provide the content only via high speed internet connection like the other platforms, it doesn't require cable or satellite provider, it can give service on mobile phones, laptop, television etc. the only requirement as mention is the high speed internet connection[522]. Netflix, Amazon Prime, Hotstar are few example of the OTT platform providing services in India. From last few years there is rapid growth of the OTT platforms in India. In one report by Boston Consulting Group (BCG) the OTT platform market will touch $5 billion by the end of year 2023[523]. This growth of these OTT platform raised a concern that whether there is any regulation or laws prevailing in India to govern these platforms or not. In 2016, The Government of India (Information and Broadcasting Ministry) in a reply of RTI stated that the CBFC only give certificate to the films for theatrical release and doesn't have any control over the online content this means that the movies or show broadcasted over OTT required no certificate or approval from CBFC[524]. The justice for Rights Foundation in a PIL in 2018 approached the Delhi HC requesting the court to issue guidelines for the content broadcasted on the OTT platforms as the content of these platforms mainly include abusive language, obscenity etc. but the court dismissed the petition by highlighting the capacity of the "Information Technology Act, 2000" (I.T. Act) as this is sufficient to regulate the content of the online platform and no further guidelines required to

[522] Clay Halton, 'Over the top (OTT)' (Investopedia, 17 July 2019) <https://www.investopedia.com/terms/o/over-top.asp> accessed 11 May 2020.
[523] Lata Jha, 'Video Streaming Market in India to reach $5 billion by 2023: BCG Report' (Livemint, 21 November 2018) <https://www.livemint.com/Consumer/P9ZSN91tXV9eWM3mXRndrJ/Video-streaming-market-in-India-to-reach-5- billion-by-2023.html> accessed 11 May 2020.
[524] Ashima Obhan & Akanksha Dua, 'India: Regulating the Unregulated: Stories of OTT Platforms in India' (Mondaq, 26 September 2019) <https://www.mondaq.com/india/broadcasting-film-tv-radio/848724/regulating-the-unregulated-stories-of-ott-platforms-in-india> accessed 12 May 2020.

regulate the OTT platforms in India[525]. Then, the foundation approached the Apex Court via special leave petition which is still pending[526]. In 2019, The High Court of Karnataka while dismissing a public interest litigation stated that it is not easy to regulate online content broadcast on OTT platforms and specifically, the Cinematograph Act of 1952 doesn't have any application over OTT platforms[527]. Now, this paper will brief that why OTT platform required regulation and try to answer what are the different laws or regulation governing OTT platform now in India and whether the laws or regulations are sufficient or we need some specific guidelines like in China or France.

THE NEED FOR REGULATION

This part of the work will cover that why we need to regulate the content of the OTT platform and the next part will brief what are laws or regulation governing OTT platform. The OTT platform content was always a matter of debate on the ground of obscenity, hurting religious sentiments, creating hatred, inciting against state etc. Though, till now no case of violence reported because of the OTT content but netizens has criticised many content till now.

THE ISSUE OF OBSCENITY IN THE CONTENT

The word 'obscene' and 'obscenity' has no specific meaning, it changes from time to time, culture to culture, values to values. For example, something which was obscene in 1980s may not be obscene in recent times or something which is obscene in India may be normal in western culture. In India also, the word Obscene has no accepted definition but the Black's law dictionary define the word as "material taken as a whole appeals to prurient interest" or

[525] Sneha Johari, 'Delhi HC dismisses petition seeking licensing and regulation of OTT platforms' (Medianama, 11 February 2019) <https://www.medianama.com/2019/02/223-delhi-hc-no-regulation-ott-platforms/> accessed 12 May 2020.
[526] Unknown, 'Bringing out the big guns. Justice for Rights appeals' (Internet Freedom Foundation, 13 May 2019) <https://internetfreedom.in/we-appeal-to-an-appeal-justice-for-rights-goes-to-court-again/> accessed 12 May 2020.
[527] Radhika Kajarekar, 'Govt. Cannot Regulate Netflix, YouTube, Amazon Prime; No Law Exists to Regulate Online Content' (Trak.In, 10 August 2019) <https://trak.in/tags/business/2019/08/10/govt-cannot-regulate-netflix-youtube-amazon-prime-no-law-exists-to-regulate-online-content/> accessed 13 May 2020.

'characterized by offensiveness'[528]. The Britannica define this 'as material as offensive to the public sense of decency'.[529] Initially in India we have English Hicklin test to determine obscenity as highlighted in *Ranjit D. Udeshi v. State of Maharashtra*[530] but later on, in *Aveek Sarkar v. State of West Bengal,* Hon'ble Supreme Court disapproved the Hicklin test and adopted the "Roth Test from United States as introduced in *Roths v. United States".*[531] In Roth test, the content as whole must need to considered and if the content is lascivious and tends to deprave the person who reads, hear or watch the content, then the content is considered obscene in India[532].

In one of the petition in Bombay High Court, petitioner claimed that online platform content are obscene and vulgar, on this the court issued notice to the "Ministry of Information and Broadcasting" (MIB) on the issue of regulation of online content, the matter is still pending in the Court[533]. Lots of OTT platforms serve content which are obscene in nature, like the two most famous web series 'Sacred Games' and 'Mirzapur' of the online platforms are full of vulgar contents. The shows like 'Gandi Baat' on ALTBalaji, Mastram on MX Player, Charm Sukh on Ullu are other few example of the falling content standard of the online platforms. All these shows contain plethora of vulgar and nude scenes. The subplot of these shows revolve around lust, sensuality etc. Though, after the introduction of 'code of best practices' all web series or movies on OTT platform in India must need to categorize their work as per age that this is adult content and can be watched only above the age of 18 years[534]. But the concern is access, these content can be accessed even by a minor in a single click and the minors are not

[528] *Black's Law Dictionary* (4th edn, 2014) vol 01.
[529] John Philip Jenkins, 'Obscenity' (Britannica, 11 April 2018) <https://www.britannica.com/topic/obscenity/Developments-in-the-20th-century> accessed 13 May 2020.
[530] |1965| 1 SCR |65|.
[531] |1957| 354 U.S. 476.
[532] S.S. Rana & Co. Advocates, 'India: Minimum Modicum of Obscenity & Need of Online Content Regulation in India' (Mondaq, 10 September 2019) <https://www.mondaq.com/india/broadcasting-film-tv-radio/843750/minimum- modicum-of-obscenity-need-of-online-content-regulation-in-india> accessed 14 May 2020.
[533] Anila Kurian, 'Are online shows obscene' (Deccan Herald, 11 October 2018) < https://www.deccanherald.com/ metrolife/are-online-shows-obscene-697197.html > accessed 14 May 2020.
[534] Ikigai Law, 'Online Content Regulation: How is it done in other parts of the world' (Ikigai Law, 30 November 2019) <https://www.ikigailaw.com/online-content-regulation-how-is-it-done-in-other-parts-of-the-world/#accept License> accessed 14 May 2020.

prudent enough to decide what to watch and what not to watch, they are curious and interested in watching everything.

The question is why majority of shows on OTT platforms are obscene as one of the reason is the ban of the porn by the Indian Government. After the Uttrakhand High Court decision to ban pornographic sites, the central government banned more than 800 porn sites in India in 2018[535]. In 2015, Pornhub, a porn sites showed his worldwide traffic in which India was at third position which means the third most porn watch country in the world was India[536]. This means Indians were addicted to pornography and after the complete ban they were looking for alternatives as the demands increased, then the content of the OTT platform was the only solution because for television we have BCCC to regulate, theatrical movies are certified by CBFC and the only ignored zone was OTT platforms. The OTT players were smart enough to understand the demands of adult content. This probably one of the reason of the rapid increase of obscenity over the OTT platforms which need to be regulated.

OTT CONTENT HURTS RELIGIOUS SENTIMENTS IN INDIA

Religion always in the epicentre of major violence events in India. From 2002 Gujarat to Recent Delhi riots every time religion acted as the trigger point during these violence in India[537]. India is a country having diverse religious beliefs and religion is always a sensitive topic in India, as they treat their faith and belief as supreme. Several times it was alleged that OTT platforms hurts the religious sentiments in India. Netizens often slammed the online platform for the 'Hindu phobic' content and for hurting Hindu sentiments. Many people alleged that shows like 'Leila' on Netflix specifically target organisation as RSS and VHP by showing

[535] Rachel Chitra, 'Govt. plays Net nanny, bans 800 porn sites' (Times of India, 27 December 2018) <https://timesofindia.indiatimes.com/india/govt-plays-net-nanny-bans-800-porn-sites-subscribers-see-red/articleshow/66453163.cms> accessed 14 May 2020.

[536] Souvik Ray, 'India 3rd Most Porn Watching Country in the World, Up from 4th Last year' (Indiatimes, 09 May 2017) <https://www.indiatimes.com/news/world/india-3rd-most-porn-watching-country-in-the-world-up-fro m-4th-last-year-249212.html> accessed 14 May 2020.

[537] Prathama Banerjee, 'Are Communal Riots a new thing in India' (The Print, 03 March 2020) <https://theprint.in/ opinion/are-communal-riots-a-new-thing-in-india-yes-and-it-started-with-the-british/374458/> accessed 15 May 2020.

that these organisation incites violence and try to promote 'Hindu-Phobic' Propaganda by their content. They criticise because these shows Hindus customs and rituals in bad light. Another series 'Ghoul' showed persecution of Muslims citizen in Hindu state and Indian army in derogatory way[538]. In August 2019, Bharatiya Janta Party Official Member, filed a complaint against the show 'Sacred Games' of Netflix as the show intentionally hurts Sikh sentiments. In the show there is a controversial scene, where a Sikh Cop throws his 'Kada' in the sea. In the complaint he states that throwing the 'kada' is act of disrespecting the community of Sikh in whole as 'Kada' is the integral part of the Sikh religion and the sole intention of this scene is to outrage the Sikh community[539]. This was not only the first complaint against the show 'Sacred Games' as in September 2019, a complaint was also filed by Shiv Sena Member against the show 'Sacred Games' as the show depicts Hindus responsible for all crimes in the world including US killings. Not only this, it was also alleged in the complaint that many Hindus Mantras or Sacred Hymn of Hindus was used as war cry to incites violence and radicalize people to indulge in war against humanity[540]. Plethora of time the content of many shows alleged to be defamatory and insulting for specific religion. In September 2019, because of these complaint and outrage the trend hashtag BanNetflixInIndia was trending on the twitter with 32 thousand tweets. The major contention of these tweets are they promotes anti-Hindu and anti-India content. They also claimed that OTT platforms like Netflix wants to defame the Hindu religion at global level and associate the Hindu religion with violence, crimes etc.[541] Recently in May 2020, The Bombay High Court ordered to remove a video of Muslim leader

[538] Team Sabrang, 'Angry Centre wants OTT platforms to only ban Hindu-Phobic Content' (Sabrang India, 25 October 2019) <https://sabrangindia.in/article/angry-centre-wants-ott-platforms-only-ban-hindu-phobic-content> accessed 11 May 2020.

[539] HT Correspondent, 'Sacred Games: BJP's Tajinder Bagga files police complaint against Anurag Kashyap over controversial 'kada' scene' (Hindustan Times, 20 August 2019) <https://www.hindustantimes.com/tv/sacred-games-bjp-s-tajinder-bagga-files-police-complaint-against-anurag-kashyap-over-controversial-kada-scene/story-AIgve5nsLi7xD0shTfWXHN.html> accessed 16 May 2020.

