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

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

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

INDEX

ADMINISTRATIVE TRIBUNALS IN INDIA

- SIDDHARTH JHA

ABSTRACT

This article deals with the term' Tribunals' used in administrative law. Which has significant sense & refers to the adjudicatory bodies which lies outside the ordinary judicial system. In India the judicial powers are settled in the courts which aims to safeguard the rights of the individuals and promotes justice. Therefore, tribunals basically deals with special laws and also judicial powers are delegated to administrative tribunal so that it can reduce the heavy burden of courts. It is a Quasi- judicial body made through specific enactment done by the legislature. After going through with this article it will help to make understand what is 'Tribunal' what is it need in administration, functions, powers, advantages of tribunals & disadvantages of tribunals and it also deals with the cases regarding the tribunals.

INTRODUCTION

The term 'Tribunal' is derived from the word 'Tribunes', which means 'Magistrates of the Classical Roman Republic'. Tribunal is referred to as the office of the 'Tribunes' A Roman official under the monarchy and the republic with the function of protecting the citizen from arbitrary action by the aristocrat magistrates. A Tribunal generally is any person or institution having an authority to judge, adjudicate on, or to determine claims or disputes – whether or not it is called a tribunal in its title.

In Administrative law 'Tribunal' basically refers in only the adjudicatory bodies which lies outside the ordinary judicial system. In India the judicial powers are settled in the courts which aims to safeguards the rights of the individuals and promotes justice. Tribunals can be described as minor courts that adjudicate disputes in special cases. It is a quasi judicial body & its deals with special cases specific enactment done by the legislature for the purpose of reducing heavy burden of courts. They are different from courts they have self-regulation powers. The need for the inquiry of the administrative tribunals couldn't be ignored.

ALL COURTS ARE TRIBUNALS BUT ALL TRIBUNALS ARE NOT COURTS.

The 42nd constitutional amendment act 1976 (Part XIV- A) which included Article-323A (Administrative Tribunals) Article 323B (Other Tribunal)

HISTORY OF TRIBUNALISATION

The concept of Tribunalisation came in existence in India with establishment of the income tax appellate Tribunal before Independence of the country. After independence their was a need for resolving administrative disputes with flexibility and speed. The main objective of tribunalisation was to provide speedy justice to the people.

After the drafting of the Indian constitution rights for the welfare of the individuals were guaranteed by the constitution people have the right to speedy trials by courts which cannot be divided by the judicial system due to the overburden of cases and appeals. Technicalities in procedure etc; hence, They are different from courts they have self regulation powers. The need for the inquiry of the administrative tribunals couldn't be ignored.

GROWTH OF ADMINISTRATIVE TRIBUNALS

The 42nd constitutional amendment act 1976 PartXIV-A which included Article-323-A (Administrative Tribunal) Article-323-B (Other Tribunal) was done with the objective of excluding the jurisdiction of the High Courts under article226 and 227, except the jurisdiction of the Supreme Courts under article136 and for originating an alternative institutional mechanism or authority for specific judicial cases.

The purpose of establishing tribunals to reduce the heavy burden of the courts. Therefore, tribunals are organised as a part of civil and criminal court system under the supreme court of India. An administrative tribunal is also called 'quasi judicial' body.

CHARACTERSTICS OF ADMINISTRATIVE TRIBUNALS

1. An administrative tribunal performs the quasi judicial and judicial functions and bound to act judicially in every circumstances.
2. They don't have strict rules of evidence and procedure.
3. Administrative tribunals must have statutory origin.
4. They have power to make rules & regulations
5. They are different from courts.
6. Disposal case in 6 months.
7. They followed the principle of natural, justice
8. They have prerogative writs of certiorari and prohibition available against the decisions of administrative tribunals.

THE ADMINISTRATIVE TRIBUNALS ACT- 1985

In the provisions in article-323A parliament passed the administrative tribunal act 1985, providing for all the matter falling within the clause(1) of article 323-A.

According to act the central administrative tribunal (CAT) was set up to the act of the legislature in 1985. The tribunals exercise jurisdiction of service matters of employees covered by it. The appeals against the orders of the administrative tribunals lie before division bench of the concerned high court.

The tribunals are procedurally flexible and this flexibility increases their efficiency. Tribunals are to provide speedy and inexpensive justice to the litigants. We can say governments is a major litigant in the courts and government related litigations has increased in the delay and pendency of litigation such tribunals over the past two decades have significantly these articles empower the parliament to set up the tribunals for adjudication specialised disputes. The range of disputes mentioned in the constitution refers.

1. Disputes pertaining to service conditions of the government officers.
2. Collection and enforcement of tax.
3. Industrial and labour disputes.
4. Matters concerning land reforms.

State administrative tribunal (SAT) at the state level for every state. The tribunal is competent to declare the constitutionality of the relevant laws and statutes. The act is extends to in so far as it is related to the central administrative tribunal to the whole India expect the state of Jammu & Kashmir administrative tribunals for states.

MAIN OBJECTIVE FOR THE ESTABLISHMENT OF ADMINISTRATIVE TRIBUNALS

The main purpose of the introduction of this act.

1. To lower the burden of cases in courts.
2. To provide speedy justice of disputes relating to the service matters.

PROCEDURE AND POWERS OF TRIBUNALS

Administration Tribunals Act, 1985 in section 22 days down the powers and procedure of tribunals

1. A tribunals is not bound by the strict rule of procedure & evidence.
2. It has power to regulate its own procedure by the principle of natural justice.

3. Any other matter prescribed by the central government.
4. A tribunal shall decide the applications and cases made to it as rapidly as possible and every application shall be decided after scrutinizing and documents and written submissions and perceiving the oral arguments.
5. Whose presiding officers are frequently neither judges nor magistrates.
6. To solve the complex problems & increase in governmental functions.

CASE

1. ***S.P. Sampath Kumar V. Union of India***

Facts: The Administrative Tribunals Act, 1985, was challenged on the ground that this Act excludes jurisdiction of High Courts under Article 226 & 227 with regard to service matters and hence, destroyed the concept of judicial review which was an essential feature of the Indian constitution. Tribunals are quasi – judicial functioning body which deals with administrative as judicial procedure.

Judgment: A five- judge Bench held on court the validity of the Act section 6(1)(c). The court held that this Act has excluded in the jurisdiction of judicial review exercised by the High Courts in the service matters it has not been entirely excluded the concept of judicial review. The jurisdiction of Supreme Court under Article 32 and 136 has not been excluded by this Act and kept unscathed.

The court recommend the term of 5 years prescribed under the Act for chairman, Vice-Chairman and other members of the tribunal is not rational because it would act as dissuasion for the good and generous people to accept the job in the tribunal and should, therefore, be reasonably extended.

The directions given by the Supreme Court came into effect through the Administrative Tribunals (Amendment) Act,1987.

2. ***L.Chandra Kumar V. Union of India. AIR 1997 SC 1125***

The Central theme of entire judgement was that the tribunals not have the power of judicial review. The tribunals will act as supplementary institutions & will remain under the supervision of the High Courts and can in no way be considered as institutions parallel to the High Courts.

Judgement: The power of judicial review vested in the Supreme Court and High Court by Article 32 and 226 respectively is a part of the basic structure of the constitution.

There is the supervision of the Supreme Court and High Court over there tribunals and also the part of the basic structure of the constitution.

(I.P.Messey)

Power to punish for contempt.—A Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to the modifications that the administrative tribunals have a quite informal and easy going procedure.

ADVANTAGES

1. Administrative justice is cheaper.
2. Perform their functions with greater flexibility.
3. The proceeding are broadly characterised by informality and simplicity.
4. Quicker than ordinary courts.
5. Flexibility adaptation and responsiveness are cited as some of the merits of administrative adjudication.
6. Emergency power may be granted to, or withdraw from the administrative authorities sometimes by a notification or executive orders.
7. Provide all relief to the ordinary courts.

DISADVANTAGES

1. It violates the rule of law.
2. There is lack of publicity.
3. Tribunals cannot act judicially being not manned by persons of judicial training and experience.
4. Sometimes, no appeals to the ordinary courts of law is permitted against the decision of the administrative tribunal.
5. Do not observe uniform procedure.

Administrative adjudication suffers from many shortcomings and abuses cannot perhaps be denied. But it is an inescapable necessary in a modern complex society. It should not be ended, rather, attention and efforts should be directed towards mending it.

Power to remove difficulties

1. If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty.
2. Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

Merging of Tribunals

- The Finance Act of 2017 merged eight tribunals according to functional similarity. The list of the tribunals that have been merged are given below:

    1. The Employees Provident Fund Appellate Tribunal with The Industrial Tribunal.
    2. The Copyright Board with The Intellectual Property Appellate Board .
    3. The Railways Rates Tribunal with The Railways Claims Tribunal.
    4. The Appellate Tribunal for Foreign Exchange with The Appellate Tribunal (Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.
    5. The National Highways Tribunal with The Airport Appellate Tribunal.
    6. The Cyber Appellate Tribunal and The Airports Economic Regulatory Authority with The Settlement and Appellate Tribunal (TDSAT) .
    7. The Competition Appellate Tribunal with the National Company Law Appellate Tribunal.

Income Tax Appellate Tribunal

- Section 252 of the Income Tax Act, 1961 provides that the Central Government shall constitute an Appellate Tribunal consisting of many Judicial Members and Accountant members as it thinks fit to exercise the powers and functions conferred on the Tribunal by the Act

National Green Tribunal (NGT)

- The National Environment Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997 were found to be inadequate giving rise to demand for an institution to deal with environmental cases more efficiently and effectively.
- The Law Commission in its 186th Report suggested multi-faceted Courts with judicial and technical inputs referring to the practice of environmental Courts in Australia and New Zealand.

As a result, NGT was formed as a special fast-track, quasi-judicial body comprising of judges and environment experts to ensure expeditious disposal of cases.

- The National Green Tribunal was established in 2010 under the National Green Tribunal Act 2010 as a statutory body**.**

It was setup for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources.
It also ensures enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property.

- The Tribunal is mandated to make and endeavour for disposal of applications or appeals finally within 6 months of filing of the same.
- Initially, the NGT is proposed to be set up at five places of sittings and will follow circuit procedure for making itself more accessible.

New Delhi is the Principal Place of Sitting of the Tribunal and Bhopal, Pune, Kolkata and Chennai shall be the other four place of sitting of the Tribunal.

CONCLUSION

The administrative and judicial functions may often regulated by one agency. Tribunals are often manned, not by qualified judges and administrators, but by civil servants and also the administration has become an important part of government as well as the citizen's life. Due to this increasing role, it is important to establish a competent authority for the redressal of peoples grievance and adjudication of disputes & also lower the burden of courts. Therefore, the concept of administrative tribunals was emerged and is very dynamically rising in India and holding certain flaws and strengths.

JUDICIAL ACTIVISM AGAINST LEGISLATIVE EXCESS: THROUGH AN ASSESSMENT OF GENDER JUSTICE JURISDICTIONS

- TAHA ISHTIYAQ

ABSTRACT

Judicial Activism has been under the microscope recently across the globe, criticizing the practice as a leeway for Judiciaries towards arbitrariness. Being missed is the growing political order of executive overreach, leading to a power imbalance within polities, and governments skirting authoritarianism. This paper attempts to prove that Judicial Activism is the appropriate constitutional response of the Indian Judiciary to increasing Legislative adventurism. A brief assessment of its jurisdiction on *Gender Justice* reveals the capacity of the courts, along-with structural changes needed for its evolution.

INTRODUCTION

> *"The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society."*
>
> -Justice P.N. Bhagwati

The Indian Constitution has no defined provision regarding a doctrine of *separation of powers*. Rather, the principle is implied through functional demarcations as apropos to a Legislature, Executive and Judiciary, within *Article 50, 53, 121, 122, 211, 212, 154*, and *361* respectively[1]. Therefore, as has been observed over time, there is constant overlapping of functions within the institutions, and a resultant convention of 'checks and balances'.

Judicial Activism prominently empowers the judiciary. Lacking any distinctive constitutional provision, the term is enforced through Articles *13,32* and *326*, equipping the institution to act proactively in upholding citizens' rights and the country's constitutionalism. It entails going beyond the usual boundaries of jurisprudence, sometimes within territories of the other two organs.

Judicial Review serves as a check on functions of the Legislature and Executive. Unlike Judicial Activism which holds a broader realm, judicial review is separately concerned with the constitutional legality of governmental actions, unlike the former which also partakes the

role of 'activist', i.e., *judicial philosophy which motivates judges to depart from traditional precedents in favour of progressive and new social policies*.[2]

The objective of this paper is to prove that the Indian Judiciary, through constitutional provisions and political conventions developed over time, holds the authority to correct and guide the social order against a government failing to uphold the country's basic ideals. Although the line separating judicial activism with *judicial adventurism* is extremely narrow, a proactive judiciary checking an increasingly unapproachable government seems to be the need of the hour.

The *Farm Laws 2020* of the BJP government, in fact, consist a blatant example of *executive overreach* which is being largely overlooked[3]. This curtailment of jurisdiction by the executive displays obvious violation of the power separation principles. Requiring attention also are questions about which institution exactly should be scrutinized for overreaching.

Through brief assessment of the Judiciary's role in imparting momentum to India's G*ender Equality* vehicle, the paper aims to elucidate that the institution is well-equipped to reinstate constitutional principles for a forgetful polity, and has successfully done so in the past. Stated also are pronouncements when the judiciary was disappointingly patriarchal, to highlight how it reflects societal equations ensuing discourse on what requires change.

The purpose is to claim that the problem presently is not that of Judicial overreach but under-reach, and that the Indian Judiciary needs to dust off and stand up as the agency to enforce the ideals of social justice enshrined in the *Preamble and Constitution of India.* That doing so in the given socio-political scenario would not be a breach but rather an urgent necessity, if we are to save what is left of the country's democratic values.

METHODOLOGY

"Any provision treating women with inequality is not constitutional."

-Justice Dipak Mishra

Gender equality in India is a herculean task in progress. While on one side an overview of various competitive fields shows promising statistics, the ground reality of women and other binaries simply being treated as equals to the male population is a dream yet to be realized. With the BJP government presenting legislations like the *Love Jihad Bill*, furthering narratives

which control women's agency and mobility[4], the future of India's gender justice movement remains bleak.

The ball, therefore, is in the 'court' of the Judiciary. Over time the institution has proved to be a body of enormous influence in shaping socio-political discourses and even opinions concerning legitimacy of the ruling government. Though none among the three organs holds complete autonomy over the others, the judiciary's role as the *constitutional watchdog* grants it a slight weightage**. Arun Shourie** narrates his views on the same[5]:

> *"Now that I can see things from within the executive, I notice in it a healthy fear of the courts. How would the courts react if we do X instead of Y? Has the direction of the courts been complied with in full? This overarching concern for the likely reactions and views of the courts ensures that the impact of courts far transcends the individual cases they decide: it is a potent influence for accountability, for rule-abidingness in the executive. Without doubt, an important function of the courts is to proclaim ideals before society, to stretch the executive so that it puts in the maximum possible effort."*

When an institution holds a position of such proficient importance, its actions become stepping-stones for sociological progression and most certainly, of the various vulnerable sections depending on it for acknowledgment and protection of their independence. Therefore, the Judiciary is not only responsible for imparting justice, but also for ensuring timely modifications of the socio-economic order. Along-with showing the way to those in power.

The Silver Linings

Over a period of time and recently, there have been a plethora of judgements from Indian courts which upheld the ideals of equality, dignity and justice concerning the empowerment of women, not only when the patriarchal and deeply misogynist societal principles were in question, but also dueling a legislature and executive failing to do their part. Here are some such pronouncements when the Indian Judiciary acted as the much-needed *torchbearer* of India's Gender Justice movement:

- ***Laxmi vs Union of India***[6] brought in a critical change regarding the consideration of acid attacks as a crime worth penalization separately as opposed to being a 'general offense' earlier, including provisions for compensation to the victim. The verdict

imposed restrictions on the sale and purchase of acidic substances. Legislative action followed next with the inclusion of renewed guidelines within the *Criminal Amendment Act 2013* relating to acid violence, with recommendations from Justice J.S. Verma.

- ***Centre for inquiry into health and allied themes (CEHAT) vs Union of India***[7] tackled the issue of *female infanticide,* challenging the practice of prenatal diagnosis for sex determination. The NGO petitioned for correct implementation of the *Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994,* bringing the judiciary's attention to the lack thereof and misuse of technology. The verdict was also followed by amendments to the respective act in 2003.
- ***Air India vs Nargesh Meerza***[8] challenged the discriminatory Air India Employees Service Regulations, which consisted disparities regarding male and female employees on several grounds. The Supreme Court passed judgement declaring the clauses on pregnancy and retirement as unconstitutional, recommending amendments to the same.
- ***Neera Mathur vs LIC***[9] brought forth judicial action regarding women's right to privacy within the field of employment. The petition challenged invasive policies of the mentioned company which demanded details regarding pregnancy and the menstrual cycle as part of the job application. The court ordered such regulations to be struck down, defending women's right to privacy as a personal liberty.
- ***State of Tamil Nadu vs Suhas Katti***[10] resulted in reforms regarding cyber-crime and internet harassment. The case also brought provisions of *Section 67 of The Information Technology Act 2000* under judicial scrutiny, leading to questions regarding its vague terminology.
- ***Indian Young Lawyers Association vs The State of Kerala***[11] popularly known as the *Sabrimala Case,* benchmarked a great precedent of adjusting orthodox practices with the changing times in societal contexts, especially those restricting women's rights. In it, the Supreme Court overturned the previously justified practice of barring women between the age of 10-50 from entering the temple, declaring it unconstitutional and discriminatory.
- ***Vishakha vs The State of Rajasthan***[12] which led to the conception of the infamous *Vishakha Guidelines,* is another popular instance of the judiciary upholding women's right to life with dignity and invoking necessary legislations. The guidelines recommended by the apex court formed the basis of *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Re-dressal) Act, 2013.*

Potholes separating Law and Enforcement

On that note what is imperative to be brought to attention is that despite the milestone impact of the *Vishakha Case*, the victim **Bhanwari Devi,** still awaits legal justice over 20 years later[13]. It is a saddening reminder that despite the Judiciary's progressive declarations, the implementation of the same is a totally different, disappointing story. The mere existence of laws does not guarantee their enforcement, especially those aiming for gender equality in a nation as deeply patriarchal and misogynist as India[14].

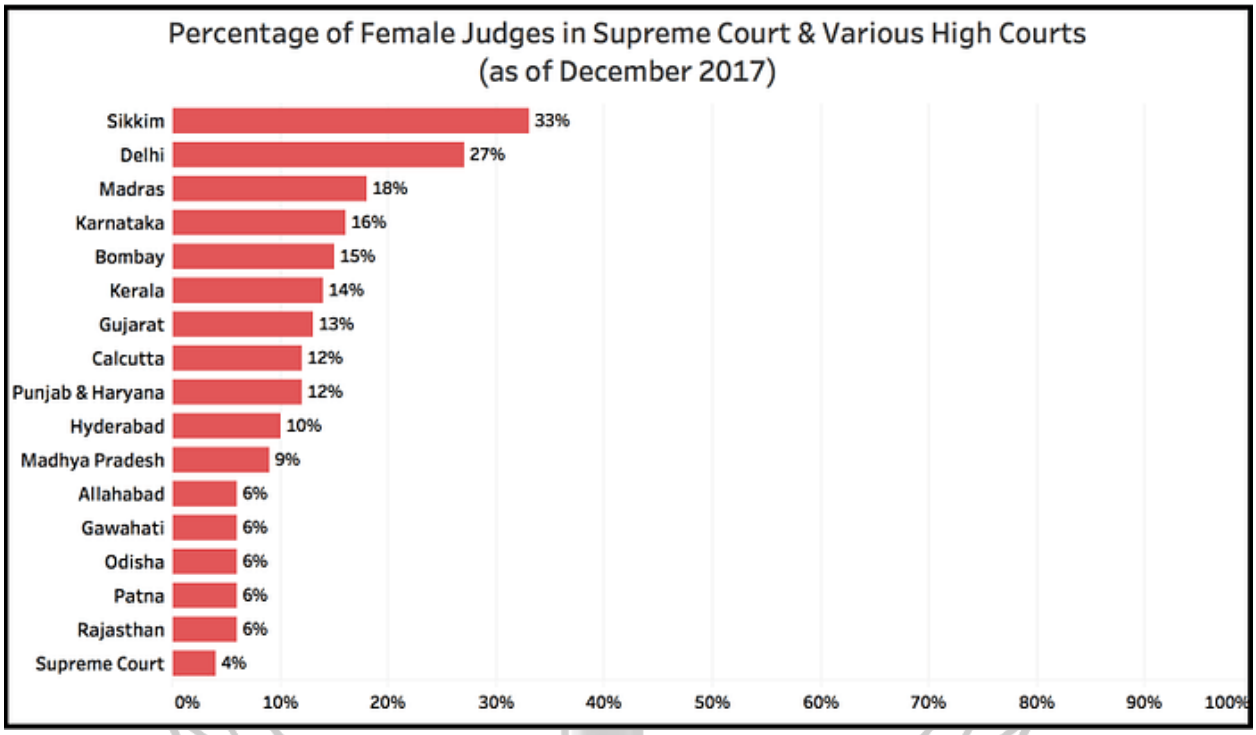
Our institutions and the socio-political scenario in general is nowhere free of gender discrimination. The glossy illusions of women empowerment portrayed by several government schemes and slogans only do so much when the truth is glaringly naked[15]. With the present government's conservative rhetoric being fuel to the fire of growing anti-women sentiments in the society, there is little hope from the law-makers of donning the feminist hat any time soon[16]. The Legislature and Executive continuously display shallow enthusiasm on the topic of Gender Justice, with no firm action backing their proclamations. Even on occasions when an issue is picked up, the execution usually lacks diligence and will. Following are brief examples which highlight the same:

1. Despite a solid majority in the Lok Sabha and vigorous poll promises[17], the BJP government is yet to pass the **Women's Reservation Bill.** In fact, after 2014, the bill has made no appearance in the parliament.
2. Often ignored within the walls of gender equality is a place for *Transgender* rights. The provisions of the **Transgender Persons (Protection of Rights) Bill 2019** was met with great dissent and criticism[18] from the very community it was meant to protect, with activist **Grace Banu** describing it as a "murder of gender justice".

The Judiciary's role, therefore, in setting society's tone relating to prevalent inequalities becomes enormous. It must set exemplary precedents not just for the society, but as a roadmap for the governing organs as well.

Sexism and Stereotypes

Unfortunately, the courts have not escaped India's deep-rooted patriarchal stereotypes as much as we would like to believe. The institution, like most others, is mushroomed with gatekeeping when it comes to the incorporation of women in the body. While inclusion of concerned communities into administrative positions does not guarantee complete attentiveness to their issues, it does offer a great deal of sensitivity and resourcefulness to the overall approach as opposed to a body consisting of no representation at all.



Picture Courtesy: The Quint[19]

The above included graph represents women in the higher courts solely, as there is currently no data maintained on women in lower or tribunal courts, as revealed by **Attorney General K. K. Venugopal** in a *written submission to the Supreme Court in 2020*. He further emphasized the lack of representation[20]:

"There are only 80 women judges out of the total sanctioned strength of 1,113 judges in the High Courts and the Supreme Court across India..The Supreme Court only has 2 women judges, as against a sanctioned strength of 34 judges and there has never been a female Chief Justice of India.."

Needless to say, there have been questionable pronouncements from the judiciary that have contributed to the society moving several steps backward in terms of Gender Justice. Following are few instances:

- ***Madhu Kishwar vs The State of Bihar***[21] is an instance when the courts deemed evading "further legal chaos" more important in comparison to upholding women's right to inheritance and property. The judiciary refrained from striking down provisions which restricted women's right to inheritance as opposed to that of men.
- ***Tukaram and others vs State of Maharashtra***[22] commonly known as the *Mathura rape case,* was an extremely problematic instance of the judiciary adhering to severely stereotypical and sexist norms. The victim, a minor, was repeatedly denied justice on

the grounds of being 'habituated to sex' and the 'lack of proof of resistance on her part' was equated to 'consent'.

- ***Mahmood Farooqui vs State of Delhi***[23] was another travesty of justice when the rape accused was acquitted on several misplaced legal grounds. The Delhi High Court terming assault as consensual due to 'feeble hesitation' from the victim was a severe blow to the evolving gender jurisprudence.
- ***Rakesh vs State of Karnataka***[24] is surrounded by criticism due to highly stereotypical remarks from Justice Dixit of the High Court in dismissal of the rape victim's complaint. The judge observed that the victim behaved in a manner "unbecoming of a woman" and did not react like she was "ravished".
- ***Vikram Bagri vs State of Madhya Pradesh***[25] is a recent pronouncement where the High Court ordered bail of the assault accused on the condition of the victim "tying a *rakhi* on his wrist", accepting him as a 'brother' and hence dismissing the crime.

Such judgements reflect the extent to which misogyny is normalized within the society, and at large reiterate that institutions are indeed a microcosm of the civilizations they represent. The purpose behind highlighting these is to stress the influential position of India's judiciary, beyond its traditional role, over the society and the intermingling of values. The process to ensure any aspect of Social Justice will therefore, not only be limited to modifying the civil society, but also entail rejuvenation of the powers that be.

Summation:

Assessing Gender Justice, the paper expresses how the Judiciary executed social justice principles upon requirement. It took the traditional role of acting out its jurisdiction, as well as discretion when necessary. What critics term as *adventurism or overreach,* though not impossible, has hardly been the case in recent times.

Under the NDA government, the judiciary has gradually enfeebled and been infiltrated, with increasing concerns over severe executive interference. The infamous *Press Conference of January 2018* elevated the growing apprehension. The obvious decline of democratic values under the regime have been a secret to nobody.

It is, therefore, compelling that the courts take up what the government has not only forgotten, but is beginning to destroy. The judiciary might have simmered down during the last decade,

but it has not been extinguished. The onus rests on it to rise through the debris of societal inequalities heightened by the government, and refurbish constitutional values.

As was observed in the paper, the institution holds it well-within its constitutional rights to fill the gaps left by the legislature and has successfully done so when the need arose. What India needs now urgently is Judicial Activism in its true form, while gradually shedding the mold of stereotypes and discrimination to ensure sensitized and appropriate jurisdiction.

CONCLUSION

"Judicial Activism is our duty against Legislative adventurism and Executive excess."

-Justice Kurian Joseph

Judicial Activism has garnered criticism across polities for tipping the scales of power through overreach, although the demarcation of said reach is often debatable. In a nation like India, where separation of powers is based upon conventions rather than rigid provisions, the intermixing of functions is predictably commonplace.

While the despotism of one institution is never advisable, the responsiveness of one when the rest exhibit a lack of the same, is necessary for balance. Judicial Activism cannot be a remedy to all constitutional ailments, but is certainly the place to start.

Gender equality is one of the many aspects of Social justice enshrined in India's constitution. Implemented rigorously over time, it serves as one among several examples of jurisprudence towards affirmative action. It also proves the efficiency of the courts in handling approaches usually outside their realm, but within constitutionality.

As expressed in the paper through an assessment of problematic judgements, it is equally important to assure the Judiciary is sensitized to the needs of the concerned communities and is approachable beyond discrimination. What India needs is a Judiciary stretching its limits, preferably one not riddled with cobwebs of bigotry.

A CRITICAL UNDERSTANDING OF CRIMINAL INVESTIGATION IN INDIA

- PARTH BINDAL

ABSTRACT:

The need for better administration of Criminal Justice has been felt by humanity since the dawn of civilization and continues to be the goal of human endeavor. One of the essentials of administration in modern democracies is the system of Criminal Justice. A number of institutions have been developed in course of time to administer justice to the people. In the operative part of the system of Criminal Justice there are four distinct components or constituent elements, namely; the Police, that is the investigative agency; the Prosecution, that is the agency to pursue a case in a court of law on behalf of the society; the courts, that is the Judiciary to try and decide about the guilt or innocence of a certain person and the Prison and correctional institutions. The fundamental functional basis for the Criminal Justice System is the 'law of the land'. The very process of law in a democratic society ensures a measure of public sanction for law through the consent expressed by their elected representatives. The entire criminal justice system in our country therefore revolves round the Criminal Law enacted by the Union Parliament and the State Legislatures. After laws are made by the legislative institutions their enforcement is taken up by various agencies set up for the purpose by the Government. The Police steps in at this stage as the primary law enforcing arm of the state-machinery. Enforcement by Police is primarily an exercise of taking due notice of every serious infraction of law as soon as it occurs and then proceeding with ascertainment of the connected facts thereof including the identity of the offender. This particular task in the system of Criminal Justice is aptly called as 'Investigation'. Investigation is one of the main and essential parts of Criminal Justice system and doing it effectively is a major challenge before police in India.. An efficient and timey investigation is inevitable. In India due to the inefficient opaque and delayed investigation innocent has to suffer and the culprit gets the benefit of it, either in form of bail or acquittal. Scientific methods of collecting are not used by police in India. Generally they do not record the statement of witnesses and they write their own statement (Section 161 of Cr.P.C.). When investigating officer fails to find sufficient true evidences they try to include false evidences. Investigating officers do not follow the legislative provisions of Cr.P.C. and do not respect the procedure established by law and by using barbaric and torture

methods are used to extract information from accused and in many cases from innocent suspicious person. The Code of Criminal Procedure is the main legislation on procedure for administration of substantive criminal law in India. It was enacted in 1973 and came into force on 1 April, 1974. Cr.P.C. provides the machinery for the investigation of crime, apprehension of suspected criminals, collection of evidence, determination of guilt or innocence of the accused person and the determination of punishment of the guilty.

INTRODUCTION:

The police in one country are the instrument for enforcing the Rule of Law, they are the means by which civilised society maintains order that people may live safely in their homes and go freely about their lawful business. Thus police is the law enforcement agency whose fundamental duty is to serve mankind and safeguard peoples live and property, to protect the innocent against deception, the weak against oppression or intimidation, peaceful against violence and disorder and to respect constitutional rights of all men to liberty, equality and justice. A police force is constituted body of persons empowered by state to enforce the law, to protect people and property and to prevent crime and civil disorder. In India State government is empowered to enact legislation relation to Police under entry one & two of the Sate List (List II) of VIIth Schedule of the constitution of India. In case of the criminal investigation the police agency applies the Indian penal Code 1860, Criminal Procedural Code 1973, Indian Evidence Act 1872, the Police Act 1861.The police of the state in comprehensive sense embrace its whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offences against the state, but also to establish for the intercourse of citizen to citizen. The word 'police' are derived from the Greek word 'Politeia' or its Latin equivalent 'politia' which means "civil administration". The term 'Police' connotes a body of servants whose primary duties are preservation of order, prevention and detection of crimes and enforcement of law. In India the great ancient law giver Manu emphasised the need of police force for maintenance of law and order. He suggested that police functions could be entrusted to only those who were well acquainted with the local people and were dedicated to the cause of protection of society against law violators.

"According to **Richard Ward, the author of 'Introduction to Criminal Investigation'** , the primary function of the Criminal investigator is to gather information, determine the validity of this information, identity and locate the perpetrator of the crime, and provide evidence of his guilt for a Court of law. Inherent in this function is a responsibility to protect the innocent. The means by which the investigator carries out his functions may be classified in two ways:

internal and external. Internal refers to the process of logic, expertise, intuition, experience, and knowledge that he brings to the investigations, while external refers to the tools, scientific aids, additional personnel, and other resources that he brings to bear on the investigation."

PRIOR TO INVESTIGATION:

The role of the police during investigation is to search for truth as per the law of the land, and they should be unfettered in this search. However, in practice, myriad influences work on the investigators. At times, the police play the role of a mediator in resolving disputes informally, even before matters go to court. Criminal cases fall under two categories, cognisable and non-cognisable. As per law, only in cognisable cases can a police officer carry out investigations suo motu and make an arrest without a warrant. Cognisable cases are those which involve offences such as murder, rape, theft, and robbery. Non-cognisable cases are those where a police officer has no authority to carry out arrests without a warrant. In these cases, the police cannot start an investigation without a court order. In any police station, one invariably finds that non-cognisable cases are more in number than cognisable cases. Police officers spend more time and have greater interest in resolving such non-cognisable cases. While in service, I used to receive several calls in a day, requesting my help and intervention in resolving non-cognisable cases. People believe that the police should step in to resolve such cases and become offended when they are directed to approach the court. Added to the enormous time and resources spent on such matters, undue police interference in a case can also give rise to malpractice and breeds institutional corruption, such as minimising a cognisable crime and making it non-cognisable. For instance, many dowry death cases are palmed off as accidental death cases for a price. It has been argued that the difference between cognisable offences and non-cognisable offences should be done away with. If the distinction between the two is removed, all reports of all registered cases can go directly to the jurisdictional magistrate, and the magistrate can identify what aspect of the crime needs to be investigated and what needs to be further verified by the police before a full-length investigation is launched.

Burking, or minimising and not registering crimes, is just one general malady. Police investigation of heinous cases suffers from insufficient allocation of resources (money, time, as well as manpower). In most states, police station staff definitely does not have separate allocation of moneys required for investigation of crime, for example, crime scene preservation and photography. The cases that police officers are most often asked to resolve out of court relate to recovery of money, property, marital disputes, domestic violence, and civil contracts, where one party feels cheated.

INVESTIGATION OF CRIME:

The powers and duties of a police officer making an investigation are laid down in sections 157 to 173 of Cr.P.C.

According to judicial interpretation, investigation consists generally of the following steps:

1.) Proceeding to the spot.

2.) Ascertainment of the facts and circumstances of the cases.

3.) Discovery and arrest of the suspected offender.

4.) Collection of evidence relating to the commission of the offence which may consist of:

(a) The examination of various persons (including the accused) and the reduction of the statements into writing, if the officer thinks fit.

(b) The search of places or seizure of things considered necessary for the investigation are to be produced at the trial.

5.) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial, and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173(3).

(1). Directorate of Enforcement vs. Deepak Mahajan

In this case the Supreme Court said: "The expression 'investigation' has been defined in Section 2(h). It is an inclusive definition. It being an inclusive definition the ordinary connotation of the expression 'Investigation' cannot be overlooked. An 'Investigation' means search for material and facts in order to find out whether or not an offence has been committed. It does not matter whether it is made by the Police officer or a customs officer who intends to lodge a complaint".

(2). N H Dave, Inspector of Customs vs. Mohammed Akhtar

In this case the Gujarat High Court while examining a case of investigation under Section 104 of the Customs Act said, "The expression 'investigation' has been defined in Section 2(h). It is an inclusive definition. No doubt, it will not strictly fall under the definition of 'investigation' in so far as the inclusive part is concerned. But then it being an inclusive definition the ordinary connotation of the expression 'investigation' cannot be overlooked."

"Improper Investigation will always benefit the accused as it is prosecutor who has to prove the case beyond reasonable doubt. Benefit arising from faulty investigation ought to go to accused and not to prosecution. Hence it is necessary to conduct investigation impartially, as per the law & within reasonable time."

ROLE OF POLICE IN INVESTIGATION:

The primary responsibilities of police are to protect life, liberty and property of citizens. It is for the protection of these rights that criminal justice system has been constitutive assigning important responsibilities to the police. They have various duties to perform the most among them being maintenance of law and order and investigation of offences. Therefore in the criminal justice system the police play the important role of investigation. “Investigation" includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a magistrate) who is authorized by a magistrate in this behalf. Investigation is a preliminary stage conducted by the police usually starts after the record of first information report (F. I.R) in the police station. When the police comes to know of the commission of the crime they will start the criminal investigation. Under section 2 clause (h) of the criminal procedure code 1973,"Investigation" includes all the proceedings under the code for the collection of evidence conducted by the police officer or by any person (other than a magistrate) who is authorised by a magistrate. According to the views of supreme court the investigation of an offence mainly consists of; the proceedings on the spot of crime, facts and situation of the case, finding and arresting of the suspected offenders, search of evidences such as the search of places and things which are essential for the investigation and the interrogation of various persons along with the accused. After that the accused is placed before a magistrate and a charge-sheet is prepared under section 173 of the criminal procedure code 1973. The main motive of investigation is to collect evidence and apprehend the culprits. It is the duty of everyone concerned to assist the police in their work. The police can question any person supposed to be acquainted with the facts and circumstances of the case, and any such person shall be bound to answer truly all questions relating to such case. A witness may, however, avoid giving those answers which will expose him to any criminal charge. The police may write down the answer orally given by the witness. The witness has neither to give answers in writing nor sign those recorded by the police. In Investigation, a police officer can call in writing a person to be witness who appears to have some knowledge of the crime being investigated and who is within the Jurisdiction of such police officer or in an adjoining police station8.The witness so called has to appear before the police officer, but a woman or a child below 15 years of age cannot be required by the police officer for such investigation to go to any place other than their own residence. A witness appearing in police investigation may take help of a lawyer in answering written question put to him

In the police Act 1861, section 23 provides that it shall be duty of every police officer to collect and communicate intelligence affecting the public nuisance; to detect and bring offender to

justice and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists. The criminal procedure code classified the crime as cognizable and non-cognizable. Sec 2(1) clause (c) defines the cognizable and non cognizable offences. "cognizable offences" means an offence for which, and cognizable case means a case in which, a police officer may in accordance with the first schedule or under any other law for the time being in force, arrest without warrant defined under section 2(c)of the criminal procedure code, 1973 And according to section 2(I) "Non cognizable offences" means an offence, for which, and "Non cognizable case means a case in which, a police officer has a no authority to arrest without warrant. A cognizable offence may be investigated by an officer in charge of a police station without the order of a magistrate. While in the case of non cognizable offences the police have no power to investigate without the order of a magistrate having power to try such case or commit the same for trial. Every information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police station shall be reduced to a writing by him or under his direction, and be read over to the informant, and every such information when reduced to writing as aforesaid, shall be signed by informant, and the substance thereof shall be entered in a prescribed book known as station diary. A copy of the information as recorded under sub section (1) shall be given forth with, free of cost, to the informant.

FIRST INFORMATION REPORT

Under section 154, the statement which is recorded of the information usually mentioned in first information report (F.I.R).The principal object of first information report is to set the criminal law in motion. The first information report means information recorded by a police officer on duty given either by the aggrieved person or any other person to the commission of an alleged offence. The police commence its investigation on the basis of first information report. Section 154 of the code of criminal procedure 1973 defines as to what amounts to first information.

The said section reads as under:-

Information in cognizable cases

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a police station, shall be reduced to writing by him or under his direction,

and be read over to the informant; and ever such information, whether given in writing or reduced it writing as aforesaid shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the state government may prescribe in this behalf.

Supreme Court has given Directions to be followed in regards to Registration of an FIR, these directions are discussed below:

1.) Registration of FIR is mandatory under section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

2.) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

3.) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

4.) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

5.) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

6.) As to what type and in which cases preliminary inquiry is to be conducted will depend in the facts and circumstances of each case. The categories of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay in initiating criminal prosecution, for example, over 3 months delay.

7.) In reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

8.) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

9.) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, it was directed by Supreme Court that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatory and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

CHALLENGES FACED BY THE POLICE DURING INVESTIGATION

(1). Lack of Trust:

The general credibility of the police and the investigation agencies in the country is very low. However, branding all police officials as untrustworthy is in my view preposterous. As a member of the criminal justice system, I find it abhorrent that all police are mistrusted by default under law. This mistrust means that the police are not able to perform their duties in the pursuit of justice. It is high time that such mistrust in the police, a colonial legacy, which undermines all their work and causes the abject failure of the rule of law, is changed. It is up to the judiciary to set an example and openly display support for and trust in the police. For instance, they can do this by allowing custodial interrogation as and when the police request for it.

(2). Custodial Interrogation:

One of the challenges that the police face most commonly while working on an investigation is the inability to repeatedly interrogate an accused to verify the veracity of the statements made by the accused. The accused is quite obviously, the key figure in an investigation, who knows all the attendant circumstances, and it is only by a thorough and sustained interrogation of the accused that the police can find out relevant details about the crime. Not allowing continued contact between the police and the accused in custody defeats the purpose of investigation. Even when the accused is in judicial custody, repeated interrogation as and when fresh facts surface will help in investigation. Custodial interrogation facilitates the police in confronting the witnesses and the accused, and obtains leads for corroboration from them. Police custody and interrogation therefore must be allowed as a matter of right to the police. The 14-day period of police custody need not be a continuous period. In fact, police officers would prefer it to be intermittent, as confronting the accused with evidence collected is very important towards the end of an investigation. In Japan, before the matter is taken to court for adjudication, the prosecutor discusses the issues with both sides and facilitates plea bargaining. The result of this is speedy justice.

EFFICIENCY IN INVESTIGATION – A MAJOR CHALLENGE

The most significant challenge that the criminal justice system in India faces today is the sheer number of cases. In order to deal with this workload, judges need to be methodical. There are of course individual judges who are organized and well-prepared; however, systemic reform is required in order to improve overall efficiency. Some measures that the judiciary can take to improve efficiency in the criminal justice system are:

1.) Hear and dispose of cases on a first-come, first-served basis. This will allow judges to hear cases with a set order and in an organized manner.

2.) Sessions trials, as the name suggests, must be heard in a single session. Currently, sessions trials are heard in parts, which mean that judges often lose track of proceedings.

3.) Both issues and statements of witnesses must be framed in advance.

4.) Technological processes must be used to improve efficiency. For instance, it is now possible to send and verify summons through email and WhatsApp. If this is done, precious court and police time will be conserved.

5.) Processes should be separated out into procedural and substantive, and judges should concern themselves mainly with substantive matters. Procedural matters, such as issuing of notice or summons, can be carried on by other officers of the court. This will allow court processes to be carried out in parallel.

6.) It is not essential that all matters need to have an actual hearing in the court. The court can consider documents for certain issues instead of having a hearing in court. This is a process that is followed in other countries, such as Japan.

7.) The classification of evidence must be improved. For instance, experts providing forensic evidence do not always need to come in person before the court. They can send the evidence to court through documents or other means.

8.) Methods such as plea bargaining can be used in appropriate cases to settle simple matters and to prevent clogging of the courts.

MISCONDUCT OR ILLEGAL ACTION BY THE POLICE DURING INVESTIGATION

Now-a-days custodial torture has become a common phenomenon and a routine police practice of interrogation these days comes under suspect in the eyes of judiciary as well as in general public. Though there is no specific and separate protection against torture. Accused is beaten or starved or tortured in many ways during the course of investigation by the police. Development human rights demand that this is a dangerous practice and should be eliminated. There is a huge gap between rate at which crime are committed and F. I. R's are lodged, public complaints are not addressed properly and there is always delay in FIR. Quality of investigating standards is deteriorating work load is also one of the major reason for inefficiency of police. There is delay in justice in India due to conventional method of investigation. The primary duty of police officials is to serve mankind, to prevent crime, to uphold and protect human rights and to investigate and detect and activate the prosecution of offences, to curb public disorder, to deal with major and minor crisis and help those who are in distress. But it is often seen that while discharging official duties, police officials do not undertake their responsibilities in a proper way and abuse their power for personal or official gain. It also hearts when police cross

their limits and act out of powers confined to them which is not a good sign for a country like India. They break their social contract and indulge in various unscrupulous activities. Such illegal action or inappropriate action can be defined as police misconduct. These improper actions by police officials or use of excessive power than that is reasonably necessary lead to miscarriage of justice, discrimination and involve obstruction of justice. Though the goals and objectives of police are noble but they have been criticized and condemned for committing acts which are just contrary and this is because the powers given to them to fulfill their social responsibilities are capable of being abused by them to trample the constitutional rights of the community16. If we see the misconduct of police the first thing comes in our minds are corruption and other forms of police crimes.

Two incidents from this year stand out: the Palghar lynching to which the police were meek bystanders and violence by Uttar Pradesh police against people protesting the Citizenship Amendment Act, especially children. Other excesses have also come to the fore during the lockdown to prevent the spread of corona virus, such as the indiscriminate use of lathis against people violating the restrictions as well as against providers of essential services.

The number of deaths of people in the custody of the Indian police is staggering. Between April 2017 and February 2018, India recorded a staggering 1,674 custodial deaths, a rate of five custodial deaths per day, according to statistics placed by the Home Ministry before the Rajya Sabha. Uttar Pradesh topped the list, with 374 deaths reported in this period of under a year.

Possible Solution:

Keeping the above in mind, it is imperative to understand the framework for pursuing grievances against police excesses. Remedies, including compensation, can be sought before the High Courts and the Supreme Court under the Constitution of India for violations of fundamental rights. However, these constitutional courts are not widely accessible and usually deal only with egregious cases where the burden of proof is high. Relief can also be sought before the National and the State Human Rights Commissions set up under the Protection of Human Rights Act, 1993, but their recommendations are not binding on the respective governments. Additionally, as of December 2019, three states did not have State Human Rights Commissions. In two states, the commissions were completely dysfunctional, while in ten states, the post of chairperson of the commission was vacant.

Supreme court Observation:

(1) Prakash Singh v Union of India

In view of the absence of an effective framework for accountability against police misconduct, the Supreme Court in 2006, the court in this case, directed states to establish Police Complaints Authorities at the state and district levels. The recommendations of these authorities for departmental or criminal action against a delinquent police officer would be binding, as per the court. An independent appointment mechanism for the members deciding complaints was also provided. The court noted that the National Police Commission had, in its first report in February 1979, dealt with the modalities for inquiries into complaints of police misconduct to be conducted in a manner that was credible, fair and impartial. Yet, these and various other recommendations made across eight reports of the National Police Commission were not implemented, forcing the Supreme Court's hand to issue binding directions till appropriate legislations were passed by states.

(2) Kishore Singh v State of Rajasthan

In this case the Supreme Court showed its deep concern regarding the police atrocities in the following words "No police life style which relies more of fists than wits and on torture more than on culture can control crime because it means boomerang on ends and re- fuel the vice which it seeks to extinguish.

CONCLUSION:

The criminal justice system and in particular, the police have remained unchanged for the last 140 years which makes it more crucial to bring a amendment in the Criminal law system and make it as per the today's needs and requirements in the society. There has been no difference in the behavioral aspect of police personnel either. Police personnel see themselves as rulers and guardians of the state, emphasizing order maintenance rather than service to the people. India is a nation where bureaucrats of every rank indulge in notorious dealings undaunted by the police, the so called enforcers of law and order, because these officials are practiced in the art of bribery and influence. The criminalization of politics has affected police performance more than that of any other State institution. While there are numerous provisions in the Constitution of India along with other laws, most of these provisions are not implemented. It is usually the poor and deprived sections of the society who are victims of custodial crimes and police atrocities."Poor people regard the police as agents of oppression, not protection. Over and over again, poor people said that justice and police protection are only for rich businesses,

rich people and those with connections."As the law stands at present, there is no special provision as to the burden proof where injuries were received by a person in police custody.

At the same instance it is also vital for states to implement the Supreme Court's directions in letter and spirit. Additional instances of violations as well as lapses by the police – including unjustified recourse to lathis, dereliction of duty at times of mob lynching, parading of arrested persons in handcuffs, video recording public shaming of alleged violators by the police and circulation of such videos on social media – should also be included within the list of complaints that can be dealt with by the authorities. On its part, the Centre must ensure that appropriate legislation is passed for the Union Territories. The creation of a central authority similar to the Police Complaints Authority to look into complaints against central police forces, such as the Central Reserve Police Force and Railway Protection Force, is also needed.

FRAMING OF ISSUES: A METHODICAL STEP?

- ZEENAT UL KUBRA

ABSTRACT

Framing of issues is probably the most important part of a trial. It helps a judge to come to fair conclusion in an effective manner. Inaccurate issues may kill valuable time. The framing of issues is a very vexed problem and the incorrect and inaccurate framing of issues is possibly the primary cause of unnecessary delay in disposing of matters before the Court, apart from causing unnecessary expense to the clients in terms of time, effort and energy. Conversely, if issues are framed in the manner required by law, after going through all the proceedings in the matter including the plaint, written statement and the documents as envisaged by law, it will cut down a lot of unnecessary court time.

The term "issue" in a civil case means a disputed question related to rival contention in a suit. It is the focal point of a disagreement, an argument or decision. It is the point on which the case itself is decided in favor of one or the other, by the court. An issue arises when a material proposition of fact or law is affirmed by one party and denied by the other party to the suit. Narrowing down the area of conflict and solving that by determining where the parties differ is the major challenge is this.

The topic of "*framing of issues*" will further be dealt in this project.

Key words: - Issue, Civil case, Decision, Material Proposition, Court.

INTRODUCTION

When one party affirms and other party denies a material proposition of fact or law, then only an issue arises. If there is no specific denial, the question of framing issue does not, generally, arise. Material propositions are those propositions of law or fact. The plaintiff must allege such material propositions in order to show his right to sue. In the same way, defendant must allege as to constitute his defense. Unless each material proposition is affirmed by the plaintiff and denied by the defendant, a distinct issue will not form.

Now the question arises as to what is "Material Proposition"?

Basically, Material propositions can be understood in sense of two aspects. Those are Proposition of fact and Proposition of law. Those propositions of fact or law which a plaintiff

must specifically allege in order to show a right to sue or a defendant must specifically allege in order to constitute his defense in such suit.

In *Sri Nanjudchari vs. The Chairman*, it was held that "It is mandatory on the part of the trial court to frame all necessary issues arising from pleadings i.e., material preposition of fact and law of affirmed by the one party and denied by the another."

The primary difficulty in understanding issues as stated herein before, is that the term 'issues' in our mind is controlled off by the first part of Order XIV of the Code of Civil Procedure, which deals with issues, which we take as a complete and exhaustive exposition of the law on the subject.

The word material is defined thereafter and separately in sub clause (2) of the Order, but even though it is of utmost importance, it is often sidelined while framing issues and this is probably the main reason why there is much confusion in relation to framing of issues. The word material in the above Section can only have reference to the Cause of Action in the matter. Without this interpretation it loses all its meaning. "The cause of action" is a bundle of essential facts when considered against the law applicable to such facts, gives the plaintiff a right to seek some relief against the defendant in the case.

A suit essentially is an action of an aggrieved party in a court for the recovery of a legal claim or right. When such a right is decided by the court after due adjudication, it becomes a decree. Any decision of the court that does not touch upon such claim or right is only an order of the court but not the decree.

When issue is framed?

When plaint is presented to the court the case is set in motion. Subsequently the written statement is filed by the other party. After that issues are framed. The day on which the issues are framed is termed the day of "first hearing of the suit". On the first day of the suit the court shall ascertain from each party whether he admits or denies the allegation in the plaint. It is after "the first hearing of the suit" from the parties, reading the plaint and the written statement, and ascertaining on what material proposition of fact or law the parties are at variance, the court frame issues. The right decision in any case dominantly rests on the correctness of the issues framed. If the defendant makes no defense in the first hearing of the suit, there is no need to frame the issues. Issues are framed to avoid surprises in the trial and enable the parties know what points they need to provide evidence on. The averments not denied in the written statement are taken as admitted.

The court should pronounce judgment on all issues. It cannot leave any issue unattended to. Issues relating to jurisdiction of the court and the bar to the suit by any law should be taken up first when proceedings start.

The issues are to be framed by the court from the following sources:-

- Allegations of parties or their behalf on oath
- Allegations made in the pleadings/interrogatories
- The contents of documents produced by both parties.

The court can even examine witnesses or documents not brought before it, before framing the issues if it is not possible otherwise. For bringing them before the court seven days adjournment is possible.

The court can amend, add or delete issues at any time before passing a decree if such changes are necessary in the interest of justice.

If the parties are ready to agree for a settlement in any matter before the court, they should frame it in the form of an issue and then enter into an agreement. The agreement thus arrived at may be in the following format: "the first party will pay the amount so agreed upon (specify the amount) to the second party and the second party will hand over the assets in question (give details here) to the other party".

If the court is satisfied that the agreement is executed by the parties, the parties have interest in the above said substantial question thus agreed to, and the issue is fit enough to be tried and decided, it shall proceed to try the issue and come out with the judgment. If the issue is decided in favor of the plaintiff it will give him relief. If it is decided in favor of the defendant it will be a valid defense against the claim.

TYPES OF ISSUES

There are three kinds of issues: issues of fact, issues of law, and mixed issues of fact and law.

A question of law on which no evidence is to be brought in by the parties can be tried as a preliminary issue. It is being done when the issue involves a question of law alone. To decide to try anything as a preliminary issue is a matter of discretion for the court, but it is not an obligation (O XIV R 2(2).

When determination of a 'question of law' depends on a 'question of fact', then the issue of law should not be tried as a preliminary issue. The plea of limitation, estoppel, and res judicata etc, raised in the beginning of a case can be tried as preliminary issue.

Court cannot refuse to decide issues

The court cannot refuse to decide any issue if the issue is framed and evidence is given, even though the point finds no mention in the pleadings.

The court should not frame any issue which does not arise in the pleadings. The issue must be confined onto the material questions of fact or law.

Importance of issues

To decide a case properly the framing of the issue should be appropriate.

Framing of issue helps the parties to lead necessary evidence in support of the claims and the reliefs. It will give the other party to confront or construct the case to bring home his defense. Issues are the lamp post which enlightens the parties, the trial and the appellate court as to what the controversy is, what the evidence must be, and where the truth in the dispute lies.

Duty of the court in framing issues

It is the duty of the court to frame proper issues. The judge must apply his mind and understand the facts of the case when framing issues. If the court frames improper issues, the parties can move the court for framing proper issues. Framing of issues largely depends on literary skill of the judge. Issues should be precise, crystal clear and to the point.

The court may examine the witness or inspect the documents before framing or amending the issues. If the parties agree to a question of fact or law in issue between them, they may state it in the form of an issue and the court can issue judgment on the issue.

The framing of issues is the crucial part of the trial. Only on laying down the foundation of the case with proper issues, is it possible for the court to go along the right lines and come to the right judgment in a case.

The stage of framing issues is an important one. It is on that day the scope of the trial is determined by laying the path on which a trial should proceed. Omission to frame an issue is an irregularity, but not a material one to vitiate the proceedings if it does not affect the merit of the case. Even if wrong issues were framed, the decree would not be set aside unless it is a prejudicial one.

When lower court omits framing any issue

When the lower court omitted to frame an issue before trying a matter in controversy, the appellate court can frame the issue and refer it for trial to the lower court. There is no need to remand the entire case. Then the lower court should try such issues and return the evidence and its decision to the appellate court (Section 25 of the CPC and the Order XLI Rule 24).

In appeal and second appeal

In an appeal, the primary issue is what wrong occurred in the Judgment/order. The question of fact or law can be challenged in an appeal.

However, in the second appeal, the substantial question of law involved has to be framed as the issue.

Court adjudicates on issues

It is on the issues that the court applies its mind and decides which issue should be decided in whose favor.

The judgment is the application of the court's mind on the issues that the court initially frames. That means the issues run as a thread from the first day of hearing of a case to the last day of its judgment.

JUDGEMENTS

- In *Nusli Neville Wadia vs. Ivory properties and Ors.*[1]"While deciding the issue of bar created by the law of limitation, re judicata, the court must have jurisdiction to decide these issues. Under the provisions of section 9A and Order XIV Rule 2, it is open to decide preliminary issues if it purely a question of law not a mixed question of law and fact by recording evidence."
- In *Foreshore Cooperative vs. Praveen D. Desai*[2]the petition was dismissed as it was observed by the Hon'ble Judges (Justice M. Yusuf Eqbal and Justice Kurian Joseph, JJ.) that the intention law is to decide the issue relating to jurisdiction of the court as a preliminary issue notwithstanding the provision contained in Order XIV Rule 2 CPC. However, it is made clear that in other cases where the suits are governed by above provisions, it is the discretion of the court to decide the issue based on law as preliminary issue.
- In *Mukesh Rishi Chheda and Anr. vs. Dhirajlal R. Chedda & Ors*[3] Hon'ble Justice B.P. Colabawalla held that the issues framed by the learned judge involve mixed question of facts and law. This gives the court autonomy as to decide which issue is a preliminary issue or where the same ought to be decided with all other issues is entirely in the discretion of the court as per Rule XIV CPC.

[1] (2019 SC)
[2](2015 SC)
[3](2020 Bombay HC)

- In *D.R. Narasimhamurthy vs. Sri Srinivasa*[4], it was laid down that the perusal of the said Order XIV Rule 1 of CPC indicates that whenever there is a proposition of fact or law which is affirmed or denied by the other, an issue has to be framed by the court and all issues raised by the court are to be answered in the judgment to be passed in terms of Order XIV Rule 5, The court may before passing the decree, amend the issues or frame additional issues on such terms as it thinks fit.
- In *Sri Gangai Vinayagar Temple vs. Meenakshi Ammal*[5] it was held that it is the primary duty of the court to frame proper issues. The obligation and duty to frame issues is cast solely on the court. But the pleaders appearing for both the parties also should assist the court in framing issues.
- In *Venkataswamy vs. Narayana A. and Ors*[6]. where the Karnataka High Court was pleased to lay down that it was imperative on the part of the Trial Court to have framed an issue with regard to the title as observed above and to have given a fair opportunity to both the parties to adduce evidence with regard to the nature of the property as to whether it is exclusive property of the Plaintiff or otherwise depending upon the answer to the question the Plaintiff would be entitled to the final relief.
- The Supreme Court in its decision reported as *Ramesh B.Desai Vs. Bipin Vadilal Mehta*[7], has laid down that Order 14 Rule 2 of Civil Procedure Code, 1908 confers no jurisdiction on a Court to decide the mixed questions of fact and law as a preliminary issue. In this ruling, it was held that Sub-rule (2) of Order XIV Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force.
- In the case of *Major S.S Khanna V. Brig. F.J.Dillon*[8], it was observed as under:- "Under Order XIV Rule 2 where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only

[4](2020 Karnataka HC)
[5] (2015) 3 SCC 624
[6] AIR 2002 Kant 326
[7] 2006 5 SCC 638
[8] AIR 1964 SC 497

where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

- In *Siddhi Chunilal Vs. Suresh Gopkishan*[9] in which Justice Borkar J. passed his Judgment, the required issue stated with accuracy when viewed in this context ought to have been: Does Plaintiff prove that he is in settled possession of the premises? And not- Does Plaintiff prove that he is in lawful possession of the premises? In the latter case it will cause confusion, as the question of title might then crop in leading to obfuscation of the matter.
- In *Maddaa Sai Lakshmi v. Medisetti Lakshmi Narasamma*[10], in this case, it was held that "Before commencement of trial, suit be posted to a specific date for hearing both sides on the issues already framed to see if they have been property framed or if any reframing of issues is needed on the core issues in dispute. Trial be commenced only after such exercise.'

In *Makhan lal bangal vs. Manas Bhunia and Ors.*[11]The Hon'ble Apex Court has laid down: "the stage of framing issues is an important one in as much as on that day the scope of the trial is determined by laying the path on which a trial should proceed excluding diversions and departures therefrom. That the dispute between the parties is determined, aitia forfeited Naroda and the concave mirror held by the Court the reflecting the pleadings of the parties pinpointed the issues the disputes on which the two sides differ. The correct decision of civil lis largely depends on the correct framing of issues correctly determining the real point in controversy which need to be decided. The scheme of Order 14 of the Code of Civil Procedure relating to settlement of issues shows that and issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition and from the one party and denied by the other to form the subject of a distinct issue. An obligation is cast on the Court to read the plaint/petition and the written statement/counter if any, and indigenous with assistants of the landed counsel for the parties committed propositions of fact or law on

[9] 2009(6) BCR 857
[10] 2006 (4) ALD 46
[11] AIR 2001 Supreme Court 490

which the parties are at variance. Issues should be framed and recorded on with this in the case will depend"

CONCLUSION

The principles that can be deduced from the above discussion on issues:

1. Issues may be based under Order 14 Rule 1 and 2 of the Code of Civil Procedure, but there is nothing to suggest that the above Order is exhaustive and that issues cannot be framed if there are no pleadings in the case.

2. There are a fixed set of issues for every type/genre of cases and they form the frame under which the Court should work to frame issues. Any pleading or material outside these broad basic issues is irrelevant to the matter and ought to be discarded.

3. On looking to the mandatory issues like limitation and jurisdiction if they are based only on pure law, and not on facts and not being mixed questions of law and facts, the Court may proceed to decide the same under the law after giving a hearing to both the parties.

4. If however, they are mixed questions of law and fact or questions of fact framing an issue on the same will depend on the law of pleadings

5. The Court must decide as to what is pleaded and what is not on adverting to the law of pleadings in the Code of Civil Procedure.

6. The Court must frame issues within the broad framework given above, on seeing the factual position that is pleaded by the parties.

7. The question of burden of proof is dependent on the relevant provisions of the Evidence Act; however, all rules must bend to the rule that the person with the best evidence must produce the same.

8. The burden of proof is fixed on a person and never shifts, however, the onus of proof shifts from time to time. Onus of proof cannot be a matter of issues.

EMERGENCY PROVISIONS AND ITS EFFECT ON FUNDAMENTAL RIGHTS

- MANVI JAIN & AKRATI MODI

ABSTRACT

Order XVIII of the Constitution of India mentions the various provisions for declaration of emergency in the country. The provisions have changed significantly after the 44th Constitutional Amendment came into action, considering the need to protect the fundamental rights of the citizens and to protect the nation from any exploitation as a whole. In light of this, the first part of the paper will discuss the different types of emergencies and how they are put into action. The second part of the paper will be discussing the various occasions during which the emergency was proclaimed in the country. This will be followed by the conclusion which elaborates on the different reforms that have taken place over the years to make the provisions for emergency less exploitative and to protect the fundamental rights granted to the citizens under the Constitution.

INTRODUCTION

During the time the Indian Constitution was being drafted, that is in the year 1947, the surroundings and circumstances that India was going through were very taxing. This is because a lot of changes were happening in and around the country like the partition, merging of the princely states, etc. Therefore, enough attention was paid to the authority that the central government will get in order to deal with any situation that might arise in the future. Accordingly, the central government was given the authority to deal with situations when the security of the nation is under threat. These provisions are mentioned in the constitution of India under the heading of "Emergency Provisions" under Order XVIII. In India, emergency is further divided into 3 subcategories, namely:

1. National emergency
2. Financial emergency
3. Constitutional emergency

During the period of emergency, the President of India has the authority to overrule many provisions that are mentioned in the Constitution of India, including some fundamental rights that are granted to the citizens. This is done so that the sovereignty, integrity, security and unity

of the nation are maintained and there is no compromise on achieving the objectives of the preamble. This paper aims to analyse the various emergency provisions and how they affect the fundamental rights of the citizens.

National Emergency

A national emergency is applied when there is a threat to the nation as a whole and not just to a specific state or district. It can also be applied in case of a war or due to some external aggression. Under Article 352 of the Indian Constitution, a national emergency can be proclaimed.

Article 352 of the Constitution states that *"if the president is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation."*[12]

Hence, the president can declare an emergency in the nation only if he believes that the security of the nation is in danger because of war, armed rebellion, or some external aggression. Along with this, it can also be declared if the war, external aggression, or an armed rebellion is anticipated or if the security of the nation is likely to be threatened, given that the President is satisfied that there is some serious threat to the security of the nation. These provisions are made in order to deal with such extraordinary situations that threaten the peace and harmony of the nation.

Before 1978, an emergency in the country could be declared in three situations, war, external aggression, and internal disturbance. This term 'internal disturbance' was later replaced by 'armed rebellion' in the 44th amendment of the Constitution. This was because even though internal disturbance is serious, it does not pose a threat to the security of the nation. On the other hand, armed rebellion poses a threat to the security of the nation or a part of the nation. The intention behind this replacement of words was to limit the scope of Article 352 so that it is invoked only in extreme situations.

As already stated above, the president of India has the authority to announce a national emergency, but he can do so only with the permission of the cabinet. This permission has to be in writing as mentioned in Article 352(3) of the Constitution. In order to announce the national emergency, both the houses of the parliament must approve of the same by a majority.

[12] The Constitution of India 1950, art 352.

However, if the Lok Sabha is dissolved at the time of the proclamation of emergency, in that case, it has to be approved by the Rajya Sabha within a month and thereafter, once the new session of the Lok Sabha begins, then within a month, it has to be approved by the Lok Sabha. Once the parliament approves of the emergency, then it is in force for 6 months from the date of the proclamation as mentioned in Article 352(5) of the Constitution. In case, the period of emergency is required to be increased, then a resolution has to be passed by the parliament. In *Minerva Mills Ltd. v. Union of India*[13], it was held that the courts do not have the power to hold a judicial review regarding the validity of the emergency announced by the President under Article352(1) of the Constitution. They only have the power to examine whether or not the procedure was followed before the proclamation of such an emergency.

During the time when the emergency is operative, if the situation comes under control and if the President is satisfied, in that case, he can revoke the emergency by another proclamation. To revoke the emergency, a minimum of 10 percent of the members of the Lok Sabha is required to hold a meeting and by a majority, they can revoke the emergency. This procedure was introduced in the 44th amendment of the Constitution.

When an emergency is declared, it affects the rights of individuals as well as the State. Its effect on the fundamental rights of the citizens will be discussed in-depth in later parts of the paper.

During the proclamation of emergency, the federal form of the Constitution changes to a unitary form because most of the powers of the State transfers to the President. Hence, in such a situation, the parliament has the power to make laws for the entire nation, even for the matters that are included in the State list. For instance, the president has the power to issue guidelines as to how the executive powers of the state must be exercised during this period as mentioned in Article 353(a) of the Constitution. Even the distribution of the revenue between the State and the Centre can be modified, according to what the president seems feasible.

State Emergency

Another type of emergency is the State emergency, which is issued under Article 356(1) of the Constitution. It is the duty of the Central Government to ensure that the State is governed in accordance with the constitutional provisions. In case of any failure in this system leads to the declaration of State emergency. The president must be satisfied that the State government is not being functioned smoothly. This is also known as President's rule. For the proclamation of State emergency, the idea is first brought up in front of both the houses of the parliament. Once

[13] *Minerva Mills Ltd. v. Union of India* 1980 AIR 1789.

it is approved by both the houses, only then it is announced in the public domain. However, this approval must be given within 2 months, starting from the day it is presented, as after the period of 2 months, this proclamation ceases to exist. In case the Lok Sabha is dissolved and only Rajya Sabha has approved it, once the Lok Sabha is reconstituted, then within one month of its first sitting, it has to be approved or else, it stands canceled. It shall extend for up to 6 months starting from the day it is announced, if not revoked before that. However, if no resolution is passed by the parliament after 6 months, then automatically the proclamation stands canceled as per Article 356(4) of the Constitution. It can also be renewed with the approval of both the houses for more than 6 months. The 44th amendment of the Constitution introduced that the power of the parliament shall not exceed beyond 1 year. It is subject to certain conditions as per Article 356(5) of the Constitution, which is as follows:

1. If a national emergency is in operation.
2. If the election commission notifies that the State Assembly cannot be held.
3. As per Article 352(2) of the Constitution, from the date on which the President issues a proclamation for the revocation of emergency.

