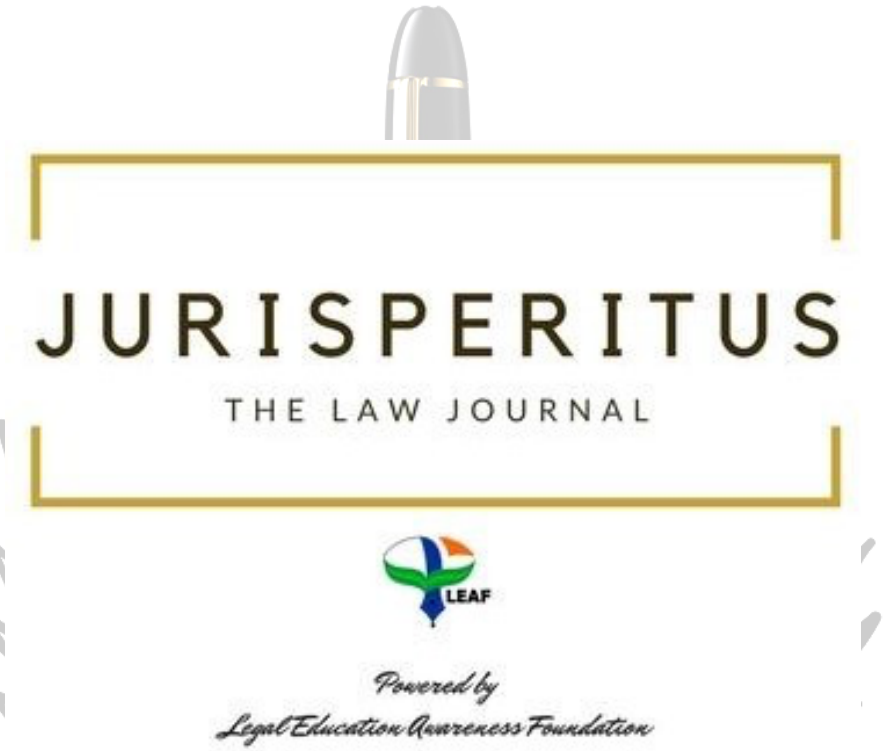


VOLUME 5 ISSUE I

|| DECEMBER 2021 ||

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

DISCLAIMER

EDITORIAL TEAM

Editor-in-Chief

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

Additional Editor -in-Chief

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

Editor

MR. RITABRATA ROY
PhD Research Scholar || University of Sussex, United Kingdom
Phone Number +91 7042689109
Email ID: ritabrata.kls@gmail.com

Mr. NILANJAN CHAKROBORTY
Assistant Professor in Law || School of Law & Justice
Adamas University, Kolkata
Phone Number + 91 8013552943
Email ID: nilchakroborty24@gmail.com

Prof. NANA CHARLES NGUINDIP
Senior Lecturer in Law || University of Dschang, Cameroon
Phone Number +23 7652086893
Email ID: nanalecturer84@gmail.com

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

ABOUT US

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

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

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

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

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

INDEX

SAME-SEX MARRIAGES AND RELATIONSHIPS IN INDIA: DEDUCING FUTURE SCOPE

- RAHUL SAINI

In any event, when more considerable attention to the humanity and integrity of homosexual people came in the period after World War II, the contention that gays and lesbians had a simple case to dignity was in the clash with both law and broad social shows. Same-sex closeness remained wrongdoing in numerous States. Gays and lesbians were disallowed from most government work, banned from military help, barred under immigration laws, targeted by police, and burdened in their rights to associate.

For a significant part of the twentieth century in most of the world, also, homosexuality was treated as a sickness. When the American Psychiatric Association published the primary Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was perceived as a psychological disorder; a position clung to until 1973.[1] In later years, therapists and others perceived that sexual orientation is a typical articulation of human sexuality and permanent.[2]

In the late twentieth century, following great social and political turns of events, same-sex couples started to lead more open and public lives and set up families. This advancement was trailed by an extensive conversation of the issue in both legislative and private areas and a move in open perspectives toward more prominent resistance.[3] Accordingly, inquiries regarding gays and lesbians' privileges before long arrived at the courts, where the issue could be talked about in the formal talk of the law.

United States Court initially gave definite thought to the legal status of gay people in *Bowers v. Hardwick*;[4] There, it maintained the legality of a Georgia law considered to condemn specific gay demonstrations. After ten years, in *Romer v. Evans*,[5] the Court nullified a correction to Colorado's Constitution that looked to dispossess any branch or political development of the State from securing people against separation dependent on sexual course.[6] At that point, in

[1] Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974); . caselaw.findlaw.com; happylibnet.com

[2] Brief for American Psychological Association et al. as Amici Curiae 7-17. caselaw.findlaw.com; happylibnet.com

[3] happylibnet.com

[4] MANU/USSC/0151/1986: 478 U.S. 186 (1986); https://www.cali.org

[5] MANU/USSC/0042/1996: 517 U.S. 620 (1996); https://www.cali.org

[6] https://www.cali.org

2003, the Court overruled Bowers, holding that law-making same-sex closeness wrongdoing "belittle the lives of gay people."[7]

Against this foundation, the legitimate inquiry of same-sex marriage emerged. In 1993, the Hawaii Supreme Court held Hawaii's law[8] confining union with other gender couples established a characterization based on sex and was in this manner subject to severe examination under the Hawaii Constitution. *Baehr v. Lewin*.[9] Even though this choice did not command that equal sex marriage be permitted, a few States were worried by its suggestions and reaffirmed in their laws that marriage is characterized as a relationship between other gender accomplices.[10] So excessively, in 1996, Congress passed the Defense of Marriage Act (DOMA)[11], marking marriage for all government law purposes as "just a lawful relationship between one man and one lady as a couple."[12]

The new and broad conversation of the subject drove different States to an alternate end. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution ensured same-sex couples the option to wed.[13]

The old inceptions of marriage affirm its centrality. However, it has not remained in seclusion from advancements in law and society. The historical backdrop of the wedding is one of both continuity and change.[14] Institutions that are confined to opposite-sex relations have developed after some time. For instance, marriage was once seen as an arrangement by the couple's folks which was dependent on political, strict, and monetary concerns; however, by the time of the Nation's founding, it was perceived to be a deliberate agreement between a man a lady.[15]

As the job and status of ladies changed, the organization further advanced. Under the ancient coverture regulation, a married man and lady were treated by the State as a single, male-dominated legal entity.[16] As women got legal, political, and property rights, and as society comprehended that ladies have equal dignity, the coverture law was deserted.

[7] Lawrence v. Texas MANU/USSC/0070/2003: 539 U.S. 558, 575; caselaw.findlaw.com
[8] caselaw.findlaw.com
[9] 74 Haw. 530, 852 P. 2d 44; https://www.cali.org
[10] https://www.cali.org
[11] 110 Stat. 2419
[12] 1 U.S.C. § 7; https://www.cali.org
[13] caselaw.findlaw.com
[14] https://www.equalrightstrust.org
[15] N. Cott, Public Vows: A History of Marriage and the Nation 9-17 (2000); S. Coontz, Marriage, A History 15-16 (2005);
[16] W. Blackstone, Commentaries on the Laws of England 430 (1765); caselaw.findlaw.com

These and different improvements in marriage establishment over the previous hundreds of years were not simple shallow changes. Alternatively, maybe, they worked profound changes in its structure, influencing parts of marriage since many individuals saw by numerous individuals as fundamental.[17] These new experiences have reinforced, not debilitated, the Institution of marriage[18]. Changed understandings of marriage are typical for a Nation where new elements of opportunity become clear to new ages, regularly through points of view that start in requests or fights and afterward are considered in the political circle and the regular cycle.[19]

This dynamic can be found in the Nation's encounters with the privileges of gays and lesbians. Until the mid-twentieth century, same-sex closeness, since quite a while ago, had been criticized as corrupt by the State itself in most Western countries; a conviction frequently typified in the criminal law.[20] Thus, numerous people did not consider gay people to have respect in their unmistakable character. An honest affirmation by same-sex couples of what was in their souls needed to stay implicit.

As per the legal obligation to put together their choices concerning principled reasons and unbiased conversations, courts have composed a significant collection of law thinking about all sides of these issues without contemptuous or defaming critique.[21] That case-law assists with clarifying the underlying standards this Court presently should consider. Except for the opinion here under review and one other Citizens *for Equal Protection v. Bruning*[22], the Courts of Appeals have held that barring same-sex couples from marriage disregards the Constitution. There have also been numerous insightful District Court and most high courts of multiple States choices tending to same-sex marriage. The majority of them, as well, have closed same-sex couples should be permitted to wed.

Following quite a while of the Case, enactment, referenda, and the conversations that went to these public demonstrations, the States are currently separated on the issue of same-sex marriage.[23] Under the Due Process Clause of the Fourteenth Amendment, no State[24] will

[17] N. Cott, Public Vows; S. Coontz, Marriage; H. Hartog, Man & Wife in America: A History (2000); caselaw.findlaw.com
[18] caselaw.findlaw.com
[19] caselaw.findlaw.com
[20] caselaw.findlaw.com
[21] caselaw.findlaw.com
[22] MANU/FEET/0068/2006: 455 F.3d 859, 864-868 (CA8 2006); caselaw.findlaw.com
[23] https://www.cali.org
[24] https://www.cali.org

"deprive any person of life, liberty, or property, without due process of law." The principal freedoms ensured by this Clause incorporate the more significant part of the rights listed in the Bill of Rights.[25]

Likewise, these freedoms reach out to personal choices central to individual dignity and autonomy, including intimate options that define personal identity and beliefs. It is just plain obvious, e.g., *Eisenstadt v. Baird*[26]*; Griswold v. Connecticut*[27],

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That obligation, notwithstanding, "has not been diminished to any equation."[28] Instead, it expects courts to practice contemplated judgment in recognizing the individual's interests so central that the State should accord them its regard[29]. History and custom guide and order this request yet do not define its external limits.[30] That strategy regards our set of experiences and gains from it without permitting the past alone to manage the present.

CURRENT POSITION IN INDIA

The idea of injustice is that we may not always see it in our times. The ages that composed and sanctioned the Bill of Rights and the Fourteenth Amendment did not dare to know the degree of opportunity in the entirety of its measurements.[31] Thus they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[32] When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to the right must be addressed.[33]

Navtej Singh Johar v. Union of India[34] is a milestone ruling by the Apex Court and the underlying, establishing ventures towards enhancing the lawful situation of homosexuals. The Supreme Court of India, in September 2018, read down Section 377[35] of the Indian Penal Code

[25] Duncan v. Louisiana, MANU/USSC/0122/1968: 391 U.S. 145, 147-149 (1968)
[26] MANU/USSC/0240/1972 : 405 U.S. 438, 453 (1972
[27] MANU/USSC/0210/1965 : 381 U.S. 479, 484-486 (1965).
[28] Poe v. Ullman(Harlan, J., dissenting). MANU/USSC/0162/1961 : 367 U.S. 497, 542 (1961)
[29] Id.
[30] Lawrence, supra, at 572.
[31] caselaw.findlaw.com
[32] caselaw.findlaw.com
[33] caselaw.findlaw.com
[34] Navtej Singh Johar v. Union ofIndia, (2018) 10 SCC 1. http://rsrr.in
[35] The Indian Penal Code, 1860, S. 377. http://rsrr.in

while turning around the previous decision of the Court in Suresh Kumar Koushal[36]. The five-judge bench of the Court at the same time recognised the Fundamental Rights held by the gay and the LGBT people group. The ruling came as a snapshot of festivity for various people and gatherings who had been supporting the idea of equivalent rights for gay people since quite a while now.

The court has additionally understood three significant ideas which had created and comprised the Court's thinking and examination for the situation, which are to be specific, 'Transformative constitutionalism', 'Constitutional Morality' and the Right to Privacy.

We try to feature how in the decision, the Court has embraced a reformatory and progressive methodology while perusing down Section 377 of Indian Penal Code which has supported the development for equivalent rights for gay people. The obsolete standards, on which the establishment of Section 377 rested, couldn't stand upstanding when tested against these three features of the Constitution.

Additionally, the court while perusing down Section 377, the Court removed from its ambit - consensual sex between grown-ups in private. The Court's dynamic translation of the issue exuding from Section 377 - which condemned gay acts between consenting grown-ups – and the whole thinking embraced by the Court merits severe academic investigation.

THREE FOLD ASPECTS TOUCHED BY THE COURT IN INDIA

TRANSFORMATIVE CONSTITUTIONALISM

'The Constitution of India on different events has been alluded to as a dynamic record. Aside from being the crucial overseeing law of the nation, it is additionally viewed as a social record. Notwithstanding that, the Constitution conceived to ensure and advance the basic freedoms of minority groups and classes of people who had been deliberately and verifiably distraught and victimized in the past.'[37]

This fundamental rule involved that the Constitution knew about status quo at the time of its enactment, notwithstanding, in contrast to the American Constitution; it picked and tried to change the general public from what it was. One of the basic reasons for Constitution is

[36] Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors., (2014) 1 SCC 1.

[37] http://rsrr.in

considered to reformatory affect the general public to improve things and this goal is the essential mainstay of Transformative constitutionalism.[38]

The Supreme Court of India, while deciphering the Constitution consolidates the idea of Transformative constitutionalism. Basically, this indicates that the Constitution tries to change the general public instead of support the current qualities bought in by the Majority. *The Court in Navtej Singh Johar embraced this line of thinking persuasively. The Court articulated the inward thirst of the Constitution to change the Indian culture and in this manner, grasp the standards of justice, liberty, equality and fraternity. This additionally proposes that the Constitution can change with time and embrace as indicated by the cultural necessities. It is this capacity of the Constitution which gives it the personality of a dynamic, living and natural record.*[39]

Concerning Section 377 of the IPC, the Court saw that the general public has logically changed a great deal from what it was in 1860 when IPC was brought into power. The sexual minorities have been perceived and acknowledged in different legal spheres[40] be that as it may, criminalization of gay direct under Section 377 makes only a chilling effect. The rule of 'Transformative constitutionalism' is applied to enhance this condition.

The Court saw that the judiciary has the obligation to guarantee that a feeling of change radiates and is proliferated in the general public through the Constitution just as different arrangements of law. The motivation behind 'Transformative constitutionalism' subsequently, is to guide the general public with the assistance of legal institutions, toward a path of democratic egalitarianism with an expanded insurance of fundamental rights and other freedoms.

Punishing homosexual conduct, in the assessment of the bench, bared people having a place with LGBT people group of their protected right to carry on with a satisfying life. The Court proceeded to hold that Section 377 abuses the Right to Life and equal protection of law. Be that as it may, the fundamental guideline in the entire thinking radiated from the 'transformative constitutional' aspect of the Constitution. In de-criminalisation of consensual homosexual intercourse between two grown-ups, the Constitution guaranteed that the

[38] State of Kerala and Anr. v. N.M. Thomas and Ors., AIR 1976 SC 490. http://rsrr.in
[39] http://rsrr.in
[40] National Legal Services Authority v. Union of India and Ors., (2014) 5 SCC 438. http://rsrr.in

homosexual as well as the whole LGBT people group can carry on with a valiant existence with independence from state interruption in consensual closeness.[41]

In addition, the Court while taking a touchy position perceived that the whole homosexual society had been persecuted, denied of equity inside a nation, which is committed to human opportunity. To address this issue, change of the general public is basic. Basically, Constitution assumes the significant part of examining the current thoughts concerning the strength of genders and sexual orientations. It assumes a groundbreaking job just as coordinates the general public's consideration towards settling the polarities of sex and binary nature of sex. By uprightness of which, "… the constitutional values prevail over the impulses of the time."

The origination of "Transformative constitutionalism" has been received by the apex court in its other legal decisions also. While decriminalizing the archaic offence of adultery, the Court in Joseph Shine[42] perceived the groundbreaking idea of the Constitution and how it influences the general public. As I would see it, the new decisions of the Supreme Court look to change the status quo which exists in the society by asserting the transformative nature and the qualities which radiate from it.

In this way, 'Transformative constitutionalism' assumed a significant job in deciding the Court's premise of its thinking in Navtej Singh Johar. In any case, the inquiry which remains is whether simply by decriminalization of homosexual conduct, that is, by eliminating a negative obstruction without guaranteeing any sure rights for the LGBT people group, how far will the general public be changed? In the event that societal transformation through constitutional values was the motivation behind the Navtej Singh Johar judgment, it very well may be viewed as simply an initial move towards improving the situation of the homosexual in the general public.

Though being an underlying advance towards understanding the privileges of minority LGBT people group, it was an amazingly huge one. It turned around the decision in the former instance of Suresh Kumar Koushal where the court had depended upon the morality of the majority to maintain the established legitimacy of Section 377. Navtej Singh Johar, then again, tries to change the current majoritarian societal opinion with respect to homosexuality. Be that as it may, the truth will surface eventually with respect to how far the Constitution and the law would be fruitful to accomplish its Transformative goal.

[41] http://rsrr.in

[42] Joseph Shine v. Union of India, 2018 (11) SCALE 556. http://rsrr.in

CONSTITUTIONAL MORALITY

The then Chief Justice of India, Dipak Mishra, had seen in his judgment that constitutional morality was not confined to the strict text and provisions of the Constitution as this idea was not about the 'simple recognition of the center standards of constitutionalism'. It should empower in guiding a multicultural and comprehensive society.[43]

The point of our Constitution was to tie down natural rights to the residents to cultivate a feeling of development and advancement. Additionally, it was imagined that the executive, legislature and the judiciary, would practice and remain alive to the idea of constitutional morality. This idea asks these organs of the State to keep a heterogeneous fiber in the general public.[44] The guideline of constitutional morality will be abused if there is an endeavor to push a uniform, homogenous and normalized reasoning in the general public and henceforth, the organs of the state ought to guarantee that majoritarian standards don't overwhelm different contemplations during strategy choices.

In *Government of NCT of Delhi v. Union of India and Others*, [45] it was spotted that

" *Constitutional Morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse*."[46]

The courts have an obligation to maintain the standards radiating from the constitution and arbitrate over the legitimacy of a law and to not be affected by the majoritarian see. At the point when a penal provision, similar to Section 377 for this situation, is tested, ideas of social morality and prevalent attitudes which have no legitimate validity, ought not be permitted to stomp on over constitutional morality, regardless of whether the group whose crucial right is disregarded is minuscule. This is rather than the Suresh Kumar Koushal situation where the court while maintaining the constitutional legitimacy of Section 377 expressed that *"...a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders…*"[47]

[43] http://rsrr.in
[44] http://rsrr.in
[45] Government of NCT of Delhi v . Union of India and Ors., 2018 (8) SCALE 72. http://rsrr.in
[46] Id. http://rsrr.in
[47] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, 43. http://rsrr.in

Courts assume a basic job in guaranteeing that at whatever point there is an infringement of a Fundamental right, constitutional morality beats Social morality. Because of the predominance of social morality, the individuals from the LGBT people group have been, for a significant stretch of time, prohibition by the general public. The court in the Suresh Kumar Koushal case, had neglected to secure the Fundamental Rights of the community. Much the same as the Constitution expected to redress the discrimination against the backward community, these aspects of the majoritarian social morality against the LGBT people group should be corrected. Social morality can't be an avocation for the infringement of Fundamental rights.

Section 377 is a Victorian age law and hence, the justification behind the provision and the morality which was predominant at that time is not relevant anymore and hence there is no reason to continue with the law.[48]

The court had made clear in *S. Khushboo v Kanniamaal*[49]that "*notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not coextensive.*"[50]

Justice DY Chandrachud expressed that 'Constitutional Morality' mirrors that in the battle for presence, the ideal of justice should be an abrogating factor over some other thought of social acceptance. 'Constitutional Morality' is an equilibrium against popular public morality.

The opponents also contend that homosexuality is against morality and is unsatisfactory in the Indian culture. To answer, in the case of Naz Foundation it was held,

"*Thus, popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a 'Constitutional Morality' derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality… In our scheme of things, 'Constitutional Morality' must outweigh the argument of public morality, even if it be the majoritarian view*."[51]

The Right to Live a stately life is ensured by the Constitution and henceforth the Court proclaimed that LGBT people are equivalent residents of India. They can't be oppressed and

[48] http://rsrr.in
[49] S. Khushboo v. Kanniamaal, (2010) 5 SCC 600.
[50] Id.
[51] Naz Foundation v. Government of NCT of Delhi, (2009) 3 CCR 1. http://rsrr.in

reserve the Right to Express themselves through their intimate decisions. The Court additionally expressed that 'Constitutional Morality' will supplant any culture or custom and the expression of sexuality between consenting grown-ups can't be directed by the sentiments predominant in the general public. The Court acts like a counter majoritarian institution and ensure the rights ensured by the constitution independent of the majoritarian see.[52]

THE RIGHT TO PRIVACY

The Indian jurisprudence on the Right to Privacy observed its peak in the year 2017 when the Supreme Court of India through 9 judges bench declared Right to Privacy as a Fundamental Right within the sphere of Article 21 of the Constitution in *Justice K S Puttawamy v. Union of India*. [53]

The Court in Navtej Singh Johar gave due respect to the standards set down in the previously mentioned case. It perceived that the individual self-sufficiency incorporates Sexual Orientation of an individual also. One's sexual identity is an unavoidable and inherent piece of his/her very personality. Basically, the individual independence decides the identity of an individual and consequently, comprises a critical part of the dignity of such person.

The LGBT community is looking for a fundamental Right to Companionship, as long as it is consensual. This Right to Consensual Companionship has been a recognised right as it is noticed and perceived that sexual closeness is basic for the prosperity of a general public and exhaustive advancement of human character.[54] The South African Supreme Court has additionally noticed that the Concept of privacy fuses sexuality too. In that Court's assessment, Privacy recognizes both a Right to Private Intimacy and autonomy without any sort of interference.[55]

The Indian Supreme Court while reversing the judgment in Suresh Kumar Koushal held that ensuing to the translation of Right to Privacy under Article 21, the guideline set down in Suresh Kumar Koushal isn't important any longer and is definitely not a sustainable premise to deny the Right to Privacy. The very motivation behind Right to Privacy is to ensure people form the disdain of the majorities. The Right to Privacy doesn't rely upon what the Majority assessment

[52] http://rsrr.in
[53] Justice K S Puttawamy v. Union ofIndia, (2017) 10 SCC 1. http://rsrr.in
[54] Bowers v. Hardwick, 478 U.S. 186 (1986).
[55] National Coalition for Gay and Lesbian Equality and another v. Minister ofJustice and Ors., 1998 (12) BCLR 1517 (CC).

is. The Court in Navtej Singh Johar reprimanded the strategy embraced in Suresh Kumar Koushal which viewed simple mainstream acknowledgment as a valid basis to dismiss rights presented on people by excellence of the Constitution. Majoritarian standards should not be applied to deny Rights ensured by the Constitution.[56]

As the nine-judge seat in Puttaswamy judgment held sexual orientation to be an aspect of an individual's privacy, Section 377 of IPC meddles with a gay individual's private, singular life. The Court held that Section 377 abused the Right to Privacy ensured to an individual, dismissing the general population/greater part assessment.

The Supreme Court of India has in different late cases depended upon the Right to Privacy, perceived as a principal directly in Puttaswamy judgment. The Apex Court in Joseph Shine while dealing with the issue of adultery and in Common Cause (A Registered Society) v. Union of India and Another[57] while managing the issue of euthanasia, recognized and articulated the significance of a person's self-governance in the background of the as of late perceived right to privacy.

Consequently, the developing acknowledgment of the right to privacy to security prompting acknowledgment of self-governance in a person's private circle can't acknowledge an age-old law, for example, Section 377, which barges in on the private existence of consenting gay people. The Court supported the Right to Privacy while denying the provision any constitutional validity. This is once more, a significant advance taken by the Judiciary towards complete acknowledgment of fundamental rights for the LGBT people group in India.

IMPORTANT CONCERNS REGARDING SAME-SEX MARRIAGES ADDRESSED THROUGH UNITED STATES COURTS' STAND

WHETHER FUNDAMENTAL RIGHT TO MARRY EXTEND TO SAME-SEX COUPLES?

The prominence of this preliminary structure of the question may be observed in two former Court outlooks dealing with sodomy prosecutions of homosexuals. In *Bowers v. Hardwick*, the first sodomy case decided by the Court, the question was articulated as follows: "*The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals*

[56] http://rsrr.in

[57] Common Cause (A Registered Society) v. Union of India and Anr., (2018) 5 SCC 1.

to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a long time." In Bowers, the Court swiftly decided That there was no right to involve in homosexual sodomy rooted in our legal or constitutional record. By way of divergence, in *Lawrence v. Texas*, the second. Sodomy case, the Court reasoned that the Case involved a liberty interest (the Court did not use the term fundamental right) to engage in sexual intimacy and whether homosexuals can be denied that right. The Lawrence Court framed. the question in these terms: "*We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clauses of the Fourteenth Amendment to the Constitution.*"
The Court in Lawrence concluded: "*When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make their choice.*"
From this declaration, it may be seen that *Lawrence* not only provided the organizational approach for framing the question to be deliberated in Obergefell, it also authorized the decision that the relationship recognized by marriage involves a fundamental right to which same-sex couples could claim access.

WHETHER THESE SAME-SEX COUPLES WERE DEPRIVED OF THAT INTEREST WITHOUT DUE PROCESS OF LAW?

'At its heart, the Court's reasoning is based on substantive due process, which affords that fundamental liberties are protected under the Due Process Clause of the Fourteenth Amendment, barring any state from depriving "any person of life, liberty, or property without due process of law."[58]

The Court in Obergefell[59] took as its basic premise that there are fundamental liberties beyond those enumerated in the Bill of Rights that are protected by the Due Process Clause[60]: "*Besides, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."*

[58] http://journals.iupui.edu
[59] 576 U.S. 644 (2015)
[60] http://journals.iupui.edu

The Court recognized its judicial role as categorizing and defending such fundamental liberties, not by any rigid formula, but by "exercise of reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." However, there is no rigid formula identifying such fundamental liberties, its known history, and tradition as providing direction in this process. The Court found such guidance in its understanding of its previous opinions.[61]

The Court's most crucial precedent was *Loving v. Virginia*, which overturned penal laws punishing interracial marriage. This decision is understood as founding that marriage cannot be denied to interracial couples.[62] Two other marriage cases are identified as recognizing a right to marriage requiring compelling state justification for the exclusion of individuals from access to "one of the vital personal rights essential to the orderly pursuit of happiness by free men."

In Zablocki v. Redhail held that the right to marry was unconstitutionally limited by prohibiting fathers, who were behind on child support, to marry. The Court approved that its earlier opinions dealt with cases involving opposite-sex partners.[63]

However, the Court invoked *Lawrence* for the proposition that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association." Rather than emphasizing a historical basis for the claim of same-sex partners to marry, the Court identified four principles or traditions, which establish marriage under the Constitution as fundamental, that have equal significance for same-sex couples[64]:

(1) the right to personal choice or expression of autonomy in intimate association, which "shape an individual's destiny" and "fulfills yearnings for security, haven, and connection," and involve personal "expression, intimacy, and spirituality";

(2) an association in the form of a union involving commitment and intimacy, which "glorifies couples who 'wish to define themselves by their commitment to each other'";

(3) protection for families and children that provides a legal structure for family life, affording solidity and stability without which children suffer disgrace, may result in uncertain family life, and whose denial can "harm and demean the children of same-sex couples";

[61] http://journals.iupui.edu
[62] http://journals.iupui.edu
[63] http://journals.iupui.edu
[64] http://journals.iupui.edu

(4) a recognition of families as foundational for social order, which benefits from the symbolic recognition of a couple's union by civil society and provides material support for the household. The Court also acknowledged some of the legal aspects of marital standing, counting taxation, inheritance, spousal benefit, medical decision-making, rights of survivors, health insurance, child custody, support, and visitation.

The Court established that these principles divulge no inconsistency between same-sex and opposite-sex couples concerning the computable aspects of marriage and additionally saw that "*same-sex couples, too, may seek to the transcendent purposes of marriage and seek contentment in its highest meaning."*

WHETHER PROCREATION IS ESSENTIAL TO THE MARRIAGE?

The Court provocatively omitted procreation as a central component or tenant of marriage from its invocations of marriage's significant aspects.

Unabashedly the Court stated: "*An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State*." Without explicitly citing the Court's earlier opinions dealing with contraception or abortion, the Court emphasized: "*In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or States have conditioned the right to marry on the capacity or commitment to procreate.*"

It is undoubtedly true that sterile individuals and women past childbearing age are permitted to marry. Therefore, rather than understanding procreation as an indispensable feature of marriage, the Court viewed procreation as a possible occurrence of marriage and decided: "*The constitutional marriage right has many aspects, of which childbearing is only one.*"

It is on this argument that the majority had its most noteworthy difference with the dissenting opinion of *Chief Justice Roberts*, who stated that the "*universal definition of marriage as the union of a man and a woman . . . arose like things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship."*

The definition of marriage was recognised by Justice Kennedy as an ancient custom involving a' gender-differentiated union of man and woman' in which the parties in a transformative association pledged themselves to each other. *In addition,* his identification of the "transcendent importance of marriage" promises dignity to those who commit themselves to

each other through marriage, which led Justice Kennedy to categorize this as the significant interest that same-sex couples have in obtaining access to marriage.

This puts the same-sex couple on equivalence with the petitioners in *Loving*. The Court alleged race is an immutable characteristic requiring firm scrutiny when defining the litigants' equal protection claims.

In considering a right to marry for same-sex couples, Kennedy asserted that "*their immutable nature dictates that same-sex marriage is their only real path to this profound commitment*," which is only offered to a couple through marriage.

CONCLUSION

The Supreme Court of India in Navtej Singh Johar, has without a doubt made a strongly critical stride towards a general set of laws which upholds the incorporationist and populist estimations of the Constitution of India. It tries to change Status quo and the existing cultural convictions by uprightness of 'Transformational constitutionalism' while maintaining 'Constitutional Morality' far beyond the morality of Majority of the society. At the same time, the Court perceived the significance of the right to privacy and how it is fundamental for it to work in the private, consensual lead of gay grown-ups.

Legalizing private homosexual intercourse between two consenting grown-ups by perusing down Section 377 of the IPC, is a strong advance which the Court has taken in a desire towards a general public where the individuals from the LGBT people group appreciate every single central right allowed by the Constitution, comparable to every other person. In any case, a lot still needs to be done, in a positive way, for the insurance of the LGBT people group from the systematic oppression and discrimination which it has endured in the Indian culture. Perusing down of Section 377, along these lines, is just an initial move towards equal protection of the LGBT people group. The three organs of the State and the general public has far to go from Navtej Singh Johar to guarantee that the morality and qualities exuded from the Constitution win and guide us towards a superior tomorrow with poise, sexual independence and individuality for the LGBT people group in India.

Talking about the same-sex marriage issue, the definition of the fundamental right of marriage must include same-sex couples because their exclusion irrationally restricts those person's liberty and irrationally discriminates against that class of persons. Marriage is a fundamental

right that includes same-sex couples. There was no example to hold that marriage was exclusively for opposite-sex couples.

MARITIME LEGISLATIONS: ARE DECISIONS OF THE TRIBUNALS ENFORCEABLE?

- ANIL KUMAR YADAV

INTRODUCTION

There is very famous maxim called *ubi ius, ibi remedium,* which means where there is a right, there is a remedy. Whenever any right is infringed, or there is a dispute between the parties, the concerned parties may prefer a forum to solve the disputes or to get the required remedies for the damages it has suffered. Similarly, the 1982 Convention contains detailed and complex provisions stating the different forums available for the resolution of the sea disputes. The Convention states that whenever the disputes arise, the parties are to proceed immediately to an exchange of views regarding its settlement by negations or other peaceful means. And when the parties are unable to settle the disputes between them then the compulsory procedures laid down in Part XV Section 2 will become operative. According to Article 287 of the UNCLOS III the state may choose one of the following means of third-party dispute settlement system; The International Tribunal for the Law of the Sea (ITLOS) under Annex VI, the International Court of Justice (ICJ), an arbitral tribunal under Annex VII or a special arbitral tribunal under Annex VIII for specific disputes. Due to this flexibility, the states were unable to agree on a single third party forum where they can approach when informal mechanisms failed to resolve a dispute.

The creation of the ITLOS was always considered to be controversial because it was notion that the ICJ has more expertise as well as experience in deciding matters related to the sea cases. The main object or the primary responsibility of the International tribunal is to interpret and apply one treat which is the 1982 Law of the Sea Convention. But along with the interpretation of the convention, the issues it may address and the ole it may fulfill vary tremendously. At the end the paper will also focus on the legal binding nature of the decisions delivered by the arbitral tribunal and the ITLOS and the effect when the parties fail to comply with the decisions of these tribunals.

International Tribunal for the Law of the Sea (ITLOS)

A. Origin of the (ITLOS) due to the negotiation of the Law of the Sea Convention and the Dispute Settlement provisions

The ITLOS is considered to be the latest judicial institution which was established after the entry into force of the United Nations Convention on Law of the Sea in the year November 1994. The creation of the ITLOS was considered to be very controversial as states preferred informal way of negotiations for solving the disputes and did not want any third party dispute settlement system to interfere with their sovereignty. Also the question arose that why the states will mutually consent to the jurisdiction of the international tribunal before arising of a particular dispute. The possible answer for the question may the recent technological development which has increased the capacity to explore living and non- living ocean resources which may ultimately lead to create tensions over maritime boundaries. Moreover, agreeing to the third party dispute settlement will counterbalance political, economic, and military pressures from powerful states and will also help in maintaining the integrity of the Convention's package deal.

Hence, the Convention's provisions establishing the ITLOS and defining its jurisdiction were the product of difficult negotiations and political compromises. Hence it can be concluded that the negotiations at the UNCLOS III had led to the ITLOS.

B. Features or Characteristics of ITLOS

As Article 287 offers State Parties to choose among several third party tribunals, they state have an option to choose any of the third party tribunals. Some states favor ICJ because according to them it had successfully dealt with several laws of the sea cases and according to them a proliferation of tribunal might undercut the development of a uniform jurisprudence on law of the sea issues while other may prefer arbitration or any other form of dispute settlements options available.

Now due to such wide options available, some features of the ITLOS must be highlighted in order to set it apart from the other dispute settlements options which as a result will enable or rather attracts the State to prefer the newly created ITLOS over other dispute settlement options of the Convention.

Some important Features of the ITLOS are as follows-

1. **Judges of the Tribunal** -The tribunal is composed of 21 independent members have an expertise on the subject and are elected by the State Parties to the Convention. Also there is a President and Vice President of the Tribunal who are elected by a secret ballot by a majority of the member of the Tribunal.
2. **Chamber of the Tribunal**–There are specialized chambers available in case of these tribunals which might prove attractive to some states. Moreover, these chambers are composed of expert judges. There are two standing special chambers to address problems that require specific expertise. Also, ITLOS has established a Chamber of Summary Procedure, which at the request of parties to a dispute can deal on any matter. Availability of these tribunals allows parties to choose a forum for either its efficiencies or its particular expertise.
3. **Annex VI of the Convention –** The related provisions related to the tribunal and its jurisdiction suggested that ITLOS may receive more use than the ICJ or other tribunals in several cases like the cases under Article 292 which deals with prompt release cases, cases involving provisional measures, cases in which advisory opinions are sought, and Part XI sea-bed mining cases in which Convention provide the ITLOS a particularly significant role.

   Moreover, Article 292 as well as cases involving provisional measures grants residual compulsory jurisdiction to the ITLOS, rather than an arbitral tribunal, when parties are unable to agree on a tribunal. The reason is that the time taken in constituting an arbitral tribunal might frustrate the quick time frame allotted for prompt release cases.
4. **Access and Jurisdiction of the ITLOS –** States who are not the parties to the Convention may also obtain access to the ITLOS if they have so agreed in any other treaty or agreement and hence, the ITLOS will have jurisdiction over the disputes specified in that treaty or agreement. Also unlike ICJ, not only states but also other entities like the natural and juridical persons may become parties.
5. **Risk of Inconsistent Jurisprudence –** Also the risk of inconsistent decisions is minimal when the ITLOS has exclusive or residuary compulsory jurisdiction. Cases under Article 292, provisional measures cases etc. are some of its examples.

C. Functions of the ITLOS

The ITLOS is a recent addition to the number of the available specialized international tribunals. And in order to understand the relationships with different entities, the functions of the ITLOS has to be taken into consideration for which it is designed to serve. And in order to gain legitimacy, ITLOS ability to develop its decision making techniques according to different suitable situations has to be taken into consideration.

When a coastal state detains a flag state's vessel and crew, the flag state may ask the ITLOS to order their prompt release under Article 292 of the Law of the Convention as it was done in the 1st case in front of the ITLOS which was ***The M/V Saiga case***[65]**.** Article 292[66] allows applications "by or on behalf of' the flag state of a vessel, when the detaining state allegedly "has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. Moreover, in interpreting and construing Article 292, the ITLOS must balance the rights and interest of the entities as this article place the ITLOS in a web of relationships involving individuals, states, and national courts.

It can be said that ITLOS though being a recent addition, is an institution within the field of law of the sea, exercises positive norm-reinforcing, legislative, equitable, and constitutional functions. Along with the State parties, the ITLOS also different audiences such as political branches of two states, sometimes multiple states, individuals, national courts and other international institutions.

Arbitral Tribunal

Like ITLOS, Arbitral Tribunal is one of the third party dispute settlement mechanism provided under the Convention. This Arbitral Tribunal is specified under the Annex VII of the UNCLOS III. This Tribunal is used for the settlement of disputes between parties that have not made a declaration of choosing procedure or for parties where one parties choose a different forum whereas the other disputed parties chooses another forum. A dispute may be brought before the Arbitral tribunal by written notification addressed to the other party. The notification should be accompanied by a statement of the claim and the ground on which it is based[67].

[65](1998) 37 ILM 360.
[66]United Nations Convention of the Law of the Sea.
[67]Annex VII, Article 1 of the UNCLOS III.