[540] Manavi Kapur, 'Netflix has joined the list of things that Indians want banned' (Quartz India, 06 September 2019) <https://qz.com/india/1703651/shiv-sena-man-wants-netflix-banned-for-sacred-games-leila-ghoul/> accessed 14 May 2020.

[541] India TV Trending Desk, '#BanNetflixInIndia trends on Twitter Here's why' (India TV News, 06 September 2019) <https://www.indiatvnews.com/trending/news-netflix-ban-in-india-trending-on-twitter-547716> accessed 17 May 2020.

from YouTube a OTT Platform in which the leader encouraging the Muslims to attack non-Muslim doctors. The court said the speech is of inflammatory nature and capable of creating hatred between these two community[542]. The number of complaints and the outrage clearly shows that how some part of the society is not satisfied with the unregulated content of the OTT platforms.

RISE OF DEROGATORY/DEFAMATORY REMARKS ON ONLINE CONTENT

"As per the Constitution of India, every Indian has freedom of Speech and expression"[543] but the question is whether using the derogatory words like 'Fattu' or 'Pussy' for the former PM comes under the ambit of freedom of speech in India. This question was raised by the Nikhil Bhalla in his Public Interest Litigation in the Delhi HC and raised the need of the regulation of OTT platforms. In one of the show of Netflix, the actor used the word 'Fattu' for the former PM Rajiv Gandhi[544]. These remarks are capable enough to affect the public order which is similar to public peace, safety and tranquillity. The OTT platforms is always in the limelight because of the controversy related to their shows. Recently, a plea filed in the Delhi High Court as one of the show named 'Hasmukh' for allegedly maligning the image of advocates. The comedian in this show referred the advocates as 'thieves', 'scoundrels', 'goons' and even 'rapists'[545]. These remarks will bring disrepute to the legal profession as millions of viewers who watched this show will always have negative opinion for legal professionals. Furthermore, the Hardik Pandya derogatory remarks for the women on the Hotstar was also in the limelight

[542] Meera Emmanuel, 'Block inflammatory online video by "AIMIM Abu Faizal", look into complaint filed for creating Hindu-Muslim hatred: Bombay HC directs State' (Bar and Bench, 24 May 2020) <https://www.barandbench.com/news/litigation/block-inflammatory-online-video-by-aimim-abu-faizal-look-into-complaint-filed-for-creating-hindu-muslim-hatred-bombay-hc-directs-state> accessed 16 May 2020.

[543] Constitution of India 1950, Art. 19.

[544] Namita Singh, 'Sacred Games: Petitioner seeks regulation for OTT platforms on account of Public Order' (Medianama, 20 December 2018) <https://www.medianama.com/2018/12/223-sacred-games-petitioner-regulatory- mechanism-ott-platforms/> accessed 13 May 2020.

[545] HT Correspondent 'Lawyer seeks restraint on Netflix series Hasmukh for 'maligning' legal fraternity' (Hindustan Times, 22 April 2020) <https://www.hindustantimes.com/india-news/lawyer-seeks-restraint-on-netflix-series-for-maligning-legal-fraternity/story-aKDZKY2Tu2OLE4UsFPVNaL.html> accessed 17 May 2020.

for a while but later on the show was removed because of the criticism[546]. These are just few examples of the derogatory or defamatory remarks over the OTT platforms and these examples justified that how much proper regulation is required on this issue.

OTT PLATFORMS AND THE CONCERN OF CENSORSHIP

One of the important concern of OTT platforms is the issue of censorship. The word censor means removing something offensive[547]. In the survey conducted by the 'YouGov' in India, 57% of Indian supports censoring violence, nudity, strong language on OTT platforms[548]. Apart from the adult content the anti-national ideology is also one of the reason for the support of censoring. In another survey conducted by 'Local Circles', 63 percent respondents believe that there is a need of censorship or code of conduct[549]. The top OTT Platforms like 'Amazon', 'Netflix', 'MX Player' etc. are against the idea of censorship and suggested self-regulation in different discussions with the government. The players belive that any kind of censorship may alienate the viewers in India. As per different report many major broadcasters invested a huge money in launch of their OTT platforms in India[550]. The censorship will affect the OTT industry a lot. Many critics believe that censorship will hamper the creativity, as the idea of censorship is against the idea of freedom in a democratic state. Not only this they also said that OTT platform censoring the content will take us ten step back in the global competition[551].

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[546] WION Web Team, 'Amid controversy, Star's OTT platform removes Hardik Pandya, KL Rahul's 'Koffee with Karan' episode' (WION, 11 January 2019) <https://www.wionews.com/sports/amid-controversy-stars-ott-platform-removes-hardik-pandya-kl-rahuls-koffee-with-karan-episode-189613> accessed 16 May 2020.

[547] *Cambridge Dictionary* (4th edn 2020) vol 1.

[548] Ketaki Desai, 'Indians support censorship of OTT platforms, shows survey' (Times of India, 05 November 2019) <https://timesofindia.indiatimes.com/home/sunday-times/indians-support-censorship-of-ott-platforms-shows-survey/articleshow/71926831.cms> accessed 11 May 2020.

[549] Abhishek Jha, 'OTT platform content: Adult content worries many, majority seek censorship, finds survey' (CNBC TV 19, 24 February 2020) <https://www.cnbctv18.com/technology/ott-platform-content-majority-seek-censorship-finds-survey-5358391.htm> accessed 19 May 2020.

[550] Shivam Srivastav, 'Amazon India Says 'No' To Self-Censorship, Urges Other OTT Players to Follow' (INC 42, 12 September 2018) <https://inc42.com/buzz/amazon-india-says-no-to-self-censorship-urges-other-ott-players-to-follow/> accessed 18 May 2020.

[551] Adrija Bose, 'It will ruin creativity: A Panel Discussion at iReel Awards on OTT Platforms and Censorship' (News 18, 24 October 2019) <https://www.news18.com/news/movies/it-will-ruin-creativity-a-panel-discussion-at-ireel-awards-on-ott-platforms-and-censorship-2321349.html> accessed 18 May 2020.

The issue of self-censorship is also interesting in India. Recently in February 2020, Hotstar censored his content without any government order or request. A satirical news show hosted by John Oliver was censored in India as in the show the host criticised the Modi Government policy like Citizenship (Amendment) Act (CAA) and National Register of Citizens (NRC)[552]. Even the Amazon in 2019, self-censor one of his show 'Madam Secretary' to not hurt Hindu sentiments as the show depicts Hindu Nationalism in bad light in Kashmir[553]. But, the concern is still there that whether censorship is important or self-censor is sufficient in the democratic state like India.

NEED TO ACKNOWLEDGE THE WOMEN'S RIGHT

Majority of the shows on these platforms follows patriarchy. Patriarchy is society which is controlled by men[554]. Patriarchy in the society leads to women's subordination. No doubt that we cannot regulate the patriarchy by law itself, the society plus law both need to play a pivotal role in this. How patriarchy is deeply embedded in these platforms lets discuss this with few examples, Shows like Mirzapur on Amazon Prime, Sacred Games on Netflix, Rangbaaz on ZEE5, Aapharan on ALT Balaji and many others in these shows the women are only treated as object with no active role to play and these role are limited to procreation, fulfilling sexual desire etc. One of the statement in Mirzapur by his lead actor Pankaj Tripathi (Kaleen Bhaiya), Aurat ka kam hai neeche rehna which mean women are inferior than men. Though, there are also few works that acknowledge women's right but the proportion are very less. There is a strong need to make more women centric shows on OTT platforms to empower them.

[552] Prateek Waghre, 'Hotstar blocked John Oliver show even before Modi govt. could ask. It's a dangerous new trend' (The Print, 27 February 2020) <https://theprint.in/opinion/hotstar-blocking-john-oliver-modi-is-self-censorship-india-cutting-out-middleman/372250/> accessed 18 May 2020.

[553] Aditya Mani Jha, 'In act of self-censorship, Amazon Prime de letes episode of CBS show Madam Secretary which deals with Hindu nationalism and Kashmir' (Firstpost, 19 November 2019) <https://www.firstpost.com/entertainment/in-act-of-self-censorship-amazon-prime-deletes-episode-of-cbs-show-madam-secretary-which-deals-with-hindu-nationalism-and-kashmir-7673661.html> accessed 22 May 2020.

[554] *Cambridge Dictionary* (4th edn 2020) vol 1.

OTHER GROUNDS

The use of abusive language is also a major concern in these OTT content. Though, till now, we don't have any specific data or report to justify that how these language impacts the society, but any prudent viewer can tell that nowadays, the use of abusive language in the show has crossed the permissible limits. Same in the case of increase in violence in these shows. These two things will impact the society in the long run. Because these contents influence the youth very easily. There are also many scientific theory that suggests exposure to violence video or content will increase the risk of violent behaviour in the future[555]. Furthermore, the regulation is also important as if not regulated the content in future may incite violence against the state or can promotes terrorism as well. These all reason abovementioned clearly justify that why there is urgent need to regulate the content of OTT platforms in India.

EXISTING LAWS/REGULATION IN INDIA

Now, we will discuss the laws or regulation exists in India to regulate these online platforms.

SELF-REGULATION AND THE OTT PLATFORMS

The Internet and Mobile Association of India (IAMAI) drafted a code for the self-regulation to guide these OTT platforms, the title of the draft was ''Code of Best Practices for Online Curated Content Providers". In January 2019, nine OTT platform voluntarily signed the self-regulatory code of best practices. The objective of the code is to regulate the content and not to censor it[556]. The code ensure that the OTT platforms will conduct their work in more responsible way and this overall increase the interest of the consumer towards the OTT platforms. Many OTT platforms appreciated this code by saying that it will safeguards the

[555] L. Rowell Huesmann, 'The Impact of Electronic Media Violence: Scientific Theory and Research' (US National Institutes of Health, 10 October 2016) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2704015/> accessed 18 May 2020.

[556] Digit News Desk, 'Netflix, Hotstar and other OTT players sign IAMAI code to self-regulate, not censor, content' (Digit, 18 January 2019) <https://www.digit.in/news/entertainment/netflix-hotstar-and-other-ott-players-sign-iamai-code-to-self-regulate-not-censor-content-45923.html> accessed 11 May 2020.

freedom to create for the creator, the freedom of choose for the viewers and develop an ecosystem that foster innovation. The plus point of this code is it provide a mechanism for the grievances against these OTT platform and work as complaint redressal system for the consumers[557]. Any viewer by using their login Id and mentioning the title of the content and the mentioning the specific part of the content in question can approach the redressal department. After this the department must acknowledge the complaint within three working days and respond to the complaint that what action has been taken in the time frame of 10-30 working days[558]. This code also encourage the online platform to categorize the content as per age and enable parental control. This code also prohibits certain restrictions on the content of the OTT platform, such as, (a) No content which disrespect the national emblem or flag, (b) Content regarding child pornography (c) content which hurt religious sentiments (d) content which promotes or encourages terrorism or violence against the state and (e) content banned under different applicable law in different jurisdiction in India.[559]

But there are certain drawbacks of this codes, first, no comment on the binding nature of the code, what is the punishment or penalty for violation. Like in case if any platform didn't responded on the complaint of the consumer then what will be the punishment or penalty in these situations[560]. Second, the code is silent on the qualifications of members of redressal committee. Third, the independence of committee is in question as because the platforms will deal with the complaint against themselves, they might adopt a liberal approach for their creators because of which a neutral redressal committee was required. Fourth, no appeal from the redressal department which means the platform itself is binding. Fifth, as this code prohibit few things but the ambit of the prohibition is not well settled, like the issue of content hurting

[557] Ibid 35.