If the proclamation is not presented before the Houses of the parliament for approval within 2 months from the day it is made, then the proclamation expires or if it is presented before the Houses within those 2 months and gets rejected, in that case, it expires according to Article 356(3) of the Constitution. Once the State emergency is declared, the President gets all the power with regards to the State. He can delegate this authority completely or a part of it to the executive authority. He has the authority to ask the Parliament to make rules and regulations on behalf of the State.

There are a few differences between the National emergency and the State emergency, the first one being the relationship with the Centre. During the State emergency, the relationship of only 1 state in which the emergency is proclaimed changes with the Centre. However, during the National emergency, the relationship of all the states changes with the Centre because of the shift of power. Another point of difference is the effect on fundamental rights. During the National emergency, the fundamental rights of the citizens are significantly affected but no such rights are affected in case of a State emergency.

The President's rule is often criticized because of the wide discretionary powers that the President gets. Despite the safeguards that are mentioned in the 44th amendment Act, people fear that it might be misused by the President. The Sarkaria Commission[14] which was made to

[14] The Sarkaria Commission *'Emergency Provisions'* (Chapter VI).

analyze and review the relationship between the State and the Centre also mentioned that opting for State emergency should be the last resort of the Central government and accordingly, the Commission mentioned that every aspect of forming an alternative government must be explored before declaring a State emergency.

In the case of *S.R. Bommai v. Union of India*[15], it was held that the State Assembly cannot be dissolved until the proclamation for State emergency is approved by the parliament.

Financial Emergency

The third type of emergency is called the financial emergency which is proclaimed under Article 360 of the Constitution. It is declared in situations when the financial stability of India or any part of India is in danger. The president must be satisfied that there is a financial threat to the country or a part of the country before declaring a financial emergency. For its proclamation, it shall be approved by the parliament within 2 months. Once the financial emergency is declared, the legislative and executive powers of the State transfers to the Centre. This emergency ceases to be operational after the expiry of 2 months unless a fresh resolution is passed by the houses of the parliament for an extension. During a financial emergency, the Union Government has the authority to direct the State legislations regarding their financial decisions. The Central government also has the authority to order the State legislations to reduce the salaries of the people employed in government services. In case, a financial emergency is declared in the entire nation then the President can order for a reduction of the salaries and allowances of the people employed in the Centre. This also includes the High Court and the Supreme Court judges. India has never experienced the imposition of financial emergency in the country or any state.

Proclamation of Emergency in India

In India, emergency has been proclaimed three times, in 1962, 1971, and 1975 because of the Chinese invasion, war with Pakistan, and internal disturbance respectively, and each time Article 352 has been invoked. Each time the court has viewed the effects of emergency provisions on fundamental rights differently.

Article 358 & 359- Provisions of the Constitution

Article 358 and 359 of Part XVIII are the provisions that talk about the role of fundamental rights during a proclamation of emergency. Article 358 allows for the "Suspension of provisions of Article 19 during Emergencies" while Article 359 allows for the "Suspension of

[15] *S.R. Bommai v. Union of India* 1994 AIR 1918.

the enforcement of the rights conferred by Part III during emergencies".[16] The main difference to note between the two is that the suspension of certain rights under Article 359 can only be done on the order of the President, whereas Article 358 automatically suspends the entire right under Article 19.

1962- First Emergency

National emergency was first declared in India in 1962 and it continued till 1968. It was declared because India's security was threatened due to war and external aggression as the Chinese attacked the North-East Frontier Area (NEFA). As soon as the emergency was announced, Article 358 immediately came into effect, thus suspending the rights under Article 19, enabling the State to make any legislation contrary to Article 19. Following the proclamation, the President of India curbed the fundamental rights of the citizens under Article 14, 21, and 22 by passing an order under Article 359. This meant that any action by the Defense of India Ordinance, 1962 which violates these rights could not be challenged in a court of law. This order would apply in two ways, firstly – that the citizens would not be able to enforce rights mentioned only in Article 14, 21, and 22 and secondly that the rights are contained only when there is an infringement with regard to the Defense of India Act.

In the case of *Makhan Singh Tarsikka vs. the State of Punjab*[17], the court examined the effect and scope of the order and pointed out the difference between Article 358 and 359. A significant suggestion that arose from this case was that, in trying to impose the rights of the detainee, the courts had to understand 'the substance of the order and not its form'[18]. As a result, the court could not have recourse to other clauses of separate laws which would have the effect of implementing a right, which is to be limited by the order.

The most important proposal of the law put out by the court, in this case, was that, although the order prevented any appeal to an order of detention in compliance with the particular clauses of the Articles, it did not prevent appeal on any other grounds. Therefore, the detainee could appeal on the grounds like mala fide, improper implementation of the law, excessive delegation, and other rights.[19]

Another issue posed before the Supreme Court was whether the order issued according to Article 359 could be questioned on the grounds of the same rights it tried to prevent

[16] The Constitution of India 1950, art 358,359.
[17] *Makhan Singh Tarsikka vs. State of Punjab* AIR 1964 SC 381.
[18] ibid [30].
[19] ibid [37], [39], [45].

compliance. In the case of *Ghulam Sarwar vs. Union of India*[20], the plaintiff questioned the legality of the presidential order issued according to Article 359, on the basis that it violated Article 14, the same right which it tried to prohibit the compliance of. The court made a differentiation between "the order per se and the effect of the order"[21]. Hence, the order would be null if it is violative in itself of Part III and therefore remedies mentioned in the Articles would not be suspended. The court reviewed the order when making this suggestion and found that it was in effect a fair classification and not in violation of Article 14. This decision was overruled in *Mohd. Yakub vs. State of J&K*[22] by the Supreme Court. In the case, the court mentioned that in compliance with Article 359 and Article 13(2), the Presidential order had to be formulated harmoniously in order to avoid the Articles being held of no value. In compliance with Article 13(3)(a), the Court thus construed the term "law" to leave out the Presidential Order under Article 359. This path taken by the court appears to be more realistic and does not defeat the very object of the presidential order, which is to restrict the authority of the State to a restricted degree.

The courts also pointed out that the pre-emergency law which is void ab initio cannot be authorised by Article 358 or by order pursuant to Article 359. In *State of Madhya Pradesh vs. Bharat Singh*[23], the court ruled that the compulsory suspension of privileges under Article 19 during an emergency could not be used to justify the pre-emergency laws. This refers to the recognition that eclipse doctrine did not work in the case of the post-constitutional statute and therefore such a statute would be unconstitutional ab initio if it ignored any of the clauses of Part III[24].

Thus, despite the emergency of 1962 and the ensuing presidential order under Article 359, the effect on fundamental rights in Part III was held at a fair degree. The explanations provided by the courts tried to strike a balance between the fundamental rights of the citizen and the expanded authority of the State to deal with the situation. This was done by providing for appeals to arrest orders on grounds other than those specifically banned. However, if any indirect means were used to bypass the express provisions, even those means would be banned. The courts then offered a general understanding of the express provisions and, simultaneously the scope of such an understanding was limited by prohibiting them from interpreting implied grounds.

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[20] *Ghulam Sarwar vs. Union of India* AIR 1967 SC 1335.
[21] ibid [16].
[22] *Mohd. Yakub vs. State of J&K* AIR 1968 SC 765.
[23] *State of Madhya Pradesh vs. Bharat Singh* AIR 1967 SC 1170.
[24] *Bennett Coleman vs. Union of India* (1972) 2 SCC 788 [27].

1971 & 1975- Second and Third Emergency

In 1971 and 1975 emergency was declared in India owing to a threat to India's security by Pakistan's aggression and internal disturbance respectively. The emergencies came to an end in 1977.

In the light of these proclamations, the President, in 1975, issued an order, according to Article 359 specifying that the freedom of any citizen to move any court to implement the rights found under Articles 14, 21, and 22 and any proceedings pending in courts for enforcing the same were suspended for the time during which the 1971 and 1975 emergencies were in effect.

The order was very similar to that of 1962, except for one crucial aspect. In 1962, one barred challenge only where deprivation was rendered under the Defence of India Act, no such categorization was rendered by the 1975 order. In addition, the decree also called for the termination of any cases pending before the courts for the protection of those rights.

With respect to the suspension of proceedings before the courts, the issue which immediately emerged was as to the nature of the suspension. Under the case that the interlocutory injunction had already been issued, was it to be lifted, or was the whole proceeding to be frozen? Several High Courts have taken a different view on the subject. Although the precise situation is now quite uncertain, the most appropriate position seems to be to restore the full status quo ante. It would also mean that an interim stay order would be vacated until such an order had been passed. A related point of contention emerged as to whether the suspension of Article 14 meant the suspension of other Articles deemed to be species of Article 14, such as Articles 15 and 16. The High Courts have also shared opposing views on this issue.

In the case of *A.D.M., Jabalpur v. Shivakant Shukla*[25] also known as the *Habeas Corpus* case, the Supreme Court held that no individual at all had the locus standi to appeal the High Court or the Supreme Court for any writ as per the Presidential order under Article 359. The court also prohibited challenge to detention order on other grounds not stated in the Presidential order which was allowed in the case of *Makhan Singh Tarsikka*[26]. Therefore, as per the case, the detention order couldn't be challenged at all during the proclamation. Even if a person was detained under an invalid law, he would have no recourse and the detention will be held valid. Although some of the judges in this case expressly claimed that the detention had to be regulated by valid laws, the final order forbade any appeal to detention orders based on invalid

[25] *A.D.M., Jabalpur v. Shivakant Shukla* AIR 1976 SC 1207.
[26] *Makhan* (n2).

laws. It gave the state the power to conduct brazen abuses of fundamental human rights and get away without anyone being held responsible.

Another surprising finding drawn by the court was that Article 21 of the Constitution was the "sole repository" of the rights to life and personal liberty, and that, while the enforcement of Article 21 was revoked, the right to life could not be upheld under any other provision of law.[27] This inevitably begs the question of whether Article 21 of the Constitution may have been best abolished. If it had not been listed in Part III, it could not have been excluded either, it would have continued to exist as a natural right and as a common law right. The outcome was to abrogate its presence in these other ways by referencing it directly. In the Supreme Court's reasoning, there appears to be an inherent paradox.

In the case of *Bhanudas Krishna Gawde vs. Union of India,*[28] the court followed the reasoning of the Habeas Corpus case. The court repeated the same proposals here and decided that it would not implicitly impose the right to life by any right under natural or common law.

Thus, during the 1971 and 1975 emergency, the fundamental rights of the people were affected massively by giving unrestrained and unchecked powers in the hands of the executive, press censorship was inflicted, and a huge number of people were sent for detention without any justification for the same. And this continued till 1977 when the emergency was revoked. The measures put forward were eventually rendered nugatory by constitutional amendments. While the case of Habeas Corpus mainly has historic significance today, it still serves as a reminder of the massive misuse of authority during the proclamation of 1975 and of the failure of the Supreme Court to deal adequately with it.

44th Amendment

During the time of an emergency in the country or a part thereof, the Constitution of the nation is affected as the fundamental rights of the citizens are taken away to some extent. Therefore, it is only in exceptional circumstances that an emergency should be proclaimed. Considering the harsh effect of such emergencies, the 44th amendment was introduced to make the proclamation of emergency restricted to only extraordinary circumstances.

The various changes introduced by this amendment are as follows[29]:

[27] *Shukla* (n10) [137].
[28] *Bhanudas Krishna Gawde vs. Union of India* (1977) 1 SCC 834.
[29] 'The Constitution (Forty-Fourth Amendment) Act, 1978 | National Portal of India' <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-fourth-amendment-act-1978> accessed 7 November 2020.

1. Under Article 352 of the Constitution, the term 'armed rebellion' was used in place of 'internal disturbance'.
2. The Cabinet must approve the decision of declaring an emergency in the country in writing.
3. The Houses of the Parliament must approve the proclamation of emergency within 1 month from the day it is presented.
4. In order to continue the emergency, both the houses are required to re-approve the decision after every six months.
5. Article 358 of the Constitution lays down that Article 19 can be suspended only in the situation of war but not in the case of armed rebellion. Apart from this, if there is any other law that suspends Article 358 of the Constitution then it must mention its relation to Article 358 of the Constitution.
6. The term of Lok Sabha was fixed at 5 years.

CONCLUSION

Indian judiciaries undertaking on the effect of the state of emergency on fundamental rights shows impetuous fluctuations at various points of time. In 1962, the courts tried to find a delicate balance between the need to arm the State with expanded powers and constitutional freedoms. This method was fully eliminated in 1971 and 1975. Following the revocation of the emergency, many reforms have been introduced to guarantee the supremacy of those fundamental rights.

After the emergency of 1975, the laws on proclamations were stringently revised. The Emergency was a crossroads from which India graduated to create a stronger democracy. The rule of law has been reaffirmed and the principle of freedom of expression and dissension has been restored. The Indian system has shown a transition from one with little to no respect for people's freedoms to one in which those freedoms are held inalienable and supreme. This transition is a reflection of a growing political understanding between the legislature as well as within the judiciary.

However, any legislative and political machinery can be exploited. The amendments made by 44th Amendment Acts can also be exploited. Therefore, before these laws are more thoroughly checked, we cannot presume that the emergency provisions of the Constitution have been tamed.

TECHNICAL ADVANCEMENTS IN THE GLOBALISED WORLD THROUGH THE LENS OF IPR

- ANANYA PANDEY & ROOPKATHA ROY

ABSTRACT

The paper at hand focuses on how as to there the close nexus between the close nexus between the technical aspects of the intellectual property rights and the issues of the globalization. The paper also, states that relationship as to how there is a relation between the different forms of intellectual property rights and the economic globalization that is involved in the same. In the discussion that, is taken forward in this paper states about the different form of the intellectual property rights and to what sense it is promoting the essence of globalization. Further, the paper also analyses the different conventions that govern the different form of the intellectual property rights to what extent they play role in the globalization field. The paper also enumerates the important principles that can be stated to be influential to make the world as a single dominated player. The paper also discusses suggestions that is portrayed by the authors to as to strike a balance between the protectionism and the principles of non-discrimination.

Key words: IPR, intellectual property rights, globalization, trade, technical aspect, advancement, convention, principles.

RESEARCH OBJECTIVES

1. To understand the position of the globalization in the real sense.
2. To analyse nexus between globalization and intellectual property rights.
3. To delve into the various convention and the principles that are stated in them.
4. To connect the convention with the essence of globalization.
5. To provide for suggestions and recommendations.

RESEARCH QUESTIONS

1. Whether there can be a link between the different form of Intellectual property technical development and globalization?

2. In what way has the conventions of intellectual property rights impacted and shaped globalization?
3. Whether the principles of the non-discrimination impacted the trade and created a connection between IP trade and globalization?

RESEARCH METHODOLOGY

The methodology adopted in this research is doctrinal. The doctrinal research refers to the way that black letter law is followed. non-doctrinal research can be in a way where the focus of the research is such that it focuses on the case laws. It looks at the law as it is written as a set of rules. Further, in the research that is conducted, non-empirical research is that kind of research that is focused more on the theories, methods, and articles that focus on the methodology. It relies on empirical research literature and is not data-driven.

MODE OF CITATION

An uniform mode of bluebook 20th edition citation system has been followed throughout the research paper.

INTRODUCTION

"The 'third world' is a term I don't like. We are all one world"[30]

Globalization can be termed as the speedup of the processes and the exchanges all around the planet and that in the sense brings all the countries in the entire world in a close nexus and ultimately created a borderless system of countries.[31]It can be stated that in the globalization when we state about the globalizations aspect the corporations gain a competitive advantage because they come in the terms of being the major dominant player in the market.[32] It can be said that the globalization is effecting in the way that the it is creating more new jobs in the market and also it has also been seen that the jobs that are created are not evenly distributed all around the world in an unified manner.[33] It can be said that the globalization motives are

[30]Audrey Hepburn, (9th Feb, 2021), https://quotes.yourdictionary.com/author/audrey-hepburn/618376#t_globalization
[31]You matter, Introduction, Globalization, effects and benefits,(9th Feb, 2021, 6:45 PM), https://youmatter.world/en/definition/definitions-globalization-definition-benefits-effects-examples/
[32]Jason Fernando, Understanding Globalization, Globalization, (9th Feb, 2021, 6:50 PM), https://www.investopedia.com/terms/g/globalization.asp
[33]S*upra,* Note 2

idealistic, and also opportunistic. Globalization can be said that has impacted in all arenas of life, be it cultural, economic or social. It is very hard to deny that globalization has not impacted the lives of an individual. Intellectual property rights can be said as the rights that are guaranteed to the creator, investors and the authors for the creations and the inventions. It can be stated that with the protection of the intellectual property rights, there has be the globalization and the creators have more and more place to show the skills and also get protected for the same. it can be said that the with the onset of the convention and most importantly the TRIPS it can be said that the intellectual property rights have been substantially facilitating the globalization aspect of the trade.[34] Under all the forms of the intellectual property it can be said that the conventions and the treaties have played an important role,, be it patents, copyright, trademark or geographical indication. It can be said that the intellectual property law treaties has increased the rapid exchange of the goods and services in a rapid form of the way.[35] It can be said that in a massive way trade has been impacted with the issues of globalization making the entire world in a single borderless economy.[36] In this aspect the trade in IPR has also been affected with globalization and also vice versa. Information is commonly non-excludable in that it is unimaginable to expect to keep others from applying new knowledge even without the approval of its maker. On the off chance that another innovation is essential, it is liable to be replicated or imitated, decreasing the possible benefits of the first designer and conceivably eliminating the motivation to participate in imaginative exercises. Intellectual property rights (IPRs) empower advancement by conceding fruitful designers impermanent imposing business model control over their developments. The subsequent restraining infrastructure benefits give the profits on the great interest in examination and improvement, which should be adequately enormous to make up for the high portion of Research and development speculation that is fruitless.[37]

TRIPS AGREEMENT AND GLOBALIZATION WITH RESPECT TO IPR FOR TECHNOLOGICAL ADVANCEMENTS

[34]Daniel Archibugi& Andrea Fillipeti, The Globalization of Intellectual Property Rights, (9th Feb, 7: 46 PM), https://www.globalpolicyjournal.com/articles/international-law-and-human-rights/globalisation-intellectual-property-rights-four-learned-

[35]Mridula Dalvi, Abstract, International Regime of Intellectual Property laws and its importance in trade, (9th Feb, 8:06 PM), https://www.mondaq.com/india/trademark/844028/international-regime-of-intellectual-property-laws-and-its-importance-in-trade

[36]Esteban Orpina& Diana Beltekina, Trade has grown Remarkably in the Last Century, Trade and Globalization, (9thFeb, 2021, 8:19 PM), https://ourworldindata.org/trade-and-globalization

[37] Shashank Tripathi, The International Conventions and the IPR Protection, (10th Feb, 10:24 PM), https://www.lexology.com/international-conventions-IPRs

The developing significance of IPRs has become a worldwide marvel across the developed, developing, and the LDCs with the happening to globalization. Thus, an impending interest for a global IP system was a lot acknowledged among all the countries to emerge from the bottlenecks as of now unleashed by the past Paris and Berne shows[38]. It is felt that the Trips Agreement has conquered a significant number of the previous regional impediments on IPR, out of which two are huge:

a. First, the developing limit of makers in non-industrial nations to enter removed markets for customary mechanical items have constrained the created nations to depend more vigorously on their relative focal points underway of scholarly products than in the past;

b. Besides, the ascent of information based ventures changed the idea of rivalry and upset the harmony that had come about because of more conventional near focal points. Not exclusively is the expense of innovative work regularly lopsidedly higher than in the past. However, the subsequent advancement encapsulated in the present cutting edge items has increasingly become more vulnerable to free-riding appropriators.

The TRIPS Agreement was additionally supported as in exchange progression accomplishments can be truly debilitated except for solid security for IP related products or administrations in the global market. Further exchanged products or administrations can be replicated, or the severe parts can abuse their image names in the worldwide market. This would at long last outcome in an uncomfortable business climate which can without a doubt make a likely disincentive for the future venture, exchange and especially for speculation across the world. However, various worldwide settlements or shows were set up since the late nineteenth century to blend IP security; however, scarcely they brought any acceptable outcome, as Borsches contends[39]. However, insufficiencies tormented them. Specifically, they were divided in their inclusion of IP rights; they needed successful implementation principles and frameworks for the settlement of questions; and they were frequently subject to low enrolment, with non-individuals being infamous violators of IP rights'. Hence, an all far-reaching arrangement like the TRIPS needed great importance to address every one of these issues. The introductory opposition of non-industrial nations to incorporating structures on IP

[38] Endeshaw, Assafa. 2010. Intellectual Property in Asian Emerging Economies, UK & USA: Ashgate Publishing(13th Feb, 10:27 PM)https://wipo.com/e-book/emerging-economies

[39] Bhagwati, Jagdish. 2007. In Defense of Globalization, New Delhi: Oxford University Press. Chakraborty, Debashis and Amir Ullah Khan. 2008.

insurance in the Uruguay Round was beaten when they understood that they were in an ideal situation with multilateral controls rather than dependent upon a two-sided strain IP assurance.[40]

Globalization addresses the changing forms of the world economy as quite possibly the central part of the worldwide movement. In this, the information economy assumes a critical position where better IP security expectations and worldwide authorization become progressively significant. The globalization of the worldwide economy that affects (IPRs). To begin with, the developing significance of global business sectors for licensed products has prompted pressure from pioneers in created nations for the equivalent or comparable degrees of property right insurance to be given in unfamiliar business sectors as are given at home. Second, the accomplishment of exchange progression has fortified worries that distinctions in the manner public IPRs are set up, what's more, implemented could prompt non-levy hindrances to exchange. This further recommends that the presence of a worldwide market impacts the selection of countries for a specific patent framework or an IPR framework all in all. With the Uruguay Round, the conversation on IPRs began, and the outcome was the TRIPS Agreement, which has brought a uniform worldwide IPR system across the world. In any case, the new scheme needed to confront a solid opposition from the non-industrial nations and less created nations (LDCs), which actually proceed. The business capability of IPRs has expanded since the nineteenth century; however, with the World Intellectual Property Organization (WIPO) foundation in 1967, the 1970s have seen an unrivaled premium, advocacy, and interest in this field. Genuinely, with WIPO, the hotly anticipated regulation of IPRs under the UN has begun.[41]

Dutfield and Suthersanen specify that Intellectual Property rulemaking has always gotten receptive to this expanded critical factor, just as to the readiness of public governments quick to upgrade the seriousness of their economies to viably give transnational organizations what they need, at least more often than not. Like this, since the 1960s and 1970s and up to the present, the created country protected innovation systems have gone through some very significant changes.' Dutfield (2003)[42] discusses three massive changes:

[40] Elliott, Anthony. 2007. in Larry Ray, Globalization and Everyday Life. London and New York: Routledge(12th Feb 9:30 PM)https://www.mondaq.com/globalisatio-intellectual-property-right-justice-law

[41]Kavita Dev Rao, IPR and Globalisation , 10th Feb(9:20 PM), https://iptse.com/impact-of-globalization-on-intellectual-property-rights/

[42]Srikant Das Gupta, Globalisation policy and Human Rights perspective, (14th Feb, 6:46 PM), https://www.globalpolicyjournal.com/articles/international-law-and-human-rights/globalisation-intellectual-property-rights-four-learned-

1. The first of these is the broadening of a protectable topic, including an inclination to lessen or dispose of exemptions.' For instance, the use of patent assurance to even PC programs, living things, cells, proteins, and so forth.
2. The second change is the production of new rights. Instances of new frameworks made during the late twentieth century included plant assortment insurance (or plant raiser's privileges) what's more, the benefit to formatting plans of coordinated circuits'.
3. The third change was the reformist normalization of the essential highlights of IPRs. For example, patent guidelines progressively give long term insurance terms, need earlier quality looks for oddity and assessments for imaginative advance (or non-conspicuousness), appoint right to the leading candidate rather than the primary designer, and give security to developments in a broadening scope of ventures and mechanical fields.'

Worldwide innovation move or dispersion alludes to the interaction by which a firm in one nation accesses and utilizes innovation created in another country. A few exchanges happen between willing accomplices in deliberate discussions; however, many occur through non-market interactions or overflows. The effect of more grounded IPR insurance on innovation dispersion is uncertain in principle. What's more, it relies upon a nation's conditions. From one perspective, more grounded IPR security could confine the diffusion of innovation, with licenses keeping others from utilizing restrictive information and the expanded market force of IPR holders conceivably decreasing the scattering of data because of lower yield and higher costs. Then again, IPRs could assume a positive part in information dissemination since the data accessible in patent cases is accessible to other possible innovators. Besides, solid IPR assurance may support innovation move through expanded exchange merchandise and enterprises, FDI, innovation permitting, and joint endeavors. Regardless of this hypothetical uncertainty, the dispersion of innovation from nations at the mechanical boondocks to different nations is viewed as the principal possible advantage of the TRIPS Agreement, especially for agricultural countries that tend not to enhance fundamentally. The proof recommends that more grounded IPR assurance can empower innovation move through various channels, however by and by its effect has been found to rely on multiple elements identified with a country's imitative capacity and level of advancement.[43]

[43]The World and Globalisation with respect to property,(13th Feb 9:39 PM), https://knowledge.wharton.upenn.edu/article/globalization-and-its-impact-on-inequality-for-companies/

NEXUS BETWEEN GUIDANCE OF VARIOUS CONVENTIONS OF IPR AND GLOBALIZATION

Intellectual property rights contribute in an enormous sense of the way to the national and the state economies.[44] Ample of the industries rely on the fact that all the form of intellectual property and the industrial property are adequately represented and protected. Intellectual property rights have a lot of objectives that can be elaborated.[45] The first being the, that the IP rights give important incentive to the individual for the new creations.[46] The IP laws also ensure to a certain extent that there is surety about the originality of the product. In the modern era it can be said that the IPR plays a significant role on the trade of every nation. It is in this aspect it can be stated that intellectual property rights plays a very important role in the globalization aspects. The intellectual property be it for the protection of the industrial property or be it for the intellectual property with the help of certain amount of backing of the conventions and the territorial laws and the like it can be said that the intellectual property rights, satisfies the major role of the globalization that is to making the nations come closer.[47]

In the further discuss we will take the discussion forward in the way that there will be elaborate mention of the intellectual property of patents, copyright and the convention that govern them in a substantial way and also try to find the relation between the intellectual property rights and globalization.

COPYRIGHT

when we talk of the copyright, we immediately think that it is the rights that are afforded to the authors and the performers and that the conventions protect the trade in the intellectual property rights and brings the nation closer making it a borderless world. It can be said that the term copyright is a legal word that can be used for the protection that is granted for the protection of the literary and the artistic work.[48] In the technical sense it can be said that it is the right to copy and that mean that only the creators has the right to copy.[49] It also

[44]Why are intellectual property rights important, (12th Feb, 2021, 8:14 PM), https://www.theglobalipcenter.com/why-are-intellectual-property-rights-important/

[45]*Supra,* Note 8

[46]Importance of Intellectual Property Rights, Importance of Intellectual Property Rights, (12th Feb, 9:00 PM), <https://www.ukessays.com/essays/property/importance-of-intellectual-property-rights.php?vref=1

[47]Manoj K. Singh, Introduction, The Importance of Intellectual Property Rights and What Startups should know, (12th Feb, 2021, 8:33 PM)

[48]WIPO, What is Copyright?, Copyright, (12th Feb, 9:15 PM), https://www.wipo.int/copyright/en/

[49]Will Keeton, What is copyright, Copyright, (12th Feb, 9:37 PM), https://www.investopedia.com/terms/c/copyright.asp

There are conventions that protect the rights of the copyright and the performer rights holders all around the world, which also establishes the major concepts all around the world.

- Berne Convention, 1886: the Berne convention basically works on the three principles that is the national treatment, the principle of the automatic protection, and the principle of the independence of the protection.[50] Under the same with reference there is protection to the copyright holders of the contract state, that are the states that are parties to the convention. When there is a grant of the rights to the creators of certain states, there is reduction of the trade barriers that is afforded through the help of the convention. There are also certain economic rights that are granted to the copyright holders and that can be said as the essence of the protection that is afforded under the same.
- WIPO Copyright Treaty, 1996: under the WIPO copyright treaty, computer programs and the database is protected under the same. under the same there is the recognition for the works and the same. it can be stated that the treaty is very important for the reduction of the barriers to a certain level and bring the nations closer to a certain extent.[51]
- WIPO Performers and Phonograms Treaty, 1996: the WIPO Performers and Phonograms Treaty, 1996 were enacted to respond to the new marketplace and the technological development through which there were huge amount of distribution of the digital works in the digital form.[52] The WPPT is called as the internet treaties because it protects the rights of the performers and the phonograms producers over the arena of internet.[53] Thought the WIPO Copyright treaty and the WIPO Performers and Phonograms Treaty (commonly referred to as the WIPO internet treaties) came out in the year of 1996 with the advent of internet, it was not until recently India came into accession with the with the internet treaties in the year of 2018.[54] India had not until before the year of 2012, formally acceded to the terms and condition of the WPPT, but in the year of 2012, it thoroughly amended The Copyright Act, 1957. It can be stated

[50]WIPO, Summary of the Berne Convention for the artistic and the literary works, (12th Feb, 10:00 PM), https://www.wipo.int/treaties/en/ip/berne/summary_berne.html
[51]Rights Direct, What is copyright? International copyright Basics, (12th Feb, 12:57 PM), https://www.rightsdirect.com/international-copyright-basics/
[52] Techopedia, Definition-what does WIPO Performers and Phonograms Treaty mean?, WIPO Performance and Phonograms Treaty, (Dec 8th, 2020, 7:50 PM), https://www.techopedia.com/definition/28161/wipo-performances-and-phonograms-treaty-wppt
[53]SumedhSahasrabuddhe, India: India signs up the internet copyright treaty, (12th Feb, 2021, 7:58 PM), https://www.mondaq.com/india/copyright/729312/india-signs-up-the-internet-copyright-treaty
[54]*Supra,* Note 17

that though there is, a lot of benefits that can be attached if India becomes a party but on the other hand, it can be said that the amendments will see a bleak light.[55] The treaty gives and also attempts to bring all the performers all around the world and give the concept of the globalization wings.

PATENTS

A patent can be said as an exclusive right that can be granted for a certain invention, which can be said as the product or product or process.[56] It can be said that the when the patents are granted, the technical information regarding the product. It can be said that when the patents are granted to the inventors all around the world there is protection of the rights of the inventors and also there is securing of the trade. It can be said that there are protections that are granted, there has been major lead in the globalization. The certain conventions that deal with the protection of the patent are as follows:

- Paris Convention for the Protection of Industrial Property: the convention is such that it protects the industrial property, like patents, trademarks, service models, utility models and the like. The same convention deals with the unfair competition that can be said it is rampant in the cases of the abovementioned models. It has a close nexus with the globalization, it makes the trade in a better way. It removes the trade barrier in a substantial manner.
- Patent Cooperation Treaty, 1966: the cooperation treaty can be said that the formulation of the same runs back when the executive committee, of the Paris Convention, when the makers of the same thought that there is a need to reduce the number of the patent application that is made by the applicants.[57]
- TRIPs:when we talk about the TRIPs agreement it can be said that pharmaceutical patents are protected in a substantial mode of the way through the enforcement of the is granted in TRIPs, is stated under most of the patent laws in the legislations.

The conventions are very important for the study because it can be said that the conventions make laws clearer, under the subjects that is a bit hazy when it comes territorial laws. the conventions makes all the creators and the applicant realize that world is one and brings all teh citizens closer.

[55]Seemantani Sharma, India approves accession to WIPO internet treaties, (12th Feb, 2021, 10:00 PM), https://thewire.in/diplomacy/india-approves-accession-to-wipo-internet-treaties
[56] WIPO, what is patent, Patents, (13th Feb, 2021), https://www.wipo.int/patents/en/
[57]Patent Cooperation Treaty, (13th Feb, 2021, 12:15 PM), https://www.uspto.gov/ip-policy/patent-policy/patent-cooperation-treaty

BRINGING THE WORLD CLOSER THROUGH THE PRINCIPLES OF THE TREATIES AND CONVENTIONS

Under the treaties it can be said that there are many principles that are granted, and they all play a very important role in the issues of the globalization and brings the entre world under the commo umbrella. Under the chapter, there will be a discussion regarding the principles that are mentioned under the treaties and the way it promotes globalization in al the aspects.

- National treatment principle: national treatment can be said as the principle that states that if a state provides certain amount of the privileges to its own citizen, the same has to be provided for the foreigners as well and this is one of the major principles that shape the world trade to a substantial amount.[58] It can be stated that through the process of theß justification of the national treatment there can be a substantial amount of the protection that is granted to the works of the foreign authors and also there is cultural justification that is added to the national treatment.[59] National treatment takes one step further, in the protection of the creators and the inventors to establish an a close knot global protection regime.[60]
- Right to priority principle: the principle can be found under the Paris Convention for the protection for the Industrial Property. Under this if an applicant applies for the patent in one contracting state and he files another patent in another country at a later date, all the applications shall be treated that It is on the same date. It can be said that the in the initial days of the Paris Convention, it was only applicable to the foreign applicants but now it is also applicable to the domestic applicants as well.[61] It can be said that the patent priority right is granted, be it the foreign applicants or the domestic applicants it can be stated that it reduces the barriers to trade and also upholds the very essence of the globalization.
- Most favored nation principle: the principle of the most favored nation is that principle that is mentioned in the TRIPs and can be stated as one of the major principles that

[58]Will Kenton, What is National Treatment, National Treatment, (14th Feb, 2021, 3:57 AM), https://www.investopedia.com/terms/n/nationaltreatment.asp
[59]Manzoor Laskar and Chetan Narang, Justification of the National Treatment, National Treatment and Efficient Protection of IPR as Adopted in IP Treaties, (14th Feb, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410404
[60]UlrishLowenheim, Patent and Technological Progress in a Globalized World, 596, MPI Studies on Intellectual Property, Competition and Tax Laws
[61]AFD China Intellectual Property Law Office, Origin of the Patent Priority System, Brief Introduction to patent Priority System, (14th Feb, 11:12 AM), https://www.lexology.com/library/detail.aspx?g=ffa0ecae-c84c-4fa0-b62b-2df59f67e825

govern the system of trade. When we state about the most favored principle, it can be stated that in case of the intellectual property rights and the it benefits that is afforded by the same. the developed nation and the developing nations are put at the same level of the traders who are willing to trade in the intellectual property products.[62]

The discussion takes place on that note is that all the principles to certain extend contributes to the globalization and can be said as the important nexus between the technical advancements, intellectual property rights and globalization. It can also be stated that the national treatment principles though has in all sense brought the nations in all senses together, it can be said that the most favored nations have destroyed the protectionism viewpoint and has in furtherance to that has destroyed the national sovereignty.[63] The principles of the non-discrimination can be said as basis that projects the globalization in the modern world. When a new age thing comes to a forefront the entire world knows about it and the entire world trade is benefitted from the same. the conventions as well as the principles underlying them, in in all terms and senses brings all nations under one umbrella. The principles can be also argued that they have a lot of paucity and shortcoming like they do not value the local needs of the artisans, creators and the authors and they try to paint the bigger picture while there is out front ignorance of the local needs of the people. In some cases there can be overlooking of the needs of the local traders and the multinational corporations take over the commercialization and the exploitation of the intellectual products that is created by them. But also with the cons that is attached with the principles, it can be said that they protect the rights of the intellectual property rights holder to a large extent.

CONCLUSION AND SUGGESTIONS

It is actually quite hard to make any single inference about the current IPR framework. Unexpectedly, if there is one thing that this exploration recommends, the discussion and debates encompassing the IP field, especially the patent administration framework, have not been limited or restrained over the long run, but instead the inverse. In any case, it very well may be securely inferred that IPRs have an undeniable and broad impact on our lives. IPRs have become an indistinguishable piece of our insight-based economy and society. They

[62]Kimberly Amdeo, Advantages, MFN Status: pros and Cons, (14th Feb, 2021, 12:02 PM), https://www.thebalance.com/most-favored-nation-status-3305840
[63]The National Treatment Clause, (14th Feb, 2021, 12:28 PM), https://www.britannica.com/topic/international-trade/The-national-treatment-clause

influence how we assess, popularize and use various information items and enlightening administrations[64]. They are a significant powerful instrument in the general interaction of innovation move. They influence the greatness, speed, and bearing of data and information trading between the individuals who make information and the individuals who devour it. At long last, the job of the TRIPS Agreement in the development of the worldwide IP system would consistently stay basic. It is so in light of the fact that TRIPS genuinely denotes a quintessential limit and a standard for finding the system elements in the new worldwide licensed innovation request. In the long run, this has helped advance the market arranged neo-liberal financial approaches and projects into another stature. Subsequently, a resistance and a considerable lot of vulnerability remain regarding the economic effect of the execution of the TRIPS Agreement over the agricultural nations and the most un-non-industrial nations[65]. The importance of the convention can be felt in a substantial amount after the world has suffered from a global pandemic, it can be said that the conventions as well as the principle have shaped the laws and also protected the interests of the creators, inventors and the like to a certain extent. The conventions through the impact of certain principles have decreased the language barrier in trade and given the leeway for a quantitative amount of protection that is granted to the foreign creators of the contracting state. The principle of the national treatment has made it way to almost all the agreement of all nature, such is the importance of the national treatment principles. The authors state that there needs to be striking of the balance between the protectionism aspect and the non-discrimination principles. The suggestion that the authors tries to give is that there can be a play of a convention that also explicitly provides protection of the certain local traders and the inventors so as to prevent exploitation and discrimination.

[64] The World and Globalisation with respect to property,(13th Feb 9:56PM), https://knowledge.wharton.upenn.edu/article/globalization-and-its-impact-on-inequality-for-companies/

[65] WIPO, Summary of the Berne Convention for the artistic and the literary works, (12th Feb, 10:38 PM), https://www.wipo.int/treaties/en/ip/berne/summary_berne.html

EFFECT ON NATIONAL EDUCATIONAL POLICY,2020 ON RIGHT TO EDUCATION

- RADHIKA GUPTA

ABSTRACT

Right to education is a fundamental right guaranteed under article 21-A[66] of the Constitution of India[67], to citizens as well as non-citizens of India. It is the duty of the State to provide free and compulsory education to all the children of six to fourteen years.[68] However, "after the completion of 14 years of age, a child's right to education is subject to the limits of economic capacity and development of the State." It is interesting to note that earlier, right to education was not a fundamental right but merely an implied right under Article 21[69] of the Constitution of India[70]. It was added by the 86th amendment Act, 2002 and came into effect on 1st April 2010. In 2009, in pursuance of Article 21-A[71], Right of Children to Free and Compulsory Education Act, 2009[72] (RTE Act) was also passed as an act of the Parliament of India. However, there are certain drawbacks of the Act which have been discussed in the article, along with some suggestions. Moreover, National Education Policy, 2020, which was approved by the union cabinet on 29 July 2020 has also been discussed, corelating it with Article 21-A and RTE Act, 2009. The main theme though of the article is to study the effect of National Education Policy, 2020 on Article 21-A.

BACKGROUND AND HISTORY

Article 45[73], prior to its amendment in 2002 by the 86th Amendment Act, 2002 talked about "**Provision for free and compulsory education for children**". The aim of this Article when it was added was that within 10 years from the commencement of the Constitution of India, the

[66] INDIA CONST. art 21A: The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
[67] INDIA CONST.
[68] Inserted by Constitution 86th Amendment Act, 2002, Section 2.
[69] INDIA CONST. art 21: Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.
[70] INDIA CONST.
[71] INDIA CONST. art 21A: The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
[72] Right of Children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament (India).
[73] INDIA CONST. art. 45

State shall strive to provide for the "free and compulsory education" for all children up to the fourteen years of age.

However, it was later realised by lawmakers that Right to Education should be a Fundamental Right and should not just be covered under the Directive Principles of State Policy (DPSPs). Hence, the 86th Constitution Amendment Act, 2002 was passed which aimed to modify Article 45[74] to its present form and insert another Article namely, Article 21-A[75] (which came into effect on 1st April 2020).

Now, Article 45[76] is more specific and talks about early childhood care and education for children below six years of age.

JUDICIAL CASES/ VIEW OF THE COURT

1. The Supreme Court in the case of **Mohini Jain v. State of Karnataka**[77] observed that Article 21 contains and includes a variety of rights which are not directly mentioned under it, but which can be implied from it. Hence it was observed that Right to Education is a part of Article 21.

2. In the case of **State of T.N. v. K. Shyam Sunder**[78]**,** the Hon'ble Supreme Court held that the right of a child to free and compulsory educations should not be restricted but be extended to have a quality education, free from any kind of discrimination on the basis of the child's economic, social and cultural background.

3. However, the Supreme Court further clarified this in the case of **Unni Krishnan, J.P. And Ors. Etc. vs State of Andhra Pradesh And Ors**.[79] that Right to Education, though earlier not justiciable, is now enforceable through the Constitution of India under Right to Life under Article 21[80] of the Constitution. The court further held that "if education has to be interpreted and incorporated into life, it has to be interpreted with the directive principles. The court has taken a view that there must be harmonious

[74] INDIA CONST. Art.45.
[75] INDIA CONST. Art. 21A
[76] INDIA CONST. Art.45.: Provision for early childhood care and education to children below the age of six years – The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.
[77] Mohini Jain v. State of Karnataka , 1992 AIR 1858 (India).
78 State of T.N. v. K. Shyam Sunder, 8 SCC 737 (India).
[79]Unni Krishnan, J.P. And Ors. Etc. vs State of Andhra Pradesh And Ors., 1993 AIR 2178, 1993 SCR (1) 594 (India).
[80] INDIA CONST. art. 21.

interpretation of the fundamental rights vis-à-vis the directive principles of state policy".[81]

CONSTITUTIONAL SAFEGUARDS

1. Article 21-A
2. Article 45
3. Article 15(5) [82] : It talks about the State making special provisions for the development of any socially and educationally backward classes (SEBCs) or for the Scheduled Castes (SCs) or the Scheduled Tribes (STs) regarding their admission to educational institutions including private educational institutions (aided or unaided both). The exception to this clause is minority educational institutions as mentioned under Article 30(1).
4. Article 41[83]: It talks about a citizen's right to work, to education as well as to public assistance in cases of unemployment, old age, sickness and disablement. Under Article 41, it should be the duty of the State to make provisions to safeguard the right to education of citizens of India, subject to the economic and development capacity of the State.
5. Article 46[84] : It talks about the advancement of Scheduled Castes, Scheduled Tribes and other weaker sections through safeguarding and protecting their educational and economic interests by the State so as to shield them from any kind of social injustice and all forms of exploitation.
6. Article 51-A (k) – "It shall be the fundamental duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or ward between the age of six and fourteen years."[85]

RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009[86] (RTE ACT)

[81] Pragash Boopal, Unni Krishnan J.P & ors. vs. State of Andhra Pradesh & ors., LAW TIME JOURNAL (March 05, 2021, 4:51 P.M.), http://lawtimesjournal.in/unni-krishnan-j-p-ors-vs-state-of-andhra-pradesh-ors/.
[82] INDIA CONST. art. 15 cl. 5.
[83] INDIA CONST. art. 41.
[84] INDIA CONST. art. 46.
[85] INDIA CONST. art. 51 cl. k. *added by* the Constitution (86th Amendment Act), 2002.
[86] Right of Children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament (India).

Right of Children to Free and Compulsory Education Act, 2009, is an act of the Parliament of India which was enacted on 4th August 2009. It was passed in pursuance of Article 21-A[87]. It illustrates the importance of "free and compulsory education" for children between 6 and 14 years of age as envisaged under Article 21 of The Constitution of India.

The free and compulsory education should be in a neighbourhood school till completion of elementary education.

SALIENT FEATURES OF THE ACT

- 'Compulsory' education means obligation of the appropriate government to provide free elementary education and ensure compulsory admission, attendance and completion of elementary education to every child in the six to fourteen age group.[88]
- 'Free' means that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education.[89]
- The Act identifies the various duties and responsibilities of Governments, local authorities as well as of the parents in providing free and compulsory education to children. The Act also talks about the sharing of financial and other responsibilities between the Central and State Governments.
- It provides for employment of professionally trained teachers, i.e. teachers with the required entry and academic qualifications.
- It prohibits the following:

(a) physical punishment and mental harassment,

(b) screening procedures for admission of children,

(c) capitation fee,

(d) private tuition by teachers,

(e) running of schools without recognition.

- There is an obligation on every unaided school to admit 25% students from weaker sections.
- The state shall reimburse the school for expenditure on these students.

[87] INDIA CONST. art. 21.

[88] [88] Right of Children to Free and Compulsory Education Act, 2009, §8, No. 35, Acts of Parliament (India).

[89] Ministry of Education, Government of India, https://www.mhrd.gov.in/rte (last visited March 05, 2021).

- The Act also states that no child shall be held back in a class, expelled from school, or required to pass a board examination until the completion of his/her elementary education.
- Minority run aided and unaided schools aren't under a compulsion to implement RTE.[90]
- To provide quality education, the Act also provides for a Pupil Teacher Ratios (PTRs).

CHALLENGES FACED

- A report on the position of enactment of the Act was released by the Ministry of Human Resource Development between the year 2011 and 2015. The report admitted that about 1.7 million children in the age group 6-14 remain out of school.
- There is also a shortage of roughly 508,000 teachers in our country according to a report published by RTE forum of India in the year 2011.
- The quality of education provided in government schools is still not good.
- Government schools lack in infrastructural facilities and there exists a shortage of teachers.
- Currently, the implementation of the Act and the realisation of the right in Article 21-A is facing enormous problems due to vacancies of teachers in the school.[91]
- There exist no provisions for penalties on the appropriate Governments who fail to discharge their duties in this regard under the RTE Act, 2009.
- According to Section 16 of the Act, "no child shall be held back, expelled, or required to pass a board examination until the completion of elementary education." However, this can hinder the knowledge of the child who failed. Detaining a child in the same class ensures that a child has gained sufficient knowledge in his subjects.
- The Act only covers the children between the age of 6 and 14. After 14 years of age, it is left upon the financial capabilities and development of the State.
- These laws which are in place have not been fully implemented. Even though there are various national initiatives such as the "Sarva Shiksha Abhiyan", "District Primary Education " and the "Universal Elementary Education Programme" , the statistical data shows that the goal to achieve full literacy is still a distant dream.[92]

[90] Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1: AIR 2012 SC 3445 (India), and Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1,259 (India).
[91] Environmental & Consumer Protection Education v Delhi Administration., 2011, 7 SCC 1, 259 (India).
[92] Bhartiya Seva Samaj Trust Tr. Pres. v. Yogeshbhai Ambalal Patel, AIR 2012 SC, pg 3285 (India).

SUGGESTIONS

- The Act should cover the children above the age of 14 years till completion of secondary and/or senior-secondary.
- There should be penal provisions on the State and Central governments for violation of the Act.
- Parents, especially at the rural level should be made aware of the existing provisions of the RTE Act, 2009.
- There should be a quality of education. To ensure this, the State should ensure that the teachers are skilled and have completed the basic minimum requirements for teaching.
- There should be statuary bodies for redressal for problems regarding the implementation of the Act. The Judiciary, hence, should play a major role in this.

EFFECT OF NATIONAL EDUCATION POLICY 2020 ON RIGHT TO EDUCATION

- The Right to Education Act (RTE) calls for free and compulsory education for children between 6-14 years. According to NEP, school learning will now begin from 3 years of age. Hence, the scope of the RTE Act will now be from 3 to 18 years of age rather than the earlier 6-14 years of age bracket.
- It talks about making "free and compulsory" quality education an integral part of RTE Act for classes 9-12
- Quality early childhood care and education (ECCE) will be expanded to young children, especially to those from economically disadvantaged families.
- The government now aims to "ensure universal access to high-quality early childhood care and education, with special attention and focus on socio-economically disadvantaged.
- The State governments are now expected to have "cadres of professionally qualified educators for early childhood education." This is to be done through professional training, mentoring and career mapping.
- Facilities for preparation as well as the Continuous Professional Development (CPD) for educators and mentors is to be prepared by the State government.
- High vacant posts of teachers are expected to be filled in areas, especially with high illiteracy rates and large pupil-to-teacher ratio, with the main focus on disadvantaged areas.

- The pupil-teacher ratio is to be maintained and kept under 30:1, at each level of school. In the socio-economically disadvantaged area, the aim should be to keep the pupil-teacher ratio under 25:1
- The teachers should be well trained, encouraged as well as supported with continuous professional development. This should be done to particularly help those students who fall behind than the rest.
- The nutrition of the children will be taken care of through meals and to address the issues of poverty among those children. The focus will also be on the health (including the mental health) of the children. This will be particularly addressed through introduction of social workers and counsellors. The idea behind this is to expand the focus and horizon from the basic education system.

CONCLUSION

India is now one of the 135th country in the world to make Right to Education a Fundamental Right under its Constitution.[93] This happened when the RTE Act came into force in the year 2010.

The Parliament of India by introducing the RTE Act, 2002, however, the aim of achieving full literacy in India is still a dream.

The literacy rate in India is still just 72.99% as recorded by World Bank in the year 2011. This number is expected to have dropped especially in the wake of Covid-19.

However, one cannot deny the fact that ever since the implementation of Article 21-A and RTE Act, 2002, the literacy rate has gone up. More and more schemes are launched by the government to ensure that literacy remains high in India.

Now, since the announcement of NEP 2020, the figure is expected to rise. The State still has a long way to go to fully implement the Right to Education. However, one can expect that the data will show promising figures in the future."

[93](02 April 2010, 11:18 AM), https://www.thehindu.com/news/national/India-joins-list-of-135-countries-in-making-education-a-right/article13666115.ece

JUDICIAL APPROACH ON DESCRIPTIVE TRADE MARKS IN INDIA

- PRAGATI SRIVASTAVA

ABSTRACT:

Trade Mark is basically a mark or label which is capable of being graphically depicted and which can help in distinguishing one product or service from another person' products or services**.** In India, **Trade Marks** can be registered under the Trade Marks Act, 1999. Although there are a few conditions which a trade mark has to fulfill before they can be granted registration. One such pre requisite is that should not be **descriptive** or laudatory in nature. A descriptive trade mark is a term that defines the features of the product or service to which the mark relates. Being laudatory forfeits the basic purpose of a trade mark. That being said, it is pertinent to note that it does not ultimately prohibit a person from gaining the exclusive right that go along with a distinctive trade mark just because someone started using a descriptive trade mark or it was originally agreed to be a descriptive trade mark. To do so, the trade mark must acquire certain **distinctiveness** and must be a well known trade mark. On that condition one can get have their descriptive trade mark registered. The present paper concerns with the scope of Descriptive Trade Marks in India focusing on the recent Supreme Court judgment in the case of ITC Limited v/s Nestle India Limited[94].

INTRODUCTION:

In a recent judgment, the Hon'ble Supreme Court of India held that monopoly cannot be granted over laudatory epithets. 'Laudatory epithets' are words or more specifically adjectives that describe a particular product. For instance; 'tangy orange' is a laudatory epithet and used by many soft drink brands such as Rasna and Glucon D. As 'tangy orange' is just an adjective used to describe the flavor and is being used in common parlance in Indian food industry, no company can get a monopoly over these words. Trademarks can be divided into five categories; namely Generic, Descriptive, Suggestive, Arbitrary and Fanciful. Laudatory trademarks are covered under the descriptive marks as it derives secondary meaning to the brand or its product. They are often considered weak and have a very confined scope of protection. Another issue involved with laudatory trademark is that it can be used for false or misleading advertising.

[94] C.S No. 231 of 2013

Companies can use such trademarks for describing the quality of their product portraying it to be superior to other brand's products and thus can create a false image of the product in the eyes of the consumers. Nevertheless, one can get there descriptive trademark registered only if it has acquired distinctiveness or a secondary meaning during the course of its usage and has gained popularity before the date of application for registration.

HISTORY OF TRADEMARKS:

The origin of trademarks dates back to the outset of industrial revolution when the large scale manufacturing and distribution of products made it impossible for the consumers to directly contact the producers. Middlemen and retailers came into the scenario which gave rise to impersonal transactions. Trademarks began to assume importance as "symbols bridging the gap between manufacturers and consumers."[95] It helped the consumers identify the products of a specific manufacturer and established a direct contact between the producer and consumer. In the beginning, the trademark was merely used to establish a direct and personal contact between the seller and the buyer but as the economies grew and emergence of competitive market economy, producers started using them to distinguish their products from others and used them as an advertising tool. As a result, trademarks started acquiring goodwill and there came a need to protect them from copying by other manufacturers. The first multilateral convention for the protection of Industrial Property known as the Paris Convention was adopted in 1883. In India, the first legislation for the protection of Trade Marks came into force in 1889 known as Indian Merchandise Marks which was later followed by Indian Trade Marks Act, 1940. In 1958, the Indian Merchandise Act as well as Trade mark Act was repealed and Trade and Merchandise mark Act came into force. For four decades, the act of 1958 performed well but with increasing globalization and India becoming a party of the TRIPs Agreement it became pertinent to establish laws in conformity with the provisions provided in the TRIPs agreement. Eventually, the Trade Marks Act, 1999 came into force in the year 2003 which served the purpose of trademark protection.

PROVISIONS OF THE TRADE MARKS ACT,1999:

The term 'Trademark' has been defined under section 2(1)(zb) of the Trademarks Act,1999 as *'a mark capable of being represented graphically and which is capable of distinguishing the*

[95] P. Fletcher, Joint Registration of Trademarks and Their Economic Value, 36 U. Miami L. Rev 297, 303 (1982)

goods or services of one person from those of others and may include shape of goods, their packaging and combination of colour.

(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and

(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark'[96]

Under section 9(1)(b) of the act, it is stated that descriptive trademarks are prohibited for registration. However, a descriptive trademark can be registered only if it has gained distinctiveness because of its usage for a certain period of time. Litigation concerning such descriptive or laudatory trademarks is tiresome. The burden of proof lies on the petitioner to show the degree of acquired distinctiveness of the laudatory trademark. Secondly, the owner must refrain himself from using the term 'descriptive sense' for the trademark. Thirdly, it is important to understand that any minimal changes in the word will be enough for the court to get convinced that it will create any confusion in the minds of the consumers.

CASE STUDY:

Recently a six year long battle concerning the grant of exclusive right over laudatory trademarks came to an end. In the case of *M/s. ITC Limited v Nestle India Limited*[97], the Hon'ble High Court of madras held that monopoly cannot be granted over laudatory marks.

BRIEF FACTS OF THE CASE:

In 2013, the plaintiff – ITC Ltd. filed a suit against the Nestle India Ltd. on account of the latter's assuming the expression 'Magical Masala' for its product 'Maggie extra- delicious Magical Masala'. The plaintiff happens to adopt the two laudatory terms 'Magic Masala' and 'Classic Masala' for its noodle brand 'Sunfeast Yippee Noodles' in the year 2010. The assertion put forward by the plaintiff was that the words 'Magic Masala' and 'Magical Masala'

[96] Trade Marks Act,1999
[97] C.S No. 231 of 2013

were the sub brands of the plaintiff's products and the defendant has deceivingly used the term for their noodle brand. The sub brands have gained a distinctive character already and therefore defendant's usage of the words will create a confusion in the minds of the consumers. On the other hand the defendant contended that the term 'Magic' is used in a laudatory sense to describe the Indian spice mix that is 'Masala' and therefore, it is not capable of protection under the Trade Marks act.

JUDGMENT:

The Court was of the opinion that the expression of the plaintiff 'MagicMasala', was influenc ed by the fact that both common terms were used not only by the defendant
for some of his goods
prior to the adoption of that expression, but also by other traders in the food industry for their goods. Taking into account the fact that the defendant used the word 'Magic' earlier in time to identify some of its goods, the court found that the defendant was motivated to embrace this concept from some of its own products in addition to the whole expression 'Magical Masala' being popular to trade. Although explaining the above, the Court added that the defendant was definitely motivated to use the words similar to plaintiff's but this cannot be attributed to the defendant's *mala fide* nature as no company or person is allowed to appropriate laudatory words.

The Court was also of the view that the term 'Magic Masala' is not a sub brand and is just used to describe the flavor of the noodles like 'Chinese Masala' or 'Classic Masala'. Hence, the suit was dismissed and the defendant was not held liable neither any relief was claimed.

ANALYSIS:

Any business or enterprise must be cautious while adopting any trademark as the extent of protection afforded to a trademark depends on its degree of distinctiveness. As such, words which, in relation to the products and services involved are considered to be laudatory or descriptive may not be accorded a desirable scope of exclusivity and are therefore not very desirable and should be excluded as one's choice for a trademark.

BEING LAUDATORY: TEST OF DESCRIPTIVENESS:

It is mandatory to consider whether or not the trademark is laudatory when assessing the degree of descriptiveness of the mark. In the case of Nestle v Amul[98]; the Delhi High Court was of the view that 'A+' is laudatory in nature and it to get protected as a trademark under the trade mark Act, 1999, it is imperative for the claimant to prove that the mark has gained distinctiveness through prolonged use and is only associated with the claimant. Even if the trademark is laudatory if it has gained popularity after being used by a particular brand and describes the product for which it is used then only that laudatory trademark can get protection under the Trade Marks Act, 1999.

DEFENSE OF PRIOR USE IN CASE OF DESCRIPTIVE TRADE MARKS:

In the case of peps Industries Pvt. Ltd. v Kurlon Limited[99]; the Hon'ble High Court of Delhi observed that the defense of prior use is available to the party under section 34 of the Trade Marks Act, 1999 only on the condition that the usage of the mark has been continuous and not intermittent. The plaintiff was the registered owner of the descriptive trademark 'No turn' for its mattresses since the year 2008 but the defendant have been using the trademark since 2007 that is before the filing date of the application of the plaintiff . The court was of the opinion that the right of the registered trademark owner shall not be greater than that of the person who uses or resembles the same trademark in relation to similar goods and services, given that the other party has consistently used the trademark prior to the registered trademark owner's use. The utilization of the mark by another party must be constant, distinct from the user who is isolated or disjointed and needs the constant industrial use of the label in relation to that user. The sales amount must also be demonstrated by a defendant attempting to create a defense of previous use under section 34 of the Trade marks Act. A recipient of the label does not entail the mere issuance of an advertising.

The Court ruled, however, that the plaintiff was still not entitled to remedy the injunction on t he ground that the mark 'No

Turn' was a descriptive mark and that the plaintiff had not put on

record any material showing that the mark of the plaintiff had gained distinctive qualification s on the date of application or even on the date of registration in order to attain the status of a well-known mark.

[98] 2017

[99] MANU/DE/0832/2020

CONCLUSION:

Trademark Registration gives the proprietor an exclusive right and separates the commodity f rom other related goods from those of other companies. However, it is important that before getting a trademark registered the company must ensure that their trademark is not being used or is similar to any other brand's trademark. Laudatory trademarks are more prone to get copied by other brands and the litigation for such trademark infringement is very lengthy and tiresome. The judiciary has undertaken a similar approach where they examine the legality of a descriptive trademark by considering there usage and that whether the trademark has attained distinctive qualifications or not. However, to avoid lengthy proceedings in courts the companies must be very cautious while selecting any trademark for their brand to avoid its stealing or duplication.

GOODS AND SERVICES TAX AND AUTOMOBILE INDUSTRY

- PRACHIE SINGH & HARSH SINGH

INTRODUCTION

GST is one of the major tax reforms in indirect taxation. It has subsumed all the indirect taxes into one which is known as "Goods & Service Tax". It is Destination based tax which means it will be levied at every "value addition". GST is levied at time of supply of Goods & Services. Before getting into detailed understanding of GST it is necessary to understand the constitutional amendments which were brought in force for the implementation of GST in India.[100]The Indian Constitution empowers the central government to levy excise duty on manufacturing of goods and service tax on provision of service, further the Indian Constitution also gives power to the state government to levy sales tax in form of "Value Added Tax" (VAT) on sale of goods. This division of power had led to multiplicity of taxes in Indian economy. Further on Inter-state supply of goods, Central Sales Tax was levied by the central government, along with that many state levy entry tax on entry of goods in the area.

Automobile industry is considered as core industry in India, and that in developing economy a well transportation system plays a key role. According to the reports issued by society of automobile manufacturers[101] it has been recorded that India became the 4th largest automobile industry market in the world in 2017 with increase in sale to 4.02 million excluding two-wheeler.[102] From Financial year2103-2019 the domestic automobile sale increase to 6.71 % by selling 26.27 vehicles sold in financial year 2019.[103] The Indian and global manufacturer are putting effort in the innovation and enhancement of automobile industry.

AUTOMOBILE INDUSTRY IN INDIA

India has boost its automobile sector from shifting from two- wheeler to four-wheeler vehicles and along with that some commercial vehicle and now it is moving rapidly towards electric vehicle. In last few decades people have started moving towards to buy their own vehicle and

[100] Ibid.
[101]SiamIndia.com (2019), (Online), Available at: http://www.siamindia.com/statistics.aspx?mpgid=8&pgidtrail=9 (Last Accessed on 5March, 2020).
[102] Ibid.
[103] Ibid.

isolating the public transport, this has been encouraged by the corporate automobile industry by way of launching new two-wheeler and four-wheeler at the competitive prices in the market with various different kinds of amenities and the purchasing capacity of individual has been supported by the financial institutions which provides such individual to buy the automobile in installment. Automobile sector is one of the major sectors which contribute towards the GDP of India. The Government has set plan for Automobile industry to achieve target set for 2026. Automobile industry plays an important role in economic growth of Indian economy. However the implementation has brought certain changes in the Automobile Industry which has also affected the contribution of economy as well. Automobile sector is fast growing industry in India and it has coo-relation with government policies and reforms which affects the demand and trade in automobile industry.

As per the reports, In 2007 India was considered to be the 4th largest auto-mobile industry excluding two-wheeler, and in 2008 it was 7th largest manufacturer of commercial vehicle. The government of India is initiating to make India on top of list in world in two-wheeler and four wheeler. To its target Indian government has brought of NATRip i.e. "*National Automotive Testing R&D Infrastructure project"* this projects is a unique project based on joining hands of government of India, various state government and the Automobile- Industry in India, to promote the growth of Automobile Industry in India.[104] In order to promote the growth of automotive industry the government of India has decide to establish various research and development department for bringing in new technologies in order to come at par with global technologies and their standards.

There are various investment taking place in automobile sector which is ultimately helps in increasing the Foreign Direct Investment in India, and these are as follows:

- Hyundai has planned to invest US $ 1 billion by 2020.[105]
- Mercedes Benz has its main manufacturing plant of 100 acres in Pune i.e. Chakan plant and has announced to increase the manufacturing capacity of this plant by 20,000 per year.[106]
- Honda Motors is planning to launch Hybrid and electric vehicle in India for which they have decided to open its third factory in India and cost of such investment is 9200 Crore, which is one of those largest investments in India.[107]

[104]India and India Automobile.,(2019)Indian Automobile Industry, Sector Trends, Statistics. (Online) ibef. Org. Available at: https://www.ibef.org/industry/india-automobiles.aspx (Last Accessed on 5 March, 2020).
[105] Ibid.
[106] Ibid.
[107] Ibid.

- Mahindra Electric Mobility in order to increase its manufacturing capacity to 25000 units have decided to open its electronic manufacturing plant with an investment of 100 Crore in Bangalore.[108]

Seeing above developments and initiative taken by Indian Government to enhance Automobile Industry in India it can be said automobile industry plays vital role in generating employment opportunities in India as these development will also generate more employment opportunities of Individual in India, as for the increase in production the companies have decide to establish new plants in India, which would ultimately be requiring the manpower for the same and hence this will have direct impact on the employment opportunities in India.

Indian Automobile industry is one of the largest industries in the world. This sector majorly comprises of manufacturer, automobile dealer and retailer and all of these were subject to indirect taxes such as:

- Excise duty levied at the time of manufacturing of vehicle;
- Value added tax on sale of automobile, spare parts or accessories;

In GST regime the automobile dealer and the manufacturer is subject to pay Central Goods and Service tax (CGST) and State Goods and Service Tax (SGST) on intra-state sale of vehicle however in case of inter-state supply of goods Integrated Goods and Service Tax is levied which is also known as IGST.[109]

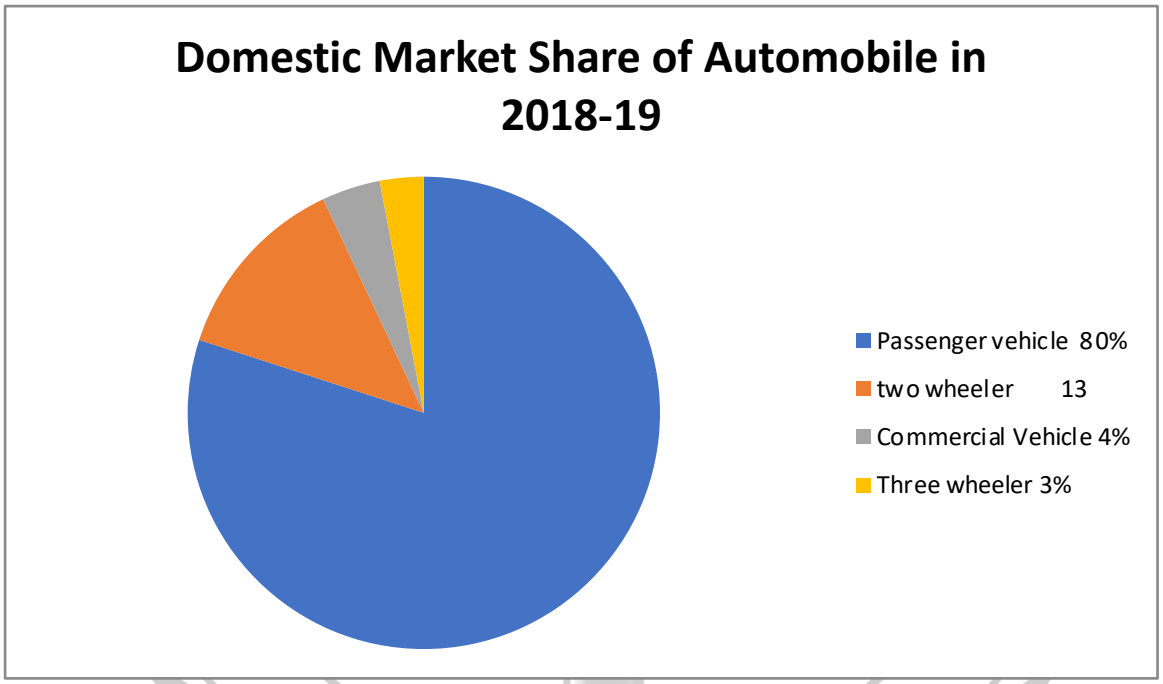
DOMESTIC MARKET SHARE OF AUTOMOBILE INDUSTRY IN INDIA 2018-19:

The below given data has been taken from SIAM i.e. Society of Indian Automobile Manufacturers.[110]

[108] Ibid.