Composition of the Arbitral Tribunal

The Arbitration is composed of five members preferably chosen from the list of arbitrators. A list of arbitrators shall be drawn up and maintained by the Secretary General of the United Nations[68]. Every State Party shall be entitled to nominate four arbitrators to constitute the list[69]. The arbitrators, which the parties have nominated, shall have similar qualification to those nominated for member of the Tribunal. When the case is brought before the Arbitration, the party instituting the proceedings shall appoints one member to be chosen preferably from the list of arbitrators, who may be its national[70]. The other party against which the case is made, within 30 days of receipt of the notification addressed by the party that brings the case, also appoints one member among its nationals in the list. The other three members shall be appointed by agreement between the parties and they shall be chosen preferably from the list and shall be nationals of the third States unless the parties otherwise agree. The parties will choose one among the three members as a President.

All decisions of the arbitral tribunal demand a majority vote of its members. In case there is an equality of vote the President will have a casting vote. The award mentions the subject matter of the dispute and states the reasons on which it is based, and the name of the members who have participated. The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. The decisions made by the tribunal will be binding upon the parties.

Legal Enforceability of the Decisions of the above mentioned Tribunals

This sectionwill deal with the legal enforceability of the decisions delivered by the ITLOS and the arbitral tribunal which has residual compulsory jurisdiction in the case. It will specially focus on the award given in the South China Sea case and other cases.

The decisions made by the tribunals become binding due to the obligatory nature of jurisdiction. Moreover, the Convention provisions disallow techniques that disputing parties

[68]Annex VII, Article 2 of the UNCLOS III.
[69]Annex VII, Article 2 of the UNCLOS III.
[70]Annex VII, Article 3 of the UNCLOS III. The case is brought does not do so within that period or the parties are not able to reach an agreement on the appointment, the President of the International Tribunal for Law of the Sea, upon request and in consultation with the parties, shall make the necessary appointment.

historically have used to avoid the arbitrations. Also, a state's failure to appear before an arbitral tribunal will not will not nullify the jurisdiction of the tribunal.

The country which has accepted or rather ratified the UNCLOS III document cannot claim that the decisions of the tribunal are not binding on them as they haven't given consent for the interference of the third party dispute settlement mechanism. The reason is that according to the consent theory principle, if a State has agreed to a Convention, it means that they have agreed and rendered their consent to all the provisions mentioned in the Convention unless a reservation has been accepted. But the obligatory dispute settlements provisions are found either in the main body of the Convention or in the Annexures that form an integral part of the Convention. And hence, States cannot avoid them by making reservations[71].

But talking about the ITLOS, not many cases have come before to this tribunal due to the availability of different choices in deciding the third party dispute settlement forum. Talking about the cases, only 25 cases till date have been brought before the International tribunal of the law of the sea and all the decisions made by it were positively respected by the parties involved in the disputes.

But talking about the Arbitral tribunal made under Annex VII, which has the residual compulsory jurisdiction, there are many cases which have been entertained by this tribunal. The decisions made by the tribunal is also binding, but looking at the previous instances, there are many instances in which parties have refused to follow or respect the decisions of the court. One such famous case which has attracted worldwide attention is ***South China Sea dispute case***.

South China Sea: Philippines v. China

In this case, China being the defendant party rejected to participate in the proceedings of the arbitration. The non- appearance of a party before an international court or tribunal is not uncommon. In this particular case, Article 9 of Annex VII UNCLOS, Default of appearance, and Article 25 of the Rule of Procedure of the Arbitral Tribunal envision a situation in which one of the parties fails to appear before the tribunal. However, both of these articles state that the non-appearance of one party will not constitute a bar to the proceedings and at the same

[71] The Law of the Sea Convention only refers to reservations in Article 309, the Article that provides reservations are generally prohibited. Article 298 of the Convention, however, authorizes States Parties to make limited exceptions to the applicability of the provisions for obligatory third-party dispute settlement.

time require the tribunal to "satisfy itself that it has jurisdiction and that claim is well founded in fact and in law."

The use of the argument by the China that the arbitral tribunal does not have any jurisdiction as they have not participated in the proceedings is baseless and because of their absence from the proceedings will not negate their consent which they have given to the compulsory jurisdiction of the arbitral tribunal while ratifying and becoming a party to the UNCLOS III. The China inspite of its absence will continue to remain a party to the dispute unless and until the Tribunal finds that there is no jurisdiction to deal with the matter. The same contention was also rejected by the tribunal in the case of ***Artic Sunrise case*** which was against Russia.

Consequences of China's non appearance

When a party does not appear in the proceedings of the Tribunal, according to Article 9 Annex VII and rule 25, the non- appearing party will still be considered a party and the decision of the court will remain binding on the party even if it does not agrees.

In the present case, the tribunal has awarded decision in favour of the Philippines and this was rejected by China stating that the tribunal does not have the jurisdiction also they haven't agreed to the third party dispute settlement mechanism and also did not participated in the proceedings. Hence, the China did not accept the decisions made by the tribunal. And therefore, it can be very well established that although China refuse to comply with the decisions of the court, there cant be any legal sanctions against such non- compliance.

Need of an Enforcement Mechanism

The provisions of the dispute settlement mechanism states that the decisions made by these tribunals are binding but unfortunately, when the parties fail to comply with the decisions or refuse to comply with the same, there is no enforcement mechanism available as compared as that of the ICJ with the Security Council, at least in theory. When at the end, the decisions of the arbitration are not complied with,and then does that means that the whole arbitration process is futile. The point of initiating the whole long procedure which is both costly as well as time consuming becomes useless when the eventual award is destined to be ignored. Various enforcement mechanisms must be introduced in order to make the parties comply with the decisions of the tribunals.

Taking into consideration the China case, The Philippines in this case has stated that it regards the case not as the end to the South China Sea disputes, but as the beginning. This shows that

the Philippine is fully aware of the extent to which the arbitral award may resolve all of the disputes. What the Philippines seem to be seeking is for China to have to clarify its claims and bring them into conformity with international law. This in itself is only the first step in untangling the South China Sea disputes and enabling the parties to settle the disputes on a fairer and equal footing. In dealing with a neighboring country that is stronger in all aspects, the arbitration is also a way to draw public attention to China's claims and actions and to create international pressure on China to reconsider its position.In short, China's non-appearance before the Annex VII arbitral tribunal has in practice not stopped the arbitration from moving forward. China's official position of rejecting arbitration does, however, seem rather rhetorical. The various other means by which China has advanced its arguments concerning the case have in effect created more of a quasi-appearance. Even if international law and precedence do not prohibit such a move, it does show a serious lack of good faith in efforts to achieve a peaceful resolution to highly complex disputes. This inconsistent stance has undoubtedly also made the arbitral proceedings more difficult than they already are.

Hence, in order to avoid this situations, various enforcement mechanism must be initiated so that such practice may be decreased and the parties due to the enforcement mechanism available, starts complying to the decisions made by the court which are legally binding on them.

Conclusion

When coming to the disputes among states of a nation, and the decisions made by the apex court are binding as enforcement mechanism is available and no question can be raised against it. But, in the case of international law, where the parties are nations having contesting claims, the present dispute resolution mechanisms often lack teeth. Such is the case in the maritime matters, where the legal decisions of the ITLOS and other arbitral tribunals lack enforcement mechanisms. The decisions are said to be binding in nature, but the laws lack enforcement mechanisms. As seen clearly in the South China Sea case, the arbitral award could not be enforced by Philippines.

With the rise in maritime and territorial disputes in the political scenarios, it becomes imperative that the nation's party to the UNCLOS mutually devise an enforcement mechanism

for the decisions of the tribunals. A judgment or award is of no use unless it can be enforced at the world forum. As is evident from South China Sea case which related to territorial dispute, an important treaty like that of UNCLOS is lacking enforcement mechanisms. But the process of amendment in the treaties is a tedious one and not all nations may support it. Enforcement mechanisms become important to maintain the sanctity of the UNCLOS. Many treaties provide enforcement mechanisms and some even involve UN. But, there have been instance like in the case of Nicaragua vs. United States of America where the decision was against USA and could not be enforced because of USA being a permanent member of the United Nations Security Council. It is necessary that enforcement mechanism so developed remain independent of the stature of the parties involved. Equality among the member of the UN needs to be maintained and the powerful states cannot be allowed to coerce the smaller and less powerful ones

IMPACT AND ROLE OF DIGITAL FORENSIC IN CRIMINAL JURISPRUDENCE

- ANANTA AGGARWAL

Abstract:

Digital Forensics in Criminal Justice is a subject that spotlights on the insurgency of advanced criminology that has affected criminal equity. Digital forensics is a division of legal discipline that consolidates the recuperation and the investigation of records that are found in advanced procedures. Much of the time, it is identified with PC wrongdoing. The subject is constrained by the expansion of cybercriminals and the high danger that they have posted on people, private and public companies just as on public framework Digital legal sciences comes in recuperating and exploring the material that is found on advanced gadgets and those that worry PC wrongdoing. The electronic gadgets store client data, which permits measurable experts to recuperate this data. In many occasions, these gadgets record time, area and date data. This computerized scientific become broadly regarded and acknowledged in criminal cases. This article tries to uncover, talk about and examine the job does advanced legal sciences in a criminal examination.

Introduction:

With the rise of cyber-crimes, it can be used in the acquisition of evidence regarding the activities that were conducted in the digital and online worlds which include hacking into the confidential database. It is important to understand the trails that forensic investigators follow and the challenges that they are likely to face since most of the cybercriminals cover trails (Vincze, 2016).[72] The topic needs to focus on how the investigators arrive at the immediate criminal without losing track of the cyber-criminal since they can also modify and frame other innocent criminals through their skills.

Digital forensics in criminal justice van be used in the acquisition of evidence that concerns the events around the physical world. It is capable to complete an investigation through the recovery of deleted emails that may like the suspect to murder or any other crime. An example

[72] Vincze, E. A. (2016). Challenges in digital forensics. Police Practice and Research, 17(2), 183-194.

of a successfully solved case is the Canadian murder case of Kim Proctor. In this case, the criminal investigators applied digital forensics through following a digital evidence trail. Through digital forensics, there was the recovery of Wikipedia examinations, prompt mails as well as a revelation in World of Warcraft Dialogue (Nance, and Bishop, 2017).[73] It palsied a major part through GPS and the files that were allied with alibi text messages that were referred from the murder scene. They were linked to Google map pursuits to the places to get rid of the form and the two teenage boys that were responsible. The digital forensic investigator was able to collect information from a particular computing device to ensure that it can be presented in court as evidence. This investigation is conducted thoroughly in a digital investigation and builds a documented chain of evidence. In such a case such as the death of Kim Proctor they focused on past events and the series of events to identify how the crimes were conducted (Moriarty, 2017).[74]

The investigation is conducted through a standard set of procedures. The procedures need to be followed for the evidence present in court to remain valid. When conducting the investigation, they have forensic investigators need to isolate the information or the data in question to reduce the risk of accidentally contaminating the evidence (Nance, and Bishop, 2017). The investigator generates a device's storage media. They ensure that the inventive media has been duplicated and is protected in a safe and secure facility. Apart from the investigation process, the researchers use a variation of methods and propriety software forensic claims in examining the copy, conducting an investigation on the hidden folders within the copy as well as the unallocated disk space to find the duplicates of the erased, encoded and the dented files (Goodison, Davis, and Jackson, 2015).[75]

What Is Digital Forensics?

Digital forensic science is a branch of forensic science that focuses on the recovery and investigation of material found in digital devices related to cybercrime. The term digital forensics was first used as a synonym for computer forensics. Since then, it has expanded to

[73] Nance, K., & Bishop, M. (2017). Deception, Digital Forensics, and Malware Minitrack (Introduction).
[74] Moriarty, L. J. (2017). Criminal justice technology in the 21st century. Charles C Thomas Publisher.

[75] Goodison, S. E., Davis, R. C., & Jackson, B. A. (2015). Digital evidence and the US criminal justice system. Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence. Priority Criminal Justice Needs Initiative. Rand Corporation.

cover the investigation of any devices that can store digital data. Although the first computer crime was reported in 1978, followed by the Florida computers act, it wasn't until the 1990s that it became a recognized term. It was only in the early 21st century that national policies on digital forensics emerged.

Digital forensic and Challenges for Law Enforcement

Digital forensic is a branch of forensics relating to computer based evidences, their storage, collection and admissibility. It is also known as digital forensics. The reasons for employing digital forensic techniques are manifold. Firstly, analysis of computer systems belonging to accused; secondly, recovery of data in event of hardware/software failure; thirdly, to gather evidences against the employee or any person the organisation wish to terminate. Digital forensic as a discipline requires highly trained professional operating in an organized and comprehensive manner. The growing number of cybercrime indicates setting up of support group consisting of police officers in CBI, CID, state police headquarters and detective department of computer investigation. These trained police officers are needed to understand the nature of crime at the threshold and proceed with the investigation in a correct and required manner. Failing which, it will result in a botched up investigation at the outset leaving no evidences and a total failure to convict the criminal. Special measure should be taken in conducting digital forensic investigation. It must be kept in mind that only collection of evidences is not required.

Another baffling aspect which is involved in these crimes is the intelligence of criminals. Those who commit these crimes are highly skilled persons especially trained in these fields. Hence their understanding of things is far more than what investigators can perceive. In order to match with the intellect and skill of criminals a hyper technical and sharp approach is needed. Digital forensic became more challenging since new forms and techniques of data storage are continuously being changed and new technologies are being developed. One of the major challenges faced by the investigators and law courts is the legal framework. In India after the enactment of Information and Technology Act, 2000 and consequential amendments in the Indian Evidence Act, 1872 and the Indian Penal Code, 1860, electronic record is admissible evidence criminal can be bring to book. However, the major problem relates to jurisdictional issue. In case where laws of one country recognize a particular act as crime and laws of other

country do not consider it as crime, the problem of enforcement arises. Not to mention the cooperation and support that is required from the other country is also very important.

In State of Punjab v. Amritsar Beverages Ltd[76]., the Supreme Court expressed that there are a lot of difficulties faced by investigating officers due to lack of scientific expertise and insight into digital evidences techniques. The court also noted that IT Act does not deal with all types of problems and hence the agencies are seriously handicapped in some respects.

Electronic Evidences: Considerations, Care and Caution

It is very important to understand the nature of electronic evidences. Unlike any other form of evidences, it is quite easy to tutor electronic evidence, much less for an expert who deals with them on regular basis. Therefore, special care and caution must be attributed to handling such sensitive pieces of evidence. Primary threats to electronic evidence include virus, electromagnetic or mechanical damages. Such tools and methods must be adopted that are tested and tried, confirmed my experts are precise enough to get to the thin roots of nuances of complex evidence.

The evidentiary value of an electronic record is directly proportional to its quality. The Indian Evidence Act, 1872 has widely dealt with the evidentiary value of the electronic records. According to section 3 of the Act[77], "evidence" means and includes all documents including electronic records produced for the inspection of the court and such documents are called documentary evidence. Thus the section clarifies that documentary evidence can be in the form of electronic record and stands at par with conventional form of documents. The evidentiary value of electronic records is elaborated under sections 65A[78] and 65B[79] of the Evidence Act, 1872. These sections provide that if the four conditions listed are satisfied any information contained in an electronic record which is printed on paper, stored, recorded or copied in an optical or magnetic media, produced by a computer is deemed to be a document and becomes admissible in proceedings without further proof or production of the original, as evidence of

[76] Civil Writ Petition No. 14659, 14666, 14667 and 14713 of 2003
[77] Section 3, Indian Evidence Act, 1872.
[78] Section 65A, Indian Evidence Act, 1872.
[79] Section 65B, Indian Evidence Act, 1872.

any contacts of the original or any facts stated therein, which direct evidence would be admissible. The four conditions referred to above are:

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

(2) During such period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of such activities.

(3) Throughout the material part of such period, the computer must have been operating properly. In case the computer was not properly operating during such period, it must be shown that this did not affect the electronic record or the accuracy of the contents.

(4) The information contained in the electronic record should be such as reproduces or is derived from such information fed into the computer in the ordinary course of such activities.

The apex court in State v Navjot Sandhu[80], held, while examining the provisions of newly added section 65B that in a given case, it may be that the certificate containing the details in sub- section 4 of section 65B is not filed, but that does not mean that secondary evidence cannot be given. It was held by the court that the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, sections 63[81] and 65[82] of the Indian Evidence Act 1872. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of section 65-B, which is a provision dealing with admissibility of

[80] State v Navjot Sandhu (2005) 11 SCC 600; para 150.
[81] Section 63, The Indian Evidence Act 1872.
[82] Section 65, The Indian Evidence Act 1872

electronic records, there is no bar to adducing secondary evidence under the other provisions of the Indian Evidence Act 1872, namely, sections 63 and 65.

It is pertinent to note herein a recent development, as per the IT Amendment Bill 2008 (passed by both houses of Indian Parliament and yet to be enforced), section 79A empowers the Central Government to appoint any department, body or agency as examiner of electronic evidence for providing expert opinion on electronic form evidence before any court or authority. 'Electronic form of evidence' herein means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital, audio, digital video, cell phones, digital fax machines. Further as per Section 85 B of the Indian Evidence Act, there is a presumption as to authenticity of electronic records in case of secure electronic records (i.e., records digitally signed as per Section 14 of the IT Act, 2000[83].

The position of electronic documents in the form of SMS, MMS and E-mail in India is well demonstrated under the law and the interpretation provided in various cases. In State of Delhi v. Mohd. Afzal & Others[84], it was held that electronic records are admissible as evidence. If someone challenges the accuracy of a computer evidence or electronic record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it must prove the same beyond reasonable doubt. The court observed that mere theoretical and general apprehensions cannot make clear evidence defective and in admissible. This case has well demonstrated the admissibility of electronic evidence in various forms in Indian courts. The basic principles of equivalence and legal validity of both electronic signatures and hand written signatures and of equivalence between paper document and electronic document has gained universal acceptance. Despite technical measures, there is still probability of electronic records being tampered with and complex scientific methods are being devised to determine the probability of such tampering. For admissibility of electronic records, specific criteria have been made in the Indian Evidence Act to satisfy the prime condition of authenticity or reliability which may be strengthened by means of new techniques of security being introduced by advancing technologies.

Position in Federal Law of Evidence

[83] Section 14, Information Technology Act,2000.
[84] State of Delhi v. Mohd. Afzal & Others 2003 (3) SCC 1669.

In order for the 'electronic evidence' to be admissible, it must comply with the 'best evidence rule' and 'chain of custody' must be so that rules out any tampering. In most simplistic understanding 'best evidence' is considered to be in the original form. "(if) data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original."

"*A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original*."

In a leading case of Lorraine v. Markel American Insurance Company, Grimm J. describes a model for addressing admission of electronic evidence. Lorraine model suggests that admissibility of electronic evidence focuses first on relevance, asking whether the electronic evidence has any tendency to make some fact that that is of consequence of litigation more or less probable than it would be otherwise. Secondly, it should address authenticity asking if the electronic evidence can be presented purporting its authenticity. Thirdly, the issues of hearsay concerns associated with the electronic evidence must be addressed properly, asking if it is a statement by the declarant, other than one made by the declarant while testifying at the trial or hearing, offered for the truth of the matter asserted, and, if the electronic information is hearsay, whether an exclusion or exception to the hearsay rule applies. Fourthly, the application of the original documents rule must be taken care of. Fifthly, and finally, it should be considered whether the probative value of the [electronic] evidence is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time. Careful consideration of these traditional evidentiary principles will permit a proponent to successfully admit electronic evidence.

Logical Relevance – Under Federal Rules of Evidence relevant evidence is generally admissible while irrelevant evidence is not. "Relevant evidence" is defined as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rules 401 and 402 of the Federal Rules of Evidence address this fundamental question of "logical relevance. The Federal Rules' logical relevance test is quite yielding, particularly in light of the fact that a court's determination of logical relevance is reviewed under an abuse of discretion standard. This test is applied to electronic evidence in the same way that it is applied to more traditional forms of evidence. To those accustomed to applying the Federal Rules'

logical relevance test to more traditional forms of evidence, the test's application to electronic evidence is fairly intuitive; it seems that, even under the view that electronic evidence is fundamentally strange or "magical," logical relevance is logical relevance.

Pragmatic Relevance – At times it may happen that even a logically relevant evidence may be inadmissible. "If its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence".

Like logical relevance, the Federal Rules' test for pragmatic relevance is applied to electronic evidence in the same way it is applied to more traditional forms of evidence. A court is most likely to invoke Rule 403 to exclude otherwise relevant electronic evidence where such evidence: (1) "contain[s] offensive or highly derogatory language that may provoke an emotional response;" (2) consists of computer animations or simulations where "there is a substantial risk that the jury may mistake them for the actual events [at issue] in the litigation;" or (3) it is potentially unreliable or inaccurate.

Authentication – It is absolutely necessary for the court to delve deep into the authenticity of the evidence. It must be shown beyond any iota of doubt that the evidence is what it purports to be. It is a very common phenomenon that the electronic records can be easily tutored with and tampered to meet the desired ends. In this process, no one but the justice suffers. Absolute care and caution must be exercised in order to hold any electronic evidence as admissible.

Impact of Digital Forensics in the criminal law jurisprudence:

While the purpose of digital evidence has not actually changed in the criminal investigation, the capacity with which this evidence is collected has been revolutionized by the introduction of digital forensics. Digital forensics has been defined as examination and uncovering of digital evidence which is located in electronic and computer networks including mobile phones, computers, and networks. The main purpose of this digital forensics is associated with examining devices which are used to commit such crimes and those devices which contain evidence.

Computer or Digital forensics has always become indispensable especially in convicting criminals such as sexual predators, terrorist as well as murderers. Most of the terrorist organizations use computer networks and internet to recruit new members while sex predators normally lure their targets over the social networking sites by stalking on their prey. However,

most of these criminals fail to evade or cover their tracks especially with using technology in implementing their fraud or crime. They also fail to realize that most computer data and files always remain on its hard drive even after being deleted hence allowing digital investigators to track their activity accurately. Even with deletion of the data which is incriminating, the information remains is a form digital binary because of 'data remanence' (Kanelis, 2007).[85] File deletion can rename a file and also hide it from the main user making it easy to retrieve original folder.

Murder, theft, rape, terrorism, extortion, bank robbery plans and even account hackings always leave a trail or devastating mark on their victims. Most often it becomes impossible to identify a digital perpetrator without technology and forensic science (Rynearson, 2007).[86]

The ubiquity of computer devices means that most digital evidence can be present in nearly all crimes. This further offers unique opportunities for forensic investigations. However, most of the proliferation of digital devices is increasing the demand for cyber and digital techniques. This is compounded by the rise and growth in data storage capacity and devices hence adding it to forensic workloads. Intelligence and Law enforcement agencies undertake a lot of digital forensic analyses. These always provide evidence and trail of criminality by exposing tracks and plans for a digital terror attack, exonerating suspects by corroborating with an alibi as well as aiding in investigations (Shinder, 2008). Corporations can also use the digital forensics in their internal investigations such as examining fraud and security breach.

The recent instances of leakage of WhatsApp chats obtained during the course of investigation and their admissibility as evidence in a criminal trial has brought the issue of electronic evidence to the forefront. These WhatsApp chats have been leaked in the public domain at the investigation stage itself, even before the commencement of the trial. Considering these recent developments, the legal framework for electronic evidence merits further scrutiny. Under the Indian Evidence Act, 1872, Section 65B[87] prescribes a distinct framework that governs the admissibility of electronic evidence. There have been multiple litigations over the scope and ambit of Section 65B, with divergent views taken by the Apex Court.

[85] Kanelis, P. &. (2007). Digital Crime and Forensic science in cyberspace. Hershey PA: Idea Group Inc.

[86] Rynearson. (2007). Evidence and crime scene Resonstruction. National crime investigation. Shinder. (2008). The scene of cybercrime. http://dujs.dartmouth.edu/2013/03/computer-forensics-in-criminalinvestigations/#.WrwQhJPwZBw .

[87] Section 65B, Indian Evidence Act, 1872.

Under Section 65A of the Evidence Act[88], the contents of electronic records have to be proved as evidence in accordance with the requirements of Section 65B. Both Sections 65A and 65B were inserted through the Indian Evidence (Amendment) Act, 2000, and form part of Chapter V of the Evidence Act, which deals with documentary evidence. In Anvar v. Basheer[89], it was clarified that as Section 65B begins with a non-obstante clause, if forms a complete code for the admissibility of electronic evidence. Under Section 65B(1), any information contained in an electronic record, which has been stored, recorded or copied as a computer output, shall also be deemed as a 'document' – and shall be admissible as evidence without further proof or production of the originals, if the conditions mentioned are satisfied. Section 65B(2) lays down the criteria that must be satisfied for the information to be categorized as a 'computer output.' What gave rise to conflicting interpretations is the provision in Section 65B(4), which states that if the electronic evidence is to be used in any judicial proceeding, a certificate shall have to be produced which identifies the electronic record, and gives particulars of the device involved in the production of the electronic record . This certificate shall have to be signed by a person occupying a responsible official position in relation to the operation of the relevant device, or from a person who is in the management of the relevant activities involved. This signature shall be evidence of the authenticity of the certificate. Section 65B(4) also mentions that the contents of the certificate should be stated "to the best of the knowledge and belief of the person stating it." After divergent views were taken in the three earlier Supreme Court decisions referred above, confusion had arisen as to whether a certificate under Section 65B(4) would have to be obtained even when an original copy of the electronic record is produced as evidence. Another issue that arose was whether it was mandatory to comply with the provisions of Section 65B(4) or can the requirement to obtain a certificate be dispensed with. At this juncture, it is also important to refer to Section 62[90] and Section 63[91] of the Evidence Act. Section 62 defines the term 'primary evidence' – which means the document itself that is produced before the Court. Under Section 63, secondary evidence includes copies made from the original, certified copies, oral accounts of the contents of a document etc.

[88] Section 65A, Indian Evidence Act, 1872
[89] Anvar v. Basheer (2014) 10 SCC 473.
[90] Section 62,Indian Evidence Act, 1872
[91] Section 63, Indian Evidence Act, 1872

Digital forensic & Electronic Evidences

Expansion of Information innovation has carried with itself a checkered situation in the public eye. It has accepted an exceptionally critical situation in our life. The ceaseless mission to improve in innovation has impregnated different indecencies in the general public. The essence of crimes has another measurement and viewpoint with the coming of the most recent innovation. Without a doubt, we can't preclude the commitment of such intriguing innovations in our day-to-day existence, both by and by and expertly. In any case, on the gauging scale, we think that it is hard to adjust both the circumstances. At the point when we discuss the word 'digital', it naturally takes us to the prospect of the web, innovation, and the virtual world. For a legal advisor or a specialist, it brings inside its subtleties different things also. They incorporate PC, organizations, information stockpiling, programming, mobile phones, ATMs, different peripherals. Basically, they incorporate absolutely everything which has its underlying foundations in innovation or is someplace identified with the conventional term 'PC' and its branches. This load of things is aggregately and conventionally called 'the internet'. Breaking information which is encoded in a large portion of computerized gadgets and cloud has been upgraded by the devices like unscrambling calculations. (Spanford, 2013)[92]. A specialist can break the vast majority of these scrambled information by utilization of a secret phrase and private key just as access the gadget by brute force. The specialists can likewise utilize hardware's to obstruction or jam a remote access of computerized gadget being used and acquire encryption keys just as passwords. Hacking takes advantage of these weaknesses which could somehow or another be utilized for criminal or legitimate purposes.

The job of computerized legal sciences has been compounded by its reaction to cybercrimes by gathering advanced proof which is identified with these criminal cases. They use strategies deductively demonstrated in gathering, saving, dissecting and approving the computerized proof appropriate in a criminal case. (Garfinkel, 2013). This digital evidence consistently comes in different sorts and structures like video, sound records, web perusing history, email discussion logs and reports (Shinder, (Casey, 2013) 2008).[93] Moreover, digital evidence can be manufactured towards ensnaring different gatherings just as misleading a few specialists away.

[92] Spanford, C. &. (2013). Uncertainty and loss of digital evidence.
[93] Casey. (2013, Jan 12). Computer forensics in crime.

These lawbreakers consistently stow away, annihilate and scramble confirmation from the web sources and PC stockpiling by utilization of utility and shareware programming.

Cyber Forensic Laws and It's Need to Develop for the Future in India

Obviously, India is a fledgling in this field so we should begin with essentials of advanced measurable. In any event, for essential use of computerized criminological standards, we discover law authorization organizations, public examiners and judges battling. The whole body of evidence against a cybercriminal is endangered the second a flawed police examination is begun. We have cops and insight officials in India who have awesome examination abilities. Be that as it may, not every one of them can apply these examination advancements in the internet. With the rise of science and innovation, advanced legal has assumed a vital part. Also, with the expansion in the cybercrimes like hacking and so forth, the need of advanced criminological have felt , hence different devices and procedures have been produced for following the wrongdoing, making the specific report to make it acceptable in the courtroom.

The existing forensic apparatuses assume a crucial part in part of recuperation. Each instrument has its own con-strains and constraints. There is a need to make these devices and methods more developed and upgraded to make computer forensics a full success and legally valid in law. a full achievement and legitimately substantial in law. The fate of PC legal sciences is boundless.

Conclusion

Digital forensics helps any examination or activity build up the who, what, when and where of an occurrence, utilizing computerized signs and data from a variety of sources. Similarly as it is utilized by law implementation to detail a wrongdoing, the innovation can be applied to catastrophe situations to find missing people, characterize cell phone action in a particular region, and even find pictures or video caught during an occasion. Relapse investigations exhibited that scientific proof assumed a steady and strong part in the event that preparing choices. In any case, the impact of legal proof is time-and assessment subordinate: the assortment of crime location proof was prescient of capture, and the assessment of proof was prescient of reference for charges, just as of charges being documented, conviction at preliminary, and sentence length.

In outline, the fast change and speed of innovation, thusly, presents a critical test to most computerized criminological experts. New working framework, equipment, and applications

should be explored further on the best way to dependably get data of such legal worth. Huge volumes of data which are primarily put away on gadgets make it very hard to for examiners and specialists satisfy their primary commitments under Investigations and criminal demonstration. All in all, the job of advanced crime scene investigation has been on separating, revealing and dissecting the computerized proof or data which are removed legitimately from network logs, PC stockpiling in a way it's ready to give dependability and exactness on the computerized impressions and proof gathered. PC and web frameworks frequently store some significant individual and corporate secret data making it an important apparatus for individual and private use, the PC networks additionally give such advantageous preparing administrations and information access making it a characteristic objective for cybercriminal intermediaries and associations.

INSOLVENCY UNDER PRIVATE INTERNATIONAL LAW

- SUTIKSHAN RAINA

INTRODUCTION: THE ROOTS OF CORPORATE INSOLVENCY LAW

Problem of insolvency arose in the world once it became common to extend credit in trade and commerce. The history of credit is probably as long as the history of humanity. When an individual applies for credit or borrows money, he or she enters some kind of written or oral agreement. If there is no repayment, the debtor breaks a contract that is considered fundamental in every economy. The treatment of people who have become insolvent can thus give us an indication of how those who failed or could not fulfil their borrowing contracts have been considered from the point of view of the legislator. [94]

The promotion of free international trade and the development of global financial markets have resulted in significant changes to the structure and dynamics of commercial relations in the last three decades. International integration among economies has been a useful tool for achieving economic growth. Consequently, most economies are interdependent, and business has been made among traders located in different jurisdictions. Investors and enterprises have moved toward new boundaries seeking new markets. Companies have radically changed their structures as a means of maximizing profits. Nowadays multinational companies are a common feature, owning assets and assuming obligations in various countries. As a result, bankruptcy and reorganization proceedings are no longer restricted to the domestic arena.[95] Insolvency is referred to the inability to any legal person to discharge all the debts and they become due. It is the state or condition to have more debts (liabilities) than the total assets which may available to pay them, Even if assets were mortgaged or sold. Insolvency takes place in certain things happens. In some of which may comprise of: mismanagement of cash, inflation in the cash expenses, or reduction of cash flow. The detection of the insolvency is important; as the creditors are empowered and entitled to exercise the specific rights against insolvent and

[94] K.G. Sri Durga Priya & M. Kannappan, *A Critical Analysis of Corporate Recovery and Insolvency of India 2017*, International Journal of Pure and Applied Mathematics. Volume 119 No. 17 2018, 983-995.

[95] Fernando Locatelli, International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? https://www.amprs.com.br/public/arquivos/revista_artigo/arquivo_1259072860.pdf

individual or organization. [96]Inevitably, from time to time, people were unable to meet there obligations.[97]

Development of capital markets is promoted by greater investor protection, while more developed credit markets exist in countries with greater creditor protection. An important component of a country's creditor rights is its insolvency framework, which together with a supporting judicial environment affects the degree to which commercial distress is resolved using formal bankruptcy proceedings. Strong bankruptcy regimes also play a role in determining higher liquidation values and improved chances of ex-post firm survival.[98]

The conflict between different legal systems has affected parties' rights, creating uncertainty. This effect has happened because national bankruptcy laws have been inadequate in efficiently addressing the necessities required by international insolvencies in the new economic arena, increasing transaction costs to all parties. As a response, a model law was designed by UNCITRAL to assist countries in developing harmonic procedural rules of coordination and assistance among jurisdictions in cross-border insolvency cases as a means of producing greater legal certainty for trade and investment.[99] Globally, the UNCITRAL Model Law has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues and legislation based on the Model Law has been adopted in 44 countries in a total of 46 jurisdictions. The UNCITRAL Model Law ensures full recognition of a country's domestic insolvency law by giving precedence to domestic proceedings and allowing denial of relief under the Model Law if such relief is against the public policy of the enacting country. Including the United Kingdom, the United States of America, Japan, South Korea and Singapore. [100]

Insolvency around the world

Insolvency regimes are complex in design as they try to balance several objectives, including protecting the rights of creditors essential to the mobilization of capital for investment and working capital and other resources and preventing the premature liquidation of viable firms. In addition to legal rights, there is a need for an efficient judicial system to enforce these rights,

[96] K.G. Sri Durga Priya & M. Kannappan, *supra* note 1.
[97] SETALVAD's, CONFLICT OF LAWS.
[98] Stijn Claessens & Leora Klapper, INSOLVENCY LAWS AROUND THE WORLD – A STATISTICAL ANALYSIS AND RULES FOR THEIR DESIGN https://www.ifo.de/DocDL/dicereport106-forum2.pdf
[99] *Ibid*
[100] REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENC, OCTOBER, 2018 (available at: https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf).

or at least to serve as a credible enforcement threat, and to speedily conduct the process of liquidation or restructuring when so desired. These different objectives and constraints have led to differences in insolvency and collateral regimes across countries, as well as considerable variation in the actual use of bankruptcy proceedings to resolve financial distress.[101]

In Europe rules relating to insolvency had been evolved in roman law, from which they became part of the ' Law merchant', a Europe wide set of rules applicable to traders. In England the first In England, the first recognised piece of legislation was the Statute of Bankrupts 1542. A series of statutes followed from time to time initially the law only applied to traders, and it was later extended to all persons. In Australia, bankruptcy is a status which applies to individuals and is governed by the federal Bankruptcy Act 1966. Companies do not go bankrupt but rather go into liquidation or administration, which is governed by the federal Corporations Act 2001. In Brazil, the Bankruptcy Law governs court-ordered or out-of-court receivership and bankruptcy and only applies to public companies with the exception of financial institutions, credit cooperatives, consortia, and supplementary scheme entities, companies administering health care plans, equity companies and a few other legal entities. It does not apply to state-run companies. The Parliament of India in the first week of May 2016 passed Insolvency and Bankruptcy Code 2016. Earlier a clear law on corporate bankruptcy did not exist, even though individual bankruptcy laws have been in existence since 1874. The earlier law in force was enacted in 1920 called the Provincial Insolvency Act.[102]

INTERNATIONAL CONVENTIONS

In a society that facilitates the use of credit by companies[103] there is a degree of risk that those who are owed money by a firm will suffer because the firm has become unable to pay its debts on the due date. If a number of creditors were owed money and all pursued the rights and remedies available to them (for example, contractual rights; rights to enforce security interests; rights to set off the debt against other obligations; proceedings for delivery, foreclosure or sale) a chaotic race to protect interests would take place and this might produce inefficiencies and unfairness.[104]

---

[101] *Ibid*
[102] SETALVAD's, CONFLICT OF LAWS.
[103] See Cork Report: *Report of the ReviewCommittee on Insolvency Law and Practice* (Cmnd 8558, 1982)ch. 1
[104] VANESSA FINCH, *CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES (2002.)*

The earliest insolvency laws in England and Wales were concerned with individual insolvency (bankruptcy) and date back to medieval times.[105] Early common law offered no collective procedure for administering an insolvent's estate but a creditor could seize either the body of a debtor or his effects – but not both. Creditors, moreover, had to act individually, there being no machinery for sharing expenses. When the person of the debtor was seized, detention in person at the creditor's pleasure was provided for. Insolvency was thus seen as an offence little less criminal than a felony.[106] From Tudor times onwards, insolvency has been driven by three distinct forces: impulsions to punish bankrupts; wishes to organise administration of their assets so that competing creditors are treated fairly and efficiently; and the hope that the bankrupt would be allowed to rehabilitate himself.[107]

Elizabethan legislation of 1570 then drew an important distinction between traders and others, including within the definition of a bankrupt only traders and merchants: those who earned their living by 'buying and selling'.[108] Non-traders could thus not be declared bankrupt. As for distribution, this statute again provided for equal distribution of assets among creditors.

CURRENT PROBLEMS OF CROSS BORDER INSOLVENCY.

The difficulty with most insolvency these days is that they are not contained within one jurisdiction. In the distant past where companies had their operations, assets and debts within the jurisdiction where they were incorporated, it was completely logical and within the expectations of their creditors that they would be wound up by the laws of that jurisdiction. The rule that the law that creates is that which can "*uncreate*" remains the conflicts rule of most jurisdictions today. Increasingly however companies operate, have their assets and creditors in several countries beyond their jurisdiction of incorporation. Many jurisdictions have responded to this by legislating to confer on their courts the right to wind up foreign

[105] See Cornish and Clark, *Law and Society*, p. 231.
[106] VANESSA FINCH, *CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES (2002.)*
[107] On the history of insolvency law see Cork Report ch. 2, paras. 26–34;W. R. Cornish and G. de N. Clark, *Law and Society in England 1750–1950* (Sweet & Maxwell, London, 1989)ch. 3, part II; B. G. Carruthers and T. C.Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Clarendon Press, Oxford, 1998); G. R. Rubin and D. Sugarman (eds.), *Law, Economy and Society: Essays in theHistory of English Law* (Professional Books, Abingdon, 1984)pp. 43–7; I. F. Fletcher, *The Law of Insolvency* (2nd edn, Sweet & Maxwell, London, 1996)pp. 6 ff.; V. M. Lester, *Victorian Insolvency* (Oxford University Press, Oxford, 1996).
[108] J. Cohen, '*History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy'* (1982)3 *Journal of Legal History* 153– 6.

companies.[109] Potentially proceedings to wind up the company may be opened in all the jurisdictions in which the company has some connection.