[558] Namita Singh, 'IAMAI's regulatory code for OTT platforms outlining principles and seeking a creation of grievance redressal; will it lead to self-censorship' (Medianama, 17 January 2019) <https://www.medianama.com/2019/01/223-iamai-ott-regulation-video-platforms/> accessed 22 May 2020.

[559] Gopi, 'Streaming platforms to self-regulate content in India' (SocialNews.XYZ, 17 January 2019) <https://www.socialnews.xyz/2019/01/17/streaming-platforms-to-self-regulate-content-in-india/> accessed 18 May 2020.

[560] ibid 8.

religious sentiment is very subjective, same in content encourage terrorism or violence against state as these matter are very subjective and cannot have common consensus among platforms.

OTT PLATFORMS AND DCCC REGULATION MODEL

Like in India for television we have Broadcasting Content Complaints Council (BCCC) similarly few OTT platforms like Hotstar, Jio, Sonyliv and Eros formed an adjudicatory body Digital Content Complaint Council (DCCC). The adjudicatory body was headed by the Retd. Judge A.P. Shah (Chairman)[561]. The council consists representation from the govt. as well as from the OTT industries. The main objective of the council is to look into the consumer complaints. But, the idea of the institutional regulation was criticized by few others OTT players like Netflix, Amazon Prime[562]. The opposition believe that we don't need such council as we have already redressal department. Also, the BCCC is there because whole family watch television but online platforms targets only one individual. Hence, common set of rules for television telecasting cannot be applied for broadcasting in OTT. The opposition further stated that why we need a separate council for regulation, when we have already IPC, I.T. Act, Cable Act 1995 and others regulating the content of the online platforms[563]. Interestingly, only those who signed the code of best practices is in January, 2019 is criticising this DCCC because they are more inclined towards the self-regulation. As stated there are few laws that govern this field. Let's discuss the application of these laws on OTT platforms.

THE APPLICABILITY OF INFORMATION TECHNOLOGY ACT OVER OTT PLATFORMS

[561] ET Bureau, 'OTT Players Oppose DCCC regulation model' (ET Rise, 04 March 2020), <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/ott-players-oppose-dccc-regulation-model/articleshow/74468435.cms?from=mdr> accessed 17 May 2020.

[562] Amrita Nayak Dutta, 'Netflix differs with Hotstar & SonyLiv as self-regulation body divides streaming industry' (The Print, 17 March 2020) <https://theprint.in/india/netflix-differs-with-hotstar-sonyliv-as-self-regulation-body-divides-streaming-industry/381717/> accessed 21 May 2020.

[563] ibid 10.

As in the Justice for Right Foundation petition, Delhi High Court clearly stated that specific regulation for OTT is not required in the presence of I.T. Act, 2000[564]. To understand the applicability we need to first analyse the position of OTT platforms in the act. The OTT qualified as intermediaries in the act. "Intermediaries are any person who on behalf another person receives, stores or transmits the message or provides any service with regard to the message"[565]. In other language we can say that intermediaries are those who facilitate the use internet for others. The concept of intermediary liability has changed a lot from the *Avnish Bajaj Case*[566] to *Shreya Singhal Case*[567] in India. The intermediaries are liable for their content subject to certain exception as discussed in section 79 of the Act[568]. The entire act is applicable on the OTT platform but we will discuss only important provisions.

Section 67 talks about the punishment for the publishing or transmitting the obscene materials in the electronic form. Section 67A brief the punishment for publishing or transmitting content containing sexually explicit act. Section 67B punish child pornographic material[569]. These provisions directly apply to the content of the OTT platforms in India. Furthermore, section 69A of the Act empower the Ministry of Electronics and Information Technology (MEITY) is to block information, URLs or websites when necessary in the interest of sovereignty and integrity of the India, defense of India, Security of State, public order, preventing incitement to the commission of any cognizable offence and to maintain relation with foreign countries[570]. This provision also empower the Ministry to block the OTT contents. MEITY from 2010 to 2018 has blocked more than 14000 websites/URLs from public access in India[571] under this

[564] ibid 4.
[565] The Information Technology Act 2000, s 2.
[566] |2005| 3 CompLJ 364 Del.
[567] |2013| 12 S.C.C. 73.
[568] Alaya Legal, 'India: Intermediaries under the Information Technology (Amendment) Act 2008' (Mondaq, 06 March 2013) <https://www.mondaq.com/india/telecoms-mobile-cable-communications/225328/intermediaries-und er-the-information-technology-amendment-act-2008> accessed 22 May 2020.
[569] TVP Bureau, 'Enough safeguards available under IT Act for content appearing on OTT platforms' (Television Post, 29 Dec 2017) <https://www.televisionpost.com/enough-safeguards-available-under-it-act-for-content-appearing-on-ott-platforms-rathore/> accessed 18 May 2020.
[570] ibid 48.
[571] SFLC, 'Over 14000 Websites Blocked by MEITY' (SFLC, 01 July 2019) https://sflc.in/over-14000-websites-blocked-meity.

provision. Apart from the provision of the act, there is also intermediary guidelines of 2011 and 2018 which talks about their liability and provide due diligence framework for intermediaries[572].

Though, there are conditional immunity for the intermediaries under this act like section 79 when the intermediary only act as a facilitator and doesn't play any role in creation or modification of the content. This is called 'Safe harbour protection' where the intermediary cannot be liable for the act of the third parties[573]. But in practical sense immunity of section 79 cannot be applicable on the OTT players as they create or modify their own content and there is no third party involve but there is one exception of YouTube as YouTube doesn't create their own content like Netflix, Amazon etc. as in YouTube anyone can upload their content and YouTube only act as a facilitator. Furthermore, in the Shreya Singhal Case the Court applied section 79(3) (b) which talks about 'Notice and Take Down'. In this the intermediary is bound to remove the unlawful content upon receiving actual knowledge of its existence within 36 hours from the notice from the appropriate authority, agency or the court. The intermediary would lose its immunity, if failed to remove the content after receiving such notice[574]. These all above mentioned provisions, case laws clearly justify that I.T. act is regulating the OTT Platforms at many fronts.

CONSTITUTIONAL REGULATION OVER OTT PLATFORMS

In India, all citizen have the fundamental right to freedom of speech and expressions[575]. This means that the OTT platforms is also entitled to this democratic rights. But this right is not

[572] S.S. Rana & Co. Advocates, India: Analysis of the Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018, Mondaq (Mar. 29, 2019) <https://www.mondaq.com/india/social-media/794624/analysis-of-the-information-technology-intermediaries-guidelines-amendment-rules-2018> accessed 23 May 2020.

[573] Suraj, 'Liability of Intermediaries under information technology act 2000' (R&A Associates, 23 February, 2017) <https://www.rna-cs.com/liability-of-intermediaries-under-information-technology-act-2000/> accessed 24 May 2020.

[574] Malvika Kapila Kalra, 'Intermediary Liability under the Information Technology Act: Time for an Amendment' (Bar and Bench, 28 July 2019) <https://www.barandbench.com/columns/intermediary-liability-under-the-information-technology-act-time-for-an-amendment> accessed 22 May 2020.

[575] Constitution of India 1950, Article 19(1) (a).

absolute in nature and subject to certain restrictions imposed under the constitutions[576]. These restrictions acts as regulation for the OTT platforms. The restrictions must be reasonable in nature and cannot be arbitrary, illegal or erroneous[577].

The first ground of restriction is the 'Security of the State' which consider serious and aggravated forms of public order e.g. waging war against the State. Second restrictions, 'Public Order' was added after the first constitution amendment which refers to the tranquillity of state which prevails among the members of political society[578]. Anything that interfere with public tranquillity or public peace affects public order. Hon'ble Supreme Court in the case of *Kedar Nath v. State of Bihar*[579] stated that public order and national security were reasonable restrictions imposed under article 19(2). The third ground of restriction is 'Friendly relations with foreign states' that prohibits any speech and expression which may jeopardise the friendly relation with foreign states[580]. The fourth restrictions prohibits decency or morality as discussed in section 292 to 294 of IPC, 1860. The fifth restriction is the 'Contempt of Court' which is further regulated by Contempt of Court Act, 1971. The sixth restriction is 'Defamation' as already discussed in above issues. Seventh and eighth restrictions are 'Incitement to an offence' and 'Sedition'.[581] These restrictions basically barred the OTT platforms that their content must not violate these restrictions.

APPLICABILITY OF OTHER LAWS OVER OTT PLATFORMS

[576] Constitution of India 1950, Article 19(2).

[577] Ajay Kumar, 'Dissent Gagged: Ambiguity of Free Speech Laws in India' (Firstpost, 17 March 2019) <https://www.firstpost.com/long-reads/dissent-gagged-ambiguity-of-free-speech-laws-in-india-3392734.html> accessed 21 May 2020.

[578] Unknown, 'Freedom of Speech and Expression' (Law Teacher, 02 February 2018) <https://www.lawteacher.net/ free-law-essays/constitutional-law/freedom-of-speech-and-expression-constitutional-law-essay.php> accessed 17 May 2020.

[579] |1962| AIR 955 SC.

[580] Tanu Priya, 'Articles on Legal Issues' (Academike+, 02 September 2014) <https://www.lawctopus.com/ academike/freedom-of-speech-and-expression/> accessed 21 May 2020.

[581] Apurva Rathee, 'Article 19 (2): Reasonable Restrictions on Article 19 (1) (a)' (Law School Notes, 13 April 2017) <https://lawschoolnotes.wordpress.com/2017/04/13/article-19-2-reasonable-restrictions-on-article-19-1-a/> accessed 22 May 2020.

There are lots of other laws applicable on the OTT platforms but the two most important are IPC, 1860 and Indecent Representation of Women (Prohibition) Act, 1986 (IRWP). The different PIL filed in different courts alleged that apart from I.T. few OTT platform also violates different provisions of IPC, 1860 and IRWP, 1986 act[582]. Few of important provision of IPC that regulates OTT platforms are section 292 prohibits obscenity in the content of the OTT Platforms, section 295A of IPC prohibit the deliberate and malicious acts which are intended to hurt religion or religious belief in India[583], the Dissemination of defamatory comment is also punished under section 500 of IPC. IRWP Act, 1986 basically prohibits the indecent representation of women on the online contents[584].

Government Approach

The government proposal for institutional regulation by highlighting regulation of France and China was already rejected by many OTT players like Netflix & Amazon. Though, the government believe in self-regulation but subject to exceptions like sovereignty, security of State etc.[585] Even the government in the reply of the Justice for Right Foundation petition in the Delhi High Court stated the I.T. Act & IPC are sufficient to regulate the OTT platform on many fronts[586]. In November 2018, The Telecom Regulatory Authority of India introduced the consultation paper on 'Regulatory framework for Over-The-Top (OTT) communication Services' to receive comments from different stakeholders regarding regulatory issues and economic concerns pertaining to such OTT services and whether it can be regarded the same or similar to the service provided by Telecom Service Providers (TSPs).[587] In two month total

[582] IANS, 'Provocative content growing on OTT platforms, government serious' (The New Indian Express, 04 September 2019) <https://www.newindianexpress.com/nation/2019/sep/04/provocative-content-growing-on-ott-platforms-government-serious-2028755.html> accessed 25 May 2020.

[583] Kusuma Trust, 'Section 295A of the Indian Penal Code' (The Centre for Internet & Society, 13 March 2017) <https://cis-india.org/internet-governance/resources/section-295a-indian-penal-code> accessed 24 May 2020.

[584] ibid 3.

[585] Megha Mandavia, 'Self-regulation model may work for OTT companies: Govt' (The Economic Times, 29 February 2020) <https://economictimes.indiatimes.com/tech/internet/self-regulation-model-may-work-for-ott-companies-govt/articleshow/74410087.cms?from=mdr> accessed 18 May 2020.