[109][109]Agarwal, Sanjiv. and Malhotra, Sanjeev. (2017) *Goods and Service Tax Laws, Concept & Impact Analysis on Selected Industries*, 2nd ed., Bloomsbury Publishing India Pvt, Ltd.,pp. 613-614.

[110]Siamindia.com,(2019),*Society of Indian Automobile Manufacturer, Available at:*http://www.siamindia.com/statistics.aspx?mpgid=8&pgidtrail=12 (Last Accessed on 29 February, 2020).



The automobile sector mainly consist of passenger vehicle, two wheeler, commercial vehicle, three wheelers, these vehicle have been further classified as follows:

- Two wheeler are of three types i.e. scooter, electric scooters, motorcycles;[111]
- Passenger vehicle has been classified as passenger car, utility vehicle, multipurpose vehicle;[112]
- Commercial vehicle has been classified into two vehicle i.e. light commercial vehicle and medium and heavy commercial vehicle;
- Three wheelers have been classified as passenger carriers, goods carrier.[113]

TAXES LEVIED ON AUTOMOBILES:

In earlier regime the following taxes were levied, which are as follows:

- Excise duty had four slabs out of which the lowest slab was applicable to small cars;[114]
- Service tax was levied on servicing and repair service at the rate of 15%;[115]
- Value added Tax (VAT) was levied at the rate of 14.5 % subject to different tax rate depending of the state and category of goods and services.[116]

[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.

By virtue of implementation of GST the excise duty, service tax, VAT and all other local indirect taxes levied by state will get subsumed under GST. By implementing GST it is expected that the procurement cost will come down and the benefit will be transferred to the end consumer as it will lead to reduction in price of vehicle.

COMPARISON OF TAXES BETWEEN PRE AND POST GST REGIME:

Vehicle type	Excise Duty	NCCD Cess	Infra Cess	CST	VAT	Total Tax	CGST	SGST	Total GST
Motor Cycle	12.5	2.00	1	2.0	14.5	32	9	9	18
Small cars	12.5	2.00	1	2.0	14.5	32	9	9	18
Mid-size Car	24.0	2.00	2.50	2.0	14.5	45	9	9	18
Luxury Car	27.0	2.00	4	2.0	14.5	49.5	14	14	28
SUVs	30.0	2.00	4	2.0	14.5	52.5	14	14	28

IMPACT OF GST IN AUTOMOBILE INDUSTRY

Introducing Goods and service tax in India has been considered a significant step taken by the government. In post-independence it is one of the historic reforms that have taken place in the field of indirect taxation. It is subsuming of indirect taxes into one which makes it one nation one tax and where India has become a common market place. It is one single which will be levied on the entire supply chain right from the manufacturer to the wholesaler.

Taxation of goods and services by centre and state will bring distortion in taxation structure and will adversely affect revenue. GST is consumption based tax system and is multilayered tax system. GST aims at evolving an efficient and harmonized consumption based tax system. GST is tax on goods and services on continuous chain and provides set off benefit from producer point to retailer point, it is levied on value addition at each stage and supplier is entitle to set off the tax paid on inputs and hence the final consumer will only bear the cost of GST charged by last dealer of the supply chain. For e.g.

Let us suppose the rate of GST is 10% with manufacturer making value addition of Rs. 30/- on his purchase worth Rs. 100/- of input of goods and services used in manufacturing process, the manufacturer then pay net GST –Rs. 3 by setting off Rs. 10 which was already paid on inputs by him as input tax credit from Gross GST of Rs. 13/-, the manufacturer then sells the goods to the wholesaler and then the wholesaler sells the goods after making value addition of Rs. 20/- he will pay net GST of Rs. 2/- after setting off Rs. 13/- from Gross GST of Rs. 15/- to the manufacturer. Similarly when the retailer sells the same good after value addition of Rs. 10/- he pays net GST of Rs. 1/- after setting Rs. 15/- from his Gross GST Rs. 16/- paid to wholesaler and the manufacturer, wholesaler and retailer will only have to pay Rs. 6/- as GST (i.e. 3+2+1) in the entire value chain, thus it can be seen that the entire burden of paying tax has been eliminated to nominal in the entire supply chain.

Stage of Supply Chain	Purchase Value of input	Value Addition	Value at which supply of goods and services made to next stage	Rate of GST	GST on Output	Input Tax Credit	Net GST = GST on Output – Input Tax Credit
Manufacturer	100	30	130	10%	13	10	3
Wholesaler	130	20	150	10%	15	13	2
Retailer	150	10	160	10%	16	15	1

In earlier regime there were many indirect taxes which were levied by central government and state government, which certainly led to increase in price of goods due to cascading effect, however after introduction of Goods and Service Tax there is removal of cascading effect which leads to decrease in price of goods. In earlier regime the price of goods were uniform because of different tax laws; however after introduction of Goods and service tax the rate of central and state goods will be uniform throughout the country. GST has been implemented with an expectation that it will boost each industry and ultimately the economy, this chapter

discusses the impact on automobile industry after the implementation of Goods and Service Tax and the same has been discussed in detailed below.

V Lavanya, Dr. D Pradeep Kumar, Dr. Narayana Reddy (2017):

V Lavanya, Dr. D Pradeep Kumar, Dr. Narayana Reddy have discussed about the importance of automobile industry with respect to manufacturing industry, as this industry has played major role in contributing the economic growth of India. Even the government of India has realized the importance of Automobile industry and that's why the government of India has brought Automobile Industry plan 2026. Accordingly the growth pattern in automobile industry has direct relation with reforms and polices enacted by government of India. They highlighted the support required by government in form of policies to enhance growth in automobile sector, as the main focus of automobile industry to increase the volume and to improve them also suggested that lower tax rate will result in increase in volume and such increase in volume will result more collection of tax by authorities. However on the other hand in case of high tax rate the prices of automobiles will increase and will result in decrease in volume which will ultimately lower the growth of automobile industry and due to which the tax revenue will also be reduced. Further in the conclusion they discussed that the automobile industry has been identified to have great potential in contributing to Indian Economy, for this in "Make in India" plan. PM Narendra Modi has identified automobile industry as one of those industry which would be helpful in achieving make in India plan. GST is one single tax which is payable on manufacturing, sale & Consumption and the implementation has eliminated the cascading effect and it is expected that this will result in decrease in prices of automobiles as well. Further GST has also provided a kind of relaxation to manufacturer in form Input tax Credit, where the manufacturer of automobile can set off the credit of inputs used in manufacturing against the output supply and will be liable to pay the net balance only, this will result in reduction of burden on the manufacturer.[117]

Dr. Ashok Sharma, Dr. Davendrakumar Sharma (2018):

Dr. Ashok Sharma, Dr. Davendrakumar Sharmahave discussed in detail about the impact of implementation GST in automobile industry as the automobile industry produces in large

[117]Sharma, Ashok. And Sharma, Davendra.(2017). *Impact of GST on Automobile Industry in India*International Research Journal of Management Science and Technology Volume 9, issue 3, pp. 149-153.

number two-wheeler and four wheeler to satisfy the needs of such large population. Automobile sector is considered as one of the largest industry sector in India which foster growth. India has taken stand in automobile industry in world while being the largest manufacturer of tractors, being 2nd largest manufacturer of two-wheeler and 6th largest manufacturer of commercial transport. The 2026 plan in automobile industry is to bring India on top among manufacturing, exports of vehicle and its component and the idea is to achieve 12% GDP. According to report issued by Department of Industry Policy and Promotion, the major play in Indian automobile industry is two-wheeler because majority population is middle class or youngsters and because of this it holds 14% of the market share. In conclusion they discussed that GST is single and uniform tax based system in India, by being uniform it will make market as a common market and this will also enhance the ease of doing business. GST has eliminated all tax which were levied earlier like VAT, Excise, Service Tax etc. which would also result in elimination of cascading effect and will result in lower the cost of automobiles sold in the market. Further this paper has done comparative analysis of change in rates of tax in pre and post GST era.The earlier tax regime was suffering from cascading effect which was leading to high price of product which has been reduced by ways for availing of Input tax credit on each level of distribution where the tax paid of input can be set off against output supply. There is a kind of cash lock involved that the time of transfer of vehicle for a dealer as the dealer generally provide some facilities to benefit the customer at the time of purchasing the vehicle, which they generally provide by way of issuing voucher, but for issuing such voucher to customer the dealer is liable to pay pre-GST and then the voucher will be issued however after issuance of voucher the customer can avail such services anytime.

Dr. Ritu Paliwal (2017):

The author has discussed in detail about the implementation of GST in India and its overall impact on automobile industry, GST is one major reform in Indian Indirect system and its implementation has influenced many sectors in India out of which one sector is automobile industry, the author has aim to highlight the impact of GST in automobile Industry. Automobile industry is one major industry which contributes to the growth of country, it is one of those huge industries which produce cars and bikes and other vehicle as per the need of people. The automobile has recently faced tough times like demonetizations, however it is expected that implementation of GST will lead to simplification in tax structure and will benefit automobile industry. In earlier regime there were several taxes which were levied on sale of vehicle, spare parts, accessories which includes central sales tax, VAT, CVD etc. all these led to cascading

effect which ultimately leads to increase in price of product, after implementation of GST it is expected that the price of product will decrease because of seamless flow of credit which flows in the entire supply chain.[118]

K. Neelavathi, Rachana Sharma (2017):

The duo authors have considered the automobile industry as one of the most successful industry after liberalization.The automobile industry is considered to be vehicle of growth in economy. It is one of those sectors in India which has potential to contribute to economy and employment generation. For the growth of economy it is necessary to ensure free flow of trade in an economy. By virtue of implementation of GST there will be free flow of trade and elimination of cascading effect. In earlier regime a normal person was charged to 26.50% to 44% which is quite higher than the rate of GST i.e. 18% and 28% and then will reduce burden on end consumer.

Valuation: under GST section 15 of CGST act deals with valuation, it says that the value of supply of goods and services shall be the transactional value. The term transaction value means the price paid or payable for supply of goods and service along with this it has further 2 conditions which are:

- Price is the sole consideration;
- Supplier and recipient are not related.

The followings are to be included in the value of supply and these are as follows:

- Any taxes, duties, cesses charged other than in CGST act, SGST act, UTGST act charged by supplier for e.g. toll tax etc.
- Any amount which is paid by recipient on behalf of supplier with respect to supply and is not included in price paid or payable for example: payment made to Labour on behalf of supplier.
- Any incidental expenses.
- Any kind of interest or late fee paid on delayed payment.
- Value of subsidies linked to supply of goods and service however it excludes the subsidies which are provided by state government and central government.

The following Valuation issues are relevant with respect to automobile industries, which are as follows:

[118] Paliwal, D. (2017). *GST-The Game Changer in Indian Economy* International Journal of Innovative Research in Multidisciplinary filed (IJIRMF), (special issue 3), pp. 33-37.

- *Road Tax/Life Tax:* in earlier regime Vat or service tax was not paid on road tax.

However after implementation of Goods and Service Tax, the value of GST will also include road tax, which means road tax has not been subsumed in GST and its value vary from state to state which is between 2% to 15% and this will certainly increase the cost of automobile to the consumer.

- *Car sent for Exhibition:* when cars are send from showroom to exhibition the ownership of the car still lies with the company for their own end use and hence it shall not be liable to GST
- *Sale of Old car by customer to dealer:* it generally thus happen that a person sells his old car which is not in furtherance of business that transaction will not be subjected to GST in the hands of customer, however if the customer is a registered person then in that case he will be subject to GST.
- *Related Party Transaction:* According to section 25 if there is any transaction between related party or distinct person, which is made in course of furtherance of business even if it is without consideration, it will be treated as supply and that will attract GST. The determination of valuation in case of related party transaction has always been a key issue which generally leads to litigation also, however to resolve this issue Rule 28 in valuation rules was incorporated, it says describes the computation of valuation if the transaction is between related parties and it says that, in case of related person;
    - Open market value i.e. OMV;
    - Value of supply of like and quality of goods and services and
    - 110% of cost of supply of goods or services or
    - In any reasonable manner which is consistent with section 15.
    - If goods are meant for further supply then in that case 90% of the sale price shall be taken.

there are certain ancillary functions like repairing of vehicles at service centre or transfer of vehicle to warehouse or sale through marketing agent is considered as related party transaction, in these cases transactional value is liable to be rejected if the transaction is with related party or is with other party with different GST No. which is not reasonable, such has to be in accordance with valuation provision only.

In GST transactional value can be rejected in case where the price is not the sole consideration for sale, further it was held in the case of *Fiat India*[119] that when a sale is made below

[119] 2012 (283) E.L.T. 161 (SC).

manufacturing cost for market penetration then in that case it will be considered as price is not the sole consideration. Under GST in case there is any additional consideration then in that case valuation has to be done in accordance with valuation provision.

- *Reimbursement of Insurance, Registration:* along with value of goods there are addition amount which are also taken as a pure agent, like insurance of vehicle, registration charges, number plate charges, credit card swiping charge and such other chargers, in earlier regime these charges were not subjected to tax and under GST it is expected that these amount will be treated out of purview of GST.
- *Pre-Supply Discounts:* when discounts are given it is always provided with a condition that the discount in normal trade practice, this term is very subjective in nature, which means the discounts vary according to variants and may cause valuation disputes also.
- *Post Supply Discount:* Many times the automobile dealer receives discount from the manufacturer based on targets or special customer, year-end discount etc. in case of such discount to claim deduction from the value of goods it is necessary to note that such discount must be related to invoice.
- *Subsidy:* Under Goods and Service Tax law it has been provided that subsidy related supply of goods or service will be part of transaction value however in automobile industry majority of them enjoys subsidy from state government in form of 'State Investment promotion subsidies' (IPS Scheme), this is given in form of refund of VAT or CST paid, under GST law this IPS scheme has been modified and these subsidies will be excluded from consideration and valuation provision as they are provided by the state government.
- *Dealer Incentive Scheme:*
- *Vehicle Booking Advance:* generally it happens that people went to showroom to see vehicles and when they liked it they finalize it, however at the time of finalization it thus happen that a person may not be carry such huge amount of sum therefore they pay token money as an advance for the booking of vehicle and this advance money was not subjected to VAT in earlier regime however in GST regime taxes have to be paid on advance received for booking also, therefore the dealer will have to pay tax on the advance either out of their own pocket or they may charge extra token money for the same.

- *Free service coupon voucher:* when people buy vehicle they get complimentary service coupon voucher at the time of sale of vehicle. On this coupon GST is levied on the date on which these coupon vouchers were issued, which means that the dealer will have to pay the tax on the date of issue of voucher however such amount of tax can be recovered by the dealer from the customer when vehicle comes for repair.
- *Imposition of GST on sale of second hand vehicle:* GST will only be levied on the margin amount, and this margin amount will be calculated (selling price- depreciation) however if the margin amount is negative then in that case no GST will be levied.

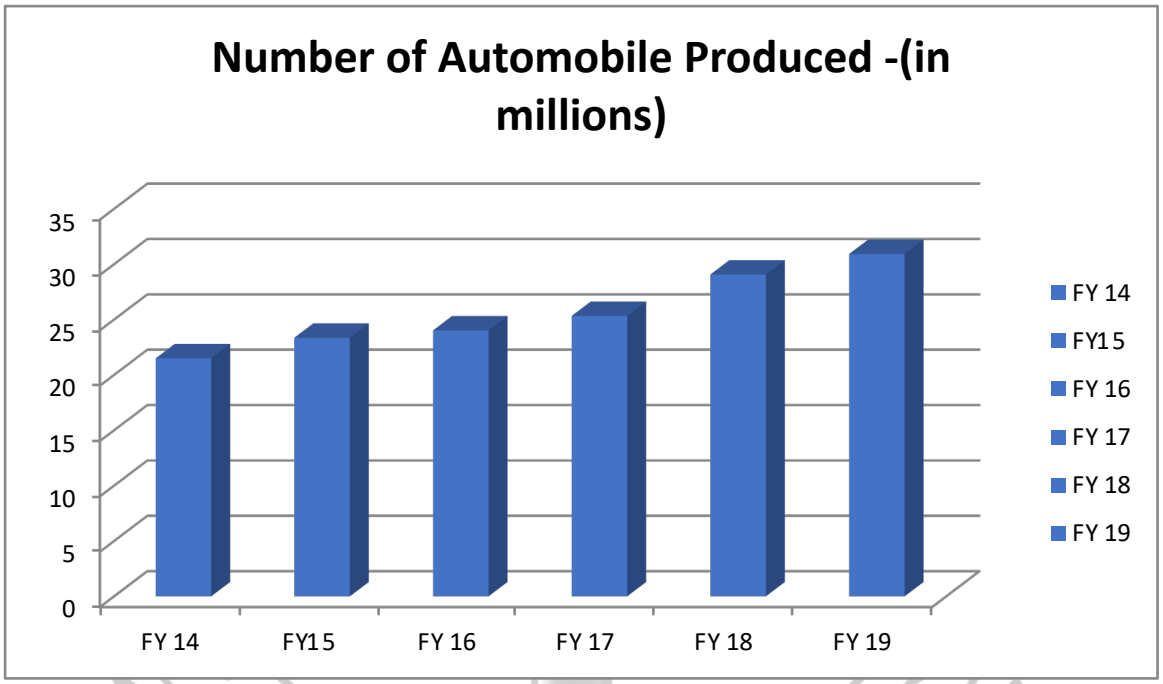
GST on Stock Transfers (Supply without Sale):

There are certain times when goods are transferred from one premises to another, the transfer of such goods will also be liable to Goods and Service Tax if such transfer is inter-state transfer. However if a dealer has separate dealerships and for each dealership he has acquired separate GST registration number then in that case if there is transfer of goods or services from one dealership to another even that transfer will also be liable to Goods and Service tax, this will lead to blocking of working capital as the taxes has to be paid from own pocket which can be recovered at the time of sale of goods or services.

Market Trends of Automobile industry in India:

Number of Automobiles Produced in Last 6 Years:

The data used in the following graphs has been taken from ibef i.e. "India Brand Equity Foundation", it is a trust created by Ministry of Commerce and Industry, Government of India, and this trust provides accurate information about Indian economy and various other industries and investments.

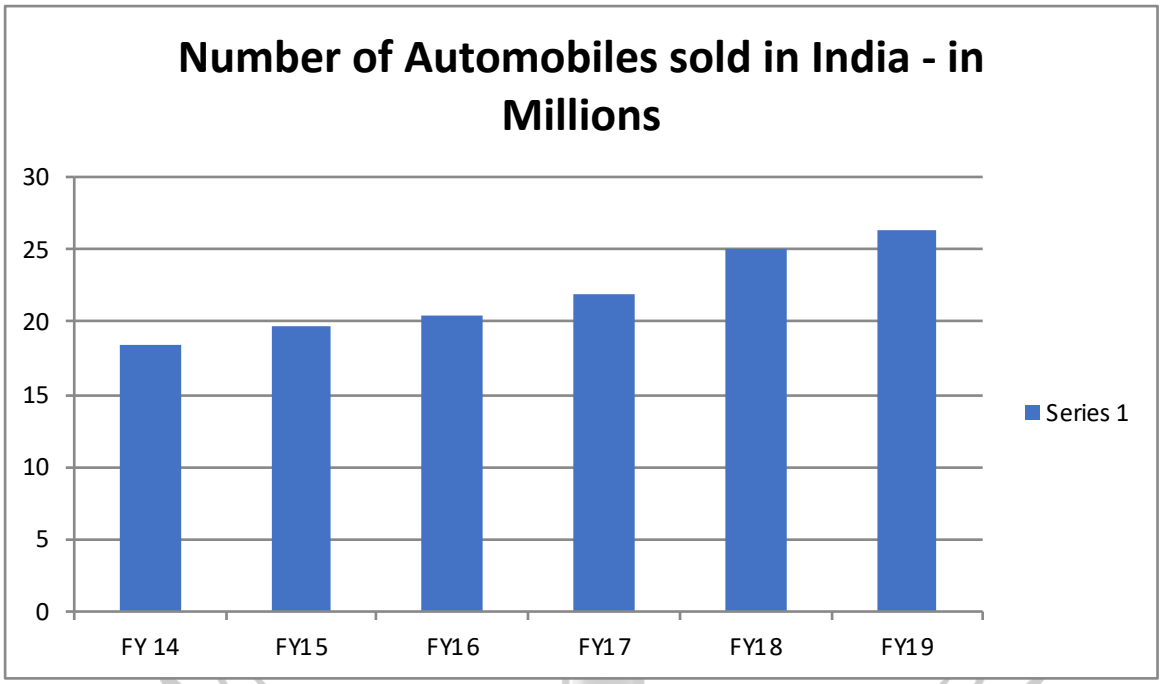


If we see the above data the trend of production of automobile has been increasing in India rapidly, which is in FY year 2014 the total automobile produced were 20.65 million, in FY 2015 it increased to 21.50, in 2016 it further increase to 24.04, in FY 2017 it increase to 25.33, in FY 2018 increased to 29.07 and in FY 2020 it increased to 30.92. This means there has been a constant increase in production in automobile industry in last 6 years. Automobile industry has always been one major sector that contributes to the economy.[120]

Number of Automobile Sold in India in Last 6 Years:

The researcher has taken data from FY 2014-2019 to analyze the impact of GST on market trend of automobile industry, which is as follows:

[120] India and Info graphic, G. (2019), *Growth of Automobile Industry India- Info graphic*. (Online) ibef.org. Available at: https://www.ibef.org/industry/india-automobiles/infographic (Last Accessed on 29 February 2020).



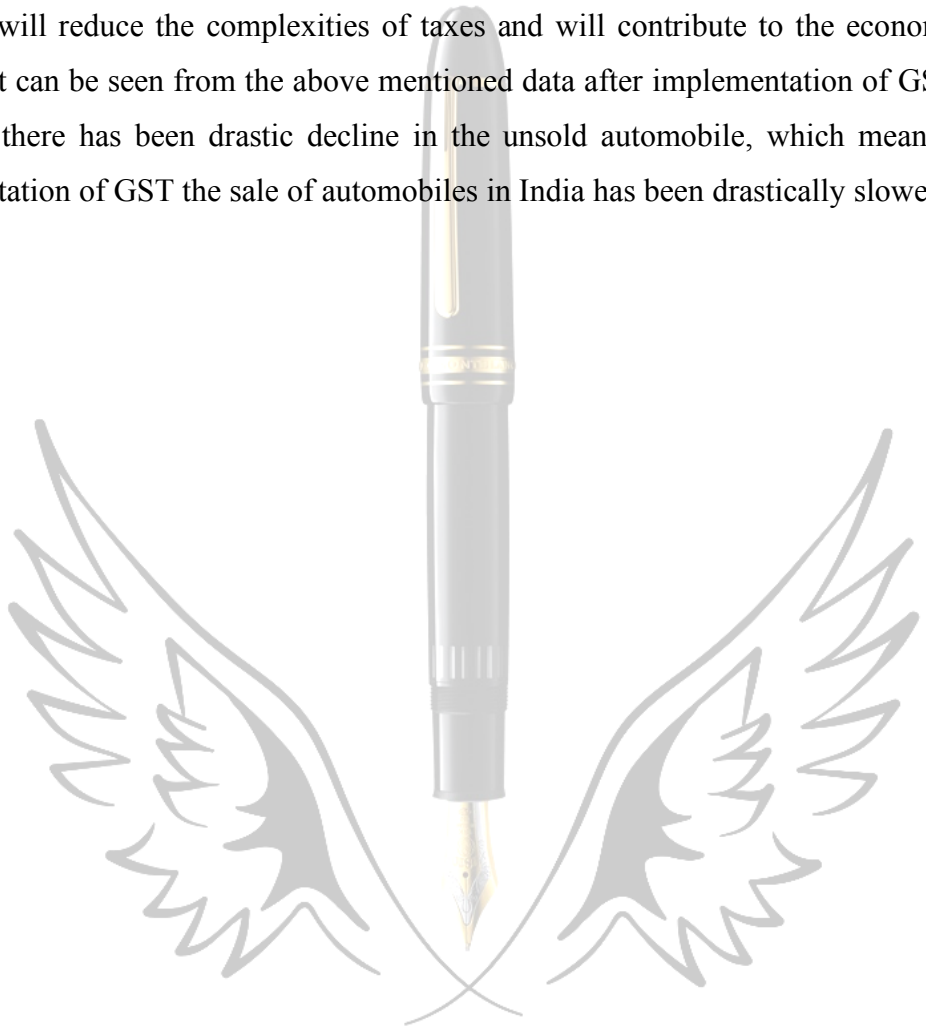
If we see the above data pertaining to sale of automobile industry we will see that each year there has been increase i.e. in financial year 2014 the sale was 18.42, in FY 2015 it was recorded at 19.72, in FY 2016 it was recorded at 20.47 and in 2017 it was recorded at 21.86, further in FY 2018 it was recorded at 24.97 and in FY 2019 it was recorded at 26.27.However if we compare the production and sale of automobile each year from 2017 when GST was implemented, we will see that there is an increase in number of unsold automobile each year.[121]

FY	Production	Sale	Unsold Automobile (Total Production – Total Sales)
2014	21.50	18.42	3.08
2015	23.36	19.72	3.64
2016	24.02	20.47	3.55
2017	25.33	21.86	3.47
2018	29.07	24.97	4.1
2019	30.92	26.27	4.65

It has been clearly shown in the above data that in 2014 there was least unsold automobile in India however this ratio suddenly increased to 3.64 in the financial year 2015 but the same has been declined in the year 2016 to 3.55 and 3.47 in 2017. In 2017 Goods and Service Tax was

[121] Ibid.

implemented in India and in Financial year 2018 the unsold automobile rise to 4.1 and then boost to 4.65 in 2019, which is highest figure in the last 6 years, GST has been one of the major tax reform in indirect structure regime in India it was expected that GST will be reduce the cost of goods will reduce the complexities of taxes and will contribute to the economic growth however it can be seen from the above mentioned data after implementation of GST i.e. after FY 2017 there has been drastic decline in the unsold automobile, which means that after implementation of GST the sale of automobiles in India has been drastically slowed down.



CONUNDRUM OF ABSOLUTE LIABILITY IN INDIAN ENVIRONMENTAL JURISPRUDENCE

- DIVYAM AGGARWAL

I. INTRODUCTION

Last year, on 6th May 2020, a fatal accident occurred in the city of Vizag in Andhra Pradesh, when 3 tonnes of toxic styrene monomer gas got leaked from a plant of the South Korean company LG Polymers Pvt. Ltd. The unit in question was an ISO certified facility, which means it had a protocol for everything. What seems to be the case is that the management, in its haste to restart the plant after the lockdown, ignored the protocol pertaining to maintenance of the plant before resuming operations. On the day of the leak, the levels of styrene were found to be 2500 times higher than the limits prescribed by the regulators. As per the investigations, it has been revealed that due to the lockdown, styrene was not being stored at the appropriate temperature, leading to pressure build up in the storage chamber and the breaking of the valve.[122]

The accident, which lead to the death of 11 persons and sickness of more than 1000 people, is being regarded as one of the worst industrial leakage disasters in the country, after the Bhopal gas leak in 1984, the Oleum Gas Leak in 1986 and the Mayapuri radiation leak in 2010. These other unfortunate accidents have largely contributed to the development of the Environmental Jurisprudence in India over the decades.

Soon after the Vizag leak, on 8th May 2020, the Principal Bench of the National Green Tribunal (NGT) at New Delhi took suo motu cognizance of the incident based upon media reports. The NGT remarked in its order:

"Leakage of hazardous gas at such a scale adversely affecting public health and environment, clearly attracts the principle of 'Strict Liability' against the enterprise engaged in hazardous or inherently dangerous industry"[123]

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[122] S. Ramanathan, Digvijay Singh, Nivit Yadav, *The complete story of Vizag gas leak,* DownToEarth, https://www.downtoearth.org.in/dte-infographics/vizag_gas_leak/index.html

[123] *Re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village Visakhapatnam in Andhra Pradesh*, 8th May 2020, National Green Tribunal Principal Bench (India)

Following this remark, there was a significant uproar in both the environmentalist and legal circles, viewing the NGT order as regressive and erroneous. The critics argued that the NGT should have applied the 'Absolute Liability' Principle in place of the 'Strict Liability' Principle.[124] The argument was backed by the landmark verdict of the Supreme Court of India in the Oleum Gas Leak case[125], where Justice Bhagwathi had laid down the principle of 'Absolute liability'. Therefore it was believed that the NGT was wrong in applying a principle that has already been rejected by the Supreme Court.

Subsequently on 1st June 2020, the NGT passed another order in the Vizag case, and this time remarked:

"We find the Company has strict and absolute liability for the environmental damage and consequential loss including to life and public health in this case"[126]

The NGT gave no specific reason for changing its 'strict liability' stance in the previous order to 'strict and absolute liability' in the subsequent order. No questions were asked about the approach adopted by the NGT for reaching these conclusions. Though the critics breathed a sigh of relief seeing the NGT use the word 'absolute' in its order.

However, the law in India with respect to strict and absolute liability isn't as black and white as people assume it to be. The two concepts are highly overlapping and actually provide a more extreme than balanced approach, and as evident from the actions of the NGT above, there is hardly any clarity on the application of these aspects.

II. STRICT LIABILITY

The concept of Strict Liability has its origins in the law of 'nuisance', but differs from nuisance as it deals with 'escape' rather than 'interference'.[127] The landmark judgment of *Rylands vs Fletcher*[128] laid down the Blackburn rule of Strict liability. In the Court of Exchequer Chamber,

[124] Amit Kumar, *Vizag Gas Leak: Why the NGT Should Have Applied Absolute, Not Strict, Liability*, 13th May 2020, THE WIRE, thewire.in/rights/vizag-gas-leak-ngt-strict-absolute-liability
[125] *M.C.Mehta vs Union of India*, 1987 (1) SCC 395
[126] *Re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village Visakhapatnam in Andhra Pradesh*, 1st June 2020, National Green Tribunal Principal Bench (India)
[127] Alastair Mullis & Ken Oliphant, *The Rule in Rylands v. Fletcher*, TORTS 242–248 (1997).
[128] (1868) LR 3 HL 330, [United Kingdom]

Blackburn. J set out the rule to be applied in such cases, together with the defences to it (his formulation was subsequently approved by the House of Lords in the same case):
"The person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie responsible for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default, or, perhaps, that the escape was the consequence of vis major, or the Act of God."

As can be observed from the language of the aforesaid formulation, the use of the word *"anything"* encompasses all kinds of materials, from non-hazardous to extra-hazardous, and from living to non-living. The dangerous thing brought on land need not be per se risky, but should be capable of mischief upon a possible escape. Though the word "responsible" is qualified by "prima facie", a complete reading of the formulation establishes that the person has been allowed an escape from this liability only in two situations – fault of the victim or act of god.[129] In subsequent cases and applications of the aforesaid rule, a few more exceptions have emerged like the natural use of land, and common benefit of the community.

The rule in Rylands vs Fletcher emerged in the context of escape of a non-hazardous material. The case concerned the flooding of the plaintiffs mine with water from the defendants' recently constructed reservoir. Yet the principle was still all-encompassing, due to the use of the word "anything". But the environmentalists have expressed displeasure with this concept, because they feel that the application of this principle with regard to hazardous materials in industries is acting way too leniently on the defaulter and allowing them enough opportunities to escape their liability through one of the doors of the exceptions.[130]

III. CRITICISM OF STRICT LIABILITY

However, jurists like Salmon and Pollock have actually taken an opposite view by considering this strict liability concept as *"uncertain"*, *"disputed"*, and *"needlessly harsh"*.[131] It is the reluctance in acceptance of the principle of strict liability with universal application that has

[129] Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification,* 30 HARV. L. REV., 409, 410-411(1917)
[130] Douglas N. Husak, *Varieties of Strict Liability*, 8 Canadian Journal of Law & Jurisprudence 189–225 (1995).
[131] Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification,* 30 HARV. L. REV., 409, 411-412(1917)

led to the emergence of wide ranging exceptions in the subsequent years.[132] As Frederick Pollock puts it, in later cases, *"there has been a manifest inclination to discover something in the facts that took the case out of the rule".*[133] The American courts have strongly contributed to this dilution, whereby they rejected the British approach of no-fault liability laid down in Rylands vs Fletcher. The Court of Appeals of the State of New York in the case of *Losee vs Buchanan*[134] discussed the Rylands vs Fletcher approach and refused to hold a person liable for an accident unless it was clearly shown that there was negligence in taking all prudent precautions.

This negligence requirement has further resonated with a significant group of jurists and judges. It has been argued that there was no requirement for a new terminology like the 'strict liability', and all cases of material escaping from control and causing damage could be very well dealt with using the concepts of 'negligence' in tort law. Even the result reached in Rylands vs Fletcher could have been easily arrived at using the principle of negligence.[135] Sir Frederick Pollock remarks in his "Draft for Civil Wrongs Bill Prepared for the Government of India"[136]:

"This doctrine that a man, in certain cases, acts at peril and is absolutely liable for non-culpable accidents is a survival from the early days when all acts were held to be done at the peril of the doer. When the courts, in more recent times, were gradually coming to adopt the doctrine that fault is generally a requisite element of liability in tort, the law on the subject of liability for negligence was not so fully developed as it is now. If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability for application in certain exceptional circumstances."

Thus, the doctrine of peril of doer and the no-fault liability were actually archaic principles, used at a time by the judges when the law relating to negligence wasn't properly developed, as the law of negligence if mainly of modern growth, and the great judges who sat to decide

[132] POLLOCK, *TORTS*, 10th ed.
[133] POLLOCK, *TORTS*, 9th ed., 661, notes, and 503
[134] 51 N.Y. 476 (N.Y. 1873)
[135] Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification,* 30 HARV. L. REV., 409, 410-411(1917)
[136] POLLOCK, *TORTS*, 10th ed., 477-78

Rylands vs Fletcher had an imperfect sense of its reach and power.[137] As Prof. E.R. Thayer rightly points out:

"... the law has at its hand in the modem law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet."[138]

If the case is a meritorious one and proper emphasis is laid on the test of "due care according to the circumstances" then the "theory of negligence" will generally be "sufficient to carry the case to the jury."[139] Prof. Thayer further reiterates the suggestion of Sir Pollock that:

"... one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors, or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge."[140]

The above suggestions seem to have rung a bell with the Australian judicial system too. The Supreme Court of India, in the judgment of *Indian Council For Enviro-Legal Action vs Union Of India*[141], observed this approach of the Australian HC in *Burnie Port Authority v. General Jones Pty Ltd.*[142] as follows:

"...the Australian High Court held by a majority that the rule in Rylands having attracted many difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of Australian Common Law, as absorbed by the principles of ordinary negligence. The Court held further that under the rules governing negligence, if a person in control of a premises, introduces a dangerous substance to carry on a dangerous activity, or allows another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another."[143]

Therefore, on the basis of the above ideology, one can understand that the concept of no-fault liability and the doctrine of acting at peril are now being looked as obsolete and there is an

[137] Prof. E.R. Thayer, *Liability Without Fault*, 29 HARV. L. REV. 805.
[138] Prof. E.R. Thayer, *Liability Without Fault*, 29 HARV. L. REV. 815
[139] Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification,* 30 HARV. L. REV., 409, 414-415(1917)
[140] POLLOCK, *TORTS*, 10th ed., 511
[141] 1996 (3) SCC 212 [India]
[142] (1994) 68 Aus LJ 331
[143] 1996 (3) SCC 212 [India], Para 63.

inclination towards "gradual diminution in the number of cases where absolute liability is imposed on non-culpable defendants"[144].

IV. ABSOLUTE LIABILITY IN INDIA

However, the Indian jurisprudence on Environmental has actually moved in direct conflict with the aforesaid fundamental doctrines of modern common law of torts, by showing a clear revulsion from the conception that fault is essential to liability. While the Indian courts had been readily applying the Rylands vs Fletcher rule with all its exceptions till early 1980s, things changed with two unfortunate disasters in 1984 and 1986, in the form of the Bhopal gas leak and the Oleum Gas Leak respectively.

Unfortunately, when these disasters occurred, India did not have specific legislations and courts in place to provide a proper legal framework for environmental issues. While the Air (Prevention and Control of Pollution) Act of 1981 and the Water (Prevention and Control of Pollution) Act of 1974 were in place, there were no principles or schemes to provide guidance in deciding the liability of the wrongdoer and for compensating the victims. The responsibility to fill up this lacuna in law then fell upon the shoulders of the apex court, resulting into various important judgments passed by way suits instituted as Public Interest Litigations.

M.C.Mehta vs Union of India[145] in December 1986 was one of such much-appreciated judgments that led to the introduction of the 'Absolute Liability' to the Indian Environmental Jurisprudence. The judgment for the 5-judge bench was written by then Chief Justice of India PN Bhagwati, who is one of the biggest contributors to the progressive jurisprudence of our country. The facts of the case related to the leakage of Oleum Gas from a plant of the Delhi-based Shriram Foods and Fertilisers. The matter had reached the Supreme Court due to a reference made by a 3-judge bench "because certain questions of seminal importance and high constitutional significance were raised in the course of arguments when the writ petition was originally heard."[146] One of those questions that the apex court came upon to discuss was regarding the "measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons

[144] Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification,* 30 HARV. L. REV., 409, 417(1917)
[145] 1987 (1) SCC 395
[146] Ibid.

die or are injured."[147] The court stumbled upon the question of whether the rule in Rylands vs Fletcher or something else could be applied to the facts of the case, and altogether rejected the applicability of the rule on the present day circumstances by observing as follows:

"This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure… Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence."[148]

After this rejection of the Strict Liability principle, Justice Bhagwati proceeded to lay down a new principle for fixing liability on hazardous industries:

"We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands vs Fletcher."[149]

Thus, in cases where a dangerous thing escapes from an inherently hazardous industry, then that enterprise would be held absolutely liable to compensate for all the harm caused by it, and no defence of exceptions would be available to that enterprise. Therefore, the liability imposed is absolute to the extent that even the acceptable defences in common law like Act of God and natural use of the land have been excluded.

The Indian courts have therefore, by this so-called neoteric judgment, moved many steps back in terms of imposing the no-fault liability. Though it has continuously received appreciation from environmental conservationists for sending out a strong message to industrialists that

[147] Ibid.
[148] Ibid., Para 31.
[149] Ibid., Para 31.

India cannot be subjected to incautious development at the cost of environmental degradation and human fatalities in the name of careless, but legally, the over-simplified approach only complicates the scenario of a developing country like ours where development and environment are to proceed hand-in-hand without any of them taking precedence.

V. CRITICISM OF ABSOLUTE LIABILITY IN INDIA

The application of this judgment to the Vizag gas leak, or to any future similar situation in India seems impractical and problematic due to a number of reasons:

a) It is in direct conflict with the modern tort law principles that encourage and accept the imposition of liability only upon the fault of the defendant. The law has moved back to the days when the judges relied upon the simple Doctrine of Acting at peril, and jurisprudence around negligence and nuisance hadn't matured enough.[150] As already discussed above, the common law countries have now been adopting the principle of 'negligence' to such cases, following the stance taken by the American Courts over the years. There seems no reason why the parameters of 'foreseeability of risk' and 'reasonable care' can't be adopted as the requisites for determining whether the person should be held liable for the accident. The prima facie responsibility could surely be fixed upon the defendant along with the burden to prove that all reasonable care was taken by him to prevent that accident. But eventually, the defendant should be granted a reasonable opportunity to rebut the prima facie conclusions and show that all requisite precautions were taken to avert the disaster.

Interestingly, even the statutes and rules in India have taken up this same route even after the MC Mehta[151] judgment. The Manufacture, Storage And Import Of Hazardous Chemical Rules, 1989 have been framed by the Central Government under the powers derived from the Environment Protection Act of 1086. These rules impose a number of duties on the "occupier" during and before the occurrence of a major accident, to ensure that the hazardous chemicals being used in the industrial activities do not cause any harm. Therefore, upon the unfortunate occurrence of any "major accident", it will have to be ascertained whether the duties and responsibilities mandated by the Rules were complied with, and if not, then the owners would be held liable. These provisions are in line with the concepts of 'foreseeability of risk' and 'reasonable care' forming part of the principle of negligence. If the courts have to hold the

[150] Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification,* 30 HARV. L. REV., 409, 413-417(1917)
[151] 1987 (1) SCC 395

defendant absolutely liable incase of an accident, then what is the point of all these mandatory duties and precautions that have provided by the Rules? The owner can very well continue running his plant without complying with any of the rules if his liability while deciding his liability has to be strict and absolute and bereft of any exceptions or explanations.

b) National Green Tribunals (NGT) were setup across the country under the NGT Act[152] of 2010 to deal particularly with matters related to the environment. Now Section 17 of the NGT Act talks about 'Liability to pay relief or compensation in certain cases'. First of all, Sub-section (1) of Section 17 says:

"Where death of, or injury to, any person (other than a workman) or damage to any property or environment has resulted from an accident or the adverse impact of an activity or operation or process… the person responsible shall be liable to pay such relief or compensation for such death, injury or damage… as may be determined by the Tribunal."

The phrase "shall be liable to pay" used above is qualified by the phrase "as may be determined by the Tribunal". So it might be an incomplete reading to say that the Section imposes an absolute liability on the defendant to compensate for all damage caused by the accident. The Tribunal has been given power to adjudicate and decide the extent of liability of the wrongdoer, and whatever is decided by the Tribunal, the defendant would be obligated to pay that amount. Secondly and more importantly, sub-section (3) of Section 17 says: *"The Tribunal shall, in case of an accident, apply the principle of no fault."*

Now the NGT Act nowhere defines the meaning of 'principle of no-fault'. A similar phrase has been used in another environmental legislation, i.e., Public Liability Insurance Act of 1991. Section 3 of that Act[153] talks about 'Liability to give relief in certain cases on principle of no fault'. However, even the Public Liability Insurance Act doesn't define what principle of no-fault entails. Though it tries to provide some guidance in sub-section (2) of Section 3 by stating that *"the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person",* the provision seems merely clarificatory, because the imposition of duties on the owner of the unit provided in Manufacture, Storage And Import Of Hazardous Chemical Rules 1989, alongwith the common law doctrine of *Res Ipsa Loquitur*, automatically puts the burden on the defendant to show absence of negligence. Apart from these provisions, there is nothing,

[152] The National Green Tribunal Act, No. 19 of 2010, India
[153] Public Liability Insurance Act, No. 6 of 1991, India

which throws light on whether the 'principle of no-fault' means Strict Liability or Absolute Liability. The *MC Mehta*[154] judgment came in 1986, while these aforesaid legislations came in 1991 and 2010. Had the legislature intended to follow the principle laid down in *MC Mehta*[155], it should have specifically mentioned 'principle of absolute liability' in the NGT Act and the Public Liability Insurance Act. The absence of such specificity points towards letting the NGT exercise discretion while granting relief in cases of accidents, keeping in consideration the negligence exhibited by the accused, and accordingly applying principles of strict liability, absolute liability, vicariously liability, or a mix of any of these along with all of their exceptions and limitations.

c) In the case of *MC Mehta*[156], Justice Bhagwati might have laid down a strong and distinct line of law, the Supreme Court there couldn't impose liability to pay compensation on Shriram (the delinquent company) because it couldn't reach a conclusion that the company came "within the meaning of `State' in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution". This has therefore lead to confusion amongst judges and lawyers in future about whether the absolute liability principle laid down by Justice Bhagwati was the ratio, or merely an obiter. Chief Justice Ranganath Misra, while writing a concurring opinion in *Union Carbide Corporation Etc. vs Union Of India*[157], remarked that what was said in the Oleum Gas Leak case regarding absolute liability might actually be a good guideline for deciding compensation in cases it was intended for, but it was "essentially obiter".

However, later in the case of *Indian Council For Enviro-Legal Action vs Union Of India*[158], Justice B. Jeevan Reddy differed with the interpretation of Justice Misra in Union Carbide(supra) of terming the MC Mehta principle as merely obiter, and found the law declared in the Oleum Gas Leak case to be "not unnecessary for the purposes of that case". Justice Reddy held Hindustan Agro Chemicals Limited in that case to be absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water, and remarked that the decision of MC Mehta not being an obiter was binding on that division bench.

[154] 1987 (1) SCC 395
[155] 1987 (1) SCC 395
[156] 1987 (1) SCC 395
[157] AIR 1992 SC 248 [India]
[158] 1996 (3) SCC 212 [India]

So what we can see is that the rule of 'Absolute Liability' given in *MC Mehta*[159], which is hailed by the environment conservationists and lawyers as a path-breaking judgment, is neither in line with the development of tort law in common law countries, nor specifically accepted by the legislature while framing statutes, nor crystal clear in minds of the judges to follow. The judgment in *MC Mehta*[160] often seems to be forced out of circumstances. The fact that India had witnessed two major gas leak accidents within just two years leading to large-scale fatalities and damage, coupled with the lack of tough environmental laws in India and the resultant failure to bring about justice for the innocent victims of these two tragedies due to purely technical reasons each time, led to Justice Bhagwati writing down the 'Absolute Liability' rule to leave no scope at all for any such disaster in future. While the brilliance of Justice Bhagwati and his contribution to the Indian Jurisprudence is undisputed, this judgment looked like a an attempt at redemption for a highly liberal judge who couldn't help but see the wrongdoers escape the clutches of law in a developing country like India. The disappointment of not being able to secure complete justice for the victims and claimants must have led to the laying down of such an extreme formulation of law. Moreover, the judges have often been reluctant to modify such seemingly pro-victim judgments, even if an opposite view resonates more with their legal senses.

VI. CONCLUSION

However, irrespective of all the circumstances surrounding the decision back then, a more practical approach needs to be taken in the present times. While it is not at all argued that Indian courts should blindly follow Western jurisprudence at every juncture, it is no major feat to take a distinct road only for the sake of standing out. Inspiration for law should be taken from whichever source it comes. Justice Shapiro of the Appellate Division of the Supreme Court of New York, Second Department once suggested a more practical approach for fixing strict liability while writing his dissenting opinion in *Doundoulakis v. Town of Hempstead*[161], where he advocated for an approach provided in 'Restatement of Torts, 2d'[162], which is as follows:

"General Principle:

[159] 1987 (1) SCC 395
[160] 1987 (1) SCC 395
[161] 51 A.D.2d 302 (N.Y. App. Div. 1976)
[162] Restatement, Torts 2d [Tentative Draft, No. 10, p. 52], American Law Institute

(1) One who carries on an 'abnormally dangerous' activity is subject to liability for harm resulting from the activity, although he has exercised the utmost care to prevent such harm.
(2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous."[163]

Further, to determine what is 'abnormally dangerous', a host of factors were suggested in the treatise, which the court should consider while determining the liability.
"In determining whether an activity is 'abnormally dangerous', the following factors are to be considered:
(a) Whether the activity involves a high degree of risk of some harm
(b) Whether the gravity of the harm which may result from it is likely to be great;
(c) Whether the risk cannot be eliminated by the exercise of reasonable care;
(d) Whether the activity is not a matter of common usage;
(e) Whether the activity is inappropriate to the place where it is carried on; and
(f) The value of the activity to the community."[164]

Even if we refuse to follow the suggestions from the American Jurisprudence on this issue, as we have continued to do all these years, we should still realize the absence of a consistent mechanism for fixing fault and no-fault liability in Environmental matters in India. While it is important to ensure that industries do not take the environmental laws of the country for granted and are subjected to the statutory principles of Sustainable Development and Polluter Pays, such an ambiguity in law is not favorable for a healthy business environment in the country. The legislature has made its intentions clear about the course that it wishes to take from the variety of approaches available before it from the decades of jurisprudence on this point. Further, the whole purpose of an adjudication process is to comprehensively understand every aspect of the incident, and find out the extent of negligence, fault and liability to determine the relief and action. A one-size-fits-all standard of determining liability isn't what the law advocates for. Each case has different facts, which might be totally unprecedented. The court needs to be provided enough discretion and leeway so that total justice can be done. It is therefore unfair on the part of environmental conservationists and lawyers to criticize judicial decisions that try and move away from the extremities of absolute liability. The written word

[163] Ibid. Section 519
[164] Ibid. Section 520

of law in the present times permits this departure from that one judgment, which is still essentially ambiguous. It is high time we accept this flexibility in law and look for a more balanced approach that follows principles of proportionality and reasonableness while deciding liabilities after environmental accidents. As Justice Madan Lokur rightly quoted:

"We must emphasise that issues impacting society are required to be looked at holistically and not in a disaggregated manner. An overall perspective is necessary on such issues including issues that impact on the environment and the people of a community or a region or the State. It is for this reason that it is necessary to look at them broadly otherwise if that broader perspective is lost everyone will be a loser and no one will be a real beneficiary."[165]

[165] The Goa Foundation v. M/s. Sesa Sterlite Ltd. & Ors., (2018) 4 SCC 218 [India], Para 138.

PROBLEM OF CYBER TERRORISM

- DR. USHA PALHOE

ABSTRACT

Information technology was developed by humans in the form of communication revolution in which this technology spread all over the world with the invention of internet, in which computer communication network, information data storage, all of them revolutionized the field of communications, most of them mainly Services went online like banking sector, insurance sector, security sector, all of them were renamed as information revolution through internet but as we know Cyber Terrorism means illegal threats or targeted attacks to cause harm to computers /or network , critical systems and information related to one or more countries that is aimed at intimidating its government and the public or causing fear in the society for an illegal political religions or social objectives. The acts of cyber terrorism include damage to the protected critical computer systems that contain sensitive information of national inters, plane hijacking and crashes, automated, bomb explosions and damage to any public utility services which are managed by use of computer systems such attacks may cause physical are virtual violence which cause direct damage of nation's people and property or results in riots

As we know there are 2 aspects of every coin. Some people took this information technology as a boon and took it to new heights in the nation and the world like cyberspace. But there were also some anti-social people who misused this technology in this information communication system. Planned to harm the entire world by damaging cybercrime and cyber terrorism Cyber Terrorism is a difficult task. Cyber terrorists cause economic damage to the government of any country through the use of information technology through internet and computers. There is a major role of cyber criminals which turns into cyber terrorism. The biggest danger to them is that it is a difficult task to get hold of them and find the right location.

Cyber terrorist viruses send secret information in computer systems such as international security steals information related to national security, make cyber attack on any government. Actually all this is done by hacking cars through internet to prevent these cyber criminals. Special technology is required for cyber terrorists to do this attack by making special issue the issue. Cyber terrorism is the biggest threat to the whole world and country. Terrorists

spread violence in any area by sending information immediately through the Internet. The result is loss of life and property and loss of government property.

Keywords

Cyberterrorism, information technologies, Internet, computer network, cyberspace, E-Crimes, security.

RESERCH METHODLOGY,

In order to achieve the objectives, doctrinal and explorative research methodology has been used. The data has been collected from various primary sources like statutes and text of conventions and reports and secondary sources like books and e- resources etc. Summative content analysis of available text has relied upon.

INTRODUCTION

Terrorism is a much used term, with many definitions. According to the US Department of State, the term Cyber Terrorism means premeditated, politically motivated violence perpetrated against not – combatant targets by sub- national groups or clandestine agents . As the Times of India reports the rising threat of Terrorism has led to unprecedented levels of security of nation.

If a nation is to be enslaved, it can be made an economic slave through hacking. It is the job of cyber terrorists. There are two important elements of cyber terrorists. Use of information technology and the overthrow of the government of any country. Strong desire and religious frenzy result of cyber attacks, murder, economic loss, large scale violence, etc. To prevent these, large scale computer technology requires modernization in which the world can be saved from cyber attacks

Later, Fibber Stage Technology Network System Program, this security circle created for Tata security, cyber terrorists enters into the data without permission and damage the data. By the government of any country, the people of any country and any country are subjected to heavy economic damage by cyber attacks. This cyber attack is a big threat to the national security. By unauthorized entry into the computer security circle, interfere in important tasks

We today dependent on all services online using All Internets and in the current situation of Kovid-19. All the computers were dependent on the network. At times, there is also the information in the newspapers that Cyber Criminals steal Kovid-19. These terrorists are

causing economic damage to any country by hacking computer systems in any security agency leader government system. Is becoming.

Present situation 2020 and 2021, if we see, the number of them is increasing continuously, since the terrorist attack of 9/11, Cyber terrorists have not become a new word on the target of international security agencies, but Cyber terrorism has become a challenge in the whole world. Which we have to face with the knowledge of modern technology.

MEANING OF CYBER TERRORISM

Terrorism is a much used term, with many definitions. According to the US Department of State, the term Cyber Terrorism means premeditated, politically motivated violence perpetrated against not – combatant targets by sub- national groups or clandestine agents . As the Times of India reports the rising threat of Terrorism has led to unprecedented levels of security of nation.

Cyber Terrorism means illegal threats or targeted attacks to cause harm to computers /or network , critical systems and information related to one or more countries that is aimed at intimidating its government and the public or causing fear in the society for an illegal political religions or social objectives. The acts of cyber terrorism include damage to the protected critical computer systems that contain sensitive information of national inters, plane hijacking and crashes, automated, bomb explosions and damage to any public utility services which are managed by use of computer systems such attacks may cause physical are virtual violence which cause direct damage of nation's people and property or results in riots.[166]

Despite lighter physical and border security, terrorism has been a complex problem faced by the government and the policy makers. With the emergence of new communication technologies, the nature and mode of operation of terrorism has undergone a radical change giving rise to a new variety of terrorism called as cyber terrorism.

According to U.S. National Infra- structure Protection Centre, Cyber terrorism is defined as – "a criminal act perpetrated by the use of computer and telecommunication capabilities, resultant violence, destruction and/ are disruption of services to create fear by causing confusion and uncertainty within a given population, with the goal of influencing a government population to conform to a particular political, social or ideological agenda"

[166] Dresser. Mandeni, Information Technology law (Cyber laws), Asia law house, First Edition 2016.

Thus, cyber terrorism may be said to be a convergence of terrorism and cyber space involving unlawful attacks or threats of attacks against computers, networks and the information stored therein in order to coerce or intimidate a government or its people in furtherance of political or ideological objectives.[167]

The 21th century witnessed the emergence of new Terrorism which is called 'Cyber Terrorism' which was coined by Barry C. Collin. It is controversial term.

WHAT IS CYBER TERRORISM?

Even after several trials and analysis, there has been no clear cut definition of the term 'cyber terrorism'. Most of the discussion regarding the topic has been through the media which is a firm believer of adding drama and sensation. Thus, no good, effective and operational definitions have been produced yet.[168]

Dorothy Denning, professor of computer science has put forward a definition in numerous articles and in her testimony on the subject, before the House Armed Services Committee in May 2000 – "Cyber terrorism is the convergence of cyberspace and terrorism. It refers to unlawful attacks and threats of attacks against computers, networks and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives. Further, to qualify as cyber terrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. Attacks that lead to death or bodily injury, explosions, or severe economic loss would be examples. Serious attacks against critical infrastructures could be acts of cyber terrorism, depending on their impact. Attacks that disrupt nonessential services or that are mainly a costly nuisance would not."[169]

Other scholars have also given unique dentitions of cyber terrorism. Polity denned cyber terrorism as "the premeditated, politically motivated attack against information, computer systems, and data which results in violence against non-combatant targets by sub-national groups and clandestine agents."[170]

TECHNOLOGY.

[167] Satyr P K: computer science& computer Forensics, (2001) page 5.

[168] https://blog.ipleaders.in/ supra Nots 4.

[169] https://blog.ipleaders.in/supra knots 5.

[170] https://blog.ipleaders.in/supra knots 6.

Information includes data, message, text, image, sound, Voice, codes, computer programmers, software and databases or micro film or computer generated micro fiche (Sec. (v) of IT Act, 2000)

Definition of information technologies"[171]The Internatio9nal Foundation for Information Technology (IF&IT) provides three definitions for Information Technology They are: Information Technology is "The technology used for the study, understanding, planning, design, construction, testing , distribution , support and operations of software, computers and computer related systems that exist for the purpose of Data, Information and Knowledge processing"

Information Technology is the industry that has evolved to include the study, science, and solution sets for all aspects of Data, Information Knowledge management and /or processing.

Information Technology is "The organization in an enterprise or business that is held responsible and accountable for the Technology used for planning, design, construction, test ion, distribution, support and operations of software, computers and computer related systems that exist for the purpose of Data, Information and Knowledge Management and/or processing."

MEANING AND DEFINITION DO'CYBERSPACE'

Cyberspace Is "The electronic medium of computer networks, in which online communication takes place (The American Heritage Dictionary of the English Language).

"Cyberspace- a computer network consisting of a worldwide network of computer networks the use the TCP/IP network protocols to facilitate data transmission and exchange" (Thesaurus Legend).[172]

INTERNET

The Internet is a vast computer network linking smaller computer network world wide. An Internet is a series of computer networks all hooked together. Individual computers can communicate with each other over the world because the networks are interconnected.[173]

The Information Technology is lead for e- crimes in cyber space such as cyber warfare, Cyber terrorism, Backing, data thefts, invasion do privacy, hashing attacks, intellectual property infringements, and identity theft and other computer related frauds. The anonymity and speed

[171]Dr. Mandeni Supra Nots 2.
[172]Dr. Mandeni, Supra knots 3
[173]Dr. Mandeni Supra knots 4.

with which these crimes can be committed online renders Cyberspace an attractive medium to cyber criminals.

The e-Crimes often pose serious threats to national security, cause, danger to life and property and may cause economic less to entities and individuals apart from threat to one's privacy and freedom in cyber space.

There are growing instances of behavioral advertising corporate espionage, data mining, employee surveillance and illegal use of web budgeand cookies which is also an affront to the right to privacy of individuals.[174]

THE LEGAL CHALLENGE DUE TO TECHNOLOGY.

Due to new technology and inventions of new tools and machines transforms the industrial or traditional society to the informational society .We can identify three effects of the move:

It represents a shift from ownership or control of things to ownership of or control over information. It represents anew and revolutionary model to market and deliver products or services: and Itrepresents a move from rivalrousness to nonrivalrousness.

All three of these pose serious challenges to traditional legal values and traditional legal rules. All traditional legal systems, including the common law system and the civilian tradition have a basic distinction between tangible and intangible goods. Tangible goods represent goods of economic value and are protected. A person is guilty of theft if they dishonestly appropriate property belonging to another with the intention to permanently deprive the other of it. The key phrase isinterntion to' permanently deprive' makes clear that to commit the offence of theft you must take something which is physical and rivalries. Thus 'coping' without the permission of the owner is not theft. Neither is not theft. The question of how we protect the value of information technology in computer and web gee where it is instantly replicable, transmissible, and is almost infinitely scalable is the challenge the law faces today .the present problems are due to cyber speech and defamation, databases ,copy right in the information age, and computer crime.[175]

In the Information Technology age, equivalent of fragmented responses to different types of physical things in traditional legal settlements: thus instead of a law do property and chattels we have a law of the telephone, law of tale communication. The is exactly what we are doing now in the world of bits by producing specific regulation to deal with copyright infringement,

[174]Dr. Mandeni Supra knots 5.
[175]Dr. Mandeni Supra knots 6.

in indecency, computer crimes such as hacking, pornography, cyber stalking, virus dissemination, piracy, net extortion, phish cyber terrorism, violation privacy on internet. To fall these problems new legal- regulatory formwork of digital information has been evolved.[176]

THE CONCEPT OF CYBER TERRORISM.

that is individuals or groups using the network capabilities of the information society to launch unlawful attacks and threats of attack against computers, networks and the information stored therein to intimidate or coerce a government or its people in furtherance of political or social objectives, is newer, dating from around the turn of the millennium . Some authors choose a very narrow definition relating to deployments, by known terrorist organizations, of disruption attacks against information systems for the primary purpose of creating alarm and panic. Cyber Terrorism canals redefending much more generally as given below. [177]

TYPES OF CYBER TERROR CAPABILITY

The following three levels of cyber terror capability are defined by Monterey group:

Single- unstructured: the capability to conduct basic backs against individual systems using tools created by someone else. The organization possesses little target analysis command and control, or learning capability Advanced – structured: the capability to conduct more sophisticated attacks against multiple systems or networks and possibly, to modify or create basic hacking tool. The organization possesses on elementary target analysis, command and control, and Yearning capability.

Complex-coordinated: the capability for a coordinated attacks capability of causing mass-disruption against integrated, heterogeneous defences Ability to create sophisticated hacking tools. Highly capable; target analysis command and control, and organization learning capability.[178]

(CYBER) CRIMINALITY AND (CYBER)TERRORISM

In the same way that any crime should not be confused with a terrorist attack[179], the concept of cybercrime should not be confused with that of cyber terrorism. In that sense and as already indicated, just as terrorism is always more severe than other forms of criminality, cyber

[176]Dr. Mandeni Supra knots 7.
[177]Dr. Mandeni Supra knots 8.
[178]Dr. Mandeni Supra Knots 9.
[179]https://scielo.conicyt.cl/scielo.php? Script=sci_arttext&PID=S0719-25842018000200005#B54.

terrorism is always more severe than other behaviors that are carried out "in" or "through" cyberspace. This approach seeks to avoid a "trivialization" of the concept of terrorism [180] and cyber terrorism, which would certainly occur if they were defined without considering the particular severity that characterizes both phenomena.

In order to better understand what has been pointed out, we must take into account not only the concepts of terrorism and cyber terrorism, in the aforementioned sense, but also the notions of computer crime, cybercrime, and common crime. It should be noted that although not all authors distinguish between computer crime and cybercrime, differentiating between them can be useful for analytical purposes.

Computer crimes can be classified into computer crimes in a broad sense and computer crimes in a strict sense. Computer crimes in a broad s[181]

ELEMENTS

Cyber terrorism in its entirety consists of two crucial elements, the teleological element and instrumental element. The teleological element describes cyber terrorism being committed with the objectives of altering the constitutional order or to capsize the legitimately elected government, through a major political agenda The instrumental element perpetrates that acts must be executed in a manner that instill a sense of terror in people's minds, establishing a belief that anyone anywhere could be a victim of cyber terrorism, involving the realization of an indiscriminate attack "in" or "through" the cyberspace, with devastating consequences like deaths, serious injuries or other similar outcomes in the real world.[182]

LEGAL ISSUES RELATING TO INFORMATION TECHNOLOGY OR CYBERSPACE.

Over the last decade, computer and telecommunications Technology have developed at an extraordinary rate. The computing power, advances in data transmission and attractive and used- friendly graphic interfaces have developed and used at an abnormal speed throughout the world. The increased Information Technology paved the ways to the different kinds of cybercrimes.

[180]https://scielo.conicyt.cl/scielo.php? Script=sci_arttext&PID=S0719-25842018000200005#B44.

[181]https://scielo.conicyt.cl/scielo.php? Script=sci_arttext&PID=S0719-25842018000200005#B41.

[182]https://blog.ipleaders.in/supra nots.

The dynamics of Information Technology requires special treatment due to its unique and inherent matrix and far reaching implications. Information Technology clearly requires a special law to be developed. However, the special law may not be able to cover exhaustively all fields of law such as Criminal law, Evidence law, intellectual property law but the same are often relevant for consideration wherever there is involvement of computers or internet which is in extricable linked with act or omission, dispute or subject matter under adjudication. Hence adapting the relevant traditional laws to provide for laws governing online sphere is imperative to enable is clear application and effective dispensation of justice.

INDIA HAS BEGUN ITS DEVELOPMENT CYBER TERRORISM IN INDIA

And reliance on technology depicting its steady growth and shifting to a modern form of governance. Sectors like income tax, passports and visas have taken the driver seat to e-governance with police and judiciary culminating its way upward. This growth has both positive as well as negative aspects to it. With use comes greater responsibility of handling data online with care as any damage can have catastrophic consequences and India cannot afford to collapse. The episodes of online warfare and cyber-attacks are high against India. Time and again we have been attacked in full force by China and Pakistan.[183]

China, who on one hand is strengthening its ability to wage electronic warfare, on the other hand, Pakistan has increased cyber attacks on India and its crucial websites in retaliation to the Jammu and Kashmir issue, thus extending their warfare to completely new, unpredictable and dangerous zones like cyberspace. Hacker groups have intensified their raging attacks on India and we need a strong and structured system to fight the digital war. The acts of cybercrimes and terrorism have multiplied in lots and bounds; the Parliament of the Republic of India has not yet enacted any legislation that specifically addresses the problem of cyber coercion. However, there are some existing legislation and some amendments to incorporate it at intervals to deal with the issues.[184]

THE INDIAN SYSTEM [185]

India has always taken a tough stance and fought against acts of terrorism. It does not come as a shocker that India, in the context of cyber terrorism, has formulated stringent laws and policies to overcome the uncertain yet grave danger to the society and important infrastructure.

183https://blog.ipleaders.in/supraNots 6.
[184]https://blog.ipleaders.in/Supra knots 7.
[185]https://blog.ipleaders.in/Supra nots 8.

Our nation has equipped its Information and Technology Act, 2000 with stringent laws. The original IT Act was drafted by T. Vishwanath, but the idea of cyber terrorism wasn't included in the parental legislation. In the year 2008 after witnessing the incidents of international and national incidents of cyber terrorism, there was a realized need for strong and stringent provision as well as punishment of cyber terrorism.

The use of technology in the Mumbai attacks of November 2008 made India adopt the amendments to its 2000 IT Act in December 2008, which inculcated provisions related to cyber terrorism, which might be applied in the future. In the purview of these amendments, Section 66F had been inserted in the Act by Information Technology (Amendment) Act, 2008. This section contains the substantive offence of committing the act of cyber terrorism. The Sections 66-F, 70, 70-A and 70-B of the Information Technology Act, 2000 makes it possible for the government to maintain cyber security in the country.