Jurisdictions are wont to exercise jurisdiction on increasingly thin connection resulting in proliferation of insolvency proceedings. The concern with multiplicity of proceedings has mostly been with larger costs and smaller returns, not inevitable but common, and the problem of recognition and enforcement of orders by courts that are not of the jurisdiction of incorporation. These have been addressed with considerable success by the UNCITRAL Model Law and the EU Insolvency Regulation.[110] There is however another seemingly intractable problem that affects more directly advancements in international trade. Multiplicity of proceedings almost invariably means a multiplicity of insolvency laws since courts mostly apply the *lex fori* (law of the forum) for insolvency matters. This stands in the way of *ex ante* predictability for creditors as to the applicable insolvency law that is critical to the pricing of risk, and provision against it. The consequence of this is often increased cost of capital for the debtor. That is the problem of conflict of laws that remains to be addressed in a viable way, and which this paper seeks to suggest a solution for.[111]

EXISTING INSTRUMENTS DEALING WITH CROSS BORDER INSOLVENCY

Efforts have been made at international, regional and domestic[112] levels to address the cross border issues most of which are focused on recognition and cooperation. Amongst them the UNCITRAL Model Law and the EU Insolvency Regulation have had the greatest impact. The former is a nonbinding international initiative by UNCITRAL which allows for free divergence by those adopting it, whilst the latter is binding legislation of the EU Member States, with limited divergence permitted. Both implement a system of modified universalism.[113] The UNCITRAL Model Law facilitates the recognition of foreign insolvency proceedings by

[109] *Cross-border Insolvency and its Threat to International Trade: Proposal for a Comprehensive UNCITRAL solution*',Dr Maisie Ooi.
[110] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
[111] '*Cross-border Insolvency and its Threat to International Trade: Proposal for a Comprehensive UNCITRAL solution*',Dr Maisie Ooi.
[112] Ian Fletcher, Insolvency in Private International Law (2nd edn), chapts 5-8.
[113] Franken, "Cross-Border Insolvency Law: A Comparative Insitutional Analysis"92014) 34(1) Oxford Journal of Legal Studies 97, at p116 suggested that the Model Law essentially offers a cooperative territorial approach to cross border insolvency law. LoPucki, "Universalism Unravels" (2005) 79(1) American Bankruptcy Law Journal 143, p 166 on the other hand suggested that it is a form of backdoor universalism. The EU Insolvency Regulation has been said to embody a modified version of territorialism: Horst Eidenmuller, "Free Choice in International Company Insolvency Law in Europe" European Business Organization Law Review (2005) 423, at p 433.

mandating and encouraging cooperation and coordination to varying degrees depending on whether the proceedings are "*main*" or "*non-main*". It does not deal with the conflicts issues of jurisdiction and applicable law but is predicated upon jurisdiction to open main insolvency proceedings being with the centre of main interests (hereinafter referred to as the "COMI") of the company,[114] and non-main proceedings where the company has an establishment.[115] It does not, whether directly or indirectly, provide for the law applicable to the proceedings.

UNCITRAL

In December 1997, the General Assembly endorsed the Model Law on Cross-Border Insolvency, developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law does not purport to address substantive domestic insolvency law. Rather, it provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State. As at the end of March 2011, 19 States and territories had enacted legislation based on the Model Law.[116]

The UNCITRAL Insolvency Law will provide a modern, coherent and comprehensive cross border insolvency regime that is well suited to dealing with the consequences and complexities of cross border insolvencies. The UNCITRAL Legislative Guide on Insolvency Law would be a good reference for the crafting of the Law, with adjustments tailored to address more specifically the cross border issues.[117] The company's choice of this Law would mean that there is no connection whether by assets, establishment or law but this is not a problem. Since the UNCITRAL Insolvency Law is not the law of any particular jurisdiction it in fact allows the insolvency proceedings to be opened unhindered in the jurisdictions where it would be efficient to do so. These may well be those traditionally thought to be the jurisdictions of the main and secondary proceedings. If the UNCITRAL Insolvency Law proves to be a popular choice this would send positive signals to national lawmakers to model their insolvency laws

[114] Art 16(3) of UNCITRAL Model law on Cross Border Insolvency.
[115] Art 17 (2) of UNCITRAL Model law on Cross Border Insolvency.
[116] Australia (2008), British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland; 2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) and United States of America (2005).
[117] '*Cross-border Insolvency and its Threat to International Trade: Proposal for a Comprehensive UNCITRAL solution*',Dr Maisie Ooi.

after it. This will lead to greater convergence of insolvency laws and their underlying policies.[118]

The Model Law is designed to apply where:[119]

(a) Assistance is sought in a State (the enacting State) by a foreign court or a foreign representative in connection with a foreign insolvency proceeding;

(b) Assistance is sought in the foreign State in connection with a specified insolvency proceeding under the laws of that State;

(c) A foreign proceeding and an insolvency proceeding under specified laws of the enacting State are taking place concurrently, in respect of the same debtor;

(d) Creditors or other interested persons have an interest in requesting the commencement of, or participating in, an insolvency proceeding under specified laws of the enacting State.

POSITION IN INDIA.

India adopted regime for the personal insolvencies and bankruptcies as a part of the comprehensive new Insolvency, Bankruptcy Code. The Code was drafted and the enacted in very short amount of time, personal insolvency and the bankruptcy provisions received considerably less attention.[120]

In India, as elsewhere in the countries following the common law system, the subject is governed by statutes. For historical reasons, two statutes were are in force in India: presidency towns Insolvency Act, 1990 in force in the areas within the original jurisdiction of the high court's of Bombay, Calcutta and madras and the Provincial Insolvency Act,1920 in force in most of the rest of the India. Both the act are modelled on the English bankruptancy Acts in force when they were enacted.[121]

Under the Constitution of India 'Bankruptcy & Insolvency' is provided in Entry 9 List III - Concurrent List, (Article 246 –Seventh Schedule to the Constitution) i.e. both Centre and State Governments make laws relating to this subject. The major legislations currently governing Corporate Insolvency are:

---

[118] '*Cross-border Insolvency and its Threat to International Trade: Proposal for a Comprehensive UNCITRAL solution*',Dr Maisie Ooi.

[119] UNCITRAL Model Law, art. 1, para. 1.

[120] K.G. Sri Durga Priya & M. Kannappan, *supra* note 1.

[121] SETALVAD's, CONFLICT OF LAWS.

• Companies Act, 1956, relating to winding up of companies.

• The Sick Industrial Companies (Special Provisions) Act, 1985.[122]

In India, the legal and institutional machinery for dealing with debt default has not been in line with global standards. The recovery action by creditors, either through the Contract Act or through special laws such as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, has not had desired outcomes. Similarly, action through the Sick Industrial Companies (Special Provisions) Act, 1985 and the winding up provisions of the Companies Act, 1956 have neither been able to aid recovery for lenders nor aid restructuring of firms. Laws dealing with individual insolvency, the Presidential Towns insolvency Act, 1909 and the Provincial Insolvency Act. 1920 are almost a century old. This has hampered the confidence of the lender. [123]When lenders are unconfident, debt access for borrowers is diminished. This reflects in the state of the credit markets in India. Secured credit by banks is the largest component of the credit market in India. The corporate bond market is yet to develop. In this backdrop Parliament enacted Insolvency and Bankruptcy Code, 2016. The objective of the Insolvency and Bankruptcy Code, 2016 is to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner and for maximization of value of assets of such persons and matters connected therewith or incidental thereto.[124]

The Insolvency Law Committee constituted by the Ministry of Corporate Affairs submitted its first Report in March 2018 which recommended amendments to the Insolvency and Bankruptcy Code, 2016 based on the experience gained from implementation of the Code. With respect to cross-border insolvency, the Committee noted that the existing provisions in the Code (sections 234 and 235) do not provide a comprehensive framework for cross-border insolvency matters.[125] The Committee decided to attempt to provide a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997 which could be made a part of the Code by inserting a separate part for this purpose.

[122] THE INSTITUTE OF COMPANY SECRETARIES OF INDIA, INSOLVENCY – LAW AND PRACTICE.
[123] REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENC, OCTOBER, 2018 (available at: https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf).
[124] THE INSTITUTE OF COMPANY SECRETARIES OF INDIA, INSOLVENCY – LAW AND PRACTICE.
[125] Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March 2018.

Given the complexity of the subject matter and the requirement of in-depth research to adapt the UNCITRAL Model Law for India, the Committee decided to submit its recommendations on cross-border insolvency separately.[126] The necessity to make the existing cross-border insolvency framework under the Code more elaborate and self-contained is widely accepted and needs immediate attention. Some of the key advantages of adopting the Model Law with specific carve outs as recommended by the Committee are as under:

(i) Increasing foreign investment:
(ii) Flexibility
(iii) Protection of domestic interest
(iv) Priority to domestic proceedings
(v) Mechanism for cooperation

Incorporation of cross-border insolvency provisions as recommended by the Committee will create an internationally aligned and comprehensive insolvency framework for corporate debtors under the Code, which is most essential in a globalised environment.[127]

The current legal framework in India

Sections 234 and 235 of the Code deal with cross border insolvency in a cursory manner, empowering the government to make treaties and further empowering the Adjudicating Authority under the Code, to issue a letter of request to a court in a country, with which an agreement has been entered into, to deal with the assets in a specified manner (presumably, in accordance with the provisions of the Code). Theoretically, this should also provide a framework for foreign representatives to apply to the Indian courts to deal with assets in India in a manner consistent with the insolvency laws of the jurisdiction where foreign main proceedings have been initiated, in relation to a debtor, with assets in India.[128]

For foreign proceedings to be recognized in India, the process set out under the Civil Procedure Code, 1908 will be applicable, together with English common law principles, though it should

[126] *Ibid*
[127] Report of the Joint Committee on Insolvency and Bankruptcy Code, (2015).
[128] Mohan, S. Chandra. 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?', (2012), International Insolvency Review. Vol. 21, (3), pp. 199-223.

be noted that it is not broad enough to cover some insolvency related proceedings.[129] Likewise, for Indian proceedings to be recognized abroad, the procedural rules of that foreign jurisdiction will apply. Those countries that have adopted the UNCITRAL Model Law (which include most industrialized countries) are required to provide recognition, assistance, cooperation and appropriate relief in relation to insolvency proceedings commenced in India, except where that country has otherwise required reciprocity.[130]

As of June 2018, 44 states have adopted the UNCITRAL Model Law, including the United States, the United Kingdom and Singapore. Note, however, that certain countries that have adopted it may have made reservations to it, and may require reciprocity.[131]Clearly, while the Code permits the government to enter into treaties to implement the UNCITRAL Model Law, negotiating up to 200 separate bilateral treaties in a relatively short space of time is just not practical, and it would further complicate matters, with the Indian courts having to take into account the nuances of each treaty in any cross border insolvency matter. Surely, the simplest solution would be for India to simply sign and ratify the UNCITRAL Model Law and then incorporate that into the Code.[132]

While the Notification proposes to essentially adopt the UNCITRAL Model Law, there are a couple of key nuances and it appears to apply only to corporate insolvency, and not in relation to the insolvency of individuals. There is a general public policy restriction, which essentially says that India will not give effect to the treaty provisions if it violates public policy, though it should be noted that this reservation is a common one amongst most contracting states and the nuance is how the courts in India might interpret the principle, and whether they will accord it narrow, or broad status, potentially frustrating the rights of foreign representatives in actions before the Indian courts.[133]

CONCLUSION

[129] Ran Chakrabarti, *India's Proposed Cross Border Insolvency Regime: Will It Trump The Gibbs Rule?*.
[130] Keith D.Yamauchi, 'Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 Int. Insolv. Rev. 149.
[131] Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March 2018.
[132] Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, March 2018.
[133] *Ibid*

As elaborated above it becomes clear that India currently has no cross border insolvency mechanism. Status quo highlights the nuances and the Law Commission has laid down certain suggestion which have yet not been adopted. However, adopting UNCITRAL into our domestic laws would be of great value and help as India being a growing economy is witnessing a huge quantum of foreign companies coming into India for doing business. So not only would India become a place that provides ease of doing business but it would be easier for the judiciary to deliver justice as is being attempted in the case of *Jet Airways.*[134] As we look into the aspect of cross border insolvency, it requires a proper legal framework. This necessity has been recognized by the legislature as without proper legal provisions there would be a threat for the foreign investors to invest in India. While when we look at the current situation in India, India is inviting many foreign nations to invest in the country and to even set up their manufacturing units in the country. So in order to save their interest and motivate them to invest in the country the formulation of the law is of great importance.

The UNCITRAL has also given aspects of cross border insolvency and has given procedural framework in regards to insolvency for efficiency in the administration. As when we look into the aspect of insolvency it requires many complex issues in several areas of law in different jurisdictions.

So keeping in view the Model Law, the notice that has been issued by *MoCA* on cross border insolvency which would be added in the IBC itself. With the incorporation of this public notice in the Code, a uniform mechanism will be followed by various countries which also enhance cooperation among them. But there are various flaws in the public notice like the definitions of certain terms are not provided or is ambiguous, also there are flaws in certain provisions which should be taken into consideration before enacting such a public notice as a chapter in the Code. This public notice once incorporated into the IBC will resolve the problem of the cumbersome process provided in Section 234 and 235 of the IBC which has been followed till now and thereby will provide faster and proper remedy to the foreign creditors in cross border insolvency matters if the deficiencies provided are resolved too.

[134] Jet Airways (India) Ltd. *v.* State Bank of India & Anr., Company Appeal (AT) (Insolvency) No. 707 of 2019.

SENTENCING- THE INDIAN CONTEXT & RECOMMENDATIONS

- SARANSH KHURANA

Justice is a relative concept which changes with time. Since the codification of substantive criminal law in 1860, to the modernized India in 2015, the judicial court rooms have produced judgments which have shaken the spines of criminals and have given justice to the much needed victims while others have called for sharp criticism. No matter what it is the Judge's stroke of ink that has created a pattern in which sentencing is given in India. The Indian penal code u/s 53 has divided punishments into various kinds based on the theories of punishment. Some crimes call for simple imprisonment, some rigorous imprisonment, some crimes call for just fines while others call for capital punishment. In Indian criminal jurisprudence, the maximum and minimum punishments have been prescribed giving the judges wide discretionary powers to decide on the quantum of sentence. Under such situation there are conflicting sentencing given by the judiciary wherein similar crime has been committed but different sentences have been rendered. This paper analyses the concept of disparity and discrimination in the sentencing method and if there is a need for a sentencing guideline in India.

INTRODUCTION

One of the fundamental principles of the criminal law is consistency: like offenders must be treated alike. However, research has shown that when it comes to sentencing in India, there is in fact substantial regional disparity in the penalty imposed on similarly situated offenders. The situation is unacceptable, and undermines the integrity of the criminal justice system. Sentencing … is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.[135]

Sentencing is a notoriously difficult component of the criminal law. It requires a judge to balance complex, abstract and often competing considerations with a view to achieving the

[135] Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 Law and Contemp Probs 265 at 265.

elusive and equally abstract notion of "justice". To this end, judges have traditionally enjoyed considerable discretion to tailor an appropriate sentence, subject to the maximum penalties prescribed by Parliament. However, this flexibility comes at the cost of another important principle of the criminal law: consistency. The more discretion a judge is allowed to exercise, the greater the risk of similarly situated offenders being treated differently. How to resolve this tension and find a suitable equilibrium is a problem faced by jurisdictions the world over.

A sentence, in criminal law is punishment that a court orders, imposed on a person convicted of criminal activity.[136] Sentences typically consist of fines, corporal punishment, imprisonment for varying periods including life, or capital punishment, and sometimes combine two or more elements. In the United States, the Eighth Amendment to the Constitution bans "cruel and unusual punishments" (effectively excluding corporal punishment), and exile and forfeiture of property by heirs are not imposed. In India, The Indian Penal Code u/s 53 has divided punishments into various kinds based on the theories of punishment. These are death, imprisonment for life, simple imprisonment, rigorous imprisonment (with hard labour), forfeiture of property and lastly, fines. Imprisonment may be solitary as well under Section 73. Article 21 of the Indian Constitution provides the right to life and thereby, restricts the death penalty save “procedure established by law”.

The sentence to be imposed is generally fixed by statute. In some cases (mandatory sentencing) the duration is exactly prescribed; in others the judge has limited discretion. The Indian Supreme Court has held that courts in sentencing may, and sometimes must, consider not only the crimes for which a defendant was convicted, but also other charges, even if they led to acquittal. If a person is convicted of more than one crime at a single trial, the sentences may run concurrently (i.e., all beginning at the same time) or consecutively. In indeterminate sentencing, a minimum and maximum term is set, and good behavior may allow a convict to be released on parole any time after the minimum term has been served. In many states successive convictions on felony charges bring longer sentences, and in the 1980s some U.S. states and the federal government began to impose "three strikes" and similar laws, ordering mandatory long-term or life imprisonment for repeated felony offenses. Such laws have been criticized for sometimes requiring long sentences for nonviolent offenders whose crimes may include petty theft or drug possession. Persons found incapable of understanding the nature of

[136] Blacks Law Dictionary, 8th edn. pg. 1393.

their crimes or of helping in their defense are often committed to mental institutions for periods that are to end if they recover sanity; these are effectively, if not technically, sentences.

This paper will explore three different mechanisms for guiding judicial discretion in the pursuit of sentencing consistency. It will undertake an analysis of mandatory sentences and the "instinctive synthesis" approach, both of which will be shown to be unsatisfactory. Instead, the article will argue that the establishment of a Sentencing Council with a mandate to draft presumptively binding guidelines is the most appropriate way forward for India. This option finds the correct equilibrium between giving a judge sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases.

As an example, crushed by poverty, Majnu, pick-pocketed a meager amount of money to satisfy his hunger. In Legal parlance, Majnu has committed a crime of theft and for the offence of theft there is a punishment of imprisonment of either description which may extend to 3 years, with fine or both according to Indian penal code. Based on the gravity of the crime Majnu could also be placed on probation under Section 360 of Code of Criminal Procedure. According to the Act, considering the circumstances of the crime, the offender can be released on probation or after due admonition. Because it has been considered according to progressive interpretation of criminal law that person having no criminal records and tendency, who are first offenders shall not be put in situation which will bring connection with obdurate criminals which will result in increasing the criminal tendency in any individual. The above illustration goes on to show that if Rajkumar is sentenced by Judge A, a hardliner, who believes that theft is a crime on the increase in India, he will receive the maximum penalty of 3 years in prison. If he is sentenced by Judge B who believes that imprisonment is not an effective punishment for petty offences and will be placed on probation according to The Probation of Offenders Act, 1958. Is this fair? Should the sentence Majnu receives depend on the Judges who impose it? Should the sentence depend on a Judge’s philosophy of punishment or personal beliefs about the perniciousness of crime? Or should it be based on an objective evaluation of the seriousness of crime and the offender’s prior criminal record.

SENTENCING IN INDIA

In India, neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.

Judges often impose different sentences on similarly situated offenders or identical sentences on offenders whose crime and prior criminal history are different. Echoing judge Marvel Frankel the critics suggest that unconstrained discretion leads to lawlessness in sentencing. In plethora of cases Supreme Court of India has cited a number of principles which should be taken into account while exercising discretion in sentencing such as proportionality, deterrence, seriousness and rehabilitation. Mitigating and aggravating factors should also be considered.

In *Mohd. Chaman vs State* the accused was charged under section 376 and 302 of IPC for committing rape and then murder of a one and a half year old child. The learned trial judge came to the conclusion that this is a fit case in which extreme penalty of death should be awarded. The high court confirmed the death penalty saying it to be the rarest of the rare case. However the Supreme Court reversed the capital punishment imposed against the appellant to rigorous imprisonment for life. Similarly, in the case of *Gurdev Singh & Anr. V. State of Punjab* the appellants were convicted of murdering 15 individuals being part of an unlawful assembly and were convicted by high court and were awarded death penalty. They then approached the Supreme Court on three different special leave petitions out of which two of them were upheld for death penalty.

Analyzing both the case laws, the offence is the same but the aggravating and the mitigating circumstances are different. There are catena of case laws in which Supreme Court has given death penalty for the same offence of rape and murder while imprisonment for life as the other alternative to death penalty in the same offence for reasons based on the discretionary powers of the Judges which has been left open as the intention of the legislature while framing the

laws. However, the discretionary powers used by the judges introduced disparity in awarding sentences. Allegations of lawlessness and sentencing reflect concerns about both disparity and discriminations. Although these terms are sometimes used interchangeably they do not mean the same thing. Disparity is a difference in treatment or outcome that does not necessarily result from intentional bias or prejudice. Discrimination on the other hand is a differential treatment of individuals based on irrelevant criteria such as race, gender or social class. Applied to the sentencing process, disparity exists when similar offenders are sentenced differently or when different offenders receive the same sentence. It exists when Judges impose different sentences on two offenders with identical criminal histories who are convicted of the same crime or when Judges impose identical sentences on two offenders whose prior records and crimes are very different or when the sentence depends on the Judge who imposes it or the jurisdiction on which it is imposed. In the scenario described at the beginning of this paper the fact that Majnu would receive a significantly harsher sentence for theft of a meager amount to satisfy his hunger from Judge A, the hardliner, than he would from Judge B, who believes in reformation, is an example of sentencing disparity.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating, [t]he Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore, each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence. There are several

factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.[137]

The Committee advised further that, in order to bring "predictability in the matter of sentencing," a statutory committee should be established "to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative."[138] In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines.[139]

In an October 2010 news report, the Law Minister is quoted as having stated that the government is looking into establishing a "uniform sentencing policy" in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences.[140]

In 2008, the Supreme Court of India, in *State of Punjab v. Prem Sagar & Ors.,* also noted the absence of judiciary-driven guidelines in India's criminal justice system, stating, "in our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except for making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines."[141] The Court stated that the superior courts have come across a large number of cases that "show anomalies as regards the policy of sentencing,"[142] adding, "whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine."[143]

In 2013, the Hon'ble Supreme Court, in the case of *Soman v. State of Kerala*, also observed the absence of structured guidelines: "Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial

[137] Government of India, Ministry Of Home Affairs, Committee On Reforms Of Criminal Justice System Report 170 (Mar. 2003).
[138] Ibid. at 171.
[139] Ibid. at 18–19.
[140] Govt for a Uniform Sentencing Policy by Courts, ZEENEWS (Oct. 7, 2010), http://zeenews.india.com/news/nation/ govt-for-a-uniform-sentencing-policy-by-courts_660232.html.
[141] State of Punjab v. Prem Sagar & Ors., (2008) 7 S.C.C. 550, para. 2.
[142] Ibid. para. 8.
[143] Ibid.

court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges."[144] However, in describing India's sentencing approach the Court has also asserted that "the impossibility of laying down standards is at the very core of the Criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment."[145]

Sentencing procedure is established under the Code of Criminal Procedure, which provides broad discretionary sentencing powers to judges.[146]

In a 2007 paper on the need for sentencing policy in India, author R. Niruphama asserted that, in the absence of an adequate sentencing policy or guidelines, it comes down to the judges to decide which factors to take into account and which to ignore. Moreover, he considered that broad discretion opens the sentencing process to abuse and allows personal prejudices of the judges to influence decisions.[147]

CRIMES AND JUDICIAL SENTENCING GUIDANCE

In the Supreme Court's judgment in *Soman v. Kerala*[148], the Court cited a number of principles that it has taken into account "while exercising discretion in sentencing," such as proportionality, deterrence, and rehabilitation. As part of the proportionality analysis, mitigating and aggravating factors should also be considered, the Court noted.

In *State of M.P. v. Bablu Natt*[149], the Supreme Court stated that "the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with." Moreover, in *Alister Anthony Pareira v. State of Maharashtra*,[150] the Court held that "sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction.

[144] Soman v. State of Kerala, (2013) 11 S.C.C. 382.
[145] Jagmohan Singh v. State of Uttar Pradesh, (1973) 2 S.C.R. 541, para. 26.
[146] CODE OF CRIMINAL PROCEDURE, No. 2 of 1974, Sentencing is covered under section(s) 235, 248, 325, 360 and 361 of the Code.
[147] R. Niruphama, Need for Sentencing Policy in India: Second Critical Studies Conference – "Spheres of Justice" Paper Presentation (Sept. 20–22, 2007).
[148] Soman v. State of Kerala, (2013) 11 S.C.C. 382, para. 13.
[149] State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 13.
[150] Alister Anthony Pareira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 69.

What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

A. Murder

The punishment for murder under India's Penal Code is life imprisonment or death and the person is also liable to a fine. Guidance on the application of the death sentence was provided by the Supreme Court of India in *Jagmohan Singh v. State of Uttar Pradesh*, where the Court enunciated an approach of balancing mitigating and aggravating factors of the crime when deciding on the imposition of capital punishment.[151]

However, this approach was called into question first in *Bachan Singh v. State of Punjab* where the Court emphasized that since an amendment was made to India's Code of Criminal Procedure, the rule has changed so that "the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so."[152] The Court also emphasized that due consideration should not only be given to the circumstances of the crime but to the criminal also.[153]

However, more recently the Court in *Sangeet & Anr. v. State of Haryana*[154], noted that the approach in Bachan has not been fully adopted subsequently, that "primacy still seems to be given to the nature of the crime," and that the "circumstances of the criminal, referred to in Bachan Singh appear to have taken a bit of a back seat in the sentencing process."

The Court in Sangeet concluded as follows:

"1. This Court has not endorsed the approach of aggravating and mitigating circumstances in the case of Bachan Singh. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.

2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.

[151] Jagmohan Singh v. State of Uttar Pradesh, (1973) 2 S.C.R. 541.
[152] Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684, para. 165.
[153] Ibid.
[154] Sangeet & Anr. v. State of Haryana, (2013) 2 S.C.C. 452, paras. 29 & 52–54.

3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.
4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.
5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced."

B. Theft

The punishment for theft is up to three years' imprisonment, a fine, or both.23 No judicial guidance was found regarding sentencing for theft.

C. Culpable Homicide

Causing death by negligence is punishable by imprisonment of up to two years, a fine, or both. Other crimes similar to manslaughter include punishment for culpable homicide not amounting to murder, addressed in section 304 of the Penal Code: Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with [a] fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. The Supreme Court looked at the question of sentencing involving sections 304 and 304A in a drunken driving case and found that punishment must be commensurate with the crime and that deterrence was a primary consideration when deciding on the severity of the sentence where rash or negligent driving was involved.[155]

D. Trafficking of Persons

The level of punishment under the new trafficking of persons crime set forth in section 370 of the Penal Code depends on the number of persons that have been trafficked, whether the victim was a minor, and whether the assailant was a public official: (2) Whoever commits the offence

[155]Alister Anthony Pareira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 86–98.

of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine. (3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine. (4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. (5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine. (6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. (7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. Other sections of the Code may also be used to prosecute traffickers, including sections 366A and 372. Section 5B of the Immoral Trafficking Prevention Act (ITPA) also punishes trafficking in persons with "rigorous imprisonment for a term which shall not be less than seven years and in the event of a second or subsequent conviction with imprisonment for life."[156]

E. Rape

Recent changes have been made to the crime of rape in India's Penal Code. Absent any aggravating factors, the section stipulates a minimum punishment of imprisonment for seven years up to a maximum of life, and a mandatory fine. In situations where certain aggravated situations occur, punishment is for a minimum term of ten years up to a maximum of life imprisonment, and a mandatory fine. In the previous section on the crime of rape, there was a proviso that empowered the Court to award a sentence that was less than the minimum for adequate and special reasons stipulated in the judgment. The Supreme Court provided direction in several cases on how such discretion should be exercised.[157]

CONCLUSION & RECOMMENDATIONS

[156] Immoral Trafficking (Prevention) Act (ITPA), No. 104 of 1956.
[157] State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 14.

The recommendation of the Malimath committee on reforms of criminal justice system and the Dr. Prof Madhav Mennon committee suggested that since the enactment of the IPC many developments have taken place, new forms of crime have come into existence, punishment for some crimes are proving grossly inadequate and the need for imposing only fine as a sentence for smaller offences has failed. The committee specifies that IPC prescribes only maximum punishment for the offences and in some cases minimum punishment is also prescribed. Judges exercised his wide discretion within the statutory limits. They are no statutory guidelines to regulate his discretion. The committee is therefore in favour of a permanent statutory committee being constituted for the purpose of prescribing sentencing guidelines.

The Supreme Court has emphasized on the fact that superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender had not issued any guidelines. Countries like the USA. U.K. AND Australia have already done so. In a recent case of *Narender Singh v. State of Punjab*, the Supreme Court has emphasized the need of sentencing guidelines stating that there are provisions, statutory or otherwise in other countries, which may guide judges for awarding specific sentence. However, in India we do not have such sentencing policy till date. The Supreme Court also stated that the prevalence of such guidelines may not only aim at achieving consistency in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well. The Supreme Court in *Mohd. Chaman v. State* taking note on a decision of the Supreme Court of USA in *Gregg V. Gorgia*, the court observed – critically examined, demonstrate the truth of what we have said earlier, that it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards. Nevertheless, these decisions do show that it is not impossible to lay down broad guidelines as distinguished from iron – cased standards, which will minimize the risk of arbitrary imposition of death penalty for murder and some other offences under the penal code.

To reduce the fear of crime a policy maker may seek to impose higher punishments on certain categories of crime. An assessment of levels of fear would then be required. In India the moral seriousness of killing a human being varies with differential reasons. Prevalence of caste based society and a strong system of caste and religion among masses creates controversies far beyond the regular control of a sovereign. The Gujarat riot is a prime example of that. Only an

indirect measure of moral seriousness can help qualify public opinion as a legitimate point in determining sentencing policy.

The prolonged loggerhead between the two pillars of our Constitution is nothing but buying time for themselves at the cost of the lives of innocents. Because, once a death penalty is awarded to an innocent based on imperfect facts and non-designated mitigating circumstances, his life would come to an end. It is not just that there is disparity in sentencing, or in cases of death penalty or rape but there are other offences in the IPC which clearly brings similar disparities into light. It is time that we should imbibe the finer aspects of the successful Justice System in various parts of the world and make our Criminal Justice System stronger and more efficient.

AN ANALYSIS ON THE AMBIGUITY OF ARTICLE 12 UNDER CONSTITUTION OF INDIA,1950

- JAGRITI ROY

INTRODUCTION

"What are we having this liberty for? We are having this liberty in order to reform our social system, which is full of inequality, discrimination, and other things, which conflict with our fundamental rights." -B R Ambedkar

The state has been defined under article 12 of the constitution of India which is contained under PART III of the constitution which includes a long list of fundamental rights and provides substances protection as well as procedural rights apart from guaranteeing basic civil rights and freedom to all and also safeguard the rights of the minorities and protect religious freedom and cultural rights. YouTube video the main objective of having a declaration of the fundamental right in the constitution of India was to provide elementary rights such as the right to life and personal liberty freedom of speech and expression and to maintain the sovereignty of India.

Indian Constitution has six broad categories of fundamental rights:

Article 14-18 deals with the RIGHT TO EQUALITY

Article 19-22 deals with the RIGHT TO FREEDOM

Article 23-24 deals with the RIGHT AGAINST EXPLOITATION

Article 25-28 deals with the RIGHT TO FREEDOM OF RELIGION

Article 29-30 deals with the CULTURAL AND EDUCATIONAL RIGHTS

Article 32-35 deals with the RIGHT TO CONSTITUTIONAL REMEDIES

According to the given definition of the ‘state’ under article 12 of the Indian Constitution, it includes the Government and Parliament of India, the Government and Legislature of each of the states, and all local and other authorities within the territory of India or under the control of the Government of India. As per the definition, it is clear that the actions of the executive and legislature can be challenged in the court if it is found to be violating fundamental rights but the term ‘local and other authorities’ is ambiguous because it is nowhere defined in the statutes. The definition has been evolved from time to time by the apex court of the country that is in the Supreme Court’s judgment. Earlier it was considered to be that the state was

mainly concerned with the maintenance of law and order and the protection of life, liberty, and property of the subject but over time with the wake of administrative law, such restrictive concept is not efficient to limit and control the power exercised by administrative authorities.

As the state is evolving and developing the definition of State should also evolve following the need. The welfare state takes care of a man from birth to death and to achieve the desired goals, various public sector undertakings and departments have been formed. In India, the inequality level is not enormously skewed and the recent growth has accelerated to reduce poverty if power is executed in a just, fair, and reasonable manner.

The members of the drafting committee did not find State as a necessary evil but rather as a means to an end; State as a means and welfare of the people being the end and with that aim in the mind they had imposed a positive obligation on the State to realize certain socio-economic rights when the state is capable of doing so.[158] The positive duty is discharged by the state when it uses its administrative authority which has conferred power to them in the wake of the welfare state. The checks and balance can only take place if it falls under the purview of the state.

However, in this era of Globalization, Free Market, and World Economy, a step has been initiated by the government of India to encourage privatization in performing welfare, commercial, and other such activities which were earlier considered to be the functions of the State as welfare State. But this has raised several questions of constitutional importance generally and exercise of Fundamental Rights, their violations, and the claim relating to infringement of Fundamental Rights. The case of Air India v Nargez Mirza[159] would have never happened if the same fundamental right to equality would have been violated by a different airline company because Air India comes under the State[160]

In the changing nature of India's democratic developmental state, the struggles for more inclusive development are occurring at various levels of the body politic, eventual prospects for making India's growth process more inclusive are not encouraging.[161] If rapid growth continues, some of this will necessarily 'trickle down' and help the poor.[162]

[158] Constitution of Inida,1950,Article 37
[159] 1981 AIR 1829.
[160] Constitution of Inida,1950,Article 12
[161] Indian Constitutional Law: The New Challenges, *available at:* http://www.nmu.ac.in/Portals/46/SLM/LL.%20M.%20Paper-II.pdf.
[162] ibid

SCOPE OF THE STATE

John Locke says that the purpose of the state is common good or the good of mankind state is a body that comes into existence for maintaining the life and upholds and upholds the dignity of its purpose is to maintain the dignity and lifestyle of its individual by holding their rights individual cannot have rights if the state fails in its function.

The members of the drafting committee wanted to create a society wherein all its citizens shall have all the basic fundamental rights. Thus, it became the obligation of the state to enforce all the fundamental rights to the citizen so that they could overcome the oppression cast upon them in the British Era. Individuals need constitutional protections against the state[163]. The rights conferred under Part III of the Constitution of India guarantees against the state and distinguishes them from violation of rights by privates. Private actions are protected by sufficient laws[164]. The majority of fundamental rights are enforceable against the state only[165]. Supreme Court observed that the object of Part III is to protect the rights and freedoms guaranteed under this part against the invasion of State. Part III and Part IV carry a theme of Human Rights, Dignity of Individuals, and also the unity and dignity of the nation. These parts respectively act as a Negative Obligation of the State and that is not to have interfered with the Liberty of the Individual, and Positive Obligation of the State is to take steps for the welfare of the Individual.[166]

AUTHORITY- It means a person or a body exercising its power or having a legal right to command and conferred with official responsibility for a particular area of activity and having a moral duty or legal right or ability to control others[167].

As per the definition of the Cambridge international dictionary – *"Authority means a public administrative agency or corporation having quasi-governmental powers and authorized to administrative producing public enterprise. Authority in law belongs to the province of power. Authority in administrative law is a body having jurisdiction in certain matters of a public nature".*

A government company carrying on commercial activities incorporated under the Companies Act which does not have any power of making rules or regulations binding as law, nor the

[163] Pandey, JN, "The constitutional law in India", Central Law Agency,49th edition pg59
[164] Shamdasani V Central Bank of India AIR 1952 SC 59
[165] VidyaVerma v Shivnarain AIR 1956 SC 108
[166] State of West Bangal v. Subodh Gopal Bose, 1954 SCR 587.
[167] Ujjambai v state of u.p (1963)1SCR778(968-9)

power to administer or enforce such rules or regulation is not an authority under this Article. The word "authority" includes Central and State. It also includes all constitutional or statutory authorities who have power conferred by law, including even autonomous bodies, and whether or not they may be regarded as agents or delegates of the government. A religious endowment board has the power to make rules or bye-laws under a statute. The chief justice of the high court has the power to make rules having the force of law.

INCLUDES - This word indicates that the definition is not exhaustive. Hence, even though the definition expressly mentions only the Government and the Legislature, there might be other instrumentalities of State action within the sweep of the definition. The non-mention of the Judiciary does not indicate that the Courts are intended to be excluded from the definition[168].

LOCAL AUTHORITY- It means that it is an authority that is legally entitled to or entrusted by the government with the control or management of a local fund hence dock labour board is a local authority but a gram panchayat does not come within the ambit of the local authority[169].

EVOLUTION OF THE ARTICLE 12

Under article 12 of the Indian Constitution, the term 'State' includes:

- 'The Government and Parliament of India i.e., Executive and Legislature of the Centre
- The Government and the Legislature of each State i.e., Executive and Legislature of States.
- All Local Authorities.
- *Other Authorities* within the territory of India, or under the control of the Central Government.'

While the scope and extent of Parliament, executive, legislature, local authorities are well defined, the term 'other authorities' has been left ambiguous in nature. Let's review the evolution through various judicial pronouncements.

Ejusem Generis

In the case of **The University of Madras by the Registrar v. Shantha Bai[170]**, the madras high court evolved the principle of *'ejusdem generis'* i.e. of the like nature. It means the authorities

[168] UjjamBai v. State of U.P., (1963) 1SCR 778 (968-9)
[169] University of madras v santa bai AIR 1954 sc 67
[170] AIR 1954 Mad. 67.

of nature, which are similar to the other, mentioned in the articles and which perform governmental or sovereign functions. However, in the case of **Rajasthan State Electricity Board, Jaipur v. Mohan Lal[171], the** Supreme court held that 'The rule of ejusdem generis cannot be applied to interpret this expression in as much as there is no common feature running through the named bodies under the *other authorities* in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. The body created under a statute by the government will be considered as other authorities in article 12.[172]

Doctrine of Instrumentality

However, the ambiguity was still not resolved as no particular test was laid to know the inclusiveness of other authorities. Therefore, to provide a clear and liberal interpretation the supreme court in the case of **Ramana Dayaram Shetty v International Airport Authority of India[173]** it pointed out that the corporations acting as instrumentality or agency of government would obviously be subject to the same limitations in the field of constitutional or administrative law as the government itself, though in the eyes of law they would be distinct and independent legal entities.