[586] ibid 64.

[587] Telecom Regulatory Authority of India (TRAI), 'Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services' (Govt. of India, November 2018) <https://trai.gov.in/sites/default/files/CPOTT12112018.pdf> accessed 22 May 2020.

89 Stakeholders submitted their response including 11 TSPs, 11 OTT Service providers, 40 civil society and 23 trade associations.[588] In the response 35 stakeholders believe that OTT and TSPs are not similar and should be regulated in different way, 27 stakeholders have ambiguous opinion and the rest 27 believe that both TSPs and OTT have similar legacy and should be regulated in similar way.[589] Till now, no such step taken on this.

Recently in March 2020, the Information and Broadcasting Minister Prakash Javadekar gave the ultimatum of 100 days to finalise a code of conduct and set up an adjudicatory body. The government in the code of conduct also expecting different ways of segregating and categorising online content for different age group as alternative of censorship[590].

OTT REGULATION IN OTHER COUNTRIES

In this we will first cover those China and Australia, in which there is government imposed regulation then we will cover those countries who follow self-regulation for OTT platforms. This will help us to understand the similarities or contrast present in the regulation adopted by these countries and whether we can adopt the same method in India. The international perspective also help us to identify options that might otherwise be overlooked.

China

China is one of the example of institutional regulation of OTT platforms. The National Administration of TV and Radio (NATR), a government bureaucratic body regulate the OTT platforms in China. One of the tightly regulated OTT industry in the world. Many OTT giants like Prime video and Netflix is banned in China.[591] The main focus of the NATR is to reduce

[588] Telecom Regulatory Authority of India (TRAI), 'Comments on the Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services' (Govt. of India, January 2019) <https://trai.gov.in/consultation-paper-regulatory-framework-over-top-ott-communication-services> accessed 24 May 2020.

[589] Ratul Roshan, 'Over-The-Top and Telecom Services – Similar or Not? Stakeholders' Responses to TRAI Consultation Paper' (IKIGAI Law, 1 August 2019) <https://www.ikigailaw.com/over-the-top-and-telecom-services -similar-or-not-stakeholders-responses-to-trai-consultation-paper/> accessed 23 May 2020.

[590] Quint Entertainment, 'Govt. gives OTT Platforms 100 days to finalise code of conduct' (The Quint, 03 March 2020) <https://www.thequint.com/entertainment/hot-on-web/government-gives-netflix-hotstar-ott-platforms-100 -days-to-finalise-code-of-conduct> accessed 19 May 2020.

[591] Pranit Sarda, 'Pakistan to China: How countries regulate Netflix and other OTT Content' (India Forbes, 07 November 2019) <https://www.forbesindia.com/article/leaderboard/pakistan-to-china-how-countries-regulate-netflix-an d-other-ott-content/56025/1> accessed 25 May 2020.

the foreign content while boosting the local content. As per the regulation the online video services limit the size of foreign content by 30%. Furthermore, during the prime time of (7.00 pm – 10.00pm) foreign content is prohibited and cannot be broadcasted unless NATR's specific approval[592]. In China, the regulator approve all the foreign content before broadcasting, this means that NATR control all the content consumed by the people.

Australia

The Broadcasting services act, 1992 (BSA) governs the OTT sector in Australia. Regulation is done in Australia through a complaints- based mechanism (Online content co-regulatory scheme). The BSA framed guideline for the content broadcasted on the online platform[593]. They classified their content in four category; (a) RC (Refused Collection) Selling and importing prohibited in Australia, (b) X 18 + Content only for adult because of its sexually explicit nature, (c) R18+ Content only for adult and may offensive to adult community, (d) MA 15+ Content only for the age above 15[594]. The BSA prohibits access of the RC content.[595] In Australia, the Australian classification board takes 'Pilot Test' to check whether the classification done by the OTT platforms are above the standard or not[596].

Singapore

The Infocomm Media Development Authority (IMDA) regulates the OTT industry in Singapore. The IMDA issued code of practices for OTT and video-on-demand services. Under this they are required to classify their content on basis like general (G), parental guidance (PG), parental guidance for children below 13 (PG13), no for children below 16 (NC16), Mature

[592] Kia Ling Teoh, 'China media watchdog continue to tighten control over foreign content' (Technology Informa, 05 October 2018) <https://technology.informa.com/607647/china-media-watchdog-continues-to-tighten-control-over-foreign-content> accessed 23 May 2020.

[593] Australian Communications and Media Authority, 'Submission by the Australian Communications and Media Authority to the Australian Law Reform Commission Inquiry into Serious Invasions of Privacy in the Digital Era – Issues Paper 43' (Australian Government, November 2013) <https://www.alrc.gov.au/wp-content/uploads/2019/08/52._org_acma_submission.pdf> accessed 22 May 2020.

[594] Broadcasting Services Act 1992, s 60(1) (c)-(e).

[595] Broadcasting Services Act 1992, s 20.

[596] Ikigai Law, 'Online content regulation: how is it done in other parts of the world' (Ikigai Law, 30 November 2019) <https://www.ikigailaw.com/online-content-regulation-how-is-it-done-in-other-parts-of-the-world/> accessed 23 May 2020.

audiences (M18) and Content for 21 years plus only (R21). The display of rating and theme of content (Nudity, sex, violence, language, drug abuse, and horror) is mandatory. The code consists of some dos and don'ts for OTT platforms like not to undermine national or public interest etc.[597]

Japan

There is no institutional regulation in Japan for OTT platform. Even the Television content in Japan enjoy very less regulation. The only censorship of content in Japan is pornography which is also considered criminal offense as per article 175 of the Criminal code of Japan. The OTT content in Japan is not filtered by any authority or regulated by any law, without any kind of restriction, the content enjoy complete freedom[598].

CONCLUSION

The contention of the OTT players that in India the entire family watch television together but not OTT platforms as OTT content is consumed only by individual and doesn't require strict regulation is not true. Nowadays, because of the technology the OTT content can be broadcasted easily even on the television. There are very less shows on OTT platforms that can be watched with the family together. The issue of nudity, strong language, violence, sexually explicit act etc. are increasing drastically in the online content. This raised the concern of OTT regulation. The Delhi High Court said that the OTT Platforms doesn't required specific regulation in the presence of I.T. Act & IPC but the government recently gives 100 days to the OTT Platform to draft a code of conduct and set up an adjudicatory body for the regulation of OTT platform. No doubt, the OTT platforms required specific regulation because we need to understand that even in the presence of these laws the condition is same. Laws like I.T. and IPC is to punish in case of violation but regulation works as a precautionary measures. With

[597] 'Content code for over-the-top, video-on-demand and niche services' (Infocomm Media Development Authority, 29 April 2019) <https://www.imda.gov.sg/-/media/imda/files/regulation-licensing-and-consultations/codes-of-practice-and-guidelines/acts-codes/ott-vod-niche-services-content-code-1mar2018.pdf?la=en> accessed 24 May 2020.

[598] Ibid 70.

the increase of cases in the courts, it is not suitable to approach court on these frivolous issues and choke the judiciary. Instead of that we required an adjudicatory body like DCCC, in which there must be proportionate representation from the OTT industry, Government and other concern stake holders. The need of this body is because of the unregulated, unfiltered, unrestricted content of the OTT platform which have the potential to 'affect the children as well as youth', 'hurt religious sentiments', 'incite violence against the state', 'encourage terrorism' etc. Though, many OTT platform categorise their work age-wise in India but anyone can access it which means even a child of the age 14 can access the content restricted for the age of 18+. We need specific regulation even on categorisation of the content and access of adult content. Like China, we also need regulation in which we can regulate the foreign content and promote the local content which not only promotes our local creator but also develop an internal ecosystem that foster innovation. The issue of censorship is also a concern because the idea of censorship is against the democratic freedom unless if come under the reasonable restrictions mentioned in the Constitution of India under article 19(2). There is a need of specific regulation for the OTT players which must also respect the creativity of the OTT players.

DOMESTIC VIOLENCE: AN UNSEEN CRISIS DURING COVID-19 LOCKDOWN IN INDIA

- RIDDHIMAN ROY CHOUDHURI & ANSHALA VERMA

On 11th March 2020 Dr. Tedros Adhanom Ghebreyesus, the Director-General of the World Health Organization declared COVID-19 a pandemic. The Coronavirus is a large family of virus and COVID-19 is a new coronavirus, which means that it is likely no one has natural immunity to it.[599] According to the Centers for Disease Control and Prevention, COVID-19 is spread mainly from person-to-person, usually through close contact that is within six feet. That could be through physical contact, like handshaking (if someone's hands are contaminated with the virus) or touching contaminated surfaces.[600] When you touch your own eyes, nose or mouth after touching a contaminated surface, the virus can enter the body and have adverse affect on one's body. The new term that has entered in the coronavirus vocabulary is 'community spread', it means that people in specific area have been infected even if they do not know how and from where they contracted the virus.[601] So it basically means that the person infected neither has come in contact with someone with COVID-19 nor has any travel history to a place where COVID-19 outbreak has taken place, it is impossible to pin point the source from where the virus has been contracted.

Dr. Anthony Stephen Fauci, director of the National Institute of Allergy and Infectious Diseases said "the worst pandemic would be a new respiratory virus that jumped from animals to humans, easily transmissible and has a high death rate" and COVID-19 fulfills all the criteria for being called the worst pandemic and as already declared by Fauci that COVID-19 indeed

[599] What is COVID-19 and how is it spread?, Gavi The Vaccine Alliance, (March 27, 2020) https://www.gavi.org/vaccineswork/what-is-covid-19-and-how-does-it-spread
[600] Jessica Migala, How is Coronavirus Spread?, Health, (April 03, 2020) , https://www.health.com/condition/infectious-diseases/how-is-coronavirus-spread
[601] Ibid 2

turns out to be his worst nightmare.[602] With a disease which is highly contagious and can have lethal results at hand, many countries around the world went under lockdown and so did India. Lockdown literally means restricting the movement of people for the security of the state. With COVID-19 outbreak, lockdown of countries is an inevitable step taken by government across borders to curb the rising cases. Lockdown would ensure two things, first, that the gathering due to day to day activities, for example taking metro to work, working in malls, halls etc, attending schools and colleges and leisure activities like going out to watch movies, shopping, dining out etc would come to a stop and second, it would also help in geographical localisation of the virus which would lead to reduction in the effective population where the disease can spread and thus there would be fewer outbreaks in new localities[603] which in turn would prevent COVID-19 virus spreading like wildfire among people.

On 24th March 2020, our Prime Minister Mr. Narendera Modi announced that the country will go under 21 day nationwide lockdown and from 25th March 2020, everything except essential goods and services was shut down. The sudden lockdown in the country had its effect on every aspect of life, from mode of working and pedagogy to lifestyle of people. Lockdown may be bringing families closer but at the same time it is also giving rise to a latent crisis of domestic violence. Lockdown and domestic violence are closely related. To understand the relation between lockdown and domestic violence, it is important to give a brief idea of what actually is domestic violence because in our Indian society, those who recognize domestic violence have the most common perception of domestic violence as being restricted to just physical abuse.