The term "Critical Information Infrastructure" in Section 66F is defined in the Explanation enshrined in the amended Section 70. Section 70A has been formed to secure the CII through a National Nodal Agency which will be established by the Central Government.

Section 70B gives power to the Indian Computer Emergency Response Team (CERT-IN) as the national focal point for gathering information on threats and to facilitate the Central Government's response to computer centred incidents.

Sections 70-A and 70-B cover both the investigatory process and the preventive measures.

The section under the IT Act deals with a wide variety of issues including:

Hacking (Sections 43 & 66)

phishing (Sections 66C, 66D & 74)

Identity fraud (Sections 66C)

Electronic theft (Sections 72 & 72A)

DATA ANALYSISYEAR 2016-2019

The NCRB's data stated that 12317 cases of cyber crimes were registered in 2016 as compared to 21796 in 2017.

Comparing the data of 2016 and 2017 cybercrime according to NCRB recurs, we find that the there is a significant increase in 9479 cyber crime in 2017 as compared to 2016.

The NCRB's data stated that 21796 cases of cyber crimes were registered in 2017 as compared to 28248 in 2018.

Comparing the data of 2017 and 2018 cybercrime according to NCRB recurs, we find that the there is a significant increase in 6452 cyber crime in 2018 as compared to 2017.

The NCRB's data stated that 27248 cases of cyber crimes were registered in 2018 as compared to 44546 in 2019.

Comparing the data of 2018 and 2019 cybercrime according to NCRB recurs, we find that the there is a significant increase in 17298 cyber crime in 2019 as compared to 2018.

The NCRB's data stated that 4, 4546 cases of cyber crimes were registered in 2019 as compared to 28248 in 2018.

New Delhi:

Digital India may have become a soft target for criminals as country recorded a huge increase of 63.5 percent in cyber crime cases in the year 2019, showed the National Crime Record Bureau data.

The NCRB's data stated that 4, 4546 cases of cyber crimes were registered in 2019 as compared to 28,248 in 2018.

The data showed in 60.4 percent of cases, registered fraud was the motive followed by sexual exploitation (5.1%) and causing disrepute (4.2%).

Highest number of cyber crime cases were registered in Karnataka (12,020) followed by Uttar Pradesh (11,416), Maharashtra (4,967), Telangana (2,691) and Assam (2,231). Among the Union Territories, Delhi alone accounted for 78 percent of cyber crimes.[186]

Since the start of the COVID-19 pandemic, WHO has seen a dramatic increase in the number of cyber attacks directed at its staff, and email scams targeting the public at large. [187]

This week, some 450 active WHO email addresses and passwords were leaked online along with thousands belonging to others working on the novel corona virus response.

The leaked credentials did not put WHO systems at risk because the data was not recent. However, the attack did impact an older extranet system, used by current and retired staff as well as partners.

WHO are now migrating affected systems to a more secure authentication system?

Scammers impersonating WHO in emails have also increasingly targeted the general public in order to channel donations to a fictitious fund and not the authentic .The number of cyber

[186] https://www.ndtv.com/india-news/digital-india-sees-63-5-increase-in-cyber-crime-cases-shows-data-2302958

[187] https://www.who.int/news/item/23-04-2020-who-reports-fivefold-increase-in-cyber-attacks-urges

attacks is now more than five times the number directed at the Organization in the same period last year. [188]

"Ensuring the security of health information for Member States and the privacy of users interacting with us a priority for WHO at all times, but also particularly during the COVID-19 pandemic. We are grateful for the alerts we receive from Member States and the private sector. We are all in this fight together," said Bernardo Mariano, WHO's Chief Information Officer. WHO is working with the private sector to establish m[189]ore robust internal systems and to strengthen security measures and is educating staff on cyber security risks. [190]

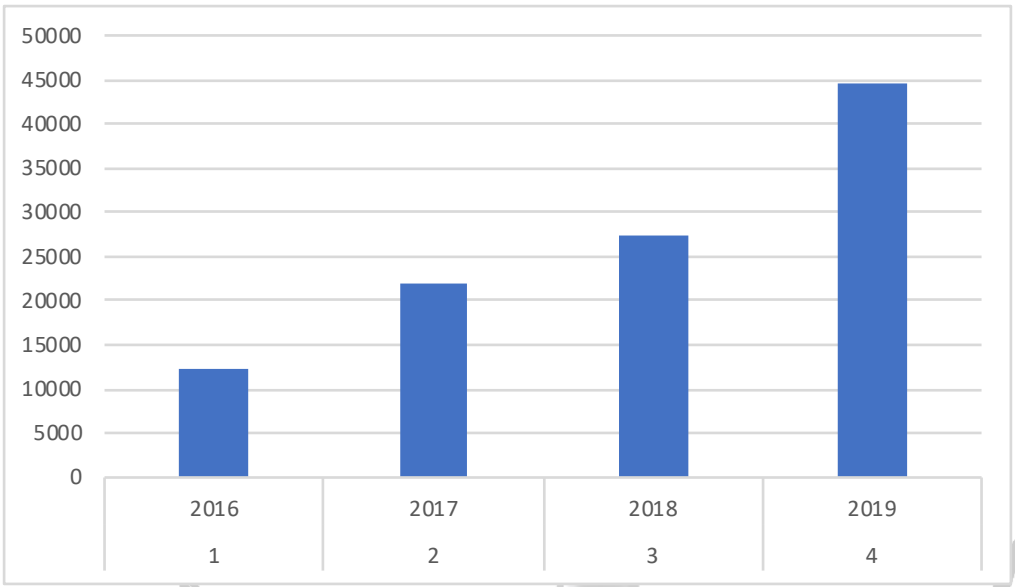
WHO asks the public to remain vigilant against fraudulent emails and recommends the use of reliable sources to obtain factual information about COVID-19 and other health issues. For more information, please [191]

CYBER CRIME (State –wises- 2026-2019)[192]

Table[193]I

SO No	Total UT(S)Total all India	Total UT(s) total all India.
1	2016	12317
2	2017	21796
3	2018	27248
4	2019	44546

[188] . https://www.who.suopra Nots2.
[189] . https://www.who.suopra Nots3
[190] . https://www.who.suopra Nots4.
[191]: www.who.int/covid-1
[192] Crime in India 2018Volume II page -799.
[193] Crime in India 2019Volume II peg- 775.



Year 2016-2019

FAMOUS CASES [194]

The NotPetya was a similar incident which highlighted the importance of stringent measures and laws to be taken up exposing a systemic risk and affecting a broad cross-section of businesses without specific targeting, thus demonstrating the potential for the increasing threat of cyber terrorism.

9/11

"Our nation is at great risk of a cyber attack that could devastate national psyche and economy more broadly than did the 9/11". - Roy Marion

The 'still entrenched in the minds' event that took place on September 11, 2001, in America which shook the whole world and raised a very big question, about the safety in the uncertain and unknown areas of cyberspace and its potential to create a terrorist attack. Importance of provisions and laws along with a safety net seriously and thus, was created a challenge to accomplish all possible methods to reduce the cyber threat. It was a wake-up call for the world to deal with the ever-rising issue. Even after 9/11 similar attacks continue to take place and require a lot of attention to face the potential threat cyberspace poses to the globe.

AHMADABAD BOMB BLAST

[194] https://blog.ipleaders.in/cyber-terrorism-a-rising-threat-to-india/

On 26 July 2008, The Ahmadabad bomb blast took place which was a series of 21 blasts in 70 mines where more than 70 people were killed and around 200 got injured. News agencies reported that they had received 14 page long emails from the terror group called Indian Mujahedeen, Islamic Militant Group (Hark at-Ulf-Jihad-al-Islam) claiming responsibility of terror attack just 5 minutes before the blast referring to an Awaited 5 minute patient act to take Revenge from Gujarat in retaliation to the 2002 Gujarat Godhead Train Burning incident.

26/11

The date 26th November 2008 was a dark day for witnessing a very tragic Incident of 12 coordinate shooting and bombing that lasted 4days across Mumbai. According to Experts, it was a major cyber attack. There were ten Pakistani men related to the phobia cluster terrorist group attacked buildings in Bombay, killing 164 individuals, 9 gunmen were killed throughout the attacks, one survived. They began their journey from Karachi, West Pakistan to Bombay via boat. Hijacking a fishing trawler and killing four crew members and slitting the captain's throat. The terrorists thrived in the Bombay city district close to the entryway of the Republic of India monument.

And requirements of national security are changing rapidly. The most important implications of these changes for cyber security may well be that national policies must adjust to growing interdependence among economies and emphasize the need for cooperation among nations to defeat cyber threats

HOW TO PROTECT FROM CYBER TERRORISM

All accounts should have passwords and the password should be unusual difficult to guess.

Change the network configuration when defects become know.

Cheek with vendors for upgrades and patches.

Audit systems and check logs to help in detecting and tracing, an intruder.

If you are ever unsure about the safety of a site, or receive suspicious email from an unknown address, don't access it. It could be treble.

Supervisory Control and Data Acquisition (SCADA) systems are used to protect against a cyber attack .SCADA systems are computer systems relied upon by most critical infrastructure organisations to automatically monitor and adjust witching manufacturing and other process control activities based on feedback data gathered by sensors. In addition to SCADA system,

commercial off- the Shelf (cots) software system is being used by linking their internet directly to their corporate headquarters office.[195]

Cyber- terrorism may be defined as "any person, group or organisation who with the terroristic internet utilises, accesses or causes to access a computer or computer network or electronic system or device or by any available means and thereby knowingly engaged in or attempts to engage in a terrorist act, commits the offence of cyber terrorism. Thus it is a pre- meditated use of disruptive activities or threat thereof in cyberspace with the interspaced to further some social, ideological, religious, political or similar objective or to intimidate any person in furtherance of such objective, [196]In other words, it is a premeditated, politically motivated violence perpetrated against non – combatant6 targets by anti- national groups or clandestine agent, agent, usually intended to create terror and insecurity among the people.[197]

In cyber terrorism, a particular person is not affected but it has its vicious impact on the community at large. In this sense, it is somewhat different from other cybercrimes for the reason that later is generally a domestic issue, which may or may not have for have far reaching consequences, Cyber terrorism is a matter of global concern having both, domestic as well as international implication. The common form of terrorist attack on the internet is distributed denial of service, hate websites, hate e- mails, attack on sensitive computer networks etc.[198]

The threat from cyber terrorism has assumed alarming dimension with the international terrorist group operating from countless sources to attain their ill- conceived extremist – goals, Al Qaeda is one such prominent international terrorism group which has drawn attention in last few year. It is opposed to all

'Non-Islamic "regimes and is strongly anti – western. Its main goal is to re-establish the Muslim State throughout the Persian Gulf. If it has developed a communication network based on the internet to be used as a weapon against the western world.[199]The U.S. Government it waging a cyber war against Osama bin laden and his allies utilizing the services of a group of hackers called young Intelligent Hackers against Terrorists headed by Kim Schmitz, a German hacker working as security consultant for U.S.[200]

[195] Dresser. Mandeni, Supra Nots 10.
[196]NagpalR: Defining Cyber Terrorism, page 122.
[197] Dr Vishwanath paranjape ,Legal Dimensions of Cybercrimes and preventive laws with Special Reference to India ,Edition 2010 ,page-61
[198] Dr Vishwanath paranjape, Supra nots page-61.
[199] Dr Amite Vera: cybercrimes and law, 1st Edi.2009, page 226.
[200] Another U S –based hacker group Known as "ispatchers"is also engaged in tracking down the sites of Osama Bin Laden.

As of 2016 there have been seventeen conventions and major legal instruments that specifically deal with terrorist activities and can also be applied to cyber terrorism.[201]

1963: Convention on Offences and Certain Other Acts Committed on Board Aircraft[202]

1970: Convention for the Suppression of Unlawful Seizure of Aircraft

1971: Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

1973: Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons

1979: International Convention against the Taking of Hostages

1980: Convention on the Physical Protection of Nuclear Material

1988: Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation

1988: Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

1988: Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

1989: Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

1991: Convention on the Marking of Plastic Explosives for the Purpose of Detection

1997: International Convention for the Suppression of Terrorist Bombings

1999: International Convention for the Suppression of the Financing of Terrorism

2005: Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

2005: International Convention for the Suppression of Acts of Nuclear Terrorism

2010: Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft

2010: Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation[203]

CONCLUSION AND SUGGESTION

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[201] https://en.wikipedia.org/wiki/Cyberterrorism.

[202] https://en.wikipedia.org/wiki/Cyberterrorism

[203] https://en.wikipedia.org/wiki/Cyberterrorism.

The expansion of internet and computer network all over the world has generated a new species of crime co0mmonly known as cyber crimes. The area's most hit by the impact of the these crimes is economy and security regimes because the alarmingly expanding dimensions of cyber fronds and terrorist activities of hardcore terrorists are ruining the nation's economy and posing a threat to the national security destroying its internal and external peace. The studies conducted by Mc Connell International on cyber law concluded that 'cyber criminals around the world are lurking on Net as a menace to financial health of businesses, and an emerging threat to the nation's security.' The intellectual property rights violation and leakage of confidential information and trade secret disclosure online of the business houses, industries, banking and financial institutions etc. is causing tremendous loss which extend to millions of rupees.

Information technology was developed by humans in the form of communication revolution in which this technology spread all over the world with the invention of internet, in which computer communication network, information data storage, all of them revolutionized the field of communications, most of them mainly Services went online like banking sector, insurance sector, security sector, all of them were renamed as information revolution through internet but as we know

Thus it is a pre- meditated use of disruptive activities or threat thereof in cyberspace with the interspaced to further some social, ideological, religious, political or intimidate any person in furtherance of such objective,

In cyber terrorism, a particular person is not affected but it has its vicious impact on the community at large. In this sense, it is somewhat different from other cybercrimes for the reason that later is generally a domestic issue, which may or may not have for have far reaching consequences, Cyber terrorism is a matter of global concern having both, domestic as well as international implication. The common form of terrorist attack on the internet is distributed denial of service, hate websites, hate e- mails, attack on sensitive computer networks etc

As we know there are 2 aspects of every coin. Some people took this information technology as a boon and took it to new heights in the nation and the world like cyberspace. But there were also some anti-social people who misused this technology in this information communication system.

Defining cyberTerrorism is a difficult task. Cyberterrorists cause economic damage to the government of any country through the use of information technology through internet and

computers. There is a major role of cyber criminals which turns into cyber terrorism. The biggest danger to them is that it is a difficult task to get hold of them and find the right location. There should be a sense of cooperation between nations to avoid cyber attacks. The law needs to be improved by spreading public awareness about the dangers of cyber terrorism

With increasing dependence on the IT sector, effective measures to protect it are necessary. Social justice systems are under greater pressure to deal with the cyber criminals and what they need to know about the stringent provisions that cyber terrorism is increasing globally. At the same level, an effective task force should be formed to deal with them under the leadership of the youth, there is a shortage of good IT experts in our country and they should be made available through training.

OVERLAPPING AND POSSIBLE CONTRADICTIONS BETWEEN BILATERAL INVESTMENT TREATIES AND THE TRIPS AGREEMENT: A BRIEF STUDY

- PARIEKH PANDEY

1. INTRODUCTION

With the tremendous growth of businesses in international spheres, the need of protection of intellectual property owned has risen manifold, mainly due to the internet – a medium through which a business becomes capable of reaching consumers throughout the globe. This has sparked the need to recognise the protection of Intellectual Property Rights (IPRs) over a number of States, while becoming a major worry for the international investors willing to invest in a particular country.

The need for international protection of IPRs can be ascertained from the fact that by strengthening the level of protection afforded to intellectual property in a closed economy, such a State can ensure a greater incentive for creativity and innovation, and subsequently the benefits that come from having better products. However, it curtails the scope of potential competition and subsequent development for firms that have previously innovated, and thus limits the benefits realised from the existing products.[204]

On these lines, it must be noted that an efficient patent regime is one that provides optimal incentives to innovators through various combinations of patent policies in different countries.[205] Case studies like Pfizer show the extent to which companies and businesses can go to protect its intellectual property, in a world where such a concept is not universally recognised or accepted.[206] In principle, the efforts to extend IPRs beyond the boundaries of the concerned State are not recognised. However, while IPRs do create the market power, the impact on competition is variable, depending upon the products, technologies, nations as well as the scope of protection.[207]

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[204] Gene M. Grossman and Edwin L.C. Lai, "International Protection of Intellectual Property", *The American Economic Review*, Vol. 94, No. 5, December 2004, pp. 1635-1653.

[205] *Ibid*.

[206] Lynn S. Paine and Michael Santoro, "Pfizer: Global Protection of Intellectual Property", *Harvard Business School (HBS) Case Collection*, February 1992.

[207] Keith E. Maskus, "The International Regulation of Intellectual Property", *IESG Conference – University of Nottingham*, September 1997, available at

2. CONCEPTS – DEFINITION AND SCOPE

Before understanding the interdependence between the two concepts, and the relevant conflicts and contradictions between them, it is necessary to understand what the two concepts entail in their basic context, with respect to both the investment criteria of individual countries as well as the protection of intellectual property in such contexts.

2.1. Bilateral Investment Treaties (BITs)

BITs, also referred to as Bilateral Investment Protection Agreements (BIPA), refers to an agreement made between two countries containing reciprocal undertakings in relation to the promotion and protection of private investments made by nationals of the signatory countries in each other's territories. They establish the terms and conditions under which investments of nationals as well as their rights and protections are determined and governed.[208]

BITs can also be defined in other words as agreements between two countries for the reciprocal promotion and protection of investments in each other's territories by individuals and companies situated in either State. These agreements serve the purpose of protecting the investments made in one country by investors belonging to another.[209] In other words, it is an agreement between two countries, setting up the "rules of the road" with regard to foreign investment in each other's countries.[210]

The significance of such treaties can be ascertained not only from the extensive network of rights and obligations corresponding with the respective parties, but also from their contribution to an emerging international acceptance of common standards regarding the treatment of foreign investment.[211] Another reason behind their popularity would be the

http://siteresources.worldbank.org/INTRANETTRADE/Resources/maskus3.pdf (last accessed 07 November 2018).

[208] "Bilateral investment treaty (BIT)", *Thomson Reuters Practical Law Glossary*, at https://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 (last accessed 07 November 2018).

[209] Tojo Jose, "What is Model Bilateral Investment Treaty (BIT) 2016?", *IndianEconomy.net*, 29 July 2017, at https://www.indianeconomy.net/splclassroom/what-is-model-bilateral-investment-treaty-bit-2016/ (last accessed 07 November 2018).

[210] "Bilateral Investment Treaties: What They Are and Why They Matter", *The US-China Business Council*, June 2014, available at https://www.uschina.org/reports/bilateral-investment-treaties-what-they-are-and-why-they-matter (last accessed 07 November 2018).

[211] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, Leiden (Netherlands), 1995.

unsuccessful multilateral treaties on foreign investment, due to disagreements and contradictions regarding key issues on this matter.[212]

As compared to the Friendship, Commerce and Navigation Treaties (FCNs), which were the first generation of investment treaties requiring host states to treat foreign investments on the same lines as investments from its own investors, the BITs act as the second generation of investment treaties, setting forth certain standards applicable and actionable as per investors from other nations, inclusive of:

- Fair and equitable treatment (also known as National Treatment/ Most Favoured Nations clause)
- Protection from expropriation; and
- Free transfer of means, apart from full protection and security.[213]

There can be several potential benefits or advantages, identifiable from the usage and adoption of BITs, which majorly include the following:

- Attracting foreign investment.
- Levelling the playing field for both domestic and foreign investors.
- Facilitating domestic reforms in host countries in terms of investment regulations.
- Depoliticisation of Investment disputes between investors or even nations.
- System costs and benefits.
- Distributive impacts and benefits, such as improved negotiations between investors and nations as well.[214]

2.2. The TRIPS Agreement

The World Trade Organisation (WTO), having 162 nations as members till date, is the international organisation dealing with the rules of trade between nations. In becoming the members of the WTO, the member countries have undertaken to acknowledge and adhere to the 18 specific agreements annexed to the Agreement establishing the WTO. One of these agreements is the Agreement relating to the Trade-Related Aspects of Intellectual Property

[212] Tarcisio Gazzini and Eric Brabandere, *International Investment Law: The Sources of Rights and Obligations*, Martinus Nijhoff Publishers, Leiden (Netherlands), 2012.

[213] "Bilateral Investment Treaty", *Legal Information Institute – Cornell Law School*, at https://www.law.cornell.edu/wex/bilateral_investment_treaty (last accessed 07 November 2018).

[214] Jonathan Bonnitcha, "Assessing the Impacts of Investment Treaties: Overview of the evidence", *International Institute for Sustainable Development (IISD)*, September 2017, available at https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf (last accessed 07 November 2018).

Rights (TRIPS), the most comprehensive multilateral agreement on intellectual property till date.[215]

After the Uruguay Round of 1986-94, the 8th round regarding the negotiation rounds between the erstwhile General Agreement on Tariffs and Trade (GATT) member nations, the TRIPS Agreement came into effect on 01 January 1995.[216] The main aim of the agreement, as mentioned in its Preamble, is the desire "*to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade*".[217]

The areas of intellectual property covered under the TRIPS agreement include copyrights and related rights, as well as trademarks (inclusive of service marks) and patents (including protection to new plant varieties), apart from geographical indications, industrial designs, layout-designs of integrated circuits, and undisclosed information. Under the Agreement, members are obligated to a limited extent to recognise the provisions of the Agreement in their legislative practices.[218]

The Agreement imposes certain conditions on the member States, to attain the minimum levels and standards of protection. In addition, the Agreement proposes certain domestic procedures and remedies with respect to the protection of intellectual property rights. There is sufficient freedom with the member States to determine and legislate on the most appropriate method of implementation of the provisions of the Agreement, within their own legal system and practice, depending on the conditions and environment in the individual States concerned.[219]

3. CONTRADICTIONS BETWEEN BITs AND TRIPS

The overlapping nature has been a source of debate and discussion among economists and legal authorities, regarding the prevalence of individual treaties over other agreements, the nature of

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[215] "WTO and the TRIPS Agreement", *World Health Organisation (WHO)*, at http://www.who.int/medicines/areas/policy/wto_trips/en/ (last accessed 07 November 2018).

[216] "TRIPS Agreement on the Trade-Related Aspects of Intellectual Property", *LawTeacher*, at https://www.lawteacher.net/acts/trips-agreement-intellectual-property.php#_ftn13 (last accessed 07 November 2018).

[217] *Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)* (adopted 15 April 1994, entered into force 01 January 1995) 1869 U.N.T.S. 299: 33 I.L.M. 1197.

[218] Tojo Jose, "What is Trade-Related Intellectual Property Rights (TRIPS)?", *IndianEconomy.net*, 30 April 2017, at https://www.indianeconomy.net/splclassroom/what-is-trade-related-intellectual-property-rights-trips/ (last accessed 07 November 2018).

[219] "Overview: the TRIPS Agreement", *World Trade Organisation (WTO)*, at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last accessed 07 November 2018).

individual protection of IPRs, etc. However, it is well established that the BITs are much more independent and inclusive of provisions relating to IPR protection, as compared to the rigidity of the TRIPS agreement in terms of its adaptation in the domestic laws of the WTO member States.

3.1. Interrelation between BITs and TRIPS

Bilateral trade agreements between WTO members are by definition considered under the term "WTO-plus", considering their purpose of deviating from the multilaterally decided and agreed standards for the international protection of IPRs. With respect to national treatment, there might be a possible situation challengeable under a BIT, although the treatment might conform to the TRIPS agreement due to its varied exceptions. The arguments based on the legitimate expectations of the investors offer considerable room for investors to claim their rights against host governments.[220]

The International Law Commission (ILC) recognises two basic kinds of relationships between two valid and applicable international law norms, which can include a TRIPS provision as opposed to a BIT provision. These categories are described as follows:

- Relationships of interpretation – In such cases, one norm aids or assists in the interpretation of another, and may be recognised as an application, clarification, updating or modification of the latter. Such norms are to applied in conjunction.
- Relationships of conflict – In these cases, a choice is required to be mad between two perfectly valid points or provisions, applicable to the same subject-matter or two incompatible decisions pitted against each other. The basic rules for dealing with such situations is to be found in the relative provisions of the Vienna Convention on the Law of Treaties (VCLT).[221]

On these lines, while relationships of interpretation can be resolved by adopting the principles of harmonic interpretation and systemic integration, the relationships of conflicts between the BITs and the TRIPS agreement can be solved by the concerned conflict resolution rules

[220] Bertram Boie, "The Protection of Intellectual Property Rights through Bilateral Investment Treaties: Is there a TRIPS-plus Dimension?", *The National Centres of Competence in Research (NCCR) Trade Working Papers*, No. 2010/19, November 2010, p. 40.

[221] *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (adopted 18 July 2006, entered into force 01 September 2006) U.N. Doc. A/CN.4/L.702.

applicable, which may derive either from the treaties or from general international law.[222] Apart from acknowledging the application of Articles 30 and 41 of the VCLT, the aforementioned ILC Report identifies certain legal maxims as options to the VCLT provisions, inclusive of:

- *Lex specialis* (regarding the relations between general and more specific rules)
- *Lex posterior* (regarding the relations between prior and subsequent rules) or
- *Lex superior* (regarding the relations between rules at different levels of the same hierarchy).[223]

3.2. Approach with regards to BITs in terms of TRIPS

In contrast to a confrontational approach between the concerned BITs and the TRIPS agreement, the legal scholars and IPR activists propose a more cooperative stance, wherein the WTO member States can treat the TRIPS agreement as a basic set of default rules which can be "bargained" and negotiated, with a view to obtaining the best for all the parties and players involved.[224] In other terms, the emerging rules of protection in BITs can be easily made to base their foundation on the TRIPS agreement, for an all-round level of IPR protection without impending conflicts.[225]

4. INDIA-UAE BILATERAL TREATY – BRIEF STUDY

On 12 December 2013, the Indian government signed a bilateral agreement with the United Arab Emirates (UAE), in the course of reviewing its bilateral investment protection regime in the wake of public outcry over arbitration notices served by foreign investors such as Vodafone and Sistema.[226] This is the latest bilateral treaty entered into by India, in force since 21 August 2014.[227]

The provisions of the treaty are discussed as follows in a brief manner:

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[222] Joost Pauwelyn, "The Role of Public International Law in the WTO: How far can we go?", *American Journal of International Law*, Vol. 95, No. 3, July 2001, pp. 535-578.

[223] Henning Grosse Ruse-Khan, "The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?", *Journal of Intellectual Property Law – University of Georgia*, Vol. 18, No. 2, March 2011, pp. 325-365.

[224] J.H. Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?", *Case Western Reserve Journal of International Law*, Vol. 32, No. 3, January 2000, pp. 441-470.

[225] Ruse-Khan, *supra* note 16.

[226] Kavaljit Singh, "Assessing India's Bilateral Investment Protection Agreement with UAE", *Madhyam Commentary*, 27 October 2014, at http://www.madhyam.org.in/assessing-indias-bilateral-investment-protection-agreement-uae/ (last accessed 09 November 2018).

[227] "India – United Arab Emirates BIT (2013)", *Investment Policy Hub – UNCTAD*, at http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/1967 (last accessed 09 November 2018).

1) The treaty contains a provision regarding the treatment of investments from the UAE, to be treated in the same manner and at the same level as the investments from other nations, however favourable the treatment of other investments might be.[228] This is similar to the TRIPS provision regarding the MFN clause, apart from exclusion of procedural or jurisdictional matters from its purview while notwithstanding the provisions of other BITs.

However, the treaty also excludes the obligation of a nation to extend any special treatment or privileges arising from any customs or economic or monetary union, or any other similar international agreement to which either of the Contracting Parties may be a party, apart from any other international agreement relating wholly to taxation.[229]

2) Article 13 of the treaty clearly specifies, "*If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling Investments and associated activities by Investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over this Agreement.*"[230]

In simple words, it can be noted that obligations under international agreements, including those under TRIPS, are to prevail over this particular treaty. However, this is not the specific rule when it comes to determining the scope of repugnancy between BITs and TRIPS, since different countries have different perspectives about being governed by the provisions of either BIT or TRIPS.

Thus, it is clear from the provisions of the above-mentioned treaty between India and UAE, that in case of any repugnancy between the TRIPS and the BIT, the TRIPS would prevail, but only to the extent as is made permissible under the BIT. In other words, the BIT in actuality determines the extent to which India ascertains and acknowledges its obligations under the TRIPS agreement.

5. ANALYSIS AND CONCLUSION

[228] *Agreement Between The Government of the Republic of India and The Government of the United Arab Emirates on The Promotion and Protection of Investments*, art. 5, para 1.

[229] *Id*, art. 5, para 4.

[230] *Id*, art. 13.

The possible scope of contradiction between BITs and the TRIPS agreement gives rise to the following arguments in favour of BITs, due to some logical and implementation flaws of the TRIPS agreement, as explained below:

1) Although the TRIPS agreement recognises the principle of National Treatment, it must be noted that due to the pseudo-legal nature of the provisions of international law in general, there is no scope for implementation of the same principle in the individual dealings and functioning of even the members to the WTO, let alone the countries independent of the same. This inevitably leads to the conclusion that even if countries adopt certain provisions not in accordance with the standards of protection enlisted under the TRIPS agreement, the respective States cannot be compelled to give complete and absolute recognition to the TRIPS provisions. In other words, there is no fixed, foolproof mechanism to ensure the implementation of the TRIPS provisions by individual States in their treaties and legal systems, except through the vague and ambiguous social sanctions by the WTO.
2) Article 1 of the TRIPS agreement states that, "*Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.*"[231] This iterates the freedom accorded to members to incorporate, modify or even eliminate and omit the provisions corresponding to those under the TRIPS agreement. Also, enacting BITs gives the requisite liberty to nations to develop their own provisions in relation to not only the protection of intellectual property, but also cover other aspects pertaining to business involving the former.
3) The TRIPS agreement is very clear in its position regarding the individual treaties between nations, in comparison with the National Treatment principle as well as the Most-Favoured-Nation (MFN) clause, which may pertain to the protection of IPRs – "*Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property.*"[232] Thus, it can be understood that if the BITs pertain to the protection of intellectual property, but provide for some favourable protection with respect to the individuals from a certain nation or many nations, they can be exempted from conforming with the provisions of the TRIPS agreement. This

[231] *TRIPS*, *supra* note 10, art. 1, para 1.

[232] *Id*, art. 4.

opens many avenues with the nations entering into treaties, to develop their own provisions in relation to IPR protection while maintaining the main objective of encouraging and promoting an investment-friendly atmosphere, in keeping with the requirements of the environment as well as the conditions regarding the same in both the party-States.

Thus, it can be safely concluded from the aforementioned views and observations, that in case of any discrepancies or contradictions between an individual BIT and the broader TRIPS agreement, the countries would naturally tend to favour their individual treaties due to the reasons as discussed. Summarily, such a behaviour can be accrued not only to the greater amount of freedom entailed with the nature of the BITs, but also to the indirect authorisation available under the relevant provision of the TRIPS agreement.

However, it is very important and highly crucial to note that once the parties to a BIT decide to conform to the BIT provisions, and bypass the protection standards under the TRIPS agreement, they cannot revert back to the TRIPS agreement if any dispute occurs between the two. In other words, the foregoing of the TRIPS provisions would consequently mean that the States cannot resort to these under any circumstances which arise due to any differences or disagreements between them.

HUMAN RIGHTS AND THE SCUFFLE IN ITS OPERATION

- MEENAKSHI. S & THAJASWINI.C.B

"In larger Freedom: towards development, security and human rights for all"[233]

- UN Secretary-General, 2005

ABSTRACT

The notion of Human Rights as we know today has developed over three decades. The concept of natural rights emerged in the seventeenth and eighteenth centuries. It developed as an idea of immutable rights that humans possess from birth. The fortification of human rights becomes the utmost and primary responsibility of every sovereign power of the world. Human rights are based on the essential principles of liberty, dignity and equality to every human being born in this planet. People are entitled to enjoy rights irrespective of national origin, color, language, race, sex, and class or religious or political beliefs. This paper gives a wide analysis of the significance of Human Rights, and the interplay of humanitarian intervention and world politics causing discomposure to the enforcement and sustainability of Human Rights.

I INTRODUCTION

Human rights are one of the most extraordinary moral devices of all stretches. No other conception has an even comparable potential to bring about changes in political life. But they are also one of the most impervious notions of our moral repertoire. Human rights are standards that allow all people to live with **dignity, freedom, equality, justice**, and **peace.** Every person has these rights simply because they are human beings. They are guaranteed to everyone without differences of any kind, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth, or another status.

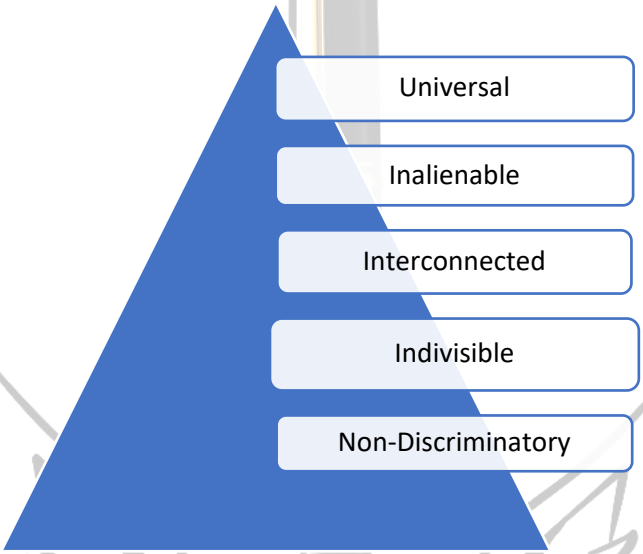
> *"Human rights are foreign to no culture and native to all nations; they are universal."*

II THE ELEMENTS OF HUMAN RIGHTS

[233] *Available at:* https://www.un.org/ (Last visited on April 21, 2020).

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[234]

The important characteristics of Human Rights include:



III IMPORTANCE AND APPLICABILITY OF HUMAN RIGHTS

Human rights reflect the minimum ethics necessary for people to live with self-esteem. Human rights give people the freedom to choose how they live, how they express themselves, and what kind of government they want to support, among many other things. Human rights also guarantee people the means necessary to gratify their basic needs, such as food, housing, and education, so they can take full advantage of all opportunities. Finally, by promising life, liberty, equality, and security, human rights protect people against exploitation by those who are more powerful.

Application of Human Rights Conventions to Domestic Law –

The UNHRCs may effect Domestic Law in the following ways:[235]

A.	Effect on Constitutions
B.	Effect on Legislation
C.	Effect on Common Law

[234] UN General Assembly, Vienna Declaration and Programme of Action, GA Res 48/121, GAOR, UN Doc A/CONF.157/23 (12 July 1993), para 5.
[235] From Lord Bingham's maiden speech to the House of Lord in *Hunt: 1999, 10.*

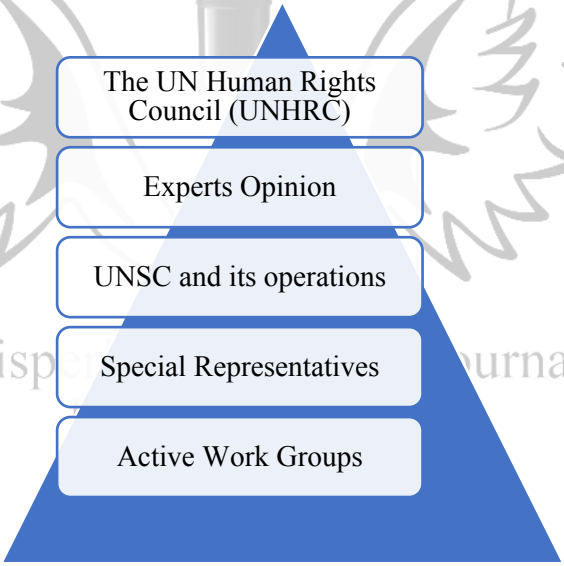
Where a statute is capable of two understandings, the Parliament intended to enact reliably with the UNHRC is what the courts will assume. This is a rule of construction which, on the reliance of it, is fit for creating a liberal elucidation of the legislature in question. Interpretation is directed by an assumed general intention to execute the legislature in question.

If the common law is undefined, vague, or incomplete, courts will administer in a manner, which conforms to the convention. Where courts have discretion, they seek to act in a way, which does not violate the Convention. In the Hong Kong case of *Yin v. Director of Immigration*[236], it was held that "*...when exercising a discretion, the obligations of ratifying a treaty has to be a factor to be taken into account.*"

IV ENFORCEMENT OF HUMAN RIGHTS

The institution of The United Nations (UN) in 1945 guaranteed the protection and enforcement of human rights and subsequently with the adoption of a resolution on the Universal Declaration of Human Rights (UDHR) in December 1948.

Their primitive mechanism includes the following -



Major regional organizations in the Western Hemisphere, Europe, and Africa—such as the Organization of American States (OAS), the European Union (EU), and the African Union (AU)—have integrated human rights into their mandate and established courts to which citizens can appeal if a nation violates their rights. This has led to important verdicts on slavery in Niger and spousal abuse in Brazil, for example, but corruption continues to hamper

[236] [1995] 2 LRC 1.

implementation throughout Latin America and Africa, and a dearth of leadership in African nations has slowed institutionalization.[237]

Over hundred nations across the world have ratified numerous treaties which draws inspiration and their origin from the UDHR. Few of such treaties include:

TREATIES	YEAR
The International Convention on the Elimination of Racial Discrimination	1965
The International Covenant on Economic, Social, and Cultural Rights	1966
The International Covenant on Civil and Political Rights	1966
The Convention on the Elimination of All Forms of Discrimination against Women	1979
The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1984
The Convention on the Rights of the Child	1989

Other multilateral institutions like

- The International Bank for Reconstruction and Development (IBRD),
- International Monetary Fund (IMF), and
- World Trade Organization (WTO)

Indirectly support and lend a helping hand in promoting human rights through alienating poverty, eradicating unemployment and providing financial support through a proper monetary mechanism as followed in developing countries.

V ROLE OF VARIOUS INTERNATIONAL ORGANISATIONS

It is essential to understand what role international organizations play, as the sovereign's right of non-interference is the trump card used by almost all the countries to escape the enforcement of human rights concerning the internal matters of their countries. Several organizations are working together and separately, trying hard to help various groups of people across the globe to protect their human rights, but are they successful?

Thus, it is safe to say that though many of these international organizations have conducted some successful work, but they are not always successful.

[237] *Available at*: https://www.cfr.org/ (Last visited on April 15, 2020).

VI AN IGNORANT GOVERNMENT IS FATAL TO HUMAN RIGHTS

Recently, there has been a humongous raise in human rights violations and infringement across the nations worldwide even by the sovereign powers and governments. But the idea was being used to get political gains and the protection of sovereignty in internal affairs by the very same countries which were failing to protect human rights. All governments some way or the other mention human rights in the international and national arena and many countries have established departments or institutions for effective control on the breach of human rights, but what happens when the government itself violates the same? Or human rights as a concept that is used by these governments as a tool to ensure their political interests. Where it is stimulating to see that even the United Nations human rights mechanism has been accused of just being used as a political tool as the States are divided in opinion and one is more powerful than the other and what is more interesting is that this observation was made by the representative of India in the general assembly third committee Seventy-first session, 37th & 38th meetings[238].

It also has to be noted that government can use various methods of implementation, incorporation by enacting domestic laws in just one among them and any branch of the government can take an active part in this process, for instance in *Vishaka vs. the State of Rajasthan*[239], the Indian Supreme Court came up with the concept of reading international treaties into the existing domestic laws where there is no specific law regarding a particular issue. It is important to stress that the domestic implementation of human rights norms requires a joint and coordinated effort of all branches of the government. Government strategy for national efforts with human rights is very important.

VII THE RESPONSIBILITY FOR UPHOLDING HUMAN RIGHTS

Under the human rights treaties, governments have the major responsibility for protecting and promising human rights. Nevertheless, governments are not solely accountable for ensuring human rights. The UDHR states[240]:

Every individual and every organ of society … shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

[238]UN General Assembly, *Social, Humanitarian & Cultural Issues*, General Assembly Third Committee Seventy-First Session, 37th & 38th meetings (Am & Pm), GA/SHC/4181, (October 31, 2016), para 3.
[239] AIR 1997 SC 3011.
[240] *Available at*: https://www.un.org/en/universal-declaration-human-rights/ https://www.un.org/en/universal-declaration-human-rights/ (Last visited on May 12, 2020).

This provision implies that not only the government, but also industries, civil society, and people are responsible for encouraging and valuing human rights.

THE ROLE OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law has been enacted to preserve humanity in all circumstances, even during conflicts. Such law "creates areas of peace in the midst of conflict, imposes the principle of shared humanity, and calls for discourse."[241] It rules out limitless force or total war and seeks to limit the use of violence in the hopes of maintaining the necessary conditions for a return to peace. Various international agencies and commissions are in place to monitor amenability with human rights standards and report any violations. When breaches do occur, they are brought to the attention of international tribunals or tried in an international court or war crimes tribunal.

VIII THE RAISE OF POLITICAL INTERVENTION

Political agendas vs. Human rights – always a battle

Discrimination and oppression of people do not happen overnight. The small actions that mount up over time and build into racism and aggression. In the government policies, they are only seen as quotas, but never heard or acknowledged in the real sense. There are several such cases all over the world were human rights of these marginalized groups have been violated but justice is never given. Sometimes even the governments themselves are behind such acts.

Lack of convergence

For better implementation of human rights, the International Community and the national governments must come together in this process. International organizations including UNHR, HRRR, and others have on several occasions, come forward in protection against the violation of human rights but alas they more often than not, fail in their action for several reasons.

i. Repudiation of access and poor cooperation with UN bodies

Several countries around the world make the self-serving argument that the Human Right Council shall not interfere with country situations and thus have not cooperated with the international mechanisms for human rights. For instance:

"Despite repeated high-level requests to India and Pakistan, permission for OHCHR staff to have unconditional access to both sides of the Line of Control in India-Administered Jammu

[241] Veuthey, M., "International Humanitarian Law and the Restoration and Maintenance of Peace" *African Security Review,* 27 (1998).

and Kashmir and Pakistan-Administered Kashmir has still not been granted, and there are continuous reports of increasing violence, civilian casualties, curfews, and website blackouts"[242].

ii. Sovereignty and Non-interference

As discussed above, sovereignty and the idea of internal state affaire is used time and again to stop the international institutions from taking actions against violating governments.

The statement made by India's Ministry of External Affairs spokesman Raveesh Kumar on UN High Commissioner for Human Right's decision as to file an intervention application in the Supreme Court of India in respect to the issue of CAA as it is a matter of internal affairs of India and concerns the sovereign right of the Indian Parliament to make laws thus no foreign party having any locus standi on the issues is one clear example of such arguments[243].

iii. Transparency and Accountability

The roles and responsibilities of any NHRI depend mostly on its enabling statute and any powers conferred to depends on the legislation and its intent. More often than not, these powers of NHRIs are limited only to deal with matters that arise after the creation of such a body. Several NHRIs are established only as part of institutional reform in the transitional justice process[244]. Only if they could govern there issues and performances will the establishment of an NHRI be meaningful.

iv. Rule of law

It is essential to have laws even for the protection of something as inalienable as human rights. But the cunning politics ensures such ambiguity in these laws that allows the governments to rationalize almost anything done beyond their capacity which is not a random instance of defective draftsmanship but a deliberate choice to escape the treaties with poorly defined obligations. International treaties do not provide any concrete definitions of these rights, and the international courts and monitoring bodies cannot typically directly enforce their decisions in the United States[245].

v. Corruption

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[242]Office of the United Nations High Commissioner for Human Rights*, Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (June 14, 2018), 4.

[243] Raveesh Kumar's Public statement (India's Ministry of External Affairs spokesman), The Hindu, March 3, 2020.

[244] National Human Rights Institutions - History, Principles, Roles and Responsibilities, UNITED NATIONS PUBLICATION Sales No. E.09.XIV.4 ISBN 978-92-1-154189-2 ISSN 1020-1688, 3 para 2.

[245] The Advocates for Human Rights, n.d. *How has the US handled human rights issues in past and today? Available at*: https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states. (Last visited on April 12, 2020).

Highly corrupt states are generally perceived to be with a poor records of human rights, consequently, International organisations have tended to find a loophole between both social harms[246]. Bribery, for instance, is considered to be a victimless crime[247]. Likewise when political parties lace financial soundness and are practically indebted to the donor it adversely who are in many instances, unaware of those vested interests. "The scaring instance of January 2018, when Guangzhou authorities forcibly disappeared Li Huaiping, wife of Chen Xiaoping, a US-based journalist for the Chinese-language Mirror Media Group which happened shortly after Chen interviewed Guo Wengui, a Chinese billionaire fugitive who exposed corruption among China's ruling elite"[248], clearly shows this loop.

vi. Media and social media freedom

Article 19 of the Universal Declaration of Human Rights provides for the freedom of expression which is a fundamental human right and this has to be protected in both online and offline modes and the UNESCO dynamically promotes the safety of journalists who must work in liberty to voice out public and collective opinion[249].

But in July, "Hunan (China), police detained independent blogger Chen Jieren after he wrote articles alleging corruption by provincial party officials; state media repeatedly attacked Chen as an 'internet pest' who had 'polluted the online space'."[250]

Political rights and civil rights

Individual's liberty needs protection against infringement by other private individuals, social organizations, and even their governments as these are the rights that ensure indiscriminate participation in socio-political life, protect them against repression, and provides civil life liberty. The international laws are formulated keeping this in mind and thus, article 3 of the Universal Declaration of Human Rights speaks of the right of everyone to "*...life, liberty and security of person...*"[251] Yet many times, countries across the world do ignore these rights pertaining to one group or the other.

i. Right to civil society

[246] European Journal of International Law, Volume 29, Issue 4, November 2018, Pages 1251–1287, abstract para1.
[247] Korte, 'Commentary on § 331', in W. Joecks and K. Miebach (eds), Münchener Kommentar zum StGB (2nd edn, 2014) § 331, para. 12.
[248] Human Rights Watch, 2019. *World Report 2019: China, available at*: https://www.hrw.org/world-report/2019/country-chapters/china-and-tibet (last visited on April 22, 2020).
[249] Irina Bokova, *Freedom of expression: A fundamental human right underpinning all civil liberties,* UNESCO, (2015), para. 4.
[250] *Supra* note 31 at para 19.
[251] The Universal Declaration of Human Rights, Art.3.

The civil society organizations plays a genuinely essential part in the protection, promotion of human rights and actualizing the essence of any democracies. It provides a censorious base in keeping the governments responsible, helping in certifying good governance, and in furthering the protection of all human rights, including economic, social, and cultural rights.

For instance, "the Human rights groups in Bangladesh remained under pressure, due to restrictions on accessing foreign funding and the journalists reported threats and intimidation to prevent any criticism of the government"[252].

ii. Non Discrimination and Equality

Human rights in itself mean that all humans are equal and shall not be treated with a discriminant eye for any reason but it's a gospel truth worldwide that discrimination exists in one way or the other, some are singled out based on ethnicity and some picked against for being of certain racial or religious orientation, even being a native is looked down upon in some places and this causes for deep-rooted oppression.

Though their people face discrimination elsewhere, xenophobic violence continues to threaten African foreign nationals in South Africa, including refugees and asylum-seekers, "In May 2018 the KwaZulu-Natal Premier Willies Mchunu met with foreign shop owners after the Northern Region Business Association ordered them to close their businesses or face attacks"[253].

iii. Surveillance society over democracy

The whole world is under a threat of the creation of a total surveillance society which is coming very much close to reality. This is dangerous and a huge blow on the whole idea of human rights as it includes the privacy of any individual or the state itself. This practice endangers fundamental human rights, including the right to privacy[254], freedom of information and expression[255] , etc. and this can jeopardize the entire empire of rule of law if proper measures of judicial control are not taken. This might also lead to the opening of black doors easily exploitable by the terrorists and also these poorly scrutinized laws would most probably lead

[252] Human Rights Watch, 2019. *Bangladesh events of 2018, available at*: https://www.hrw.org/world-report/2019/country-chapters/bangladesh (last visited on April 22, 2020).

[253] Human Rights Watch, 2019. *South Africa Events of 2019, available* at: https://www.hrw.org/world-report/2019/country-chapters/south-africa (last visited on April 21, 2020).

[254] ECHR, art. 8.

[255] *Id.,* art. 10.

to extensive use of secret laws, secret courts, and secret interpretation of such laws, which is nothing but a black mark on human rights in to-to[256].

iv. Sexual orientation and Gender Identity

One of the fundamental human right principle protection against any kind of discrimination and this is ensured all core human rights treaties which include the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR) and thus any kind of discrimination based on SOGI would be a violation of human rights. Thought several countries have recognized these rights and the LGBTQ community, several of them are yet to do so.

For example, the Indian Supreme Court, in September struck down section 377 of IPC, which criminalized same-sex relations between consenting adults[257]. Later, in December, the Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, 2018[258]. "Although the government incorporated several amendments in the revised bill, it failed to adequately protect the community, including transgender people's right to self-identify"[259]. In the USA, "Gender identity and sexual orientation are not included as protected grounds in anti-discrimination or hate speech laws, limiting legal recourse for many crimes against LGBTI people"[260].

v. Torture - An enemy to mankind

The most conflicting act to any civilized society, considered to be inhumane and barbaric is the act of torturing anyone, making freedom from torture a universally recognized human right. What is shocking is that there are countries that still practice this.

This happened in Russia, in July 2018, when "Novaya Gazeta published a leaked video of penitentiary staff in Yaroslavl viciously beating a prisoner. Responding to public indignation, Russia's criminal investigation agency arrested 15 suspects by November. One suspect testified that staff recorded the video to demonstrate that they had carried out an order by senior officials to punish the prisoner"[261]. In several countries, the government prefers to have draconian Anti-Terrorism wherein a peculiar use of terminology allows the sovereign to make administrative detention and facilitate the use of torture to obtain confessions by easily surpassing human rights[262].

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[256] Report on Mass Surveillance, Committee on Legal Affairs and Human Rights, The parliamentary assembly of the Council of Europe, 29 January 2015, para 12.
[257] Navtej Singh Johor v s Union of India, W. P. (Crl.) No. 76 of 2016, 6 September, 2018.
[258] THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2018.
[259] *Supra* note 34, para 38.
[260] Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity, (June 23, 2017), para 2.
[261] Human Rights Watch, 2019. *Russia Events of 2018,*
available at: https://www.hrw.org/world-report/2019/country-chapters/russia (last visited on April 17, 2020).
[262]Global Human Rights Watch, UNHRC.

Economic and cultural rights

"Economic, social and cultural rights include the rights to adequate food, to adequate housing, to education, to health, to social security, to take part in cultural life, to water and sanitation, and to work"[263]. These rights are a key requirement for human existence, an integral part of their livelihood and essence to their existence. Any violation against these rights would directly affect the life of a common man in a way the consequences of which are irreparable.

i. Burning in Poverty

The cruel reality of many nations including the developed once is that the overall prosperity is just a front wall behind which lies the stark reality serious divergence between the extremes of richness and poverty. The widening gap in the income distribution scale and sky-reaching costs of medical and education facilities is constantly attacking social security standards for many of those who form the bottom of these countries making their lives miserable.

ii. Education is the Ultimate Salvation

Education around the world had to be considered as a human right and not a privilege to the haves and begging for the have-nots. The educations rights are assured by international human rights law. The countries across the world are duty-bound to protect, promote, and provide education to its citizens[264]. But not all countries oblige to this duty. A UN report puts that "more than 260 million children are out of school worldwide. Discrimination of marginalized groups by teachers and other students, long distances to school, formal and informal school fees, and the absence of inclusive education are among the main causes"[265]. "As Non-white children suffer from serious discrimination in education, where the African American students are three times more likely to be suspended or expelled than their white peers, according to the US Department of Education[266]".

iii. Protection of the Families

Denial of rights to immigrants, refusal to grant refugee status, etc. has led to the breaking of several families around the world. The states must understand that equal rights to family life is a must for all individuals. Keeping in mind, the principle of impartiality and non-discrimination, the individual's right found a family must be recognized[267]. The "US immigration authorities had separated more than 5,400 children from their parents at the

[263]UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, December 2008, No. 33, available at: https://www.refworld.org/docid/499176e62.html, page 1, question 1. (Last visited on May 3, 2020).
[264] *Supra note* 35, art. 26.
[265] *Supra* note 5.
[266] Equity of Opportunity, US Department of Education.
[267]ICCPR, arts. 3, 23 and 26,

Mexico border since July 2017. A total of twenty-four immigrants, including seven children, have died in US custody since 2018"[268]. "Hundreds of parents were deported separately from their children, including many whose asylum claims were improperly dismissed by US border agents"[269]. As this right is mostly undermined many times the violation of this is not even recognized.

iv. Climate Change

One of the greatest threats to the whole world in this era is Climate change as it is not only an environmental issue but also poses a high risk to the other fundamental rights to life, health, food, and an sufficient standard of living of everyone all across the world[270]. Countries across the world must come together in cooperation to tackle this issue. Sustainable development is equally important thus both Human Rights and sustainable development should be simultaneous[271]. The countries addressing climate change should not forget that while fighting this they cannot leave behind human rights as both are equally important and needed to be addressed simultaneously.

Worst hit groups

In all countries certain groups suffer the most, due to some peculiar reasons which might range from gender identity, immigrants, refugees, religious minorities, ethnic minorities, etc. thus they require special attention but are not always provided the same.

i. Refuse to Refugee

"Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safe and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum"[272]. But this means that at first the refugee status of those in need shall be acknowledged and accepted but many countries refuse to do so quoting internal safety and law and order issues as reasons.

ii. The Plight of the Internally Displaced

UNHCR works with countries around the world for the resettlement of these people, but not all countries cooperate with these international organizations. It so happened in Indonesia,

[268] *Supra* note 45, para 40.
[269] *Supra* note 28, para 7.
[270] UNEP, *Report on Climate Change and Human Rights*, (December 2015), VI.
[271] UN General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles),* GA Res 48/134, GAOR, (December 20, 1993), para. 7.
[272] United Nations High Commissioner for Refugees, Human Rights and Refugee Protection (RLD 5), (October 1995) 2, para 3.

when UNHCR spokesperson Ron Redmond stated at a press briefing at the Palais des Nations in Geneva, on July 14, 2000 that it is *"...Profoundly disappointed at the lack of cooperation we have received from Indonesian authorities in trying to resolve the longstanding problem of some 125,000 East Timor refugees in West Timor..."*[273].

iii. Rights of the Child

All human beings are born free and equal in dignity and rights[274]. The groups that are easily exploited are these young ones. Many times, those who exploit them are the ones who are responsible for their safety. In several countries, millions of children have suffered due to almost no access to education, they are forced to work in hazardous industries.

For instance, in Pakistan "over five million primary-school-age children are out of school, most of the girls, for reasons including lack of schools in their areas, child marriage, and gender discrimination. Also, Child sexual abuse remains common. According to the organization Sahil, more than ten cases of child sexual abuse are reported daily"[275].

iv. Women's rights

Assault against women is growing all over the world, though some governments enact stringent laws for their safety yet in most countries the conviction rate is minimum in cases of sexual assaults. Women are targeted for various reasons, even for belonging to a particular religion, or for demanding equal rights, etc. But when they demand justice, it's not provided to them.

As it happened in India when women filed "High profile" rape cases, in the year 2019 several such cases were filed, including one against a "BJP leader, highlighted how women seeking justice face significant barriers, including police refusal to register cases, victim-blaming, intimidation and violence, and lack of witness protection. The accused leader was arrested in September after widespread condemnation, including on social media. In April, a sexual harassment complaint against the sitting chief justice of the Supreme Court illustrated similar challenges. Other women who complained against powerful men also became vulnerable to criminal defamation cases"[276].

v. Defend the Defenders

There are people worldwide who work day and night promoting human rights, striving to protect those who are affected and help them live a life of dignity, in this process these

[273] Timor: UNHCR strongly criticizes lack of government cooperation, UNHCR, (July 14, 2000), para 1.
[274] *Supra note* 34, art.1.
[275] Human Rights Watch, 2020. *Pakistan Events 2019,*
available at: https://www.hrw.org/world-report/2020/country-chapters/pakistan (last visited April 30, 2020).
[276]Human Rights Watch, 2020. *India Events 2019.* , para 31,
available at: https://www.hrw.org/world-report/2020/country-chapters/india (last visited on April 30, 2020).

defenders of human rights face many hurdles and need protection, for which certain Articles of the Declaration on Human Rights Defenders provide some specific protections to them which include[277]:

ARTICLES	PROTECTION RENDERED
Article 1	To seek the protection and realization of human rights at the national and international levels
Article 6	To seek, obtain, receive and hold information relating to human rights
Article 5	To conduct human rights work individually and in association with others
Article 5	To form associations and non-governmental organizations
Article 5	To meet or assemble peacefully
Article 7	To develop and discuss new human rights ideas and principles and to advocate their acceptance, etc.

But not always that these rights are protected. In many countries, long term imprisonments are awarded to many predominant prominent human rights activists without conducting or after conducting sham proceedings.

IX CONCLUSION

The striving need to preserve Human Rights and its applicability for effective enforcement has become much-needed concern amidst the raising chaos of it being intervened and often taken for granted by the Governments and major violations by their intervention. It allows people to stand up to societal corruption and a strong basis of encouragement to freedom of speech and expression from brutal reprisal. Thus, Human Rights provides a universal customary norm that holds governments accountable for all of its unreasonable activities.

Hence, there's power in naming injustice and pointing to a precedent, which makes the Universal Declaration of Human Rights and other Human Rights conventions inevitable.

[277] Declaration on Human Rights Defenders

UGC (PREVENTION, PROHIBITION AND REDRESSAL OF SEXUAL HARASSMENT OF WOMEN EMPLOYEES AND STUDENTS IN HIGHER EDUCATION INSTITUTIONS) REGULATION, 2015 WITH SPECIAL REFERENCE TO STUDENTS IN HIGHER EDUCATION INSTITUTIONS

- ANAGHA

ABSTRACT

Around the world today, various movements have been led by people for helping women get equal rights in almost all the aspects of life, whether it be a career choice or a personal one. Although many organizations and individuals have been fighting for equal rights among women for decades, there is another dimension to the cause of such movements which are trying to prevent, prohibit and create awareness all over the world about the crimes against a woman. These crimes range from anywhere between eve-teasing and harassment to rape and murder. Building a value based culture where each individual respects the privacy of another is very important in any society.

The emphasis of this research paper is to set up a brief introduction to the topic and further research on the preventive measures set up by the government to develop a better and reliable culture in educational institutions, where such institutions would be free from any acts of sexual violence.

To accomplish this, the paper would overview the recent developments in the area of sexual harassment and the legal aspects of safeguarding, preventing and prohibiting such acts of violence in schools, colleges and universities. This paper focuses on the measures for effective implementation of Sexual Harassment Redressal Fora in Educational Institutions as prescribed by the legal institutions.

Research Methodology

The Research Methodology adopted for this paper is Empirical Research. The research has been conducted by collecting data and analyzing it to form opinions. The information collected is secondary in nature.

Keywords: harassment, crime, women, student

INTRODUCTION

In today's day and age, acts of sexual violence have become one of the most prominent crimes against a woman. Every one of us have come across the term 'sexual violence' in one form or another on a daily basis. Although it is hard to determine the exact number of sexual violence acts happening across the world daily due to a majority portion of such cases not being reported, a Latin American study estimated that only around 5% of adult victims of sexual violence have reported the crime.

India has been reported as one of the 'countries with the lowest per capita rates of rape' since many rapes go unreported in the country. Between 2019 and 2020, 22% of married women have experienced domestic violence or sexual violence. Registered cases of sexual harassment at workplace has increased from 54% (371 cases) in 2014 to 570 in 2017.

The term sexual harassment can be defined as any unwelcome physical contact or advances, demands or requests for sexual favors and unconsented sexual images or videography and sexual remarks under Section 356A of the Indian Penal Code. It involves the use of sexual overtones, implicitly or expressly, including the promise of rewards in exchange for sexual favors. It can include a range of actions such as sexual abuse or assault to transgressions.

Sexual harassment can occur at any place such as a public domain, workplace, home, schools or various institutions etc. often, the perpetrator has power or authority over the victim due to differences in social, political or educational status or even in age.

The Indian Constitution has various statutes to tackle the issue of sexual harassment in the society while also protecting the civil and fundamental rights of the citizens of the country. Some of these statutes include the Indian Penal Code, 1860, the national commission for women act, 1990, the indecent representation of women (prohibition) act, 1986 along with various committees and regulations which safeguard the rights of a woman in the country.

PROVISIONS PREVENTING SEXUAL HARASSMENT

I. Constitution of India

Sexual exploitation or harassment is a clear violation of the fundamental rights of any citizens as stated in Article 14 which deals with the right to equality, Article 15 which states that discrimination on the basis of sex of a person is prohibited, Article 21 which provides the right to life and personal liberty, indicating the prohibition of discrimination of gender from the right to practice any profession and carry occupation, trade or business, the right to a safe environment free from any sexual harassment of any form under Article 19(1)(g) and Article 23 which prohibits human trafficking for sexual slavery or forced prostitution.

II. Indian Penal Code, 1860

On April 3, 2013, the Criminal Law Amendment Act, 2013 amended Section 354A into IPC where it defined the term 'sexual harassment' as any unwelcome physical contact or advances, demands or requests for sexual favors and unconsented sexual images or videography and sexual remarks, with a punishment for up to 3 years in prison and fine. The Act also includes provisions such as Section 354B- forcing a women to undress, Section 354C- voyeurism and Section 354D which is stalking.

III. Indecent Representation of Women (Prohibition) Act, 1986

Indecent representation of women is a very common concept included in public entertainment such as songs and movies to novels and books. Sections 292, 293 and 294 of the Indian Penal Code deal with the law relating to obscenity but none of the provisions of the Code have any special reference to the indecent representation of women and perhaps due to this lack of legal statutes, the tendency to represent women in an indecent manner is growing which affects the minds of the society at large. To deal with this situation, a Bill was introduced in the Parliament to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner.

IV. National Commission for Women

The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 (Act No. 20 of 1990 of Govt. of India) to review the Constitutional and Legal safeguards for women, recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women[278].

V. Internal Complaints Committee

In compliance with the instructions of National Commission for women and guidelines issued in implementation of the directives of Hon'ble Supreme Court Judgement dated 13th August, 1997 in the case of Visakha and others vs. State of Rajasthan and Others on the subject of sexual harassment of women in the workplace, this Department had duly constituted a

[278] Available at http://ncw.nic.in/commission/about-us last visited on 27/08/20

Complaint Committee for considering complaints of sexual harassment of women working in the Department of Science and Technology[279].

PROVISIONS UNDER UGC

In exercise of the powers conferred by the University Grants Commission Act, 1956, the commission made the University Grants Commission (prevention, prohibition and redressal of sexual harassment of women employees and students in higher education institutions) Regulations, 2015 which applied to all the students, employees, workplaces and higher education institutions in India. In the said Act, the term 'employee' included all persons who are trainees, apprentices, interns, volunteers, teacher assistants, research assistants whether they were employed or not[280], thus covering all the different positions a person can work in along with being a student, inside or outside the campus of a Higher Education Institution (or HEI) or pursuing a programme through regular or distance mode, including short-term training programs[281].

The Act divided the definition of the term 'sexual harassment' into two parts, defining the term as an unwanted conduct of sexual nature or undertones which may demean, humiliate, create fear or induce submission through physical, verbal or non-verbal conduct and advances by any person, in the first part of the section[282].

In the second part of the section, the instances for sexual harassment have been covered as any implied or expressed conduct with sexual undertones, promising preferential treatments for sexual favors, threatening detrimental treatment or present/ future status of the person, creating a hostile environment, humiliating which may affect the health, safety, dignity or physical integrity of a person[283].

Section 3 of the rules laid down by the University Grants Commission talks about the responsibilities a higher education institute has regarding the safety of the women whether they are students or employees. Some of these responsibilities include publicly notifying the provisions against sexual harassment and ensure their wide dissemination[284], organizing training programs and workshops for all the functionaries, teachers and students about the SAKSHAM Report (Measures for Ensuring the Safety of Women and Programs for Gender

[279] Available at https://dst.gov.in/internal-complaints-committeeicc-women last visited on 27/08/20
[280] S.2(f) of University Grants Commission (prevention, prohibition and redressal of sexual harassment of women employees and students in higher education institutions) Regulations, 2015
[281] Ibid S.2(l)
[282] Id S.2 (k)(i)
[283] Id S.2 (k)(ii)
[284] Id S.3 (1) (b)

Sensitization on Campuses)[285] to sensitize everyone towards sexual harassment and inform the victims about the steps to be taken in case they face harassment[286], publicly committing to a zero tolerance policy towards sexual harassment[287] and treat sexual harassment as a misconduct under service rules and initiate action against employee perpetrator[288] and as a violation of disciplinary rules leading to rustication and expulsion where the perpetrator is a student[289]. Court judgements will update the rules and regulations by which the ICC will function from time-to-time[290].The executive authority of the HEI must mandatorily extend full support to see that the recommendations made by the ICC are implemented in a timely manner[291]. The HEIs will see to it that the vulnerable groups[292], research students and doctoral candidates[293] are safeguarded from harassment by enabling guidelines for ethics and conducting a regular review of efficacy and implementation of sexual harassment policy[294] and conduct orientation courses and counselling services. They must ensure that the infrastructure of the campus is safe from women along with providing safe public utilities and health facilities such as transport, hostels, libraries and gender sensitive doctors and nurses according to sub-section 10, 11 and 14.

Internal Complaints Committee

According to Section 4 of the UGC rules, 2015, every Executive Authority shall constitute an Internal Complaints Committee which would regulate, sensitize and file complaints of sexual harassment[295]. The ICC shall provide assistance if an employee or a student chooses to file a complaint with the police, provide mechanism of dispute resolution, address issues through just and fair conciliation, protect and safeguard the complainant, provide mandatory relief of sanctioned leave and/or transfer to another department or supervisor, ensure that the victims are not discriminated against after filing the complaint and ensure prohibition of retaliation or adverse action against a covered individual (persons engaged in protected activity).