Functional and Deep & Pervasive Control

In the case of **Som Prakash v. Union of India[174]**, the Supreme court held the company to fall under Article 12. The Court emphasized that the true test for the purpose of whether a body was an 'authority or not was whether it was formed by a statute, or under a statute, but it was 'functional'. This interpretation was also broad was not enough to define inclusiveness. In the case of **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,** [175] the Supreme Court held that 'These are merely indicative indicia and are by no means conclusive or clinching in any case. Whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government'.

Public Corporation

[171] AIR 1967 SC 1857.
[172] Sukhdev Singh v. Bhagat Ram, AIR 1975 SC 1331.
[173] 1979 AIR 1628.
[174] AIR 1981 SC 212.
[175] (2002) 5 SCC 111.

A public corporation is a hybrid organization combining the features of a business company and a government department.[176] Their powers are set out in the Acts which created them and they are empowered to make regulations subject to the doctrine of ultra vires.[177] In a number of decisions, it was held that Public Corporations and Undertakings fall within the definition of State, therefore these corporations and undertakings are subject to Part III of the Constitution. Thus, State Bank of India v. Kalpaka Transport Company, AIR 1979, State Financial Corporation,[178] Central Inland Water Transport Board[179], Steel Authority of India Limited[180], Warehousing Corporation[181] , etc. would fall in the category of 'State' and their acts have to be in conformity with the Fundamental Rights.

Registered Societies

In ***Sindhi Education Society v. Chief Secretary, Govt. of NCT of Delhi***[182] it was held that unless all the three aspects of state control viz; 'financial control,' 'managerial control' and 'administrative control' are exercised by the State over any other authority, society, organization or private body it will not be allowed to term that society, organization or body is State. Thus, it can be stated that in the case of registered societies extensive state control is mandatory. The functional test, granting aid cannot play a prominent role here.

Government Companies

In the case of Government Companies, Supreme Court held that 'unless entrusted with any public

[176] D.D. BASU, 'Administrative Law', (4th, Kamal Law House, Kolkata 2000). ('A public corporation is set created by a statute whenever it is intended to take over some industry or social service from private enterprise and to run it in public interest. Instead of giving over the public corporation which has a separate legal entity and can carry on the function with autonomy subject to the ultimate control of Parliament and the Government., mainly on policy matters, so as to safeguard the interest of the public.').
[177] Ibid
[178] Workmen Food Corporation of India v. Food Corporation of India (1985) 2 SCC 136; Satpal v. Himachal Pradesh Food Corporation (1977) SLR 447.
[179] Balbir Kaur v. Steel Authority of India Ltd., (2006) 6 SCC 493.
[180] *Steel Authority of India ltd* v. *National Union Water Front* (2001) 7 SCC 1.
[181] *K.L. Mathew* v. *Union of India* AIR 1974 Ker.4; *U. P. Warehousing Corpn.* v. *Vinay,* AIR 1980 SC.
[182] 1 IT 2010 (7) SC 98.

duties, by statute[183] or it constitutes an agency of the government,' no relief can be had against a government company, in a proceeding against Article 32 or 226 of the Constitution.[184] However, with development at its peak and delegation of power, the interpretation by the judiciary at every instance is not possible. Globalization though required is becoming a threat to the traditional concept of 'State'.

Nationalized Banks

In-***State Bank of India, Canara Bank v. Ganesan***,[185] Madras High Court held that 'nationalized banks are falling within the ambit of the other authority, the right to get salary is a right to property and the nationalized banks shouldn't act arbitrarily and illegally withholding the salary of their employees for the period during which they had worked.' However private banks do not fall under the ambit of Article 12.

Though trying hard, in the post-globalization era, the judiciary is unwilling to further expand the scope of the definition. The intention of the judiciary is evident from the observation made by Santosh Hegde J. in ***Zee Telefilms v. Union of India***[186]

'in view of the need of the day this Court in Rajasthan SEB and Sukhdev Singh seeing the financial approach of the nation however it fit to extend the meaning of the term "other authorities" to incorporate bodies other than legal bodies…. It is to be noticed that meanwhile, the financial strategy of the Government of India has changed… and the State is today removing itself from business exercises and focusing on administration rather than on the business. In this manner, the circumstance winning at the hour of Sukhdev Singh isn't in presence, for now, thus, there is by all accounts no compelling reason to additionally extend the extent of "other authorities" in Article 12 by legal translation for the present.'

Maybe the fundamental design is in question in wake of LPG, there is a more prominent need currently to extend the extent of public government assistance is to be guaranteed.

NEED FOR WIDENING THE DEFINITION OF STATE

A. ERA OF LPG (LIBERALIZATION, PRIVATIZATION, GLOBALIZATION)

[183] *Agarwal* v. *Hindustan Steel* AIR 1970 SC.
[184] *Praga Tool Corporation* v. *Immanuel* AIR 1969 SC 1306; *CF Guru Gobindh* v. *Sankari Prasad* AIR 1964 SC 254.
[185] (1989) ILLJ 109 Mad.
[186] 2005) 4 SCC 649.

The idea of globalization has an extremely long history and it is a complex peculiarity having social, social, monetary, legitimate, and political aspects. Progression and privatization has its base on the monetary element of globalization.[187] The economic element of globalization alludes to the augmenting and extending of the worldwide progressions of exchange, capital, innovation, and data inside a solitary coordinated worldwide market. The current methodology is seen that state is wasteful in offering types of assistance for government assistance state. It thinks that in a changing globalizing worldwide and transnational climate the State isn't just its very own specialist change, yet additionally a significant wellspring of advancement of globalization itself.[188]

In India, the seeds of globalization were planted in the mid-1980's nevertheless the genuine push was given through the New Economic Policy (1991) (NEP) of the P.V. Narasimha Rao Government.[189] The strategy contrasted from the method of economy arranged by the designers. The composers imagined that essential businesses ought to be possessed or constrained by the State and the private area should acknowledge the public plan and fit to it and this was in consonance with the blended economy vision, which was profoundly attached to the Indian Constitution.[190]

The arising pattern of globalization will in general bring to India a neo-liberal culture and that is very clear from the financial measures embraced by the government.[191] The public authority is eliminating the bottlenecks, which will prevent unfamiliar speculation and influence unfamiliar financial backer certainty and unfamiliar capital flow.[192]Disinvestment in open areas and privatization bring about subverting the privileges of laborers since they are not limited by sacred commitments. The public law of the country is unequipped to manage these

[187] Moore K. & Lewis D.V, *The Origins of Gloalization*, (1st edn, Routledge 2009). Liberalization and privatization are the economic rules set by globalization to amplify the goal of achieving a free market economy).

[188] Cenry P., *The Dynamics of Financial Globalization: Technology Market Structure and Policy Response,* 27 POLICY SCI. 319-342 (1994).

[189] Anil Kumar Jain & Parul Gupta, *Globalization: The Indian Experience*, MAINSTREAM, February, 2008 at 8. C.P.BHAMBHRI, THE INDIAN STATE FIFTY YEARS 210-237 (1997).

[190] This was one of the key components in the Election Manifesto of the Indian National Congress during the first General Elections of 1952.

[191] Chandrasekhar, For the sake of Foreign Investments, FRONTLINE, *2019 available at: https*://frontline.thehindu.com/profile/author/?page=2&urlSuffix=C.P.-CHANDRASEKHAR (last accessed at March 8, 2020)

[192] Ibid

tribulations.[193] Privatization of instructive areas is moreover a declaration to the moving of government assistance obligation to private actors.[194]

India plans to sell a few state-claimed firms to nearby or unfamiliar firms to raise up to 600 billion rupees ($8.5 billion) by March 2020, a senior Finance Ministry official said on Monday. The government wanted to sell Bharat Petroleum Corp Ltd, co-ordinations firm Container Corp of India Ltd also, obligation loaded Air India before the finish of the 2019/20 monetary year[195] The information as of now shows how government firms are changing over into private. This shows that to the extent a firm is under the government, crucial freedoms of the individual stay alive, but when it is sold the dependable privileges try not to exist. Despite the fact that the capacity performed by the organization is the same, the idea of proprietorship will characterize the presence of crucial freedoms.

Notwithstanding, with the start of the New Economic Policy, the state is letting completely go over the economy. At the point when the states are progressively taking on the proportions of liberations, disinvestment, denationalization, they are losing their administrative powers as well as, more significantly, their redistributionist limit too. David Schneiderman featured this viewpoint concisely while examining worldwide speculation rules, in the accompanying words[196]

'The development of a transnational system for the assurance and advancement of unfamiliar speculation challenges straightforwardly the recommendation that worldwide capital has not unmistakable, institutional texture. This rules system in total endeavors to mold a worldwide embroidered artwork of monetary arrangement, property freedoms, furthermore, constitutionalism that standardizes the political undertaking of neo-progressivism. This venture propels the possibility that the state ought to retreat from the market, limit its monetary capacities, and limit its redistributionist limit. The oddity is that when establishments of majority rule government are being repeated worldwide, majority rule government isn't

[193] *BALCO Employee's Union (Regd.*) v. *Union of India,* A.I.R 2002 S.C 350 (there can be no judicial of the economic policy of the government.)

[194] *BALCO Employee's Union (Regd.*) v. *Union of India,* A.I.R 2002 S.C 350 (there can be no judicial of the economic policy of the government.)

[195] Economic Times, 'Government aims to sell Air India, other firms by March 2020, says official *available at:* https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/government-aims-to-sell-air-indiaother-firms-by-march-2020-says-official/articleshow/71258818.cms (last visited on March 6, 2020)

[196] David Schzeiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* 2 (Cambridge University Press, London 2008).

trustworthy in monetary issues.' Upendra Baxi communicated comparative perspectives as well, who expressed that 'liberation means not a finish of the country state yet a finish to the redistributionist state.'[197] It might likewise be relevant to allude to the perceptions made by Surya Deva on this aspect[198]:

'Considering that the arrangements advancing advancement essentially, including privatization and disinvestment, have been pronounced to be established and are digging in for the long haul, it should be viewed as how they sway on the sacred commitment of the Indian state to advance basic freedoms – regardless of whether exemplified as mandate standards or as "changed over basic freedoms". For instance, can the Indian government actually set up a simply friendly request by limiting/taking out disparities, guarantee that there is no convergence of abundance or method for creation, secure maternity benefits in the private area, or ensure climate and untamed life? The equivalent could be said in regards to the plenty of freedoms made by the legal executive by bringing order standards into key privileges. For instance, it isn't clear how the public authority intended to guarantee that different qualities of globalization don't preposterously influence, for instance, the right to work or the option to protect.'

Global Corporations, Multi-National Companies, and so on are progressively playing out the capacities that were generally connected with the State.[199] In such a plan of fundamentally slanted power elements, the financial and social liberties of residents may be disregarded with no response to change the infringement. Subsequently, it is basic for the State to ensure the Fundamental Rights against the private elements also.

B. **Protection of Fundamental Rights in the Era of LPG**

The changing situation of LPG has presented genuine questions about the application and adequacy of the principal privileges and the uncertainty is predominantly founded on the ground that with the expanding job of private venture and the diminishing job of the State crucial freedoms would be abused more by the private endeavors than by the State[200]. To protect is just conceivable through the development of the idea of State under Article 12.

[197] Upendra Baxi, *The Future Of Human Rights*, (2nd edn, Oxford University Press, New Delhi 2012)..

[198] Surya Deva, 'Globalization and its Impact on the Realization of Human Rights: Indian Perspective on a GlobalCanvas' in C. Rajkumar, K. Chockalingam (eds.), Human Rights, Justice, and Constitutional Empowerment 236 at 257 (2003).

[199] Nolan, Aoife, *'Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland*', 12 *IJOCL* 61-93 (2014).

[200] V. N Shukla, *V.N. Shukla's Constitution Of India* (7th edn, Eastern Book Co, Lucknow, 2003).

The court has anyway advanced the guideline of Article 12. The Court accepted that the State has the positive commitment to guarantee the right to equity and non-segregation to the applicants and by augmentation, to force sanctions against the private body that encroaches on something similar. Subsequently, the job of the State was not restricted to a negative commitment of guaranteeing there is no encroachment of central privileges without anyone else, rather it is seen as an 'underwriter and defender' of the Fundamental Rights[201].

In Bodhisattwa Gautam v. Subhra Chakraborty[202] Court granted remuneration to an assault casualty for infringement of her Right to Life under Article 21, regardless of any causal connection with the episode also, the State. In Vishakha v. Territory of Rajasthan[203] the court maintained the infringement of basic privileges and held that because of the absence of an enactment tending to inappropriate behavior in the work environment, the State is liable for not satisfying its positive commitments of ensuring and securing the freedoms of the ladies, in any event, when such an infringement happens by a private substance.

In ***Bharat Kumar M. Palicha v. Province of Kerala,***[204] the court declined to offer any viewpoint and held that without administrative activity with respect to the State Court has the sufficient ward to give a revelatory alleviation to the applicants since the appeal depends on infringement of major rights.[205] In cases like ***M.C.Mehta v. Association of India***[206], ***Mackinnon Mackenzie, and Co. Ltd v. Audrey D'Costa***[207], ***Subhash Kumar versus Province of Bihar***[208], ***Indian Council for Enviro-lawful activity v. Association of India***[209] and a lot more the court have given the need to infringement of essential privileges and positive commitment of the state to guarantee that private bodies are not abusing the right ensured under Part III of the constitution.

The above cases show that the courts have taken on the idea of circuitous horizontality. The approach implies when the Fundamental Rights are enforceable against other private

[201] *Dr. Noorjehan Safia Niaz* v. *State Of Maharashtra*, PIL No. 106 of 2014.
[202] 1996 SCC (1) 490.
[203] (1997) 6 SCC 241.
[204] AIR 1997 Ker. 291.
[205] *Id* at para. 18.
[206] AIR 1988 SC 1115.
[207] (1987) 2 SCC 469.
[208] AIR 1991 SC 420.
[209] 1996 SCC (3) 212.

entertainers, such application happens 'horizontally'.[210] However, in the current situation of restricted administration and unavoidable privatization, the likelihood of encroachment of major privileges with respect to non- State entertainers is gigantically more than the State.[211] In ***M.C. Mehta v. Association of India,***[212] the Supreme Court of India had the event to consider on the inquiry whether a private substance releasing significant public capacities would go under the meaning of 'different specialists'. Notwithstanding giving great signs on including private partnerships as State Bhagwati J., in any case, left the inquiry unanswered. He believed 'it is through imaginative translation and strong advancement that the basic liberties law has been created in our country to an astounding degree and this forward walk of the development of the common freedom can't be permitted to be stopped by unwarranted misgivings communicated by status-quoits.' capacities to summon Article 12. The courts ought to be restless to develop the extent of the definition of state in order to subject the state in the entirety of its bunch exercises, regardless of whether through regular people or through corporate or private substances, to the essential commitment of the key privileges. Endeavors ought to be made by the courts to grow the scope and ambit of these specialists, rather than to constrict their significance and content.[213] From the above legal works, it is perfectly clear that the legal executive is removing itself from including non-state entertainers inside the domain of Article 12.[214] The case stays significant as the Court saw that the American teaching of State Action may be pertinent in India, and that, every one of the elements of a body decided as 'State' need not be public.

CONCLUSION

The constitution should be kept fit to meet the social change. This work is in the possession of the legal executive. As of now non-state on-screen characters are the power communities in the general public. An enormous piece of the principal organizations are at their hands and

[210] Singh, M. P., *Fundamental Rights, State Action and Cricket in India*, (13 Asia Pacific Law Review, 2005).
[211] Florczak-Wątor, M.,'*Horizontal Dimension of Constitutional Social Rights', World Academy Of Science, Engineering And Technology*', 9 *IJSBEEBIE* 1349–1352 (2015).
[212] AIR 1987 SC 1086 (The question that arose in MC Mehta was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution).
[213] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.
[214] *Zee Telefilms Ltd*. v. *Union Of India*, AIR. 2005 SC 72 (Santhosh Kumar J. ruled that in a democracy there is a dividing line between a State enterprise and a non State enterprise, which is distinct and the judiciary should not be aninstrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.').

there is an abatement in the work of the state as a specialist co-op. In this setting, the legal executive requirements to relook into the believability of tests determined by the Court under Article 12 to maintain principal privileges against private bodies. A revelation of private performers as 'State' is fundamental on account of the changing position of State in the light of the neo-liberal changes enrolled from 1991 onwards. It is appropriate to take note of the expressions of MacIver in such a manner 'government alone can secure individuals against the extremely tight grip these goliaths (transnational partnerships), looking for their own benefit, can, in any case, attach on purchaser and specialist and investor the same.

SUGGESTIONS

- Absorption of the Political Metamorphosis of the Concept of State in the political sense - from government assistance to neoliberal state should be given due significance.
- the purposive and liberal methodology should be taken on by the court while deciphering Article 12 considering the realities and conditions of each case. Translations can just give lifeblood to the generally dormant expressions of the Constitution.
- Regulatory control would be held as do the trick, the non-dutifulness of which will prompt unusual results.
- A restraint equation as is set down in Ajay Hasia and R.D.Shetty where the term 'other authority' and 'instrumentality or organization' were treated as equivalent, will prompt unnatural birth cycle of equity.
- Horizontal Application of Fundamental Right will assist with guaranteeing equity in the evolving situation. It ought to be taken on and created by the Courts in cases including private entertainers furthermore, infringement of essential freedoms by them and furthermore in instances of State Inaction.
- Implementation of the Recommendation of National Commission on the Review of the Working of the Constitution (NCRWC) changes to Article 12 of the Constitution should be completed to incorporate private non-state elements like BCCI which release significant quasigovernmental or significant public capacities, which have

repercussions on the life and government assistance of the local area under the meaning of State.[215]

[215] National Commission to Review the Working of the Constitution, Enlargement of Fundamental Rights, May 11,2001, *available at:* http://lawmin.nic.in/ncrwc/finalreport/v2b1-3.html (last accessed at March 10, 2020).

CYBER DEFAMATION IN INDIA AND ITS EFFECTS ON VICTIMS

- ANKANKSHA MISHRA

INTRODUCTION

"Of all grieves that harass the distressed, Sure the most bitter is a scornful jest" – Samuel Johnson.

One of the greatest invention in mankind's history is invention of the internet. It comes with numerous benefits, one if which is connecting strangers. In fact major social networking such as facebook and twitter were based on this very idea. But some people have been misusing these sites to tarnish the reputation of other people in the eyes of the public. Cyber defamation is one of the major issues on the internet today. It is an act of intentionally defaming another individual or a party via a virtual medium (mostly the internet). It could be both written and oral. What makes it such a major issue? The aftermath. There have been multiple reports have suicides caused by cyber defamation. Many countries, including India, have made several provisions to tackle this problem. But the question is, are they enough? And if not what can we do about it?

AIM

The aim of this research is to study cyber defamation laws in India, its cases in India and the impact it leaves on the victims.

RESEARCH QUESTIONS

Via research, the author aims to answer the following questions

1. What is cyber defamation and why is it harmful?
2. What are the provisions taken by India to curb it?
3. What does the victim go through and how can we improve the situation?

RESEARCH OBJECTIVES

The author via this research aims to achieve the following objectives

1. To define cyber defamation and its harmful effects
2. To examine the current laws taken by India to curb it
3. To understand the impact on the victim and analyse the management of after effects of cyber defamation in a victim's life

RESEARCH METHODDOLOGY

The author has adopted 'Doctrinal Research' methodology for this paper.

The author shall be undertaking the following methods to provide a comprehensive view on the topic:

1. Identify existing laws regarding cyber defamation in India
2. Identify various cases of cyber defamation in India
3. Analysing the laws and finding improvements if required
4. Examining how it effects the victims
5.

In today's world social media has become an integral part of a person's life. It gives an insight into a person's private life to general public. People here can like, share or comment on anyone's picture.[216] While its main motive maybe to bring people from different parts of the world together on a virtual platform, some people tend to misuse it. One of the major issues faced by people today is cybercrime. In this paper the author has focused on one specific type of cybercrime – Cyber defamation. Cyber defamation is defined as publishing defamatory content with a malicious intention against another person. Since it's done on an online platform, this content can be spread across the entire world and tarnish the reputation of an individual up to such an extent that it could cause mental harassment to the individual.[217] In this paper the author discusses the damage caused to a person by cyber defamation, what are the provisions taken by India to curb it, what does the victim go through and how can we improve the situation.

CYBER DEFAMATION LAWS IN INDIA

As mentioned earlier, cyber defamation is a serious issue in the 21st century and thus many countries, such as India, have taken steps to curb this grave issue. Cyber defamation is both a civil wrong and criminal offence. There are two types of defamation – libel and slander. Libel is in written form whereas slander is in verbal form. Under the Information Technology Act of India, 2000, section 66 A states any person who spreads any information that is false or invalid to cause insult, hatred or injury could be sentenced up to 3 years of imprisonment along with a fine. [218] However this law was scrapped after the case of Shreya Singhal v. Union of India[219] because it violated the freedom of speech. Indian Penal Code too has several sections such as

[216] Replogle E, "Fame, Social Media Use, and Ethics" (2014) 29 Sociological Forum 736

[217] Zakaria Z and Harun SA, "Cyber Defamation Awareness Among Adolescent: Case Studies in One Private Institution" (2019) 1529 Journal of Physics: Conference Series

[218] Sarmah A, Sarmah R and Baruah AJ, "A Brief Study on Cyber Crime and Cyber Laws of India" (2017) 4 International Research Journal of Engineering and Technology 1638

[219] *Shreya Singhal vs Union of India* [2015] (Global Freedom of Expression , Columbia University)

section 499 a person is said to have defame another person if he/she/them has made any false statements by either speaking or writing or depicting through signs in such a way that could harm any individual's reputation in eyes of a sane person. A third party has to be aware of the defamatory comments made by this person for it to be defamation. Section 500 specifies the punishment for the same. The person who is liable shall be imprisoned for 2 years or fined or in some cases both. Section 469 deals with forgery (a person would be made liable if he/she/them makes a fake account or a false document and harms another person's reputation).[220]The person could be imprisoned for 3 years. Section 503 deals with criminal intimidation (a person would be made liable if he/she/they threat to tarnish reputation of an individual by electronic means).[221]One can report cyber defamation at Cyber Crime Investigation Cell at the National Cyber Crime Reporting Portal.

WAYS IN WHICH CYBER DEFAMTION EXIST

In order to curb this problem we need to understand in what ways cyber defamation can exist. The major source of this issue is social media. We live in the age where internet rules our lives. According to a source 3.81 million people use social media accounts in 2020.[222] That is more than half of the current population. Apart from social media, Social networking sites also play a major role here. Social networking sites such as Twitter, Facebook or Instagram are immensely popular. People here tend to give an insight into their private lives. This can make them vulnerable as some people might twist the facts and issue false statements that could hurt them. Lack of awareness amongst the public could make them prone to cyber defamation. They could also receive emails containing threat to tarnish their reputation. These are some of the ways people might be a victim of cyber defamation. [223]

CYBER DEFAMTION CASES IN INDIA

The first case that author wishes to discuss the case of SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra[224] where a company employee sent vulgar and derogatory emails to his fellow

[220] Asthana S, "Defamation in the Internet Age: Laws and Issues in India" (*ipleaders* June 1, 2019)

[221] Rani S, "CYBER SECURITY: TYPES AND CONSTITUTIONAL PROVISIONS" (2019) 6 IJRAR 597

[222] Dean B, "Social Network Usage & Growth Statistics: How Many People Use Social Media in 2020?" (*backlinko* August 12, 2020)

[223] Dashora K, "Cyber Crime in the Society: Problems and Preventions" (2011) 3 Journal of Alternative Perspectives in the Social Sciences

[224] *Smc Pneumatics (India) Pvt Ltd vs Shri Jogesh Kwatra* [12 February, 2014] (Indiakanoon)

employees and the company's subsidiaries with an intent to defame the company. Delhi district court made the employee liable and restrained him from defaming the company further. Kalandi Charan Lenka v. state of Odisha [225]is another case where the petitioner was stalked online and fake accounts were created in her name. The culprit went onto send obscene messages to the petitioners friends and continued to defame her. In the case of M/S Spentex Industries Ltd. & Anr. vs. Pulak Chowdhary[226] the defendant had to pay the plaintiff Rs. 5,00,000 along with the charges of suit after he sent defamatory emails to the International Finance Corporation, World Bank, President of Republic of Uzbekistan and UZEREPORT. Be it company or an individual, through these cases we can clearly see that grave damage was intended by defendant/ culprit which harmed the individual or the business of the individuals.[227]

EFFECTS OF CYBER DEFAMATION ON VITCTIMS

Warren Buffett once said it takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently. As seen clearly in the paragraph before, Cyber defamation can cause damage to a business. The damage could be worth crores at times. It is going to create a bad impression on the consumers and affect the company's business. Talking about individuals, cyber defamation could cause mental harassment by making the victim uncomfortable and feeling vulnerable. In certain cases the victim commits suicide because he/she/they can't tolerate the hate, embarrassment or in certain cases online prosecution. Online prosecution is a comparatively new term. Often regarded as social media trial, the public accuses a person on online platforms such as twitter and grill that person as a lawyer grills a witness in a court room. This puts a lot of pressure on the victim as he/she/they are scrutinized without them being at fault. [228]

CONCLUSION

It is clearly evident that cyber defamation is a matter deep concern and it needs to be taken seriously. It is often neglected and seen as minor issue. But it's about time that we as society shed light on this matter and make more and more people aware about this. Cyber defamation is when a person with a malicious intention spreads false information to tarnish the person's/ company's reputation. This causes grave damage to that particular. There are provisions in our law to combat this problem **but are they enough?** We could definitely add/improve it. In case

[225] *Kalandi Charan Lenka vs State Of Odisha* [2017] (indiankanoon)
[226] *M/S Spentex Industries Ltd & Anr vs Pulak Chowdhar* [1 May,2019] (indiakanoon)
[227] Rana SS, "The International Finance Corporation, World Bank, President of Republic of Uzbekistan and UZEREPORT" (*mondaq* January 7, 2020)
[228] Nappinai NS, "Cyber Laws Part II: A Guide for Victims of Cyber Victims "(*Economic Times* November 3, 2017

of defaming and individual, while the defendant/culprit does face imprisonment and has to pay fine, **he/she/they should also be liable to pay for the victim's therapy if needed** as he/she/they were the ones responsible for it. While defaming a company, **they should also be held liable for the distressed cause to the employees and thus should also be liable for their betterment**.[229] **Awareness regarding this topic needs to be promoted more often** because this issue is more evident in current times. Instagram recently came up with a feature where it gives a warning to user that information in that particular post might be false. [230] This is a really great initiative on their part and should be adapted by other social networking/media platforms. Journalists or authors need to be absolutely sure while publishing anything defamatory content on an individual. **It is really important for us to teach children and youth** (who are the target audience for social networking sites) **about responsible usage of social media and networking sites.** While making provisions for this issue , **law makers need to make sure that they aren't infringing freedom of speech** like in section 66 A of IT Act, 2000. **Criticising someone or making content for humour such as parodies (with innocent intention) are not equivalent to defamation. This needs to be highlighted while educating people about social media usage. Social media is for everyone. It is our duty to make sure our actions on an online platform doesn't cause inconvenience to anyone as everyone is supposed to enjoy it. We all need to be aware about our responsibilities as in today's world we can't afford to ignore these matter. Let's not trivialize things and start using these privileges wisely.**

[229] Kumari S, "Dimensions of Cyber Defamation: Critical Study" (*Legal Service India* 2019)
[230] Constine J, "Instagram Hides False Content behind Warnings, except for Politicians" (*Tech crunch* December 17, 2019)

IS THE INDIAN INTELLECTUAL PROPERTY LAW SAFE AND FAIR FOR USERS AND OWNERS?

- REVA GUPTA

Abstract

The quantity of material created by various technological devices and apps has increased rapidly in recent years. Corporations receive enormous value from the study of 'deep learning,' and they also outline their strategic plan based on it. Although the corporate efficiency is undeniable, the burning question is whether individuals have any influence over how information about them is gathered and managed by others.

The evolution of "technology" and the "dynamism" of the judiciary order provide insight into contemporary "privacy and data security problems". As a result of activities, privacy has become a worry for everyone, while security has stopped growing. Every "data management programme" must include Intellectual Property Rights (IPR) management". The designer of a database or other data resource will be intrigued in who owns it and how it might be used against us. Anyone who expects to use the tool with "data" provided in part by others should make sure that any "legal, ethical, or professional obligations" to the "data supplier" are satisfied. Personal rights is emphasised by "data protection", and this "individual's freedom" is challenged by "stranger intervention". By any means required, it is vital to keep a halt to the "stranger's action" on the "person's activities".

What are some of "India's most essential data privacy laws"?

Because private information reflects an "individual's personality", "Indian courts", including the "Supreme Court of India", have recognised that the "right to privacy" is an integral aspect of the "right to life" and "personal liberty", which is guaranteed to "every citizen" under the "Indian Constitution". As a result, the "Indian judiciary" places a premium on the "right to privacy", which can only be strengthened for justifiable reasons like as "national security" and "public interest". However, like the constitution of India, there are a variety of other legal frameworks that talk about data security and these are as follows:

1. 1. "Information Technology Act of 2000 (the "IT Act")": The "IT Act" makes it possible to defend against such "infringements" using "data" from "computer systems". This legislation governs provisions to "protect data", "files", and "resources from illegal usage". Individual responsibility for "illegal" or "criminal" use of "computers", "computer

systems", and "stored information" is included in this provision. However, the "foregoing section" does not consider the roles of "Internet access providers", "network service providers", or "data processing firms". In "Section 79", the "bodies' liability" is further reduced by the inclusion of prerequisites for "information" and "best efforts" prior to the "amount of fines". This assumes that the "network service provider" or "outsourcing service provider" will not be made responsible for the "infringement of any third-party data" made available to him because it illustrates that the "infringement" or "violation" was obligated without his wisdom or that he exercised "adequate infringement".

2. "Intellectual Property Laws": "The Indian Copyright Act" mandates the imprisonment of anyone who "infringes on intellectual property", regardless of the "severity of the offence". According to "Section 63B" of the "Indian Copyright Act", anyone who purposefully uses an unlicensed copy of a "computer programme" on a computer faces a "minimum of six months in prison and a maximum of three years in prison". It's worth noting that Tribunals accept data as having "copyright". It has been argued that constructing a list of "clients/customers" by "putting effort", "resources", "effort", and "talents" to the task constitutes "literary work" for which the author holds "copyright" under the "Copyright Act". As a result, if a record is "infringed" upon, the "parent outsourced firm" may have remedies under the "Copyright Act".

3. "Indian Penal Code, 1860": The "Indian Penal Code" does not directly address "data privacy violations". Similar violations under the "Indian Penal Code" must be used to place blame for these "infringements". "Credit Information Companies Regulation Act", 2005("CICRA"): According to the "CICRA", "credit information" about "persons in India" must be accessed in accordance with the "CICRA Regulation's privacy rules". Agencies "collecting and storing data" are responsibility for any "misuse or alteration of the data" that may occur. The "CICRA" has specified a "stringent structure" for "credit and finance information" for people and institutions in India, based on the "Fair Credit Reporting Act and the Graham Leach Bliley Act". The "Reserve Bank of India" recently issued a circular outlining the parameters of the "CICRA Regulations", which enforce "strict data privacy guidelines".

How "IPR promotes and ensures data privacy"

The combination between "data protection" and "intellectual property legislation" must be studied as the ideal path to the functioning of "computer-related databases". Anyone who is aware of an infringing copy of the programme on a "computer" is responsible for "infringement" under "Section 63B" of the "Indian Copyright Act". The aspects of a "person's right" to "intellectual property" include "effort, competence, and judgement". The conservation of the "owner's right" to that work is "vital" in the case of "legislation" on "specific works of literature, fiction, music, art, and film". However, the "Copyright Act" makes it impossible to discern between "data privacy" and "database security". The aim of "data protection" is to preserve "individual privacy", but the object of "database security" is to protect the "ingenuity" and "investment" made in the "collection, verification, and presentation of databases. Access", "anonymity", "ownership", and "facts" are all legal characteristics that are common to all "relationships".

These guidelines, on the other hand, can be used to assess the "rights and duties" of "professional and business record keepers". "Records", rather than being only "physical objects", may be subject to "property law" as legal items that serve as "evidence of a legal connection". The "diverse interests" of "participants" in "record keeping" are exemplified by "access and intellectual rights and obligations". The demand to keep "identifying information" over time in order to create "rights and obligations" must be "balanced" with "privacy protection".

"Ownership" of "large data" and its "relationship to intellectual property rights"-

According to "IBM", "2.5 quintillion bytes of data" are created every day in the existing situations. Given the complexity of the internet age, information gathering, collection, interpretation, and export of Deep Learning should be as versatile. It's also claimed that 90 percent of the data in today's world was created in the last two years. The term "big data" is frequently used to describe the fast growth of data and the ease with which it can be accessed, both in informal and formal forms. It can be divided into three parameters to achieve an accurate definition of big data:

"Speed" is a phrase that refers to the degree at which data transforms in real time. The theory behind this explanation is that all of the intelligence gathered is derived from historical data,

resulting in a data network. It examines the various speeds at which data operations occur, as well as the connection between two sets of data updates.

In present era, data comes in all forms and sizes. The many modes in which descriptive and predictive data are entered are included on the exposition. Information is typically held at the micro level and is rarely accessible for assessment, making it tough to "comprehend, integrate, and analyse the information".

"Unstructured data" from "social media and other media types" is referred to as "volume". With the expanded storage of "sensor and machine-to-machine data", massive data levels can be used for "analytics, assisting in the drawing of appropriate conclusions".

[231]Data analytics is extremely useful from the aspect of a "business, society, or government", because the more information collected, the more precise the studies will be. As a result, judgement, organizational effectiveness, fuel savings, and risk mitigation would all better. However, knowledge alone cannot bring about a digital age. To have an impact on it, it must be properly collected and preserved. If it is obtained, it is crucial to assess it effectively, and right results must be drawn and effectively shared. From unique gear to "copyrighted software" that collects and interprets data capture and retention, "intellectual property" plays a critical role in the creation of this system. Thus, unlike any physical asset, "intellectual property" is an invisible asset that is vital to a firm's operation and is difficult to value. This makes reaching the entire depth and breadth of Intellectual Property impossible, ensuring that it cannot be exploited, shared, or enjoyed. However, with more stringent "Intellectual Property rules" in place around the world, this fluid asset now has daring mission. Now, how does the security of "Big Data" come from "intellectual property rights"? It accomplishes this by:

"Copyright" — Unlike "patents", real-world details cannot be "patented". " Data representation and analysis" require a significant sense of creativity, and system processing is unique, thus it falls within the protection umbrella.

"Commercial secrecy" - Because the data generated, as well as the assessments and activities that go with it, are particular to each firm, they are kept as a proprietary secret. Whether or not

---

[231] https://carnegieindia.org/2020/03/09/will-india-s-proposed-data-protection-law-protect-privacy-and-promote-growth-pub-81217

the matter is a trade secret is evaluated by the strategic benefit and leave feedback taken to keep it hidden. In this sense, big data is delivered in accordance with IP legislation.

"Patents" - While data in its original form cannot be "copyrighted", it can be covered under "patent rules" when "processed and evaluated". There is a case to be made for putting in place the structure for such a full study that a great deal of ingenuity is demanded. The "patent system", on the other hand, has a history of being a shaky data and condition monitoring centre. "Intellectual property restrictions[232]" do exist, however. Every region has its own "intellectual property system", with entities that require investigation. Individual innovations are so possible to predict, and their stability under actual policies is closely scrutinised. As a reason, there is some ambiguity in terms of "Intellectual Property ownership and rights". Over the next two years, big data growth is likely to expand, prompting tighter and more "uniform Intellectual Property restrictions". The first thing is to decide whether privacy is wanted; nevertheless, in order to be fully efficient, data must be gathered and tables must be developed.

"India's data privacy laws and current legislation"

The Indian Law as well as several governmental legislation protect "property rights". "For example, Article 21 is divided into two sections: the personal component of the right to privacy and the business feature of the right to livelihood. Data privacy is a necessary means of survival that cannot be taken away without due process. If any individual violates the same, liability can be sought under Article 21. Similarly, Article 300A of the Constitution guarantees everyone the right to own and enjoy their land. As a result, a person's property can only be taken away by the power of law".

On the other hand, "Section 22" of the "Indian Penal Code (IPC)" provides a broad definition of the term "movable property", which encompasses all corporal properties. Because knowledge stored in the form of paper info and on a system can be moved from one site to another, the word "include" in the segment implies that content stored in the form of written data and on a system can be readily and safely regarded as transportable material. "The Supreme Court concluded in R K Dalmia v Delhi Administration that the term property was used in the IPC in a much broader connotation than the phrase movable property". There is no

[232] https://suyati.com/blog/how-big-data-can-help-in-understanding-intellectual-property/

way of limiting the meaning of the term "land" to movable or immovable when it is used without qualifiers. Whether an "offence" described in a particular version of the "IPC" can be conducted with relation to any exact sort of property may rely on whether that specific piece of housing is subject to the behaviours protected by that law, not on the definition of the word "property". There is also nothing that disables the data attribute from the "IPC object idea".

The "Information Technology Act of 2000 defines data (as defined in Section 2(1)o)" as a structured transmission of data, wisdom, factual data, conceptual frameworks, or advice that are intended to be retained, sequestered, or processed in a computer network or network of computers and may be in any form. The principles of network and storage records, as well as the security and management rules for them, are sufficient to combat "data property infringements in cyberspace".

Unless the intent dictates otherwise, "literary work" contains "computer programmes, tables, and compilations, including computer databases, according to Section 2(o) of the Copyright Act of 1957". As a basis, the "Copyright Act of 1957" also covers data company ensures. The same can be seen if we present an unbiased and current analysis of the "Copyright Act's provisions".