[602] Karen Weintraub, Viruses like the one that causes COVID-19 have long been Dr. Anthony Fauci's 'worst nightmare', USA Today (June 10,2020), https://www.usatoday.com/story/news/health/2020/06/10/anthony-fauci-worst-nightmare-coronavirus-like-one-causing-covid-19/5333466002/

[603] Murad Banaji, What effects has the lockdown had on the evolution of Covid-19 in India?, Scroll.in (May 27, 2020) https://scroll.in/article/962992/what-effects-has-the-lockdown-had-on-the-evolution-of-covid-19-in-india

Domestic violence is defined under Section 3 of Protection of Women from Domestic Violence Act 2005 which includes the following[604]

- Physical abuse which is of such nature that it causes bodily pain, danger to life, limb or health or impairs the health or development of the women and includes assault, criminal intimidation and criminal force.
- Sexual abuse includes any conduct of a sexual nature which abuses, humiliates, degrades or violates the dignity of a woman.
- Verbal and emotional abuse includes ridicule, insults, humiliation, name calling especially with regard to having child or male child or making repeated threats to cause physical pain to any person in whom the aggrieved woman is interested.
- Economic abuse includes deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law, alienation from asset, security, bond, or any like property to which the aggrieved woman is entitled to and prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

In layman's term domestic violence is violence by one member of the house on another. Women are the main victims of domestic violence around the world, especially in India. In ancient India, women were respected and adored but with the coming of Brahminical scriptures women and shudras were kept on the same pedestal. In order to prove their superiority, they started regarding women and shudras as inferiors. The downfall and various kinds of abuse of women started with these times and continued long enough till it was normalised to oppress women and give them no rights. When the British came to India, some inhumane practices against women like Sati and child marriage, prohibition on widow remarriage could come to an end with help of the British and Indian social reformers like Ram Mohan Roy and Ishwar

[604] Protection of Women from Domestic Violence Act 2005. § 3, (43 of 2005).

Chandra Vidyasagar and many more like them. The British introduced us to codified laws and also had a role to play in giving birth to the most detailed Constitution of a country that is the Constitution of India, 1950. Article 15 (3) permits 'protective discrimination' in favour of women according to which state can make special provision for women and the scope of this article is wide enough to cover the entire range of state activity including employment.[605] The Protection of Women from Domestic Violence Act 2005 is a civil law to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the domestic household.

Domestic Violence against women is a sad but very prominent reality in India. India is a patriarchal society, men are thought to be superior because women are considered to be physically and emotionally weaker than men. Men are given more opportunities than women in India, be it in education or job or in payment of salaries. Slowly things are changing, women are proving themselves in every field, proving out in the world that they deserve to be treated as equal to men, not only on papers but in reality as well. While Indian women are achieving such great milestone, behind closed doors the reality of many women is nerve wrecking and brutal which includes one or another form of domestic violence. Domestic violence takes place in rural areas, towns, cities and even metropolitan cities. It is not limited to any caste, class, age or race. Domestic Violence has broken all barriers, it is present in every part of the society and is not contained within any one box of the mankind. The reason of domestic violence against women ranges from not bearing child, or to be more specific a male child, to not cooking food on time. Domestic violence is one of the gravest form of violation of human rights. It is the basic right of every human to have a life of dignity and respect but majority of women in India are tortured physically, psychologically, sexually or economically over trivial matters like not cooking on time or over serious matters like dowry demands. According to 'United Nation Population Fund Report', around two-third of married Indian women are victims of Domestic Violence attacks and as many as 70 per cent of married women in India

[605] Salini, Protection Of Women Under Indian Constitution, Buddy Mantra (April 17, 2017) https://buddymantra.com/protection-women-indian-constitution/

between the age of 15 and 49 are victims of beating, rape or forced sex.[606] Even though majority of domestic violence case includes violence against the wife by the husband or the family of the husband but the violence within the four walls of the house is not limited to just the wives, it includes other female members of the family as well. Domestic violence cases, where women reported physical abuse in rural and urban areas, were at 29 per cent and 23 percent, respectively.[607] With such appalling statistics it is evident that women irrespective of their relation to the man is being ill treated in some way, be it his wife, sister, mother or any other relation.

According to Dr. Tedros Adhanom Ghebreyesus, COVID-19 is not just a public health concern, it is a crisis that will touch every sector[608] and it was very true, with the lockdown in India 75% of the Indian economy was under lockdown along with its people. This led to major termination of jobs, the criteria of jobs ranging from white collar jobs to manual labour in houses, salaries being held by superiors, ruination of many companies and start-ups and many more forms of economic loss in the lives of people due to the lockdown because of COVID-19. Such negative outcome of the lockdown would naturally lead to household tensions and increase in domestic violence due to forced coexistence because of stay at home rules, economic stress and fears about the virus.[609] Abusers tend to get more intensely violent when they are at home for a long period of time, the lockdown has ensured that everyone is supposed to stay at home to prevent them from getting infected and thus there is a spike in the cases of violence at home. Along with staying at home for substantially long time, the economic stress in the families has also contributed in exacerbation of domestic violence.

[606] Dhawesh Pahuja, Domestic Violence Against Women In India, Legal India (August 22, 2011) https://www.legalindia.com/domestic-violence-against-women-in-india/

[607] Sheikh Saaliq, Every Third Woman In India Suffers Sexual, Physical Violence at Home, News18 India (February 8, 2018) https://www.news18.com/news/india/the-elephant-in-the-room-every-third-woman-in-india-faces-domestic-violence-1654193.html

[608] Supra

[609] Domestic violence and abuse: Safeguarding during the COVID-19 crisis, Social Care Institute for Excellence (May 22, 2020) https://www.scie.org.uk/care-providers/coronavirus-covid-19/safeguarding/domestic-violence-abuse

Fear of contracting has also led to an increase in domestic violence, a victim of domestic violence in the United States of America told a representative for the National Domestic Violence Hotline over the phone that her husband would not let her leave the house, threatened to throw her out if she started coughing and she was afraid that if she left the house her husband would lock her out.[610] It is true that COVID-19 is a deadly virus but with proper precaution it is possible to evade contracting the virus but with irrational fear of the virus of the people has led to locking out the victims of domestic violence or confining them to a room without any symptoms of the virus. Moreover, due to the lockdown few people visit each other which means that there is increased isolation which could lead to escalation of abuse and domestic violence. Those who are already living with an abusive partner or family member are less likely to seek help from their relatives during the lockdown. Fewer visitors to the household may mean that evidence of physical abuse by the partner or family member goes unnoticed.[611]

So, domestic violence against women is definitely not a new phenomenon. Women need to hold up under the burns of residential, public, physical as well as emotional violence against them, which affects her status in the society. The insights of expanding violations against women is shocking, where women are exposed to violent assaults for example foeticide, infanticide, medical neglect, child marriages, bride burning, sexual abuse of young girl child, constrained marriages, assaults, prostitution, sexual harassment at home and at work places and so forth. In all these cases women are considered as the aggrieved individual.[612] Not only women but this violence is towards somebody with whom the person is in a relationship with, be it the spouse, son, daughter, mother, father, grandparent or some other family member. It may very well be a male's or a female's atrocities towards another male or a female. Anybody can be a victim and a perpetrator. Domestic violence against women not only hampers the life of the victim but it also has severe affects on the children. It has a negative affect on the children

[610] Mélissa Godin, As Cities Around the World Go on Lockdown Victims of Domestic Violence Look for a Way Out, TIME (March 18, 2020) https://time.com/5803887/coronavirus-domestic-violence-victims/

[611] Supra 11

[612] Supra 8

to a larger extent as they have a stronger affection towards their maternal side and once the mother's grief and sufferings are revealed, the mental health of the child gets adversely affected. The violence might lead to a divorce between the spouses which will again affect the life of the children.

During this period of lockdown in India, many cases regarding domestic violence are not getting reported as it is not easy for the women in India to come out and report and due to the ongoing pandemic there are curfews imposed on some part of the states which has made the police force occupied in the work. The police who are generally the first responder are known to be inhumane to women in the rural areas. Now, many of them do not even register the complaint against the perpetrators because of the stigma attached to divorce in India. Also, leaving the other half and finding a new shelter is especially hard during the lockdown as transport is limited. According to India's national family health survey only 14% of women who experienced violence have sought help to stop it and the rest 86% neither sought help nor did they mention it to anyone.[613] The reason that has led to a hike of cases at this time is because the abuser feels frustrated and angry because of lack of control and this prompts them to exercise greater control by abusing the partner and the children often with violence. Sometimes victims face difficulties in reaching out to the commission or NGO as the perpetrators are always close to them. Furthermore, in low-wage households, husbands are more abusive and aggravated towards their partners. Women who are financially dependent on their respective other half tend to suffer more. Not only the middle and the lower class face this problem but it is also prevalent among the richer sections of the society where women are financially independent.

Women can take protection under Section 498A of IPC which states that the husband or relative of husband of the woman subjects her to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Also, The Protection of Women from Domestic Violence Act, 2005 was implemented by the government for the

[613] What India's lockdown did to domestic abuse victims, BBC News (June 2, 2020) https://www.bbc.com/news/world-asia-india-52846304

protection of women form the perpetrators. In the landmark case of *Savita Somabhai Bhatiya vs State Of Gujarat And Ors*[614], the Supreme Court held that Section 3 of the Domestic Violence Act not only ensures protection to the married women but it also secures the right of a live-in relationship couple, and also under Section 125 of the Indian Penal Code, a woman does not have to necessarily file for a divorce to have a right to receive maintenance from her husband.

However, the authorities need to take effective measures by not only publicizing the help line numbers but through vigilant and regular checking of suspicious houses during the ongoing pandemic. Apart from these, the victim may approach professional counsellor, mediators and even psychiatrists through whatsapp or video conferencing for help, particularly at this point of time. The authorities can also adopt an approach by initiating informal complaints in nearby medical, grocery, or stationary stores to whichever the victim visits regularly.[615] In this way all protective measures must be proclaimed as a significant support to protect the domestic violence victims.

In a nation with profoundly established patriarchal morals, where women are supposed to tolerate each and everything that is tossed in their way, a lot of violence against women is expected and accepted. With extension of the lockdown, the sentence of confinement for the victims only gets prolonged. A lot of them feel helpless and hopeless as they are stuck in the situation. Battling these abusers and the beasts who prey upon the frangibility of women, is as salient as handling the pandemic. The government and law enforcement offices need to comprehend the severity of the issue. We have to ensure that these victims are not overlooked while the battle against the pandemic goes on. The protection of women from domestic violence cannot be put on hold due to the increasing periods of lockdown.

[614] Savita Somabhai Bhatiya vs State Of Gujarat And Ors (2005), AIR 399

[615] Pandemic Triggers Domestic Violence, The Leaflet (July 15, 2020), https://theleaflet.in/pandemic-triggers-domestic-violence/

MASS MEDIA: A MENACE TO RIGHT TO PRIVACY

- SHALABH

ABSTRACT

Right to privacy is a fundamental right which has come into existence after the widening up of the dimensions of Article 21 of the Indian Constitution. The constitution does not grant right to privacy in specific provision. It has been formulated keeping in pace with changing needs of the society and the Directive Principles of State Policy. According to Duhaiman Law Dictionary, Privacy means "A person's right to control access to his of her personal information. Social media has become a recent trend and has expanded rampantly with the biggest names in social media being Facebook, Instagram, Snapchat and Twitter. These social networking sites expect users to disclose their personal information and such information is made public on such sites. The extent to which such information has become accessible is a critical concern and has resulted into serious privacy violation. The misuse of pictures, personal details of person, location disclosure and cyberstalking has become one of the most common invasions to the right to privacy. This paper is aimed at discussing the new dimension of Article 21 of Indian Constitution with respect to the threat of social media on it. The causes for it and its effect on the users and the suggestions for the same.

Keywords-

Social Media; Social networking sites; Human Right Violation; Invasion of Right to Privacy; Threat to Society

1. INTRODUCTION

Privacy is dead, and social media holds the smoking gun.