[285] S.3 (1) (c) of University Grants Commission (prevention, prohibition and redressal of sexual harassment of women employees and students in higher education institutions) Regulations, 2015
[286] Ibid S.3 (1) (i)
[287] Id S.3 (1) (e)
[288] Id S.3 (1) (m)
[289] Id S.3 (1)(n)
[290] Id S3.2 (1)
[291] Id S.3.2 (2)
[292] Id S.3.2 (3)
[293] Id S.3.2 (4)
[294] Id S.3.2 (5)
[295] S.4 (1) of University Grants Commission (prevention, prohibition and redressal of sexual harassment of women employees and students in higher education institutions) Regulations, 2015

The Act stipulates that aggrieved woman can make written complaint of sexual harassment at workplace to the ICC or to the LCC (in case a complaint is against the employer), within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident. In case the aggrieved woman is unable to make a complaint on account of her physical incapacity, a complaint may be filed inter alia by her relative or friend or her co-worker or an officer of the National Commission for Woman or State Women's Commission or any person who has knowledge of the incident, with the written consent of the aggrieved woman[296].

Upon the receipt of the complaint, the ICC shall send one copy of the complaint to the respondent within a period of 7 days. The respondent shall then file a reply of the complaint along with a list of documents, names and addresses of witnesses within a period of 10 days. The inquiry has to be completed within a period of 90 days from the receipt of the complaint. The inquiry report has to be submitted within a period of 10 days from the completion date to the Executive Authority of the HEI. An appeal against the enquiry may be filed within 30 days from the date of recommendation. The aggrieved party may seek conciliation to settle the matter, which the HEI shall facilitate. The identities of the aggrieved, victim, witness or the offender shall not be made public[297].

Landmark Judgements

Before the Vishaka guidelines came into picture, women had to take matter of Sexual Harassment at Workplace through lodging a complaint under Sec 354 and 509 of IPC. In India until the Vishaka's judgment was given out, there was no law to govern this matter and the guidelines which came as an outcome of this case were derived from the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). The Indian Constitution had grounded provisions in the form of fundamental rights.

Vishaka And Others V. State of Rajasthan JT 1997 (7) SC 384

This was a landmark case which set out preventive laws for women in the Indian Legislature. In the stated case, Bhanwari Devi, who was a social activist working in a social development program administered by the Rajasthan State Government in a village in Rajasthan, endeavored to stop the marriage of one-year old Ramkaran Gujjars (Thakur) girls. She was not pardoned

[296] Available at https://dst.gov.in/internal-complaints-committeeicc-women last visited on 27/08/20
[297] Ibid S.8

for her actions and was boycotted for the same. In September, 1992, she was gang-raped by Ramkaran Gujjar and five of his friends in front of her husband. The male doctor at normal primary health center declined to survey her and a doctor in Jaipur only confirmed her age without any recommendation of her being raped in the medical report. She was taunted at the ppolice station and further harassed by the women constables after which the Trial Court discharged the accused for not being guilty. The High Court, then, propounded that it was a gang rape out of vengeance. The situation of the case encouraged many women and NGOs to file a PIL in the Supreme Court of India.

The judgment of Vishakha's case was conveyed by Chief Justice J.S Verma as a representative of Justice Sujata Manihar and Justice B.N Kripal on the account of writ petition. The court observed that the fundamental rights under Article 14(2), 19(3) (1) (g) and 21(4) of the Constitution of India were being violated. It hampered the right to life and the right to live a dignified life.

The Supreme Court held that, women have fundamental right towards the freedom of sexual harassment at workplace. It also put forward various important guidelines for the employees to follow them and avoid sexual harassment of women at workplace. The court also suggested to have proper techniques for the implementation of cases where there is sexual harassment at workplace. The main aim/objective of the Supreme Court was to ensure gender equality among people and also to ensure that there should be no discrimination towards women at workplace.

Jindal Law School Case

In April 2015, a case was filed against 3 college students for blackmailing and gang-raping the victim for almost 2 years. The Additional District and Sessions Court had awarded the primary accused with 20 years of imprisonment while his friends were sentenced to 7 years jail terms. Later in March 2017, the High Court of Punjab and Haryana suspended the sentence and released the accused on the terms that they would not leave the country or contact the victim. The accused were also suggested to psychiatric counselling 'until they are free of their voyeuristic tendencies'.

The Bench comprised of Justice Mahesh Grover and Justice Raj Shekhar Attri and instead of following on the Justice Verma Committee Report 2013 stating that in sexual assault, criminal laws must be interpreted from the perspective of the victim, the Bench examined portions of the victim's testimony and derogated the character of the victim. Provisions of the Indian Penal Code such as gang rape (Section 376D) and criminal intimidation (Section 506), provision of the Information Technology Act – publishing of information which is obscene in electronic

form (Section 67) and Section 4 of The Indecent Representation of Women (Prohibition) Act which prohibits distribution or circulating any indecent or obscene photographs of any woman were not delved into at all by the Bench. The Court stated that the testimony of the victim reflected 'the immature but nefarious world of youngsters unable to comprehend the worth of a relationship based on respect and understanding' and how "the entire crass sequence actually is reflective of a degenerative mindset of the youth breeding denigrating relationships mired in drugs, alcohol, casual sexual escapades and a promiscuous and voyeuristic world."[298]

The rationale for the verdict was that there was no gut-wrenching violence which generally accompanies such incidents as in the case of the 2012 Jyoti Pandey rape case of New Delhi. The Court blames the character of the victim, instead of the accused, stating that her statement has a "perverse streak" and "offers an alternate conclusion of misadventure stemming from a promiscuous attitude and a voyeuristic mind".

The victim, then, approached the Supreme Court challenging the order of the Punjab and Haryana High Court along with expressing her fear of the possibility of continued blackmailing as the accused still possessed her pictures. The Supreme Court dismissed the order of the High Court and sentenced the two accused back to jail in November 2017.

SUGGESTIONS

Even though the debate of making Female related laws stricter has been an issue for far too long with no possible answer, the laws relating to women crimes should be amended regularly so as to tackle any future disputes and reduce the crime rate in the country. Some of the steps to reduce the crimes occurring against women in Educational Institutions can be:

1) Framing policies and adopting strict measures in the Institution to create awareness among all students and faculties so as to prevent and address sexual harassment cases.
2) Every institution should have an ICC panel for dealing with the issue of sexual harassment.
3) There should be a policy framing committee as well as a complaint committee with an efficient management system following the rules and regulations set by the ICC along with a body of conciliation and mediation on the institution's ground, a legal aid cell and a psychologist assistance cell, all headed by professionals who would expertise in

[298] Available at https://www.firstpost.com/india/jindal-law-school-rape-punjab-and-haryana-hc-verdict-shows-little-has-changed-despite-verma-committee-report-4073653.html/amp last visited on 18/09/20

their respective areas to provide all students and employees a safe and harassment-free zone.

4) Awareness programs must be conducted throughout the institution and the educational structure should be re-instated to include educational policies against harassment and its redressal.
5) Training programs should be regularly conducted for the employees working in the harassment redressal cells so as to update them on legal policies and the psychological welfare it takes to work in the redressal system.

CONCLUSION

The issue of Sexual Harassment has been a world-wide problem for centuries. In the modern day, this issue keeps rising and there are fewer courts per case to tackle the issue effectively and efficiently. The legal system includes many provisions for the prevention, prohibition and redressal of harassment disputes but it needs to be amended regularly and not when a landmark case, such as Nirbhaya case of 2012, occurs that would shock the society across the country. With new laws in India relating to the safety of women in workplace and educational institutions, every woman at the place of work and study, who fall within the jurisdiction of educational institution, including its, academic, nonacademic staff and students should be protected from sexual harassment, intimidation and exploitation while they are associated with the campus.

Despite bold judgments by the Supreme Court, there are no sexual harassment complaints committee in many educational institutions. The apex court must direct such institutions to form sexual harassment committees within a stipulated time frame.

In any civilized society, it is the fundamental right of people to be able to lead their lives with dignity, free from mental or physical torture. To ensure this, transgressors must pay for their unsolicited sexual advances. To effectively prevent sexual harassment in educational institutions, we need an effective initiative by the state and civil society initiatives from citizens, women organizations and trade unions.

ROLE OF UNITED NATIONS FORUM ON FORESTS IN CONSERVATION AND SUSTAINABLE MANAGEMENT OF FORESTS IN INDIA

- UTKARSH KUMAR SINGH & PARTH JAIN

ABSTRACT:

Forests have been high on the international policy and political agenda, The United Nations Forum on Forests is composed of all member states of the United Nations. The main function of the United Nations Forum on Forests is management conservation and sustainable development of all types of forests and to strengthen long term political commitment to this end. In India over the years, forests in the country have suffered serious depletion due to overexploitation and other reasons such as tremendous pressures arising from the ever-increasing demand for fuelwood, fodder and timber; inadequacy of protection measures. This paper is an endeavour to study global objectives on forests decided up in the 16th session forests of UNFF along with the working, Objectives and Functions of United Nations Forum on Forests, also various instruments which articulates a series of agreed policies and measures for sustainable forest management. This paper highlights the role of UNFF in context of India in formulating sustainable management of the forests along with various forests types found in India. This paper emphasises on the target of UNFF to India in achieving 2.5 billion tonnes of CO2 equivalent by additional forest and tree cover by 2030 and for restoring 26 million hectares of degraded land by 2030.

1.1 INTRODUCTION:

The United Nations Forum on Forests (UNFF) is an intergovernmental policy forum, established in 2000, which promotes "management, conservation and sustainable development of all types of forests and to strengthen long-term political commitment to this end". Although being a UN body specifically discussing the issue of forests, other UN initiatives have gained relatively much more attention when it comes to the international discussion on forests, such as the UNFCCC (REDD discussion) and the CBD (biodiversity and forests)[299]. The UN Forum

[299] https://wrm.org.uy/browse-by-subject/international-processes-and-actors/united-nations-forum-on-forests/

on Forests is composed of all Member States of the United Nations. Since its inception, the Forum has reached notable milestones including the adoption of the first UN Forest Instrument in 2007, the creation of the Global Forest Financing Facilitation Network (GFFFN) in 2015 and most recently, the adoption of the first UN Strategic Plan for Forests 2030 in 2017. The UNFF Secretariat, in the UN Department of Economic and Social Affairs, tracks progress in the implementation of the UN Forest Instrument using qualitative data from national reports, and quantitative data from FAO, ITTO and other partners[300].

Background

On 27 April 2017, the UN General Assembly adopted the first ever UN Strategic Plan for Forests 2017-2030. The Strategic Plan provides a global framework for actions at all levels to sustainably manage all types of forests and trees outside forests and halt deforestation and forest degradation. At the heart of the Strategic Plan are six Global Forest Goals and 26 associated targets to be achieved by 2030, which are voluntary and universal. They support the objectives of the International Arrangement on Forests and aim to contribute to progress on the Sustainable Development Goals, the Aichi Biodiversity Targets, the Paris Agreement adopted under the UN Framework Convention on Climate Change and other international forest-related instruments, processes, commitments and goals[301].

United Nations Forum on Forests mandate

In October 2000, the Economic and Social Council of the United Nations (ECOSOC) established the United Nations Forum on Forests (UNFF), a subsidiary body with its main objective to promote "… the management, conservation and sustainable development of all types of forests and to strengthen long-term political commitment to this end…" The roles and functions of the UNFF evolved from based on the Rio Declaration on the Environment and Development and its Forest Principles and Agenda 21, and the outcome of the IPF/IFF Processes and other key milestones of international forest policy[302].

1.2 UNFF GLOBAL OBJECTIVES ON FORESTS

Delegates of United Nations Member States decided at the sixth session of the United Nations Forum on Forests to set shared global objectives on forests and to agree to work globally and nationally to achieve progress towards their achievement.

Global Objective 1

[300] https://www.un.org/esa/forests/wp-content/uploads/2018/12/UNFI__brochure.pdf
[301] https://www.un.org/esa/forests/forum/about-unff/index.html
[302] https://www.agriculture.gov.au/forestry/international/forums/unff

Reverse Forest Loss: Reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation.

Global Objective 2

Enhance Forest-Based Benefits: Enhance forest-based economic, social and environmental benefits, including by improving the livelihoods of forest-dependent people.

Global Objective 3

Increase Sustainability Managed Forests: Increase significantly the area of protected forests worldwide and other areas of sustainably managed forests, as well as the proportion of forest products from sustainably managed forests.

Global Objective 4

Mobilize Financial Resources: Reverse the decline in official development assistance for sustainable forest management and mobilize significantly-increased new and additional financial resources from all sources for the implementation of sustainable forest management.[303]

FUNCTIONS AND WORKING OF UNFF:

FUNCTIONS[304]

The U.N. Forum on Forests (UNFF) operates along certain principal functions. The organization summarizes these functions as follows.

- Facilitate the implementation of forest-related agreements and foster a common understanding on sustainable forest management;
- Ensure continued policy development and dialogue among governments, international organizations, including major groups as identified in Agenda 21, as well as address forest issues and emerging areas of concern in a holistic, comprehensive and integrated manner;
- Enhance cooperation as well as policy and program coordination on forest-related issues;
- Foster international cooperation;
- Monitor, assess and report on the progress of aforementioned functions and objectives;

[303] https://www.un.org/esa/forests/documents/global-objectives/index.html
[304] https://www.hurriyetdailynews.com/principal-functions-of-un-forum-on-forests-44468

- Strengthen political commitment to the management, conservation and sustainable development of all types of forests;
- Enhance the contribution of forests to the achievement of the internationally agreed development goals, including the Millennium Development Goals, and the implementation of the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development, bearing in mind the Monterrey Consensus of the International Conference on Financing for Development;
- Encourage and assist countries, including those with low forest cover, to develop and implement forest conservation and rehabilitation strategies, increase the area of forests under sustainable management and reduce forest degradation and the loss of forest cover in order to maintain and improve their forest resources with a view to enhancing the benefits of forests to meet present and future needs, in particular the needs of indigenous peoples and local communities whose livelihoods depend on forests;
- Strengthen interaction between the United Nations Forum on Forests and relevant regional and sub-regional forest-related mechanisms, institutions and instruments, organizations and processes, with the participation of major groups, as identified in Agenda 21, and relevant stakeholders to facilitate enhanced cooperation and effective implementation of sustainable forest management, as well as to contribute to the work of the forum.

WORKING[305]

The thematic focus of UN Forum on Forests sessions are determined by its Programme of Work as adopted by the Forum.

2021 – 2024

The quadrennial programme of work for 2021-24 will be adopted by UNFF 15 in May 2020. Current inter-sessional activities to support the development of the new 4 POW include a questionnaire which was circulated in August 2019 and an Expert Group meeting to be held in November 2019.

2017 – 2020

[305] https://www.un.org/esa/forests/documents/un-strategic-plan-for-forests-2030/index.html

The quadrennial programme of work of the United Nations Forum on Forests for the period 2017–2020 was adopted by a special session of the UN Forum on Forests in January 2017, and subsequently adopted by the UN Economic and Social Council in April 2017 through E/RES/2017/4.

2007 – 2015

The UNFF Multi-Year Programme of Work 2007-2015, was adopted at the seventh session of UNFF and reflected the change in format to biennial sessions.

2000 – 2005

The 2000-2005 UNFF Multi-Year Programme of Work was adopted at the first session of UNFF and outlined the structure for subsequent sessions of the UNFF.

1.4 UNITED NATIONS FORESTS INSTRUMENTS:

The United Nations forest instrument provides countries with a framework for promoting sustainable forest management. The Instrument articulates a series of agreed policies and measures at the international and national levels to strengthen forest governance, technical and institutional capacity, policy and legal frameworks, forest sector investment and stakeholder participation[306]. The landmark United Nations Forest Instrument was adopted by the United Nations General Assembly in 2007, reflecting strong international commitment to advance sustainable forest management, curb deforestation, and enhance forest contributions to the achievement of the internationally agreed development goals.. The Instrument articulates a series of agreed policies and measures at the international and national levels to strengthen forest governance, technical and institutional capacity, policy and legal frameworks, forest sector investment and stakeholder participation. In 2007, following successful negotiations and agreement by the UN Forum on Forests, the UN General Assembly adopted the Non-Legally Binding Instrument on All Types of Forests (which was subsequently named the UN Forest Instrument in 2015). Agreement on the instrument was the culmination of intense negotiations spanning over a decade and half, and marked the first time that Member States of the UN agreed on an international instrument on international forest policy and cooperation[307].

The Purpose of United Nations forests instruments is:

[306] https://www.un.org/esa/forests/documents/un-forest-instrument/index.html
[307] https://www.un.org/esa/forests/wp-content/uploads/2018/12/UNFI__brochure.pdf

- To strengthen political commitment and action at all levels to implement effectively sustainable management of all types of forests and to achieve the shared global objectives on forests;
- To enhance the contribution of forests to the achievement of the internationally agreed development goals, including the, 2030 Agenda for Sustainable Development and the Sustainable Development Goals;
- To provide a framework for national action and international cooperation.

1.5 COLLABORATIVE PARTENERSHIP ON FORESTS:

The Collaborative Partnership on Forests (CPF) is an informal, voluntary arrangement among 15 international organizations and secretariats with substantial programmes on forests. These agencies share their experiences and build on them to produce new benefits for their respective constituencies. They collaborate to streamline and align their work and to find ways of improving forest management, conservation, the production and trade of forest products. The members are also forming close and valuable strategic partnerships with one another, benefiting from shared expertise and pooled resources. The mission of the CPF is to help enhance the contribution of all types of forests and trees outside forests to the 2030 Agenda for Sustainable Development and other internationally agreed development goals, promote the sustainable management of all types of forests and to strengthen long-term political commitment to that end[308].

FUNCTIONS[309] :

The core functions of the CPF are to:

- support the work of UNFF and its member countries;
- provide scientific and technical advice to the Forum and governing bodies of other CPF members, at their request;
- enhance coherence, cooperation as well as policy and programme coordination at all levels, including through joint programming and the submission of coordinated proposals to members' governing bodies, consistent with their mandates;

[308] http://www.cpfweb.org/73947/en/#:~:text=The%20Collaborative%20Partnership%20on%20Forests%20(CPF)%20is%20an%20innovative%20voluntary,that%20established%20the%20International%20Arrangement

[309] https://www.un.org/esa/forests/collaborative-partnership-on-forests/index.html

- promote the implementation of the UN Forest Instrument and the United Nations Strategic Plan for Forests as well as the contribution of forests and trees to the 2030 Agenda for Sustainable Development and other major forest-related agreements.

Members of Collaborative Partnership on Forest

The CPF is comprised of 15 international organizations:

- Centre for International Forestry Research (CIFOR)
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Secretariat
- Food and Agriculture Organization of the United Nations (FAO)
- Global Environmental Facility (GEF) Secretariat
- International Tropical Timber Organization (ITTO)
- International Union for Conservation of Nature (IUCN)
- International Union of Forest Research Organizations (IUFRO)
- Secretariat of the Convention on Biological Diversity (SCBD)
- United Nations Convention to Combat Desertification (UNCCD) Secretariat
- United Nations Development Programme (UNDP)
- United Nations Environment Programme (UNEP)
- United Nations Framework Convention on Climate Change (UNFCCC) Secretariat
- United Nations Forum on Forests (UNFF) Secretariat
- World Agro-forestry Centre (ICRAF)
- World Bank

1.6 THE INTERNATIONAL ARRANGEMENT ON FORESTS[310]:

The International Arrangement on Forests (IAF) has five main components: the UN Forum on Forests (UNFF) and its Member States, the UNFF Secretariat, the Collaborative Partnership on Forests (CPF), the UNFF Global Forest Financing Facilitation Network (GFFFN), and the UNFF Trust Fund.

Some of the key objectives of the IAF include:

- Promoting implementation of sustainable forest management (SFM), in particular the implementation of the UN Forest Instrument;

[310] https://www.un.org/esa/forests/documents/international-arrangement-on-forests/index.html

- Enhancing the contribution of forests to the post-2015 development agenda;
- Enhancing cooperation, coordination, coherence and synergies on forest-related issues;
- Fostering international cooperation, public-private partnerships and cross-sectoral cooperation;
- Strengthening forest governance frameworks and means of implementation;
- Strengthening long-term political commitment towards the achievement of SFM;
- Enhancing coherence, cooperation and synergies with other forest-related agreements, processes and initiatives.

In 2015, during the eleventh session of the Forum, the review of the International Arrangement was concluded. Among other things, members of the Forum decided that the Forum should develop a concise Strategic Plan for 2017-2030 and quadrennial programmes of work to enhance the coherence and guide the work of the IAF and its components.

1.7 FOREST TYPES IN INDIA[311]:

a) Coniferous Forests grow in the Himalayan mountain region, where the temperatures are low. These forests have tall stately trees with needlelike leaves and downward sloping branches so that the snow can slip off the branches. They have cones instead of seeds and are called Gymnosperms.

b) Broadleaved Forests have several types, such as evergreen forests, deciduous forests, thorn forests, and mangrove forests. Broadleaved forests have large leaves of various shapes.

c) Evergreen Forests grow in the high rainfall areas of the Western Ghats, North-Eastern India, and the Andaman and Nicobar Islands. These forests grow in areas where the monsoon lasts for several months. The trees overlap with each other to form a continuous canopy. Thus very little light penetrates down to the forest floor. Only a few shade-loving plants can grow in the ground layer in areas where some light filters down from the closed canopy. The forest is rich in orchids and ferns. The barks of the trees are covered in moss.

d) Wet Evergreen

Wet evergreen forests are found in the south along the Western Ghats and the Nicobar and Andaman Islands and all along the north-eastern region. It is characterized by tall, straight evergreen trees that have a buttressed trunk or root on three sides like a tripod that helps to keep a tree upright during a storm. These trees often rise to a great height before they open out like a cauliflower. The more common trees that are found here are the jackfruit, betel nut palm,

[311] https://www.jagranjosh.com/general-knowledge/types-of-forests-in-india-1440149324-1

Jamun, Mango, and Hollock. The trees in this forest form a tiered pattern: shrubs cover the layer closer to the ground, followed by the short structured trees and then the tall variety. Beautiful ferns of various colours and different varieties of orchids grow on the trunks of the trees.

e) Semi-Evergreen

Semi-evergreen forests are found in the Western Ghats, Andaman and Nicobar Islands, and the Eastern Himalayas. Such forests have a mixture of the wet evergreen trees and the moist deciduous trees. The forest is dense and is filled with a large variety of trees of both types.

f) Deciduous Forests are found in regions with a moderate amount of seasonal rainfall that lasts for only a few months. Most of the forests in which Teak trees grow are of this type. The deciduous trees shed their leaves during the winter and hot summer months. Mal life and is most rich in insect life.

Total Forest Area in India[312] : According to the 2019 report, the total forest cover of the country is 712,249 square kilometres (21.67 percent of India's total geographical area) slightly up from 708,273 sq. km (21.54 percent) in 2017. The tree cover of the country is 95,027 sq. km (2.89 percent of the total area) again slightly up from 93,815 sq. km. (2.85 percent) in 2017. There are 18 notified biosphere reserves in India spread over 89530 sq km. Today there are 868 Protected Areas (PAs) including 104 National Parks and 550 wild life sanctuaries, covering 1,65,088.10sq km (5.02% of total geographical area). The National Wildlife Action Plan 2017-30 has listed various actions for natural habitats conservation by adopting a landscape/seascape approach with inclusive management.

1.8 ROLE OF UNFF IN FORMULATING SUSTAINABLE DEVELOPMENT OF FORESTS IN INDIA:

As a member state of UNFF, India supports the global forest goals and targets and UNSPF for period 2017-2030 adopted by UNFF. India is committed to ensuring sustainable management of forests and achieving the global forest goals of the UNSPF 2030[313]. The UNFF is the responsible intergovernmental body for follow-up and review of the implementation of the UN Strategic Plan for Forests 2017–2030 (UNSPF). Adopted by the UN General Assembly in 2017, the UNSPF 2030 and its Global Forest Goals (GFGs) and targets represent an ambitious and transformational plan of actions for countries, the UN system, the Collaborative

[312] https://india.mongabay.com/2020/01/indias-forest-cover-is-rising-but-northeast-and-tribals-lose/#:~:text=According%20to%20the%202019%20report,slightly%20up%20from%2093%2C815%20sq.
[313] https://www.un.org/esa/forests/wp-content/uploads/2020/01/India-VNC-Dec2019.pdf

Partnership on Forests (CPF) and all other actors to address the challenges facing the world's forests and maximizing the contribution of forests and sustainable forest management to the SDGs[314]. India has only 2.4% of the world's land mass, it supports 17% of the world population and 18% of the cattle population. Despite this huge biotic pressure the country has been able to maintain 80.21 million hectare as per India State of Forest Report 2017 which constitute as 24.39% of the geographical area of the country. There is also an increase of 8021 sq km of forest and tree cover at the national level compared to the last assessment of forest cover in India State of Forest Report 2015. India is committed to achieve Global Forest Goals which are voluntary and universal. India's forest cover has increased by 6778 sq km which is 0.21% of total geographical area, through sustainable forest management, including protection, restoration, afforestation and reforestation. Joint Forest Management and Community Forest Management has improved livelihood of forest dependent communities. National Compensatory Fund Management and Planning Authority will infuse about Rs 47000 crore ($6.7 billion) for sustainable forest management at sub-national level. In line with international commitment India is incorporating forestry and environment related issues into policy and legal framework through its new National Forest Policy which is being finalised now[315]. As a member state of United Nations Forum on Forest, India supports the global forest goals and target for period 2017-30. Due to the efforts of UNFF the forest area is increased by 3% worldwide by 2020.

1.9 CONCLUSION:

United Nations Forum on Forests is an international subsidiary body for the management, conservation and sustainable development of all types of forests, established by The United Nations Economic and Social Council (ECOSOC) in October 2005 in its resolution 2000/35. Environment Protection has always been high on the international and political agenda, therefore all the member stated of the United Nations are a part of the United Nations Forum on Forests. India is committed to ensuring sustainable management of Forests and in achieving the global forest objectives of United Nations Strategic Plan for Forests by 2030. The roles and functions of UNFF evolve from agenda 21 of the Rio declaration. In developing countries like India which are already facing various other problems, Deforestation mainly for fuelwood, fodder, timber and environmental pollution obstructs the path of development like a speed

[314]https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=2472&menu=3170#:~:text=The%20UN%20Forum%20on%20Forests,Sustainable%20Development%20(HLPF)%20and%20other

[315] https://www.pminewyork.gov.in/pdf/uploadpdf/statements__1504348840.pdf

breaker. India as a member of the United Nations is also a member of UNFF and has to work accordingly to the guidelines of UNFF to achieve the global objectives by 2030. The global objectives of UNFF are to reverse forest loss, to enhance forest-based benefits, to increase sustainably managed forests, and to mobilize the financial resources. UNFF also facilitate the implementation of forest-related agreements and ensures continued policy development and dialogue among governments and international organisations. It monitors and assess the reports on the progress of the forest management and encourages the countries to implement forest conservation and in increasing the forest area. In 2007, The United Nations General Assembly adopted some forest instruments known as United Nations Forest Instruments to advance the sustainable forest management, to curb deforestation and enhance forest contributions. These instruments articulate a series of agreed policies at national and international levels to strengthen forest governance, technical and institutional capacity, forest sector investment and stakeholder participation. UNFF is in a collaborative partnership with 15 international organisations which work in finding ways of improving forest management, conservation, production and trade of forest products. According to the geographical and environmental factors of India, There are 6 types of forests in India i.e. Coniferous forests, Broadleaved Forests, Evergreen Forests, Wet Evergreen Forests, Semi-Evergreen Forests and Deciduous Forests. According to the Forest Report of 2019, the Total Forest Area in India is about 21.67% i.e. 7,12,249 sq km which is a slight increase of 0.13% i.e. 21.54% to 21.67%. Around 2.89% i.e. 95,027 sq km of the total area is covered by the trees and there are about 550 wildlife sanctuaries along with 104 national parks; due to implementation of the policies and strategies of the UNFF the total World Area Forest is increased 3% by 2020. The target of UNFF to India is to restore 26 million hectares of degraded land and to achieve 2.5 billion tonnes of CO_2 equivalent by additional afforestation by the year 2030 and India is working swiftly, constantly, efficiently and consistently to achieve the target. According to Forest Report of 2017, there is an increase of 8021 sq km of trees and forest cover from the last survey of 2015. This shows the efforts of India in implementing the strategies for conservation and sustainable management of Forests.

CORPORATE SOCIAL RESPONSIBILITY (CSR) IN THE GLOBALISING WORLD

- MYTHILI SRINIVASAMURTHY

ABSTRACT

Corporate Social Responsibility (CSR) is a dynamic concept that has constantly evolved since its origin in nineteenth century and is changing with the turn of each decade. With the globalisation of markets in 1990s when CSR expanded from its age-old concept of philanthropy towards being juxtaposed and integrated with complimentary concepts such as business ethics (BE), corporate citizenship (CC), corporate social performance (CSP) and sustainability. 2000s saw reinforcement of CSR through its recognition and implementation as core business strategy. With increase in consumer awareness and societal expectation, CSR in 2010s emerged as means to achieve a shared value and innovation. With the start of 2020s with COVID-19, CSR has been leaning towards activities related to COVID-19 management and assistance. The author in this paper provides evolution of concept of CSR in the last three decades starting with the 1990s.

Keywords: *Corporate Social Responsibility, CSR, Philanthropy, Business Ethics (BE), Corporate Citizenship (CC), Corporate Social Performance (CSP), Sustainability (CS), Integrated CSR, Strategic CSR, Shared Value CSR*

DEFINITION AND ORIGIN

There is no universal definition of CSR adopted as each enterprise undertakes CSR in its own unique way.[316] But, Carroll's four-part definition "*Corporate social responsibility encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time*"[317] is of relevance even today although it defined way back in 1979.

[316] Vaibhav P Birwatkar, 'Corporate Social Responsibility: All at Sea' (2017) Journal of Territorial and Maritime Studies 4/2 66.
[317] Archie B Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) 4 Academy of Management Review 497.

Many scholars argue that CSR emerged during the industrial revolution in 1880s as a response to labour conflicts and factory system that prompted companies to take a paternalistic approach towards working class by pioneering in welfare schemes and philanthropy.[318] But, CSR found its academic roots in 1930s with articles of Adolf A. Berle and E. Merrick Dodd published in the Harvard Law Review debating on the role of corporate managers.[319] But, CSR in its modern sense found its foundation with Howard R. Bowen's landmark publication[320] where he articulates the doctrine of social responsibility of businessmen.[321] Since then, concept of CSR has exponentially evolved and is still evolving as you read. In this paper, we will look at the evolution of CSR in the past three decades - Integrated CSR in 1990s as, Strategic CSR in 2000s and Shared Value and innovation CSR in 2010s.

INTEGRATED CSR IN 1990s

1990s brought globalisation of markets, commercial and financial relations enabling companies to spread across and establish a global reach and capital expansion.[322] With companies becoming primary institutions influencing social developments, CSR gained a globalised presence by emerging as means to address societal problems that was previously seen as government's responsibilities.[323] Companies started being perceived to be more powerful than governments in alleviating social issues. [324]As globalisation paved way for companies to cross borders and cultures like never before, CSR gained global visibility and

[318] Sara Rodriguez Gomez et al 'Where does CSR Come from and Where Does it Go? A Review of the State of the Art' (2020) 10 Administrative Sciences <https://www.mdpi.com/2076-3387/10/3/60> accessed 12 November 2020; Mauricio Andres Latapi et al 'A Literature Review of the History and Evolution of Corporate Social Responsibility' (2019) 4 International Journal of Corporate Social Responsibility < https://jcsr.springeropen.com/articles/10.1186/s40991-018-0039-y> accessed 09 November 2020.
[319] Adaze Okoye, 'Theorising Corporate Social Responsibility as an Essentially Contested Concept: Is a Definition Necessary?' (2009) Journal of Business Ethics 613; Allen Ferrell et al, 'Socially Responsible Firms' (*Oxford Business Law* Blog, 16 January 2017) < https://www.law.ox.ac.uk/business-law-blog/blog/2017/01/socially-responsible-firms#:~:text=Back%20in%20the%201930s%2C%20two%20American%20lawyers%2C%20Adolf%20A.&text=Berle%20argued%20that%20the%20management,they%20operated%20and%20their%20shareholders.> accessed 11 November 2020.
[320] Howard Rothmann Bowen, *Social Responsibilities of the Businessman*, (1st edn, Harper & Brothers 1953)
[321] Archie B Carroll, 'A History of Corporate Social Responsibility Concepts and Practices' in Andrew Crane et al (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2008).
[322] Mauricio Andres Latapi et al 'A Literature Review of the History and Evolution of Corporate Social Responsibility' (2019) 4 International Journal of Corporate Social Responsibility < https://jcsr.springeropen.com/articles/10.1186/s40991-018-0039-y> accessed 09 November 2020.
[323] Myria W Allen et al, 'Rethinking Corporate Social Responsibility in the Age of Climate Change: A Communication Perspective'(2016) 1 International Journal of Corporate Social Responsibility < https://jcsr.springeropen.com/articles/10.1186/s40991-016-0002-8#citeas> accessed 15 November 2020.
[324] Elise Hunter, 'Five Decades of CSR Research Have We Really Learnt Anything About Value Perceptions Since Nestle?' (MBus thesis, Auckland University of Technology 2018).

became more formalised, varied and deeply integrated with different complimentary concepts and expanded from mere philanthropic approach to an eventual and abiding concern for socially responsible products, processes and employee relations.[325] With recognition of CSR in globalising world, it started being juxtaposed and integrated with complimentary concepts such as business ethics (BE), corporate citizenship (CC), corporate social performance (CSP) and corporate sustainability (SUS).

Business Ethics (BE)

Simultaneous rise in stakeholders' consciousness, widespread business scandals, and conviction of large companies for social, environmental and humanitarian consequences by media, activists and governments across the globe, resulted in the loss of confidence of public in companies.[326] The only way for redemption for companies was through explicitly establishing ethical values by promoting socially responsible goals, normative principles and establishing fairness and justice in across all business transactions.[327] With competitiveness and reputational risks becoming globalised, companies strived to achieve legitimacy and ethical values by integrating BE with CSR.[328]

Corporate Citizenship (CC)

The popular notion of "*business of business is business*"[329] seemed to be declining. As companies emerged as global citizens, companies were viewed equivalent to individual citizens giving rise to a new concept of CC that encouraged companies to exceed its minimum obligations towards the society.[330] CC, a concept derived from political science is "*rhetorically*

[325] Archie B Carroll, 'Corporate Social Responsibility: The Centerpiece of Competing and Complementary Frameworks' (2015) 44/2 Organizational Dynamics 87; Archie B Carroll (n 7).
[326] Elise Hunter (n 10); Victoria Sadaf Azizi, 'The Magic of Corporate Social Responsibility: An Academic Perspective' (2020) 12/1 Amsterdam Law Forum 3.
[327] William C Frederick 'Corporate Social Responsibility: Deep Roots, Flourishing Growth, Promising Future' in Andrew Crane et al (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2008).
[328] Archie B Carroll, 'Corporate Social Responsibility: The Centerpiece of Competing and Complementary Frameworks' (2015) 44/2 Organizational Dynamics 87.
[329] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (New York, 13 September 1970).
[330] Lisa Whitehouse, 'Corporate Social Responsibility as Citizenship and Compliance Initiatives on the Domestic, European and Global Level' (2003) Journal of Corporate Citizenship 85.

a superior synonym to CSR"[331], but seemed to be just a continuance and deeper elaboration of CSR which endured companies' contribution to common wealth, participation in governance and demonstration of respect for other citizens.[332]

Corporate Social Performance (CSP)

CSP is an offspring of CSR based on responsiveness of companies towards stakeholders' demands whose dimensions are spread across from environment, community relations, employee relations, diversity to product issues. CSP encourages companies to establish communication and dialogue with stakeholders to perform better in fulfilling societal needs.[333] CSP gained huge importance as investors perceived companies with high CSP as lower risk investment even if they didn't perform financially well and job seekers considered CSP as an important assessment of companies.[334] CSP helps integrating CSR into business framework and develop corporate policies addressing social issues.[335]

Sustainability

The doctrine of sustainable development coined by the Brundtland Commission[336] in 1987 as a solution to growing environmental and climate issues, gained international appeal almost immediately and became a part and parcel of business activities across the world. Sustainability became a means to balance challenges and opportunities of globalisation as companies started using it in multitude ways as they realised that "*the key to sustainability is the future*".[337] Through the years, sustainability became closely associated to CSR as it encouraged companies

[331] Mark Anthony Camilleri, 'Corporate Social Responsibility: Theoretical Underpinnings and Conceptual Developments' in Samuel O Idowu and Stephen Vertigans (eds) *Stages of Corporate Social Responsibility From Ideas to Impact* (Springer 2017), ch 5.
[332] ibid; William C Frederick (n 17); Najeb Masoud, 'How to Win the Battle of Ideas in Corporate Social Responsibility: The International Pyramid Model of CSR' (2017) 2 International Journal of Corporate Social Responsibility < https://jcsr.springeropen.com/articles/10.1186/s40991-017-0015-y> accessed 10 November 2020.
[333] Mark Anthony Camilleri (n 17).
[334] Elise Hunter (n 10); Archie B Carroll (n 7).
[335] Tan Seng Teck et al, 'A Contextual Review on the Evolution of Corporate Social Responsibility' (2019) 9/2 Journal of Management and Sustainability 136; Archie B Carroll (n 7).
[336] United Nations World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future* (Oxford University Press 1987).
[337] Mauricio Andres Latapi (n 8); Archie B Carroll (n 11).

to have social and environmentally responsible behaviour that can be positively balanced with economic goals.[338]

STRATEGIC CSR IN 2000s

2000s emerged as a decade where CSR moved into core of businesses by becoming part of strategic policies. As companies recognised CSR's role in fulfilling its capitalist goals while achieving accountability towards stakeholders, society and environment, they also realised that it was not possible to spend anything which does not make "*business sense*"[339] in the era of globalisation and cut throat competition.[340] Therefore, companies started resorting to CSR as a strategic managerial instrument to generate opportunity, innovation and competitive advantage while solving social problems and enhancing legitimacy.[341] Companies became proactive in strategic CSR as it focused at micro level by supporting social and environmental issues by aligning them to business strategies which yielded better response from stakeholders.[342]

Strategic CSR gained further momentum as companies realised that responsible businesses created positive image and competitive advantage to companies and companies could attract higher quality and quantity of investors which ultimately helped in increasing the company's economic growth in the long run.[343] It was also observed that CSR increased brand loyalty and positive association.[344]

At the same time, nature of strategic CSR and its communication was also of utmost importance. Not all CSR strategies yielded desired benefits. Critiques point out that short-term CSR and cause – related CSR are not only ineffective but are also dangerous as they often allow companies to profit out of social problems.[345] Also, businesses engaged in CSR because of extrinsic motivators such as social pressure, mere legal compliance or mere image

[338] Mauricio Andres Latapi (n 8).
[339] Parul Rishi and Swati Moghe 'Integrating Corporate Social Responsibility and Culture as a Strategy for Holistic Corporate Success in India' (2013) The Journal of Corporate Citizenship 17.
[340] Ibid.
[341] Parul Rishi (n 25); Marcus A Hollerer (ed) 'The Career of CSR', in *Between Creed, Rhetoric Façade, and Disregard*' (Peter Lang AG 2012).
[342] Wayne Visser, 'The Ages and Stages of CSR Towards the Future with CSR 2.0' (2011) 3 CSR International Paper Series.
[343] Vaibhav P Birwatkar (n 2).
[344] Elise Hunter (n 10).
[345] Myria W Allen (n 9).

enhancement tactic generally faced public criticism and boycott leading to negative impact.[346] Strategic CSR became of utmost importance from employee perspective as well. If CSR fails to be integrated into strategic policies, it ended up being considered an additional burden by employees which resulted in negative contribution.[347]

SHARED VALUE AND INNOVATION CSR IN 2010s

With the beginning of 2010s, companies realised that the best way to strike a balance was by achieving shared value that emphasised on interconnections between societal and economic progress.[348] This could be achieved through three distinct ways – reconceiving product and markets, redefining productivity in value chain and building supportive industry clusters at company's location.[349] The shared value CSR (SVCSR), changes the narrative from maximisation of profit to optimisation of value by companies.[350] SVCSR brings out a new thinking with congruence between societal progress and productivity, promotion of capitalism in the poorer economies by exploring the "undeserved markets" and enhancing the purchasing power.[351] SVCSR is more than just financial profitability, it is a goal focused on the holistic overall economic development.[352] SVCSR helped in bridging the gap between expectations of society and companies as there is a strong link between the societal expectation and corporate behaviour.[353] With SVCSR, companies redefined their purpose to do what is best for society and world.[354] Shared value or added value created beyond commercial transaction are gained loyal relationships.[355] Through SVCSR, businesses are said to harness and achieve full potential by approaching societal issues with a value perspective which will result in the enhanced connections between economic and social concerns by throwing focus on the right kind of profits that create societal benefits rather than reap profits at the expense of societal needs.[356]

[346] Elise Hunter (n 10).
[347] Parul Rishi (n 25).
[348] Archie B Carroll (n 11).
[349] Michael E Porter and Mark R Kramer, 'Creating Shared Value How to Reinvent Capitalism – and unleash a wave of innovation and growth' (2011) Harvard Business Review 1.
[350] Mauricio Andres Latapi (n 8).
[351] Michael E Porter (n 35).
[352] Wayne Visser (n 28).
[353] Elise Hunter (n 10); Mauricio Andres Latapi (n 8).
[354] Mauricio Andres Latapi (n 8).
[355] Parul Rishi (n 25).
[356] Michael E Porter (n 35).

In addition to SVCSR, 2010s paved way to innovative practices, processes and products.[357] Innovation thorough CSR helped in achieving better organisational efficiency and performance through efficient planning and use of cleaner and faster technologies.[358] With the increased need to curb environmental problems, CSR also gave rise to "green innovation", or sustainability-oriented innovation.[359] SVCSR that postulated innovation and will drive the next wave of innovation and productivity growth in the global economy.[360] Technological advancements, digitalisation and artificial intelligence have further paved way for adoption and adaption of innovation into the business environment.[361]

COVID CSR IN 2020s?

2020 has started off with a deadly virus spreading havoc, pain and destruction across the globe. It has changed the narrative of all domestic, national and international norms once and for all. It has even put CSR to the test.[362] We have already seen companies across the globe involving in CSR activities being directed towards mitigating damages caused by COVID-19, be it through funding medical research or medicines, or distributing basic necessities to the needy, or taking losses to mitigate societal loss. But, how long are the companies going to continue CSR this way? How will CSR evolve in the 2020s? Will businesses across the world go back to capitalism and profit maximisation to sustain themselves? Will CSR go back to its age-old concept of being just a philanthropy and charity? These are questions that only time can answer.

But, to quote Mark Kramer "*No one expects or requires major companies to take extraordinary measures to help their many stakeholders, but the bold and creative steps they take today to deliver immediate assistance will define their legacy tomorrow*"[363].

CONCLUSION

[357] Sara Rodriguez Gomez et al 'Where does CSR Come from and Where Does it Go? A Review of the State of the Art' (2020) 10 Administrative Sciences <https://www.mdpi.com/2076-3387/10/3/60> accessed 12 November 2020.
[358] ibid.
[359] ibid.
[360] Sara Rodriguez Gomez (n 42); Michael E Porter (n 35).
[361] Mauricio Andres Latapi (n 8).
[362] Mark R Kramer, 'Coronavirus is Pitting Corporate Social Responsibility to the Test' (*Harvard Business Review*, 01 April 2020) < https://hbr.org/2020/04/coronavirus-is-putting-corporate-social-responsibility-to-the-test> accessed 17 November 2020.
[363] ibid.

CSR has emerged as a concept that has changed the narrative of companies through the last three decades. CSR in 1990s, CSR emerged as a holistic concept with BE, CC, CSP and sustainability integrated with it as its subsets. The profit-centric and capitalist mindset of companies seemed to have declined as there appeared to be an unwritten memorandum of understanding between communities and companies that had been missing for centuries as CSR triumphed in becoming an inescapable priority for companies.[364] By 2000s, CSR was a key instrumental in business strategies that helped companies strike balance between achieving economic goals and fulfilling social obligations. As CSR became a fundamental element in strategic business management, CSR evolved to depict the fundamental principles and organisational culture of companies.[365] SVCSR in 2010s opened up a whole new perspective to the companies by moving away from the legacy of profit maximisation and capitalism and by concentrating on the balanced shared value between companies and societies. SVCSR changed the dynamics of operation of companies by changing the basic fundamental approach of business.

CSR in the globalising world has come out as a core business element. What started off as mere philanthropy and charity centuries ago eventually evolved to question the ethical and moral nature of businesses around the world. With the passage of time, CSR emerged as a core business strategy to enhance economic profits. Ultimately, today CSR has emerged as a concept that has brought in a new narrative of shared value where balance between companies and society has risen to be the paramount motive behind businesses, breaking away from ancient motives of capitalism, profit maximisation and individual gain. CSR through the decades has helped shaped fundamental principles behind the motive of companies. With globalisation, CSR has shaped businesses and economies across the globe by bringing back the lost limelight on the societal needs as the motive for economic activities. But, with the COVID-19 breaking all norms, the evolution or the way ahead for CSR looks like an enigma that can only be answered by time.

[364] Samuel O Idowu and Stephen Vertigans (eds), 'Stages of Corporate Social Responsibility: An Introduction' in *Stages of Corporate Social Responsibility From Ideas to Impact* (Springer 2017); Victoria Sadaf Azizi, 'The Magic of Corporate Social Responsibility: An Academic Perspective' (2020) 12/1 Amsterdam Law Forum 3.
[365] Sara Rodriguez Gomez (n 43).

WHAT IS THE LEGAL POSITION OF CONSENT IN LAW, ESPECIALLY IN CONTRACTUAL LAW

- MAAHIKA S.

ABSTRACT

What is the significance here to consent? What does even this term mean at first? When all is said in done, in law, yet authoritative matters as well. Consent is a fundamental segment of agreements, yet its part in agreement law is dark. Despite its significance, there is no free teaching of consent; instead, it has a crucial role; however, it is a poorly characterized job in evaluating principles like consent or coercion. This research paper tends to this critical exclusion in agreement law by dismantling the importance of legally binding assent into three conditions: a deliberate demonstration or indication of assent, willfulness, and information. This paper contends to explore that consent must be perceived comparative with these three conditions. Likewise, it is a determination yet an interaction and a unique that relies on an assortment of variables, including the overall accountability of the gatherings, their relationship, outsider impacts, and artistic effect. Through an assessment of exemplary and current cases, the paper exhibits how the idea of relative assent gives an intelligible system to understanding agreement law and what is its actual position and situation in lawful matters like contracts.

INTRODUCTION

We run over agreements all the time in our regular day to day existences while never getting them. Agreements are all over, regardless of whether we are purchasing something in a drug store, getting link, or downloading an application on our gadgets. Agreements are a fundamental part of any organization. Agreements are utilized in practically any understanding, regardless of whether composed or verbal. The Indian Contracts Act controls contracts in India. As per the Indian Contract Act 1872, an arrangement enforceable by law is an agreement. All arrangements are contracts in the event that they are made by the free assent of gatherings equipped to contract, for a legitimate thought and with a legal article, and are not as of now explicitly pronounced to be void. Agree is supposed to be so caused when it would not have been given yet for the presence of such compulsion, excessive impact, extortion, distortion, or slip-up.

At the point when agree to an arrangement is brought about by compulsion, extortion, or distortion, the understanding is an agreement voidable at the choice of the gathering whose assent was so caused. Involved with an agreement whose assent was brought about by extortion or deception may, in the event that he thinks fit, demand that the agreement will be performed and that he will be placed in the position he would have been if the portrayals made had been affirmed. A special case for the standard is that if such assent was brought about by distortion or by quiet, false inside the significance of S.17, the agreement, by the by, isn't voidable if the gathering whose assent was so caused had the methods for finding reality with common determination. Extortion or deception that didn't make the assent an agreement of the gathering on whom such extortion was rehearsed or to whom such distortion was made doesn't deliver an agreement voidable.

HYPOTHESIS

Free consent is a crucial element in any contract. In the absence of free consent, the contract or the agreement should be void in any circumstances. Validity is canceled if the contract was breached regarding consent.

CONSENT IN LAW

Consent is the act of reasoning and agreeing. A person who is strong uses his or her mental faculties to make a wise decision shows that he or she is willing to do what is right.[366] Consent takes the body's ability to perform and exert effort to demonstrate, be willing, and countless. It is an unaffected act of fraud, pressure, or sometimes even an error where these things are not the consent's cause. Consent is stated in all agreements. When it comes to contracts, approval is a form of deliberation. When a person has the mental capacity to reach a sound decision, they can demonstrate their consent by fulfilling the request requested by another person. The parties who finalized the claim in accordance with the consent order agreed to the terms of the decision entered in the court record after the court's approval. Consent is a practice for a community built on communication. When we come across on-screen information on the Internet, we read and "agree" with long words presented in a small font. The physician reads a patient-informed document at the hospital that outlines the risks, benefits, and alternatives before the procedure. Your partner may use a facial expression to indicate a willingness to be physically intimate. These examples show that social relationships create the principles of a

[366] West's Encyclopedia of American Law, edition 2.Consent legal definition of consent

consensus system and, in so doing, transform unhealthy behavior into permissive behavior. In these cases, the consent notes the difference between sharing personal information and privacy attacks; invalidity of a contract due to lack of consent; surgery from a medical battery; and sexual assault.[367]

The definition of consent is complex because our definition of "normal agreement" of consent is not just intuition.[368] Definition of it only occurs when a person or community feels that there has been a significant violation (breach) of the consent. It is easier to 'understand' what consent is than to 'decide' what consent is.

Consent also plays an essential role in contract law because it reflects the purpose and acceptance of the agreement's terms and conditions.[369] Although general contractual law sets out reasonable consent in these circumstances, research shows that consent plays a subtle role in trading arrangements. Indeed, the study of consent often shows a contradiction between how one defines a permit compared to how legal rules and regulations dictate how a particular practice should be practiced. In these cases, the prescribed rules of consent often benefit and protect institutions rather than individuals.

AGREEMENT'S ESSENTIALS

Section 10 of the Indian Contract Act, 1872 tells that:

Between two parties, there should be an agreement.. When another accepts one party's application, it becomes an agreement. The parties to the agreement must be able to agree. There should be a legal consideration and a legal factor in the agreement. Free consent of the contractual parties to the contract is a must. An agreement should not be said that the law does not work. This research paper explores on one of the most important aspects of a legal contract: the Free Consent and its significance in the Contracts Act.

FREE CONSENT

[367] https://ohrh.law.ox.ac.uk/consent-in-indian-rape-law-a-case-for-an-objective-standard-of-determining-consent/#:~:text=Explanation%202%20appended%20to%20section,in%20the%20specific%20sexual%20act%E2%80%9D.

[368] https://www.upcounsel.com/consent-contract-law

[369] https://blog.ipleaders.in/free-consent-3/

The parties' approval must be binding for the agreement to operate. The ad-idem principle is applied, which states that the contracting parties must mean the same thing in the same way. The contracting parties should have a common view of the problem at hand.

Permission (consent) isn't enough to make a contract enforceable. Consent must be given freely and voluntarily.

The Indian Contracts offer a definition of free agreement, stating that it must be free of coercion, undue influence, fraud, misrepresentation, or mistake. Permission is granted where there is a compulsion, harmful impact, deception, misrepresentation, or omission that prevents it from being granted. Free assent unmistakably implies the shortfall of any type of compulsion, ill-advised impact, extortion, distortion, or wrongdoing. At the point when the assent allowed is influenced by these issues, it inquires as to whether the license assent was free and deliberate. The motivation behind this framework is to guarantee that the gatherings' decisions at the hour of going into the agreement have not been abbreviated. In this manner an assent allowed under pressure, excessive impact, extortion, deception, or a misstep has the ability to nullify the contract.

Unauthorized features

As mentioned above, the consent given must not be due to:

COERCION

As per the Indian Contracts Act, 1872, coercion is defined as:

"'Forced' to commit, or to threaten to commit, any act which is prohibited by the Indian Penal Code (45 of 1860) or to unlawful detention, or to threaten to seize, any property, in discrimination of any person, to commit any person to enter into an agreement. The point to remember is that the IPC does not need to operate where approval has been obtained. The most important part of the law is the term "discrimination of any person or thing," which means that coercion can be directed at the discrimination of any person and not just a party to the agreement. It is also not important that only the contract party creates the enforcement. Even a third party contractor can create a compulsion to obtain approval, as was shown in the case of Ranganayakamma v. Alwar Sethi when a widow was forced to take her child by her parents by not allowing the widow's husband's body to be removed from the house until the adopted child was made.[370] In the cases of coercion, the burden of proof lies with the party whose consent

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has been granted. When a group acquisition is obtained by force, the contract affects the party's choice of its acquired consent. Also, Coercion need not continue from gathering to contract. It need not be coordinated against the other contracting party. It is unimportant whether the IPC is or is not power at that point or where the pressure is utilized.

Impact of the danger to document a suit: A danger to document a suit does not add to intimidation except if the suit is on a misleading allegation. The danger of documenting a suit on the fraudulent allegation is a demonstration taboo by the IPC and, in this manner, will add up to a demonstration of pressure.

Impact of Threat to end it all: The danger to end it all does not add up to pressure in light of the fact that the endeavor to self-destruction is culpable in IPC, not a danger to end it all. Hence voidable. (Chikham Ammiraju v/s Seshama).

Impact of a danger to strike: A danger to strike by workers on the side of their requests is not viewed as a compulsion. This is on the grounds that the danger to strike is not an offense under the IPC. It is a correct given under the Industrial Disputes Act.

Impact: When intimidation is utilized to acquire the assent of a gathering, the agreement is voidable at the alternative of the gathering where assent was gotten by compulsion.

Keeping property under contract: Confinement of property by a home loan until the installment of advance does not add to compulsion.

UNDUE INFLUENCE

When contractual parties are in a partnership where one may exert leverage over the other's will and use the fraudulent incentive to obtain the other's consent, the consent is allegedly inappropriately affected. The Contract Act of 1872 now includes provisions for cases in which one may exercise authority over the will of another. There are the following: When one person has total or apparent control over another. These are: When someone has total or apparent power over someone. When a person enters into a contract with another mentally ill person, it can be temporary or permanent.. When the party in charge of the will, enters into a contract, and the original contractual agreement appears to be incomprehensible, it is the ruling party's responsibility to prove that the consent was not obtained with improper influence. When a party's consent to the contract is obtained by improper influence, the contract becomes legal at the discretion of the party whose consent has been obtained.

FRAUD

If consent is obtained by deceit, it is not considered to be free. In such situations, the contract plays a role in the team's decision to pursue a fraudulent acquisition. Furthermore, fraud is a form of cruelty, as is the act of causing harm. The Indian Contract Act of 1872 defines the term "fraud." The law defines five actions that constitute fraud when they are committed by an agency or with its assistance or counsel to defraud another person. The following are the steps to take. Concerning a deception, a concept conceived by a group of people who consider it to be false. A party's sufficient concealment of the facts or a promise rendered without the intent of fulfilling it.. Simply keeping quiet about the facts can affect a person's willingness to enter an agreement; however, if there is a promise to talk to a peaceful individual, that is deceptive. The Uberrima Fides contracts, also known as Contracts of Utilitarian Great Faith, are an example of such cases, as they are expected to be fully disclosed. In cases of misrepresentation, the party that reports them bears the standard of proof. The meeting should reveal the circumstances that could lead to extortion. Basically, speaking in a cryptic manner isn't enough. If a group whose consent was obtained by deception has had the opportunity or plans to obtain truth through cooperative efforts, the agreement is valid.

MISREPRESENTATION

Misrepresentation under the Indian Contract Act, 1872 has an entire importance and can be isolated into three kinds.

- The principal type is the point at which an individual says something that isn't correct or who trusts it to be valid.

- The second is the sort wherein there is a penetrate of obligation by an individual who offers a counterfeit expression and acquires some benefit despite the fact that it was not his goal to deceive the other party.

- The third is the sort where in the event that one gathering acts honestly. It makes the other party commit any error regarding the matter of the understanding.

As can be seen over, these three kinds of deception share one critical point practically speaking: the negative portrayal party's goal isn't to be faulted; it's anything but a stunt for the other party

to go into an arrangement. The motivation behind a group that offers a flase expression is the distinction among deception and extortion.

The duty rests with the gathering looking for inappropriate portrayal to dodge an agreement demonstrating that the portrayal has been abused. At the point when the securing is acquired by ill-advised portrayal, it becomes void when the party gets its assent.

MISTAKE

When one of the parties consented to the contract under some form of misunderstanding, the consent was given in error. If there was not any misunderstanding or mistake, the party would not have entered into an agreement. Under contract law, an error can have two types: 1) mistake of law and 2) mistake of fact.

Mistake of law

When a party has a disagreement over the terms of a law, it is called a Mistake of Law. Now, the party may be confused as to national law or foreign law. If it is a violation of state law, the contract is unavoidable. The party cannot make a request for no knowledge of the laws of his country. However, if it is a mistake in the law of the land, it may be forgiven.

Mistake of fact

When the parties have a misunderstanding regarding the subject or terms of the contract, it is said to be a factual error. Misunderstandings may be on one side or both.

Bilateral mistake- When both parties are subject to a misunderstanding/error related to a factual matter essential to an agreement, the agreement becomes effective.

Unilateral mistake - If the misunderstanding/error is on one side of the contract, the agreement remains valid. Only when a party makes a mistake about the parties to the agreement or the work type, the agreement becomes void.

A contract may not be legitimate or lawfully restricting except if approved to do as such. The arrangement, essentially, happens when the two players consent to concur with one another. Authorization isn't conceded under tension. On the off chance that one or the two players give their assent under pressure, the agreement won't be substantial. In the event that there is a

negative impact or pressing factor, it is accepted that the party can't give their approval uninhibitedly.

Both pressing factor and the negative effect can make the agreement be ended. This likewise implies that the gatherings may lose their capacity to reimburse the agreement at the hour of affirmation, which implies that they won't reestablish it to its pre-contract status. Loss of capacity to concede agreement can likewise deny outsider rights assuming any.

Free consent is basic in making an agreement a legitimate agreement. The estimation of free assent can't be overemphasized. consent of the party of the contract to the understanding must be free and deliberate. Agree to the understanding should be allowed with no type of pressure or misrepresentation. The agree given to the gatherings should be free as this could influence the legitimacy of the arrangement. In the event that the arrangement's consent is acquired or upheld, inappropriate impact, extortion, deception, or mistake, at that point it has the ability to refute the understanding.

Break of agreement.

As referenced above, if free assent is missing, a few variables sway the understanding's support. Therefore, free agree to the agreement is essential to the understanding's genuineness. If you don't give your assent, you won't have the choice to consent to an arrangement. Also, the getting party's endorsement, rather than the distant, is central to the arrangement's validness.

CONCLUSION.

It is clear that consent has a significant role in law and contractual matters, where all the matters are based on each other's discretion. Free Consent is significant to settle on concurrence with a legitimate agreement. The significance of free consent cannot be focused on enough. Consent of the gatherings to the agreement should be free and deliberate. Agree to the agreement must be given with no critical factor or daydreams. Significantly, the gatherings' consent is free as this can influence the agreement or contract's legitimacy. If the agreement to the arrangement was acquired or instigated by compulsion, disproportionate impact, extortion, distortion, or mistake of fact or law, at that point, it could settle on the understanding void. When there is no consent or mistake in consent, there is no contract. The individual should give legitimate consent at the hour of making the agreement. The ethical responsibility for a contract has

consistently been the 'consent.' Since the importance of consent has been darkened, it has again been conflated and mistaken for a purposeful demonstration or "appearance," which was accepted to show assent. The legitimacy of consent, in any case, relies on the legitimacy of the conditions which are constitutive of it. It is the cycle of assessing the states of consent which this research paper has tried to deliver more straightforward. A relative consent structure catches more than the abstract condition of the consenting gathering; it separates the conditions that establish consent and surveys them considering the two players' lead to decide the "legitimacy" of consent. Moreover, just like in contracts, the truth of consent must be caught as an entity in that particular context.

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DISSOCIATIVE IDENTITY DISORDER: A GREY AREA WITHIN THE INSANITY DEFENSE

- VEDANT SAXENA

ABSTRACT

Insanity essentially refers to a condition when a person is incapable of comprehending the nature and consequences of his actions. According to Section 84 of the Indian Penal Code, a person shall not be held liable by reason of unsoundness of mind, if he was incapable of knowing the nature of the act, or that what he was doing was either wrong or contrary to law. However, what happens when the act has been committed voluntarily and with full knowledge of its nature and consequences, but not by the person's primary personality? Through this article, the author discusses the injustice in holding an innocent person liable for the acts of his alter personality, and the need for judges to identify patients suffering from dissociation as legally insane. Explaining the uniqueness of Dissociative identity disorder as a mental illness, the author tries to justify the fact that holding a person liable for the acts of his alter is equivalent to holding an innocent person liable, which the law condemns.

1. INTRODUCTION

Dissociative Identity Disorder (DID), previously referred to as Multiple Personality Disorder, is a condition when one person harbors two or more personalities. Each personality possesses its own memories, behavior and preferences. Dissociation is usually an outcome of the brain's persistence in adapting to self-preserve, amid conditions of severe stress or anxiety. Most DID patients have been subject to one or more traumatic events in their lives, such as childhood abuse, domestic violence, kidnapping, war, etc. In its most common form, only one personality manifests itself at a time, while the rest remain dormant. They may or may not be aware of the active personality's actions. The dormant alters may or may not be aware of the active personality's actions. Therefore, with regards to the culpability of a DID patient, a perplexing question comes up: Would it be just to hold a person criminally liable for the actions of his alter personality? This issue has come up numerous times before law courts. However, most have shown reluctance in acquitting the accused since DID does not satisfy the insanity defense.

2. REASONABILITY OF HOLDING A PERSON LIABLE FOR THE ACTS OF HIS ALTER

2.1. Criminal responsibility if alters are persons

If a crime is committed by an insane person, it could be concluded that the person was incapable of comprehending the nature and consequences of his actions. However, in the case of DID, the person might be fully conscious of his actions. The only difference is, that the act is committed not by the person's primary personality, but by his alter. Holding the host personality liable for the acts of an alter would clearly be equivalent to holding an innocent liable for the acts of the guilty.[371] It is true that the act is committed both consciously and voluntarily, but there exists at least one personality which is innocent.

Consider the case of conjoined twins. If one twin one was to pick up a gun and shoot somebody, punishing the culprit would mean punishing an innocent too. Similarly, in the case of DID, punishing only the criminal alter would not only be unjust, but also impossible. For instance, how would the prison guards be able to determine when the criminal alter manifests itself? Or how would they be able to make the criminal alter stay out for the entirety of the punishment? It could also be argued that in order to save the innocent from punishment, the person must simply be kept in prison for the duration of the punishment, and the punitive intent must only be directed towards him when the criminal alter is active. However, this argument is flawed too, for this case would involve keeping the innocent host imprisoned, and thereby having to serve for the acts of another.

Therefore, in order to save innocent persons from being held culpable, the guilty would essentially have to go free. However, the law considers convicting an innocent to be a whole lot worse than letting the guilty go free. According to Blackstone, "Better that ten guilty persons escape, than that one innocent suffers."[372]

2.2. Criminal responsibility if alters are person-like centers of consciousness

Since alters are fairly unconventional entities, not all people may regard alters to be separate persons altogether. Alters being person-like entities is essentially based on the premise that one body houses only one person, and therefore disembodied entities cannot be considered persons. However, if it is proven that a DID patient houses more than one personality, with each personality having its own distinct memories, thoughts and histories, how would it be just to convict an innocent personality for the actions of another?

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[371] Elyn R. Saks & Stephen H. Behnke, Jekyll on trial: multiple personality disorder and criminal law 68-80 (New York University Press 2000).

[372] 4 William Blackstone, Commentaries on the laws of England 358 (1826).

The very foundation of determining the culpability of DID patients is based on the premise that alters are separate person-like entities. Therefore, even though they might not possess separate bodies, they still are separate entities, and punishing the innocent host would mean punishing an innocent person.[373]

3. WHEN MUST THE HOST BE HELD CULPABLE?

In most cases, holding a person liable for the actions of his alter seems unjust. However, there are 2 major instances when the host could be convicted. Firstly, if all alters knew of, and acquiesced to the commission of the act. In *State v. Green*[374], one litigant suggested a test in order to help determine the culpability of the accused. According to it, if the host personality was, even in the slightest, aware of the act, the accused shall not be allowed to invoke the insanity defense. However, this view is both unreasonable and unjust. Knowledge does not guarantee control. It must also be proven that the other personalities were not in a position to reasonably prevent its commission.

Secondly, if the alters are placed in a particularly organized manner, they could be held liable on the basis of corporate criminal responsibility. However, even in such cases, the punishment would have to be mitigated on account of certain factors. The offenders of a corporation cannot be imprisoned; they can only be charged a fine. Therefore, corporate criminal liability could be invoked for only those offences which do not attract mandatory imprisonment.

3.1. State v. Moore (1988)

This case[375] involved one Marie Moore, who had terrorized a group of children, and participated in beating one of them to death. On being arrested, she contended that at the time of commission of the offence, she was dissociated from her primary personality, and therefore, by virtue of insanity she cannot be held liable. However, it was discovered that Marie Moore herself had not been unaware of her alter's actions. For instance, she used to make regular phone calls to herself pretending to be her alter calling. On one occasion, she avoided the police when she was summoned. Therefore, she was unable to invoke the insanity defense, for the host personality itself was no stranger to the alter's crimes.

4. VIEWS OF THE COURTS

[373] Elyn R. Saks & Stephen H. Behnke, Jekyll on trial: multiple personality disorder and criminal law 80-90 (New York University Press 2000).
[374] State v. Greene, 960 P.2d 980.
[375] State v. Moore, 113 N.J. 239 (1988).

4.1. The 'Alter' approach

The alter approach seems to have been predominantly applied by courts in cases of DID. It involves an identification of the criminal personality and an assessment of his state of mind at the time of the offence. If the alter who committed the crime would be culpable under the law, the innocence of the host personality becomes immaterial. This approach seeks to punish each personality for his or her own individual actions. Therefore, if this approach were to be followed, the innocent host personality might well have to bear the brunt of the alter's actions.