What is a "company's liability"?

The interaction between "data security" and "business affairs" is frequently cantered on a basic viable strategy. The firm is impacted in a lot of formats. It is vital that data be "accessed, disclosed, shared, and processed in a secure manner". "Data processor or computer controller custody" has played a key role in the private companies. It is sometimes the corporate organization's obligation to share or not share. This is the battle between commercial and residential groups over regulatory authority.

Anyone who needs to listen information or order a service remotely must first input their details. Submitted as part of this material, the question of whether the organisation's data adheres with governmental emerges. "For example, in the banking industry, it is the banker's responsibility not to expose the information in their possession, resulting in a breach of the client's duty of confidentiality and confidentiality. Insofar as it clashes with the right to information and public information, the scope of banking clients' right to privacy has been limited".

The "Securities and Exchange Board of India Act (1992)" creates the "Securities and Exchange Board of India (SEBI)" to monitor and regulate the use of specific creditworthiness. The

"Security Exchange Board of India", which is empowered to have widespread access to personal sector data connected to the "securities market", provides "reactive government" access under the Act.

"SEBI" is only permitted to enter if it has reasonable cause to believe that: an insider or deceptive corporation is "trading, unfair trading practises" are being used, or "securities transactions" are being handled in a way that is toxic to the shareholder, the "intermediary", or any other group associated with the "securities". The Act reinforces "reactive information access" and disclosure by "imposing penalties" on anyone who fails to supply the necessary information.

“Issues” and “challenges”

The majority of arguments believe that India should embrace a "rights-based" "data security paradigm" rather than the current "consent-based" model. The data controller in the "consent-based model" is "free to access, process, and share data" with any third party as long as the user's consent has been gained. At the time of consent, however, not everyone is aware of the "practical ramifications of indiscreet data sharing". The "rights-based model", on the other hand, gives users more control over their data while allowing the "data controller" to verify that those "rights are not violated". Users will have "more control over their data" as a result of this. The Hon'ble Supreme Court created a "triple criterion" for the State's intervention with basic rights in the case of "K. S. Puttaswamy (Retd.) v Union of India". When a state may intervene to "protect legitimate state interests", here must be a law in place to "justify an invasion of privacy, which is an express provision of Article 21 of the Constitution; the form and "" enforcing a restriction" must fall within the "reasonableness area" specified by "Article 14", and the means adopted by the "legislature must be proportionate". The "Hon'ble Supreme Court's decision" gives "Indian citizens" the ability to seek "judicial remedies" if their "data privacy rights are violated". It could have an impact on "India's tech companies' privacy and security standards". Users have the "option of filing charges" based on "wrongdoing as well as exercising their fundamental right to privacy".

Suggestions

Companies who break this principle would also be "violating Indian constitutional restrictions" on "informational privacy as well as users' property rights". Simultaneously, "consenting individuals" must be able to accept responsibility for their decision. The owners of data shall be held "liable" for any "damage of this nature". They should not, however, be

required to take "precautions against prospective data misuse". The regulation would address a wide range of market flaws. Redirecting to a "more broad-based strategy" would necessitate a shift away from responsibilities like "privacy by design and data protection officer recruitment".

The remaining "preventative regulatory obligations" will be prioritised based on the following "cost-benefit analysis": Firms who do not handle "data intensely" or "process sensitive personal data" should have their "obligations lowered in a proportion" to the dangers associated with their activities. One such reduction may be the "removal of the necessity that businesses handle data manually" in order to "benefit from the exemptions".

"Legislative ambiguity" must be "reduced": To promote "business certainty", the bill's "ambiguity must be reduced". The bill now has "three key flaws" that could result in "significant regulatory ambiguity". Second, there isn't a "uniform way of describing sensitive personal information". Second, it does not specify the conditions under which "cross-border data transfers" will be accepted. Second, it gives the "government the authority" to enable the "interchange of non-personal data" without any "limitations" on how it can be used or compensation paid.

It should be balanced with "suitable provisions" in the legislation itself stating that the "government has the authority to exempt any government agency from the "bills' demands". The government should not be granted the "authority to select which agencies are exempt" and which safeguards should be applied to them.

Landmark judgments

The Supreme Court first reviewed whether the right to privacy is a basic right in the case of "M.P. Sharma and Ors. V Satish Chandra", in which a search and seizure warrant was issued under "Sections 94 and 96(1) of the Code of Criminal Procedure". The Supreme Court of the "United States ruled that the authority of search and seizure did not violate any constitutional provisions". Furthermore, the Hon'ble Supreme Court declined "to recognise the right to privacy as a fundamental right guaranteed by the Indian Constitution", stating that the "power of search and seizure" is an overarching state social security power that must be regulated by "legislation in all legal systems".

Following that, in "Kharak Singh v State of Uttar Pradesh and Ors", the Hon'ble Supreme Court considered "whether surveillance of the accused by night home visits was an abuse of the right guaranteed under Article 21 of the Indian Constitution", raising the question of "whether

Article 21 included the right to privacy". The Supreme Court ruled that such "oversight was in fact in violation of Article 21".

Furthermore, the majority of judges concluded that because Article 21 does not clearly provide for a privacy clause, the right to privacy could not be regarded as a fundamental right. The Supreme Court stated, "Having regard to our best examination of the situation, we are plainly of the conclusion that surveillance of the suspect's movements does not infringe on the freedom protected by Article 19(1)(d)". We also do not believe that "Article 21" has any significance in this instance, as argued by the "petitioner's experienced counsel".

As previously stated, the "right to privacy" is not incorporated in our Constitution, and hence a breach of a fundamental right provided under "Part III does not represent an attempt to assess individual movements in terms of privacy invasion".

Nonetheless, in the case of "A.K. Gopalan vs. The State Of Madras", Hon'ble Mr. Justice Subba Rao's minority decision recognised privacy as an important part of citizen rights, observing the following: "Personal liberty is defined as freedom relating to or relating to an individual's person or body; in this sense, it is the polar opposite of physical restraint or compulsion".

Following that, in the case of "Gobind v State of M.P[233].", the police's power to conduct house surveillance was questioned, as it "violated the right to privacy guaranteed by Article 21 of the Indian Constitution". The Supreme Court of India concluded that police legislation did not follow the essence of personal liberty, and recognised the "right to privacy as a fundamental right protected by India's Constitution", but favoured and refused its evolution on a case-by-case basis. A case-by-case implementation method, according to the "Supreme Court of Hon'ble, would invariably entail the right to privacy".

The Hon'ble Supreme Court concluded in "People's Union for Civil Liberties (PUCL) v Union of India" that they have no reservations in supporting the "right to privacy" as part of the right to "living" and "personal freedom" under "Article 21 of the Constitution". "Article 21 will be drawn where facts in a given case indicate a right to privacy. A right like this can only be extended “in the absence of a legal procedure".

[233] https://suyati.com/blog/how-big-data-can-help-in-understanding-intellectual-property/

The "Aadhaar Card Scheme" was challenged in the landmark case of "Justice K.S.Puttaswamy(Retd) Vs. Union Of India" on the grounds that it violates a "constitutional right to privacy enshrined in Article 21 of the Indian Constitution" to collect and "collect demographic and biometric data" on the "country's citizens for various purposes". "Part III of the Indian Constitution, which recognises citizens' fundamental rights, would include private life, according to the ruling".

Conclusion

"Computer systems" hold vast volumes of "sensitive data", making data "protection a core human right". "Non-authorized access to computers", "computer systems", "computer networks/resources", or "unlawful alteration", "deletion, addition, modification, destruction, duplication, or transmission of data", among other things, are defined by "information technology regulation". The liability is defined in "Chapters IX and XI of this Act".

"Financial data, health data, business proposals, intellectual property, and sensitive information are all examples of data that should be protected". Today, however, "anyone's personal information" from anywhere can be viewed at any time, posing a new danger to "privacy and secrecy". "Technology" has become more widely accepted as a "result of globalisation". "Different nations have enacted different legal frameworks in response to the increasing demands, such as the DPA (Data Protection Act) 1998 in the United Kingdom, the ECPA (Data Protection Act (1986) in the United States, and so on". The "right to privacy" is recognised by the "constitution", but its growth and development is totally dependent on the "justice system". It is very difficult to keep information from leaking into the "public domain" in today's linked world if someone is devoted to putting it out without using severely repressive measures. "Data protection and privacy" are addressed in part by the "Information Technology (Amendment) Act 2008", but not entirely. "Specific rules for the techniques and purposes of absorbing privacy and personal information must be established in the IT Act".

References

- https://carnegieindia.org/2020/03/09/will-india-s-proposed-data-protection-law-protect-privacy-and-promote-growth-pub-81217
- https://hbr.org/2019/12/how-india-plans-to-protect-consumer-data

- https://www.mondaq.com/india/data-protection/655034/data-protection-laws-in-india–everything-you-must-know
- https://suyati.com/blog/how-big-data-can-help-in-understanding-intellectual-property/

UNDERSTANDING THE BALANCE BETWEEN TRADITIONAL IP RIGHTS AND OPEN ACCESS INITIATIVES

- SHUBHRANSHU TRIPATHI

Abstract

The need for patent law arose with the demand for founders to regulate their work. The writers wanted to make a profit out of their work but not without good morals, they also wanted a fair credit for their work. Decades later, open access arises in the belief of lowering the back control of asset protection that limits the access and movement of ideas to the public. Although both face a similar subject, namely, art, science and literature. The controversy, however, remains the discrepancy in the notion that copyright and patent may link the scope of additional scientific research in educational institutions and may reduce the quality of research after that which has led to lower publication. The economic crisis is climate rather than a necessity to protect the OA by increasing the issue of IP and increasing patent grants.

Key words: – OA- Open access, IP- Intellectual property, IPR, Budapest open access initiatives.

Introduction

Intellectual property can be defined in a variety of ways. One way to describe it is as a group of intangible assets owned by a legal entity that is used to protect the use of those intangible assets by those who are allowed to use them. However, in basic terms, it can be argued that protection is provided through the construction of one's mind or intellect. Intellectual property, in general, refers to rights arising from any intellectual activity, be it in the fields of economics, science, literature, or the arts.

After all, it is important to stay ahead of the curve in terms of innovation and innovation so that we can compete in the difficult technological and commercial markets. India is best known for its expertise in software engineering, missile technology, lunar missions or Jupiter, and other technological fields. In terms of registered patents, industrial construction, trademarks, and other IPR assets, on the other hand, are lagging behind. According to a recent study by the US Chamber of Commerce, India is ranked 29th out of 30 countries in the global IP list. The situation is most relevant to policy makers and the country as a whole. The IPR and its policy framework are closely linked to the growth of any community. The inventions died due to a

lack of awareness of the IPR, which led to a high risk of breach, economic loss, and the end of years of professionalism in the country. As a result, there is an urgent need for IPR information to be disseminated to promote indigenous discovery and development in the field of research and technology.

In a time of public health crisis, the need for timely access to quality issues to help the community becomes more acute. Open movement is always promoted as the most effective way to overcome access restrictions created by IPRs. In response to COVID-19, for example, a number of IPR owners' demands have been made to allow open movement to access appropriate secure objects. These IPR governance processes aim to increase access while keeping public interests at the forefront of open spaces. These programs address a long-standing and major problem for IPR structures: the lack of effective and efficient actions that serve the public interest. In addition to their obvious benefits, we believe that both patents and patents provide limited responses because they are unintentional, and cannot effectively address the accessibility issues that exist for good (public).[234]

In Section 4, we look at the existing legal doctrines as an alternative and complementary solution to the access restrictions obtained. There are various options available to both patents and patents to remove access restrictions for the benefit of the community. We say that, although both beliefs may be helpful, they are actually the same.[235]

IPR registration actually consists in protecting a person's professional creative work and works of art, identifying its source, and granting the owner unlimited rights to that particular product for a period of time. The main purpose of many open access programs is to assist individuals and organizations in overcoming obstacles. In addition, to assist individuals and organizations in overcoming legal issues, exchanging and building information, and resolving global issues. The effort encourages open distribution of access and provides instructions on how to disseminate information without favouring any person or group of people. It can also encourage new ideas and solutions to major social problems, and provide a platform for all entrepreneurs and individuals to compete on an equal footing with larger and more resourceful enterprises. As a result, these concepts are designed to encourage and facilitate access to people who may not otherwise be able to afford them.

[234] Otero (2020); Brown, Ng and Adebola (2020); Stothers and Morgan (2020); Trimble (2020); "COVID-19 Special Issue" (2020) 42(9) EIPR; Contreras et al. (2020a); Gurry (2020).

[235] The public welfare goals of IPR have been the subject of a rich body of literature, 2011 (last visited on, Oct 6th 2021).

'Overview of open access initiative'

The concept and practice of providing free access-initiated Budapest Statement on Open Access published in 2003 by the Budapest Open Access Initiative 2002 and the Berlin Declaration for Information on Science and Humanities in 2003. Its purpose is to provide unlimited access to research and literature. Allows users to read, download, copy, distribute, print, search, transfer or retrieve data from the Software or use it for any legal purpose other than financial or legal liability. There are many types of coloured OA. Hybrid OA Magazine is a mixture of gold and green, providing OA access to certain articles while charging subscriptions for access to others. Distributers two-fer by expanding the APC while the membership rate stays as before. Bronze open access let clients read articles liberated from cost yet they need authorized papers. Such articles may not be accessible for reuse. Precious stone/platinum OA Journals don't charge any distribution expense nor distribution charge.[236]

The effort encourages open distribution of access and provides instructions on how to disseminate information without favouring any person or group of people. It can also encourage new ideas and solutions to major social problems, and provide a platform for all entrepreneurs and individuals to compete on an equal footing with larger and more resourceful enterprises. As a result, these concepts are designed to encourage and facilitate access to people who may not otherwise be able to afford them.

The basics of open access, as can be shown, contravene one of the most fundamental concepts of intellectual property rights, which is to safeguard intellectual property. The rationale of the parties wanting legal protection for their IP is mostly commercial profit. The patent helps provide a framework to share protected work without letting go of any commercial benefits like product sales and licensing royalties. For instance, a person can patent his scientific tool and then sell the same to a huge corporation.

Creators may wish to benefit from their art. A copyrighted artist / songwriter for a piece of music, for example, is less likely to contribute to his or her work. They often monetize their copyright by making live copyrighted songs, selling copyright, selling records and broadcasting. Traditional IP rights remain a dominant force in the sector, albeit a state of affairs and increasingly complex systems such as the Music Modernization Act of 2018, which aims to simplify and renew the copyright law for digital access.

[236] Andrew Beckerman-Rodau, 'The problem with intellectual property rights: subject matter expansion' (2005) 13 Yale J.L. & Tech.

The availability of appropriate academic assets is essential to the development of knowledge. These documents are becoming more and more diverse, international, expensive, digital, and hidden behind technical barriers to comply with license limits28. Documents and other materials that should be available free of charge online are those provided to the public by scholars without charge. The OA includes not only peer-reviewed peer-reviewed journals, but also any unpublished warnings that researchers may choose to post online for discussion or to inform colleagues of important research results. By the word "OA" in the manual, it means that any user may read, download, copy, distribute, distribute, search, or link to the full text; identify them for indexing, transfer them as data to the software, or use them for any other legal purpose, without having to deal with any financial, legal, or technical barriers other than those that are inseparably connected and gaining student access. The authors manage the integrity of their work and the right to be well received and articulated by OA-related barriers to reproduction and distribution. The role of copyright in this domain is by the authors who control the integrity of their work and the right to be properly recognized and identified. It is therefore refreshing to define OA as a concept that removes “price barriers” (e.g., subscription fees) and “permit barriers” (e.g. copyright and license restrictions) on “royal monetary entries” (e.g., free scholarly works for authors), making it available “with limited use limits” (e.g. author adjective) 31. As a result, many OA digital functions. The reason for this form is not related to the fact that the cost of producing the first digital copy of the work increases afterwards.[237]

‘Overview of traditional IP right’

Intellectual property traditionally refers to the rights granted to mental creations such as inventions and creative works. These rights, often viewed as patents, copyrights, trademarks and trade secrets, are supported by a legal framework that gives the owner a limited monopoly over a specific product. IP is found almost everywhere and is crucial for economic growth in some sectors including entertainment, publishing, pharmaceuticals, consumer electronics and apparel.

Patents: Patents provide a framework for the sharing of secure work without sacrificing financial benefits such as the sale of products and stocks through the payment of licenses. Each designer, for example, can authorize a medical gadget and sell it to a big business. The company can often produce a gadget at a reduced cost, lowering the cost to the user. It is a win-win

[237] Mahendra Kumar Sunkar, ‘Copyright Law in India’, http://www.legalserviceindia.com/article/l195-Copyright-Law-in-India.html, (accessed on 6th Oct, 2021).

situation for the copyright owner, the beneficiary of the invention, the business that sells gadget to the customer, and the buyer who saves money on those tools.

Copyrights: IP protection often benefits creative people who want to protect the things they create, such as music, writing activities, movies, and computer software. Without copyright protection, a product may be degraded, duplicated, and harassed without paying the original author.

Trademarks: IP protection is especially beneficial for businesses that use a unique name, brand or design to identify their products. The movie "Coming to America" features a hamburger chain called "McDowells", which is similar to McDonald's. According to the joke, it has similar logo and similar ingredients like "Big" burger and milkshake. In the real world, lumbering elephants are exposed by the aggression of speeding midgets. Trademark Protection protects businesses that develop a product and seeks to protect it from "copies", as well as customers whose market is disturbed.

The utilitarian notion of the "largest good for the greatest number of individuals" (Wilkof, Theories of Intellectual Property: Is it Worth the Effort? 2014) & the owner regains control of his property, which is now subject to public scrutiny. While patent and copyright laws protect works, trademark laws protect business insignia. Because the transmission of knowledge is required in an age for study, artistic and creative endeavours, and economic operations that benefit society, the duration of copyright or patent legislation is not maintained indefinite but for a certain number of years. Non-fiction and non-fiction novels that are entitled to copyright protection under copyright law, whereas common findings do not. Plants, for example, do not qualify for a patent. Agricultural or agricultural method; mathematical or business method or individual computer system or algorithms; presentation of information; local status of integrated circuits; an invention that is, in fact, traditional or compound knowledge or a repetition of knowledge (Act on Indian Patents).[238]

An idea-expression dichotomy is a belief in copyright law that protects the representation of a basic concept in the work rather than the actual self. Procedures, System, Choreographic Works, Building Methods, Speeches, and Fashion are also not protected under copyright law. The issue of copyright law is that it applies to anything from literature, theatre, or movies to

[238] 'China Becomes Top Filer of International Patents in 2019 Amid Robust Growth for WIPO's IP Services, Treaties and Finances' (2020), https://www.wipo.int/pressroom/en/articles/2020/article_0005.html, (Accessed on 5th Oct, 2021).

rigorous research. Creating and directing literature / theatre activities is one thing; making and benefiting from R&D businesses is another thing. These days require significant investments, state-of-the-art technology, and up-to-date infrastructure, which may not be able to meet basic needs.

Access to Protected Subject-Matter

Keywords such as "access," "public," and "open" remain deceptive concepts when analysing systems that protect the public interest, because they are often informed or relied on various opinions, directives, and settings. Before moving on to paragraph 3, we will go through more definitions of "access" and "community."

What Is Access?

To get started, content access is affected by both IPR and non-IPR parameters. Which of these parameters naturally forms the shape, or the content can be accessed and reused.

IPRs are built on the idea of reducing access to the affected material. This empowers founders and founders (hence the name “creators”) to limit and use access to titles in a timely manner and subject to limitations of protection.[239] When a topic is important enough that it may be necessary, access that uses is usually a means of payment to the right holder. Legally, the ability to use access is intended to encourage creators to produce relevant content content. In anticipation of further discussions, this short-term limit is believed to be of great benefit to the long-term interests of the community (i.e., the community or society as a whole). The public interest is given in the short term by reducing that set of special rights. In order to create long-term benefits to the public interest, IPR adjustments are based on measuring access and short-term limitations. This method is based on the fair value of the protected title content.[240]

The restrictive features of IPR are removed, minimized, or modified by open movement. Open navigation, on the other hand, is not usually done within or by the same regulatory mechanisms that have established the IPR regime. They certainly emerged as a response at lower levels in the strong regulatory and legal frameworks. Because of this, open movement is better understood as private IPR order tactics.

Conflict between IP and open access

[239] What is Open Access? https://www.researchgate.net/deref/http%3A%2F%2Fwww.diqital-scholarship.org%2FcwbAA%2FhatlsOA.htm, (last visited on Oct 5th, 2021).

[240] Intellectual Property Rights and Access in Crisis, https://link.springer.com/article/10.1007/s40319-021-01041-1#Fn1, (last visited on, Oct 5th 2021).

Because IP contains compelling and acceptable rights, it prevents others from copying the author's work while also granting exclusive copyright to the work. An attempt to approve, use, and duplicate the original author's work is known as open access. Copyrighted copywriters can keep their work in an open space or send a stamp to a magazine that you can or will not do easily. APC may or may not be charged for the magazine. When the magazine charged the APC, they were given a Creative Commons license. When an author submits his or her work to a magazine, the author grants the magazine permission to reserve the rights to distribute the work. If permission to publish is denied, the author or publisher can add the work to the archive list or errata list. Government agencies, educational institutions, assistants, and marketing products and companies fund books that offer free access to scientific material. Membership, premium subscriptions, donations, sponsorships, and other forms of funding are used by some publications, while others rely on volunteers. For writers, relinquishing their rights is not free. Most writers who contribute to opening up access channels do so for non-profit reasons. Educational institutions or governments fund research and publication costs.[241]

Striking the balance

Collaboration between government, industry and academia may have the unintended effect of curbing the flow of information among academics, according to many concerns raised by experts. The organization that sponsors the research may distort the information and disrupt the results in favour of them. In addition, authors may be concerned about their ignorance of the concept of copyright or fear of widespread copyright infringement, as well as weak infrastructure or lack of appropriate resources, as publishing requires high bandwidth internet connectivity. It has also been noted that research conducted at smaller universities leads to concerns about cheating in large institutions. The programmers in OA Software can simply change the software, what it does, and how it looks. Software produced by companies or individuals is copyrighted or used with limited access for the same reason. They are kept hidden and tightly guarded by the companies that make them.[242]

Finding a balance between traditional intellectual property rights and open access to projects can be difficult, because artists may also think about the consequences of doing something more accurately, but they may also remember that what made their creation possible. However,

[241] Nirja Shah, 'The "Balancing Act" of Copyright & Open Access' (Open Access, 20 July 2016), http://openaccessindia.org/balancing-act-copyright-open-access/, (accessed on 5th Oct, 2021).
[242] https://doaj.org/, (last visited on 6th Oct, 2021).

more recently this rift has emerged within the Open COVID Pledge where the sector is coming together to fight the epidemic. The purpose of the committee is to mobilize organizations around the world to share their blockchain assets so that we can fight COVID collectively. This pledge will help sooner or later in the defeat of COVID-19 and may benefit all mankind. Participating in this pledge can benefit companies by generating benefits and pursuing the benefits of established industries.[243]

Stabilizing between common IP rights and open-source projects can be difficult. More creators may want to take advantage of their IP at the same time as thinking more about the effects of a major right, and how coming something can benefit the community as a whole.

One place where this merger can be seen is the Open COVID Pledge. The purpose of this Declaration is to encourage "organizations around the world to exercise their intellectual property rights and rights in the fight against the COVID-19 epidemic." Creative Commons currently owns the Open COVID Pledge, with other developments that organizations have promised to include untouched password verification, access to health records and 3-d-published respirators. There are three types of licenses that a provider can issue, as well as an "open COVID license" that expires over a period of time.[244]

Failure to offer protection to highbrow assets can also negatively impact the enterprise and funding. Opposite of that is personal ownership of thoughts and facts that may make marketplace competitive with inflated charges and tough access to technological know-how and literature. The writer or proprietor of intellectual assets can restrict or rate exorbitantly high fee for its use, IP additionally has an ability of monopolizing a quarter. Over bearing IP may result in opposition inside the commercial enterprise and markets. However, for the legislators, the intention has been to offer enough prison protection to maximize incentives to inspire innovative works, to ease free float of thoughts and to minimize market competitiveness. Several rules and doctrine together with Right of integrity, Moral proper, truthful use doctrine etc. Embodies these sentiments. Ignoring this balancing concept can either result in over-safety or below-protection of highbrow property.

The Benefits of Participating Within the Pledge — Success in the fight against the deadly COVID-19 virus will benefit humanity around the world and call for international partnership

[243] Intellectual Property Rights VS Open Access Initiatives, https://www.kslegal.co.in/intellectual-property-rights-vs-open-access-initiatives/, (last visited on, Oct 6th 2021).

[244] Understanding the Balance of Traditional IP Rights and Open Access Initiative, https://michelsonip.com/traditional-ip-rights-and-open-access-initiatives/, (last visited on, Oct 5th 2021).

and cooperation. In addition, pledge companies gain public popularity for their partnerships, creating a goodwill that brings business benefits elsewhere. However, taking a pledge after the end of the epidemic may impose capacity limitations on the licensing of IPs. There are compliance issues that must be addressed and resolved before swearing. Also, how are derivative works resolved? While many agencies have taken the Pledge and supplied get entry to to various patents and copyrights, these concerns have prevented a few key industries, including clinical device companies and pharmaceuticals from fully embracing the standards of the Pledge.[245]

With the professional economy introduced over the past 60 years largely due to traditional IP rights incentives, the question of how to achieve stability through the great benefits of openness to principal admissions can be a project, an opportunity, and it may have a new new effect on its own. In the words of Stan Muller of Crash Course, "we will try to avoid simplified intellectual property as opposed to binary technology. The concept we have to choose between reducing the end result of professionalism and hard work, or undermining modern realities of sharing our networks is not straightforward.

The purpose of the committee is to mobilize organizations around the world to balance their intellectual property so that we can fight COVID collectively. This pledge will ultimately help within the defeat of COVID-19 and may benefit all humanity. Participating in this promise can help teams further by helping with good construction and lead to future industry benefits.

Conclusion

In an entirely knowledge-based system, the rights to high-quality property are central to today's Social Development. IPR is a basic requirement to be part of a residential environment in addition to strong global trade without the Dissemination of IPR information and its implementation, creating a change environment is absolutely impossible. It is important that policy makers integrate IPR with a simple educational program and encourage IPR registration by encouraging designers and creators. India has all the resources in terms of raw materials, low-cost workers, new and creative commitments. There is no doubt that India and other developing parts of the world will actually use their limited value in international exchanges with the help of property patents.

[245] The balance between IPR and open access initiative, https://allindialegalforum.in/2021/04/28/the-balance-between-ipr-and-open-access-initiatives/amp/, (accessed on 5th Oct, 2021).

In a closed partnership where outside actors are not welcomed with open arms, as they will be competing or dangerous in that institution, the Open access gadget is a beacon of desire. OA-supported courses in any of the participating provinces are essential for promoting scientific expertise and literary development. Providing access to the public with essential technologies, literature and technical knowledge enhances the technical skills, art and strength of a man or a woman. Legislatures around the world should strive to provide the highest protection of intellectual property of authors / founders in industries outside of them. Governments should sell fair competition within the market in order to attract bigger clients. While there is a need for intellectual property management in general there is a need for collaboration between university-enterprise or property-owner. The dotted line of equality between the two can be strengthened with the help of keeping in mind the sacred law that the purpose of any law is to strike a balance between granting greater freedom to its citizens without violating the rights of others.

There is no doubt that in the current context, the available mode of balancing intellectual property and public reality with CC and OA. Without the rapid advent of CC and OA use, it is doubtful for miles that those approaches have gone a long way in eliminating or minimizing the effects of procurement on high public access. However, the use of CC and OA should be increased for non-electrical activities.

ANALYSIS ON AMENDMENT PROCEEDINGS OF PLEADINGS

- SRUTI DEVAN .K

INTRODUCTION :

The Code of Civil Procedure, 1908 prescribes the provisions through that the amendments to pleadings is introduced throughout the trial method. Since the bygone era, the idea of virtually all the legal systems was that the courts should have unrestricted Associate in Nursing unguided power to amend the pleadings therefore on more the explanation for justice while not inflicting an iota of injustice to the mortal party. Rule seventeen of Order VI provides for the powers to the courts in Bharat to permit the amendments. Adding to the current, the council, the Supreme Court and different Courts in Bharat are implementing this follow since the ages. In 1990s, lots of considerations were raised on the extent of usage of this facility in the majority the cases litigated until then. numerous reports found that no stone has been right-side-out to not utilize this provision and therefore there's a requirement for a re-look. This scientific research is concerning the modification of Pleadings.

CONCEPT OF PLEADINGS :

Order VI deals with pleadings generally. Rule one of that Order defines pleadings as a plaint or written statement. Plaint is employed to apprise the other party of the case that's filed against him or her. Framing of pleadings is that the most basic and should be treated lots of caution. the rationale is that, once the pleadings square measure framed, nobody has the facility to amend them expect for the choose on his discretion. within the absence of the pleadings, if any proof is created by the parties, that can't be thought-about. it's a settled law that no party should be allowed to venture on the far side the pleadings. there's lots of judicial proceeding during this space on the scope and extent of the freedom to amend the pleadings. within the Common law, the pleading follow was a mechanical and rigid exercise specified misspellings of minor details weren't allowed .The object and purpose of the pleadings is to form the other party realize the case he must face within the due course of your time. the entire object of the pleadings is to bring parties to the definite problems, scale back prices and to confirm the

speedy delivery of justice. This conjointly ends up in the conduct of the honest and unflawed trial and also the pleadings should contain all the essential material facts so the mortal party isn't removed abruptly. The parties square measure ordinarily expected to confine to the pleadings. one among the foremost vital objects of permitting the modification to pleadings is to stop multiplicity of suits. If the modification is wanted seeking Associate in nursing supportive relief isn't allowed, then the party may need a remedy to lift a similar within the resulting case. The amendments concerning constructive subject should not be allowed by the courts.

AMENDMENT OF PLEADINGS :

Order VI, Rule seventeen of the Code of Civil Procedure provides for the "Amendment of pleadings." the availability enumerates that a court could permit any party at any stage to amend the proceedings if it considers that to be simply. All such amendments that square measure necessary for the aim of decisive the important queries in tilt between the parties shall be created by the court. A condition has been another to the current provision through the CPC (Amendment) Act, 1999, that intends to limit the powers of the court's discretion of modification of pleadings. It says that no application for the modification shall be allowed by the court once the commencement of the trial, unless the court is of the opinion that even so the parties' due diligence, they might not have raised the matter before the commencement of the trial.

Rule sixteen of a similar Order provides for the placing out of the pleadings. This was conjointly subjected to the modification within the year 1976. It provides that the Court might at any stage of the proceedings order to amend or take away any a part of the pleading that makes no sense, scandalous, light-minded or bothersome etc. The Court may additionally modify at any stage any matter that delays the honest trial or abuses the method of the court.

NATURE AND SCOPE :

The conception of modification of pleadings will be copied back to the choice of the council within the case of Ma Shwe Mya vs. Maung Mo Huang. The Court ascertained that the principles of Courts ar nothing however provisions supposed for securing the ends of justice and every one those rules should be subordinate to realize that

purpose. For that to be achieved, full powers of modification should be enjoyed associate degreed generously exercised by the courts and it's extra a caveat that an modification can't be created to substitute one reason behind action for an additional. Order I, Rule ten confers the facility to the court either to feature or take away a celebration to the suit. the proper of the court either to feature or calculate the parties will be exercised either suo motto or by associate degree application of the party.
The things whereby the amendments to the pleadings ought to or mustn't be allowed can't be ordered down by a court of law in an exceedingly straight jacket formula. It should be selected independent basis. However, this rule applies to different proceedings like execution proceedings, arbitration proceedings, petitions underneath Special wedding Act etc.

PRETRAIL AND POST AMENDMENTS :

Pre-trial amendments are a lot of generously allowed the post-trial amendments. the explanation is that within the formal cases, it's assumed that the alternative party isn't aforementioned to be prejudiced as he has full chance of meeting the case advises by his opponent. within the latter cases, the question of prejudice might arise and should be dealt fastidiously.

AMENDMENTS TO WRITTEN STATEMNETS :

The principles that apply to amendments of pleadings conjointly apply to the written statements .The Supreme Court in Usha Balasahed Hindu vs. Kiran Appaso Hindu explained the law with reference to the pertinence of law with reference to modification of pleadings to the amendments of written statements. It aforementioned that the prayer with reference to the modification to the plaint which of written statements stand on completely different levels. the final principle is that amendments mustn't be allowed that substitute a reason behind action within the nature of the claim. The Supreme Court aforementioned that there's no counterpart within the principles with reference to the modification of the written statement. Hence, the Court aforementioned that addition or substitution of written statement wouldn't be objectionable whereas adding or subtracting the reason behind actions by the plaint could also be objectionable.
Thus the Apex Court during this case command that the courts ought to be a lot of liberal

in permitting the applications for the modification of the written statements that within the case of plaints as question of prejudice would be a lot of within the former .

EFFECT OF 2002 MODIFICATION :

On the advice of the law commission, the CPC was amended in 2002, limiting the facility of courts in granting the amendments once the commencement of the trial. With the intention of shortening the legal proceeding and for the speedy disposal of the cases, order seventeen was omitted by the 1999 modification. The legislators felt that this rule was within the written record since ages and there's no single case wherever this rule wasn't used. The availability was improved back in 2002 in sight of the protests, agitations and strikes everywhere the country, however with a caveat within the type of the precondition. The new precondition provides that no application for modification should be processed by the court once the commencement of the trial, unless the courts return to the conclusion that in spite of the due-diligence of the parties, they might not have raised before the commencement. But, the difficulty of deciding whether or not the parties in spite of due diligence may have raised the prayer or not depends on the facts and circumstances of the every case. This modification is making an attempt to limit the powers of the court to some extent, however, the courts have unchained powers within the cases of the unforeseen things. This provision has been already subjected to the judicial scrutiny by the courts in Asian country. The province tribunal within the case of E. Prasad Goud vs. B. Lakshamana Goud command that the pre conditionisn't a whole bar nor shuts out amusement of any later application if the court finds that a celebration in spite of due diligence couldn't raise the plea. The Supreme Court within the case of Salem Advocate Bar Association, province vs. Union of Asian country upheld the validity of the availability and aforementioned that its object is to forestalllight-minded applications filed to delay the method of trial. The Supreme Court in Baldev Singh case command that the term “commencement of the trial” should be employed in restricted sense as that means final hearing of the suit, examination of the witnesses, filing of the documents and addressing the documents.

The court conjointly placated the litigator by location that “in the interest of the litigator, the new reliefs hunted for thought-about by the court to be deemed to be created on the date on that the applying seeking modification was filed”.

In another attention-grabbing case Nagappa vs. Gurdayal Singh, the facts area unit that complainant suffered injuries in associate accident associated filed an claim of 1 hundred thousand. But, within the Apex Court he increased his claimed to 5 hundred thousand. The Supreme Court granted him relief stating that once there's decent proof on record justifying the improved compensation for medical treatment, an equivalent ought to be granted. during this sort of cases, the court aforesaid that there's no doubt of introducing a replacement or inconsistent reason behind action. Hence, the courts, just in case they need to try to to justice to the parties, don't take into account themselves to be restricted by any legislation.

CONCLUSION :

The law of change of pleadings is settled by the Supreme Court. The Courts started with the rule of law that there should not be any restriction on the powers of the courts be it law of limitation or when the commencement of the continuing, for securing the ends of justice and to reduce the hurt caused to the other party. The Courts are terribly active during this space developing the law time and once more to suit to the assorted time frames. However, the legislators themselves thought that discretion ought to be granted to the courts whether or not to permit the change or to not decide the matter in issue. The courts themselves since 1908 have started crystallization the law through pointers that should be followed whereas permitting the amendments. they need ordered down the principles within which the leave to change ought to be granted and also the cases within which it mustn't be. However, the Supreme Court has been cautious and wakeful in rigorously coming up withthe rules to be followed by the lower courts. Gradually, as lots of discretion is unconditional on the courts, there's a prospect of misuse. There was a Law Commission Report stating that this provision of the change was used on an out sized scale and therefore it must be restricted. In 1999, efforts were created to eliminate this provision however couldn't be brought into force. Because of lots of protests from the legal practitioners, this was reconditioned back within the 2002 CPC change. But, currently a little caveat was adduced to the provision with a read to limit the unrestrained power of the courts in permitting or refusing the amendments. This was that the court shall enable the amendments to the pleadings on condition that it feels that the parties couldn't have raised before in spite of their due diligence. By the literal reading of the availability, it seems that that the ability of the

Courts is restricted. But, an easy look at the judgments pronounced since 2002 mentioned within the on top of sections shows that the Courts continuing to exercise the uncured power even when the change for securing the ends of justice. this is often daring interpreting that has reached nice heights and failed to erode the religion entrusted by the voters within the judiciary.

REFERENCES:

[i]http://lawcommissionofindia.nic.in/reports/report222.pdf.
[ii]http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf.
[iii] Holdsworth, THE HISTORY OF English people LAW 305 (1923).
[iv] Narayana Pillai vs. Parameshwaran Pillai, AIR 2000 SC 614.

''AGE MATTERS'' (DISCRIMINATIVE MARRIAGE AGE)

- YOJANA CHOPRA

ABSTRACT:

On one hand, the Indian Constitution assigns to all its citizens Right to equality and conversely on the other hand, the Hindu Marriage Act, 1955, distinguishes betwixt males and females, by setting up contrasting age of marriage for both. As masses are au fait with the Constitution being predominant, the law conferring different age bars for both genders, tends to disrupt its harmony.

STATUS OF WOMEN:

Regardless of this being called an era of equality, women are still invariably being deprived of their rights. Where on one hand they, have been transcending in every bailiwick concurrently, on the other hand, they are still considered as a burden to some. It's conjectured that there is no difference left between men and women. But the veracity is absolutely different from what it appears to be. Only a woman can discern the prejudice incourse of her progression. The strong ones get through and advance, whereas the weak ones are plagued with angst for the whole life. This paper consists of how the legal inequality discommodes females.

SECTION 5(iii) OF THE HINDU MARRIAGE ACT, 1955:

Section 5 of the Hindu Marriage Act, 1955 comprises of the prerequisites for a Hindu marriage. Of which, clause iii specifies the minimum age of marriage for males to be 21 and females to be 18 years. The present paper consists of the reasons on why the minimum age of marriage for both genders should be equal.