The word privacy can be defined as "a state in which one is not observed or disturbed by other people." Secrecy in social media and privacy as per article 21 of Indian constitution are antonyms. Privacy requires keeping things and information confidential where as in social

media things are disclosed to the public at large. With the advent of digital technology in todays era especially after 2006 it is very important to bring about the much needed balance between the right to privacy of Internet users and the right of third parties, including social networking websites users through comprehensive compromise.

Before the impending of social networking sites in the World Wide Web, there were other forms of social network technologies that included: online multiplayer games, blog and meeting sites, newsgroups, mailing lists and blind date services.[616] These sites acted as a support system for the new and incoming social media sites including snapchat, facebook, tinder, cupid, instagram etc.

In the present era, with the advent of social networking sites which have now gained popularity, cybercrimes have greatly increased. It has become a subject of great interest among all age group of people. The children and the old age people are also being trapped in the web of social media. The users are expected to reveal their personal information on such platforms that can be easily accessible by any unknown person. People, especially women and children who are falling victim to unknown people with whom they can be friends with, chat and video call through their account. Though, such sites do offer privacy options but they are clearly not sufficient. It is the need of the hour for our nation to make it a matter of concern and to make strict rules with regard to the developing technology.

2. PRIVACY

Justice Louis Brande, Judge United states Supreme Court are one of the early profounder of the expression 'Privacy'. He explained privacy as the "right to be left alone". [617] According to Duhaiman Law Dictionary, Privacy means "A person's right to control access to his or her personal information."

[616] Wikipedia https://en.wikipedia.org/wiki/Privacy_concerns_with_social_networking_services
[617] Warren S &Brandeis L.D, 'The Right to Privacy', Harv. L. R 4 (1890): 19
[3] MP SHARMA VS SATISH CHANDRA, [1954] 1 SCR 1077
[4] KHARAK SINGH VS STATE OF U.P., [1964] 1 SCR 332

The evolution of right to privacy as a fundamental right can be traced from the case of **M.P SHARMA v. SATISH CHANDARJI**[618] in this case the apex court ruled that right to privacy is not a fundamental right under the Constitution of India. The same decision was given in the case of **KHARAK SINGH v. STATE OF UTTAR PRADESH**[619] that right to privacy was not guaranteed under the constitution and thus is not a fundamental right. Right to privacy has always been in controversy with regards to its constitutional validity. Article 21 of Indian Constitution which guarantees right to life and personal liberty has now covered in its ambit Right to privacy. This right has expanded the scope of Article 21. Right to privacy is now a fundamental right especially after the case of **MANEKA GANDHI v. UNION OF INDIA**[620] and **R.C. COOPER v. UNION OF INDIA**[621] which held that right to life and personal liberty would have no meaning if right to privacy is not assured with it. Article 21 of Indian Constitution will have no meaning without Right to privacy. The extension of Article 21 is a part of judicial adventurism which has given a wide meaning to right to life and personal liberty.

3. RIGHT TO PRIVACY AND SOCIAL MEDIA

Social media is a network that helps in formation and exchanging data, facts and other forms of expression. There are various forms of social media websites that exist today but over the past few years social networking sites like facebook, twitter, whatsapp, orkut have gained recognition amongst people and are now in trend. Almost all people of every age group use these sites. Such sites help people to interact with the whole world by sitting just at home. It creates a boundary-less state in the form of a virtual place for interaction. But the users aren't aware the cons which comes with using these sites. These sites eventually have given rise to cybercrimes that we see today which are increasing rampantly. As these sites are becoming

[620] 1978 AIR 597, 1978 SCR (2) 621
[621] 1970 AIR 564, 1970 SCR (3) 530

trendy since 1990, the concept of cybercrimes has increased to a great peak. The users while making their account on such sites take the bad onus of such sites along with it. The online shopping websites like Myntra, Flipkart etc. Saves the personal record of the users and provide with those advertisements and designs which the user has liked before. But little does the user know that such information can be used identity thefts, sexual predators, unintentional fame, cyber staking and defamation which have started gaining focus.

The sites like facebook, instagram and other social networking sites whose users are teenager and children often fall prey to these identity thieves. They do not have the sense of what is good for them and what not. They add unknown people into their account and share their personal information including their pictures, family details etc. This leads to cyber crime. Also, whenever the user installs such application, most of the users click Yes on 'share contact details' and other personal information that such application seek for. This can also be termed as oxymoronic nature of such sites. Sharing of such information and personal pictures which often leads to defamation and cyber stalking has resulted in increase of suicide rate especially amongst women as per 2016 Survey on social media usage. Making of fake account for harassment has been very common form of cybercrime these days.

4. CAUSES WHICH LEAD TO PRIVACY INVASION

Notably, there can be various reasons which results in invasion of privacy.
Such reasons can be summed up in:-

- These websites are designed in such a way that they require the personal information of the users which can then be made public. This is the very nature of such websites. The main purpose as to why these websites have been established is to increase connectivity with other people. [622]

[622] Quinn, Kelly. "Why We Share: A Uses and Gratifications Approach to Privacy Regulation in Social Media Use". *EBSCOhost*. Journal of Broadcasting & Electronic Media. Retrieved 5 April 2018.

- The information shared by the person can be seen not only to his or her friends but also to the acquaintances. Such information can always have an unintentional spread. It is a well evident rule that once information is share on the internet it no longer remains private.
- The users for their safety can also turn their privacy settings on but no social media site can guarantee that even after enabling privacy setting such information will not go beyond the attended audience.
- It is also established that once a picture is posted on any website it is easily accessible to any person, no matter that person has privacy setting or not.
- Once something is shared on such sites, one cannot assume how far it can reach. Many employers now look into the social profile of their employee before hiring them.
- Boyd describes that "achieving privacy requires the ability to control the social situation by navigating complex contextual cues, technical affordances, and social dynamics." Society is constantly changing; therefore, the ability to understand social situations to obtain privacy regularly has to be changed.[623]

5. **USERS DISTRESS**

The users are very concerned about the sharing of personal information on such sites. According to a report it has been found that 62% of the users have enabled their privacy settings. The remaining people who do not have secured accounts their information can be easily seen by any other user without any hardship. Some of the users aren't aware about the inbuilt security features on such applications and then end up being in trouble.

In the study by Van der Velden and El Emam, teenagers are described as "active users of social media, who seem to care about privacy, but who also reveal a considerable amount of personal

[623] Boyd, Danah (2014). *It's Complicated: The Social Lives of Networked Teens*. Yale University Press. pp. 56, 60.

information."[624] They do not know the difference between what is right and what is not. The simple reason can be the mental incapacity to understand what they are throwing themselves into

6. INDIAN LEGISLATION ON PRIVACY INVASION BY SOCIAL MEDIA.

Prior to the adoption of Right to Privacy as a fundamental right, there were no specific provisions of law that governed this subject. After the ambit of Article 21 has enlarged, right to privacy has gained constitutional recognition and now is a matter of great concern and therefore violation of such right is a direct infringement to Indian Constituent.

in order to give it more recognition and support, in 2000 our Indian legislature has made efforts to secure the right of users by legislation Information Technology Act, 2000. This act is the most comprehensive act which has the provisions of safeguarding the users from the cyber crimes including **cyber stalking**, **online victimization, Surveillance, Sexual predators, Stalking**, **Identity theft etc.**

PROVISIONS THAT CLEAR PROTECT RIGHT TO PRIVACY UNDER INFORMATION TECHNOLOGY ACT, 2000

- **Section 43**

43. **Penalty and compensation for damage to computer, computer system, etc**. If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network, or computer resource —

1. accesses or secures access to such computer, computer system or computer network;

[624] an der Velden, El Emam, Maja, Khaled (January 1, 2013). ""Not all my friends need to know": a qualitative study of teenage patients, privacy, and social media". *Journal of the American Medical Informatics Association*. **20**: 16–24. doi:10.1136/amiajnl-2012-000949. PMID 22771531. Archived from the original on 2018-03-30.

2. downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
3. introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
4. damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
5. disrupts or causes disruption of any computer, computer system or computer network;
6. denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means; (g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;
7. charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network, he shall be liable to pay damages by way of compensation to the person so affected.
8. destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;
9. steel, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;

Explanation.

For the purposes of this section:

1. "computer contaminant" means any set of computer instructions that are designed —
    - to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network; or
    - by any means to usurp the normal operation of the computer, computer system, or computer network;

2. "computer data base" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network;
3. "computer virus" means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, daia or instruction is executed or some other event takes place in that computer resource;
4. "damage" means to destroy, alter, delete, add, modify or rearrange any computer resource by any means.
5. "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

- **Section 66A**

PUNISHMENT FOR SENDING OFFENSIVE MESSAGES THROUGH COMMUNICATION SERVICE, ETC.

Any person who sends, by means of a computer resource or a communication device,

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.— For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message.

7. CONCLUSION AND SUGGESTIONS

Violation of privacy in India is increasing alarmingly. It is high time India should prioritize privacy and recognize it as fundamental right. However, there are certain flaws which should be eradicated first. Like:-

1. The application developers should move from data-centric approach to a consumer-trust centric approach so that the privacy laws are able differentiate as to who they will regulate and what they will protect.
2. After the SC ruling on the WhatsApp case, it has become very important that the subscribers should be given an option as to whether they want to share their data or not.
3. The principle of "Datensparsamkeit" (data minimization) from the German privacy legislation, should be adopted
4. Indian users should be given the option to opt out of specific features instead of a singular 'I Agree' button (vias introduced by EU legislation).

WINDING UP- MAJOR ASPECTS IN INDIA

- SIMRAN SINGH

ABSTRACT

Till the advent of Insolvency & Bankruptcy Code, 2016 (IBC, 2016), winding up of companies was completely under the purview of the erstwhile Companies Act, 1956 and later Companies Act, 2013. However, with the enactment of IBC, 2016, a company can be wound up either under the Companies Act, 2013 or under IBC, 2016 depending on the facts and circumstances of each case. Sections 230-231 and 270-365 of the Companies Act, 2013 and Sections 33 to 54 and Section 59 of IBC, 2016 deal with the issue of winding up of the companies.

With the advent of the new IBC, 2016, India is moving into a new paradigm of economic and financial success, an era that began with the liberalization of the economy in 1991. The provisions of the Code have been implemented in a phased manner to effect a smooth transition from the previous regime, since the Code has not only overhauled the law on insolvency and bankruptcy in the country by repealing several legislations, but has also effected amendments in a whole gamut of existing laws, substantially so in certain cases 1.

With this as the backdrop, this research paper attempts to study the major aspects of winding up in India, the present and probable future impact of the Code on the Companies Act, 2013, how both the statutes will operate in tandem, and whether the existing situation requires any changes to be made in order to further simplify the bankruptcy framework in India.

INTRODUCTION

Earlier, neither the Companies Act, 1956 nor the Companies Act (Second Amendment), 2002 defined the term "winding up". Under the Halsbury's Laws of England, winding-up is defined as a proceeding by means of which the dissolution of a company is brought about and in the course of which its assets are collected and realized: and applied in payment of its debts; and when these are satisfied, the remaining amount is applied for returning to its members the sums

which they have contributed to the company in accordance with Articles of the Company 2. In the Indian context, definition of "winding up" was introduced by the Indian Companies Act, 2013 whereby Section 2(94A) was inserted which stated that it means "winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable".

In simple terms, winding up is a legal process by which the life of a company is brought to an end by taking over the reins of management of the Company from the Board of Directors of the Company, selling off its assets and the money realized from such sale is then used for clearing off its debts and the surplus amount, if any, is then distributed amongst the members of the Company.