4.1.1. Ohio v. Grimsley (1982)

Robin Grimsley was arrested on the charge of drunk-driving.[376] Robin contended that she should not be held criminally liable, for at the time of the commission of the crime she was dissociated from her primary personality. She claimed that neither was she aware of the commission of the crime and therefore she cannot be said to have committed it voluntarily. The court, however, after a detailed study of DID and voluntariness, came to the conclusion that in this case, the act was committed voluntarily. It stated that as long as the person was conscious of her actions, it is immaterial whether the act had been committed by the host personality or an alter.

4.1.2. Kirkland v. Georgia (1983)

Phyllis Kirkland had been arrested on the charge of 2 bank robberies.[377] She was diagnosed with a psychogenic fugue, which the court considered to be more or less similar to DID. She claimed that since she had been dissociated from her primary personality at the time of the offence, she should not be held liable. The trial court declared the plaintiff to be mentally sick, and therefore, absolved her. However, the Georgia Court of Appeals reversed the decision of the trial court. It declared that the lower court had erred in giving its judgement, for although the plaintiff had been diagnosed with a disorder similar to DID, she had committed the with rational, purposeful criminal intent, and with knowledge that it was wrong.

4.1.3. Hawaii v. Rodrigues (1984)

Rodrigo Rodrigues had been arrested on account of sexually assaulting and raping a number of young girls.[378] The trial court acquitted him because he was diagnosed with DID. The Hawaii Supreme Court, however, reversed the lower court's judgement and held that a diagnosis of DID does not per se bring forth an acquittal. In order to prove innocence, it must also be shown that the accused was not sane at the time of the commission of the offence. In the words of the

[376] Ohio v. Grimsley, 444 N.E.2d 1071, 1072 (Ohio Ct. App. 1982).
[377] Kirkland v. State, 166 Ga. App. 478 (1983).
[378] State v. Rodrigues, 679 P.2d 615 (1984).

court: "What psychiatrists may consider a mental disease or defect for medical purposes where clinical treatment is the main concern may not be the same as mental disease or defect for the jury's purpose where an accuser's criminal responsibility is at issue".[379] Therefore, in this case, it was established that the discovery of DID does not automatically exonerate the accused.

4.1.4. Kirby v. Georgia (1991)

In this case[380], William Kirby was found guilty of defrauding a large number of people up to 3,00,000 dollars. However, he was declared mentally ill, and his psychiatrist testified that Kirby was dissociated from his primary personality at the time of the commission of the crimes. Kirby contended that on account of recent advancements in the study of DID, the Georgia Court of Appeals' judgement in Kirkland v. Georgia must be overruled. But the court affirmed the conviction. It held that although Kirby was able to show that the understanding of DID had improved significantly, he failed to show that a person suffering from DID must be absolved of criminal liability. Going by the alter approach, the court held Kirby guilty of his acts, for the defendant had acted both voluntarily, and under his own volition.

4.2. The Unified Approach

According to this approach, one human body houses only one person, regardless of the number of personalities the person may have. This approach reflects the traditional belief that a separate personality cannot be regarded as a separate person. For instance, if a person consciously commits a murder, he must essentially be held liable regardless of the fact whether the act was committed by the host personality or the alter. The mental states of the host personality and the alters do not need to be separately evaluated, for the only essential fact to be proven is whether the accused committed the act with rational criminal intent and with knowledge that it was wrong. Proponents of this approach do not deny the existence of DID outright, but they do not make any allowances for varying states of mind.

This approach might be fairly easy for the courts in determining culpability, it is clearly unjust on part of the innocent personality(s). Just like the life of an innocent cannot be compromised under any circumstances, the innocent personality too should not be held culpable for the acts of an alter.

4.2.1. Nebraska v. Halcomb (1993)

[379] *The insanity defense: Related issues*, Indian journal of psychiatry (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5282615/.
[380] Kirby v. State, 201 Ga. App. 116 (1991).

This case[381] involved one Anthony Halcomb, who was arrested for sexually assaulting two 5-year old girls. The defendant confessed to his actions before the police. However, later on, he was diagnosed with DID, and therefore was deemed mentally unfit. He contended that since he had made the confession on account of his illness, it cannot be considered permissible before the court. The question before the court was to what extent does mental illness render a confession before the police impermissible in a court of law.

Analyzing the mental disorder and seeking the help of psychiatric testimony, the court reached a conclusion that since the statement had been made voluntarily by the defendant, it was admissible evidence. Even if it were to be believed that the confession had not been made by the host personality but an alter, it was still Anthony Halcomb who had made the confession. Confessions made on account of police coercion may not be admissible, but voluntary confessions most certainly are.

4.3. The 'Host' approach

This approach, although controversial, is clearly the best approach for determining the culpability of a patient suffering from DID. Through this approach, the guilt of the host personality is first determined. If it is proven that the host personality was unaware of the act, or if the host personality was aware of, but could not reasonably prevent it, the accused shall be deemed innocent by virtue of insanity. This approach is based on the premise that sentencing an innocent host for the acts of an alter is similar to sentencing an innocent person for the acts of another.[382] Therefore, it could be said that alters are more or less treated as persons through this approach.

The Host approach differs from the Alter approach in that determining the culpability of the alter, as taken up in the former, is not considered necessary in the latter. As long as the host personality is not responsible for the acts, the person cannot be held liable.

4.3.1. United States v. Denny-Shaffer (1993)

Bridget Denny-Shaffer, the defendant in this case[383], had been employed as a labor and delivery nurse at Rehoboth Hospital in Galum, New Mexico. In 1991, in order to kidnap a baby from the hospital, she duped others into thinking that she was a medical student doing pediatric rounds. She also told her supervisor that she had just given birth to a baby, which rendered people suspicious of her actions.

[381] State v. Halcomb, 510 N.W.2d 344 (1993).
[382] Mark E. Hindley, *United States v. Denny Shaffer* and Multiple Personality Disorder: Who stole the Cookie from the Cookie jar? 961-966 (Utah L. Rev. 1994).
[383] United States v. Denny-Shaffer, 2 F.3d 999 (10th Cir. 1993).

Denny-Shaffer was arrested on the charge of kidnapping. She contended that an alternate personality had taken over her body at the time of the offence, and therefore by reason of insanity she cannot be held liable. The plaintiffs too agreed that the defendant had been suffering from DID. Although the trial court agreed with the plaintiff's contentions that the act had not been committed by the host personality, it could not agree with the argument that the alter had been legally insane during the time of commission of the offence. On account of insufficient evidence on the alter personality, the court refused to grant the insanity defense, and held the defendant liable. The appellate court, however, reversed the decision of the trial court. It held that once it is proven that the act was not committed by the host personality but an alter, it is immaterial whether the alter was legally insane at the time of its commission. Since in this case the defendant was completely unaware of the crime committed, she cannot be held liable for the acts of her alter.

This approach is however, subject to certain limitations. For instance, it could be a perplexing task to identify the host personality. This approach could easily be malingered with, for a skillful person could easily claim to be unaware of the act.

4.4. Clinical approach

The clinical approach has widely been employed in the clinical community for therapeutic purposes. According to it, alters cannot be considered separate personalities all together. Rather, they are varying fragments of a single, complicated personality.[384] Since this approach does not identify any separate personalities, the host must be held liable for the acts of his alters. Patients are often warned that they will be held responsible for all of their actions, despite difficulties they might have in remembering them or feeling a sense of control and ownership of them.

Although this approach is used extensively throughout the clinical community, it has not been employed by a court of law till date. Apart from the unified approach, the courts have mostly identified alters as separate persons, whose culpability must separately be dealt with. The Alter approach aims at determining the culpability of the criminal personality, and the Host approach aims at identifying the mind of the host personality. While the two approaches determine the patient's culpability in separate ways, both regard separate personalities to be separate people. The most probable reason why this approach has not been used by a court of law is that an innocent personality may have to bear the consequences of an alter's act. The clinical approach

[384] *The differential diagnosis of multiple personality*. A comprehensive review, The Psychiatric clinics of North America 51-69 (1984), https://pubmed.ncbi.nlm.nih.gov/6371728/.

is similar to the unified approach in the sense that the accused is considered liable for the acts of all his alters, but different in the sense that while the former regards alters to be fragmented parts of one complex personality, the latter regards alters to be separate entities.

5. STATUS OF DISSOCIATIVE IDENTITY DISORDER IN INDIA

According to Vikram Kirtikar (Psychologist & Outreach Associate, Mpower), "Dissociative disorders in India usually have a cultural context. They are mental disorders that involve experiencing a disconnection and lack of continuity between thoughts, memories, surroundings, actions and identity. People with dissociative disorders escape reality in ways that are involuntary and unhealthy and cause problems with functioning in everyday life."[385]

In 2009, a paper was published[386] by members of NIMHANS (Department of Psychiatry, National Institute of Mental Health and Neurosciences), entitled: 'Dissociative Disorders in a Psychiatric Institute in India - A Selected Review and Patterns Over a Decade' This paper was an outcome of a study conducted to discover the patterns of dissociative disorders among people attending psychiatric wards. Both inpatients and outpatients were taken as subjects.

It was found that over that past decade, a total of 893 patients had been diagnosed with dissociative disorder. Around 66% of them were outpatients, while the rest were inpatients.[387]

Another study was conducted[388] in Father Muller Medical College Hospital, Mangalore. This tertiary care center is regarded as one of the best psychiatric hospitals in the state of Karnataka. It was found out that in the years 1999, 2009 & 2018, the number of in-patient admissions were 963,874 & 1683 respectively. The number of patients suffering from DID were 17/796 (2.13%),13/645(2.01%) & 10/1117(0.9%) respectively. Some of the findings of the study are listed as follows: The patients exhibiting symptoms of DID were predominantly females, less than 25 years of age, and married.[389]

For centuries together, women have been suppressed and denied basic rights such as equality and freedom. The girl child has been hailed as 'a burden' on the family. While the scenario has improved a great deal now, there are still certain areas in North India where a son is heavily

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[385] Kalpana Sharma, *Dissociative disorder: When a person develops two personalities*, TNN (2019), https://timesofindia.indiatimes.com/life-style/health-fitness/de-stress/dissociative-disorder-when-a-person-develops-two-personalities/articleshow/70275502.cms.

[386] Santosh K. Chaturvedi et al., *Dissociative Disorders in a Psychiatric Institute in India - A Selected Review and Patterns Over a Decade*, INT'L J. SOCIAL PSYCHIATRY 533-539 (2009).

[387] Id.

[388] Dr. Joylin Jovita Mascarenhas et al., Clinical Patterns of Dissociative Disorder in InPatients from Dakshina Kannada District across Two Decades: A Retrospective Study in a Tertiary Care Hospital, INT'L J. HEALTH SCIENCES & RESEARCH (2019).

[389] Id.

preferred over a daughter. In such families, failing to bear a male child often results in unhealthy arguments, violence, and separation. Such stressful environments cause girls to start dissociating from their personal selves.

According to the study, most of the people suffering from DID were less than 25 years of age, and married. Within the first 20-25 years of life, a person undergoes a lot of ups and downs: relationships, education, marriage, etc. When women are married off at such young ages, they often encounter adjustment problems in their new home. Along with that, engaging in unpleasant brawls with her husband and in-laws often play upon the woman's psyche. This results in the development of dissociation symptoms.

5.1. The Mental HealthCare Act, 2017

The Mental HealthCare Act, 2017[390] was passed with an aim of promoting the quality of mental healthcare facilities across the country. It primarily focused on improving the quality of healthcare received by patients during treatment. The decriminalization of attempt to suicide was one of the standouts of this Act. According to section 115, any person who attempts to commit suicide would be presumed have severe stress, and not be punished. Further, the government will be under a duty to provide treatment and rehabilitation to such person.

The Act defines mental illness as "a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgement, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs".[391] One major flaw is evident within this definition- there is no set criteria for determining which mental illnesses are to be regarded as 'a substantial disorder'. Although dissociative disorders are fairly severe, a medical professional would be required to objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. Moreover, as explained earlier, medical professionals have mostly shown reluctance in recognizing the innocence of the patient.

6. CONCLUSION

With an increase in the number of people suffering from DID, a culpability approach needs to be identified which could be applied consistently and fairly. Courts have not yet adopted a uniform approach to deal with such cases. Adoption of a fixed rule would provide predictability.

[390] Mental Healthcare Act, 2017, No. 10, Acts of Parliament, 2017 (India).
[391] Id. § 2(1)(s).

Out of the 3 approaches which have been employed by courts, the Host approach seems to be the most appropriate one for securing justice for an innocent personality. This approach recognizes that even if the criminal alter does not satisfy the insanity defense, there is still at least one other alter which is innocent, and should not be held culpable. Punishing an innocent person for the acts of his alter is not only unjust, but also futile. The likelihood of an alter committing a similar act in the future would remain more or less constant, if not more. Instead, if the patient were to receive therapeutic treatment, he would be much more likely to return to society in a mentally sound state and not to further endanger himself or others. Therefore, in determining the culpability of people suffering from DID, therapy is much more of a viable option than punishment.

PATENTS, MONOPOLY AND ITS IMPACT ON ACCESS TO HEALTHCARE IN LIGHT OF COVID-19

- PRANJALI AGGARWAL

INTRODUCTION

It's often quoted that 'Health is Wealth', simply put if one has wealth, health is automatically guaranteed in today's era and all it takes is the simple replacement of first letters. Nowadays it is often witnessed that one is marred by expensive medicines, increased tax slabs, more import duty on medicines. These unrealistic demands of the pharmaceutical industry instead of escalating the chain of affordable and essential drugs is leading to a spiral increase in the mortality rate of people and this cannot be ignored[392].

Patents were originated in ancient with an objective to grant protection for an invention. Today patented inventions are all around us from everyday kitchen items like coffee Greece machine and cleaning products to inventions that have a significant global impact such as advances in medicinal drugs, systems to purify water and harvesting of crops. And in return for these inventions the inventors of new and useful product and prices are rewarded with the monopoly, usually for 20 years. The patent is the legal instrument that protects that monopoly. [393]

The rationale behind the development of patent system was to create a win-win situation by increased prosperity and monopoly in the market and recoup research costs and make a profit and for welfare for society which could be yielded from these new inventions. But it is being witnessed that the intent of the patenting process and the balance between the dual objective have been warped out over the past decade. The use of patents as strategic tools has undermined the original intent and objective of patent system and have skewered the patent bargain in favor of the inventor only.

It is being witnessed that patents now are not just a shield to protect against imitation but as a strategic tool to block competition and dominate markets as observed by Carnegie Mellon Survey of US. Patents have numerous consequences Firstly it leads to the hike in general price than what would have been if there was a free competition because of which many people are

[392]Patents And Public Health- Price of health and cost of Monopoly –JSS Law College

[393] Is the Patent system a Barrier to Inclusive Prosperity The Biomedical perspective [https://onlinelibrary.wiley.com

deprived of its access. Second patent monopolies limit what others can do with subject matter and may hamper follow -on innovation that could be life changing.

PATENTS AND PHARMACEUTICAL INDUSTRY

Medicines are among humanity's great achievements. They have helped attain dramatic improvements in health and longevity as well as huge costs saving through reduced sick days and hospitalizations. The global market for pharmaceuticals is currently around Rs 110 crore lakh annually, 1.7% of the gross world product. Roughly 55% of this global pharmaceutical spending, Rs 60 lakh crores is for brand name products usually under patents. [394] Even the Indian pharmaceutical industry is valued at US $33 billion in 2017.

Pharmaceutical industry stress that without patents there would be no innovation and invention at all, The International Federation of Pharmaceutical Manufacturers and Associates claims 'Without patent protection, the world would have been deprived of the innovative medicine which have saved countless lives. They are of the opinion that these patents are reward and they should have the hegemony in the market so that they could recover all the costs incurred for the invention and gain profits.

But the interdisciplinary exploration of patent law, the pharmaceutical industry and the medical profession serves to at least partially explain how one health care system became the most expensive in the world. And how the exclusive right to be given to inventor to exploit their invention in turning it into a cost-affair concept , with no control in the hands of middle-class man . The establishment of health sector as business opportunity and facility as a market commodity through the slow acceptance of patenting represent s a fiercely guarded wealth that continues into this era and this clearly portrays how healthcare is being hampered with the use of patents [395]

. "Are patents a tool for development of medical treatment for patients or merely a roadblock to access to health care" is a constant question in today's world. It is often observed that the commercial pharmaceutical companies have for decades been privatizing and locking up the knowledge by extending control over lifesaving drugs through unwarranted, frivolous or secondary patents and by lobbying against the approval and production of generics

[394] "A Right time to shift pharma gears " , The Hindu Editorial published on 6 June, 2020

[395] ' Medical Patents and How New Instruments or Medications Might Be Patented" available at (https://www.ncbi.nlm.gov/pmc

The industries employ many strategies to sustain their monopoly in the market and to reap profits. Either they wrap many patents around one original patent resulting in patent clusters like for e.g.- depending on the medicine the medicine may come with a proprietary inhaler or injector that is integrated into the product yet these combinations will be patented separately. Consequently, even after all patents on medicine expire the remaining patents on the associated instruments can be sufficient to hamper generic entry. Another evergreen strategy that is being followed is to patent old drug again with just slight modifications and monopolize for another twenty years which provide for lifetime monopoly for the company. [396]

Moreover, the companies employ R&D in the sector which can yield profits later like they ignore most of the diseases that are suffered by poor who cannot afford these exorbitant treatments. The 20 WHO-listed neglected tropical diseases together affect over 1 billion people but attract only 0.35% of pharmaceutical industry in R&D . Merely 0.12% of this R&D spending is devoted to tuberculosis and malaria which kill around 67 million people each year. Secondly thanks to the affluent or well insured patients that support the profit maximization of new products that lead to the major world population not being able to afford these medicines[397]

PATENTS AND RIGHT TO HEALTH CARE IN INDIA

Indian pharmaceutical industry is growing steadily over the past three decades but due to patent regime the issue of access and availability of medicine to all has been in the limelight since the millennium. Even government is trying to create an equilibrium between the patents and the access to the medicines.

Indian constitution provides Right to good health though not directly but it is the right camouflaged with right to life under Article 21. In many judiciary pronouncements it is elucidated by the court that Right to Life includes Right to Health and access to medical treatment as well. Even the Article 47 of the constitution declare that it the duty and obligation of the Indian state to improve public health. Moreover Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESR) adopted by India asserts that nations have an obligation to facilitate the Right to Health.

Thus, the government of India operates under the premise that medicine that is critical to the important healthcare needs of India's population must be both available and affordable. Indeed this paradigm is the foundational basis for India's vision for the right to health while promoting

[396] " Should Patents come before Patients ? ' (https://www.marketwatch.com)
[397] ibid

innovation and to protect the business interests through patents and this powerful undercurrent has been shaping the evolution of the Indian patent regime since India's independence in 1947 , through 1970 s , the economic liberalization era initiated in the 1990 s through the membership of WTO and TRIPS Agreement in 1995 , post -TRIPS in 2005 and all the way up today .

PATENT LAW IN INDIA AND PUBLIC HEALTH

The Patent Act, 1970 is the main legislation in India for the patenting method . Indian patent regime used to cater to needs of poor as only process patents for inventions relating to food , medicine and chemical products were allowed and not product patents but since 2004 product patenting has been recognized in the country as India being the member of WTO needed to comply with the requirements of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) . which lay down minimum standard of protection for intellectual property rights and their enforcement which was altered and this was adopted in India through Patents (Amendment) Act, 2005.[398]

But adoption of TRIPS Agreement deterred the smooth functioning of the system. The patent applications filed by foreign entities decreased. Even the medicines were priced beyond the reach of the poor which was detrimental to their interest as the medicine needed were neither easily available nor affordable for them.

Though TRIPS Agreement has not been a beneficial bargain for the country but it cannot be wholly criticized as some following clauses seek to achieve a balance between rights and obligations while paving the way towards public policy goals including access to essential drugs.

i) Article 7 of TRIPS focuses on the balance between technological up gradation as well as the socio-economic welfare of the classes so that both do not contradict.

ii) Article 8 gives autonomy to the states so that they can incorporate measures that are necessary to boost and protect public health.

iii) Even the state can prohibit patentability of inventions if they are threat to human life or health according to Article 27(2).

iv) Even TRIPS Agreement allows Compulsory Licensing that allows government to grant license to use a patent without the patent holder's permission. It is an involuntary contract between a willing buyer and unwilling seller imposed or

[398] Patents and Right to Healthcare in India available at https://www.google.com/amp/s/blog.ipleaders.in/patent-right-healthcare-india/amp/ last accessed on 11 March , 2021

enforced by the law. TRIPS Agreement do not mention Compulsory Licensing directly bit it can be inferred from the usage of words in Article 31 i.e., ' other use without authorization' It is done so as to control the production of the product so that it's supply is maintained . [399]

Moreover Section 3(d) of the Patents Act, 1970 is a check on ever greening which limits the scope of subject matter that is not eligible for patents that is not primarily covered under ' inventions' according to Patents Act, 1970 . It rejects the patents for the mere discovery of a new form of known substance unless such product manifests significant enhanced " therapeutic efficiency" over the original and known substance .

The Natco case[400] has pioneered a revolution in Indian pharmaceutical industry on working of patents and established a consonance between TRIPS and domestic laws. Even the 2013 judgement of Novartis AG v. Union of India[401] ha splayed a major role to shape Indian legislation regarding patent protection . In this judgement the Supreme Court upheld the intent of the legislature behind Section 3(d) that is to prevent evergreening which was done so as to make life saving drugs accessible to everyone . This even shows how Indian government give social welfare priority.[402]

There are still many hurdles for India to overcome so that public health and both innovation could be given equal importance . And as Innovation and patent are the two sides of the same coin there is still a long road and a lot of alterations that are to be made.

PATENTS AND CORONA VIRUS

We are living in shadow of COVID-19 pandemic, anxious about our families, our friends and ourselves depressed with widespread suffering and anxiety and knowing that mote of the poor and marginalized are worse affected as patents and price hike hit them the most. Considering the current scenario of COVID-19 it is ostensibly clear that such monopolization comes at cost of human lives. Monopoly control over the technology used in testing for virus has hampered the rapid rollout for more test kits as new producers have made it difficult for new producers

[399] Pharmaceutical Patents and Healthcare available at https://www.google.com/amp/s/www.scconline.com/blog/post/2019/09/03/pharmaceutical-patents-and-healthcare-a-legal-conundrum/amp/ last accessed on 12 March , 2021

[400] Bayer Corpn. V. Union of India, 2014 SCC OnLine Bom 963.

[401] (2013) 6 SCC 1

[402] Patent Regime and Right to Health available at http://www.legalservicesindia.com/articles/pg.htm#:~:text=The%20right%20to%20life%20and,Intellectual%20Property%20Rights%20(TRIPS) last accessed on 15 March, 2021

to enter market and sell face masks or sanitizers or to work on vaccine. Adding to this, numerous patients are in need of the three most promising treatment s for COVID-19 - Remidesivir, faviperavir and lopinavir which are also looped around patents. Patents are affecting both affordability and availability of the medicines.[403] And as now different vaccines like Pfizer, Astrazeneca, Covishield have been developed and the states are trying hard to boost up the production of the vaccine. As most of the countries that are manufacturers of the vaccine are part of TRIPS Agreement can patent their vaccines which would deteriorate public health as well as degrade the innovation. Thus, this pandemic has put this TRIPS Agreement at odds with an international effort to ramp up vaccine production. Number of countries have brought forward the request for temporary waiver of the TRIPS Agreement when it comes to COVID-19. Even India and South Africa with bunch of other countries have signed the petition to create this waiver but ut is being opposed by a few powerful nations for their personal gain. It is true that if the waiver is passed by WTO even then the outcome is still unknown. Though releasing of patent rights gave successfully lowered down the price of the vaccine but the catch is that if there is another outbreak in future, the companies will not have enough funds for the research and development. Thus, we need to find means to meet halfway so that both innovation and public health can go hand in hand.[404]

There are two options for the future: -

In the first case, we can continue as usual by relying on the existing patents where inventors will set the price high forcing downstream rationing of care. And the process would surely take a toll on human lives and particularly affecting the poor sect and developing countries. Another alternative for patent monopoly could be patent pooling which would help in affordability and availability of drugs. The pharmaceutical industry should work on socialist ideas rather than capitalist approach. They should not commercialize health care facilities and instead work for welfare of the people. For too long it has been believed that IP regime is necessary to provide for the funds to the companies and for welfare of people. With COVID -19 death toll skyrocketing with each passing day, we should question the wisdom and morality of a system that condemns millions of human beings to death and suffering every year.

CONCLUSION

[403] ibid

[404] Have COVID-19 vaccines changed intellectual property for good? available at https://www.raconteur.net/legal/intellectual-property/vaccines-intellectual-property/ last accessed on 15 th March, 2021

Government should deliberate over intriguing yet controversial question that 'Should Patents come before patients ' because the patent hegemony is hampering the health care and is taking toll on human lives. Today household expenditure on drugs constitutes 71% of all-out-of-pocket spending on health. It is the need of hour to adopt another alternative so that there is a balance between both class of the society and not only pharmaceutical industry is on upper hand .

"**You can't say that anything under the sun can be patented. The costs to the public of such a sweeping generalization would be unimaginable," said Justice Ian Binnie**[405]

Thus, a proper demarcation should be made about the products to be patented by understanding their pros and cons on large scale and patents should be used for the welfare of the society so that they do not impede healthcare facilities and innovations. Moreover, patents are not the only driver of innovation. Even in the context of drug discovery there have been major innovation that were made without any patent incentives. DR SALK, inventor of revolutionary polio vaccine when asked about who is the owner of patent, he said the people only . And there was no patent

. One suggestion is to develop a Health Impact Fund that would reward the innovations based on their performance rather to be focusing on price hike. The medicines could be sold at reasonable prices but they would get the funds based on the performance and health gain. This would also engage companies to enter into certain projects that are non-profitable under current regime. Another strategy that can be adopted is to exclude the lifesaving drugs from the patent regime so that it is affordable for all through compulsory licensing with the government through which its availability can be generated in the market. There can be profits but not profiteering. The objective should be to replace this monopoly driven system with one based on cooperation and shared knowledge.[406]

[405] Does patent law help or hinder medical innovation ? (https://www.law.utoronto.ca/news/nexus/nexus-archives/does-patent-law-help-or-hinder-medical-innovation

[406] ibid

CIVIL BOTCHES AND REMEDIES

- S. SUBHASHINI & VIJAYALAKSHMI. R

ABSTRACT

Effective and efficient access to justice is the basic and the fundamental condition for establishing rule of law in the country. Though our country has a well-established legal system, the delay in the legal process is generally highest in case of civil proceedings. The impact of these delays, for whatever reason, are pronounced in the society. A reasonable expeditious trial is an integral and essential part of the fundamental right to life and liberty. The delays are generally caused by different factors during the course namely the administrative issues, Intent of the parties concerned or the absence of the knowledge concerned. Due to delay caused by different factors, during the course of the civil proceedings, the efficiency of the judicial system is also coming down slowly. Hence, speedy trials in the civil proceedings are to be guaranteed to hold the faith of the common man in the judicial system. At the same time, speedy trial should not in any way lead to the non-compliance to the proceedings of Civil Procedure Code. General causes of the delay in the civil proceedings, the impact of the delay in the society and suggestions to tackle the problem of delay in civil proceedings are discussed in this paper.

KEY WORDS

Civil Proceedings, Order XVII Rule 1, Adjournment, Civil Procedure Code

INTRODUCTION

Cogent percolation to justice is the basic condition for establishing rule of law in a country. It has been a very commonly settled fact that the judicial system or the justice serving system in complexities in the procedure involved in the judicial system eventually creates a forum of injustice for litigants. The two most commonly used adage regarding law and the time involved in the judicial process are *"justice delayed is justice denied"* and *"justice hurried is justice buried"*. The right to litigate is one of the basic rights that has been guaranteed under our Constitution and by other international instruments signed by India. From a layman's perspective, irrespective of a well-established legal system in our country, the delay in the process makes justice a distant fruit. Nevertheless, it is important to remember that the schedules of the parties, witness, lawyers and the court play an important role in delays in

litigation. Prior to the 1999 Amendment, there was no code governing the civil proceedings in the court of law. After the two amendment, that are discussed below, there were changes in the law, but that has not taken a step to solve the problems of the citizens. Though the right to speedy justice is a fundamental right guaranteed under the Indian Constitution, it hasn't paved its way yet.

PENDING CASES

The 46th Chief Justice of India, Hon'ble Rajan Gogoi during his period of power stated that there were about 1000 cases pending in the courts for over 50 years. In addition to which, over 2 lakhs 25-year-old cases were also pending. His observations state that out of 90-lakh pending civil cases summons were not served for more than 20 lakh cases. Though there were 126 lakhs and 130 lakhs cases disposed off in the years 2017 and 2018 respectively, there were nearly 205 lakhs cases that were added on to the already pending 297 lakhs cases in lower courts between 2015 and 2018. And there was a rapid increase to more than 330 lakhs cases that were kept pending

in the subordinate courts of India. Why do we find such a humongous escalation in the number of pending cases? The legislature wants a quick disposing off the judiciary system, which is contrary to the present working of the judiciary. In one of the meetings which was held to discuss this pressing issue, His Lordship Justice Rajan Gogoi wrote to The Hon'ble Prime Minister that this can be solved by increasing the strength of judges in High courts and Supreme Court and the magistrates in the lower courts. By the end of September 2019, nearly 37% of the judicial posts were vacant. It is a worrying issue to note that the jails are overpopulated as there are cases pending in Thousands for undertrials pending for trials for years now.

As rightly said by the former chief justice, there are many cases that are pending in the courts, in-spite of the amendments in the law. It is high time the judiciary has to function properly, following the law, for speedy trial and justice to all those who come to courts, believing they would be served justice.

It was held in one of the cases that, "the court has to balance and weigh the several relevant factors and determine in each case whether right to speedy trial has been denied in a given case"[407].However, it was held that, "a reasonable expeditious trial is an integral and also an

[407] *A.R. Antulay v R.S. Nayak***;** 1988 AIR 1531, 1988 SCR Supl. (1) 1

essential part of fundamental right to life and liberty as enshrined in Article 21 of the Indian constitution"[408]

AMENDMENTS

Prior to the 1999 Amendment, there was no limit for the adjournment of the cases. But, after the 1999 Amendment, the upper limit for the number of trial adjournments the court could give was fixed to three times, by filing adjournment petition under Order XVII Rule 1. But this was invoked by a number of High Courts, in the year 2005, after a case, where the Supreme Court interpreted the problem as not curtailing the court's power to allow more than three adjournments. The same amendment also got a change, where there was only 30 days granted for service of summons for the defendants. However, this was just an outline timeframe, within which steps must be taken by the plaintiff to enable the court to issue summons and did not clearly specify the time within which the defendants ought to be served with the summons[409]. Before the 2002 amendment, the parties to the case were allowed to file the written petition within the time frame as allowed by the courts. However, after the 2002 amendment, it strictly prohibited the courts to accept the filing of a written statement beyond the period of 30 days under Order VIII Rule 1. This was extended to 90 days by incorporating to proviso in Rule 1 by the amendment in 2002. Beyond this 30-day time period, the court has a discretionary power to grant an extension period of 90 days. These two (2) amendments in the year 1999 and 2002 were for speedy completion of the pending cases and the upcoming cases, but the Supreme Court relaxed those amendments for their comfort.

CAUSE FOR DELAY

There basically exists several reasons for delay in the proceedings of cases. The following are few important causative factors that lead to delay in cases:

1. MISUSE OF PILs: In recent days the courts are filled with an immense number of fatuous PILs. In the majority of cases these fatuous PILs are not filed in the good interest for the community. Petitioners of such PILs take this forum as a scope for their own good. It was warned by Justice Bhagawati in the case of *Janata Dal v. H.S.*

[408] *Ranjan Dwivedi v. CBI*; 2008 CriLJ 1440, 146 (2008) DLT 684

[409] *Salem Advocate Bar Association-II*; 2005 (6) SCC 344

Chowdary[410] that, PILs should not be filed for the personal or political purposes of the petitioners. This has to be brought into use effectively.

2. TRANSFER OF JUDGES: Frequent transfer for judges is one of the important causes for the delay and pending cases. When the new Judge orders for a *de novo* trial, the proceedings of the court are hindered. This in turn becomes a burden for the court as it has to deal with the same case right from the scratch.
3. NON-APPEARANCE OF THE PARTIES: According to the provisions of CPC, the suit will be dismissed if the plaintiff is not present on the day of the hearing even after the receipt of summons were served, or if the summons were not served which were deemed to have been served through proper sources accepted by the courts. Similarly, the court can declare an ex-parte when the defendant doesn't make himself present. Thus, non-appearance of the parties involved in the particular case will cause delay in pronouncing judgement. This naturally becomes a heavy burden for the courts.
4. ABSENCE OF SPECIALIZED KNOWLEDGE: The improvement and advancement in technology and science has eventually paved way for new offences. Absence of specialized knowledge of the Judges in these areas will have a serious impact. With the advent of the internet in almost all spheres of human life, numerous crimes regarding the internet have also evolved. Cyber pornography, cyber hacking, stalking are few examples of the crimes that evolved with the evolution of internet. And absence of specialized knowledge of the judges will lead to delay or slow-down in the court proceedings.

IMPACT

The constant delay in civil proceedings have led to inevitable and also a serious impact in society. Since there is delay in justice being served, there is a negative impact on the model of the judiciary in the eyes of the common man. Judiciary has secured less faith in the minds of common man. The long procedure itself is tiresome in nature for the layman and there are chances wherein they don't approach the court to resolve the dispute. Such delay also leads to a situation where there is no witness present, due to various reasons such as death, transfer, etc. There are also chances that the culprit might evade the law, and escape punishment. It is also necessary to note that, even though there are witnesses present during trials, with the time, their memory fades away. The very process basically denies the poor and under-trial prisoners their due justice. With the constant delay in the time of the civil proceeding, the efficiency of the

[410] 1992 (4) SCC 305

judicial system has slowly come down. It has been held in the case of *Hussainara Khatoon v. State of Bihar*[411] and *Abdul Rahman Antulay v. R S Nayak*[412] that, "the procedure which does not provide for a speedy trial cannot be regarded as just, fair and unreasonable". The petitioner and the defendant suffer mental and physical agony due to the delay in proceedings. There are also chances that the case becomes infructuous.This means that the circumstance of filing the case would have changed and that the judgement for that case at that point of the time would be of no use.

SUGGESTIONS TO TACKLE THE PROBLEM OF DELAY IN CIVIL PROCEEDINGS

1. DISPUTE SETTLEMENT OUTSIDE THE COURT: Where it is observed by the court that there exist elements of settlement outside the premises of court and such method is acceptable to both the parties involved in that particular case, then suggestions must be given by the court to resolve the dispute in such a method. The following settlement methods should be made more efficient:
    a) Arbitration
    b) Conciliation
    c) Judicial settlement including settlement through Lok Adalat
    d) Mediation

As per section 89 of The Civil Procedure Code, 1908 adhering to the Alternate Dispute Resolution mechanism would help reduce the delays in proceedings.

2. ESTABLISHING GRAM NYAYALAYA: The Gram Nyayalaya Act of 2008 sets up the Nyayalaya. These Nyayalaya are basically village courts which are set up to ensure speedy disposal of petty cases at Gram level. Though this is a good initiative, there are only a few Nyayalaya that are functioning as of now. Establishing more Nyayalaya would probably be a possible solution to tackle the problem of delay in justice serving time.
3. WIDENING THE JURISDICTION OF COMMERCIAL COURTS: The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 has been passed so as to set up commercial courts. This setting up commercial courts would reduce the burden that has been vested on the civil courts. However, it

[411] 1979 AIR 1369, 1979 SCR (3) (532)
[412] 1988 AIR 1531, 1988 SCR Supl. (1) (1)

should increase its jurisdiction to solve cases easily and at a faster rate. In a case, **t**he apex court of the country directed that "the law commission for creation of additional courts for expeditious disposal of cases and elimination of delay".**[413]** As per the chapter IV of the act, the court shall dispose of the petition within a period of six (6) months, if it complies to Order XLIII of the civil procedure code. In the case of *Dilip Choudhury v. Pratishruti Projects Limited and Ors*., the first judgement dated 17 September 2019, dismissed the review petition dated 1 February 2019 by *Justice MOUSHUMI BHATTACHARYA*. Later in the order dated 9 January 2020, *Justice DEBANGSU BASAK,* allowed the defendant to file a written statement within 7 days from date, and the old judgement was disposed without any order as to costs.

4. ROLE PLAYED BY THE LEGISLATION: Legislation has a very important role to play in the field of ensuring speedy and also fair justice. It is the role of the legislation to make effective legislation that curtails any delayed process of judicial activities, by this the time consumed to pass judgement can be reduced. The judgement pronounced by the Supreme Court in the case of *Kailash v. Nanhku*[414], that the extension of time period for submission of written statement, beyond the extended period of 90- days[415] is discretionary and not mandatory, should be quashed, and a judgement should be passed to not allow submissions beyond the time frame granted by the law.
5. LIMIT FOR ADJOURNMENT: The major problem persisting in the courts till date is the adjournment of cases. According to Order XVII of The Code of Civil Procedure, 1906 a litigant can file up to three (3) adjournment petitions, and if he files any subsequent adjournment petition, then the case is dismissed by default. But in the real time scenario, they orally ask for the adjournment of the case. This should change. Whether asked orally or through a written statement, there should be a limit prescribed for it.
6. TIME LIMIT FOR CONDONE DELAY: Section 5 of the Limitations Act, 1963 except for Order XXI[416], of Civil Procedure Code, may admit cases even after the prescribed time period along with a condone delay petition. Parties to the cases may file a Condone Delay petition. If once the Condone delay petition is filed once again the procedures

[413] *Imtiyaz Ahmad v. State of U.P***;** (2012) 2 SCC 688

[414] AIR 2005 SC 2441

[415] Order VIII, Rule 1 of C.P.C.

[416] Execution of Decree and Orders

have to be followed by the Courts and it is literally the waste of valuable time of the Hon'ble Courts. If the Hon'ble courts are not satisfied with the reasons stated in the Condone Delay petition be in (i) Appeal cases, (ii) restoration petitions (iii) Review petitions, etc., they should dismiss the condone delay petition and any appeal filed against the dismissal of the Condone Delay petition, should not be encouraged by the Appellate Courts. However, in the present system there is no limitation for this. Even the time limit for filing the appeal petition against the dismissal of the condone delay petition can be reduced to fifteen days. In a case in Madurai High Court[417], which was an appeal for the order dated 31.10.2010, was filed with a condone the delay of 266 days, was dismissed. Taking this as an example and precedent, the courts shall not allow to condone the delay except for cases that have satisfying reasons. In another case, the Supreme Court[418] held that there are two important points to be kept in mind while considering condonation delay:

a) The acceptance of condonation delay petition is the discretion of the judge. However, it cannot be asked as his right.
b) If the petition is approved, then till the final judgement is passed, the previous judgement in their favour will be binding.

7. IMPROVING SPECIALIZED KNOWLEDGE OF JUDGES: With changing time and technology, the judges should also be kept updated with the new laws and amendments being passed, with regard to the cyber-crimes and other crimes related to internet and it is necessary that, to deal with such case, judges should have more specialized knowledge about it.
8. SERVICE OF SUMMONS[419]: Order V Rule 9(2) and 9(3) deals with service of summons, where it says that the court can deliver summons in any manner as it thinks fit. But, in the present-day scenario service of summons is by way of Registered Post with Acknowledgement Due (RPAD) only. And once that ac due is to be filed in the court, by way of proper petition. If the person is not available at that address, then they have to go through a paper advertisement. This leads to more delay in the case. With the increased technology, other means such as WhatsApp, mail etc., can be used, so that there is easier and faster communication of summons for easy and quick trial. The

[417] *Ganesan v. The Commissioner of Police* on 4 December, 2017

[418] *Ram Lal v. Rewa Coalfields Ltd.*; AIR 1962 SC 361

[419] Dealt in section 61-69 and 91-92 of Cr.P.C. & section 27 and order 5 of C.P.C.

courts generally say that they accept other means, however, in practice, they do not accept any other means except for RPAD. It should be allowed by the courts to use other means too, to serve the summons.

In *Ksl and Industries Ltd. v. Mannalal Khandelwal and the State of Maharashtra,* it was held that unserved summons should be sent through mail, to avoid delay in legal proceedings.

In *Indian Bank Association & Ors v. Union of India & Anr*[420], summons should be served by post as well as by emails, and if summons is sent back un-served, follow up actions are to be taken. It was also held in this case that only a short period of time should be fixed for notice of appearance.

In another case in New Delhi High Court[421] *Justice* RAJIV SAHAI ENDLAW held that the court has been permitted the right to serve summons to defendants via WhatsApp text and emails.

In a case, Justice SURABHI SHARMA VATS in Delhi High Court allowed a woman to serve her estranged husband summons through WhatsApp and the court considered 'double-tick' as a summon being served.

9. NON-APPEARANCE OF PARTIES TO THE CASE: In lower courts, they ask for appearance of parties for every hearing of the case. And if the parties are not able to attend due to their personal reasons, just for this reason, they post the case to a later date. It should not be that way. Like I higher courts, the parties to the case should not be called for, for every hearing. Only the witnesses for examinations and cross-examination, shall be called.
10. REDUCING THE MISUSE OF PIL's: For the misuse of PIL's, there are few courts, like the Telangana High Court, where, if a Public Interest Litigation is filed without a proper reason, they are fined heavily with a fine of up to Rs. 50,000. This policy should be implemented in all the courts. This will reduce the filing of PIL's unnecessarily.

CONCLUSION:

Speedy trial is guaranteed as one of the fundamental rights, but the promise of speedy trial doesn't mean in any way non-compliance to the due proceedings of Civil Procedure Code. But it lies in the hands of the court to try its maximum to properly deal and dispose of such pending cases and to restore the faith of the people. The various committees which have been framed

[420] (2014) 5 SCC 590

[421] *Tata Sons Ltd. & Ors. v. John Does*

by, be used efficiently and the judiciary should also try its best to tackle this problem. Thus, a joint effort is necessary to tackle this problem of pending cases. Though speedy trial is the basic need of the hour, the component of fairness in the trial must not be compromised at any cost. Both expedient and fair trials are *sine qua non* for promising genuine justice to the society.

ADMISSIBILITY AND RELIABILITY OF ELECTRONIC EVIDENCE

- PALOMITA SHARMA

- **INTRODUCTION**

The inception of the 21st century was greeted by the world at large witnessing a new phase of development which is completely technological in nature. It is an information technology and its knowledge which has made almost every possible humanly work easy and quick at the swipe of a finger. Along with this ease, came great dependency which also led to a change in the laws already existing related to information technology in the country as well as the admissibility of such e-evidences in criminal as well as civil matters in the Court of law. Several amendments were made to acts such as The Information Technology Act, 2000[422] along with the Indian Penal Code and the Indian Evidence Act, 1872[423] which were made to include all the electronic shreds of evidence, usages and work coming up in all fields of life.

The changes in the law have made the Courts also to start relying on the admissibility of electronic shreds of evidence being presented in a case. Several judges and lawmakers have also opined at the current status quo altogether to provide more information pertaining to "admissibility of any such electronic evidence", how it can change the perception of the complete case and the Court's order as well as its reliability and how a person should approach with electronic evidence in the Court[424].

Now, the biggest question that arises is What is Electronic Evidence? A "digital evidence or electronic evidence" is any information[425] which has been saved or stored in a device and can be provided or exchanged, transmitted through any platform, digital or electronic. Such evidence is something related to the case in hand at the Court which has been recorded by either party and is something that can be shown to the Court as evidence of something being claimed and argued by a counsel.

Reference

[422] The Information Technology Act, 2000, Act No. 21, Acts of Parliament, 2000.

[423] Indian Evidence Act, 1872, Act No. 1, Acts of GOI, 1872.

[424] Manisha T. Karia and Tejas D. Karia, 'India' (Chapter 13) in Stephen Mason, ed, Electronic Evidence (3rd edn, LexisNexis Butterworths, 2012).

[425] Section 62 of the Indian Evidence Act, 1872.

Along with such ease, comes to a lot of difficulties and challenges as such a shred of evidence can be manipulated or tampered with, very easily. It can always be brought in the light of something which it did not, in essence, intended to be. Therefore, the Court must ascertain the veracity, authentic nature as well as the relevance of the evidence[426] to the case and it must also be necessarily established whether such a shred of evidence is hearsay and so, a copy of the same should be forwarded to the Court along with a showcase of the original one being submitted.

The Indian Evidence Act recognizes shreds of evidence under two types, namely:

a. Oral Evidence i.e. the witness statement
b. Documentary Evidence i.e. the documents related to the case which can also involve electronic records of the data which should be submitted for inspection by the Court

Section 63[427] provides for the conditions under which secondary evidence can be taken under consideration by the Court and no primary evidence is needed to be produced. Such situations are listed below, as provided in the Act:

1. The document is in hostile possession
2. Has been lost/ damaged
3. There has been complete destruction of the primary evidence
4. It is not possible to bring the evidence to the Court physically
5. Has been listed as a state property/ public document
6. Certified copies of the evidence have been permitted by the Court
7. Collection of various primary shreds of evidence brought as one

Thus, the Evidence Act, under Section 65, provides for a special process that must be necessarily followed in order to submit electronic evidence and records as evidence in a case before any Court of law. This paper in its entirety will focus on the particular as it's intrinsic provisions will create a better idea of the admissibility of electronic evidence.

The paper will throw light on the topic with the help of several case laws as discussed on e-evidence. A landmark being the judgement given by the SC in SIL Import, USA v vs. Exim

References

[426] Anvar v. Basheer and the New (Old) Law of Electronic Evidence - The Centre for Internet and Society, available at http://cisindia.org/internetgovernance/blog/anvarvbasheernewoldlawofelectronicevidence last accessed on 21/07/2020.

[427] Manisha T. Karia and Tejas D. Karia, 'India' (Chapter 13) in Stephen Mason, ed, Electronic Evidence (3rd edn, LexisNexis Butterworths, 2012).

Aides Exporters Bangalore[428], that "Technological advancement like facsimile, Internet, e-mail, etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue." There are several other cases such as Som Prakash v. the State of Delhi[429], State v. Mohd. Afzal & Ors.[430] which have thrown light on the issues and admissibility of electronic evidence. The SC also gave in findings in Navjot Sandhu case[431] where questions of such evidence were raised on topics of national security, the integrity of prosecution's evidence or in cases of high-profile political importance. This paper also aims at majorly giving an overview of the reliability and admissibility of electronic evidence in a technologically developing world where evidence needs to be inspected and checked practically and the due procedure needs to be followed in such new aspects.

- **RESEARCH QUESTIONS**

1. The primary question that the author seeks to answer through this research paper is whether 'Electronic Evidence' as defined under the Indian Evidence Act, 1872" has comprehensive or exhaustive nature? Does it cover all the aspects, challenges and difficulties which may arise in the admissibility of such evidence? Why is the submission of electronic evidence a matter of concern and caution for the law?

2. Whether the principles provided under Section 63 as well as 65-B are applied aptly in Indian cases, and whether there exists any bias towards the admissibility of primary documented facts over electronic evidence in a case despite the provisions for inspection and admission of electronic evidence by the Court?
3. Whether there were any suggestions and reforms which were brought in to the concept and were they incorporated along the lines of the Indian law as well? If so, were the reforms implemented effective and in force as procedural law?

[428] SIL Import, USA v vs. Exim Aides Exporters, Bangalore, 2001 SCC (Cri) 1163 (India).

References

[429] Som Prakash v. State of Delhi, 1974 AIR 989 (India).

[430] State v. Mohd. Afzal & Ors., 2003 (3) JCC 1669 (India).

[431] State v. Navjot Sandhu @Afsan Guru, (2005) 11 SCC 600 (India).

4. There is significant ambiguity in the principles which require more deliberate enhancement of understanding, were there any attempts made by the law or any other legislation which resulted in clarification on the criticisms raised against the guidelines of admissibility and reliability of electronic evidence?

- **RESEARCH METHODOLOGY**

The methodology adopted for this study is Doctrinal Research.

Any research which is carried out based on statutes, provisions as such statutory in nature, legal propositions or such propositions which help in the examination and analysis of various legislations and laws with the application of critical reasoning of legal knowledge is termed as doctrinal research. This type of research is considered the traditional genre of research for the legal profession as a whole. It mainly involves studying decided case laws, relevant judgements, legal theories, statutes as well as conventional sources of law.

In this paper, I have formed the complete pretence of introduction and study based on the provisions given under the Indian Evidence Act, 1872 along with The Information Technology Act, 2000 which provide various details about electronic evidence, it's reliability basis and admissibility in the Court of law. The research has been based on the various judgements given by the Supreme Court in cases which involved the submission of electronic evidence by either party and any such related digital evidence. The judgements are the sole basis of the understanding of the practical functioning of a case after submission of electronic evidence and the provisions of the said Acts help in understanding the various details for reliability and admissibility of electronic evidence.

- **LITERATURE REVIEW**

1. Ajay Bhargava, Aseem Chaturvedi & Shivank Diddi, "**Use of Electronic Evidence in Judicial Proceedings"**, Volume 1 (pgs. 43-78) talks about the various analytical procedures followed in Indian courts and in other courts based on the admissibility and reliability of electronic evidence. It also talks about the various fallacies which came in because of such an introduction and the paper discusses the loopholes and gives suggestions based on the finding of this book.
2. Dr. S. Murugan, "**Electronic Evidence: Collection, Preservation and Appreciation"** (pgs. 21-90) discusses the various methodological and systematic procedures related to electronic evidence. The paper has used areas of the

presentation paper which shows how an electronic evidence can be collected and produced in a court of law. It also talks about the various ways of appreciation of such an evidence and the way in future.

3. Pavan Duggal, "**Judicial And Practical Approaches To Electronic Evidence Law In India"**, Volume 1 (pgs.23-30) discusses the various approaches which have been taken by the judiciary particularly since the introduction of admissibility of electronic evidence under law. It discusses how an evidence is an essential element of a particular case and the paper highlights such areas with the merits and drawbacks of such approaches as being related to reliability of e-evidence.
4. Stephen Mason & Philip Argi, "**Electronic Evidence"**, Volume 4 (pgs. 269-334) discusses the general concept of electronic evidence and how can the courts approach such an admission in cases. The paper highlights the various issues which can arise due to admissibility of such an evidence as primary or secondary evidence from this book.
5. T.D. Kataria, "**Digital Evidence: An Indian Perspective"**, Issue 7 (pgs. 3-28) talks about the electronic evidence and its application solely based on the Indian perspective. The paper has taken up a comparison between such rules of admissibility in India and other countries from this research. It throws light on the various efficient ways which have been employed for the same across the globe.
6. Vivek Dubey, "**Admissibility of electronic evidence: An Indian Perspective"**, Volume 4 Issue 2 (pgs. 1-37) discusses the various admissibility criterions related to e-evidence in the Indian courts. The paper highlights the various interpretations of such a rule under the several sections of the IEA, 1872.

- **ANALYSIS**

Electronic evidence is defined as the storing, receiving or distribution of anything which can be considered as information that is useful in nature and data pertaining to any inquiry through electronic means using technological processes. It is any such electronic evidence that has the potential to be either stored by electronic means or transmitted forthwith that a party to any lawsuit at the time of filing of the suit or through litigation can use in their favour to prove their case. Such an information is available in binary data form which is only restricted to electronic devices and cannot be produced through any other substantive means. Although it is not restricted to immovable gadgets and can also be accessed through wireless platforms such as the internet, mobile phone, tablets etc.

This mentioned concept provides three dimensions of definitive values[432] —

First, it is meant to include all types of proof that is made, tampered with or deposited in a substance that can be called, in its broadest context, a machine, with the human brain removed for the time being.

Besides, it involves various devices which can provide the data in the form of an evidence from which the said proof can be taken up or put through infront of any other person directly. It involves the issue of tampering which can lead to misleading the court in several circumstances and also produce a situation of manipulation of the proofs being provided in the circumstances.

The third angle restricts the information to material that is appropriate to the instrument by which an adjudicator settle a contention, whatever the substance of the debate, whatever shape and nature of the arbitration may be for the said purposes.

This section addresses one element but it provides "to not use the concept of admission of an electronic evidence as being the criterion to put this distinction. It has the fact that there are certain proofs which can be taken out of the ambit of jurisdiction of the arbitrator and cannot be adjuged directly by a certain court because of the way the evidence was obtained and produced in the court."[433]

Nevertheless, the final condition proves as a limitation on the provision of such an evidence before the Court as a process within the fact-finding stage that must be followed before a litigation is actually started.

INDIA AND THE CONCEPT OF DIGITAL EVIDENCE

Electronic evidence has become a central cornerstone of correspondence, processing and reporting due to the tremendous development in e-governance in the public and private sectors, and different types of electronic evidence are constantly used in all forms of litigation, be it civil or criminal. Giving due consideration to this, the Courts in India have developed a principle pertaining to electronic evidence with the Judgements in various cases presented before them, requiring amendments to the Evidence Law in India to add required provisions for "appreciation of digital evidence."

References

[432] Stephen Mason (ed), " Electronic Evidence" (Lexis Nexis , 2013).

[433] Vivek Dubey, "Admissibility of Electronic Evidence: An Indian Perspective"4, FRACIJ (2017).

As per the language of Section 2(t)[434] of the Information Technology Act, an electronic record constitutes "information, record or information created, processed, received or submitted image or sound in electronic form or microfilm or computer-generated micro-fiche."

THE IEA, 1872 AND E- EVIDENCE

There are several sections which deal with an electronic proof in compliance with parts of the Indian Proof Act:-

1. **Section 3[435]**

On the description of documentary evidence, the words "Content of Content of Documentary Evidence" are specified under Section 59[436]. In order to introduce the admissibility of electronic data, records were replaced with the words 'Content of records or electronic information' and Sections 65A[437] & 65B[438] were added.

2. **Section 17[439]**

The meaning of "admission" was amended to involve certain types of evidence which can be either oral, documentary or electronic in nature that will show any relation to the case and to prove a particular argument by the parties infront of the judicial authorities.

3. **Section 22A[440]**

In order to allow for the relevance of oral testimony affecting the quality of electronic documents, new S. 22-A was introduced into the Evidence Act. It provides that if electronic record produced is in doubt, no other admission related to it can be termed acceptable in the Court of law.

4. **Section 34[441]**

References

[434] The Information Technology Act, 2000, No. 21, Acts of Parliament 2000.

[435] Section 3 of the Indian Evidence Act, 1872.

[436] Ibid

[437] Section 65A of the Indian Evidence Act, 1872.

[438] Section 65B of the Indian Evidence Act, 1872.

[439] Section 17 of the Indian Evidence Act, 1872.

References

[440] Section 22A of the Indian Evidence Act, 1872.

[441] Section 34 of the Indian Evidence Act, 1872.

Entries in the accounting records, including those kept in digital form and kept on a daily basis throughout the course of operation, are important.

There are several other sections in the Act such as S. 35, 39, 45A, 47A, 67A, 73A, 81A, 85A, 85B, 85C, 88, 88A, 90A, 131 which are related directly to the concept of electronic evidence.[442]

SECTION 65[443] OF THE INDIAN EVIDENCE ACT[444]

This is the main section involved in the admissibility of digital evidence for cases in India. It essentially involves the functions to be taken by the judiciary and the law enforcing bodies in relation to cases where such an evidence is involved. The major points to be noted are as follows:

(a) Section 65B, Indian Evidence Act[445] (read with 65A[446]) is applicable to particular parts of the "Electronic Records Act"[447]. Although Section 65 applies in paper form to "external" documents, there is no such distinction as that made with respect to an electronic record.

(b) The section provides that there is no compulsion as to any distinguishing factor between the primary and secondary data to be admitted in the form of e-evidence.

(c) S. 65B sets out the requirements under which an electronic record can be accepted as "Admissible" by the Court as a "Record" and has to be properly confirmed for the Court to consider a document, also referred to as a "Certificate or Declaration of Section 65B"

(d) S. 65B refers to the mechanism by which the "Software Data" of an electronic record is made, which is the proof to be accepted, and that device performance can be in the form of either a "Print Out" or a "Copy."

(e) There is a "method" by which the digital record becomes the "software emission" and this is defined in S. 65B as the subject operation to be done by a person with legal authority over the computer output

(f) The machine generates such output and the machine should operate correctly during the time of such processing, etc.

(g) S. 65B reflects on the activity of translating an electronic record located within a device into a "Software Output" that can be used by an observer.

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[442] Supra note 15

[443] Section 65 of the Indian Evidence Act, 1872.

[444] Supra note 15

[445] Supra note 24

[446] Supra note 23

[447] Electronic Records Act, No. 2 of 1999, Acts of Parliament, 1999.

(h) Certain observations found in Section 65B, including that the programme outcome could be generated by a variety of machines, operating successively, etc., in relation to the complex production of an electronic record from a repository and its transmission, across multiple devices, to the final recognisable type on the observer's computer and, subsequently, its transferring to a printer.

(i) In view of these meanings, the certification of Section 65B is a "matter of fact" certification to the extent that "What I saw is what I faithfully replicated as a computer production" and this can be achieved by any person who observes an electronic record on his computer and intends to produce it as evidence. A paper from the google news website does not need to be approved exclusively by the google news system administrator.

(j) There is also a major difference that "data owner" is separate from "data observer" and a data observer is expected to generate Section 65B. In the other hand, in terms of saying a bank statement, the content owner is the authorized bank director and he should have a print out as the owner of the content who knows the content and is known in the domain as an 'expert.' Anyone else that views the paper receives a certificate in Section 65B that the print out is a real production.

It is quite important that the law community and the justice system correctly understand the provision. Any understanding that certification under Section 65B may be issued by only a 'program administrator' is considered incorrect. However, a certificate may be issued by the certification authority, although it is not necessary.

THE AMENDMENTS AND OBJECTIVES

The Supreme Court observed in the Anvar Case[448] that "there is a change in the manner in which proof is created in front of the judge." However, before 2000, the situation was different. Any information stored electronically in India was considered to be a record and "Secondary evidence was provided by handwritten reproductions or translations of these electronic documents"[449], the validity of which was confirmed by a signatory competent. "Her signature will be identified by the signatory and then it must be subject to cross-examination in court."

References

[448] Anvar v. Basheer, (2014) 10 SCC 473 (India).

References

[449] Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke, MANU/ SC/0040/2015 (India).

This basic procedure successfully fulfilled the test of Sections 63 and 65 of the Evidence Act. Courts in India, on the country have actually revised a statute drawn up over a couple of centuries ago in England of the Victorians for the present needs.[450] As the speed and diffusion of technologies increased, however, and as the creation and production of Electronic file management has gotten more difficult, leading to the need for the need for more adaptation and amendment to the legislation in a comprehensive manner.

Section 61 and up to Section 65 of the 1872 "Indian Evidence Act", haven't changed the phrase "Document or substance of documents" with the phrase "'Electronic records or material of electronic documents"

This clearly shows that the legislative intent that Sections 61 to 65 of the Act must not be made applicable for any electronic evidence. The cardinal interpretation is that if the legislature has refused to use any theory, in some terms, the action so advanced is on will. In that respect, in the case of *Utkal Contractors & Joinery Private Limited vs The State of Orissa*[451], the Supreme Court decided "Parliament is therefore not required to overly express itself. Even though Parliament does not use any word without implying anything. When no law is required, Parliament does not legislate. For the purposes of the law, Parliament should not be presumed to legislate; nor does it engage in law simply to say what is needless to say or to do what is already validly done. It cannot be believed that Parliament would unnecessarily legislate."[452]

ADMISSIBILITY AND SCOPE OF ELECTRONIC EVIDENCE IN THE INDIAN SCENARIO

- **Are Tape Records counted as E- evidence?**

It was claimed in R.M. Malkani V. State Of Maharashtra[453] that a tape must be considered primary and clear evidence as to any achievements along with anything said and registered. The Court further stated on the electronically captured communication being admissible as testimony provided that such communication was applicable to the issue in question and the such made speech was heard, authenticity of any such electronically recorded conversation established by removing the risk of erasure, insertion, distortion or any other method.

[450] The Supreme Court of India re-defines admissibility of electronic evidence in India by Tejas Karia, Akhil Anand and Bahaar Dhawan.

[451] Utkal Contractors & Joinery Pvt. Ltd. v. State of Orissa, (1977) 3 SCR 71 (India).

[452] Stephen Mason (ed), " Electronic Evidence" (Lexis Nexis , 2013).

[453] R.M. Malkani v. State Of Maharashtra, (1967) 3 S.C.R. 720 (India).

Furthermore, the Court held that any causal recording made electronically of the incident involved must be considered as a material fact equivalent to any photograph of the event involved and must be made admissible in court in compliance with Section 8 of the Act. There is, however, no question that it is necessary to access such an electronic archive as evidence.

- **Electronic Record of the copy to be supplied to the Court**

State of Punjab v. Amritsar Beverages Ltd.[454]

Section 14(3), Punjab General Sales Tax Act provides for the inspection and confiscation of accounts, records and books. It states that any officer making a seiure of such book, register, account or record must automatically issue the all such relevant seals, signs, copies and receipts of the officer on the record and the same must be returned duly to the dealer. Confiscated record was kept in the hard disc cash book, ledger and other registers.

Therefore, it was not necessary to place an official's signature and seal on the seized papers. A backup was recovered from the disc drive or hard disk, however, and the same was restored.

The Court held that under certain cases, the officers must obtain a copy of the stated hard disc drive or procure a hard copy. Furthermore, they must duly sign or affix the official seal on such physical copy, and supply the distributor or individual involved with a copy.

- **Video Conferencing**

Sections 65-A and 65-B are addressed in Amitabh Bagchi V. Ena Bagchi[455]. The court held that for the purpose of adduction of testimony, the physical appearance of the person in court might not be needed and the same can be achieved by video tele-conferencing. Sections 65-A and 65-B contain certain provisions on the facts pertaining to electronic records. The Sections further deal with the admissibility of such electronic records, and video conferencing is included in the concept of electronic records.

In The State Of Maharashtra v. Dr Praful B Desai[456], the issue was whether it was possible to question a victim via a video-conference. The SC appreciated that "video conferencing is an innovation in science and technology that helps someone who is not physically present with the same facilities and ease as if they were physically present to see, hear, and speak."

References

[454] State of Punjab v. Amritsar Beverages Ltd., (2006) 7 SCC 607 (India).

[455] Amitabh Bagchi V. Ena Bagchi, AIR 2005 Cal 11 (India).

[456] The State Of Maharashtra v. Dr Praful B Desai, (2003) 4 SCC 601 (India).

The legal obligation that the witness be present does not indicate real physical appearance. The court allowed a witness to be examined by video conferencing. The Court further ordered that there was no reason as to why video conferencing examination of any witness was not a crucial and consideration worthy aspect of electronic testimony.

- **Digital Signature as a Proof**

Section 67A of the Evidence Act states that aside from on account of a secure advanced mark if the computerized mark of any endorser is said to have duly been fastened to any mentioned electronic record, the manner that the computerized mark is the advanced mark of endorser must be demonstrated. This is important to establish that such electronic evidence under Section 65B can be considered as material to the case.

In the case of *Bodala Murali Krishna v. Smt. Bodala Prathima*[457] the court opined "the changes conveyed to the Evidence Act by the presentation of Sections 65-An and 65-B are comparable to the electronic record. Sections 67-A and 73-A were presented as respects proof and check of advanced marks. As respects assumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were included. These arrangements are alluded distinctly to exhibit that the accentuation, as of now, is to perceive the electronic records and advanced marks, as permissible bits of evidence."

- **Records collected from Calls**

An appeal was made challenging the conviction of the attackers after the Parliament Attacks on 13 December, 2001 in the case of *State (NCT Of Delhi) v. Navjot Sandhu*[458]. The consideration of calls made via a cell-phone and their ability to be included as evidence was considered in this case. Giving due consideration to the facts in hand that the Appellants had ambushed the Indian Parliament, a special consideration was made and no reliance was placed on any call records considering that the the electronic evidence in question was neglected and was not established under Section 65B(4) of the Act.

- **Admissibility of Electronic Mails**

In the landmark judgement in the case of *Lorraine v. Markel American Insurance Company*[459] decided by the US Maryland Federal Court, it was observed by the Court that on electronically put away data being presented as evidence, the following factors must be duly determined:

References

[457] Bodala Murali Krishna v. Smt. Bodala Prathima, AIR 2007 AP 43 (India).

[458] State (NCT Of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 (India).

References

1. Can the data be considered significant?
2. Can the data be considered credible?
3. Can the data be considered hearsay?
4. Can the data be considered unique or on it being a copy, can it be accompanied by other evidence to prove it?
5. Can the data be considered uncalled for bias?

In the case of *Som Prakash v. the State of Delhi*[460], the Apex Court has duly decided that "in our technological age nothing more primitive can be conceived of than denying discoveries and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific aids to prove guilt." The primary role that any legislative amendments of a statute must seek to make are to establish a manner of dealing with criminal preliminaries in a critically thought out manner, and to put the burden of the rest of the task on the judiciary.

In the case of *Sil Import, the USA v. Exim Aides Exporters Bangalore*[461], it was held that "Technological advancement like facsimile, Internet, e-mail, etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue."

It was held that any electronic record created electronically must necessarily be considered evidence, and is permissible as any other form of evidence as envisaged under the Evidence Act if it fulfils Section 65B as in the case of *State v. Mohd Afzal And Ors*.[462]

EFFECTS OF THE ADMISSIBILITY OF ELECTRONIC EVIDENCE

a. Making Criminal Prosecution Easier

Considering the ongoing spate of psychological warfare on the planet, including fear mongers utilizing exceptionally refined innovation to complete assaults, it is of incredible assistance to the indictment to have the option to create electronic evidence as immediate and essential evidence in court, as they demonstrate the blame of he denounced far superior to searching for customary types of evidence to substitute the electronic records, which may not exist.

[459] Maryland in Lorraine v. Markel American Insurance Company, 241 F.R.D. 534 (USA).

[460] Som Prakash v. State of Delhi, 1974 AIR 989 (India).

[461] Sil Import, USA v. Exim Aides Exporters Bangalore, 2001 SCC (Cri) 1163 (India).