AGE REQUIREMENT FOR MARRIAGE IN THE PAST:

During the British period, the minimum age requirement of marriage for males and females was 18 and 14 years, respectively. The Protests of the Muslim organizations lead to the creation of a personal law and the Shariat act was passed in 1937.

AGE REQUIREMENT FOR MARRIAGE IN THE PRESENT:

From 1950 to 1978 , was a phase of discussions and decisively the minimum age of marriage was set up to 21 and 18 years for males and females respectively.

UNCONSTITUTIONALITY OF SEC 5(iii OF THE HINDU MARRIAGE ACT:

Section 5(iii) of the Hindu Marriage Act, 1955 renders its unconstitutionality due to the following reasons. They are as follows:

1] Violation of Article 14 of the Indian Constitution:

Article 14 is one of the Fundamental Rights mentioned in Part III of the Constitution of India. It cites the equality before law i.e., it articulates that" The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". In simple terms, it depicts that everyone is equal in the eyes of law. Section 5(iii) of the Hindu Marriage Act, 1955 clearly asserts the inequality it's been engendering the females by setting up the minimum age for marriage contrary to that of males, contravening the equality right[246] of the females.

2] Violation of Article 15 of the Indian Constitution:

Correspondingly, Article 15 is also one of the Fundamental Rights mentioned in Part III of the Constitution of India. It states the "Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth". Hence, it demonstrably manifests that setting up the minimum age lower for females collated to that of male's results in discrimination on grounds of sex, which is stringently interdicted as per Article 15. Therefore, it's comprehended that women have been stripped of their fundamental rights[247] since 1978.

3] Patriarchy System:

It is swallowed that Patriarchy system exists no more in our society. But is it really so? Hitherto, the head of the family is considered to be the father and every child in the school is questioned about the father's occupation, paying no heed to the mother's. The chief cause of perpetuation of the subsistence of patriarchy system is the set up of the minimum age for marriage different for both sexes. The prescribed ,18 year of age of marriage for females, leave them with no serendipity of building careers or even the inception to earn. A female remains with a

[246] Article 14 of Indian Constitution.
[247] Article 15 of Indian Constitution.

qualification of just 12th pass, rendering no value in this era of innovation and growth. Whereas on the other hand, Males are given an extension till 21 years incourse of which they can augment academically as well as financially. This is when men become supercilious to women, reviving the patriarchal society.

4] Population Control:

India ranks second amongst all countries in Population Growth. According to the UNICEF survey, 25 million children are born every year in India[248]. Therefore, if the marriage age is shifted from 18 to 21 years for females, it will have a positive impact on the population growth. If every girl is made to marry after 21 years of age, approximately 1 million less child births will take place. This will not only benefit the quandary of population growth, but also the young females who are perished of pregnancy and child birth complications each year.

5] Poverty:

According to surveys, India records around 84 million people living in poverty. One of the prime factors resulting out of population growth is Poverty. Correspondingly,

Another reason of poverty is illiteracy. Maximum number of girls are debarred from education at the age of 18. On account of which, half of our population, incorporated of females are left unlettered which paves way to unemployment , hence leading to poverty.

6] Economy:

According to the UNESCO report, India ranks 123 out of 135 countries in terms of female literacy rate and it ranks first in terms of illiteracy rate. Illiteracy, poverty and economy are interlinked to each other. Mostly, the earnings of male are inadequate to meet the needs of the family, because of which their children are debarred of proper education, hence leading to a rise in illiteracy rate and dampening of the economy. Ergo, if females are also uplifted, the families can also rake in and educate their children, hence escalating the economy.

7] Increase in Domestic Violence cases:

It is scrutinized that younger females are more prone to domestic violence as collated to older ones. The reason behind this is, that the age between 18-20 years is an age of immaturity. In this age, by and large, females are dearth of knowledge as well as experience about the concrete world. They are ignorant of the laws and intrepid to fight for themselves, hence

[248] https://www.unicef.org/india/key-data

remaining victims for the whole of their life's. This domestic violence in most cases lead to mental instability or even suicides.

SOLUTION:

Albeit, the minimum age of marriage mentioned in Sec 5(iii) of Hindu Marriage Act, 1955 is not a mandatory age, yet most of plebeians, dictate the girls to marry as soon as she turns 18 years of age. According, to them. girls are a burden of which they want to purge as soon as possible. Thus, Haryana has introduced an incentive named APNI BETI,APNA DHAN, which is a conditional cash transfer[249] program by which poor people are provided with Rs 25,000 as soon as their daughter turns 18 years. This leaves no burden on the parents who find it unfeasible to educate their girls. Such incentives should be initiated in all states, so that no parent will hanker to get rid of their daughter, by getting her married at an early age.

CONCLUSION:

This research hence leads to a conclusion that the minimum age for marriage of females should also be 21 years i.e same as that of males, so that they are not deprived of their fundamental rights[250].

[249] CCT

[250] Article 14 and 15 of the Indian Constitution.

BAR AGAINST ADVERTISING, TOUTING AND RELATED PARADIGM

- SAURAV UNIYAL

Abstract

Law is the rules of conduct that have been in force over a certain territory approved by the government and obeyed by the people on that territory. Law is considered as a noble profession because of which neither the advocates nor the law firms has the right to advertise their work either themselves or through a tout. In general meaning, tout is a person who promotes work of another person without disclosing that he is being paid to do so. There is also a prohibition on advocates in respect to involvement in other employments. Although advertisement is prohibited for the law professionals still the big law firms and senior lawyers succeed in advertising their work and the other advocates and firms suffers because of the same.

Through this paper, I want to study the rationale behind the prohibition of advertisements touting and other activities by the legal professionals, the nature extend and constitutional validity of the prohibition and the result of prohibition on legal professionals under the Rules of Bar Council of India in the present-day situation.

Introduction

There are about "2 million" lawyers in India, according to Bar Council of India chairman Manan Kumar Mishra[251]. Still, there isn't a lot of data accessible about the practice of advocates in India and the major reason for that is prohibition on lawyers for advertising their work. No matter how impressively an advocate has argued in the court of law still most of the times his name will not be mentioned in any newspaper.

Legal advertisement means advertisement done by the lawyers for the services provided by them through the court of law. In India, the legal profession is considered as a fair and noble profession, the promotion of legal counsellors is not straightforwardly accepted. According to rule 36 of Bar Council of India Rules, an advocate will not solicit work or publicize, directly

[251] Prachi Shrivastava, *BCI Mishra's guesstimate of real & fake lawyers in India spikes to record 2 million,* Legally India (Sep. 29, 2020, 10:29 A.M)

or indirectly, either by handouts, commercials, touts, personal communications, interviews not justified by close to home relations, furnishing or inspiring newspaper remarks or delivering his photos to be published regarding cases in which he has been locked in or concerned. His sign-board or name-plate ought to be of a reasonable size. The sign-board or name-plate or writing material must not show that he is or has been President or Member of a Bar Council or of any Association or that he has been related with any individual or association or with a specific reason or matter or that he has practical experience in a specific sort of specialist or that he has been a Judge or an Advocate General[252]

This outlook of BCI was behind the times and has undergone changes through the amendment in rule 36 of BCI on 30th April, 2008, because of which the lawyers are allowed to furnish information on internet or their websites in compliance with the Schedule. The following information can be written on the websites:

1. Name
2. Address, telephone numbers, e-mail id's
3. Enrolment number, date of enrolment, name of the State Bar Council where initially enrolled, name of the State Bar Council on whose roll they at present stand, name of the Bar Association of which the advocate is a member
4. Professional and academic qualifications
5. Areas of practice.

While furnishing the above information, the advocates are required to give a declaration that the information provided by them on their website is true.

On the positive side, through advertisement of legal professionals, the people at large will have detailed knowledge and information about different lawyers and more than that they will get an insight of the current legal issues. But on the other hand, legal advertisement can also be navigated from honorable and noble profession into profit making establishment. The last type of notice has dependably been disparaged by legislature and the courts[253]. The restriction on advertisement by advocates is based on its unfavorable consequences on the professionalism

[252] Rule 36, Section IV, Chapter II, Part VI, Bar Council of India Rules, 2008
[253] Shivam Gomber, *Right to Advertise For Lawyers,* 3 ISSN 2455-2488 , 1-5(2016)

as advertisement of the legal professional was believed to subvert the advocate's sense of dignity and self-esteem[254].

Another ground for the ban on advertisement includes deceptive nature of advertisements and lack of quality services by the lawyers and advertisement would further lead towards damaging the competition. Even *Justice Krishna Iyer* has stated that "the canon of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business. Law is not a trade, briefs no merchandise and to the heaven of commercial competition or procurement should not vulgarize the legal profession".[255]

Background

The beginning of these laws has been from the Victoria Era of the British Rule. Even after England has itself freed this thought of advertisement by advocates, India actually remains with its public intrigue and honorable demeanor towards the up developing legal profession. Dependence was laid on the Canons of the American Bar Association. Group 27 of Professional Ethics of the American Bar Association states- "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

The old nature of the rules is legitimized on the standards of public policy and nobility of the profession. It is treated as one of the noblest calling which is in light of a legitimate concern for the overall population and must not be popularized to serve few people. Legal counselors are accepted to be local officials and are under an ethical commitment to work for the upliftment of the general public and to accomplish social equity. There is for sure a main differentiation between the legal professional men on one side and those occupied in trade or business on the other side and it is of significance that that distinction should be maintained between the two. In the perspective on thinking about the legal profession as hallowed and to protect its peacefulness, the Rule 36 stands there.

[254] Ted Schneyer, "Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities, 89 FORDHAM URBAN LAW JOURNAL Vol. 40 Issue 1 Article 15 (2013)

[255] *Bar Council of Maharashtra v. M. V. Dabholkar*, 1976 AIR 242

Judicial Approach

The judiciary of India has made noteworthy commitment to maintain the respect of the legal profession and to ensure unobstructed execution of lawyers' duties towards the court. The Courts' have consistently taken a firm view towards this rule. In the case *Government Pleader vs S.A. Pleader*[256], the court held that mere round post card with name, description and address of the pleader would yet have added up to an advertisement on his part and thus would result in violation of professional standards of conduct of advocates. In the case of *R. N. Sharma, Advocate v. State of Haryana*[257], the court held that an advocate is an officer of the Court, and the legal profession isn't a trade or a business; it is a respectable profession and advocates shall make every effort to secure justice for their clients within legally permissible limits.

Also, in the case of *CD Sekkizhar v. Secretary Bar Council*[258], the Madras High Court explained that the advertisements by lawyers is viewed as unforgivable conduct because the norms which lawyers enviously create and set up for themselves are improper to the honor, nobility and position of the of the noble profession. Further, in a nation like India, a huge fragment of the population is illiterate, which cultivates a circumstance whereby deceitful lawyers may abuse the general public, while law is traditionally a profession with the objective of public service.

In another case, the respondent advocates had issued two advertisements in a newspaper; the first stating a change of address by virtue of fire in the building where they were practicing, and the second time for moving back to the building where their old office was located. In this way, they likewise published their name and address in the International Bar Directory under the headings "Singhania and Company", "Firms Major Cases" and "Delegate Clients". The Court held that there was no violation of the rule against advertisement with respect to publication in the newspaper as the same was made by virtue of fire in the building, which required critical notification of progress in address to be given to existing customers. As to the publication in the International Bar Directory, it was held that publication in any way, either in National or International Bar Directory would not constitute an infringement of Rule 36 if it is done with a motive to give data of address or phone numbers of advocates. Nonetheless, in this case, it was discovered that the publication was made to give exposure to the fact that the law

[256] AIR 1929 Bom 335
[257] 2003(3) RCR (Criminal) 166 (P&H
[258] AIR 1967 Mad. 35

firm had dealt significant cases and had famous customers; consequently, was being used to promote the firm itself[259].

Touting in Legal Profession

Touting in general sense means talking or advertising about someone again and again with a motive of encourage people to like or buy something. In simple words, it means promoting someone's work while receiving some monetary commission in return. A tout in legal profession means a person who persuades any party of a court's case to take any particular lawyer to argue case in the court. The fee of such advocate is also settled by the tout and after receiving the fees, commission is paid to such touts by the lawyers. Usually an advocate's clerks, Court's Official, Court's private typist etc are some of the people who acts as a tout. Touting does not require any academic qualification. Touting is illegal in India under Rule 36 of BCI Rules, 2008[260] since it promotes unfair practices in legal profession which is recognized as a noble profession. If BCI remove the bar on touting then the quantity of cases of a lawyer will not depend upon his efficiency, knowledge of law and hard work rather it will depend upon how he/she is maintaining with the touts. Also, the legalization of touting would result in exploitation of general public by wealthy lawyers who have connections with the touts.

Position in United Kingdom

Historically, because of the old Victorian guidelines of England, all types of advertisements for legal practitioners were restricted. However, towards the 1970s, in light of the threat of rivalry and subsequent fallouts, the prohibitions on advertising were relaxed. After a review by the Monopolies and Mergers Commission in 1970 alongside the Office of Fair Trading in 1986, where the benefits of legal advertisements were featured, the ban on advertisement by legal practitioner was lifted. From the rigid principles of promoting, another system for advertisement was born. The current law governing the advertising of all legal professionals is the Solicitors' Publicity Code, 1990 which was amended in 2016 to modernize. Additionally, Solicitors Regulation Authority (SRA) should authorize all data furnished by advocates publicly and all restrictions on advertising are governed by the SRA. The Courts have also held that no advertisement should hinder the integrity and disrespect the legal community[261].

[259] J.N. Gupta v. D.C. Singhania & J.K. Gupta, BCI TR. Case No. 38/1994

[260] Rule 36, Section IV, Chapter II, Part VI, Bar Council of India Rules, 2008

[261] Aadhitya Logeshen R, *Advertising by advocates in India: The right to advertise professional ethics,*6 ISSN 1 (2020)

Position in United States of America

In U.S. the position was similarly severe as in India until 1977. There was a restriction on advertising for legal practitioners. Canon 27 of the Profession Ethics of American Bar Association (ABA), like Rule 36 in India, expressed advertising by legal practitioner was unprofessional and unlawful[262]. This stand was later changed in 1977 after the judgment of the US Supreme Court in *Bates v. Province of Arizona*[263]. In this case, two legal counselors began free legal services for individuals who couldn't manage the cost of legal aid. The only attainable way of doing this activity was through promoting their services through advertisement, which they admitted was illegal at that point. Therefore, the Court, held that such a blanket prohibition on advertisement would be unlawful and an encroachment of the First Amendment permitting freedom of speech and expression. Consequently, the US Supreme Court made the right to advertise a constitutionally secured right. As of now, advertising in the United States is regulated by the Model Rules of Professional Conduct, 1983. All types of commercials are permitted provided that there is no false or deceiving data about the advocate's services[264] or promoting professional employment for any financial addition[265].

Constitutional Validity of Rule 36 of the BCI Rules

Article 19(1)(a) of the Indian Constitution ensures the freedom of speech and expression, the only exceptions being in the interest of sovereignty, integrity and security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of Court, defamation or incitement of an offence.[266] In Tata Yellow Pages Case[267], the Supreme Court of India expanded assurance under Article 19(1)(a) to commercial speech i.e. advertising. Hence, it has been held that giving professional legal services is a business proposition, and notice of the same to such comes under commercial speech[268]. The Supreme Court additionally said that the restrictions placed on the business of citizens cannot take away the right to freedom of speech of the people[269].

[262] Model Rules of Professional Conduct, 1969
[263] Bates v. State of Arizona 433 U.S. 350(1977)
[264] Rule 7.1, Model Rules of Profession Conduct, 1983
[265] Rule 7.3, Model Rules of Professional Conduct, 1983
[266] Article 19(1), Constitution of India, 1950
[267] Tata Yellow Pages v. MTNL, 1995 AIR 2438
[268] Dharam Vir Singh v. Vinod Majahan, AIR 1985 P&H 169
[269] Sakpal Papers v. Union of India, AIR 1962 SC 305

The researcher presents that on a basic analysis of Rule 36, it doesn't fulfill any of the conditions determined in Article 19(2). The prohibition on advertisement by legal counselors isn't constitutionally permissible, even on the ground of "public order" under Article 19(2)[270] as the public order has been held to be inseparable from public harmony, safety, tranquility and so forth.[271] Further, Article 19(1)(g) of the Indian Constitution gives right to each citizen to pick his own employment, trade or calling, having similar reasonable restrictions as Article 19(1)(a), which is regularly impregnated with an inferred right for availing all the mechanisms and resources for successfully carrying on the trade or occupation, including advertisement, if it is not violating any public interest. Rule 36, is likewise contrary to Article 19(1)(g) reasonable restriction on banning advertisement would just exist where the advertisement is against public intrigue for example at the point when it is indecent, profane or presents something which conflicts with public profound quality.[272]

Thus, according to the researcher the prohibition on advertisement by advocates under Rule 36 is extreme in nature and unlawful, as it not consistent with restrictions under Article 19(2)

Changing Face of the Legal Profession

With respect to allowing advertisements by legal practitioners, opinions stand equivocal, wherein one lot of people agreed in allowing the use of advertisements while the others believed that this business viewpoint may alter the ideals of public policy's access to legal services. An additional vagueness that exists in the framework deals with characterizing an advertisement and what its subordinates. With the nation's judgment on commercials being uncertain, it has been seen that services given by the legal counselors have been revealed onto hoardings and banners, with their names and designation. Cases announced by media regularly depict the result and decisions of prominent clients and these are communicated in media channels, as interviews and accounts, and these become a wellspring of promotion.

Different set up law offices likewise use names of profound established legal advisors as a source of glorifying their firm. Other forms of advertisement include publicizing articles written by partners, showiness of firms through accomplishments picked up by their individuals and furnishing clients with different disclaimers before picking a firm. This at that point establishes an advertisement, and the public needs to acknowledge the way that not

[270] Article 19(2), Constitution of India, 1950
[271] O.K. Ghosh v. E.X. Joseph, AIR 1963 SC 812
[272] Chintaman Rao v. State of M.P. AIR 1951 SC 118

everything exercises can be controlled.[273] Nonetheless, one must recognize the simple actuality that the fast changes in the legal profession and laws relating to consumerism have borne several reforms, which keep a check on synchronized advertising.

The Case of *K. Vishnu v. National Consumer Disputes Redressal Commission & Anr.*[274] revealed that the legal profession was a result of the Consumer Protection Act, 1986. The report introduced under the leadership of S.V.S Raghavan concluded that it was inevitable to control legislative restrictions and that these have implications on the development and growth of law firms, keeping them from contending internationally and obtaining a worldwide position to represent India's expertise, influencing the decision and freedom of buyer.[275] Considering this case, the Supreme Court demarcated legal services under the umbrella of an industry under the Industrial Disputes Act, 1947. To close, it very well may be said that legal services have been under the vision of customer protection and trade laws, receiving a way of commercialization, which in all methods is unavoidable.

Benefits of permitting Legal Advertisement

1. **More opportunities for novice advocates and independent councils**

By allowing the lawyers to advertise their work, the beginner lawyers would be able to advertise their work and would get equal opportunities in the legal market. Advertisement would also prevent monopoly in the market and will give medium and small sized firms a platform to publish information about their services.

2. **Right to information and awareness among the people**

Because of prohibition on advertising, the customers and potential clients couldn't get access to the right lawyer. The prohibition on advertisement restricts the people to get proper knowledge and guidance to avail appropriate legal services according to their purpose.

3. **Recognition**

Nationally and internationally, Indian lawyers lack recognition compared to foreign legal practitioners, as the Indian does not have the exposure of international market. In the age of

[273] Lalit Bhasin, *Law firms find loopholes to promote their services* , SOCIETY OF INDIAN LAW FIRMS

[274] K. Vishnu v. National Consumer Disputes Redressal Commission & Anr., 2000 (5) ALD 367, 2000 (5) ALT 166 (India)

[275] Aadhitya Logeshen R, *Advertising by advocates in India: The right to advertise professional ethics*, 6 ISSN 1, 3 (2020).

globalization, advertisement would allow Indian legal practitioner and firms to draw attention of potential foreign clients.

Drawbacks of permitting Legal Advertisement

1. **Change in priorities**

One of the main reasons of not permitting the legal advertisement is that the legal practitioner will focus more on advertising their work and indulge in unhealthy competition rather than improving their quality of work.

2. **Misuse**

Allowing the use of advertisement could also result in exploitation by unethical lawyers and firms by publishing false information and also if the legal advertisement is not regulated properly than it will give undue advantage to the big law firms and lawyers with deep pockets to misuse this rule completely.

Conclusion

There is no uncertainty that the legal profession is a noble profession and thus in a culture-situated nation like India where esteems and ethics are given priority, the legal profession cannot be held as a trade or business. However, as per the law any restriction enforced in light of a legitimate concern for the public must be reasonable and not arbitrary or excessive in nature, or beyond what is required in light of a legitimate concern for people in general, yet complete prohibition isn't an answer and thus unnecessary in nature. It was a rule framed when the number of law firms was not huge and globalization or liberalization didn't have a significant influence. All out advertisement and indulging in practices like touting isn't suggested, however with a legitimate set of accepted rules and code of conduct, a guideline can be made on this. It is presented that advertisement on paper structure, on the websites and legal directories must be allowed. Nothing will be allowed which will hamper the nobility of the profession and should hold the integrity, the respect and the independence of the legal practitioners. Legal advertisement isn't just to be in the limelight but should be used for the interest of the general population; for making individuals know and let them make a choice.

RIGHT TO ABORTION VERSUS RIGHT TO LIFE OF UNBORN

- VAIDEHI LAAAL

ABSTRACT

Women are fighting the struggle for their reproductive rights for centuries. Abortion has been termed as a termination of pregnancy. This has been a topic of discussion since the year abortion was legalised in India. The laws in India aren't completely liberal for the women. Abortion is a social issue that provides deliverance to women and gives them control to make their own decisions. The Right to Abortion positively falls under the view of Article 21 of the Indian Constitution as does the Right to live and make free choices unless they interfere with the current procedure of law. Article 21 of the Indian Constitution ensures that every person within the national territory of the Indian nation is guaranteed with the Right to life and Personal liberty except according to procedure established by law. In the case of abortion, the woman equally enjoys the Right to life and make free choices upon what she wants to do with her body, as any other citizen of India. Each country in the world has a different approach towards abortion. The laws in India need to be made more liberal for women. An unborn baby can be said to have the right to life, but the decision should be entirely on the mother as she is the one who bears the pain of the child. Abortion can be done for various reasons laid down in the Indian Constitution. The question which is the reason for this discussion is whether a mother has a right to abortion vis-à-vis the right to life of the unborn. Abortion has remained a debatable issue morally, ethically and legally. In this research article I will be sharing my opinions on abortion along with laws provided in the Constitution.

KEY WORDS

Abortion, Right to Life, Social issues, Liberal and Free choices.

RIGHT TO ABORTION VERSUS RIGHT TO LIFE OF UNBORN: A SOCIO - LEGAL STUDY

It has been rightly said that every individual has the right to have his or her life respected and appreciated. This right should be secured by the court of law.

Women are respected citizens of our nation and they have the right to make their own choices. India as a society that has progressed immensely over the years. Women have received the respect they deserved on one hand, and on the other hand, there have been questions been raised about a women's individuality. Over the years, there have been various laws put into action to make society more accepting of women. Despite of being a progressive society, women have been fighting various fights every day to enjoy some basic rights. The most important and the most controversial was that of Abortion. Abortion has been a taboo to some as well as a gift for women. Abortion comes with many social and legal issues in our country. Abortion has been one of the most inflammatory topics not only in India but throughout the world.

What is Abortion?

Abortion[276] is termed as a medical procedure to end a pregnancy. The embryo or foetus and the placenta are removed from the uterus. It is also labelled as "termination of pregnancy." The foetus is removed from the uterus before it has reached the stage of viability. Typically, the 20th week of development is the idyllic time to have an abortion. Pregnancy can be terminated by enumerated medical Practitioners. It is to be noted precisely that the MPT Act was executed in the year 1972, April, and further was reviewed in the year 1975 to abolish time-consuming procedures. This act was again amended in the year 2002 and 2005. The Preamble of the Act states[277], "An Act to provide for the termination of certain pregnancies by registered medical practitioners and substances connected therewith or secondary thereto".

When can an abortion take dwelling?

An abortion can be terminated under many instances as stated in The Medical Termination of Pregnancy Act, 1971 [MTP Act] Under Section 3 of the Act[278], the reasons when a pregnancy can be terminated.

---

[276] Abortion, India, available at http://www.legalserviceindia.com/legal/article-724-abortion-laws-in-india.html (last visited on May 05, 2021.)

[277] Shubhank Suman & Aayush Akar, "Analysis of the Proposed Amendments to the medical termination of pregnancy Act 1971" Centre for Criminal Justice Administration, RMLNLU; June 4, 2020.

[278] Medical Termination of Pregnancy Act, 1972 (Act of 1971), s. 3.

i. To preserve the life or the physical and mental well-being of the mother.
ii. To prevent the completion of a pregnancy that is a result of rape.
iii. To prevent the birth of a child with an extreme deformity, mental deficiency, and genetic abnormality.
iv. To prevent the birth due to economical and social reasons which consist of youth pregnancy or fewer resources of the family.
v. When there is a possible risk to the child if it were born as well as to the mother during the pregnancy.
vi. To prevent the pregnancy of a woman, who has not attained the age of 18 years or is a mentally ill person attaining the age of 18 years can be terminated with consent given in inscription of her custodian.

Irrespective of so many amendments they do not reasonably address all privacy apprehensions with the act's restrictions on abortions. The amendment allows abortions on a woman's appeal up to 12 weeks, but women still have to attest that the pregnancy was unplanned or that contraceptives failed, which still significantly restricts their exercise of choice in this matter. To get an abortion, the amendment still contends on establishing that either the foetus or the mother is at risk. Critics of the abortion law acknowledge that when it was announced it was a great accomplishment for women's health. 30 years later, the law and rules and regulations are considered overly medicalised, and as such, not concerned with women's right to access safe and legal abortion facilities. Despite of abortion being legal, it is still been frowned upon in India and is a social issue of the era. Abortions have been a term that has been known to everyone at different points in the history of India. With times, the word abortion has evolved too.

Abortion: A critical issue

The basic need for getting an abortion is for the safety of the women. Over the years, this issue has been critically acclaimed in India, even though it has been a legal act. Despite of around 50 years of the combination of the MTP act and the justification of women's right to abort, it remains a passionately argued issue in India. The half-a-decade old law is perhaps the most liberal in the world but is still not free from fallacies. Unfortunately, it has only turned out to aid an unsympathetic shoulder when women are facing killing issues. As Justice Chandrachud observed, the state does not merely have a negative duty, but also has positive obligations to take all necessary measures to protect an individual's privacy in the landmark judgement of

Justice K S Puttaswamy v Union of India 2012[279]. A 2016 Bombay High Court judgment[280] provides useful guidance for reform that in a Suo moto PIL concerning the deplorable condition of a womanly prisoner, the high court categorically stated that a "woman alone should have the right to control her body, fertility and motherhood selections." The high court also addressed the status of the legitimate state interest in protecting "potential life." It stated that since pregnancy takes place within a woman's body and intensely affects her health, mental well-being, and life, an unborn foetus cannot be put on a higher plinth than the rights of a living woman. The Bombay High Court and Supreme Court have both emphasised women's autonomy to make informed decisions regarding their own bodies, fertility, and reproduction. Even when the bench has permitted abortions beyond 20 weeks, yet females have had to follow strict limitations regarding the same. The privacy judgment has rekindled the debate around abortion and surrogacy. The judgment makes it plausible to expect petitions that raise strong challenges to the constitutionality of the provisions of these bills if they become law as is. Irrespective of so many amendments, the final decision of abortion does not entirely lie in the hands of the woman. It lies in the hands of her husband, her family, and the doctor.

Abortion: A Social issue

Abortion hints at social, religious, economic, and political aspects. Its impact on society is to be observed positively and negatively. India is a country with enormous social traditions and customs complemented by society evils such as illiteracy and poverty. The social inferences of the MTP Act can be distributed into abortion in unmarried girls and abortion in a married woman. In MTP Act married woman is not considered as a social disgrace, whereas unmarried girls are considered a shame to society. The fact that it is intolerable creates interferences in safe abortions, sometimes defeating the very purpose of abortion. The legalising of the MTP Act has had an optimistic provocation and has shown reduced incidence of suicide and betterment of health and safety.

To concise the above-stated facts, every coin has two sides. Taking into consideration, the legalising of abortion has been a great victory for the women of our country, but on the other hand, their basic right to privacy has been absent. More importantly, as a woman, the mother should have the right to choose her health and her body over that of the unborn child. The

[279] *Justice K S Puttaswamy v Union of India (*2012), 2017 SCC Online SC 996.
[280] A womb one's own: Privacy and Reproductiove rights, available at: https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights (last visited on May 05, 20201).

mother should have the sole decision of aborting the child. The decision should not lie in the hands of anyone else but the mother. In my opinion, the right to abortion should be read along with the Right to Privacy. Nevertheless, the MTP Act allows the woman to abort the child if her pregnancy period has exceeded the twenty-four weeks provided the medical administrator believes that if the abortion would not be done then that will cause a serious threat to the life of the mother.

Abortion: A Public Opinion

Abortion has not only been a matter of debate in India but in all the countries all over the world. There have been debates, speeches, and laws all over the world in terms of this topic and the laws that revolve around it. Ben Shapiro, an American conventional political reporter, and media host has a skeptical view on the topic of abortion over the years. When he was asked if, killing an individual is termed as first-degree murder, should the mother be penalised for aborting the baby, he replied saying that, the mother should not be punished for the same as they are the victim of abortion as much as the unborn baby is. He chains this by saying many women are uninformed and believed that the foetus is nothing but a ball of tissue. Irrespective of having these views, Shapiro is one of the many Republicans in the United States to believe that abortion should be illegal in all cases. Many other countries around the world have a far-fetched opinion on Abortion. In the US, after the landmark judgement of Roe V. Wade[281] in Texas, abortion was legalised, but cannot be cannot after the third trimester. In the United Kingdom, it is legalised under the Abortion Act, 1967[282], there is no period boundary for an abortion to be conducted if the child or the mother's life is at risk. Lastly, Germany being one of the countries bearing an opinion on abortion, had made abortion illegal in 1995, but a loophole states that if the pregnancy is the result of rape, then the baby can be aborted in the first three months of conception.

It has been informed that over the years, the topic of abortion has been more debated all over the world as compared to global warming. Nonetheless, when the abortion laws in the USA, UK, and India are compared, it is noticed that the laws in India are not generous enough. The debate on abortion has scaled up to all over the world and has mixed opinions which are looked down upon by critics and also appreciated by some.

Right to life of Unborn

[281] Roe V. Wade, 410 US 113 (1973).
[282] The United Kingdom, Abortion Act, 1967.

Abortion itself was a controversy as its whole. Laws were amended to make sure the women are uplifted. When the mother decides to abort her child, it is her decision and her right, but, an unborn child has a right of its own. The controversy relating to the legal rights of an unborn child has been the subject of debate time and again. Some have considered abortion as the killing of the child. The right to abort lies in the hand of the woman as per the laws laid down but an essential question arises when done so. The essential question being, whether the foetus' right to life if any, clatters with the rights guaranteed to a pregnant girl which defences her right to health, life, and where the pregnancy endangers her bodily damage or even life and where pregnancy is a significance of rape. A woman's womb is given utmost attention but the foetus inside the womb isn't because it has been believed by our ancestors that a child has its right and has a life of its own the day its born, but the reality shows something different and unique. We often forget to consider that the minute a woman is pregnant there is a life growing inside of her, even if a child hasn't been born but it still has a life inside the mothers' womb. Considering all of the above statements, an unborn child should also have the right under Article 21 of the constitution of India.

Right of an Unborn: Legal issue

Just like the pregnant woman, the unborn child also bears a right. It is identified that a baby's heart starts beating between the second and third week of pregnancy which means a human being has started to develop. The Indian constitution does not cover a foetus under Article 21. Article 21 [283]points out that *"No person shall be deprived of his life or personal liberty except according to a procedure established by law."* It also means that in our country, the foetus will not be provided with the advantage of Article 21 until it comes into existence. Even though the child cannot be provided with the benefit of Article 21 when it is a foetus, it does not mean that the foetus is not subject to receive any of the rights. In India, nevertheless the laws identify the being of an unborn as a legal person, it doesn't grant rights until the birth of the child and the state can interfere only after the unborn accomplishes feasibility. Still, it is not clear that how the law will protect the unborn and what is the duty owed to him/her. A case that took place recently took up the debate to the next stage. It has been stated that a 30-year-old woman, had a 24-week pregnancy[284]. The baby was diagnosed to have a genetic heart disease, knowing

[283] The Constitution of India, art.21.

[284] Ravi Kanojia, "Rights of an unborn baby versus the social and legal constraints of parents: Birth of a new debate" Journal of Indian Association of Pediatric Surgeons 92 (2008)

about the sickness related to the disease, the couple decided not to have the baby; however, the pregnancy was beyond 20 weeks. They chose for legal consent from the court for abortion. The court deprived of it as it was against the law. The case ended with the warped tale of some wrong reports from the hospital and with the miscarriage possibly because of the stress the mother had undergone. This incident got the community thinking about the issue in detail. An unborn child is a natural person or a legal person is the question of the hour. The answer mainly depends on the outside view which is basically whether the foetus has life or not. Further, to discuss this point, there is a landmark judgement, *Nand Kishore Sharma & Ors. V. Union of India & Anr*[285] court rejected to enter on the debate as to when a foetus comes to life but current medical researches show us that in early stages of development that is, in less than 7-14 days of fertilization, the unborn child has a life[286]. Therefore, an unborn is not a person or natural personality but a well-proven fact is that it has life, which medical and legal fields have accepted. Although, the Court has considered the women's right to abortion as a part of the right to privacy under Article 21 of the Indian Constitution, with the passing of laws it prevents the misuse of this right also. Hence, the law does not recognize a full-fledged existence of a child in the womb until it comes out. The right not to be born can also be a legal right if the suffering itself is a violation of Article 21. The courts till now are incapable to decide whether defective life is worse than non-existence. Currently, the Supreme Court is examining the petition including a compilation of 20 different countries. The Indian Ministry of Health is rereading the MTP Act. Despite of so many discussions, debates, laws, and regulations, this topic is still a major point for controversy throughout the world. Keeping in mind the above statements, an unborn baby securing the Right to Life is still a matter of discussion. A women's health, mental situation, and all the other factors play an important role. Ultimately, she is the one who has to make this decision. Numerous factors need to be taken into contemplation.

Suggestion

In my opinion, abortion should be continued to be legal with many more amendments made in the act. A woman is the one who bears the child throughout the nine months and it should be her decision if she wants to abort the foetus or not. A flower can bloom only when it has been

[285] Nand Kishore Sharma & Ors. V. Union of India & Anr., AIR 2006 Raj 166.
[286] Fetal Development, available at https://medlineplus.gov/ency/article/002398.htm (last visited on May 05, 2021).

watered every day and provided with sunlight, and the soil is healthy for it to bloom, if the soil has defected the flower fails to bloom. Similarly, if a woman is bearing a child, while being unhealthy or the pregnancy being a result of rape, should be allowed to abort the child. Since the roots of the child in terms of the health conditions of the mother aren't secure, the child won't bloom. A child when developing in a women's womb is only an organism inside the women's body, it becomes a living organism only when it comes out from the body. A foetus cannot feel pain until late in pregnancy, because its brain is not adequately developed before. But a woman can feel everything while keeping a child in her womb. The decision of aborting a child shall only be of the woman carrying it. Some people are against abortion and believe that since life begins at conception, abortion is parallel to murder as it is the act of taking human life. They also believe that abortion is in direct disobedience of the idea of the sanctity of human life and that no cultured society licenses any human to harm or take the life of another human. Their answer to an unsolicited child is adoption and they believe that with millions of childless parents wanting to adopt a child. In the occurrence of rape, they be certain of that abortion penalizes the unborn child who committed no crime; instead. According to me, women should have complete control over their body. No one should be allowed to make this decision for them. Further, I think that the Parliament should take over this opportunity to amend the pending MTP (Amendment) Bill in accordance with the privacy judgment and fulfill its positive obligations to protect an individual's privacy. The legal guidelines have annulled the women's right to liberty to a great amount, mainly concerning the right to freedom, the right to have control over her body, and the right to abortion. These protocols have formed serious inroads into a women's right to life and liberty and it has become nothing more than a deception. It is, therefore, yielded that those females should be given the right to have control over their bodies and consequently the right to have or not to have a child. The right to abortion should be liberally granted to women at least up to the first 12 weeks of pregnancy unconditionally. I think the requirement of registration for the termination of pregnancy under the MTP Act should also be removed. Lastly, according to me, an abortion should be practiced under strong medical guidance and should be more liberal towards women in India specifically.

Conclusion

To conclude and induce an inference, there will no freedom, no equality, no privacy, and no dignity for women until they demand control over their bodies and choices. Women should be able to take this decision on their own without any sort of outer influence. The fact that, right

to life is still debated in terms of an unborn baby calls for opinions all over the country. The matter of abortion will be debated worldwide irrespective of laws made and, in my opinion, the laws made should be corrected keeping in mind a woman's body, mental and physical health, and lastly her legal rights. People all over the country should be educated on the word abortion, and this term and practice should be treated with more respect and dignity and not as a taboo. The society needs to offer love and respect to the women of India and support abortion and unplanned pregnancies. Every woman in the world should be able to call herself free and dignified when it can be her decision whether she wants to be a mother or not.

DRUG ABUSE AND CRIMES: ANALYSES ON WHETHER SOCIETY CAN BREAK THIS CONNECTION WITH THE HELP OF THE LAWS?

- SANJANA KIRAN

INTRODUCTION

Any challenge viewed from the perspective of society looks at the social and legal ramifications it ultimately has. As a society that constantly observes challenges at all phases as it evolves through its complexities and diversity, the critical task lies in accepting and understanding how to cope with these challenges. One such dilemma in the legal and social perennial problems looks at drugs and crime. Crime, violence, and abuse are observed to be an epidemic within human communities that require a much larger social aid than presumed. Relatively placing the idea of these so-called "social evils" as respondents or blamed judgments on the crime has also been noted throughout the concept of human society.