It is also important to understand that winding up of the Company does not result in ending "the legal existence" of the Company i.e. despite winding up process initiated against the company, it continues to exist as a "legal corporate entity" - in as much as its name continues to remain on the Register of Companies. This legal existence comes to an end only when the Court orders dissolution of the Company - which is initiated post completion of winding up process. The effect of such an order of dissolution is that the affairs of the Company come to a halt and no business can be conducted in its name and its name is struck off the Register of Companies - thus bringing an end to the "legal corporate entity" 3.

In the year 2016, the Insolvency and Bankruptcy Code came into effect by which the Parliament sought to consolidate a single law for insolvency and bankruptcy in India. The Code basically provides for a mechanism, within a time-bound manner, to deal with and resolve the non-payment of debt to various debtors in a time bound manner by utilizing the value earned from the sale of its assets, at the same time balancing the interest of all the stakeholders 4.

The Code is a comprehensive legislation “to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and

individuals in a time bound manner" 5, hence bringing it into force would naturally be a difficult endeavor. The Code had the greatest impact on the Companies Act, 2013 under Schedule XI to the Code, which makes 36 changes to the Act. While examining these provisions, the research paper seeks to answer this pertinent question- "Whether the entire provisions of winding up in the Act should have been removed or the present situation of partly retaining the provisions in addition to provisions of the Code serves as a better model?"

The subsequent critical analysis ensued by a comprehensive conclusion addresses the major aspects of the winding up provisions in India through the following:
Ascertain the change in position of law in the erstwhile Companies Act, 2013 before and after it was amended by the Code and its present functioning alongside the Code Identify the possible lacunae in the present law which might be subject to misuse Suggest solutions to cure the lacunae harmoniously between the Act and the Code

COMPANIES ACT, 2013: MODIFIED OR MUTILATED BY THE CODE?

Earlier, it was the Companies Act which alone dealt with the issues from incorporation to dissolution of the companies. The Companies Act, 1956 provided for three modes of winding up of companies, namely :
Winding up by the Court or Compulsory winding up.
Voluntary winding up.
Winding up subject to the supervision of the Court.

The issue of "inability to pay debts" was covered under the mode of winding up by the court and generally the creditors would always press this button for recovery of their debts in a summary procedure and as a fast track solution. In this mode, if after receipt of the 21 days statutory notice, if the company failed and neglected to pay its debts, the company was deemed to be insolvent and the winding up proceedings would commence. Of course, existence of a

dispute with regard to the said payments of debts was one of the main grounds for the Company court to refuse the order of winding up 6.

The Rules as regards the disposal of winding up petition based on disputed claims are stated by the Supreme Court in Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd. 7. The Court has held that if the debt is bona fide disputed and the defense is a substantial one, the Court will not wind up the company. The principles on which the Court acts are: that the defense of the company is in good faith and one of substance; the defense is likely to succeed in point of law; and company adduces, prima facie proof of the facts on which the defense depends.

With the coming into effect of the Code, it brought about certain changes in the laws relating to winding up of Companies 8 - Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was repealed- this Act applied only to Industrial Companies whereas the amendments introduced by the Code brought all kinds of Companies, partnership firms, proprietorship firms within its fold.

It completely over-hauled the winding-up provisions under the Indian Companies Act, 2013 such as:

Section 270 which dealt with modes of winding up was deleted; Section 271 of the Act was amended to exclude the term "unable to pay its debts" as a ground available and specified following 5 grounds available, for persons authorized by Section 272, to invoke the winding up jurisdiction of the National Company Law Tribunal (NCLT) under the Companies Act:

Company by special resolution resolves that it be wound up by the Tribunal- Petition by the Company;

If the Company has acted against the interest of the sovereignty and integrity of the Country, security of the state, friendly relations with foreign states, public order, decency or morality - Petition by the Registrar, Central Government or State Government;

An application whereupon the Tribunal comes to a conclusion that the affairs of the Company are being conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purposes or that the concerned in the formation or management of its affairs have been guilty of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that its proper that the Company be wound up - Petition by Registrar or any person authorized by the Central Government

If the Company has defaulted in filing its financial statements or annual returns with the Registrar for immediately preceding 5 consecutive financial years - the Registrar
If the Tribunal is of the opinion that it is just and equitable that the company should be wound up. Section 304 and related sections (304-323) which dealt with voluntary winding- up were deleted.

The combined effect of this interpretation and the immense positive perception surrounding the Code has resulted in almost every case being instituted in the NCLTs under the Code instead of NCLTs under the Act. The only conclusion emerges is that the approach of retaining winding up provisions under the Act has led to a duplication of remedies. Moreover, since the Code has a clear prominence over the Act, the result has been disproportionately in favor of the Code. Thus, even if the entire chapters on winding up were omitted by the Code, it would not have caused any manifest injustice to any stakeholder, since the Code provides for an adequate remedy and encompasses the entire scope of insolvency 9.

IBC proposes a paradigm shift and seeks to encourage resolution as a means of resort for recovery and winding up of the company as a last resort unlike the previous regime when companies were to be wounded up for their inability to pay debts. Further, the resolution has to be in a time bound manner and as such it can be said that the IBC to be a fast track mechanism to either resolve or to liquidation10. A further discussion on these interactions between the Act and the Code continues in the forthcoming Parts.

EFFICIENCY OF THE CODE AGAINST THE ACT

This part shall focus on the question whether winding up under Chapter XX of the Act provides a more efficient remedy than liquidation under Chapter III of the Code. Since the Code has already repealed Chapter XIX of the Act and voluntary

Winding up under Part II of Chapter XX, at present the Code is the only statute that also allows for corporate debt recovery as well as voluntary liquidation.

For all practical purposes, the Code is more effective than the Act, since it is a legislation with wide overreach over all other legislations by virtue of the non- obstante clause and wide moratorium under Section 14.

Further, Innoventive Industries 11 also clarified the prominence of the Code in the clearest words –

"There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. It is precisely for this reason that the non- obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code."

Thus in any conflict between winding up under the Act and an application under the Code, the Code shall prevail.

Creditors can only make an application under the Code – they cannot approach for winding up under the Act anymore by virtue of the amended Section 272 (1). A major reason for the Code being perceived as more efficient against the Act is the strict timeline made out in the Code. This could be seen not just from the strict overall time period of 180 days (with a one-time

extension of maximum 90 days) allowed for the corporate insolvency resolution process (CIRP), but even from the time period of initial scrutiny of the application to ascertain the existence of default has been reduced from previously 90 days under the Act. Now, a CIRP may be initiated by financial creditor (section 7 (4)), by operational creditor (section 9 (5)) and by corporate applicant (section 10 (4)) in 14 days 12.

INTERACTION BETWEEN THE CODE AND THE ACT: POSSIBLE LACUNAE AND LOOPHOLES

This part shall seek to answer the question as to what sort of conflicts may arise between the Act and the Code once they both begin functioning.

In the long run, there is potential for several interesting interactions between the two statutes. One such instance arises while evaluating voluntary liquidation under Chapter V against Section 271 (a), which provides for winding up on a special resolution of the company. Prima facie, the latter process might appear counterproductive since it is longer and faces more involvement of the Tribunal than the one under the Code, yet the fine print tells otherwise.

Under Section 59 of the Code, a condition precedent to the process is that the corporate must not have committed default, while such a condition is not required under Section 271 (a). Default means "non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be 13."

Debt has been defined as "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt 14." Hence, in cases of default, a company cannot voluntarily liquidate itself under the Code, yet by a special resolution may seek winding up under the Act. Interestingly enough Section 59 (3) (c) (i) of the Code also requires a special resolution to be passed by the company. Thus, why did the Parliament retain the option for members to file for the cumbersome winding up process under the Act, especially

since it has no explanation as to when a winding up petition based on Section 271(a) is admitted? 15

One reason could be to afford the company to liquidate itself even if a default subsists, and the creditors want to continue with the functioning – an academic example with little practical justifiable examples. The other reason could be to give the promoters and management a greater control over the entire process – since the Code substitutes the management of the company with an insolvency professional and the entire process goes in accordance largely with the creditors. Thus, Section 271 (a) provides a silver lining to the management to conduct the process with greater Tribunal oversight - translating into greater management oversight and control over the process. In this regard the provisions are somewhat contradictory in themselves, though they are worded as "voluntary" liquidation, the special resolution still has to be approved by two-thirds of the creditors (proviso to section 59 (3)), thereby making the process not exactly "voluntary" 16.

RECOMMENDATIONS & CONCLUSION

Through this research, an attempt has been made to predict and foresee the possible situations where the Code and the Act may coexist and overlap. The result that emerges is virtual supremacy of the Code vis-à-vis the Act. This begs the question that when the Code was intended to be an overarching legislation covering the entire scope and an exhaustive code on the subject matter of insolvency in relation to corporate entities, why were the provisions of Chapter XX of the Act retained. While the previous parts have attempted to provide nuanced solutions to this corundum, yet the overall result is that the remedy provided in Chapter XX is simply less efficient, and subordinate to the one under the Code. While an argument could be made that Chapter XX is meant to give certain exclusive powers to the corporate debtor by excluding the creditor totally, this argument contradicts the reality that the corporate debtors themselves have been favoring the Code. Of the 148 cases approved so far by the NCLT under the Code, more than a third were initiated by the defaulters themselves 17.

Hence, to answer the central question of this research, one of the recommendations would be a total omission of Chapter XX, to make a leaner and coherent legislative policy for insolvency. Further, since a new legislation is being made for financial sector entities (the Financial Resolution and Deposit Insurance Bill 2017), retaining Chapter XX would be counterproductive when the Code can already provide everything the Act can, albeit in a more efficient fashion. Alternatively, more clarity can be provided on Section 271 (a), as to what circumstances can trigger it, and limit the opportunity of its misuse as a means to circumvent the process of voluntary liquidation under the Code

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RISE OF E COMMERCE & ARTIFICIAL INTELLIGENCE- THE NEW DOMAIN OF LAW

- SAAKSHI AGRAWAL

In the Era of Technological advancement, engineers and scientists invent new modern techniques for almost every possible field present in the world. The machines and software are making life comfortable for humans. Gradually, we have become dependent upon these kinds of technological equipment, and nowadays we cannot even think to survive without it. The technology is now even used for various businesses and trade for their feasibility of business and trading activities. This feasibility has led to adopting several modern techniques to promote their businesses and compete with their competitors. All prominent firms in the world are now equipped with the latest technologies that aid them in their day-to-day activities. Due to these technological advancements, now the businesses have made their customers internationally through the internet. This adoption of trade and commerce based on the internet is known as E-Commerce. It has become a critical aspect of business strategy and a key engine of economic growth globally. While considering E-Commerce and its technological development, it is relevant to mention here that almost all of the leading E-Commerce companies are using Artificial Intelligence for boosting their trades. This exceptional technological combination of modern techniques has given a new concern to the legal field to consider its implication and effect over society and further understand whether there is a need for regulation over this matter or not. For this consideration mentioned above, we first have to understand the meaning of "E-Commerce" and "Artificial Intelligence."

Meaning of E-Commerce

As far as the meaning and definition of E-Commerce are concerned, no statute in India defines it. Hence, various authors have given several definitions of E-Commerce in various legal journals, as cited below.

"Broadly speaking, e-commerce is the business of buying and selling goods and services on the Internet. It is also associated with conducting any transaction involving the transfer of ownership or rights to use goods or services through a computer mediated network. Driven by a young demographic profile and increasing Internet penetration, the growth in e-commerce has been phenomenal"[625].