[462] State v. Mohd Afzal And Ors., AIR 1957 S.C. 469 (India).

Terrorists in status quo plan their operations and activities in an electronic manner relying heavily on programming as was seen in the Ajmal Kasab case[463]. The ability to be able to replicate electronically the records of such internet transactions helps the prosecution of such persons, and eases establishing their guilt.

Further, in the case of *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru*[464], the entire relation drawn out between all the killed psychological militants and all the masterminds behind the said assault were established relying merely on calls records so recovered.

INCREASED RISK OF MANIPULATED EVIDENCE

Even though allowing electronic evidence of varying sorts and the list being ever growing with even Whatsapp conversation being now considered as electronic evidence greatly increases the ease of proving cases and has many mentioned benefits, it also leads to a problem of losing control over the evidence stage. It may be stated that the nature of electronic evidence being electronic make it easier for it to be tampered with and tainted as compared to physical evidence. However, such issues are duly dealt with through technology by itself. "Technological mode of criminology has sufficiently grown to discover methods of cross-checking whether an electronic record has been messed with, when and in what way."

b. Floodgates Being Opened Potentially

Going carefully by the expression of the law, any gadget including a central processor ought to be adducible in court as evidence. In any case, practical contemplations just as morals must be borne as a primary concern before letting the ambit of these sections stream that far.[465]

CONCLUSION

Over the years, there has been unseen levels of development taking place in everything around us. However, the gargantuan development that one can see being made in electronic and digital administration within all Sectors: Public and Private is unparalleled. One can clearly see the change within generations itself. The author cites a personal level example as to how the process of obtaining a Driving License has changed significantly since the time the author's father got his first driving license giving an offline pen-paper driving test, submitting a

[463] Ajmal Kasab v. State of Maharashtra, AIR 1991 SC 1346 (India).

[464] State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600 (India).

References

[465] Ratan Tata v. Union of India Writ Petition (Civil) 398 of 2010 (India).

hardcopy picture and driving a car, to the time the author herself got her first learner's driving license in 2016 giving a test on a computer and getting biometric authentication done electronically to 2019 where the author gave a driving test by filling out a form online and giving a driving test on a driving simulator. Being stated just as an example, the author seeks to establish that within a span of 30 years, there has been tremendous growth in technology and the Evidence Act must also see amendments and modernise at an equal rate to meet the ends of justice. E-commerce as a field has reached unseen booming periods, especially during the current global pandemic with Flipkart announcing sales amounting to 1000 Crore Rupees in one week, with electronic means of communication and governance, thereby creating evidence, becoming an unignorable element in the justice system in today's day and age. All processes of all organisations are now carried out in an electronic manner.

The Judicial system is posed with enormous difficulty while dealing with any form of electronic evidence due to the mere ease with which such evidence can be tampered with and misused as compared to traditional forms of evidence.

The difficulties regarding the tolerability and energy about electronic evidence, India actually has far to go in staying up with the improvements around the world[466]. In spite of the fact that the revisions were acquainted with diminishing the weight of the defender of records, they can't be supposed to be without impediments. India has been unable to find a way to ensure the veracity of the substance of any such electronic record, which may be controlled in any manner by merely gaining access to either the worker or any such server or space where this electronic evidence may be stored.

At the very conclusion of things, the burden of any shortcomings that seem to not have a definite close must fall on the judicial system. With regards to the veracity of electronic evidence, the burden again falls on the Courts in India to ensure that the electronic evidence satisfies 3 fundamental necessities: realness, dependability and honesty. In the aftermath of the *Anvar case*[467] the Supreme Court has set out the standards for tolerability of electronic evidence. The Court held that it is not out of the ordinary that the judicial system will receive a steady methodology, and will therefore duly execute all potential shields and safeguards for acknowledging all forms of electronic evidence.

References

[466] Police and Criminal Evidence Act, 1984, No. 4, Acts of Parliament, 1984.

References

[467] Supra note 37

GENDER NEUTRALITY IN RAPE LAWS: A PERSSING PRIORITY

- ANOOP CHANDRAN S

1. INTRODUCTION

"The only stable state is the one in which all are equal before the law" - Aristotle

Rape is one of the most heinous crime that is being prominently reported in India nowadays. In the midst of the growing feminine consciousness in the society India has tightened its rape laws a bit more stringent in order to ensure justice for victims and punishment for perpetrators. Under sections 375 of Indian Penal Code (45 of 1860) ,which defines rape, it is perceived to be an offence that can be done only by a man against a woman. Thus under s.376 of the code, only a man can be convicted for committing rape. This idea is rooted in the historical perception of a male dominated society that conceptualized rape as the sexual victimization of women by masculine perpetrators. But in this modern era , it has been noticed that rape is not only limited to female gender, and other genders such as both heterosexual as well as homosexual men and transgender people are also at risk of rape. On that account, gender neutrality in laws related to rape and sexual assaults is indeed a need of the hour.

Gender neutrality is a concept of annihilating the distinction between sexes, in the drafting and implementation of laws, especially, when the law is to address an issue that is common to all the genders, viz male, female and transgender. The main goal of this concept is to make every citizen entitled to equal rights and to extend the protection of law for all persons regardless of their gender. Moreover every person has an inherent right to sexual integrity and autonomy. This right is in turn reinforced by the Article 14 , 15 and 21 of the Constitution of India.

India's rape laws, which has undergone several changes over the last few decades including a major revamp in 2013, continue to be counterrevolutionary and proliferate patriarchal gender stereotypes. At a time once several countries round the globe are adopting gender neutral rape laws which recognizes the idea that a person of any gender can be a potential victim/ survivor or perpetrators, India keeps on following a law which primarily depends on the principles of

penile and vaginal penetration. This is a serious and dangerous stereotypes which denies equal status, liberty and freedom to a section of the society.

2. THE HISTORY OF RAPE LAWS IN INDIA

Rape laws have been recognized by all the countries. The offence of rape has its history as old as human civilization. In olden days besides the motive of deriving sexual pleasure, this offence has been committed so as to establish a power or control over another person. Thus historically, rape is considered as a gender specific offence that can be done by a man solely against a woman. Indian rape laws are also fundamentally founded on this historical notion.

In India 'rape laws' begun with the enactment of the Indian Penal Code in 1860. After 1860, the code was subjected to certain reforms through various amendments in many instances and the main issue of focus remained on the definition of rape. The first reform in this regard was the Criminal Law (Amendment) Act of 1983, on backdrop of the Mathura Rape Case[1], the landmark case which witnessed massive women right movements across the country.

2.1. Criminal Law (Amendment) Act, 1983

The major reforms brought about by this legislation were that rape trials should be held as 'in camera proceedings' under section 327 of CrPC and disclosure of the name of the victim was penalized under section 228A of CrPC. Besides these, an enhanced punishment was set for custodial situations under 376(2) of IPC and Presumption of absence of consent in specific situations was inserted under section 114A of Indian Evidence Act, 1872. Along with these the onus of proving consent was shifted to the accused from the prosecution. As far as the Indian Rape laws are concerned, this was one of the foremost reforms in the post independent era.

2.2. Indian (Evidence) Amendment Act, 2002

The amendment restrain the defense from asking humiliating questions pertaining to the morality and sexual history of the prosecutrix, during cross examination. The amendment repealed the section 155(4) of the Indian Evidence Act 1872 as the section technically stated that the victim's sexual history is important as it gives a direct knowledge to the morality of her character.

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1. *Tukaram and Another v. State of Maharashtra, 1979 AIR 185, 1979 SCR (1) 810*

2.3. Criminal Law (Amendment) Act 2013

The year 2013 witnessed a major revamp to the rape laws of the country. The Gang rape and murder of a 23rd year , Physiotherapy student 'Nirbhaya' in the heart of capital city in 2012 sent shock waves across India and round the world. Soon after getting immense pressure and consequent uproar from socio-civic groups, central government constituted Justice Verma Committee to reframe the sexual assaults laws India. As a result, significant changes pertaining to the definition of rape under section 375of IPC, its punishment were proposed. Moreover fast track courts were introduced in the country for dealing with rape trials.

In the aftermath of proposals made by the J.Verma committee, the stop gap legislation, Criminal Law (Amendment) Act was passed by the parliament in 2013, which had redefined rape in a broader perspective making it much more stringent. Prior to the 2013 reforms, definition of rape was limited to penile –vaginal penetration. But, now it has a wider ambit, as it covers all kinds of sexual attack on women not limited to penile vaginal penetration.

3. DEFENITION OF RAPE UNDER S.375 IPC

S.375 of Indian Penal code gives a statutory definition for the offence of rape whereas s.376 of the code punishes the same. As per s. 375 of IPC,

A man is said to commit "rape" if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

(1) Against her will.

(2) Without her consent.

(3) With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

(4) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(5) With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

(6) With or without her consent, when she is under eighteen years of age.

(7) When she is unable to communicate consent.[2]

The definition under the s.375 of IPC starts with the phrase "*A man is said to commit "rape*"..." and defines that, what rape would constitute in such a case is, rape of a woman. The crux of the offence of rape under section 375, IPC is sexual intercourse by a man against her will and without her consent. However, the definition is now not just limited to forcible penile - vaginal penetration. Now it includes the act of penetrating penis, or any other object other than penis (sexual assault), into the vagina, urethra or anus of a women, or manipulating any part of body of a woman to cause such penetration or applying his mouth to the vagina, anus or urethra of a woman or makes her to do so with him or any other person.

If we analyze this definition of rape under this section, we find that it makes two clear, albeit subtle, inferences:

— Firstly only a woman can be victimized in rape
— Secondly only a man who can be liable for rape.

In consequence, the only role Section 375 of Indian Penal Code accords men is the role of the perpetrator of rape. Furthermore it manifests that, in India there's no particular law if a male rapes another male or a female rapes a male or if a female rapes another female. Indian legal standards have now evolved from viewing rape as just a penile – vaginal to penile- orifice penetration with a non-consensual context. According to the latest definition (Supra) any physical violation using a kind of blunt objects as suffered by Nirbhaya would also can be classified as rape. Yet if the setting had been an Indian women's jail and the exact same violation had occurred by fellow prisoners, there would be no rape.

2. Section 375 of Indian Penal Code, 45 of 1860

To be sure, it would be an assault-based crime of some form, but not rape even though the victim would have been forcefully penetrated in a sexual manner by her assailants[3].

In short, the penal law regarding rape was amended in 2013 with a view to modify its definition so as to give it a broader scope and jurisdiction. But still it renders some sort of ambiguity while dealing with specific cases of male and transgender victimization because of gender barriers. Furthermore, the definition contained under section 375 also seems to be conflicting with the provisions under s.377 of IPC.

4. GENDER NEUTRALITY IN RAPE LAWS

4.1. MEANING OF GENDER NEUTRALITY

Gender neutrality in the sense means the act of being inclusive, while legislating on an issue that is applicable to all genders in common. It emphasize on the equal treatment of men, women and third gender (transgender) people in the society in socio-economical and legal aspects. Gender neutrality is essentially the spirit of the Constitution. Article 14 of the Constitution of India provides that state shall not deny any person the equality before law and equal protection of law and Article 21 reinforce the right to life and personal liberty. Moreover, the preamble to the constitution of India uphold the idea of social, economic, political freedom and justice which inherently include gender justice also. Therefore, our legislative frame work, which is founded on and owes its existence to a constitutional order should refrain from distinguishing persons based on gender roles, to avoid discrimination on the basis of sex.

4.2. SCOPE OF GENDER NEUTRALITY IN SECTION 375

Gender neutrality in current rape laws can be viewed in two major perspectives. They are:

i) Gender neutrality with respect to the victim

ii) Gender neutrality with respect to the perpetrator.

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3. John Stokes, *India's Law Should Recognize that men can be raped too,* SCROLL.IN, (Sep 11, 2014,1:30AM), https://scroll.in/article/676510/indias-law-should-recognise-that-men-can-be-raped-too

4.2.1. Gender Neutrality with Respect to Victim

It is unfortunate that Indian legal system still observes the offence through gender lens, where it is an offence that can be done only by a man solely against a woman. The law remains to be silent to the fact that, male and transgender can also be sexually assaulted and raped. This idea is fundamentally rooted in the historical perception that rape is something which is done for the gratification of lust or a strong sexual desire. Bur this is not at all true in the modern scenario. Rape can also be committed in order to exhibit one's superiority or dominance over the other. It may be directed against a man, woman or a transgender. But the patriarchal ideology that persist in our social sphere, makes it difficult to accept the reality of male and transgender victimization.

MALE VICTIMIZATION

Men are sexually abused by women on occasion, but they are most often sexually assaulted by other men. As we have stated earlier, rape is an act of showing one's dominance over other. So, the assailants at time uses weapons, physical force or threat of such force get a control over the other. They may also blackmail the victim or may use their position of power (especially when the assailant is in a position to dominate the will of other) to force them into submission. Others use alcohol, drugs, or a combination of the two to keep their victims from fighting back. It is a violation of a man's body and free will, regardless of how it occurs, and it can have long-term emotional

consequences.[4] Some of the issues surrounding male sexual victimization are discussed below

- **Patriarchy**

Recognizing male rapes in India is still a taboo, and has a negative connotation among heterosexual and homosexual men. Community often react to the sexual orientation of male victims and the gender of their perpetrators. It may be difficult for male victims to report a sexual assault they experienced, especially in a society with a strong masculine custom.[5] These are deep rooted in the strong patriarchal myths that sexual assault or sexual exploitation does not affect men. Besides men to men rapes, woman at times can also coerce men into sexual activity without his consent.. However, strong and deeply entrenched social beliefs impel men to believe that "all sex is good." In addition to this, male victims may be concerned that people will doubt their sexual orientation and may label them as homosexual, especially if raped by a male, or that they may be seen as un-masculine because they were a victim. Such feelings of

toxic masculinity in the community create an impression that men are not susceptible to sexual abuse.

- **Emotional Trauma**

Another social stereotype exist in the society regarding male rape is that males are less subjected to traumatization, hence the chances of being affected by sexual abuse is rare. But this argument

Does not hold water in the modern social arena. According to studies, the long-term effects of sexual abuse and assault are harmful to either sex, and males may be especially harmed due to the

existing social stigma and disbeliefs regarding their victimization. The false presumptions on manliness and masculinity creates immense pressure to the male victims as they feel intense guilt and embarrassment.

- **Presumption of Forever consent (Men always want sex)**

Another major false hood prevailing in our community regarding male victimization, is that "men always want sex". It is believed that mere erection of the penis or ejaculation during sexual intercourse means that man really wanted sex. But penile erection or ejaculation is purely a physiological process that can also result from a mere physical touch or even extreme stress. Hence it cannot be taken as an indication that the victim has consented to the sexual assault.

TRANSGENDER VICTIMIZATION

Transgender (sometimes may be referred to as "trans") community often recognized as 'Hijras" constitute the most marginalized, neglected and stigmatized section of our civil society. The term "transgender" describes a class of persons whose gender identity is different from which they have assigned by birth.[6] If we take a look at the history of Indian subcontinent we can trace the evidences of third gender recognition and acceptance in the ancient Indian society.

The myths in India's Ramayana and Mahabhratha also make certain references to "Third Gender" which indicates that India was a home for transgender community from time immemorial.

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4. Jeff Kulley, *For male survivors of sexual assault,* UNIVERISITY OF TENNESSEE, https://counselingcenter.utk.edu/self-help-materials/for-male-survivors-of-sexual-assault/

5. Wikipedia, *Rape of Males*, Last updated on 14 Mar 2021, 2:33, https://en.wikipedia.org/wiki/Rape_of_males

But during colonial rule in India, imposed Victorian morality introduced ruthless policing on what colonial authorities deemed aberrant gender and sexual expression, thereby villainizing and ostracizing the 'hijra' community of the country. But during colonial rule in India, imposed Victorian morality introduced ruthless policing on what colonial authorities deemed aberrant gender and sexual expression, thereby villainizing and ostracizing the 'hijra' community of the country. This trend of non-recognition and social ostracization continued even in the post independent era. But later in 2014, through its revolutionary and landmark judgement in the case *National Legal Services Authority (NALSA) v. Union of India*,[7] Supreme Court of India established legal recognition of the "Third Gender". Although the problem of legal recognition of rights of transgender people has been solved to an extent, social acceptance of this community has not yet materialized. This makes them highly prone to sexual offences than other genders.

Recently a study conducted by Peoples' Union for Civil Liberties Karnataka (PUCL-K) reveals the shocking reality of transgender victimization in India. In one such narrative, twenty three year old Sachine relives his trauma after being abandoned by a client in the middle of a ring road. What followed was a sexual assault by a policeman, which left him bleeding and in pain. His nightmare, seeffied never ending, when soon after, a van full of tourists stopped and took turns on him until he was too weak to even protest[8]. The report raises serious concern over the right of sexual integrity and autonomy of members of transgender community.

Despite the NALSA judgement, there exist a legislative vacuum, with respect to the protection of transgender rights. There is no penal provisions in India which may protect the third gender people

6. Wikipedia, *Transgender*, Last updated on 11 Mar, 2021,17:12, https://en.wikipedia.org/wiki/Transgender

7. (2014) 5 SCC 438

8. PUCL-K, Human Rights Violation against Transgender Community, ed.2003 september, p25-26, http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf

from sexual assaults by man, woman or another transgender. The 'Transgender Persons (Protection of Rights) Act, 2019, which was the first law in India governing third gender was in turn more deplorable. The legislation was further discriminatory especially in matters of sexual offences against the members of third gender community. Section 18(d) of the Act provides :

— *Whoever, harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse ,shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine*[9]

This section is outrighlty discriminatory as it treats the sexual offences against transgender community as petty offence when compared to similar offences against women. The wordings of the section trivialize the gravity of the offence when similar offence against women, is treated with utmost importance. It is ironic that when sexual assault against women is punished with an imprisonment for a life time, similar bodily assaults against transgender people (particularly transwoman) has not given much attention. This insensitivity of laws towards the rights and dignity of 'third gender' people would increases their vulnerability to such sexual abuses and assault in our current social sphere. In spite of the Supreme Court ruling that "the persons" falling under Article 14 of Constitution of India would include third gender people as well, failure to extend equal protection of law to members of trans community would results in serious violation of the basic constitutional spirit.

4.2.2 Gender Neutrality with respect to perpetrator

S.375 of Indian Penal Code explicitly begins with the phrase " A man is said to commit Rape…" from the wording of this section itself, it can be assumed that rape is something that can only be committed by a man. But women in power, whether professionally, physically or emotionally, are

also capable of coercing men into sexual activity without consent. Thus the concept of gender neutrality with to respect to perpetrator means, acknowledging that both man and woman can be the perpetrator of rape.

9. S.18(d) of Transgender Persons (Protection of Rights) Act 2019

There are two possibilities in this regard, that are not currently recognized by law.

i) Female on Male Rape and

ii) Female on Female Rape.

FEMALE ON MALE RAPE

As per definition, rape is considered as a penetrative assault on women. This limited phallus centric definition of rape under s.375 of IPC makes it legally impossible for a women to rape a man. Thus if a woman forces a man to have intercourse with her, it would not constitute rape under our current legal standards. This discriminatory approach of the law regarding sexual assault may have evolved from the common misconception that it is physically impossible for a woman to rape a man.

It is not physically impossible for a woman to rape a man.

It is widely held belief that, due to the mechanics of sex, it is physically impossible for a woman force a man to have sex with her, without his consent. One of the potential justifications of this argument is that, in order for a woman and man to have sex, he need to be aroused and such an arousal or erection indicate that he is consenting to the sex. But this isn't true. Medical researches prove that, arousal during sexual assault, can happen involuntarily as a natural physiological process. For example, woman when victimized in rape, can also show physiological responses like lubrication and orgasm at the time of rape. This necessarily do not implies a consent on part of women. Sexual arousal and orgasm are purely originating from the reflex –driven Autonomous Nervous System, the same system responsible for involuntary acts such as heart beat, respiration and digestion[10]. Thus mere arousal and erection of penis during sexual assault, is not a relevant sign to conclude that the man is consenting to sex. In addition to this it is perceived that, anatomical difference between man and woman makes men physically stronger than women so that he could be able to resist any such attempt to commit a sexual assault by female. This is also not always true as a particular man might be physically weaker than the perpetrator or he may be in state of intoxication, physically restrained, physically or mentally disabled or duped about women's identity etc.. where he is unable to consent to the act at his own free will.

10. Jenny Morber, *What Science say about arousal during Rape,* THE POPULAR SCIENCE, *(*May 30,2013), https://www.popsci.com/science/article/2013-05/science-arousal-during-rape/

FEMALE ON FEMALE RAPE

Similar to men on men rape, there are chances of female on female rapes as well. The common idea of a women cannot rape another women could not be held true always. There are instances where a female sexually exploit another female just to derive pleasure from humiliating the other.

Under our current legal frame work, even though a women cannot be held liable for rape she can still be held liable for abetment under Section 109 of IPC. Moreover, in *State Government v. Sheodayal* [11], Madhya Pradesh High Court held that a woman can violate the modesty of another woman under Section 354 of Indian Penal Code, 1860.

S.375 of IPC is unambiguous and it explicitly states that "*a woman cannot commit rape"*. On the contrary the section 376(2)(g) of IPC uses the term "any person" rather than any man" while dealing with the issue of gang rape, which clearly projects the gender neutrality of the said section. However when the issue came before the court of law in the case, *Priya Patel vs. State of Madhya Prades*[12], Supreme court held that a woman cannot have an intention to rape, as it is conceptually inconceivable and therefore, she can neither be held for rape, nor gang-rape. The rule led down by the court in this case is indeed a legal fallacy because the act of penetration itself is not a requirement, the intention is enough even if it's in the form of abetment. Moreover this erroneous judgment along with the gender specific section 375, accords women absolute immunity from any kind of rape liability.

4.3. NEED FOR GENDER NEUTRALITY IN RAPE LAWS.

India is a signatory of the The Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights, 1966 and The International Covenant on Economic, Social and Cultural Rights, 1966. All these instruments uphold the sacrosanct right of every persons to equality and human dignity. There is no disagreement with the fact that women constitute the most susceptible and vulnerable class for rape in India. Be that as it may, a considerable number of both homosexual and heterosexual men and transgender people are also at the risk of such sexual offences in this modern era.

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11. 1956 Cr LJ 83 M.P

12. AIR 2006 SC 2639

Moreover, Justice Varma Committee which was setup after the Delhi Gang Rape case came to the conclusion, "Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality, the provisions have to be cognizant of the same".

Recently, in a survey conducted by the Centre for Civil Society (CCS) , found that approximately 18% of Indian adult men surveyed reported being coerced or forced to have sex. Of those, 16% claimed a female perpetrator and 2% claimed a male perpetrator[13]. Thus we have to accept that in our modern society, it is not only women but men too are subjected to sexual assault, harassment and even penetrative acts thorough coercion. Even though male to male assaults are addressed by section 377 of IPC to a certain extent, there are no such mechanisms for finding justice for a male victim in India if the perpetrator is a female.

In *Bodhisatwa v Subhra Chakraborty*[14], the apex court of India observed that "rape is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights"

In State of *Himachal Pradesh vs. Shree Kant Shekar*[15], the Supreme Court of India held that, Rape
is not only a crime against the person of a women it's a crime against the entire society. It was also emphasized that it is a violation of the fundamental right to life under Article 21 of the Constitution of India. As we know that men, women and transgender people are all equally entitled to rights under Article 21, rape laws of India should be reconstructed to be inclusive of the rights of all persons of the society irrespective of their gender roles.

In *Sakshi vs. Union of India*[16], Supreme Court of India, framed precise issues regarding scope of term "Sexual intercourse" under s.375 to be dealt with Law Commission of India. The 172nd Law commission indicated its response to the issue and submitted changes for widening the scope of the offence in section 375 and to make it gender neutral. Various other changes have been recommended in sections 376, 376A to 376D.

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13. *India's Law Should Recognize Men can be Raped too,* CENTRE FOR CIVIL SOCEITY, https://ccs.in/indias-law-should-recognise-men-can-be-raped-too

14. 1996 AIR 922, 1996 SCC (1) 490

15. (2004) 8 SCC 153

The committee have also recommended insertion of a new section 376F dealing with unlawful sexual contact, deletion of section 377 of the IPC and enhancement of punishment in section 509 of the IPC.

Our laws have a fundamental constitutional duty to safeguard a situation where a male or a transgender is forced to have sex and if they alleges it to be rape. Even if that's the fact, Indian Penal laws and judiciary are having a culpable silence in recognizing such issues faces by male and transgender community in India.

4.3.1. Section 375 and 377 : Conflicting Definitions

Section 377 of IPC deals with unnatural carnal intercourse against the order of the nature. It includes, penile/anal penetration, finger/vaginal, finger/anal penetration and oral penetration with a man or a woman or an animal. This section primarily focus on the offences of sodomy and bestiality. Sodomy is penetration per anus by a man with a man or with a women and bestiality refers to sexual intercourse, either by a man or a woman with a non human animal or bird. It is a well settled fact that Section 377 is not a gendered law. So as per definition, if a man commits penile-anal penetration or finger – vaginal penetration on a women, it can be considered as an unnatural offence under s.377 of IPC. But at the same time if we look into the definition of rape under IPC, the very same act is covered by s.375 also under sub clauses (a) and (b). This creates a serious legislative as well as conceptual ambiguity with regard to sexual offences as the punishment preferred for both offences under IPC are slightly different. The 172nd Law Commission report, after recommending changes for widening the scope of offence under s.375, also proposed the deletion of section 377. Therefore in the interest of justice and equity, it would be appropriate to make s.375 gender neutral to address all kinds of "sexual assault" and thereby deleting section 377.

4.3.2. POCSO Act is Gender Neutral

Gender neutral laws are not a new gloom to India. The Protection of Children From Sexual Offences Act, 2021 (POCSO) was enacted by the parliament to effectively address the heinous crimes of sexual assault and sexual exploitation of children through less ambiguous and more stringent legal provisions.

16. (1999) 6 SCC 591

As the Act enacted in 2012, was only applicable in the case of a girl child, but later in 2019 the parliament of India has amended the legislation so as the accord a gender neutral status to the same. Now, according to section 2(d) of POCSO Act, it defines "Children" as "any person" not being limited to boy or a girl.

In spite of the gender neutral status of the POCSO Act, our current legal frame work fails to extend
a similar protection to the adult male victims. There is no reason why the instances of sexual assault of male child under 18 years and that of adult men are treated differently by our legal machinery.

4.3.3. Gender Neutrality is still not out of question.

Here we have discussed the different dimensions of gender neutrality with respect to the sexual harassment laws in India. Gender neutrality in rape laws is not an unattainable dream. There was a 58-day period post Justice Varma Committee report when rape laws in India were gender neutral only before the Criminal Law (Amendment) Act of 2013, repealed the provisions. The repeal was due to immense resistance from certain feminist groups who argue that gender neutralization of current rape laws will further harm the interest of female victims and also female as perpetrator is a question far away from reality. But both these arguments are not at all true. There are classic examples where women are using rape laws to get an unfair advantage over a man. Making gender neutral rape laws will not harm any of the women's right. All genders has to coexist in a democratic frame work. If male and transgender victimization in India is a reality, then it could not be bogged down by majority patriarchal perceptions. Thus a proper gender sensitization training of our legislative and judicial machinery is indeed a need of the hour.

5. CONCLUSION

Law is an instrument of social change. The evolution of a democratic society is reflected in its legal system. By studying a law, we can gain a better understanding of the general perceptions of the society in which we live. Law and society are inextricably linked. Even though law is a product of society as a whole, in some cases law can effect social change too. The law will evolve in tandem with society. The major revamps in our criminal law on the aftermath of

Nirbhaya incident is a classical example to this. Even so, there may be times when society expresses reluctance to a change in the law. That is what we are dealing with today in terms of gender neutrality in rape laws. Every piece of legislation in the country must be balanced. It must extend legal protection to all people, regardless of gender, colour, religion, race, caste, or custom etc.

In context of sexual assault laws of the country, our current judicial and legislative framework extend protection for only women victims where male and transgender victimization are consciously neglected. All person (all genders) need to coexist in the society. We cannot trivialize the suffering of male and transgender victims as it is incomparable and same for all. But still the interpretation of the law in a gendered language makes it legally impossible for a man to file a sexual assault case against a women or makes it difficult to establish a claim against another man in case of sexual assault. The condition of third gender people is also of no exception. Despite the judgement of the apex court granting them equal personal status as that of other genders, social realization of the same has not been yet materialized. Such limited definitions of rape and sexual assault which primarily evolved from the patriarchal presumptions, favors unequal treatment of person, in respect of sexual offences and violation of body, which is contrary to the basic principles of equalitarianism of the Constitution of India. Indian legislative mechanism should evolve from recognizing rape, based on gender roles, just like Bhutan, United States and United Kingdom which now have their own gender neutral rape laws. There must be given due legislative attention to the reality that man can be raped and women can rape. It is the primary duty of the law to liberate society from age old patriarchal myths and to nourish the feelings of equality and brotherhood / sisterhood in our society.

NESTLE INDIA LIMITED VS STATE OF GUJARAT AND OTHERS (1998) 1 GLR 528

- AKHILESH YADAV & AYUSHI JAIN

BRIEF FACTS

Petitioner No. 1, a Public Limited Company is a well-known manufacturer of various food products including tomato ketchup under the trade mark "Maggi" whereas petitioner No. 2 is a responsible officer of petitioner No. 1 Company and respondent Nos. 2 to 5 are the vendors and wholesalers carrying on business at Valsad. On 20-8-1992 the respondent No. 1 complainant purchased tomato ketchup of "Maggi" Brand from the respondent No. 2. The said product is manufactured by petitioner No. 1 Company. As alleged, the product was sent to laboratory for analysis and was found to be of inferior quality and not conforming the standards laid down under the law. Thus, finding the product as adulterated, the respondent No. 1 initiated criminal proceedings under Section 16(1)(a)(i) of the Act.

According to Section 13 of the Act, any sample collected by Local (Health) Authority has to be sent for analysis and examination to the Public Analyst and on receipt of result of analysis to the effect that the article of food is adulterated, the Local Authority is empowered to initiate criminal proceedings. Despite adverse report by the Public Analyst, valuable right is conferred upon the accused to send through Court another sample to the Central Food Laboratory for analysis as provided under Section 13(2-B) of the Act. Sub-section (2-D) provides that until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the Court shall not continue with the proceedings pending before it in relation to the prosecution. Sub-section (3) provides that the certificate issued by the Director of the Central Food Laboratory under Sub-section (2-B) shall supersede the report given by Public Analyst under Sub-section (1). It is true that the report of analysis prepared by Public Analyst, Annexure 'B' is adverse to the petitioners but at the same time, the accused have valuable right of sending another sample for analysis to Central Food Laboratory at Ghaziabad and the report of the Director of Central Food Laboratory shall be final and supersede all previous reports.

Respondent No. 1, Food Inspector, Food & Drugs Control Department, Valsad initiated criminal proceedings by filing Criminal Case No. 3022 of 1993 in the Court of learned Judicial Magistrate, First Class, Valsad, against the present petitioners and respondent Nos. 2 to 5 for an offence under Section 16(a)(i) of the Prevention of Food Adulteration Act ('the Act' for

short). Present petitioners are original accused Nos. 5 and 6 and present respondent Nos. 2 to 5 are original accused Nos. 1 to 4 respectively.

Relying upon the report of the Central Food Laboratory, Gaziabad, the petitioners and respondent Nos. 2 to 5 original accused had applied for discharge vide application dated 16-12-1995, Ex. 22. But, vide order dated 11-2-1997, Annexure 'FT, the application for discharge has been rejected. Aggrieved by this order, the petitioners have approached this Court under Section 482 of the Code for quashing the complaint and setting aside the impugned order.

In this case though sample was sent to the Central Food Laboratory, report received from the Central Food Laboratory which is produced at Annexure-C, is neither positive nor negative because the product could not be analysed as sample bottle was found broken. In other words, the report Annexure 'C of the Central Food Laboratory does not show that the food product is adulterated. As provided under Sub-section (3) since the report of Central Food Laboratory supersedes all previous reports, the nil report by Central Food Laboratory shall supersede the report of Public Analyst which is adverse to the petitioner. Owing to nil report by Central Food Laboratory in supersession of Public Analyst's report, the product shall be deemed to be not adulterated consequently no prosecution shall lie and if instituted shall not be continued.

ISSUES INVOLVED

(i) Applicability of **Section 13** and **Section 16** of the Food Adulteration Act.

(ii) The contention canvassed on behalf of the accused is about the express legal bar for continuance of proceedings. According to the petitioners, despite express legal bar continuation of such proceedings would be de hors the provisions of law, amounting to abuse of process and unnecessary harassment.

(iii) Superiority between Public Analyst and Central Food Laboratory

APPLICABILITY OF PREVENTION OF FOOD ADULTERATION ACT 1954

Food is one of the basic necessities for sustenance of life. Pure, fresh and healthy diet is most essential for the health of the people. It is no wonder to say that community health is national wealth. Adulteration of food-stuffs was so rampant, widespread and persistent that nothing short of a somewhat drastic remedy in the form of a comprehensive legislation became the need of the hour. To check this kind of anti-social evil a concerted and determined onslaught

was launched by the Government by introduction of the Prevention of Food Adulteration Bill in the Parliament to herald an era of much needed hope and relief for the consumers at large. Laws existed in a number of States in India for the prevention of adulteration of food- stuffs, but they lacked uniformity having been passed at different times without mutual consultation between States. The need for Central legislation for the whole country in this matter has been felt since 1937 when a Committee appointed by the Central Advisory Board of Health recommended this step. 'Adulteration of food-stuffs and other goods' is now included in the Concurrent List (III) in the Constitution of India. It has, therefore, become possible for the Central Government to enact an all India legislation on this subject. The Bill replaces all local food adulteration laws where they exist and also applies to those States where there are no local laws on the subject. Among others, it provides for-

(i) Central Food Laboratory to which food samples can be referred to for final opinion in disputed cases (clause 4),

(ii) Central Committee for Food Standards consisting of representatives of Central and State Governments to advise on matters arising from the administration of the Act (clause 3), and

(iii) The vesting in the Central Government of the rule-making power regarding standards of quality for the articles of food and certain other matters (clause 22).

SECTION 13 OF THE ACT
(REPORT TO THE PUBLIC ANALYST)

(1) The public analyst shall deliver, in such form as may be prescribed, are port to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis.

(2) On receipt of the report of the result of the analysis under sub-section(1)to the effect that the article of food is adulterated, the Local (Health)Authority shall after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under section 14A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health)Authority analysed by the Central Food Laboratory.

(2A) When an application is made to the court under sub-section (2), the court shall require the Local(Health)Authority to forward the part or parts of the sample kept by the said authority and upon such requisition being made, the said authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition.

(2B) On receipt of the part or parts of the sample from the Local (Health)Authority under sub-section (2A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b)of sub-section (1) of section11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall there upon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(2C) Where two parts of the sample have been sent to the court and only one part of the sample has been sent by the court to the Director of the Central Food Laboratory under sub-section (2B), the court shall, as soon as practicable, return the remaining part to Local (Health)Authority and that authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the court:

Provided that where the part of the sample sent by the court to the Director of the Central Food Laboratory is lost or damaged, the court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the court and on receipt thereof, the court shall proceed in the manner provided in sub-section (2B).

(2D) Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the court shall not continue with the proceedings pending before it in relation to the prosecution.

(2E) If, after considering the report, if any, of the food inspector or otherwise, the Local (Health) Authority is of the opinion that the report delivered by the public analyst under sub-section (1) is erroneous, the said authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the article of food is adulterated, the provisions of sub-sections (2) to (2D) shall, so far as may be, apply.]

(3) The certificate issued by the Director of the Central Food Laboratory [under sub-section(2B)] shall supersede the report given by the public analyst under sub-section (1).

(4) Where a certificate obtained from the Director of the Central Food Laboratory [under sub-section(2B)] is produced in any proceeding under this Act, or under sections272 to 276 of the

Indian Penal Code (45 of1860), it shall not be necessary in such proceeding to produce any part of the sample of food taken for analysis.

(5) Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, maybe used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to276 of the Indian Penal Code (45 of 1860): [Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory [not being a certificate with respect to the analysis of the part of the sample of any article of food referred to in the proviso to sub-section(1A) of section 16] shall be final and conclusive evidence of the facts stated therein.] [Explanation: In this section, and in clause (f)of sub-section (1) of section16, "Director of the Central Food Laboratory" shall include the officer for the time being in charge of any food laboratory (by whatever designation he is known) recognised by the Central Government for the purposes of this section.]

SECTION 16 OF THE ACT

PENALTIES

(1) Subject to the provisions of sub-section (1A) if any person—

(a) whether by himself or by any other person on his behalf, imports into India or manufactures for sales or stores, sells or distributes any article of food—

(i) which is adulterated within the meaning of sub-clause (m) of clause (ia) of section 2 or misbranded within the meaning of clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder or by an order of the Food (Health) Authority;

(ii) other than an article of food referred to in sub-clause (i), in contravention of any of the provisions of this Act or of any rule made thereunder; or

(b) whether by himself or by any other person on his behalf, imports into India or manufactures for sales or stores, sells or distributes any adulterant which is not injurious to health; or

(c) prevents a food inspector from taking a sample as authorised by this Act; or

(d) prevents a food inspector from exercising any other power conferred on him by or under this Act; or

(e) being a manufacturer of an article of food, has in his possession, or in any of the premises occupied by him, any adulterant which is not injurious to health; or

(f) uses any report or certificate of a test or analysis made by the Director of the Central Food Laboratory or by a public analyst or any extract thereof for the purpose of advertising any article of food; or

(g) whether by himself or by any other person on his behalf, gives to the vendor a false warranty in writing in respect of any article of food sold by him, he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years, and with fine which shall not be less than one thousand rupees: Provided that—

(i) if the offence is under sub-clause (i) of clause (a) and is with respect to an article of food, being primary food, which is adulterated due to human agency or is with respect to an article of food which is misbranded within the meaning of sub-clause (k) of clause (ix) of section 2; or

(ii) if the offence is under sub-clause (ii) of clause (a), but not being an offence with respect to the contravention of any rule made under clause (a) or clause (g) of sub-section (1A) of section 23 or under clause (b) of sub-section (2) of section 24, the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term which shall not be less than three months but which may extend to two years, and with fine which shall not be less than five hundred rupees: Provided further that if the offence is under sub-clause (ii) of clause (a) and is with respect to the contravention of any rule made under clause (a) or clause (g) of sub-section (1A) of section 23 or under clause (b) of sub-section (2) of section 24, the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term which may extend to three months and with fine which may extend to five hundred rupees.]

[(1A) If any person whether by himself or by any other person on his behalf, imports into India or manufactures for sale, or stores, sells or distributes,—

(i) any article of food which is adulterated within the meaning of any of the sub-clauses (e) to (l) (both inclusive) of clause (ia) of section 2; or

(ii) any adulterant which is injurious to health, he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable with imprisonment for a term which shall not be less than one year but which may extend to six years and with fine which shall not be less than two thousand rupees: Provided that if such article of food or adulterant when consumed by any person is likely to cause his death or is likely to cause such harm on his body as would amount to grievous hurt within the meaning of section 320 of the Indian Penal Code (45 of 1860), he shall be punishable with imprisonment for a term which shall not

be less than three years but which may extend to term of life and with fine which shall not be less than five thousand rupees.]

[(1AA)] If any person in whose safe custody any article of food has been kept under sub-section (4) of section 10, tampers or in any other manner interferes with such article, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine which shall not be less than one thousand rupees.

[(1B) If any person in whose safe custody any article of food has been kept under sub-section (4) of section 10, sells or distributes such article which is found by the magistrate before whom it is produced to be adulterated within the meaning of sub-clause (h) of clause (ia) of section 2 and which, when consumed by any person, is likely to cause his death or is likely to cause such harm on his body as would amount to grievous hurt within the meaning of section 320 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in sub-section (1AA), he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to term of life and with fine which shall not be less than five thousand rupees.]

(1C) If any person contravenes the provisions of section 14 or section 14A, he shall be punishable with imprisonment for a term which may extend to six months and with fine which shall not be less than five hundred rupees.

(1D) If any person convicted of an offence under this Act commits a like offence afterwards, then, without prejudice to the provisions of sub-section (2), the court, before which the second or subsequent conviction takes place, may order the cancellation of the licence, if any, granted to him under this Act and thereupon such licence shall, notwithstanding anything contained in this Act, or in the rules made thereunder, stand cancelled.]

(2) If any person convicted of an offence under this Act commits a like offence afterwards it shall be lawful for the court before which the second or subsequent conviction takes place to cause the offender's name and place of residence, the offence and the penalty imposed to be published at the offender's expense in such newspapers or in such other manner as the court may direct. The expenses of such publication shall be deemed to be part of the cost attending the conviction and shall be recoverable in the same manner as a fine.

JUDGEMENT ANALYSIS OF THE CASE

In this case there is no conclusive evidence (from the Central Food Laboratory) that the food product is adulterated. Consequently, no offence shall be deemed to have been committed and

if no offence is committed, no prosecution can be launched, and if launched, cannot be continued. Thus, on the face of it, in such circumstances, there would be express legal bar engrafted under the provisions of the Act from continuing the proceedings which have already been initiated. Despite the legal bar in continuing the proceedings, if such proceedings are continued by giving credence to the report of Public Analyst, in my view, is abuse of process of Court. Therefore, such proceedings deserve to be quashed and set aside. In support of his contention, Mr. Vashi appearing with Mr. Mehta for the petitioners, has invited my attention to judgments of various High Courts which are briefly discussed as under:

Hindustan Ciba-Geigy Ltd. v. State of Rajasthan 1994 Cr. LR 785 (Raj.). In that case complaint was filed under the Insecticides Act after expiry of the shelf life of the insecticide. In that case, after receipt of report of Public Analyst, the accused was deprived of his legitimate valuable right of re-analysis by second sample in the Central Food Laboratory under Section 24(4) of the Act as there was no sense in sending the sample for analysis after expiry date. Thus, taking cognizance of the matter, was held as abuse of process of Court and that to secure ends of justice, the proceedings were quashed. In the case of Surender Kumar v. State and Anr. reported in 1977(1) Prevention of Food Adulteration Cases 160 (Delhi), the report of Central Food Laboratory is held to be final and conclusive and superseding all previous reports and any attempt to give credence to the report of the Public Analyst and continuation of proceedings thereupon was held as abuse of process of Court.

In the case of Ms. Pesticides India and Ors. v. State of Rajasthan 1996 Cri. LR 254 (Raj.), the complaint filed after inordinate delay, i.e., after expiry of the shelf life of the sample was held as depriving the accused of valuable right of re- examination by the Central Food Laboratory. Consequently, proceedings were quashed under Section 482 of the Code. Similar view is also taken by Punjab & Haryana High Court, in the case of Bhai Manjit Singh v. State of Punjab, reported in 1992(1) Recent Cri. Reports 552 and in the case of Bhajan Lal Gupta v. Stale of Haryana, reported in 1997 Cri. LJ 190.

Mr. Vashi has also placed reliance upon catena of decisions in support of his contention. In all the following cases cited by Mr. Vashi, it is held that deprivation of the accused of his valuable right of re-examination and continuation of any proceedings in contravention of report of the Central Food Laboratory would amount to abuse of process and the proceedings shall have to be quashed to meet the ends of justice. Mr. Vashi has relied on the following judgments: Gupta Chemicals Pvt. Ltd v. State of Rajasthan & Insecticide Inspector, reported in 1996 Cri. LR 134 (Raj.). H. Lange, a German National, Managing Director, Bayer (India) Ltd. v. State of Punjab and Anr., reported in 1986(1) Recent Cri. Reports 176 (P. & H.). Nagar Swasthya Adhikari v.

Hari Singh 1982(1) Prevention of Food Adulteration Cases 249 (All.) Heavy reliance is also placed by him on the decision of the Supreme Court in the case of Chetumal v. State of M.P. and Anr., reported in 1981 (2) Prevention of Food Adulteration Cases 280 (SC), wherein it has been held that if the accused is deprived of his valuable right for getting sample re-examined by the Director of Central Food Laboratory, it is not open to the Court to fall back upon the report of the Public Analyst to convict the accused. In other words, the report of Central Food Laboratory shall supersede all previous reports and shall be relevant for continuation and/or termination of proceedings. Bombay High Court (Coram : V.H. Bhairavia, J.) has also taken identical view in an unreported judgment in the case of Shantilal H. Baruia and Ors. v. State of Maharashtra and Anr., in Criminal Application No. 1633 of 1990, decided on 22-4-1996. This Court (Coram : N.N. Mathur, J.) has also taken identical view in an unreported judgment in the case of Searle (India) Limited and Anr. v. L.B. Rakholia and Ors., in Misc. Criminal Application No. 900 of 1992 decided on 30-1-1997. **Under these circumstances, Judge find no chances of conviction.** Therefore, no useful purpose will be served in allowing the proceedings to continue. Thus, in my view, since an express legal bar operates in continuing the proceedings, it is a fit case to quash the impugned proceedings to prevent the abuse of process of Court.

In the result, **the application was allowed**. Impugned proceedings in Criminal Caseplo. 3022 of 1993 pending in the Court of learned Judicial Magistrate, First Class, Valsad, were quashed and set aside against the petitioners and respondent Nos. 2 to 5 herein. Rule is made absolute to the aforesaid extent.

R.B. JODHAMAL KUTHIALA V. CIT {1971 (3) SCC 369}

- DEEPNAINEE KAUSHAL

Citation
1971 (3) SCC 369: Supreme Court of India 2 Judge Bench (K.S. Hegde and A.N. Grover,JJ.) Decided on September 9, 1971
Procedural History: How case travelled to this point?
The assesse, a registered firm, purchased a hotel in Lahore. After partition, Lahore became a part of Pakistan and the hotel in question was declared evacuee property and it came to vest in the Custodian in Pakistan. In its returns for the assessment years 1952-53, 1955-56 and 1956-57 .The assessee claimed certain amounts as losses on account of interest payable to the bank but showed the gross annual letting value from the said property at Nil The Income Tax Officer held that since the property had vested in the Custodian no income or loss from that property could be considered in the assessee's case The Appellate Assistant Commissioner confirmed the order of the Income-tax Officer The Appellate Tribunal came to the conclusion that the assessee still continued to be the owner of the property for the purpose of the computation of loss The Delhi High Court came to the conclusion that for the purpose of s.9 of the Act. The assessee could not be considered as the owner of that property Jodha Mal Kuthiala, by way of Civil Appeal moved to the Supreme Court

Factual Matrix	**Issue**	**Rationale: Legal rules, precedents, regulations relied upon by court**
• The assessee, a registered firm purchased the Nedous Hotel in Lahore for a sum of Rs 46 lakhs in 1946. For that purpose it raised a loan of Rs 30 lakhs from M/s Bharat Bank Ltd., Lahore and a loan of Rs 18 lakhs from the Raja of Jubbal. • The loan taken from the bank was partly repaid but as regards the loan taken from the Raja, the assessee came to an agreement with the Raja under which the Raja accepted a half share in the said property in lieu of the loan advanced and also 1/3rd of the outstanding liability of the bank. This arrangement came into effect on November 1, 1951 • After partition, Lahore became a part of Pakistan. The Nedous Hotel was declared an evacuee property and consequently vested in the Custodian in the Pakistan. • The concerned assessment years in the case are 1952-53, 1955-56 and 1956-57, the	Whether on the facts and in the circumstances of the case, the assessee continued to be the owner of the property for the purposes of computation of income under Section 9 of the Income Tax Act, 1922 ? Answer: No	Ss.6(1),9,11,12,14(1),16(1),19,20 of (Administration of Evacuee Property) Ordinance, 1949 (XV of 1949) s.9 of Income Tax Act,1921(11 of 1922) *Sir Currimbhoy Ebrahim Baronetcy Trust* v. *CIT* [5 ITR 233 (HC)] *Commissioner of Inland Revenue* v. *Fleming* [61 IA 209] *Amar Singh* v. *Custodian, Evacuee Property, Punjab* (AIR 1957 SC 599)

relevant accounting periods being financial years ending March 31, 1952, March 31, 1955 and March 31, 1956. • The assessee claimed losses of Rs 1,00,723, Rs 1,16,599 and Rs 1,16,599 respectively but showed the gross annual letting value from the said property at Nil. The loss claimed was stated to be on account of interest payable to the bank. • the Income Tax Officer held that no income or loss from that property can be considered in the assessee's case. Since the property in question had vested in the Custodian of Evacuee Property, in Pakistan. He disallowed the assessee's claim in respect of the interest paid to the bank. • The Appellate Assistant Commissioner confirmed the order of the Income Tax Officer. • In second appeal the Tribunal came to the conclusion that the assessee still continued to be the owner of the property for the purpose of computation of loss. The Tribunal held that the interest paid is a deductible		

allowance under Section 9(1)(*iv*) of the Act.

- Thereafter at the instance of the assessee, the Tribunal submitted the question to the High C,ourt
- The Full Bench of the High Court on an analysis of the various provisions of the Pakistan (Administration of Evacuee Property) Ordinance, 1949 (15 of 1949) (to be herein-after referred to as the "Ordinance") came to the conclusion that for the purpose of Section 9 of the Act, the assessee cannot be considered as the owner of that property.
- The assesse being dissatisfied with that decision has brought these appeals

Dicta: Statement concerning question that was not asked to the court

The Court with respect to ordinance interpreted the term "administration". The Ordinance starts by saying that it is an Ordinance to provide for the administration of evacuee property and not management of evacuee property. The expression "administration" in relation to an estate, in law means management and settling of that estate. It is a power to deal with the estate.

Disposition: Procedural result e.g. decision upheld or dismissed

The Supreme Court by upholding the decision of the High Court dismissed the appeal without costs

SUMMARY OF ARGUMENTS

<table>
<tr><td colspan="2">Issue No. 1: Whether on the facts and in the circumstances of the case, the assessee continued to be the owner of the property for the purposes of computation of income under Section 9 of the Income Tax Act, 1922 ?</td></tr>
<tr><td>Petitioner's Argument
The High Court erred in opining that the assesse was not the owner of the property, for the purpose of Section 9 of the Act. The property was vested in the Custodian only for the purpose of administration and the assesse still continued to be its owner.
The term "owner" defines the person having the ultimate right to the property. As long as the assesse had a right to that property in whatever manner right might have been hedged in or restricted, he still continued to be the owner.
Relying upon observations in Pollock on Jurisprudence (6th Edn. 1929) pp. 178-80. It was argued, Ownership may be described as the entirety of the powers of use and disposal allowed by law. The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. One must look for the person</td><td>Respondent's Argument
The income tax is concerned with income, gains and profits. Therefore for the purpose of that Act, the owner is that person who is entitled to the income.
The word "owner" in Section 9 refers to the legal ownership and not to any beneficial interest in the property.</td></tr>
</table>

	having the residue of all such power when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere.	

ANALYSIS OF THE CASE

The case reviewed the concept, scope and test for determining `ownership' for taxation of the income from house property of the assesse. The chief research issue in the case was definition of 'ownership' for assessee' property and nature of amendment to Section 40(a)(ia). The ratio aptly held that the in order to know who the assesee is it is very important to know that whether he or she is entitled to the income incurring out of that property, and also whether the person who claims the right exercise the right of owner as his own right.

Form v. Substance

The distinction between "form" and "substance" is and continues to be and perhaps, will continue to be at the heart of a variety of issues arising in the administration and interpretation of tax laws. The problem is often aggravated by the fact that "substance" is a subjective concept that takes colour from the views of the person who is trying to determine the "substance", as also from the objective of the determination.

Scrutiny and deliberation on the question of who is an "owner" is one of the manifestations of the distinction between "form" and "substance". Dealing, in the context of Income-tax, with the concept of "owner", without specific reference to the principle of "form" v. "substance", the Supreme Court upheld an interpretation of 'owner' based on what the Court considered to be the substance of ownership. This interpretation was later described by the Supreme Court in *CIT* v. *Podar Cement Pvt Ltd* [468]as "leaving the husk of the legal title beyond the domain of ownership".

[468] ibid

Definition Of "Ownership" For Taxation

the apex court had the occasion to consider one of such questions where despite vesting of the property in custodian the same did not mean loss of ownership. In the context of section 9 of the Indian Income-tax Act, 1922, the apex court referred to *Stroud's Judicial Dictionary* and held that the meaning that is required to be given to the word "owner" must not be such as to make that provision capable of being made an instrument of oppression.[469] The ratio of the decision is that, having regard to the object of the Act to tax the income, "owner" is a person who is entitled to receive income from the property in his own right

The Supreme in order to contemplate the legislative intent closely examined the ordinance. The opening word of the ordinance postulated that it is an Ordinance to provide for the administration of evacuee property and not management of evacuee property. The Apex Court observed that the expression "administration" in relation to an estate, in law means management and settling of that estate. It is a power to deal with the estate. The evacuee could not take possession of his property. He could not lease that property. He could not sell that property without the consent of the Custodian. He could not mortgage that property. He could not realise the income of the property. On the other hand, the Custodian could take possession of that property. He could realise its income. He could alienate the property and he could under certain circumstances demolish the property. All the rights that the evacuee had in the property he left in Pakistan were exercisable by the Custodian excepting that he could not appropriate the proceeds for his own use. The evacuee could not exercise any rights in that property except with the consent of the Custodian. He merely had some beneficial interest in that property. No doubt that residual interest in a sense is ownership. The property having vested in the Custodian, who had all the powers of the owner, he was the legal owner of the property. In the eye of the law, the Custodian was the owner of that property. The Court made an important observation that position of the Custodian was no less than that of a Trustee.

Thereafter the language of Section 9(1) was scrutinized. The section laid that The tax shall be payable by an assessee under the head 'Income From Property' in respect of the bona fide annual value of property consisting of any buildings or lands apurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax subject to the allowances.

[469] *Ledo Tea Co. Ltd. v. Commissioner of Income-Tax*, 1999 SCC OnLine Cal 695

In order to answer the question as to who is the owner of a house property under Section 9 of the Act, The apex Court upheld the Calcutta High Court in the matter of *official assignee for Bengal* (*Estate of Jnanendra Nath Pramanik*)[470]. In that case on the adjudication of a person as insolvent under the Presidency towns Insolvency Act, 1909, certain house property of the insolvent vested in the official assignee. The question arose whether the official assignee could be taxed in respect of the income of the property under Section 9. The High Court held that the property did not by reason of the adjudication of the debtor cease to be a subject fit for taxation and in view of the provisions of Section 17 of the Presidency Towns Insolvency Act, the official assignee was the "owner" of the property and he could rightly be assessed in respect of the income from that property under Section 9.

Hence, it was noted that the powers of the Custodian are no less than that of the official assignee under the Presidency Towns Insolvency Act, 1909.

The learned Judges of the Calcutta High Court in reaching that conclusion had relied on the decision in *Commissioner of Inland Revenue* v. *Fleming*[471]. That appeal related to a claim for repayment of income tax to which the respondent claimed to be entitled in respect of "personal allowance" introduced into the income tax system by Section 18 of the Finance Act, 1920.

The claim arose in the circumstances when The respondent was declared insolvent in 1921. He was then the owner of heritable properties. His insolvency lasted till May 10, 1926, when he received his discharge on payment of composition and was reinvested in his estate. At that time his estate consisted of,

(*1*) Two of the original heritable properties which had not been realised by the trustee in the insolvency and

(*2*) a balance in cash of £53 odd. During the insolvency, the trustee paid income tax on the full annual value of the two properties in question.

The contention of the respondent was that the radical right to these properties was in him all the time, and that, in paying the tax, the trustee was really paying it on his behalf — that is on his income — and that consequently there arose in each of the years in which the payment was made a right to deduct his "personal allowance" from the annual value of the properties. The right to this abatement is said to have passed to the Respondent himself in virtue of the reinvestment in his estate that occurred upon his discharge on composition. Rejecting this contention Lord President observed:

[470] [5 ITR 233 (HC)]
[471] [61 IA 209]

"It is obvious that, unless during the years in question the annual value of the properties was income of the Respondent, he cannot have any claim to abatement of it for income tax purposes; and accordingly everything depends upon the soundness of the proposition that the income consisting in the annual value of those properties was truly income of the Respondent. I do not see how it can possibly be so described. It was part of the income arising from the sequestrated estates vested in the trustee for the respondent's creditors. Any income that did arise from those estates was income of the trustee as such, and he (and he alone) had the right to put it into his pocket as income. It was not income that went or could go into the pocket of the respondent as income in any of the years in question. How then can it be said to have reached his pocket as income on his subsequent reinvestiture."

It was held on carefully examining the facts and circumstances that Section 9 of the Income Tax 1922 brings to tax income from property and not interest of a person in that property. The property cannot be owned by two persons each one having independent and exclusive right over the property. Hence, for the purposes of Section 9, owner must be that person who can exercise the right of the owner, not on behalf of the owner but in his own right. . The court held that the residuary beneficial right so vested in the assessee could not be considered as sufficient to regard him as owner for the purpose of section 9. It was also held by the court that though equitable considerations are irrelevant in interpreting tax laws, like all other laws, for laws are to be interpreted reasonably and in consequence with justice. The court also observed that "the word 'owner' has different meanings in different contexts, under certain circumstances the lessee must be considered as the owner of the property leased to him". After considering the meaning given in *Stroud's Judicial Dictionary*, third edition, volume 3, page 2060, to the term "owner" the court held that the meaning that we give to the word "owner" under section 9 must not be such as to make that provision capable of being made an instrument of oppression but it must be in consonance with the principles underlying the Act.

The Hon'ble Supreme Court in Jodhamal Kuthiala's case in which it was laid down that the real question is, can that right be considered as ownership within the meaning of s. 9 of the Act. The receipt of income is the main criteria in determination of the right exercisable by the ownership and the word owner has different connotation under various cases. In various circumstances a lessee can be regarded as the owner of the property leased to him. In R. B. Jodha Mal Kuthiala v. CIT, the Supreme Court held that a provision, the objective of which to make a provision effective necessitates to be treated with retrospective operation so

that a deduction that is reasonable can be given to the section as well. In view of the authoritative pronouncement of the Supreme Court, this Court cannot decide otherwise. Hence the appeal is dismissed' The Hon'ble Supreme Court meant that a proviso which is inserted to remedy anticipated consequences and to make the provisions effective requires to be treated with retrospective operation so that an interpretation which is reasonable can be given to the section as a whole. It is fascinating but not unexpected to note that so many amendments favoring Revenue are proposed to be retrospective being clarificatory in nature and the one favoring taxpayer which in real sense is clarificatory is propsed to be effective prospectively.

The decision was further elaborated by larger bench in the case of CIT v. Poddar Cement Pvt. Ltd.[472] The chief research issue in the case was interpretation of the meaning of the phrase "of which the assessee is the owner" under Section 22 of the Income Tax Act, 1961. Thus, the legal question of the meaning of the word "owner" so as to determine whether the transferees in possession of any immoveable property (property in four flats in this case) who do not have a legally perfected title and enjoy all benefits which a proprietary right holder in a property would enjoy are liable for inclusion of the rents and profits, accrued from such possession either by the transferee in possession himself or subsequent transferees in possession, as "income from house property" under Section 22 of the Income Tax Act, 1961. The apex court although was concerned with the scope of the word “owner” within the meaning of section 22 of the Act, referred to *R.B. Jodha Mal Kuthiala* case, and held that It would thus be seen that where the possession of a property is acquired, with a right to exercise such necessary control over the property acquired which it is capable of, it is the intention to exclude others which evinces an element of ownership.

The position, therefore, seems to be that the idea of ownership of land is essentially one of the “better right” to be in possession and to obtain it, whereas with chattels the concept is a more, absolute one. Actual possession implies a right to retain it until the contrary is proved, and to that extent a possessor is presumed to be owner.

[472] (1997) 5 SCC 482

OBSCENITY AND PORNOGRAPHY IN DIGITAL ERA: AN OVERVIEW

- MOHD JUNED ANSARI & SHAISTA KAHKESHAN

ABSTRACT

"Obscenity or Pornography" represents a huge danger to society, and obscene work should be denounced and monitored in every civilised society. The truth of the matter is that, first of all, it's really hard to articulate what amounts to "obscenity or pornography" and then control it. That the quest of law enforcing agency is to identify and then to prosecute the act of an accused. Moreover, it is impossible to provide homogeneity in the legislation governing obscenity throughout the world. The causative factors causing this are cultural and ideological disparities and even the issue of identity, of course. Further challenge, which the legal system and law enforcement agencies are encountering with, is that of conflicting interest involved in the regulation of the obscene work. Often, an obscene work could be termed as an extension of expression of human talent in the form of art, creative work and an intellectual & creative manifestation of human mind. Human expressions, subject to reasonable restrictions, are sine quo non for effective functioning of any democratic set up and the legal system. The present paper highlights conceptual understanding of Pornography and Obscenity. The paper further throws light on Indian and International Legal Regime relating to Pornography.

Keywords: Cyberspace, Legal system, Obscenity, Pornography, Society.

INTRODUCTION

There seems to be universal acceptance that perhaps the web has expanded the exposure and distribution of pornographic and obscene content.[473] Below mentioned are the prominent forums and forms or mediums in which/through which obscene or pornographic material can be made available to the individual, publicly or privately. These 'forums' and 'forms' are the new mediums unlike conventional means of circulating obscenity. More the advancement the graver the challenge for the society and legal system to limit the criminal activity. It is of no

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[473] S. Biegel, *Beyond our control? Controlling the limits of our legal system in the age of cyberspace,* 15 Harv. J.L. & Tech., 546 (2001).

doubt that the internet has given rise to the criminal activity among individuals. Especially, the web technology has provided pornography accessible to the broader variety of users (offenders).[474] Though there are no definitive figures of how many users are using the Internet to access pictures containing pornographic material, it is certain that the Internet has contributed to a rise in the number of child pornography collectors. In fact, the Internet encourages criminals to be dishonest about their motives, their private backgrounds but also their real identities.[475]

The Internet has exacerbated the issue of child pornography by increasing the volume of content available, making it more effective to spread and making it easier to obtain.[476] The Internet, to bring it directly

i) provides access to large numbers of obscene images from around the world;

ii) renders pornography immediately accessible at any time or place;

iii) provides access to pornography (apparently) freely and secretly;

iv) enables direct contact and exchange of images between users;

v) offers comparatively cheap pornography;

vi) provides decent photographic images, which do not deteriorate and can conveniently be saved.

vii), enables the possibility of real-time and immersive environments, and provides a wide variety of formats (photos, videos, sound).

viii) allows access to plastic or synthetic photographs that have been modified; (morphing).

DEFINITION AND CONCEPTUAL UNDERSTANDING OF PORNOGRAPHY AND OBSCENITY

Erotic depiction is widespread in all civilizations and communities from the ancient Rome, Greece, Middle Ages India, China and Japan, and in the early modern era until today.[477] Erotic material was seen in all the societies as part of the culture. Information Technology has made it easy to produce, generate, distribute and preserve the same in its several forms. This has also been seen as a part of the industrialisation and has become part of the market commodity. The

[474] R. Norland and J. Bartholet, *The Web's Dark Secret,* Newsweek, Mar. 19, 2001 at 44.
[475] Melissa Wells, David Finkelhor, Janis Wolak and Kimberly Mitchell, *Law Enforcement Challenges in Internet Child Pornography Crimes*, SEX OFFENDER LAW REPORT, June-July 2004 at 42.
[476] Richard Wortley and Stephen Smallbone, *Child Pornography on the Internet* Guide No. 41, 2006, CENTRE FOR PROBLEM-ORIENTED POLICING (Jan. 15, 2021,12:55 PM), http://www.popcenter.org/problems/ child pornography/print/
[477] ANDREW MURRAY, INFORMATION TECHOLOGY LAW: THE LAW AND SOCIETY 353 (1st ed., 2010).

volume of the same is at its peak when it comes to the trading of the erotic material via internet and World Wide Web. Several jurisdictions of law have their different cultural and legal set up. Apart from trading and business in this pornographic industry, it is seen as part of "freedom of speech and expression".[478]

There is no fixed definition of 'pornography' or 'obscenity.' What is considered clearly sexually provocative but not obscene in western countries could well be treated as obscene in India. Although the term 'obscene' is not specified in the Indian Penal Code as clearly relating to the sale of obscene content, dissemination, etc., the court has had the opportunity to differentiate obscenity from art and literature involving sex and nudity by suggesting that it is appropriate to determine if obscene information is lascivious and to deprave all who take pleasure in such things. This is a matter of general obscenity.

The concern gets more intense as we talk about cyber obscenity. First of all, we ought to see what off-line obscenity entails for that matter. In addition, off-line obscenity involves words, literature or representation dealing with topics that are erotic, pornographic and sexually perverted. But the obscenity of any subject lies in its impact rather than in the definable nature of the matter itself on the conscience of the reader or spectator. It is difficult, if not impossible, to satisfactorily identify the word "obscene," whether offline or online, and to decide the entity by whom and the criterion by which the obscenity or otherwise of a matter is to be measured.

Oxford Dictionary[479] defined "obscenity, as the state or quality of being obscene, an extremely offensive word or expression".

Walker defined "Obscenity as the quality of offending decency and of tending to deprave and corrupt persons whose minds are open to sexually immoral influences and into whose hands the matter in question may come".[480]

Black's Law Dictionary defined: [481] "Lewd, impure, indecent, and calculated to shock the moral sense of man by a disregard of chastity or modesty."

Bruce A. Taylor,[482] defined pornography as "portrayal of people engaged in or descriptions of ultimate sexual acts including vaginal or anal intercourse, fellatio, cunnilingus, anilingus and masturbation."

[478] Reno v. ACLU, 521 U.S. 844 (1997).
[479] Oxford English Dictionary (Jan. 15, 2021 at 11:04 A), http://www.oxforddictionaries.com/definition/english/obscenity
[480] WALKER DAVID, *OXFORD COMPANION TO LAW*, 898-899 (1980 Ed.)
[481] DR. HARI SINGH GAUR, *PENAL LAW OF INDIA* 2269 (11th ed. 2011).
[482] Taylor A. Bruce, *"Hard Core Pornography",* 21 U. Mich. J.L. Reform 275, 271 (1988).

Further Randall D.B. Tigue,[483] defined it as "representation of women as a whore by nature." Deana Pollard,[484] defined 'pornography' as "depiction of women enjoying forceful penetration, ejaculation and manipulation of genitals."