Drugs (all-inclusive) are dangerous and harmful and extensively when used as a material of abuse. It is presumed for its more significant part as the "Social Evil" that assumes harm on an individual entity, the environment of use, and the communities. One can only comprehend it as a curse for developing countries, viz India, as it adds a strain on pre-existing challenges, namely, poverty, overpopulation, or even unemployment. But essentially, the abuse of drugs and the commission of crime sees no major borders of caste, sex, class, or nation. Adding to this, the rapid emergence of urbanization has ushered in values of permissiveness and the virtue of individualism. These reasons are extensively why drug abuse, apart from its delinquent role in increased crime rates, has also multifaceted into challenges of social context.

Let's consider the notion of crime; Drugs, apart from its idea of being illegal for consumption, procurement, or its illicit supply, the area of focus on social development must shift to the effects of its correlated "effects". As clearly pointed out in multiple studies by Professors and theorists, one such as Jeffrey Fagan, who notes that the association of drug abuse of crime is shown through the rates of crime in multiple reports. But these correlations must not be limited to mere factors but stand as its underlying cause.

The age-old phenomena on the correlations between the two look like a vicious cycle that encompasses a taboo. The relation between the two brings about an intriguing question, Which comes first? The answer? Both. The detrimental impact of it in the use of drugs and the commission of crime looks at the problem becoming more difficult to manage than presumed. When we look at drug abuse it ultimately means the excessive and unregulated use of drugs that may be to cope with a range of factors. But the fine line in distinction comes in the form, when one uses drug to just fulfil a need and when one abuses the drug that becomes a proportional factor of life.

When we look at history to understand this correlation of drugs and crime, although narcotic criminals have well been present for a long time in criminal lists it often looked at the presumption of petty crimes. The rampant acts within the 20th Century looked at the change in nature of the crime to be more violent and the cost and overall use of these drugs in relation also increase. A major understanding to the illegalisation of drugs in general in due to its very nature of triggering irregular and incomprehensible behaviour that suggests high violence and a greater force of its abuse and ultimate crime. This shows the clear cycle that traps a being at the individual level of usage. The establishment of drugs laws during the first and second world war realises its use a means to cope with the environmental effects.

Like every legislation, the Indian Republic has also looked at the duty to establish laws, be part of conventions and international treaties to curb the menace of drugs in India. The large young population and the neighbouring views that push trafficking of drugs into India is looked at from National and International perspectives. The legal possibilities and securities looks at the "26 bilateral agreements, 15 MoUs and 2 security pacts and the 1961 U.N. Convention on Narcotic Drugs, 1971 U.N. Convention on Psychotropic Substances, 1988 U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 2000 Transnational Crime Convention", signed by India to fight the global problem. These are signed from what seem to be a perspective that both crime leads to drug use and drug abuse increases crime. By the virtue of Article 47 of the Indian Constitution, which acts as a Directive Principle to State Policy, stating that

"the State shall endeavour to bring about prohibition of intoxicating drinks and drugs which are injurious to health"

Additionally, the placement of drugs under the concurrent list, highlights that the issue to curb and eliminate relies as a duty under both the state and central duties. But the major breakthrough to look at the legality of strict legislations came along with the *Narcotic Drugs and Psychotropic Substances Act, 1985* on 14th November 1985

Although, the issue of drug abuse related crime don't seem to be reducing with current relations with neighbouring countries like Afghanistan and Pakistan which illegally looks at trafficking drugs, only increases the case for security i.e. to keep general population away from drugs. Even with laws and treaties and strict regulations, India observes, 10 to 11 lakh registered drug abusers and unofficially looks at 59 lakhs drug abusers. With 50,000 plus cases that are often stuck on legislative processes and loopholes, it's often quite hard to understand that the main idea is to contain by aiding individuals to break the cycle and retain life and not only punish for creating a just society. The real question comes into place that how are these legislatives for criminal, narcotics and other laws actually helping the society develop safely?

Even rationalising the reasons for such drug abuse comes from some front holds of the falls of society, whether it be the rapid urbanisation, economic, liberal and social changes, loopholes of the medical regulations, psychological causes and ultimately even its critical opinions of placing it as a taboo that affects the comprehension of society as a unit.

Laws are present, even enforcement is present, yet actions against this "evil" of the society must be approached in a very design strategic manner only for the curbing and controlling the menace by identifying and defeating the situational deeply rooted cause of the problem.

DISCUSSIONS

A SOCIAL MALADY, that how drug abuse, and its vitals that crave within the society, its upward trends and ultimately its relation to cause of increase in crime was described in the case

of State of Punjab v. Baldev Singh[287]. The mere relation between the abuse of drugs and the increase of crime is complex. As mentioned, the shared effect of drugs on users and other associated violence that links to the manufacturing, procurement, distribution or consumption have an interconnected string.

At present, it's difficult to claim the idea of a completely free and cured picture of drug trafficking and drug abuse. Legal measures and complimentary aid by countries are necessary to deal with the rising trends. The abuse of drugs hurts the society only in its majority increase in crime, but ultimately the impact on economy and general mindsets gets affected.

"SAY NO TO DRUGS" "DRUGS ARE DEATH"; The advertisement ideal push to a drug "free" country looked at the social awareness, but often logic fell behind. Explanation to common masses on the wide use, availability, harms and inciting societal ideas to decline use of drugs should not fall in explaining why the laws to regulate have been placed upon the citizens in the first place.

A. UNDERSTANDING THE MICRO LEVEL IMPACT

Drug addiction is a multifaceted issue with social, cultural, genetic, geographic, historical, and financial ramifications. Substance abuse is extremely distressing for people, and the illicit manufacturing and sale of narcotics has resulted in crime and bloodshed all over the world. When we look at the microlevel impact of drugs on crime relations, although there is a subsequent increase in violent crimes induced by drugs, a large requisite remains to be economic – compulsive crime to obtain the drug out of addiction or abuse.

Drug usage is typically a key component in criminal activity such as homicide and robbery, according to research articles involving the study on criminals who have committed such offenses. As a result, some research shows that higher prevalence of violence are linked to higher rampant drug usage. At the same time, some drug addicts commit violent crimes, while others are neither criminals nor hostile.[288]

[287] State of Punjab v. Baldev singh [1999] INSC 224.
[288] Cutting Crime: Drug Courts in Action. Drug Strategies, 1997.

Even when one looks at the illicit market and the whole idea of drug cartels, once stopped have a high possibility to continue again as members in the long-run are economically dependent on these so called trade for income. Unless an alternative to the idea is given and the ideals of human kind are kept aside, during the efforts to stop the trade it is very unlikely that ending the markets or source is an option. The impact of law should not be restricted to the punishment but also look at creation of intervention strategies that aid the individual and society at large.[289]

B. COMPREHENDING THE LAW

The NDPS or *Narcotic Drugs and Psychotropic Substances Act, 2014,* aims at strengthening enforcement to eradicate drug trafficking, execute legal provisions and give appropriate punishment for drug related issues and ultimately decreasing the number of crimes related to drugs.

The NDPS Act restricts/prohibits the "production, cultivation, sale, possession, trade, purchase, use, consumption and import/export of psychotropic substances and narcotic drugs except scientific or medicinal as per the law". The law looks at wide classes of "*Psychotropic Substances*, *Narcotic Drugs* and *Controlled Substances*".

These Act's offences are both cognizable and non-bailable. The maximum sentence and the amount of the fine vary depending on the crime. For the most part, the penalty is affected by the volume of drug involved - a little amount, more than a small amount, although not as much as the commercial value or business portion of drugs. Each drug's commercial and small-scale quantities are reported.[290]

Punishment under the law although looks at grave and serious nature, these punishments work for crimes not the drug abuse in itself. The inability to offer a way out of the abuse apart from complete withdrawal acts as a failure on the society itself. The statute's ineffective implementation and the lack of a therapeutic organisation have further contributed to the list of flaws. The legislation, which is harsh and strict, severely impedes the penal system.

[289] William Spelman and John E. Eck, "Sitting Duck, ravenous Wolves, and Helping Hands: New approaches to Urban policing." Public Affairs Comment, 35(2):1-9, 1989.
[290] *Traffic in Opium and Other Dangerous Drugs*, 10 LEAGUE oF Nations O. J. 835 (1929)

Although punishment under the drug laws look at rigid and strict penalties, there are cases of immunity. There are multiple cases of capital punishment given in case of illicit trafficking of drugs as seen in the Gulam Mohammad Malik v. State of Gujarat & Another[291] and Paramjit Singh and Anr. v. Union Of India[292] as Section 37 of the NDPS Act given that every offence under the act is "cognizable offence".

C. LOOPHOLES UNDER THE LAW

Hasty pieces of law never meet its cause. The laws that look to safeguard are not free of loopholes of pitfalls. The unreasonable difference that it fails to draw between an abuser of a drug who could potentially look at unsafe society or a customer. It observes concepts like "usage," "ownership," and "consumption," but fails to define them. The lack of any legislative endeavour in establishing apparatus to enforce and control treatment serves as a barrier. The lack of relevant organizations in charge of educating the judicial apparatus, as well as inadequate rehabilitation facilities, have all contributed to the law's inadequacies in dealing with India's vast drug problem. The statute's ineffective enforcement and the lack of a rehabilitative organisation have further contributed to the list of flaws. The legislation, which is harsh and strict, severely impedes the judicial process.

The dearth of substance misuse has nothing to do with the dearth of data and statistics on addiction. The breadth of drug addiction and its repercussions on one's health and general well-being remains uncharted area, which is a conspicuous gap. The lack of data on the type and degree of drug addiction, which seem to be important elements to consider before developing drug policy, makes it difficult to achieve the statute's goal.

The emergence of de-addiction and detoxification clinics is the sole good development, since it has allowed us to save some people from certain death. However, these facilities are costly, and addicts have a proclivity to relapse even when they have a strong resolve and a strong urge to overcome their addiction. With guidance under the laws and aid of legal measures such as legislative tool and court measures does not aid in its establishment.[293]

[291] Gulam Mohammad Malik v. State of Gujarat & Another, AIR 2017 SC 1465
[292] Paramjit Singh and Anr. v. Union Of India, 2000 CriLJ 100
[293] James Q. Wilson, *Drugs and Crime*, 13 CRIME & Just. 521 (1990).

D. SOLUTIONS

When we look at a welfare state perspectives, the already establishes rules and acts although help minimize the criminality of drugs and the punishment of crime, we should also look to strategically develop a ration control method that would help minimise and contain the demand and supply at a policy and practical level. A vital reflection to the models of drugs policies, that have seemed to be in good light was to "contain" the problem and ensure the necessary measures to meet the different concerns rather than completely "eliminate, solve or eradicate" it.

One other necessity to look at is the distinction between the requisite demand and supply, and the ultimate approach for it from the perspective to reduce both crim that leads to an increase in drugs and drug abuse that leads to crimes. Prospectively, demand is the good guy in this picture and supply the tough guy.[294]

E. THE DUTCH THEORY

The Dutch' liberal attitude regarding drug usage, as well as the state's cheap punishments for drug-related offences, have added to the country's status as a leading manufacturer and consumer of narcotics. The nation is well-known for its "tolerant policies" which results in the non-enforcement of light drug charges. The Opium legislation of the Netherlands makes distinctions among soft and heavy narcotics. Soft drugs are those with a minimal risk of damage and/or dependency, such as hash, marijuana, sleeping pills, and sedatives. Heroin, cocaine, amphetamines, LSD, and ecstasy are examples of hard drugs. Certain drugs are thought to be more dangerous and addictive.

Dutch drug policy changed and ultimately focused the shift toward "law enforcement". The "health-oriented and harm-reduction focused approach" has characterized Dutch drug policies. Often been described as an idea of where the modern drug policy in Netherlands has "Consistently been flexible and reflects an attempt at social control by non-moralistic and adaptable means." The whole idea to non – stigmatize the issue has actually helped the Dutch

[294] Benjamin R. Nordstrom & Charles A. Dackis, *Drugs and Crime*, 39 J. Psych. & L. 663 (2011).

model succeed in proper course. Although Ferdinand Grapperhaus, the Dutch Minister of Justice and Security, has stated recently in public that "the Netherlands is on the verge of becoming a narco state."

A narcotic state is a nation whose revenue relies on the opium trade. Even though the drug trade does not yet define the Dutch market, it is an unlawful business that has a growing effect on Dutch culture. Because of its multiple transit ports and the vast quantity of synthetic pharmaceuticals produced in the nation and supplied globally, the Netherlands has been regarded as a key hub for the worldwide drug industry.

The Netherlands' drug policy attempts to minimise the consumption for narcotics, the supplying of drugs, and the hazards to drug addicts, their local surrounds, and community. The Dutch understand that it is difficult to completely prohibit individuals from consuming narcotics. This realistic strategy allows police to concentrate on the major criminals who benefit from narcotics and provide dangerous substances.

F. SUGGESSTIONS

The scarcity of data and statistics on addiction has nothing to do with the scarcity of substance usage. The scope of substance abuse and its effects on one's health and overall well-being is yet unknown, which is a significant gap. It will be hard to fulfil the statute's aim due to a lack of information on the kind and severity of drug addiction, which appear to be crucial aspects to examine when creating regulation.[295]

Undertaking "study and gathering data on drug addiction, substance misuse, and the effects on the health of those who infuse/inject substances can aid in the fight against drug abuse. The modification of the NDPS Act is the first step that the government must do if it truly wants to reconfirm its commitment to ending India's drug issue.[296]"

CONCLUSION

[295] Herman Goldstein, "Improving Policing: A Problem-Oriented Approach." Crime and Delinquency, 25(2):236-258, 1979.
[296] Engin Duragol, *The Role of Drugs in Terrorism and Organized Crime*, 2 ANKARA B. REV. 46 (2009).

The population is taught to believe that if the sale and possession of a controlled substance are not handled as crimes, society would confront harmful yet non-voluntary activities by addicts that are beyond the reach of criminal punishment. The feeling of control indicated by the concept of purpose will be lost, and society will be exposed to dangers much greater than those that the criminal law, however inadequately, attempts to protect it against. It is a social construct to classify damages as more or less significant. Individual rights are threatened by the damages that frighten and elicit a need for harsh penalty.

The legal system, on the other hand, cannot forsake the notions of accountability and rationality on which it is based, not least because the law relies on rationality for its own decision-making processes; legal decisions are rationalized as political choices that can be and are logically articulated. The failure to properly explain particular deliberate acts or the basis of reason prevents the system from functioning without them[297]. In the area of criminal law, labelling crimes as deliberate is a method of identifying them as morally wrong and justifying a lengthy jail sentence for the perpetrator. The solutions to the drug abuse and crime relations looks at multiple faces to solve the issue from design strategy, to reducing supply and implementation of proper measure. The only course aiding is the actual law and its enforcement.

BIBLIOGRAPHY

1. CASE LAWS
   a. State of Punjab v. Baldev singh [1999] INSC 224.
   b. Gulam Mohammad Malik v. State of Gujarat & Another, AIR 2017 SC 1465
   c. Paramjit Singh and Anr. v. Union Of India, 2000 CriLJ 100

2. STUDIES
   a. Ialongo, N.; Poduska, J.; Werthamer, L.; and Kellam, S. The distal impact of two first-grade preventive interventions on conduct problems and disorder in early adolescence. Journal of Emotional and Behavioral Disorders 9:146–160, 2001.

[297] Keeping Score 1997, Drug Strategies, 1997.

b. Johnston, L.D.; O'Malley, P.M.; and Bachman, J.G. Monitoring the Future National Survey Results on Drug Use, 1975–2002. Volume 1: Secondary School Students. Bethesda, MD: National Institute on Drug Abuse, 2002.
c. Kumpfer, K.L., Molgaard, V. and Spoth, R. (1996), 'The Strengthening Families Program for prevention of delinquency and drug use in special populations', in: Peters, R. and McMahon, R. J. (eds) Childhood disorders, substance abuse, and delinquency: prevention and early intervention approaches, Sage Publications, Newbury Park, CA.
d. Cutting Crime: Drug Courts in Action. Drug Strategies, 1997.
e. William Spelman and John E. Eck, "Sitting Duck, ravenous Wolves, and Helping Hands: New approaches to Urban policing." Public Affairs Comment, 35(2):1-9, 1989.
f. Traffic in Opium and Other Dangerous Drugs, 10 LEAGUE oF Nations O. J. 835 (1929)
g. James Q. Wilson, Drugs and Crime, 13 CRIME & Just. 521 (1990).
h. Benjamin R. Nordstrom & Charles A. Dackis, Drugs and Crime, 39 J. Psych. & L. 663 (2011).
i. Herman Goldstein, "Improving Policing: A Problem-Oriented Approach." Crime and Delinquency, 25(2):236-258, 1979.
j. Engin Duragol, The Role of Drugs in Terrorism and Organized Crime, 2 ANKARA B. REV. 46 (2009).
k. Keeping Score 1997, Drug Strategies, 1997.

RELEVANCE OF INTERMEDIARIES IN SECURITIES MARKET: ASYMMETRIC INFORMATION CREATES AN ADVERSE SELECTION PROBLEM

- KOMAL SHRIVASTAVA

Abstract

Way back in days , most of the people considered stock market to be gambling and always stayed away from it. While we understand the picture over the last decade , Indians have increasingly turned towards investing in Stock Market. This paper intends to discuss the evolution of security market scenario in terms of investments but at the same time the risk associated with stock market investing. "Warren Buffet" often quotes : *"Risk comes from not knowing what you are doing,"* and to understand the nature of security it is pertinent to say the all economic risks, industry related risks, company management , inflation, exchange rate ,liquidity, credit and even black swan event risk for that matter needs to be assessed while making a decision before trading into securities. This paper further tries to throw some light with respect to a layman's understanding of trading in securities while forming decisions on what an intermediary has to offer in his piece of information. As a security represents the term of exchange of money between two parties i.e. issuer and investor, there evolves the concept of asymmetric information provided by the intermediary for respective gains which overturns the decision making capacity of investor and turns out to be an investing risk. In the end this paper intends to put forth the legislative provisions for the safeguard of the interest of shareholders, and market participants with regards to trading and how the role of media can have an immediate impact to control various scams for taking place.

"To say that intermediaries are capable of making or breaking economies would not be an overstatement"

Introduction

With the fact that individual investors are unable to perform the exchange of securities directly, they happen to appoint an intermediary for the sourced of knowledge of further contact into securities market where a value of investor's amount is being traded. An individual has a tendency of investments basic which further involves savings, planning, selection criteria, investment avenues and obviously the risk associated with the probability of investment techniques but not with the asymmetric information provided by the intermediary who is being trusted. My discussion in this paper will focus upon the two major parts (A) what is the initial role of intermediary? (B) What is the effect of decision making made by the investor with the information provided or even tasks performed by the intermediary? We all know that securities are one of the extra ordinary sources of financial basis that has an effect on economy and relative business growth. With the immense power of saving and investing techniques, individual's earning capacity is being traded with corporation capital building formation to further expand or generate sources and in return investors are expected to be treated with dividends or a share of proportion in the corporate. With respect to the legal provisions available in India in terms of securities market this paper will deal with the regulatory and instructive procedures mentioned for intermediaries in order to proceed with smooth functioning of the trading transactions and creating a reliable platform to deal in. However if the situation turns and the respective guidelines aren't followed by the brokers it creates a huge gap between the layman (investors) and the firms (who intend to borrow funds for certain purpose). The asymmetric information juggles the situation with great complexity and deprives the situation of win -win concept among the traders and involves huge impact on economy growth and individual capacity.

What are Securities and Securities market?

Securities means the securities as defined in **section 2** ***(h)*** of the Securities Contract (Regulation) Act 1956.Various intermediaries in security market and their role: Protections experts significant capacity in the financial framework is hence the provision of an efficient vehicle of data towards the market. Such mediators do bear the information and exchange costs that in the singular financial backers setting would otherwise prevent the financial trade. They give financial backers a simplified informational context, wherein the expenses of procuring and handling data are significantly lowered. In hypothesis, they ought to give their clients the ideal measure of data and knowledge important to settle on cognizant and judicious speculation

choices as indicated by their preferences as far as hazard/return compromise. To the degree that such inclinations are ultimately reacted by solid purchase/sell orders (brought directly e.g., by a representative/dealer or indirectly e.g., by a shared fund to the market), this interaction will improve the efficiency of protections evaluating and, along these lines, of the general allotment of financial resources. In practice, notwithstanding, the protections experts' obligation to giving financial backers with the aptitude they regularly need is profoundly risky. In an ordinary topsy-turvy information setting, the probability of pioneering conduct leads to a genuine concern in regards to the reliability of the financial intermediary's exhortation. Financial backers coming up short on the data and the expertise to fill the role of the middle person can only with significant effort assess the quality financial data and administrations gave to them to their venture choices. Dealing with a protections proficient, the client can't know whether the individual in question has been given the right exhortation. Clients are in this manner presented to both unfriendly choice and moral hazard, for they might pick a clumsy or unscrupulous mediator, or such intermediary may put its own advantages (or the interests of another client) over those of that customer which it is expected to look after.9The essential financial reasoning legitimizing the lead of business guideline of securities professionals focuses, along these lines, on market blemishes identifying with the issue of asymmetric data. In this specific situation, it is usually seen that such market imperfections are more unavoidable in the retail area than in the discount sector.

Certainly, even the most refined investor needs help with distinguishing and acquiring data about the remarkably enormous and constantly changing arrangement of venture openings accessible in the market.11However, the same thought of financial backers complexity is conceivably misleading. A better differentiation is the one gathering protections market members in two categories: the involved and the uninvolved.12The rest are rams or people effectively involved in the dynamic administration of their portfolio and subsequently expertly educated with regards to hedging opportunities accessible available. The second and a lot more extensive gathering is that of uninformed financial backers, settling on choices with restricted data and mastery. To the latter group the financial middle person normally supplies investment administrations. Except if they are securities experts or rams in any case engaged with facial markets, financial backers are generally to be viewed as uninvolved, and along these lines unsophisticated in the proper meaning. Their circumstance is fundamentally not the same as the one describing, for example, typical institutional financial backer. Undoubtedly, the last

option is additionally partaking in financial markets through go-betweens, like agents/vendors, speculation guides, and portfolio managers. However, institutional financial backers are by and large (albeit not generally) protections professionals themselves. To the degree that institutional financial backers expertly contribute pooled reserves on behalf of others (for the most part individual and unsophisticated) financial backers; they can't be regarded as purchasers of financial administrations. In actuality, they do supply their own clients with participation administrations, similar to some other sort of protections proficient. They should be, then ultimately, viewed as delegates, rather than investors. Conduct of business rules are accordingly pointed toward alleviating head specialist conflicts of interest in the trademark association between protections experts, on one side, and individual, unsophisticated (and in this manner clueless) financial backers, on the opposite side. From a different point of view, lead of business guideline is expected to raise the quality standard of the data given by middle people to the general population of financial backers, accordingly enhancing their coincidence in the protections business and taking care of the lemons issue otherwise affecting the market for financial services. Without administrative mediation, quality uncertainty would unavoidably portray such a market. Clients who can't recognize good services from awful ones would unpredictably assess all administrations accessible as being average. This would decide, thusly, a rush to the base interaction, prompting a market where just bad quality administrations are accessible. Accordingly, hazard opposed financial backers would lack the coincidence expected to enter financial exchanges in the protections markets. They would refrain from managing protections mediators and, subsequently, from (straightforwardly or indirectly) participating in present day, complex financial markets. This customary justification for directing financial administrations has as of late been challenged .It has been contended that most market defects influencing the arrangement of financial services are in like manner describing a wide scope of nonfinancial items and services. Nonetheless, to the extent the business sectors for those products are concerned, no lead of business regulation has been established nor has any specific Authority been named to bargain with economic issues looked by buyers. Moreover, the lemons issue is potentially affecting each market described by lopsided data, however this doesn't necessarily infer that, under quality vulnerability, hazard opposed shoppers are driven out from such markets.

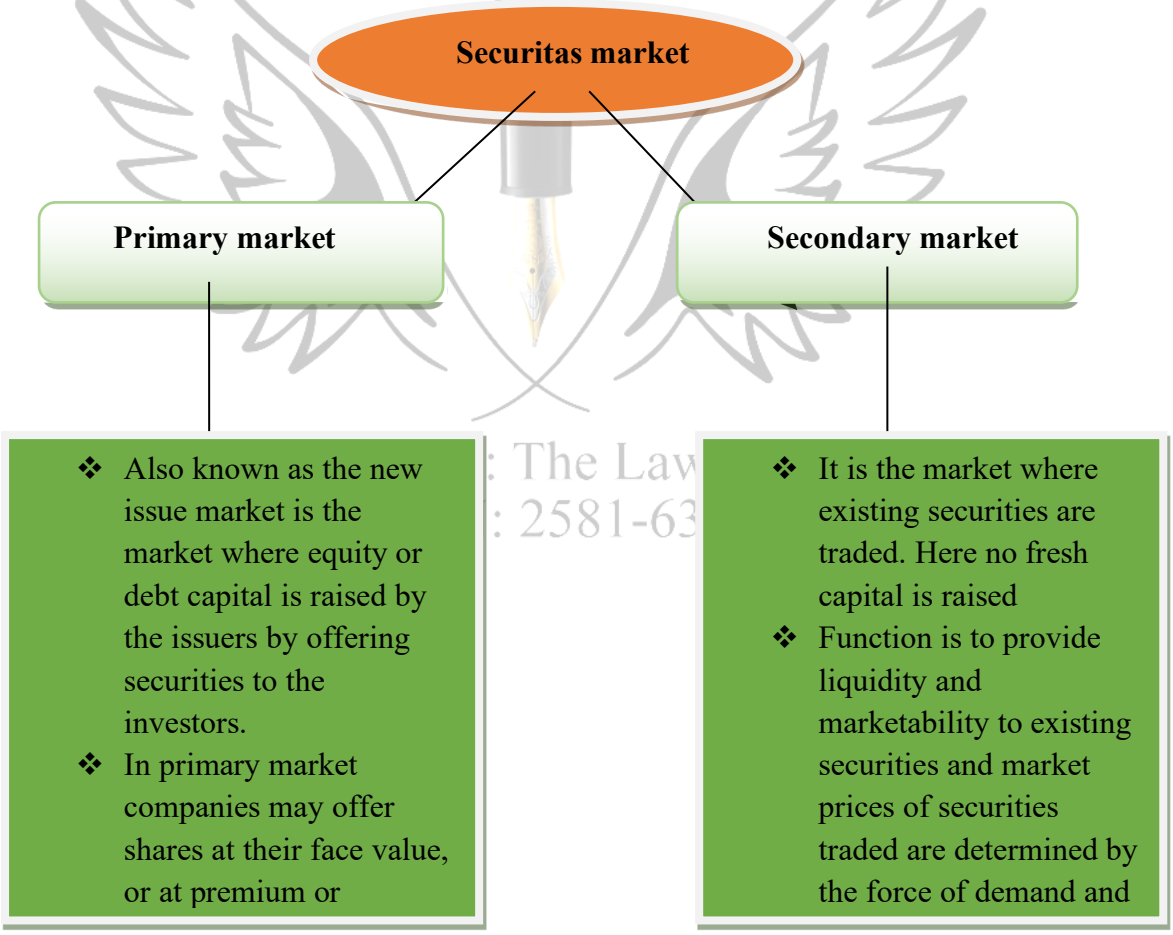
Securities Market is a place where companies can raise funds by issuing securities such as equity shares, debt securities, etc. to the investors (public) and also is a place where investors

can buy or sell various securities (shares, bonds, etc.). Once the shares (or securities) are issued to the public, the company is required to list the shares (or securities) on the recognized stock exchanges. Securities Market is thus a part of the Capital Market. The primary function of the securities market is to enable allocation of savings from investors to those who need it. This is done when investors make investments in securities of companies / entities which are in need of funds. The investors are entitled to get benefits like interest, dividend, capital appreciation, bonus shares, etc. Such investments contribute to the economic development of the country

The two entities which can among others claim, a major credit for improving the market efficiency of the Indian securities market are:

- ✓ National Securities Depositories Ltd. (NSDL)
- ✓ Central Depositories Services Ltd. (CDSL)

Primary market and Secondary market



Who are Intermediaries?

With the three broad categories of participants namely

- ❖ Issuers
- ❖ Investors
- ❖ Intermediaries

Issuers issue security to raise capital while investors buy these securities to invest their surplus money, and thereby provide capital to the issuers. However it is the task of the intermediary to facilitate interaction and co-ordination between the issuers and investors. They fulfill the bridge gap relating to the trading of securities while helping to locate each other and carry out transactions.

To understand the term "intermediaries" let us refer to the definition of intermediaries provided in the **SEBI (Intermediaries) Regulations, 2008** (henceforward, the Intermediaries Regulations), which in turn makes reference to ***Sections 11(2)(b), (be), and Section 12(1), (1A) of the SEBI Act, 1992.***[298]. According to these provisions, intermediaries comprise the following:

(a) Stock brokers and sub-brokers
(b) Share transfer agents
(c) Bankers to an issue
(d) Trustees of trust deeds
(e) Registrars to an issue
(f) Merchant bankers
(g) Underwriters
(h) Portfolio managers
(I) Investment advisers
(j) Depositories and depository participants
(k) Custodians of securities
(l) Credit rating agencies
(m) Asset management companies
(n) Clearing members
(o) Trading members
(p) Any other intermediary who may be associated with securities markets in any manner

[298] https://www.sebi.gov.in/legal/regulations/may-2021/securities-and-exchange-board-of-india-intermediaries-second-amendment-regulations-2021_50079.html

Deciphering The Term Associated With Securities Market Under SEBI Regulations, 2008. Vagueness emerges while deciphering the remaining class, i.e., (p), quite a bit of which relies upon how the SEBI deciphers related with securities market. Albeit not with regards to delegates, courts have held that people related with market would incorporate every individual who has something to do with the securities market. For example, audit firms with next to no immediate relationship with share market exercises are figured to be related with protections market, since the inspecting records of an organization straightforwardly affects the financial backers premium and market stability. While this issue is right now forthcoming in advance under the watchful eye of the Supreme Court of India, an investigation of concluded cases demonstrates that the SEBI deciphers related with market to incorporate all people having any immediate or circuitous connection with the securities market.

Role of intermediaries and effect on investors:

The essential requirement for market mediators in the protections market is to coordinate with its interest and supply powers. As such, middle people work with economies in going up against the basic test of the distribution of reserve funds to venture openings.

Monetary mediators and monetary business sectors can much of the time fill in wellsprings of monetary administrations. Moneylenders/savers specifically have a decision between the danger, return and liquidity presented by the two portions of the monetary framework. Each portion can offer an alternate scope of ventures and offers administrations to firms that are not finished substitutes. Comprehensively talking, monetary business sectors give cheaper a safe distance obligation or value money to a more modest gathering of firms ready to get such money, while monetary middle people offer money with a greater expense mirroring the cost of uncovering data and continuous observing. Monetary mediators and markets may likewise offer integral monetary types of assistance to many firms.[299]

The role of the following financial intermediaries is discussed here

- Investment Banks
- Security Analysts

[299] Allen, Franklin, and Douglas Gale. "Financial Intermediaries and Markets." *Econometrical*, vol. 72, no. 4, [Wiley, Econometric Society], 2004, pp. 1023–61, http://www.jstor.org/stable/3598778.

- Market Maker*s*

Stock markets provide a platform for trading to occur between buyers and sellers. A security's price is determined based on the market process. Market makers can provide many different services and facilitate trading. The service provided by market makers depends on the structure of the market. A market maker sometimes acts as a broker in which case her role is to bring buyers and sellers together. Another important role of a market maker is to provide liquidity to the market particularly in situations when the market for a stock does not clear automatically at one price. The market maker steps in and supplies securities out of her inventory or buys the stock with her capital in case there is excess supply. Most stocks in emerging markets tend to be thinly traded and lack liquidity, therefore this role of the market maker becomes even more crucial. Market makers do not themselves determine the trading price.

Market makers need to be compensated for this "dealer" role. When acting as a dealer, the market maker posts a bid and a ask price for each security that she wants to trade in. She earns the spread as compensation for providing immediacy and price continuity. This price continuity should result in smaller price swings from transaction to transaction and hence lower price volatility. Dealers face three types of costs:

- **Order-Processing Costs:** These include the cost of space, communication, and labor.
- **Risk-Bearing Costs:** By stepping in the market maker they hold an inventory position.
- **Adverse-Information Costs:** Market Makers can be victimized by information traders

Market makers should be required to post continuous two-sided quotes that are firm for the size posted. They should be bound only for the posted size but within this posted size they should not be able to back away. Stock exchanges should make it fairly easy to allow somebody to become a market maker. For example, on Nada any member can become a market maker as long as they satisfy minimum net capital requirements. A market maker can also withdraw its registration fairly easily. If he withdraws voluntarily then he cannot make a market in that security for 2 business days.

Investment Banks

Investment banks perform a number of different functions. A typical investment bank's services will include:

- **Financing Services:** They help companies and governments raise capital by issuing different types of securities such as, equity, debt, private placements, commercial paper, and medium-term notes.

- **Investment Services:** They trade and make a market in major equity and fixed income products. Many of them specialize in block trading.
- **Research:** Maintenance of large databases that allows them to produce research reports on economies, markets, companies, stocks, and bonds.
- **Mergers and Acquisitions:** Advise on mergers, acquisitions, and divestitures to help companies become more competitive.

Some of these critical financial intermediary services need further development in emerging markets. If financial intermediaries start performing these functions the markets will become more efficient and information flow will increase making the markets less volatile in the long-run. Next, the specific role of investment banks is discussed in capital rising in the primary markets.

Security Analysts

Security analysis examines and evaluates individual securities to estimate the results of investing in them. In making judgment about valuation of securities the analyst must seek out reliable information. This information can come from financial statements, discussions with company executives, clients, and suppliers. The discipline requires detailed analysis and diligence.

There are several barriers to the development of the security analysis profession in emerging markets. Lack of timely and reliable information is of utmost importance. If the pumping of funds into these companies by venture capitalists raised the market expectations, and the share prices of these Internet companies inflated tremendously. However, these valuations proved to be unsustainable as the share prices of these companies dropped sharply in April 2000. Eventually, these led to the "***bubble burst",*** having far- reaching implications on the U.S. economy as a whole, which economists refer to as the "lemons problem?"[xi]

Information is available late or has been manipulated then the security analyst cannot do the valuation. If it is too costly to obtain the information then that becomes another hurdle. There is also a lack of expertise available to do this research and analysis.

Security analysts can play an important role in advising potential investors on a wide range of corporate governance issues that include shareholder rights, independent directors, and hostile takeovers.

Regulatory framework governing the securities market and intermediaries to conduct trading transaction:

The **SEBI Act, 1992**, which empowers SEBI with statutory powers for

(I) protecting the interests of investors in securities,

(ii) Promoting development of the securities market,

And (iii) regulating the securities market.

The Companies Act, 2013, which provides regulations for issuance, allotment and transfer of securities, and related matters in public issues of securities; The **Securities Contracts (Regulation) Act, 1956**, which provides for recognition and regulation of transactions in securities in a Stock Exchange. The Depositories Act, 1996, which provides for electronic maintenance and transfer of ownership of dematerialized (Demit) shares.

However, if we talk about the regulation of the capital market and protection of investor's interest it is confined primarily with Securities and Exchange Board of India in terms of:

- Imposing the regulations in stock exchange with relation to securities market
- Registering and regulating the working of collective investment schemes and venture capital funds including mutual funds[300]
- Registering and regulating the workings of depositories, participants, custodians of securities, FII's credit ratings agencies.
- Registering and regulating the actions and conducts of intermediaries such as merchant bankers, underwriters, share transfer agents, portfolio managers, sub broker, stock broker and share intermediaries.
- Prohibiting any means of unfair trade practices that results in illegality under securities regulation.
- Promoting investor's education and training of intermediaries of securities market.
- Calling for information if is in suspect , carrying out timely inspections for the purpose of tallying information , audit of the stock exchange & intermediaries
- SEBI is vested with the powers to take suitable actions against the practices relating to the securities market manipulation and misleading statements to induce sale / purchase of securities.

And with that being said there are other relevant legislations namely:

[300] Universal law series , Corporate law page 66, 3rd edition 2017

- The SEBI (Stock Brokers and Sub- brokers) Regulations, 1992;
- The SEBI (Depositories and Participants) Regulations, 1996;
- The SEBI (Bankers to an Issue) Regulations, 1994; the SEBI (Merchant Bankers) Regulations, 1992;
- The SEBI (Portfolio Managers) Regulations, 1993;
- The SEBI (Registrar to an Issue and Share Transfer Agents) Regulations, 1993;
- The SEBI (Underwriters) Regulations, 1993.

How the fraudulent technique in proceeding information to the investors effects decision making and turns over GDP:

with the spill over created and spread by the intermediaries there is an adverse effect on economies and their respective GDP growth, the financial frauds turns out to be creating a huge step back from trading perspective and hence many investing mechanisms .It controls the firm including the sale of security and restriction of trading and hence the financial flow of interdependence of investors as well as firms borrowing capacity which further effects the expansions of the entity.

The economic literature explains that security trading process is accompanied by a series of explicit and implicit commitments, such as intermediary commitments to product quality information as well as maintenance in the future. These commitments often depend on the other channel parties mediating between the investors and the relative firm's reputation for self-protection due to the lack of explicit knowledge of a layman. In contemporary securities markets, financial backers and guarantors depend intensely on middle people to work on all around informed choices. Intermediaries, particularly retail financial backers, don't have satisfactory data, information, or aptitude, and guarantors don't have sufficient assets to contact individual financial backers spread the nation over and the globe. Accordingly, mediators have an extremely significant and delicate task to carry out in making the market matrix specially unknown request driven exchanging platform work easily.

Late investigation of the effect of the financial emergency on ICT has shown that the destiny of Internet delegate markets relies upon factors that are marginally unique in relation to other sectors.41 specifically, proof is arising that plans of action dependent on web-based commercial (Google, AOL, Yahoo!, IAC) in the Internet area experienced substantially less the emergency than plans of action dependent on conventional types of media commercial, as

it goes about as an impetus for the exchange of publicizing to the internet based market. On the web exchanges keep on developing as a portion of all out retail buys (for example Amazon, eBay, Expedia). Also, development in broadband and versatile information supporter numbers proceeds. More slowly generally development in certain areas can help Internet organizations as buyers search for more ideal arrangements on-line and sponsors centre around on the web promoting. This has supported further union of organizations and contributions and benefited the most fruitful firms, for example Amazon for distributed computing and internet retailing, Google for web based publicizing, or Apple for computerized content

How asymmetric information does provided by the intermediary's effect the investor's situation?