"The term E-Commerce stands for 'Electronic Commerce'. There is no standard definition for the term ecommerce as such, it is said to be used in the sense of denoting a mode of conducting business through electronic means unlike through conventional physical means. Such electronic means include 'click & buy' methods using computers as well as 'm-commerce' which make use of various mobile devices or smart phones.The concept of E-commerce not only includes selling and purchasing of goods online but also its delivery, payments, supply chain and service managements."[626]

"E-Commerce refers to any form of business transaction conducted online. The most popular example of eCommerce is online shopping, which is defined as buying and selling of goods via the internet on any device. However, E-Commerce can also entail other types of activities, such as online auctions, payment gateways, online ticketing, and internet banking."[627]

Meaning of Artificial Intelligence

As far as the meaning and definition of Artificial Intelligence are concerned, no statute in India defines it. Hence, various authors have given several definitions of Artificial Intelligence in various legal journals and Articles, as cited below.

"Artificial intelligence (AI) is wide-ranging branch of computer science concerned with building smart machines capable of performing tasks that typically require human intelligence. AI is an interdisciplinary science with multiple approaches, but advancements in machine

[625] Sumit Dutt Majumder "GST and E-commerce" 28 NLSI Rev. 123 (2016)
[626] Nishith Desai Associates, "E-Commerce in India Legal, Tax and Regulatory Analysis", July 2015, p.no. 1
[627] "E-Commerce" available at <https://www.oberlo.com/ecommerce-wiki/ecommerce> 03/10/2020

learning and deep learning are creating a paradigm shift in virtually every sector of the tech industry."[628]

"Artificial Intelligence is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data, and translating languages. AI mimics certain operations of the human mind."[629]

"Artificial intelligence is an entity (or collective set of cooperative entities), able to receive inputs from the environment, interpret and learn from such inputs, and exhibit related and flexible behaviors and actions that help the entity achieve a particular goal or objective over a period of time."[630]

How E-Commerce Sector use Artificial Intelligence?

i. Chat Bots:

Did you ever buy online using the convenient chatbox? You could speak to a bot configured to support you with all your questions while you chat with someone online, and frankly, it is hard even to say the difference! The communication interface became more customized, advertised, and insightful with modern chatbots on the market. E-commerce shops will now help customers 24/7, quickly gather useful details, monitor activity, and create continuous brand consistency through AI machine learning and development. By way of a practical, automated talk, e-commerce sites and retailers may further conversion rates by modifying the customers' online interface without any additional effort. Usually, these kind of chat boxes pop-up while we visit any webpage. Also, the Smartphones are also vested with Artificial Intelligence, the famous example of these Chatbots is Google Assistant, Siri, Alexa, etc.

ii. Customer Behavior Analysis

[628] "What is Artificial Intelligence?", available at <https://builtin.com/artificial-intelligence> last visited on 04/10/2020

[629] "A Primer on Using Artificial Intelligence in the Legal Profession" available at <https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession> last visited on 04/10/2020

[630] What is Artificial Intelligence? An Informed Definition, available at <https://emerj.com/ai-glossary-terms/what-is-artificial-intelligence-an-informed-definition/> 03/10/2020

Artificial Intelligence helps E-Commerce businesses to improve the user experience through smart personalization on the pages, as follows.

a. By evaluating hundreds of data points for a single consumer (including location, demographics, device, website activity, etc.), AI may view the most suitable offers and material.
b. By means of behavioral customization, push alerts may be unique to particular people, bringing them the specific message at any moment by considering their search history by the way of cookies.
c. By analyzing the activities done by the customer on the Internet for what product he is searching.

iii. Bulk Personalized Mailing

After Signing in the E-Mail IDs, almost every person has faced the Spamming problem by the Commercial companies. Whether they are relevant to our interests or irrelevant. When we see mails according to your personal interests, then Artificial Intelligence comes into existence. Algorithms of AIs will chart the experience of a subscriber 's website and the data of an email browser to explain all the experiences of the user with your material. This awareness helps the algorithm to recognise hyper-contextual information in order to construct customised one-on-one emails. Artificial intelligence allows it possible to deliver personal targeted e-mails to a single client. Through evaluating the customer's reading habits and topics of interest to suggest personalized content that is most important to that user, AI-assisted e-mails may become much more appealing to each consumer.

These points are not exhaustive; there are various other uses of Artificial intelligence used by the E-Commerce Sectors.

Jurisprudential Approach upon this Matter.

D.S. Wall once remarked "the same technologies which create cybercrimes also provide unique opportunities for their regulation and policing".[631]

[631] Quoted in, Talat Fatima, "Cyber Crimes", Eastern Book Company, Lucknow, First Edn. 2011. P.no. 453.

Overall, updated regulation has been enacted to cope with modern cases; new parts have been responsible for modern offenses. India is one of the countries that reacted promptly to the emerging threats and quickly passed the IT Act of 2000. An amendment was made some eight years later in 2008, referring to the IT Act's loopholes. However, it's been over a decade that there is no amendment in such legislation. However, technology is developing day-by-day.

To understand this Situation here, we must consider the "Volkgiest" theory propounded by the eminent jurist Savigny.

"Law, language, customs, and government have no separate existence. There is but one force and power in a people and it underlies all these institutions. The law like language, develops with the life of people."[632]

"(1) That law is a matter of unconscious and organic growth. Therefore, law is found and not made.

(2) Law is not universal in its nature. Like language, it varies with people and age." [633]

He further said: *"The law, like language, grows with the growth of social consciousness and organization: the law can only be evolutionary, and not revolutionary."*[634]

The abovementioned theories show the dynamism of the Law concerning Society. Hence, we can say that society and Law develop simultaneously. However, while considering the Law about artificial intelligence, we can say that there is a need for reformation, and the Law is not up to the mark.

Need for Reformation

While considering the need for the legal reforms, we must start with the interview conducted by BBC of the eminent professor Stephen Hawking. He shows the concern over the matter of Artificial Intelligence in the following words, cited below.

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632 B.N. Mani tripathi, "jurisprudence the legal theory" p.no. 28 (allahabad law agency, faridabad, nineteenth edn. 2015 reprint)

633 ibid p.no. 29

634 "Nature And Schools Of Jurisprudence An Overview", available at<http://www.legalserviceindia.com/legal/article-1952-nature-and-schools-of-jurisprudence-an-overview.html> last visited on 04/10/2020

"The development of full artificial intelligence could spell the end of the human race."[635]

Prof Hawking further says, *"the primitive forms of artificial intelligence developed so far have already proved very useful",* Also, he fears about *"the consequences of creating something that can match or surpass humans."*[636]

As far as legal reforms are concerned, it is pertinent to mention that the Artificial Intelligence needs to be regulated.

Artificial intelligence (AI) has influenced our lives and this age like never before, with booming dynamic equations. The areas of AI implementation vary, and the potential consequences are large. Several computer-based intelligence simulations have already taken place beyond the boundaries of today's human expertise, primarily due to development in technical appliance. The complexity of its usage will also grow as the ceiling on artificial intelligence grows. In other terms, the related algorithms would presumably continue to progress to a progressively influential degree and even achieve phenomenal levels of understanding. Possibly this invention would create extraordinary ethics challenges. Most analysts assumed that Artificial Intelligence would bring more threats than opportunities in the coming days.

i. Reforms Needed in Commercial Law.

As we have discussed earlier, most of the websites are vested with the Chat Box Popups, in which a human-like bot conversates with the consumer for their needs and satisfaction. These kinds of bots are equipped with the technology of Artificial Intelligence-based upon the algorithms. These kinds of Chatbots are also used for booking any order from particular E-commerce websites. It is pertinent to mention here that there is no separate legislation relating to E-Contracts formed online. They are subjected to the Indian Contract Act, 1872 and the Sales of Goods Act, 1930. All the contracts have to comply with the Essential conditions mentioned under Section 10 of the Indian Contract Act, 1872. As far as Chatbots are

635 "Stephen Hawking warns artificial intelligence could end mankind" available at <https://www.bbc.com/news/technology-30290540>, last visited on 04/10/2020.

636 ibid

considered, it is a well-known fact that even they are acting on behalf of the E-commerce company or firm, they cannot replace the human mind. The ICA and SOGA have an essential element enumerated in it, i.e., Consensus-Ad-Idem. That means *"two parties to an agreement (contract) both have the same understanding of the terms of the agreement."* In such a manner, even the company or firm doesn't even know that to whom the Chat-Bots are forming Contracts, sometimes even companies knew after the formation of the Contract. Also, an ordinary prudent doesn't even know that they are chatting with any bot or any company human-agent. Hence, we can say that these kinds of Contracts lack the essential element of Consensus-Ad-Idem. Hence, these is a need of separate legislation or provision related to such matter.

ii. Reforms needed in Cyber Law.

As we have discussed, the Customer Behavior Analysis that personalizes the content shown to the user on the website, even personalized bulk emails are also sent to the user by analyzing the user's past browsing history. This situation has led to the issue of privacy of the individual. Also, the most dangerous thing is that even the persons browsing online are not aware that cookies are tracking them, and their right to privacy is continuously being violated. Their data even sold to third parties for commercial purposes. Here is pertinent to mention that the Right to Privacy has also been considered the Fundamental Right of the individual envisaged under Article 21 of India's Constitution by the way of Judicial pronouncements, in the case *of People's Union for Civil Liberties (PUCL) v. Union of India*[637]herein it was held as under:

"We have, therefore, no hesitation in holding that right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed 'except according to procedure established by law'

The right to privacy -- by itself -- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But

[637] (1997) 1 SCC 301

the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as 'right to privacy'."While the Information Technology Act, 2000 in India, it is silent upon this matter of privacy. Hence there is a need to amend this law and to add specific provisions about this matter.

Further, while considering the cyber laws, India's people are not aware of their rights and their violation of rights. However, the internet is the most insecure and vulnerable for the people. Also, in the 21st century, we cannot even choose not to use the internet. It is a matter of concern that even educated people in India are not aware of these things. That's why there is a need for separate provisions about the awareness of the people. Hence, the government should establish some particular authority to provide awareness to the people about how they should use the internet safely.

Conclusion

To conclude, we can say that while considering the technological advancement in India, we can undisputedly say that it is developing every single second. However, while considering the legislation upon this matter, it's been over a decade since there is no reform.

E-Commerce don't just include the performance of company transactions across the Internet. This is since the change in IT takes place parallel with other trends, particularly market globalization. The modern era of world e-commerce produces a whole different market, transforming our lifestyles massively, reshaping competitiveness in multiple sectors, and altering the world economy. When businesses receive high income, more and more of their websites are being built to raise profits. When more companies are kept online, which contribute to the growth of strong economies and more modern technologies, the need for E-Commerce cannot be declined. We can say that it is necessary for the proper development of the nation.

However, each Internet user leaves their online trail in the form of personal data through internet browsing purposely or accidentally. These trails are traced by artificial intelligence to show you personalized advertisements regarding any product. It is a thousand-year-old notion that computers should build and do work much like people. There are still no new semantic

realities in AI and Mechanical Learning Frameworks. These innovations can be best viewed as a deployment by the invention of strong and long-standing cognitive concepts.

Here, the jurisprudential theory of the eminent jurist Savigny came into existence, describing the relation between society and the law. Hence, we can say that technology is very much developed compared to the legislation. And there is a need for immediate attention over this matter. Because artificial intelligence is growing rapidly, and as it is developing, fundamental rights are also being violated continuously. Furthermore, the commercial law should also be considered while forming the E-Contracts by the bot chats because it can create a misunderstanding in companies' minds and their clients. And it can also cause the multiplicity of suits that is against the interests of the nation.