Chapter-III, "Section 13 of the Protection of Children from Sexual Offences Act, 2012 incorporates the expression - Use of children for pornographic purposes". Perhaps, this is the first statute in India specifically using the expression. It runs as under:

"Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes

a. representation of the sexual organs of a child

b. usage of a child engaged in real or simulated sexual acts (with or without penetration);

c. the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes."

Coming to the point of difference between these two terms, it is significant to note here that, the dictionary meaning or the theoretically there could be differences between these two terms but legally speaking, at least in the context of India, there is no substantial difference. It is has opined that,[485] 'pornography is an aggravated form of obscenity' in the context of India. There have been no special legislations specially dealing with 'pornography' in India but then it has been read in the laws prohibiting and punishing the act of obscenity.

CHILD PORNOGRAPHY

The essence of child pornography is the sexual depiction of a child under a certain age, whether for the purpose of trade or otherwise. It is the globally recognised offence and even Convention on Rights of Child and Convention on Cyber Crime defines it. The Convention on Cyber Crime defines it as:

"Pornographic material that visually depicts: (a) a minor engaged in sexually explicit conduct; and (b) a person appearing to be a minor engaged in sexually explicit conduct; or (c) realistic images representing a minor engaged in sexually explicit conduct."

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[483] D.B. Randall, "*Civil Rights and Censorship Incompatible Bedfellows*", 11 Wm. Mitchell L. Rev. 81,85 (1985).
[484] Deana Pollard, *Regulating Violent Pornography*, 43 Vand. L. Rev. 125, 155 (1990).
[485] BRAJESH RAJAK, *PORNOGRAPHY LAW*, 49 (Universal Law Publishing - An imprint of LexisNexis ,2011).

UN Convention on Rights of Child incorporates term 'all forms' of sexual exploitation which as a natural corollary also includes in its ambit, 'child pornography' and as such online child pornography. "*Article 2 (c) of Optional Protocol to UN Convention on Rights of Child on Sale of Children, Child Prostitution and Child Pornography*, has defined child pornography as: Any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes." Though specific mention of 'computer' is not there in the definition, nonetheless, child pornography which includes representation by 'whatever means will include representation in an electronic form.[486]

Section 160 (1) of Criminal Justice Act of UK declares "child pornography" as a crime: "It is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession."

In Indian legal system, though child pornography in cyberspace has not been defined but it has made specifically as a criminal offence under Information Technology Act, 2000, though prosecution under Indian Penal Code could be made. *Section 67B of Information Technology Act, 2000 made specifically child pornography as an offence*.

REASONS, MOTIVE, AND INTENTION BEHIND COMMISSION OF CYBER OBSCENITY:

Reasons could be different as to why one is in-charge of or possession of or responsible for making available the said content. The prime reason for the same is financial gain and that has been found[487] to be the prime reason as to why there so much of obscene content in the cyber world. It is pertinent to note here that the statistics published by National Crime Record Bureau it is found and recorded that following were the main reasons why cyber-crimes, including the cyber obscenity, is resorted by persons prosecuted for:

i. Financial gain and greed

ii. Fraud and illegal gain

iii. Insult to modesty of woman

iv. Causing disrepute

v. Extortion

[486] ANIRUDH RASTOGI, *CYBER LAW-LAW OF INFORMATION TECHNOLOGY AND INTERNET*, 134 (1st ed., 2014).

[487] Brian Maccullough, *Chapter 6: History of Internet Porn* INTERNET HISTORY PODCAST (Jan. 23, 2021 at 1:14 PM), http://www.internethistorypodcast.com/2015/01/history-of-internet-porn/

vi. Personal Revenge

vii. Anger, Revenge etc

viii. Prank/Satisfaction of gaining control

'PORNOGRAPHIC CONSUMPTION' AS INCITEMENT TO COMMISSION OF CRIMES AGAINST WOMAN AND CHILDREN?

The pertinent question, in this context is, is access to porn or pornographic consumption has direct correlation with the commission of crime against woman? Is it linked with the criminal behaviour or activity of the person? Several studies have been conducted to study the impact of 'addiction to pornography' and 'incitement to commission of crime'. Uniformly it is admitted and codified in the legal regulations pertaining to the same that, if a material, which is lascivious, or obscene, has the tendency to deprave or corrupt the mind of the people, who are likely to receive the same. It is worthwhile to mention a sample provisions in this context, which will suggest us or provide a clue to us, as to whether, pornographic consumption provokes a person? Implicitly, it is mentioned in such regulations and judicial decisions. An example may be given of a regulation and an observation made by a court.

*"*Article 1 (1) of Obscene Publication Act, 1959 of UK provides that: For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it*."*

In an internationally acclaimed judicial decision of R. vs. Hicklin[488] it is observed that: an object that, regardless of literary or social value, has the ability to deprave and degrade all minds susceptible to such unethical forces. What is pertinent here is to know about the capability of (obscene) material or object. The tendency of such material is "to deprave and corrupt persons". "Deprave" and "corrupt" for what? Will it make a person, "pervert"? Will it arouse, sexual feeling, in a person? It has been found that the access to child pornographic material may lead to feeling of sexually abusing the child and the photographing children for child pornography, constitutes child sexual victimisation.[489]

[488] 1868 LR 3 QB 360,371 See: RATANLAL & DHIRAJLAL, *INDIAN PENAL CODE* 427 (23rd ed. 2005).

[489] Over the Internet, Under the Radar: Online Child Sexual Abuse and Exploitation – a brief literature review, 115 CENTRE FOR YOUTH AND CRIMINAL JUSTICE (Jan. 23, 2021 03:00 PM), http://www.barnardos.org.uk/over_the_internet__under_the_radar_literature_review.pdf

Further, as has been mentioned above, in a public interest litigation which is filed before Supreme Court of India, Kamlesh Vaswani vs. Union of India[490] it was noted that the lack of Internet laws allowed people to watch porn, and that over 20 crore clippings, which were directly downloaded from the Internet or copied from video CDs, are readily accessible in the industry. Viewing violent pornography promotes, or at least is associated with, sexual abuse as perpetrated by male devotees of the content, according to research.[491] An example of American case of State vs. Hergerg[492] could be mentioned over here to show the dangerous impact of pornography n men resulting in grade sexual assaults on innocent women.

INDIAN LEGAL REGIME RELATING TO PORNOGRAPHY

The development of laws dealing with pornography in India can be traced from its common law antecedent to the most recent decisions in India. The Indian judiciary has also followed the development in laws relating to obscenity in United States. Pornography is also supported by advocates of pornography by identifying it as a part of speech and protecting it under the garb of right to free speech and expression. Nevertheless, the India judiciary has been reluctant to admit that the pornography enjoys protection of freedom of speech and expression.

Talking about legal framework of obscenity in India, following are the principal legislations dealing directly with the acts/conduct involving 'obscenity' and 'pornography':

1. Indian Penal Code- relevant & applicable provisions
2. "Information Technology Act, 2000 & Information Technology (Amendment) Act, 2008- relevant & applicable provisions".
3. "Indecent Representation of Women (Prohibition) Act"-relevant applicable provisions.
4. "The Prevention of Children from Sexual Offences Act, 2012".

Prior to the commencement of Information Technology Act, 2000, the provisions of IPC and the Indecent Representation of Women (Prohibition) Act, were used to deal with the issues of pornography and obscenity, that too even when the same was being done or committed in electronic medium. Relevant provisions in the Indian Penal Code, and Indecent Representation of Women (Prohibition) Act, were being considered for the visual representations but other

[490] Writ Petition No. 177 of 2013

[491] Tim Ryumel. Does Pornography Lead to Sexual Assault? (Jan 19, 2021 at 4:36 pm), https://www.huffingtonpost.com/ 121 entry/does-pornography-lead-to-sexual assault_us_57c0876ae4b0b01630de8c93 (Jan 19, 2021 at 4:36 pm).

[492] 324 NW 2d 346, 347

electronic materials like audio materials and computer-generated photographs were not specifically included.

Further these Acts did not deal with the issue of child sexual abuse and more importantly with child pornography adequately. While the issue of whether pornography and prostitution should be legalized is regularly debated. The IT Act introduced some protection for the publication and transmission of obscene materials, initially, in 2000. But with the pace of time, requirement and development in law, Information Technology Act, 2000 got amended by virtue of Information Technology (Amendment) Act, 2008 and several new other offences are included along with 'child pornography' in electronic medium (specifically) and upgraded/modified version of publication of obscene material in cyberspace.

RELEVANT AND APPLICABLE PROVISIONS UNDER INDIAN PENAL CODE, 1860 RELATING TO PORNOGRAPHY

Chapter XIV of Indian Penal Code, has incorporated 'Offences affecting the Public health, safety, convenience, decency and morals' which also includes offences pertaining to obscenity and pornography. Before the enactment of Information Technology Act, 2000 and Information Technology (Amendment) Act, 2008, Chapter XIV was the only law made for the prosecution of cases in the nature of publication of obscene or pornographic material. The kind of distinction which is made in other legal systems of the world pertaining to obscenity such as: 'child pornography', 'extreme-pornography', 'importation of obscene material', 'circulation of obscene content', 'sexual or indecent communication' etc., were/are clubbed in a singular chapter of Indian Penal Code.

Below mentioned are the provisions dealing with the whole gamut of obscenity in Indian Penal Code:

1. Section 292- Sale, etc., of obscene books, etc
2. Section 293: Sale, etc., of obscene objects to young person.
3. Section 294: Obscene acts and songs.

*"*Section 292: Sale, etc., of obscene books, etc.-

(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is. if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever- (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees."

"Exception -This section does not extend to-- (a) any book, pamphlet, paper, writing, drawing, painting, representation or figure—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art of learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in—

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

"Section 293: Sale, etc., of obscene objects to young person. -

Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description

for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees."

"Section 294: Obscene acts and songs. - Whoever, to the annoyance of others—

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

RELEVANT AND APPLICABLE PROVISIONS UNDER INDECENT REPRESENTATION OF WOMEN (PROHIBITION) ACT

As mentioned earlier, Section 2 (c) lays down the definition of 'indecent representation of women', being the only definition, one may find pertaining to obscenity and pornography related aspect in the context of Indian legal framework.

Couple of provisions (acts which are codified as offences) provisions deal with what has been defined under Section 2 (c) of the said Act. Those provisions are:

"Section 3: Prohibition of advertisements containing indecent representation of Women. - No person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form."

"Section 4: Prohibition of publication or sending by post of books, pamphlets, etc; containing indecent representation of women. - No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form:

Provided that noting in this section shall apply to-

(a) any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure –

(i) the publication of which is proved to be justified as justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photography, representation or figure is in the interest of science, literature, art, or learning, art, or learning or other objects of general concern; or

(ii) which is kept or used bona fide for religious purpose; any representation sculptured, engraved, painted or otherwise represented on or in – (i) any ancient monument within the meaning of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (24 of 1958); or (ii) any temple, or on any car used or the conveyance of idols, or kept or used for any religious purpose; any film in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952), will be applicable."

RELEVANT AND APPLICABLE PROVISIONS UNDER THE INFORMATION TECHNOLOGY ACT, 2000

Enactment of Information Technology Act, 2000, is revolutionary step on the part of the legislature. "Obscenity" and "Pornography" in cyberspace is now regulated by Information Technology Act, 2000. Although Section 67 is not added recently, but Section 67A and 67B are. They have been added by virtue of the Information Technology (Amendment) Act, 2008. People are gradually getting know about the law and kind of act which the legislature sought to be punished. Knowledge and awareness on the part of the people is must because of two reasons:

1) Ignorance of law is no excuse and

2) there is rapid increase in the usage of information and communication technologies and Internet.

As a part of the survey, when asked to the people/stakeholders, as to whether they have knowledge of the such act which may amount to crime under above mentioned provisions and the law which punishes such act. Majority of them could tell that yes, they are aware of the fact that it is offence to publish and transmit such content but many of them who are not well conversant with the law and the legal system, were not aware of the law or a provision which punishes it. The main object 16 behind enactment of Section 67 of the IT Act, 2000 is to prevent the publishing and transmitting the obscene contents on the internet, which create/cause or disturb the public order and morality. As such it is safe to assume that Section 67, along with Section 67A & 67B, are based on the philosophy of "reasonable restrictions" under Article 19 (2) of the Indian Constitution, like 292 of IPC.

Section 67 of the IT Act, 2000 is modelled on the basis of Section 292 of IPC. Any obscene content or material in the form of information (in electronic form), is punishable under Information Technology Act, if the same is circulated or transmitted using electronic resources like computer, computer system, computer network, computer resource and communication devices, would be termed as an offence as per Information Technology Act, 2000. Information

Technology (Amendment) Act has made certain changes to the original text of Act and added new provisions as a part of code of obscenity in Information Technology Act. Code of obscenity in Information Technology Act, is divided into following arrangement:

1. Publishing or transmitting any obscene material in electronic form;
2. Publishing or transmitting material containing sexually explicit act, etc. in electronic form
3. Publishing or transmitting of material depicting children in sexually explicit act, etc in electronic form.

"ELECTRONIC FORM" OF OBSCENE MATERIAL AND "ELECTRONIC TRANSMISSION" OF OBSCENE MATERIAL

The major point of difference and the major reasons why a special law had to be enacted in the form of IT Act, 2000, is because of involvement of cyberspace in commission of various type of crimes. Those crimes which have been defined in Indian Penal Code, if committed or could be committed in cyberspace or with the involvement of cyberspace, then it is Information Technology Act, 2000 that is applicable and not the IT Act. This point had already been clarified by the Supreme Court of India in Sharat Babu Digumarti vs. Government of NCT[493]. So as the case, if "obscenity" offence as given under Section 292 of 56 the IPC, committed in cyberspace or with the involvement of cyberspace or if obscene material is in electronic form, then it is IT Act and not the IPC. Not just that, the second requirement for the purpose of application of IT Act or the obscenity provision under Section 67, 67A & 67B, it is also required to show that impugned act was transmitted electronically. So, basically, "electronic form" and "electronic transmission or publication", is the essential requirement of constituting an offence under these provisions of IT Act.

INTERNATIONAL LEGAL REGIME RELATING TO PORNOGRAPHY

Pornography has been a subject matter of constant and continuous debate between intellectuals from various schools of thoughts including Marxism, Liberalism and Feminism. In many countries, pornography is enveloped within the laws dealing with obscenity and understood only to mean a subset of obscenity. At the global level there are least attempt to codify and globalize cyber regulation in general and cyber obscenity in particular.

"Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923"-This is the first anti-pornography international document to curb pornography, the

[493] Criminal Appeal No. 1222 OF 2016 (Arising out of S.L.P. (Criminal) No. 7675 of 2015)

circulation of and trafficking in the same, by the League of Nations. Originally it was adopted in 1923 but later it was amended by 1947 Protocol. By virtue of a Protocol to the Convention, which was approved via *United Nations General Assembly*.[494] One of the crucial amendments being the removal of word "International" from the name of the Convention. Currently, 56 countries are part of it. The said document was agreed upon by the States to criminalise the production, possession, importation, exportation, trade, advertisement, or display of obscene writings, drawings print, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects. If the same is done as a business, whether in public or private, pertaining to the obscene matter or thing, or any sort of advertisement making known to the b any means whatsoever, it is deemed to be a punishable offence and the States Parties to it, are under obligation to take all necessary measures in this context. Convention has also incorporated "international jurisdiction" where a foreign element is involved in commission of offence under Article 1.

To interpret the said provision, it is worth to highlight here few words and phrases used in this provision, such as- "exhibition", "produce", "any other obscene objects", "make known by any means whatsoever" "obscene matter or things". All these expressions have been used in when the Information Technology or the Internet was not invented or developed. So naturally, they could not have foreseen the said activities or acts could be committed even in cyberspace. Nevertheless, above mentioned words or phrases, still provide us with, by necessary implication, the involvement of cyberspace. As a result, the said Convention even today holds its application to the obscenity or pornography related activities in cyberspace.

There are many legislations in the United Kingdom that prohibit publication of pornographic material. Obscene Publications Act, 1959, which is a principal & oldest legislation that governs the field and determines the materials that fall within prohibited category. There have several Acts of the Parliament, like the "Obscene Publication Act,1857, Obscene Publication Act, 1959, and the Obscene Publication Act, 1964". Now, only Obscene Publication Act, 1959 and 1964 are in force as amended by latest legislations.

CONCLUSION

Cyberspace, in fact, has made geographic borders largely obsolete. The exponential growth of computer networks and the ability to reach devices via normal telephone lines raise the

[494] Resolutions adopted by General Assembly (Jan. 26, 2021 at 10:50 AM), http://www.un.org/documents/ga/res/2/ares2.htm

insecurity of these systems and the likelihood of their exploitation for criminal purposes. "Information technologies and computer networks present some extremely advanced opportunities for law-breaking activities and build the ability to commit conventional forms of crime in a non-traditional manner." Due to vulnerabilities of the information technology destructive acts using computer networks have done a great loss to the society, financially or otherwise. In this connection, what we lack is, a comprehensive understanding of such vulnerabilities and the absence of universal consensus as to common action against such destructive acts like cyber-crimes, in the wake of the fact that cyberspace is not amenable to such strict regulations because of its inherent features.

No doubt, the technology has advanced to the extent of avoiding such cybercrimes; such as "blocking of websites", "filtering software", "artificial intelligence softwares", "child monitoring softwares" and also other "self-regulation" measures, these have miserably failed when more serious issues like paedophilia or child pornography over the Internet have surfaced. So, criminal sanctions are necessary to deter any destructive or anti-social conduct in the cyberspace. It may be a virtual world, but its implications are felt in real world. These implications are enormous and the real world cannot be a mere silent victim.

THE RIGHT TO FOOD AND THE FUNCTIONING OF PUBLIC DISTRIBUTION SYSTEM DURING THE PANDEMIC

- VEDANSH GUPTA

ABSTRACT:

This paper is concerned with determining the scope of 'right to food' as a constitutionally guaranteed fundamental right and further discussing upon the efficient functioning of the Public Distribution System and minimum rate shops during these challenging times of a global pandemic. The paper is based on an observational analysis by the author of his surroundings during the novel corona virus pandemic.

INTRODUCTION

IS THERE A CONSTITUTIONAL RIGHT TO FOOD?

The basic necessities which include food, shelter and clothing (called the 'Basic needs') are placed at the bottom of the social pyramid of the 'Hierarchy of Needs' given by Abraham Maslow in his paper titled 'A Theory of Human Motivation'. These items are the basis of survival of a human being in order for a civilization to flourish. A country can develop and adopt a constitution full of rules and guidelines to govern a state, but they can be followed effectively only if the majority of its members have access to all the basic items to live. Although, all the above-mentioned items are vital, but if asked to choose, anyone will select food as the most important among all the basic needs in order to survive.

But, the most important questions to ask are:

1. Is there something called a 'Right to Food'?
2. Whether food can be guaranteed to anyone who does not have the means to procure it?
3. Is there an explicit or latent Right to Food enshrined in the constitution?
4. Are there any follow up statutes to bring this Right to effect?

Fortunately, the answers to all these questions are in affirmative.

'Right to Food' as Mentioned in the Indian Constitution:

The realization to create a constitutional Right to Food emerged in 2001, when the Rajasthan government was inefficient to provide the employment and food relief guaranteed by the Rajasthan Famine Code of 1962, even though the country was producing an agricultural surplus. Thus, one of the longest running 'mandamus' cases of its kind in India was filed. The legal basis of the petition was simple. It said that Article 21 of the Constitution is a guarantee of the "Right to Life and Personal Liberty", and imposes upon the state the duty to protect it[495], and it is as clear as crystal that there is no life without food.

Also, in the case of *Ahmadabad Municipal Corporation* v. *Nawab Khan Gulab Khan & Others* it was stated that, "Right to Food is an inbuilt and inalienable part of life which cannot be compromised on any ground. The 'Right to life[496]' guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter."[497]

Article 47 of the constitution, a 'Directive Principles of State Policy', also states that there is a duty of the state to raise the level of nutrition and the standard of living and to improve the public health as among its primary duties[498]. The Supreme Court of India has found that the Government has a constitutional obligation to take steps to fight hunger and extreme poverty and to ensure a life with dignity for all individuals[499].

Hence, the above statements show that there is a constitutional Right to Food guaranteed to all the citizens of this country and there is a corresponding duty upon the State to bring this right into effect. This constitutional right is a result of many landmark cases in the respect of food as a matter of right and various efforts of the then government in creating and implementing the same.

The National Food Security Act, 2013:

Thus, to put the said right to food in effect, the Indian legislature came up with the National Food Security Act, 2013 (NFSA). It was signed into law on September 12, 2013; but has a retrospective application from July 5, 2013[500]. It aims to provide subsidized food grains to approximately 2/3rd of the Indian population. It includes the Midday Meal Scheme (MMS), Integrated Child Development Services Scheme (ICDS) and the Public Distribution Scheme

[495] People's Union for Civil Liberties v. Union of India & Ors, Writ Petition (Civil) No. 196 of 2001 (S.C.).
[496] The Constitution of India, 1950, Art. 21.
[497] Ahmadabad Municipal Corporation v. Nawab Khan Gulab Khan & Others (1977) 11 SCC 123.
[498] The Constitution of India 1950, Art. 47.
[499] Special Rapporteur on the Right to Food (2008).
[500] National Food Security Act 2013, s 1(3).

(PDS). The MMS and the ICDS scheme are universal in nature. The PDS targets 75% of the rural population and 50% of the urban population.

The beneficiaries of the PDS are entitled to five kgs per person per month[501] of rice or wheat with millet, sugar and salt at minimum rates, and these goods can be procured by any person earning anything below the minimum wages from a PDS outlet called a ration shop or a fair price shop[502].

The Efficiency of Public Distribution Scheme (PDS) During the Pandemic:

It is during tough times that the masses look forward for some help from their sovereigns. The Public distribution System being a governmental agency was expected to perform better during these tough times of novel corona virus pandemic.

It can be rightly said that the performance of PDS was not as efficient during the first phase of lockdown starting March 25, 2020 till April 14, 2020 as it should have been. Food grains or a staple diet was the major concern of thousands of people residing in a ward as earning opportunities were gone due to the state of immobility outside the houses as a curfew was under operation in the whole parts of the country. The state should have provided food grains to even people above the poverty line who had faced a scarcity of resources in those difficult times. However, despite their growing demand, the ration shops were closed in many areas owing to the lockdown.

In a state of emergency situation, the PDS mechanism should have operated with double or more efforts to safeguard a minimum quantity of food grains to everyone who cannot afford to buy it, but the PDS does not seem to take any major responsibility in the early phase of the lockdown when there was a major fear of hoarding necessary supplies in the minds of all people as predictions of further extensions of lockdown were being made both by the local public as well as the media.

The state, however, came up with some good alternatives to combat the situation with setting up of some focused distribution centres, like Municipal Corporations in the district, where double the quantities of PDS grains were distributed. Anyone can come up with an authorized and valid identity card and take his share of food. In some parts of the district, even governmental agencies were distributing necessary ration supplies by visiting households. Also, many individual citizens came up and helped as many people as they could within their

[501] National Food Security Act 2013, s 3(1).
[502] National Food Security Act 2013, s 2(4).

reach. This system was prevalent in the first lockdown only as after the first phase of lockdown, the ration shops were allowed to open and function with the condition of catering to proper social distancing between the beneficiaries.

However, after the opening of these shops, people were not satisfied with the accessibility of food grains. There were long queues of people standing in front of the ration shops since the very break of dawn to guarantee availability of grains. People standing in the long lines did not even think once about the ongoing pandemic when they showed up without masks or even a proper cloth to cover their nose and mouth. The rule of social distancing, i.e. a minimum distance of 6 feet between two individuals, was also mocked openly as people were standing very close to each other without fear of getting COVID positive.

The officials in ration shops were not remotely concerned about the life of people standing outside their shops and they did not bother to make them stand with proper social distancing. Right to Food matters, but it cannot be guaranteed by putting into danger one's Right to Life. All these issues were very important to be discussed in the light of the current pandemic and a little more effort on the part of the PDS authorities could have secured the life and food to millions of people who depend on the PDS for their survival.

Also, people were mostly dissatisfied with the quantity of food grains. Even though the quantity of every type of grains was doubled under the Pradhan Mantri Garib Kalyan Anna Yojana (PMGKAY), people reported that they were not receiving the specified quantity; rather they were receiving wheat and rice in the ratio of 4:1. Thus, people were receiving depreciated quantities of food grains than was guaranteed to them. Also, it was under the above scheme that 5 kg rice or wheat and 1 kg gram shall be provided to the poor every month which was intended to benefit 80 crore beneficiaries under the National Food Security Act, 2013[503].

People also were not satisfied with the quality of food grains they were receiving. There were innumerable pieces of stubble in the grains and even small pieces of pebble can be obtained while cleaning them. People tried to adjust only because there were no substitutes available and jobs of many working people were already lost to the pandemic.

Hence, it can be said that the functioning of the Public Distribution System was not very efficient in the first phase of lockdown in India. However, people and government helped each and other as much as they could, but a need of proper distribution mechanism was greatly felt.

[503] Barkha Mathur, 'COVID-19 Relief: 'Pradhan Mantri Garib Kalyan Anna Yojana Extended For Five Months', Says PM Modi' *NDTV* (8 July 2020) < https://swachhindia.ndtv.com/covid-19-relief-pradhan-mantri-gareeb-kalyan-anna-yojana-extended-for-five-months-prime-minister-narendra-modi-46399/ > accessed on 20 March, 2021.

But, as soon as things became neutral and life seemed to get back on track, the PDS also came back with great efficiency.

The Positive Side:

Despite all the inefficiencies shown by the ration shops and the PDS mechanism, there are certain positives to the distribution system. A total of 84-percent beneficiaries were allotted a certain minimum quantity of grains[504] under the PDS mechanism during the lockdown, although a little more effort could have raised the percentage to as close as 90.

However, a lot of humanity and care was shown towards each other by individuals and that can be witnessed from the many acts of kindness and donations made by fellow neighbours to a weak neighbor in a block. Also, the state and central governments took necessary steps and came up with various schemes of their own to help the citizens of the country.

Also, once the pandemic situation neutralized and mobility of people and automobiles were permitted, the Public Distribution System also started working a little more efficiently than in the initial days of the country-wide lockdown.

CONCLUSION:

The 'right to food' is one of the important parts of the constitutionally guaranteed 'right to life' and is also one of the directive principles of the state policy. Thus, the proper functioning of distributing authorities is very crucial. However, during the initial phase of lockdown owing to the COVID-19 virus, there can be seen various errors in the functioning of the Public Distribution System. Food was an essential requirement as there was no information on the newly found virus and predictions of total lockdown being extended were all over the social media platforms. Also, it is in tough times that people look forward to these government agencies as their saviors. But, the carelessness of these agencies have made the situation worse by making many people prone to COVID-19, including people standing outside the outlet shop and people residing in the neighborhood of the located shop.

Thus, the proper functioning of government agencies like PDS are very essential and people working in these agencies have a very big responsibility on their hands, i.e. to feed the nation's hungry citizens. Hence, they should work with utmost care proper efficiency.

[504] https://nfsa.gov.in

CENTRE-STATE RELATIONS-S.R BOMMAI CASE AND ITS IMPACT ON ARTICLE 356

- NEHA MATHEW

ABSTRACT

Article 356 has been one of the most controversial articles since the commencement of the Constitution of India and also one of the most misused Articles in the Constitution. The case of S. R Bommai v. Union of India pronounced by the Supreme Court in the year 1994 was a major focal point as far as Article 356 is concerned. The Supreme Court in this judgement laid down various guidelines concerning to the implementation of Presidential Rule in a state. The research paper focuses on the S.R Bommai case judgement, the judgements before it and also the developments after it. The paper also put forward an amendment that is similar to the guidelines laid down by the court in the Bommai case in order to try and curb the foul play on political motives alone.

Keywords: *Constitution of India, President's Rule, Article 356, Federal Structure*

I. INTRODUCTION

National integrity, unity and security of the nation were some of the most important qualities that were aspired by the founding fathers of our country. So, they didn't want to create a loose federation and bestow so much power on states as the nation was formed from hundreds of individual kingdoms and feared that dividing power equally between the centre and the state may lead to an eventual break down. They therefore created a system which was quasi-federal in nature with a strong centre. But they also were concerned about the potential manipulation of this article because if misused, it would not only violate the federal character of the constitution but also will bring destruction to the very principles of democracy itself. Dr. B. R. Ambedkar, the Chairman of the Drafting Committee hoped for this provision provided under Article 356 to be "never called into operation" and "would remain a dead letter"[505]

Unfortunately, it has been summoned for in excess of multiple times in the previous seventy years after autonomy. The greater part of the occasions, the middle abuses this force for

[505]Constituent Assembly Debates (CAD), Vol. IX, 170

accomplishing their own political intentions. The States guarantee these to be infringement on the government structure of the Union. The Emergency arrangements (Article 355, 356 and 365) under Constitution of India have consistently been a matter of debate between the middle and the States. Article 356 of the Indian Constitution has consistently been at the spotlight for a more extensive discussion with respect to the government structure of the country. This Article gives extremely wide powers to the Union government for making a therapeutic move over a State if common distress happens and the state government is deficient with regards to intends to control the turmoil. Be that as it may, this has been altogether misconstrued and abused consistently by the middle throughout the long term paying little heed to the decision parties. These are violating the major focal point of the government structure.

The objective of the research paper is to analyse the legal and political developments before and after the S. R. Bommai judgement and its role in the wider spectrum of federalism in India and also critically analysing the balance between centre-state relations post the judgement.

II. LOOKING BACK TO PRE- S. R. BOMMAI SCENARIO

State of Rajasthan V/s Union of India

The court dismissed the suit of the State governments that Article 356(1) was imposed in the State by 'malafide' intention. In the words of Justice P.N. Bhagwati[506]:"The satisfaction of the President under Article 356 is a subjective one and cannot be tested by reference to any objective tests or by judicially discoverable and manageable standards."Thus, once again the judicial review of this Article was struck down. The court held that it cannot take decisions or work according to the central government fulfilling its needs. But if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the court would have jurisdiction to examine it because in that case there would be no satisfaction of the President in regard to the matter in which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 356 (1), and if it can be shown that there was no satisfaction of the President at all, the exercise of power would be constitutionally invalid. But, in most of the cases it would be difficult, if not impossible to challenge the exercise of power under Article356 (1) even on this limited ground. This is because the facts and circumstances on which the satisfaction is based would not be known ,but what is possible is that, the existence of satisfaction can always be challenged on the grounds that it is mala fide

[506] ibid

or based on entirely unrelated and irrelevant grounds[507].In *A.K. Roy v. Union of India*[508], a Constitution Bench of the Supreme Court observed that after the deletion of Clause 5 of the 44th Constitutional Amendment, which was in existence when the Rajasthan case was decided "any observations made in the Rajasthan case on the basis of that clause cannot any longer hold good".

III. S.R. BOMMAI JUDGEMENT

Article 356 has been misused continuously for so long. This misuse of power made all the legal experts uncomfortable. Their need was to bring in a balance between the centre and the state and not to support misuse. They wanted to retain the unity of the country. It was in this situation that the judgement was given in the case of S. R. Bommai v. Union of India[509] where the court proceeded to precisely check the abuse. Though the recommendation of Sarkaria Commission had no binding force, the Supreme Court took the recommendation into consideration and included it in the S.R. Bommai case. The judgement in this case played a major role in developing article 356. This case was decided by a 9 judge bench. This decision overruled the decision given in State of Rajasthan vs. Union of India.

Sri S.R Bommai headed Janata Dal in the year 1989. He was the Chief Minister. But the problem was because certain number of members, who were deserted, made a move putting a dilemma on the majority support in the House for the Bommai Ministry. As per the chief minister's advice, it was told to test the strength of the ministry. But the Governor ignored this suggestion. He also did not explore the possibility of an alternative government but reported to the President that as Mr. Bommai had lost the majority support in the House, and as no other party was in position to form the Government action be taken under Article 356. Accordingly, the President issued the proclamation in April,1989.

Mr. Bommai challenged the validity of the proclamation before the Karnataka High court through a writ petition on various grounds. The High Court dismissed the petition and ruled that the proclamation issued under Article 356 (1) is not wholly outside the pole of judicial scrutiny, the satisfaction of the President under Article 356 (1) is a condition present issue of the proclamation right to be real and genuine satisfaction based on relevant facts and circumstances. The scope of judicial scrutiny is therefore confined to an examination whether the disclosed reasons bear any rational nexus to the proposed proclamation issued. Bommai

[507] ibid
[508](1982) 1 SCC 271
[509] (1994) 3 SCC 1

appealed to the Supreme Court against the High Court's decision. A Bench of nine judges was constituted in Bommai to consider the various issues arising in the several cases.

The court held[510]that proclamation made under Article 356 of the Constitution is justifiable and the courts could look into the materials or the reasons disclosed for issuing the proclamation to find out whether those materials or reasons were entirely unrelated to the formation of the satisfaction and held no rationality at all to the satisfaction required under Article356 of the constitution. On the basis of consensus among the judges, the following propositions can be enunciated in relation to Article 356 (1) and the scope of judicial review there under: -

(1) The proclamation of President's Rule is subject to judicial review (as provided by 44th Amendment 1978) on grounds of mala fide Intention;

(2) The proclamation shall be based on relevant material and Centre has to justify the imposition of President's Rule. The Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President arrived at his satisfaction.

(3) The court has power to revive dissolved or suspended State government. If proclamation of President's Rule is found unconstitutional and invalid, it will be open to the Court to restore the status quo ante to the issuance of the Proclamation and hence to restore the Legislative Assembly and the Ministry. The State Assembly can't be dissolved before approval of parliament for imposition of President's Rule and President can only suspend the Assembly.

(4) The grounds of serious allegations of corruption against Ministry of State and financial instability are not enough for imposition of President's Rule;

(5) The Government shall be given enough opportunities to correct itself in cases where directives are issued;

(6) Secularism is the basic feature of our Constitution and any measure or action taken by State government for security of this feature can't lead to use of Article356; the power under Article 356 can't be used to sort intraparty problems of ruling party;

(7) If Ministry of State resigns or dismissed or loses majority then Governor can't advise President to impose President's Rule until enough measures are taken by Governor for formation of an alternative Government;

(8) The SC held that power under Article 356 is an exceptional power and to be used only in case of exigencies.

[510] Ibid

Before this judgment it was difficult to figure the perspective on High Court/Supreme Court on the abuse of Article 356 that made a circumstance of vulnerability. This milestone judgment has totally changed the situation of abuse of Article 356 by Union Government. Before this recorded judgment Article 356 was viewed as veering off from its genuine reason. After this profession, Article 356 appears to have made the correct stride and makes another element of the Centre-State relationship. The Constitutional ramifications of this case have fortified the government character of Indian Constitution. This milestone judgment has put the Union government on back foot prior to forcing the official standard on irrational grounds and gives a correct heading to Article 356 for filling its very need which was foresighted by the establishing fathers of the Constitution of India. The Supreme Court additionally perceived a few suggestions given by the Sarkaria Commission. As federalism is one of the essential estimations of Indian Constitution, excusal of appropriately chose State Assembly by the focal government is actually a negative of administrative idea. This Judgment along these lines projected a profound effect on Article 356.

IV. DEVELOPMENTS AFTER S.R. BOMMAI JUDGEMENT

Article 356 was further developed in S.R. Bommai and in later cases like *Union of India vs Harish Chandra Singh Rawat and another*[511] *and Nabam Rebia vs Deputy Speaker and Others*[512]. The decisions in these cases helped in creating an impact on the importance of it and this also motivated the Supreme Court to maintain federalism in the country. Even though this case was very strong, still there are traces of misuse of article 356. The development of Article 356 after S.R. Bommai's judgment is very interesting.

V. IMPACT OF BOMMAI AND POST BOMMAI CASES ON THE INDIAN FEDERALISM

As observed from the above conversation, following the notable Bommai Judgment, the States have been reinforced and have another character for them. Besides, after an investigation of Supreme Court's decisions, plainly the Apex court is of the feeling that since both of the Union and State Governments have been chosen by direct voting, both are in this manner, equal in nature. As indicated by the judgment in the Bommai case, the Supreme Court controlled the further political abuse of Article 356 by and large conditions.

[511] MANU/SC/0611/2016
[512] 2016 SCC Online SC 694

In an alliance, the States are not the subordinate units of the Central government. It should be recollected that solitary the soul of 'co-usable federalism' can protect the harmony between the association and the States to advance the benefit of individuals and not a mentality of predominance or prevalence. Under Indian established framework no single substance can guarantee prevalence. Association and the units are the equivalent accomplices in the administration of the nation. In majority rule government the craving of individuals communicated through the political decision measure must be regarded. Any abuse or maltreatment of the force by the focal government will harm the texture of federalism. This thought is noticeable from the way that the Judiciary of India has supported the conservation of the bureaucratic framework and proclaimed that it is the fundamental structure of the Indian Constitution.

VI. CONCLUSION

It tends to be seen that on most events, President's Rule has been forced based on the report of the Governor. On the off chance that we study the part of the Governor from 1950-1994, it will be discovered that from its initiation deepest cases the function of his office was dubious and made an incredible concern and disappointment in the psyches of the States. In spite of the fact that he has been designated by the Central government and holds his office during the delight of the president, he isn't the specialist of focal government. Yet, lamentably, the part of the lead representative has been discovered more often than not unjustifiable to the States. This lead of the Governors has been uncovered so for on numerous events remembering for the ongoing instances of Arunachal Pradesh and Uttarakhand.

In 1988, the Sarkaria Commission set forward its suggestion on Article 356 however the Commission's proposals were not official. In the Bommai instance of 1994, the Supreme Court maintained the proposals of the Sarkaria Commission and made a lawfully restricting standard and rule through its legal declaration. Thusly, the Bommai judgment was a tremendous advance in fortifying the Centre-State ties and the administrative structure of the Government. The judgment in Bommai case gives a solid structure to Article 356 that cleared the path for the future improvement of this article a positive way. S.R. Bommai vs.Union of India case went about as a positive power in fortifying the government structure of the nation and its guidelines gave a wide measurement to Article 356 filling its very need in later cases.

Even after the abuse of Article 356 of every four fundamental occasions, the improvements after Bommai's judgment have gotten ready to check the abuse of the Article 356 to much degree and assumed an imperative function in contracting focal government long arm.

However, some different protections are likewise expected to check the abuse of this Article. The rules and restricting standards articulated in Bommai case are adequate to control the abuse of Article 356 however because of the colourable demonstrations of Central Governments after the milestone judgment, a correction in Article 356 as for the line of activity taken in Bommai case is the most extreme need today.

SHIVAJI CHINTAPPA PATIL V STATE OF MAHARASHTRA (2021) LL 2021 SC 125

- MANSI MANKOTIA

The recent judgment passed by Supreme Court of India[513] has thrown a light on the status of explanation or non-explanation of the accused to the questions put by the court under Section 313 of the Code of Criminal Procedure. In this case, the accused has been acquitted of all the charges as the bench was of the considered view that only the statement of the accused under Section 313 Cr.P.C cannot be used as a link to complete the chain of the circumstances where the prosecution has failed even to prove a single incriminating circumstance beyond reasonable doubt. The Apex Court lay down that it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance against the accused. Especially, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused, non-explanation by the accused doesn't hold good as an evidence to prove his guilt.

BRIEF FACTS OF THE CASE:

It is the case of the prosecution, which the appellant was addicted to liquor and used to abuse and beat the deceased forcing her to get money from her mother. On the fateful night of 23rd March 2003, the accused and deceased went to sleep in their house. At the dawn of 24th March 2003, the brother of the appellant gave a call to the appellant, so that they could go to their field for harvesting jawar crop. The accused opened the door and expressed his inability to accompany him to the field stating, that his wife has committed suicide by hanging. The brother of the appellant went to the village Panumbre to inform the mother of deceased and other relatives about the incident. PW-5 went to Kokrud Police Station and gave information about death of the deceased. On the basis of information received, initially Ad No.13/2003 came to be registered. Subsequently, crime came to be registered for the offence punishable under Section 302 IPC. As per the advance death certificate, the probable cause of death was asphyxia due to strangulation. the accused was convicted by the trial court i.e. Additional Sessions Judge, Islampur in Sessions Case No. 39 of 2003 under Section 302 of the Indian Penal Code, for the

[513] CRIMINAL APPEAL NO. 1348 of 2013. Decided by R.F. NARIMAN, J. and B.R. GAVAI, J.

murder of his wife. The conviction was upheld by the Division Bench of the High Court of Judicature at Bombay and life sentence was awarded to the accused. Hence, being aggrieved thereby, the accused filed an appeal before the Apex Court.

CONTENTION OF THE APPELLANT:

The appellant counsel submitted that the case rests entirely on the circumstantial evidence. He submitted that unless and until the prosecution proves its case beyond all reasonable doubt, conviction in a case of circumstantial evidence would not be warranted. The appellant contented that merely on the basis of suspicion, conviction would not be sustainable. According to Section 106 of the Indian Evidence Act, 1872, unless the initial burden is discharged by the prosecution, the burden would not shift on the appellant. The similar findings were made by the Supreme Court in **Subramaniam v State of Tamil Nadu and Another**[514] and **Gargi v State of Haryana**[515]**.** In **Babu v. State of Kerala**[516]**,** the Supreme Court held that in the case of circumstantial evidence, motive plays an important role. However, as per the contention of the appellant, the prosecution has utterly failed to prove the case as to motive. The appellant counsel also relied on **Devi Lal v State of Rajasthan**[517] to state that when there is a possibility of two views, one more towards the way to acquittal and another leaning towards conviction, the benefit of such situation should be given to the accused.

CONTENTION OF PROSECUTION:

The Prosecution relied on **Sharad Birdichandra Sarda v State of Maharashtra**[518]**,** to submit that it is a primary principle that the accused must be and not merely may be guilty before a court can convict. Also as per the testimony of the medical expert, this case seems more likely to be one of homicidal strangulation. The prosecution also relied on the circumstance that the appellant failed to give any explanation in his statement under Section 313 of the Code of Criminal Procedure. The prosecution also relied on Section 8 of Indian Evidence Act, 1872 considering the conduct of the accused; it contended that there were several instances of ill treatment to the deceased by the accused for not arranging money from her mother.

JUDGMENT:

[514] (2009) 14 SCC 415
[515] (2019) 9 SCC 738
[516] (2010) 9 SCC 189
[517] (2019) 19 SCC 447
[518] (1984) 4 SCC 116

The Supreme Court of India assailed the judgment and order of Bombay High Court and trial court; thereby acquitting the accused. For the same, the court reasoned that the prosecution has failed to prove that the death was homicidal, beyond reasonable doubts. It relied on the **Gargi Case (Supra)** to lay down that Section 106 does not directly comes into play for husband or wife staying under the same roof and being the last person to be with the deceased. This section does not absolve the prosecution of discharging its primary burden of proving the case beyond reasonable doubts. The court further laid down that it is only when the prosecution provides for any such evidence which will either sustain the conviction or make a prima facie case; the burden of proof will shift on the accused.[519]

The court also rejected the contention of the prosecution pertaining to state of accused under Section 313 Cr.P.C. The court reasoned that the false explanation or non-explanation can only be used as an additional circumstance in a case. It has to be used when the prosecution has already proved the chain of circumstances and there is no other conclusion derived but the guilt of the accused.[520] Statement of accused under Section 313 Cr.P.C. cannot be used as a link to complete the chain of circumstances. In **Suresh Chandra Behri v State of Bihar,**[521] the Apex Court held that if the motive is proved that would supply a link in the chain of circumstantial evidence but the absence of the same cannot be a ground to reject the case of prosecution. Subsequently, in **Babu V State of Kerala,**[522] the Supreme Court held that absence if motive in a case depending on circumstantial evidence weighs in the favor of the accused. The court was of the opinion that the prosecution has used the factor of non-explanation as a link to fortify the findings, which were anyway not proved beyond reasonable doubts. Therefore, the accused was acquitted of the charges and was directed to be released.

COMMENTARY:

The judgment although is not a type laying down a benchmark in procedural laws, however, it explains and upheld the already existing explanation to some provisions of the criminal procedure. The unbiased approach without any prejudice attached, of the criminal procedure towards the accused is what makes this judgment a significant one. The Apex Court, through this judgment, has tried to mend the loopholes in Section 313 of Code of Criminal Procedure by providing a better and well explained interpretation to it. It has secured the right of the

[519] Sawal Das v State of Bihar, (1974) 4 SCC 193
[520] Sharad Birdichand Sarda v State of Maharashtra (supra)
[521] 1995 Supp (1) SCC 80
[522] (2010) 9 SCC 189

accused to be a witness in his own case and enabling him to personally explain the circumstances which might be appearing in evidence against him. This judgment has made it evident that merely non explanation on the part of the accused under Section 313 Cr.P.C. cannot be the sole ground for confirming the conviction.

ROLE OF EDUCATION IN THE ECONOMIC DEVELOPMENT OF THE COUNTRY – AN ANALYSIS

- **KUSHAGRADHI BISWAS**

I. INTRODUCTION-

"Education is the most powerful weapon which you can chose to change the world."- Nelson Mandela. [523]

What great minds think and believe about education shows how valuable is education in an individual's life. Education is a very important to impact and influence various spheres of human life like human development, health, well-being and most importantly it eliminates the darkness of ignorance and incompetence. Education also enables one to take better decisions and initiatives that will eventually lead to good and meaningful outcomes and destinations that will make life good and convenient.

In today's highly **competitive economic world**, education is a **game-changer** that can enable a country to move **forward** and make the lives of its people **better and happier.**

This article aims to explore and analyze how education plays a major role in the economic development and improvement of the nation.

II. LITERATURE REVIEW-

The author of the paper- "**The evolution of right to education in India**"[524] , penned that education is beneficial and influential as it impacts the individual's probabilities and chances for labor market success, preparation for democratic citizenship and most importantly it upgrades his aspect of human flourishing also. He also observed that education is important and valuable for society. As a student, the opinions given in the paper is true and society ought to focus a lot on education and enhancement of knowledge and making efforts to ensure every child can continue his process of amassing knowledge and making him learn and teach continuous and consistent without being halted and stopped abruptly.

In the paper- "**A Child's right to education: Laws and Flaws**" [525], it pointed out reasons and problems that has discouraged the implementation and application of RTE (Right to Education)

[523] *Free education quotes,* AZ Quotes, https://www.azquotes.com/quotes/topics/free-education.html
[524] Sadhak Sharma, *The evolution of right to education in India,* 15, Supemo Amicus, 299,300, 2020.
[525] Sushma, *A child's right to education: laws and flaws,*4 Supremo Amicus, 450, 452, 2018.

Act. Issues related to infrastructure, distance of schools and attitude of teachers discourages the implantation of RTE Act. It ought to be understood that laws and policies need to be drafted and framed to ensure reach and quality of education is there and it impacts many lives positively, yet at the same time the issues arising also must be solved from time to time.

The author also pointed out individual issues, difficulties and obstacles that turns out be burdensome for someone who aims to educate himself and make a difference in his life. The individual issues that are faced need to be looked into and solutions ought to be provided accordingly.

The perspectives and hindrances highlighted proves that more work is also needed even after framing new laws, legislations and policies.

In the paper- "**Right to education**" [526], the author has stated the major disadvantage related to the RTE Act. The problems also need to be looked into and solved accordingly.

III. STATEMENT OF PROBLEM-

In today's time, **poverty, hunger and unemployment** is a **major issue** in many **developing and poor countries**.

IV. OBJECTIVES-

The research aims at understanding-

a. How investing in quality education has helped an underdeveloped country achieve prosperity and attain a state of financial competitiveness and stability and what are the major learnings from their success?
b. What are the steps and initiatives that must be taken to make students more capable and competent?

V. HYPOTHESIS-

The author has gone ahead with the research initiatives and work with the hypothesis that poverty and hunger are major problems that plague many nations and their economy as a result of which is affected and their progress also gets slowed down.

It also impacts their process of maintaining law and order and that impacts the overall stability and peace of the society.

[526] Mitr Rao, *Right to education,* 5, Supremo Amicus, 138, 143, 2018.

VI. RESEARCH METHEDOLOGY –

The form of research methodology that has been used is doctrinal research.

VII. HOW EDUCATION HAS HELPED SINGAPORE ACHIEVE PROSPERITY AND FINANCIAL STABILITY: A STUDY-

The country of Singapore is located in Asia with neighboring countries like Indonesia and Malaysia.

Back in the **1960s,** the country was **underdeveloped with a GDP per capita of less than $320**.[527] **Unemployment** was also a problem there.

At the time of its first moments of independence, poverty was rampant. [528]

There were also many other problems also. **Congested living** conditions were there and poor sanitation and frequent outbreak of diseases also used to happen.[529]

Overall, the situation there was not good. The country also lacked valuable natural resources.

Yet, the country **succeeded in emerging as a major Asian economic power**. **Education** did play a role in that.

The government repeatedly referred to its nation's population as its only resource and explained **education in the vocabulary of resource development**.[530] Such a mindset showed how much importance they gave to education. They understood that it was **education** which can help them **develop the talents and skills of every person** and that would help in **economic and social development**.

The government developed curriculum for schools. Primary and secondary schools were built and enrolment doubled in secondary schools between 1965 and 1970.[531] The **Primary School Leaving Examination (PSLE) was started**. [532]

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[527] Ping Zhou, *The history of Singapore's economic development,* Thought Co., (July 10th, 2019), https://www.thoughtco.com/singapores-economic-development-1434565#:~:text=In%20the%201960s%2C%20the%20city,strongest%20economies%20in%20the%20world.

[528] 99pi, *Life and death in Singapore,* 99% invisible, (July 25th, 2019), https://99percentinvisible.org/episode/singapore/

[529] Global-is-Asian staff, *Singapore's healthcare system though the years,* Lee Kuan Yew school of public policy, (April 1st, 2019), https://lkyspp.nus.edu.sg/gia/article/singapore's-healthcare-system-through-the-years#:~:text=Following%20independence%2C%20a%20major%20determinant,and%20frequent%20outbreaks%20of%20diseases.

[530] *Education,* http://countrystudies.us/singapore/26.htm

[531] *The education system of the years,* The Straits Times, (December 25th, 2016, 5:00 AM SGT), https://www.straitstimes.com/singapore/education/the-education-system-over-the-years

[532] Ibid.

Yet, the journey was not that easy and smooth for Singapore. As Singapore moved in to the **1970s**, with the curriculum that was developed in 1960s, certain **problems emerged**.
It was found that **failure levels were high** and as many as **41 percent** of PSLE candidates failed the exams and a study team observed that **high attrition rate**, **ineffective bilingualism and low literacy levels** were major issues and a **rigid** education system was a major cause for such problems. [533]

They understood the problems and worked on it. With new recommendations and solutions, a **new education policy** was implemented and put into effect.
Schools got more **autonomy and freedom and teachers got more flexibility**. [534]

Such a transition by the Singaporean government shows how much they were **open to change and improving themselves**. They ensured education solved problems for its people and aimed to **bring flexibility in the system for better functioning** and **performance**. Such a mindset of **learning from mistakes** and **bouncing back quickly** with **solutions** reflected in how the **nation recovered from an economic recession** in **1985** and then showing **growth rate of 9.2%** in **1989**. [535]

An **economic progress** from a state of **recession** to recording a **9.2% growth rate** in a matter of only **four** years proved how much they were **focused on improving** and continuous betterment of the country.

In the **1990s**, the **IT – industry** was booming and many entrepreneurs, companies, organizations and investors realized its potential and future. Singapore realized that to **stay relevant in the global competitive market**, **innovation** and **quick adaption** to technology would be a game-changer. Keeping that in mind, they launched a new initiative in **1997- Thinking Schools, Learning Nation**.
This initiative aimed at **introducing and fostering** the **mental attitude and approach** which would **motivate and inspire** them to take up new **untried** paths and create a sense of **enquiry**

[533] Ibid.
[534] Ibid.
[535] *Singapore economy – 1990,* www.thedora.com, https://theodora.com/wfb1990/singapore/singapore_economy.html

and questioning among the students. [536] **Innovation** and **enterprise** was an important part of the TSLN initiative and the then acting education minster Tharman Shanmugaratnam said that I and E requires more focus and emphasis.[537]

With a new mental approach, the students and teachers will develop mental qualities like **intellectual curiosity, sense of teamwork and a mental setup** to take **calculated** risks.[538]

Another aspect of the TSLN initiative was that it also focused on use of **information technology** in the **schools** and many changes were brought to the curriculum such as introducing **interdisciplinary project work and training schemes** were also introduced for the **teachers**.[539]

The government understood that in coming years**, IT – based services, financial services and telecommunication** will be **booming** and growing industries. Based on that thinking, the government launched a new initiative that could make its citizens **competent and mentally prepared** for the new industries.

As of now, Singapore is considered to be a **global financial hub** and even today, they are still working in **developing and improving** themselves even more.[540]

Qualities like taking **calculated risks, intellectual curiosity and a sense of giving** became **foundation** for its people when it came to following the **path of entrepreneurship**. Singapore has emerged to be a **leading center of technological innovation and a favorite place for many entrepreneurs**.[541] As per **2107 Bloomberg innovation index**, Singapore ranked **sixth globally** and **most innovative** in **Asia**.[542]

With home to as many as **40000 startups**, the country houses **6 out of 12** South-east Asian **unicorns**.[543]

[536] Pak Tee Ng, Charlene Tan, *From school to economy: innovation and enterprise in Singapore,* 11(3), The innovation journal: the public sector innovation journal, 1,5, 2006.
[537] Ibid.
[538] Pak Tee Ng, Charlene Tan, *From school to economy: innovation and enterprise in Singapore,* 11(3), The innovation journal: the public sector innovation journal, 1,6, 2006.

[539] S. Gopinathan, *Globalisation, the Singapore developmental state and education policy: a thesis revisited,* 5(1), Globalisation , societies and education, 53, 60,61, 2007.
[540] Ferdinand Bada, *What are the biggest industries in Singapore,* World Atlas, (August 28th, 2018), https://www.worldatlas.com/articles/what-are-the-biggest-industries-in-singapore.html
[541] Pooja Singh, *Why is Singapore a startup paradise,* Entrepreneur, (December 13th,2018)., https://www.entrepreneur.com/article/324589
[542] *Singapore flexes its standing as Asia's technological capital,* EDB Singapore, (March 2nd, 2018), https://www.edb.gov.sg/en/business-insights/insights/singapore-flexes-its-standing-as-asias-technology-capital.html
[543] Team YS, *How Singapore is driving global education and what it means for India's startup ecosystem,* Your Story, (October 23rd, 2019), https://yourstory.com/2019/10/singapore-driving-global-innovation

With such developments and massive results that it has achieved, it can be very well-understood how Singapore has **transformed itself into a global business, technological and financial hub**.

Singapore has also developed its college and university level education also. National University of Singapore (NUS)- the oldest higher education institution in Singapore is the **top-ranked university in Asia** and **11th worldwide** in quacquarelli symonds QS world university rankings. [544]

National University of Singapore has also made contributions in the field of research and scientific discovery. Researchers from the **Lee Kong Chian natural history museum, National University of Singapore** discovered **new species of firefly**. [545]

The government also supports research-based activities. In **December 2020**, the government announced an **increase in spending on the field of research, innovation** and enterprise known as RIE 2025 TO **SG$ 25 billion** for the upcoming **five years**.[546]

Such initiatives show how the government supports **research and innovation projects** and **work**. They know that **research and innovation** can help in **better contribution** to the **field of science and ensure the nation's academic advancements**.

The **culture of innovation and research has been stable and strong from time to time**.

Singapore also has **emerged as a leading biomedical sciences hub in Asia** where companies and firms get attracted by its **innovation ecosystem, talent and pro-business environment**. [547]

Focus has also been made in the **sphere of vocational training** also. New **reforms** were made by the nation in **making new strides in the sphere of vocational training** and education. [548] Earlier, it was done by organizing workshops.

Yet, new developments were made with the making of ITE (Singapore's institute of technical education). Impressive premises, teaching facilities, recreational amenities and programs

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[544] *NUS ranked Asia's top university for 5th Year*, Which school advisor, (June 10th, 2020),

[545] Lee Kong Chian natural history museum, *New species of firefly discovered in Singapore,* Phys Org, (March 11th, 2021), https://phys.org/news/2021-03-species-firefly-singapore.html

[546] Yojana Sharma, *New and strengthened research priorities post-pandemic,* University World News, (March 6th, 2021), https://www.universityworldnews.com/post.php?story=20210304105937958.

[547] *Pharmaceuticals and biotechnology,* EDB Singapore, https://www.edb.gov.sg/en/our-industries/pharmaceuticals-and-biotechnology.html#:~:text=As%20a%20leading%20biomedical%20sciences,better%20meet%20Asia's%20healthcare%20needs.&text=Find%20out%20how%20pharmaceutical%20companies,navigate%20opportunities%20for%20continued%20expansion.

[548] Peace Chiu, *How Singapore has overturned perceptions of vocational education, showing Hong Kong the way forward,* South China Morning Post, (October 19th, 2019, 11:00 AM), https://www.scmp.com/news/hong-kong/education/article/3033640/how-singapore-has-overturned-perceptions-vocational.

designed for helping the students spoke a lot about how much work that has been done in improving the sphere of vocational training. [549]

Singapore is a case study on how a country can transform itself from a once poor economy to now being in **the global trade and commerce map as a leader** in providing **various services** to the world.

Singapore ranked **2nd in Asia and 18th worldwide in the ease of doing business** rankings. [550]

VIII. LESSONS AND LEARNINGS FROM SINGAPORE'S SUCCESS-

The nation of Singapore has set a example on how education ought to be provided to its citizens.

Some of the key learnings from Singapore's success-

i. Changes, innovation and solutions from time to time-

From the very beginning. Singapore understood that education is important and necessary for the growth and development of the nation.

They also launched their own curriculum but soon the students there faced problems. The government **analyzed** the problems and **figured out the solutions**. They brought **new changes** in the **curriculum** and that helped them in moving forward.

They also introduced the **use of technology in their schools** and that has made it possible for **both students and teachers** to **get access** to vast **resources and materials**.[551]

ii. Greater investment in education-

The country of Singapore **spent about 20% of total government expenditure** on **public education** in **2013** while in **2002 it stood at 18.2%**.[552] This rise in spending on **education** shows how it has been a **major priority** for this country.

Singapore's increased spending on education and learning has enabled them to become **centers of learning and academics** and that has attracted many students from other nearby Asian countries and also from other parts of the world. **Singapore** is ranked **high in the QS best**

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[549] Ibid.

[550] Rachel Chia, *Singapore ranks 2nd in Asia, 18th worldwide for ease of doing business: report,* The Business Times, (June 17th, 2020, 1:51 PM), https://www.businesstimes.com.sg/government-economy/singapore-ranks-2nd-in-asia-18th-worldwide-for-ease-of-doing-business-report.

[551] Rum Tan, *Parents need-to-know: how technology has changed learning in our Singapore schools,* Smile tutor, (March 19th, 2018), https://smiletutor.sg/parents-need-to-know-how-technology-has-changed-learning-in-our-singapore-schools/

[552] *Singapore- Public expenditure on education as a share of total government expenditure,* Knoema, https://knoema.com/atlas/Singapore/topics/Education/Expenditures-on-Education/Public-expenditure-on-education.

student cities with the 20th rank and it is also said that an **international student can get a scholarship**. [553]

The country attracted as many as **65000 international students in 2018** who wished to **pursue education and learn in Singapore**. [554]

All of these prove that Singapore **invested in its education and worked on it** a lot that made them an **attractive place for study, research and innovation**.

These are the major two learnings that all nations ought to learn from Singapore.

It has consistently invested in learning and education and ensured that its students are future ready and prepared to meet the demands of the market and the industries. This has helped them solving the problem of **unemployment and joblessness**.

Apart from that, introducing new initiatives that promotes a **culture of teamwork and risk-taking motivated many students** take up the career path of **entrepreneurship**. This has resulted in the growth of many **startups and business** ventures in that nation and that has enabled some of their students to **become job creators** and **add value** to **the economy and marketplace** with their **products and services.**

IX. STEPS AND SOLUTIONS THAT OUGHT TO BE TAKEN TO MAKE STUDENTS MORE COMPETENT-

With an average age of 29 years per individual, it was said that India would become the world's youngest country by 2020. [555]

This means that there are lot of opportunities to create something good and new. Yet, certain steps and initiatives ought to be taken which can help in betterment of the youth and society.

Some of the steps that ought to be taken are as follows-

i. Investing and working more on education, educational infrastructure, training and skill upgradation-

For a young and developing country like India, focus ought to be made in making the youth more employable and competent. For that purpose, a lot of planning and spending must be

[553] *Study in Singapore,* Expat.com, (May 8th, 2020, 12:05), https://www.expat.com/en/guide/asia/singapore/15831-key-facts-for-international-students-in-singapore.html

[554] Ibid.

[555] FE Online, *With an average age of 29, India will be the world's youngest country by 2020,* Financial Express, (March 26th , 2017, 9:49 PM), https://www.financialexpress.com/india-news/with-an-average-age-of-29-india-will-be-the-worlds-youngest-country-by-2020/603435/

done in education and skill building. In 2019-20, India only spent **3.1% of its GDP on education**.[556] On the other hand, developed nations like **Norway and New Zealand** spent **6.6% and 6.3% of its GDP** respectively on **education in 2017**.[557] The success of such nations teaches a valuable lesson that **development and progress** can only be ensured and **achieved** in the long-run if **focus and priority** is given in **education**.

More awareness ought to be there about **skill upgradation** and the relevant authorities ought to **build expert-teams** that will take up the work of **skill training and upgradation** in various schools and other educational institutions across the country. Many more initiatives and steps ought to be taken to focus more on **practical and activity-based learning in schools**.

Investment ought to be done in **building proper and well-equipped science labs** in many schools. In a survey, it was found that **75%** of schools **lack decent science labs**.[558]

Another thing that also ought to be focused on is in improving the scenario and conditions that will enable in providing quality free education. **Article 21** of the Indian constitution also includes **right to education**. In the matter of **Bandhua Mukti Morcha Vs Union of India**, it was held by the court that **Article 21** does take in **'educational facilities'**.[559]

Literacy programs are also important as **literacy** it will create the foundation for other life skills.[560] More investment is also required in organizing various literacy programs.

Yet, only improving the labs will not help. In many schools, **lack of adequate drinking water and playgrounds** is still a problem.[561] Investment and work also need to be in improving these infrastructure-related problems also.

Relevant authorities at the state level ought to launch **several "learning tours"** for **teachers** where they will travel to various developed countries to get **training and learn about new innovative concepts of teaching**. **Delhi** is an example which implemented such a plan. The

[556] Shreya Khaitan, *Budget explainer: how India funds public school education,* India Spend, (January 26th , 2021), https://www.indiaspend.com/budget/budget-explainer-how-india-funds-public-school-education-718488#:~:text=In%202019%2D20%2C%2052%20years,2019%2D20%20Economic%20Survey%20showed.

[557] Paul Boulton, *Education spending in the UK,* UK Parliament, (October 28th, 2020, Wednesday), https://commonslibrary.parliament.uk/research-briefings/sn01078/#:~:text=OECD%20analysis%20puts%20UK%20public,the%20OECD%20average%20of%204.0%25.

[558] Subodh Varma, *75% of schools lack decent science labs,* The Times Of India, (August 19th, 2014, 6:26 IST), https://timesofindia.indiatimes.com/india/75-of-schools-lack-decent-science-labs-survey/articleshow/40385273.cms

[559] Sadhak Sharma, *The evolution of right to education in India,* 15, Supemo Amicus, 299,303, 2020.

[560] Mitr Rao, *Right to education,* 5, Supremo Amicus, 138, 140, 2018.

[561] Sushma, *A child's right to education: laws and flaws,*4 Supremo Amicus, 450, 456, 2018

Delhi government sent government **schoolteachers** abroad to **learn** new methods of teaching- **as many as 200 teachers** were sent to **Singapore** for a **teacher-training** program.[562]

ii. Creating a rewarding and research-friendly environment-

Research and development is also one such thing that also ought to be worked on. A **culture of research and innovation-based learning and teaching** needs to be created in schools where children are given an opportunity to **think differently** and **find solutions to various problems** on their own.

Students who **find solutions** should be **appreciated and rewarded**. They ought to be made **aware** and also be **provided opportunities** to represent themselves in various **seminars and workshops** where their **interests and innovative ideas** get a **new shape and perspective**.

Students who show interest in subjects like **public policy making**, **economics** and other social studies-based subjects ought to be provided with **opportunities** to **research and develop their ideas** on topics related to all such subjects.

Investing in research and development has always helped many countries in **progressing ahead**.

Countries like **Israel and USA** have set an example on how investing and research and development can help in economic development. **Israel** spends about **4.4 % of its GDP** on research and development.[563] As of today, Israel is considered a **tech-hub** and it is said that the nation is creating **global unicorns** with already **36 or more** operating there. [564]

USA also spends **2.7 % of its GDP on R&D** and has as many as **4205** researchers per a **million** people. [565]

This is something on which India needs to work and invest on. If more **investment and encouragement** is given to the young **research-enthusiastic** students and graduates, then it will help in creating **innovation**.

They also ought to be **rewarded and appreciated** on performing well and that will build a **positive research and innovation driven culture and ecosystem.**

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[562] Kanika Mehta, *Teach for change: Delhi government sent 200 schoolteachers abroad. This is what changed,* India Today, (September 30th, 2018, 6:40 IST),https://www.indiatoday.in/mail-today/story/teach-for-change-delhi-government-sent-200-school-teachers-abroad-1352705-2018-09-30..

[563] Tzahi Weisfeld, *How did Israel become a hub for innovation,* we work, (July 15th, 2015), https://www.wework.com/ideas/growth-innovation/how-did-israel-become-a-hub-for-innovation

[564] Glenn Solomon, *Five reasons Israel is the world's hottest tech hub,* GGV CAPITAL, (March 6th,2020), https://www.ggvc.com/insights/five-reasons-israel-is-the-worlds-hottest-tech-hub.

[565] *How much does your country invest in R&D,* UNESCO Institute of Statistics, http://uis.unesco.org/apps/visualisations/research-and-development-spending

X. CONCLUSION-

In present times, **countries who invest** in **education and overall development of its people** will emerge as **major global leaders** not only from an **economic** but also from **standard of life** point of view.

Policy makers and law makers must take into account the importance of **knowledge, competence and education** in today's times and then frame policies and laws accordingly.