Till now we have observed that intermediary plays an important role in diversifying information among the investors, to this extent it is possible that a retail investor doesn't have all the amount of knowledge to purchase a security hence he depends upon the reliable information that is provided by the intermediary to the investor , now what if the information provided turns out to be untrue, the fact comes in picture when we rely on some source and decision is the outcome pertaining the rules and regulations imposed by SEBI these expectation imply a higher willingness to purchase a security if it turns out to be real incense of information . Eventually if the information turns out to be asymmetric it will have a compelled breakdown of the market.

The fundamental elements of go-betweens have been concentrated on broadly in writing and can be summed up as follows:

- To give the foundation
- To gather, coordinate and assess scattered data
- To work with social correspondence and data trade
- To total organic market
- To work with market processes
- To give trust; and
- To consider the necessities of purchasers and merchants or clients and clients.
- To satisfy these capacities over the Internet, various kinds of delegates have created and include: access and capacity suppliers, commercial centre trades, purchase/sell satisfaction, request assortment frameworks, sell off intermediaries, virtual commercial

centres, just as web indexes, publicizing organizations, web aggregators, news coordinators or informal communication locales.

The worth added chain is the arrangement of connections of specialists with different specialists, the organization of upstream furthermore, downstream organizations, from unrefined components to definite deal, through which an item voyages. At each phase of handling, a go-between regularly plays out an assistance which works with this stream adding esteem yet likewise adding cost. As a rule, this assistance is data serious coordinating with a purchaser to a dealer, guaranteeing parties in an exchange, offering help for the exchange (for example monetary administrations) and frequently implies some sort of hazard sharing. For instance, closeout online business locales give exchanging systems to work with market processes, and simultaneously give data and total/coordinating with administrations by spreading the word about it that a given decent is marked down, by distinguishing the inclinations of clients and flagging when something of interest comes up, by giving means to the purchaser to evaluate the quality or the part of the great, the standing of the venders, and by giving certifications to exchange securely

What are the penal provisions in terms of SEBI act with respect to securities trading?

- ✓ **Penalty for insider trading:** Rs 25 core or three times the amount of profits made out of insider trading whichever is higher.
- ✓ **Penalty for fraudulent and unfair trade practices:** Rs 25 core or three times the amount of profits made out of such practice whichever is higher.

Critical analyses of trading transactions among market participants:

The stockbroker is one of the main monetary delegates in the securities exchange that assume a key part in making exchanges for you. It is a corporate substance that is enlisted as an exchanging individual from the stock trade. It holds a stock broking permit and works in consistence with SEBI rules to work with financial exchange exchanging. You want to open an exchanging account with a stockbroker request to make monetary exchanges in the securities exchange. With the assistance of an exchanging account, you can purchase or sell protections in the securities exchange. Stockbrokers give you all the help you really want have to execute in the market which incorporates giving you edge to exchange, give programming

and calling support, giving agreement notes of your exchanges, work with reserve move between your exchanging record and banks, and give administrative centre login. It charges you some expense for giving every one of the offices to make your exchanging venture smooth.[301] As the scale and extent of the Internet has developed to pervade all parts of the economy and society, so too plays the part of Internet go-betweens who give the Internets fundamental framework and stages by empowering interchanges and exchanges between outsiders just as applications and administrations. Web mediators give admittance to, have, communicate and file content began by outsiders or give Internet-based administrations to outsiders. They offer admittance to a large group of exercises through both wired furthermore, remote innovations. Most Internet go-betweens are from the business area and they length a wide scope of online financial exercises including: Internet access and specialist co-ops (ISPs), information handling also, web facilitating suppliers, Internet web crawlers and entrances, web based business go-betweens, Internet instalment frameworks, and participative arranged stages. Intermediation is the interaction by which a firm, going about as the specialist of an individual or another firm, use its mediator position to cultivate correspondence with different specialists in the commercial centre that will lead to exchanges and trades that make financial and additionally friendly worth. The principle elements of Internet middle people are I) to give framework; ii) to gather, coordinate and assess scattered data; iii) to work with social correspondence and data trade; IV) to total market interest; v) to work with market processes; VI) to give trust; and vii) to consider the requirements of the two purchasers/clients also, vendors/sponsors. There is in some cases strain between different elements of Internet go-betweens; for instance, strain between protecting character and security while customizing items and administrations in ways that advantage clients or between foundation arrangement and use.

Conclusion:

The current market costs assume a significant part in clarifying value variances, market abnormalities and market execution. In an effective market, it is normal that the costs mirror all accessible public and private data about the resource. During the 1970s, it was broadly

[301] Allen, Franklin, and Douglas Gale. "Financial Intermediaries and Markets." *Econometrica*, vol. 72, no. 4, [Wiley, Econometric Society], 2004, pp. 1023–61, http://www.jstor.org/stable/3598778.

inferred that monetary business sectors are surprisingly productive and fit for mirroring all significant data into the current costs; thusly nobody can precisely foresee future costs or conflicting changes in market exercises. In any case, there are chances and offenses that depend on different reasons, for example, legal, administrative, social, be-havioral and mental

It is broadly recognized that monetary cheats have gotten the consideration of bookkeeping and money writing. As a piece of the monetary business sectors, protections market offers a bigger number of benefits than different business sectors, and it drives financial backers to store their reserve funds on monetary instruments (for example stocks, securities, choices, trades) and to supply them as assets. For each monetary instrument, there is at least single arrangement between something like two gatherings (guarantor and financial backer); accordingly, this uncovers the need of a managed exchanging climate where market members can trade monetary instruments for future financial advantages under the guidelines with straightforwardness and certainty. Financial backers, market experts and controllers are engaged with looking for elective information mining procedures to identify fraudulent exchanges and financial exchange controls. These strategies can deal with huge volumes and assortments of monetary information to distinguish fraudulent exercises. Be that as it may, information mining included independent knowledge application in protections extortion location is a difficult endeavour by and by. .Apparently, design acknowledgment in enormous asymmetric data includes some unique techniques that are qualified to use inside the information base frameworks. To accomplish extortion discovery, there is a requirement for change of information into an appropriate construction. Anyway acquiring information quality remaining parts its essential significance. Subsequently the nature of information assumes an essential part in the precision and unwavering quality of protections markets observing frameworks. In the money business, straightforward blunders straightforwardly influence the nature of examination. Accordingly, specialists ought to assess the information before investigation process and limit blunders or irregularities by working with information insightful.

Bibliography:

STATUTES

- Companies Act ,2013
- Securities Contract Regulation Act ,1956

- SARFAESI ACT (Securitisation and Reconstruction of Financial Assets and Enforcements of Securities Interest Act
- SEBI :Securities Exchange Board of India
- Ministry of Finance and Ministry of Corporate Affairs
- Department of Economic Affairs

ARTICLES

- Allen, Franklin, and Douglas Gale. "Financial Intermediaries and Markets." *Econometrica*, vol. 72, no. 4, [Wiley, Econometric Society], 2004, pp. 1023–61, http://www.jstor.org/stable/3598778.
- Universal law series , Corporate law page 66, 3rd edition 2017
- Allen, Franklin, and Douglas Gale. "Financial Intermediaries and Markets." *Econometrical*, vol. 72, no. 4, [Wiley, Econometric Society], 2004, pp. 1023–61, http://www.jstor.org/stable/3598778.
- https://www.sebi.gov.in/legal/regulations/may-2021/securities-and-exchange-board-of-india-intermediaries-second-amendment-regulations-2021_50079.html

- ***ONLINE SOURCES***
- JSTOR
- SCC ONLINE
- MANUPATRA
- LEXISNEXIS

THE ROLE OF TRADE UNION OF INDIA

- PRAPTI HOTA

ABSTRACT

Due to the very rise of industrialization and capitalism, trade unionism has gained massive progress. Over fifty years have passed since India's trade union movement began. It has gone through a number of phases throughout its lifetime, and because of this, there have been times of frustration and hard struggle, as well as times of acknowledgment, consolidation, and accomplishment.

This research paper is primarily concerned with the functions and aims of trade unions in India. Researchers have included current working conditions, identifying the needs of the Trade Union, social relations associated with it, its working methodology, its significance, and Trade Union's role in collective bargaining because they've had a significant impact on not only social, but also economical and the political lives of people.

The goal of trade union formation in the recognition of law is to spread the peace in terms of industry, alongside the goal of providing social and economic justice to the general public, but this function can only be performed if the members of the trade unions are provided with civil liberty and democratic rights by the society in which they live. Researchers have addressed the challenges that Trade Unions confront in India, as well as discussed the ideas for Trade Union's success, at the end of the study paper.

INTRODUCTION

Trade unions are an integral part of every nation's contemporary industrial relations system, where each of them has its own set of objectives and aims to attain in accordance with its constitution, as well as its own method for achieving those goals. Workers' unions play an essential role in the industrial sector. The Ministry of Labour, Government of India's Labour Bureau, collects statistics on trade unions on an annual basis. Article 19 (1) (c) of the Indian Constitution states that the freedom to organize a trade union happens to be a basic right.[302]

[302] Uttar Pradeshiya Shramik Maha Sangh vs. The State of Uttar Pradesh.

Following the First World War, there was a massive need for coordination among the various unions, which thus led to the formation of the Indian trade union movement. [303]

Over a period of time, this movement becomes a key element of India's industrial growth. [304] Trade Unions in India have many economic, social, and political elements.
A trade union, according to the Webbs, happens to be a continuous organization of wage-earners formed which is formed with the aim of preserving or improving the working conditions.[305]

Historically, union representation and collective bargaining have been critical to the growth of a stable working population in all developed economies, which allows the workers to gain a more equitable share of the wealth that they themselves create. Not only that, but they are also capable of improving working conditions and assisting workers in gaining their job security.[306]

OBJECTIVES AND THE NEED OF THE TRADE UNION

1. **Wages and salaries-**

Wages and salaries happen to be two of the most significant topics addressed by Trade Unions. Benefits are established in the organized industry through methods such as collective bargaining, wage boards, conciliation, and adjudication.
All of these mechanisms ought to be thoroughly investigated, because through these venues, union power and objective data should have an impact on the wage situation.[307]

2. **Working conditions-**

Another key goal of Trade Unions is to ensure worker safety. Every worker must be supplied with basic amenities while on the job. Water, minimum working hours, paid holidays, social security, safety equipment, lighting, and other benefits.[308]

---

[303] Nishith Desai AssociatesIndia- Trade Unions and Collective Bargaining(2015) available at- http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/India-Trade-Unions-and-Collective-Bargaining.pdf
[304]Trade Unions Act provides certain Legal Protections To Trade Unions of India, as of March 2010.
[305] Webb, Sydney & Webb,Beatrice: that happens in the history of TU, London,1920.
[306]. Indian Journal of Industrial Relations, 1 January. http://www.highbeam.com. (2007)
[307] J. Fonseca, Organized Labour in India, and the wage distribution schemes 1964.
[308] Zivan Tanic,Workers Participation in Management: Ideal and Reality in India, New Delhi, Shri Ram Centre for Industrial Relations and Human Resources 1969.

3. **Personnel policies-**

Any personal policy of the employer regarding promotion, transfer, and training that is arbitrary may be challenged by Trade Unions.

4. **Discipline-**

Trade Unions also safeguard employees from management's arbitrary discipline action against any worker. Management should not victimize any employee by arbitrary transfer or suspension.[309]

5. **Well being-**

The fundamental goal of the Trade Union is to strive for the employees' welfare. This covers the welfare of the worker's family members or children.

6. **Employee-Employer Relations-**

In order for there to be industrial peace, there must be concord between the employer and the employee. However, owing to management's overwhelming authority, conflict might emerge. In this case, the Trade Union represents the entire group of employees and continues discussions with management. [310]

7. **As this strategy is founded on the concept of Give and Take, Trade Unions may also submit ideas to management.**

Trade Unions safeguard employees' interests through collective bargaining.

FUNCTIONS OF TRADE UNION IN INDIA

Collective Negotiating- According to the Supreme Court of India, collective bargaining is the process through which a disagreement over work conditions is settled amicably by agreement rather than compulsion.[311]

---

[310] K.N. Vaid, Political Unionism in India. July, 1968.
[311] Karol Leather Karamchari Sangathanv.Liberty Footwear Company, (1989)

During this procedure, talks and discussions on working conditions take place between the company and the employee.[312]

Refusing to negotiate collectively is a prohibited business activity. Collective bargaining aids in the resolution of labour concerns. Collective bargaining is the movement's cornerstone, and it is in the interest of labour that Trade Unions and their ability to represent workers have been granted legislative status. [313]

Trade unions defend workers from pay increases and offer job security through nonviolent means.

Trade unions also assist in giving financial and non-financial assistance to workers during lockouts, strikes, or medical emergencies.

It is also important to remember while drafting an agreement that the interests of employees who are not members of a trade union are safeguarded, and that workers who are not members of a trade union are not discriminated against.[314]

SOCIAL RESPONSIBILITES OF TRADE UNION

Social responsibility is an obligation recognized over an individual, group of individuals, or institution in order for them to be accountable and answerable to people for their civic duties; accountability refers to the goal of the act or decision, which should be the welfare of the society in order to achieve a balance between growth and welfare.[315]

An individual or group of individuals cannot be considered to be socially accountable if the outcome of an activity or choice causes harm to the public.The objective of labour laws, in some ways, lies with the establishment of industrial peace, where the protection of innocent employees is an important requirement, and this is what prompted the formation of trade unions and their legal recognition.[316]

[312] I.L.O.Collective Bargaining; A Workers Education Manual, Geneva, Page-3 1960.
[313] Poona Mazdoor Sabhav.G.K. Dhutia, AIR 1956 Bom. 743.
[314] Deoli Bakaram vs.The State Industrial Ciurt, Nagpur, 1959.
[315] Asoka Mehta,The Role of Trade Unions in Developing Countries, in M.K. Haldar and Robin Ghosh , Problems of Economic Growth, New Delhi.
[316] Harold Crouch,Trade Unions and Politics in India, Bombay, Manaktalas, 1966.

The function of collective bargaining acts as a process of negotiation between employer and employee so that either consensus or difference of opinion can be pointed out to settle the major dispute, but the need for social responsibility stems from the fact that trade unions exist in representative capacity as they represent labours, so accountability and responsibility of trade unions. [317]

Because trade union choices have a direct influence on labours, there should be justifiable social responsibility from the trade union.

This function of organization is formed by virtue of various ethical principles, and the sayings of social contract.Responsibilities can be stated in terms of trade union role and employer-employee relationship. [318]

1. Labor education and awareness so that a traditional or customary manner of participating in grave agitation might take the form of collaboration and understanding. The development of society should not be hampered by unneeded strikes and serious agitation; occasionally the agreement struck between employer and employee is advantageous to them but may be unjust to innocent customers, who are meant to be safeguarded by trade unions. [319]

2. Their actions and deliberations with employers should be in such a way that consensus becomes a part of economic growth and development; for this purpose, cooperation is required. Trade unions are not supposed to be influenced by the caste division system in order to protect the interests of its workers and the nation's integrity. Goals should be realized while keeping the community's best interests in mind.

3. The rural and urban populations are made up of unorganized labour, which should be organized by trade unions in order to raise people out of poverty. To promote planned

[317] S.P. Jain,Workers, Leaders and Politics: A Case Study,1968.
[318] Ranganathan, S. (2004)

savings programmes and concepts in order to boost capital creation. New equipment should be accompanied by education programmes on how to utilize it.

SIGNIFICANCE OF TRADE UNIONS ESTABLISHMENT

Trade unions fill in the gaps that obstruct the attainment of industrial peace and social justice. Any decision reached by virtue of deliberation with the employer, through trade union, should be strictly followed by the labours who form the part of that trade union as it improves the working conditions, wages they receive, and other matters related to employment as the trade unions helps the labours.[320]

Trade unions have a significant influence in raising employees' salaries. This function may not be noticed immediately, but wages may be boosted indirectly by trade union activities such as assurances from trade unions about the payment of marginal productivity level, which can be done by boosting negotiating ability and power. Trade unions have the ability to halt the supply of labour in a given trade, which may result in pay increases.

GROWTH AND ORIGIN OF TRADE UNION

The first factories Act was passed in 1881 on the advice of the Bombay factory recommendation in 1985. Employees in the Bombay textile sector asked that working hours be decreased, that weekly holidays be granted, and that workers be compensated for accidents sustained on the job. N. Lokhande founded the first union for employees, the Bombay Mills Hand Association, in 1890.

Following the onset of World War One, a number of labour movements arose. The people's deplorable social and economic situation at the time sparked the labour movement.

AITUC is an acronym used for the Association of International Trade Union (All India Trade Union Congress)

[320] S.N. Mishra Labour & Industrial Laws7th Edition, Central Law Publications (2014).

The All India Trade Union Congress was formed in the year 1920 for the mission of choosing delegates for International Labour Organization (ILO).
The first meeting of AITUC was held in Bombay in the year 1920 under the presidency of Lala Lajpat Rai.

The AIRF was formed in the peak of 1922,in which all the unions consisting and compromising of railway workmen were made part of it and affiliated to work under it. The AITUC divided into multiple groups because some of the members supported the war while the remaining others did not, which created various troubles. This is when the later group was formed as an organisation under the direction of congress leaders, resulting in the establishment of the Indian National Trade Union Congress (INTUC).

Socialists also broke away from the AITUC, resulting in the establishment of the Hind Mazdoor Sabha in 1948. As a result, divisions and separation might be seen, culminating in the formation of different trade unions.[321]

There are three types of unions based on the structure they have:
1. Industrial Union
2. Craft Union
3. General Union.

Crafts union comprises of earning a wage from a single livelihood. It includes all the workmen working for a single craft even from different industries, an industrial union is formed by virtue of industry actions rather than similar crafts or works, and a general union consists of workmen from various crafts and industries. In India, trade unions are formed mostly as a result of industrial choices, which may be attributed to the diminished significance of artisans following industrialization and the availability of huge amounts of unskilled labour.

The primary organizations that serve as labour unions are the INTUC, HMS, and UTUC.

[321]From National Movement to Present Day)Volume 4, Atlantic Publishers.

INTUC-

The formation is led by congress leaders, and once all other options have been tried, all unions associated with INTUC should seek arbitration for the issue.

HMS- (HIND MAZDOOR SABHA)

Following the socialist concept, it was founded in Calcutta in 1951 by individuals who did not become members of AITUC or INTUC.[322]

UTUC- (UNITED TRADE UNION CONGRESS)

It was founded in 1949 and primarily served West Bengal and Kerala. Aside from these four trade unions, there are others operating in diverse industries that are not linked with any central body. Indian trade unions have now been recognized by legislation and granted legal standing, and they have become a permanent feature of industrial society, influencing policy making and employer decisions through negotiations between workers and bosses.

Structure of Unions-

The phrase "structure of unions" refers to the premise on which unions are constructed or organized (i.e., whether they are formed on a regional, craft, or industrial basis), as well as the model by which plant unions are linked to regional or national level federations or unions. These two features of unions will be investigated individually. [323]

Trade unions are classified into three categories:

1. Craft union
2. Industrial unions
3. General unions

A craft union is an association of wage workers who work in a specific occupation. It may apply to all employees engaged in a specific craft, regardless of the industries in which they operate. Thus, even if they work in separate businesses, electricians and mechanics can establish their own union.

[322] R.N. Sinha, Trade Unions, & the Labour LegislationPearson Educational, in the year 2006.
[323] G.B. Pai,Labour Law in India, from the year 2001.

With the onset of industrialization in India, the role of Indian artisans declined, and technological advancement moved directly from agricultural to the factory stage, bypassing the merchant craftsmen stage of capitalism. As a result, the number of artisans has decreased substantially. The decline in the significance of artisans, along with a huge number of unskilled employees, resulted in the rise of industrial unions. [324]

Higher salaries for skilled employees might be another factor driving the rise of industrial unions. Because skilled employees were in short supply in the early days of unionization, their pay were higher. As a result, they were uninterested in unionism.

Their lack of interest, along with the prevalence of unskilled employees, promoted union expansion along industrial rather than craft lines.[325]

Because of the influence of outsiders, industrial unions grew as well. Because trade unions were founded by outsiders, they were concerned with the labour class as a whole, rather than simply a subset of it. Industrial unions have more employees in their ranks than craft unions, thus outsiders were more interested in their creation. [326]

STRUCTURE OF TRADITION

The patterns in union structure of our nation is connected to the interaction between unions at the national, regional, local, and plant levels.[327]

The following describes their relationship:

Local Level:

A local level federation is the second level from the bottom of the system. The local trade union federation brings together the plant level unions in a certain craft or sector at the local level. These federations may be linked with a regional or national federation, or they may be autonomous.

[324] P. Bajaj- A study in Delhi, Indian Journal of Industrial Relations, in the year January, 1967.
[325] Trade Union System of Organization(a study being conducted by Ishwar Dayal, IIM, Ahmedabad) sponsored by the ICSSR.
[326] Structure and Functions Ann Arbor, UoM, 1970.
[327] H.L. Kumar Labour and Industrial Law Â Volume-2, 9th Edition, Universal Law Publication, 2016.

Regional Level:

This is the organization that includes all of the component unions in a certain state or area. Their significance cannot be overstated beyond a certain state or area because situations, cultures, practices, and ways of life differ from one another. These regional federations may have two types of members:

(1) plant level unions that directly affiliate with them, and

(2) local federations. In the second model, plant-level unions join regional unions through local federations.

National Level:

These are the national level organizations to which plant level unions, local unions, and regional level unions can connect. These are the apex bodies at the structure's top that serve as coordinating bodies.

THE PROBLEMS FACED BY THE TRADE UNION

The Trade Union suffers from problems time and again. Here is a brief account on the very same:-

1. Uneven Growth-

Trade union operations are concentrated in large size businesses, mostly in manual work, and primarily in larger industrial centres; there are almost no trade union activities in small scale firms, domestic labour, or rural labour. The degree of unionism varies greatly from sector to industry, affecting just a subset of India's working class.[328]

2. Low Membership-

Despite the fact that the number of trade unions in India has risen significantly, membership per union has decreased. In 1927-28, the average number of members each union was around 3,500. It fell to around 1,400 in 1946-47, and then again to 675 in 1985-86 and 659 in 2000-01.

[328] S. Nandan & A. Gupta, a Case Study of National Thermal Power Corporation (Ntpc)Â□, Unchahar. Management, (2009).

3. Inter Union Rivalry-

Unions strive to undermine one another in order to acquire more clout among employees. They do more harm than good to the cause of unionism as a whole in the process. Employers are given the option of pitting unions against one another. They have the right to refuse to bargain on the grounds that there is no real representative union. Aside from that, the employees' own unity has been lost. Employers can gain an advantage by exploiting labour disputes. [329]

4. Weak Financial Position-

Their financial situation is dire since their average yearly salary is insufficient. Due to the large number of unions, subscription rates are quite low. Unions that want to increase their membership keep subscription fees low, resulting in a lack of cash with the unions. Another major factor for unions' poor financial situation is that substantial sums of subscription dues get unpaid by employees. The names of constant defaulters appear on the records of the majority of unions on a regular basis. According to the union regulations, they are neither expelled nor cease to be members ipso facto.[330]

5. Lack of Public Support-

Strikes and protests are regularly used by labour unions to get their demands met. As a result, the public is inconvenienced. The public's compassion or support is practically non-existent in this case.[331]

Hence, in conclusion, unfair labour practices and the habit of not including employees in any type of decision-making culminated in the creation of trade unions in India and their legal recognition. The concept of social justice and industrial peace can only be realized via mutual collaboration between employers and employees, which is why trade unions play such important roles in establishing industrial peace and providing overall justice to employees.

There are several contexts in which employees should be exempted from arbitrary decisions made by employers, such as wages, bonuses, working hours, and holidays. This exemption can

[329] Jaspal Singh, Indias Trade Union leadership, New Delhi, Page-56-67- the year 1980.
[330] Deepak Ghosh, Industrial relations in changing perspective, Indian journal of Industrial relations, Vol.11,Issue 3, New Delhi, Page-156-162, (1960).
[331] N.R. Seth Trade union in an Indian Factory (1960)

only be obtained through negotiation known as collective bargaining, in which the interests of both parties are prioritized in any type of dispute. The origin of trade union explains the struggle that led to the creation of trade unions in India.

Again, The continuous division in trade unions at the national level led to less implementation of the objectives they set before formation; one of the causes can also be tracked down in the form of legislation in this regard; now a days, there are only two requirements that must be met in order to establish a trade union: a substantial number of workers and a substantial nexus with the matter of dispute.

FEMALE FOETICIDE *VS.* THE MEDICAL PRACTITIONERS- AN ANALYSIS

- DR. BHASWATEE PATHAK

Abstract

Female foeticide is a serious violation of violation of human rights as well as violation of right to life. In a country like India, where girl child is often treated as inferior or a burden upon the family, the modern technological advancement through which the sex of the fetus can be determined prior to its birth has contributed to the tremendous growth of the commission of the crime of female foeticide. If we are concerned about the crime of female foeticide, we have to take into consideration the role played by the medical practitioners as without assistance from a medical practitioner, commission of the crime of female foeticide is impossible. The medical fraternity sometimes indulges in these activities for monetary gain and sometimes for other unavoidable circumstances created by the parents of the female fetus or their family members. Moreover, the formalities required under both the Medical termination of Pregnancy Act, 1971 and Pre Conception and Pre Natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994 are sometimes create doubt and obstacles in the way of giving adequate healthcare facilities to the needy.

Keywords: Female Foeticide, Medical Practitioners, Girl Child

Introduction

In society, the members of the medical community enjoy a powerful position. Female foeticide is an issue which is directly related to the will of the parents of the child in mother's womb as well as the ethical value of the doctor concerned before whom the parents of the unborn child reveal their evil intention for sex selective abortion. Although the government of India has adopted the PC & PNDT Act, 1994 and has also provided for certain rules under the said Act which are to be followed by all the medical practitioners as well as the Genetic Counseling Centers, Genetic Clinics and Laboratories, the data available in the website of NITI Aayog

mentions 901 daughters in 2005-07 and 900 daughters in 20013-2015 as compared to 1000 males.[332]

In India, the practice of sex-selective abortion or female foeticide is only the latest manifestation of a long history of gender bias, evident in the historically low and declining population ratio of women to men. Moreover, the medical fraternity in India has been quick to see entrepreneurial opportunities in catering to the insatiable demand for a male child. Until recently, the technology was prohibitively expensive.[333]

A ban on the government departments at the centre and in the states, making use of pre-natal sex determination for the purpose of 'abortion- a penal offence' led to the commercialization of the technology; private clinics providing sex determination tests through amniocentesis multiplied rapidly and widely.[334] Advertisements appear blatantly encouraging people to abort their female fetuses in order to save the future cost of dowry. The portable ultrasound machine has allowed doctors to go from house to house in towns and villages. In a democracy it is difficult to restrict right to business and livelihood if the usual parameters are fulfilled.[335]

Position of medical practitioners under the Medical Termination of Pregnancy (MTP) Act, 1971

The MTP Act is the first initiative taken by the legislature of India to bring all cases of termination of pregnancy under institutional basis. Before passing of this Act, law relating to abortion and miscarriage was dealt with under various provisions of the Indian Penal Code, 1860 and as there was penal provisions for acts of abortion, people in most of the times opt for termination of pregnancy by unregistered medical practitioners which contributed to gradually increasing Maternal Mortality Rate(MMR) in India. The MTP Act brought revolution in India regarding termination of pregnancy and now if there are justifiable abnormalities of the fetus it can be terminated.

Regarding position of the medical practitioner after the enactment of 1971 law, it can be seen that the legislature of India has taken a much liberal view regarding termination of pregnancy

[332] Amandeep Aggarwal(2018, July 31), Female Foeticide: Are Doctors the fall guys? Retrieved on March 20,2020, from downtoearth.org.in/blog/health/female-foeticide-are-doctors-the-fall-guys-61279

[333] Technology and its impact on female foeticide in India; retrieved on March 31, 2020,from athttps://www.govtech.com/e-government/Technology-and-its-Impact-on-Female.html

[334] ibid

[335] ibid

by registered medical practitioners. This is a welcoming step as the women with unwanted pregnancy can now terminate it through experienced doctors and well equipped registered medical clinics where their right to health will be taken care.

But apart from the positive aspects, we cannot deny the negative attributes attached to this Act. These can be summed up as-

Firstly, according to Section 3 of the Act, if at least two medical practitioners are of the opinion formed in good faith, that the continuance of pregnancy would involve a risk to the life or grave injury to the mental and physical health of the pregnant woman as well as the child, the pregnancy can be terminated. Moreover, consent of the major women and in other cases consent of the guardian is needed. The concept of "good faith" is a very vague concept and no number of legislations can guarantee that a doctor is acting in good faith. Most of the doctors do not realize that their patient's well being is their top priority and whatever they do is to be done for the maximum benefit of his patients and hence often do not act in good faith.[336]

Secondly, in case of crime of rape, women in India are raped by the outsiders as well as in the hands of family members and near relatives. However, very few cases dealing with the second category have been reported so far. Under such circumstances girls are often taken to shady hospitals, using unhygienic conditions to abort child. Sometimes a particular family may frame up such an incident in order to get a female fetus aborted.[337]

Thirdly, a couple already have a girl child and the women have conceived another female fetus, they may use this clause to get the fetus aborted as their action cannot be questioned by police authorities or doctors for it is exclusively their decision whether to increase their family or not.[338]

Fourthly, under this Act female foeticide was not declared as an offence. At that time, various sex selective techniques were not known to the people and that part was not dealt under this Act. This led to tremendous increase in the number of cases of female foeticide.[339]

Lastly, doctors reckon that that these conditions are more aggravated because the MTP Act, which was brought into protect a women's right, is being misused by society and the concerned

[336] P.Bardhan(1982, September 4), Little girls and death in India, Economic and Political Weekly, p.23

[337] A. Clark(1987,April 25), Social demography of excess female mortality in India: New Directions, Social and Political Weekly, p.56

[338] M. Dasgupta(1987), Selective discrimination against girl children in rural Punjab, Population and Development Review 13(1). Pp.90-95

[339] Sangeeta Cheeru(1991), Growing Menance of Female Foeticide in India, Indian Socio Legal Journal, p.17

parents. They often opt to do the abortions in hospitals or registered clinics where the reason for abortion is not questioned.

Position of medical practitioners under the Pre Conception and Pre Natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994

The crime of female foeticide in India is the contribution of tremendous growth of modern technology which helps the medical practitioners and the parents of the fetus to know about the sex of the unborn before its birth. This technological advancement has contributed a lot to the commission of the crime of female foeticide as a girl child here is always considered as a burden. The sole aim of passing of PNDT Act, 1994 is to regularize the conditions under which the parents can undergo the ultrasound procedure and to provide guidelines regarding total prohibition on determination of the sex of the fetus.

Under the provisions of this Act and the rules attached to this Act, stringent provisions were made so that no can engage in activities like pre natal sex determination and female foeticide. This Act was amended in2003 and through this amendment the provision for constitution of District level Committees were included to ensure proper implementation of the provisions of this Act. If we compare this Act with the MTP Act, 1971 we will find the PC & PNDT Act is more effective for preventing the crime of female foeticide.

This legislation however is not free from criticism and if we consider the position of the medical practitioners under this Act we will find that-

Although India has a strong law prohibiting sex selection, effective implementation of the PC & PNDT Act is hampered by practical difficulties and social apathy. The practical difficulties for proper implementation of the Act are

Firstly, the main object of the PC and PNDT Act is to prohibit the disclosure of the sex of the fetus. But the information of sex of the fetus is given behind closed doors and these informations are shared orally or by signs. Therefore, there it is difficult to obtain information about these crimes.[340]

Secondly, since educated people are party to the practice of female foeticide, it is difficult to bring them to book or the doctors who are engaged in these activities. Here the enforcement

[340] Dr. Shallu(2008), Female Foeticide: A Socio Legal Problem and Some Solutions, The Criminal Law Journal, (volume3, July to September),p. 235

authorities are not so much strict as they should be and the offenders can find a way to escape after committing the crime. [341]

Thirdly, in the matter of sex selection, both the service-seeker and service-provider are perpetrators while the female fetus is the only victim. Conviction is rare as there is non-reporting of crime and absence of evidence and witness.[342]

Fourthly, the Appropriate Authorities (Chief Medical Officers/Civil Surgeons) were unable to devote adequate attention to the work relating to the PC & PNDT Act. In some cases they felt that they are not fully equipped to carry out their work. [343]

Fifthly, the Appropriate Authorities did not have the necessary expertise and experience in legal matters. Evidently, nothing prevented the government from imparting legal training to them.[344]

Sixthly, the requisite bodies under the PC & PNDT Act do not exist in all the States and wherever they exist, they are stymied because of inadequate legal orientation, expertise and initiative.

Seventhly, sex selective abortion enjoys social sanction and is not perceived as a crime but as a method of ensuring the birth of sons. As the law itself was ineffective, nothing deterred people from going for sex determination. Also this argument presupposes that women were the willing agency and were complicit in the act of sex selective tests.

Moreover, it becomes difficult to distinguish cases of female foeticide and medical terminations of pregnancy.Also, there are shortcomings also in the receipt of quarterly reports from States and Union Territories. Duly completed forms containing details of pregnancy-related tests conducted by ultrasound clinics are either not submitted sent by the stipulated time or never submitted at all.[345]

Another important loophole under the Act is that the Penal under the Act, which is supposed to scrutinize the forms, fails to meet regularly. Much time is wasted upon registration of clinics and routine administrative works while clinic records are not strictly and regularly monitored.

[341] ibid
[342] supra, at 303
[343] Frontline. May 20,2011,p.109
[344] ibid
[345] supra, at 396

It is impossible to regulate all private clinics that offer facilities s for pre-conception and pre-natal diagnostics techniques.[346]

Another problem for the implementation of the Act is that abortions are conducted illegally by untrained or unqualified persons which have increased the risk of death of pregnant woman. Fake addresses of patients and wrong reasons for doing ultrasound are also recorded. For this reason it is not possible to detect the people who are actually involved in the crime of female foeticide.

The amended Act of 2003 is proved very beneficial to the corrupt officials as under this Act, the Chief District Medical Officer is the only competent authority who has been given powers to register cases against clinics. The Clinics or Laboratories who conduct gender determination test, can sometimes manage the Medical Officer by offering bribe. As no legal action can be brought against the Chief District Medical Officer while they are performing their duties, they can act according to their own convenience.[347]

Lastly, as the cases of female foeticide are done in secrecy, there is generally no evidence available to register a case against the offender. The department of police also does not have proper information about the implementation of this statute as in the matters of inspection, investigation, search and seizure of offending objects, the appropriate authority is entrusted with wide discretionary power.[348] Moreover, police think that it is very risky for the lone medical officer to carry on raid in the p[remises of those who have political back in It is a true fact that Radiologists and sonologists doing ultrasound scans are risking their lives, liberty and careers while doing the ultrasound scans of pregnant women. On the one hand, the existing custodians of the PCPNDT Act have created various impediments even on the otherwise justified scans of pregnant women.[349]

The Pre-Conception and Pre-Natal Diagnostic Techniques Act and Rules 1994 mandate that sex selection by any person, by any means, before or after conception, is prohibited. While the Act seeks to regulate and prevent misuse of pre-natal diagnostic techniques, it rightly cannot deny them either. The PNDT Act allows pre-natal diagnosis only for chromosomal abnormalities, genetic metabolic disorders and congenital abnormalities. The law however

[346] ibid

[347] Shivani Goswami(2012), Female Foeticide in India, Indian Bar Review, Vol. XXXIX(2), p.28

[348] ibid

[349] supra, at 403

permits ultrasound clinics, clinics for medical termination of pregnancies and assisted reproductive facilities as a routine matter and as a legitimate business.[350] Hence, the provisions under this Act create confusion in the minds of the medical practitioners.

In addition, there is the legally binding Code of Medical Ethics, constituted by the Indian Parliament in the Medical Council Act, 1956 that many doctors ignore.[351] Doctors are legally bound to report medical malpractice. The PC&PNDT Act mandates that any person conducting ultrasonography or any other pre-natal diagnostic technique must maintain proper records. The Act requires the filling up of a written form, duly signed by the expectant mother, as to why she has sought diagnosis.[352] Violations are punishable by imprisonment and a fine. The law also permits abortions for failure of contraception. It is a huge challenge for the government to detect violations of the PNDT Act, since it is a crime of collusion and by consensus.

While considering the question of role of doctors the major points that has to be taken into consideration are- India doesn't have sufficient number of radiologists. No one can deny the grim reality that radiologists prefer to settle in big cities and no radiologist is ready to serve in villages where most of India lives.[353]

In 2014, in the name of curbing female foeticide, 6-month training rules were introduced that bar even sonologists having 10, 20 or 30 years of experience in sonography from conducting ultrasounds after January 1, 2017. Others will have to clear a competency test or avail fresh training of 6 months. But how will this notification help curb foeticide, the government doesn't have the answer.[354]But it was found by the researcher during the research process that after the introduction of these new rules, there are certain other difficulties that create obstacles in the path restricting the practice of female foeticide and infanticide. These difficulties are-

First of all, the Medical Council of India (MCI) prohibits anyone from claiming to be a specialist until he/she possesses a MCI-recognized MD/MS/Diploma in the said specialty. The MCI doesn't recognize a person possessing six months of training introduced by the Indian government as a specialist in sonology.[355]

---

[350] Supra, at 211

[351] Medical Council of India notification; available at https://www.mciindia.org/CMS/rules-regulations/code-of-medical-ethics-regulations-2002, accessed on 31/3/2020

[352] ibid

[353] supra, at 259

[354] ibid

[355] ibid

Similarly, the MCI doesn't consider a person who qualifies for a competency-based examination introduced by the government of India as a specialist. [356]

Moreover, it is difficult to comprehend as to how, to serve purpose of curbing female foeticide, it is relevant whether the ultrasound machine is in the hands of a person having an MBBS or MD (Radio-Diagnosis) qualification. It will not be valid to state that a person qualified as MBBS lacks the education or understanding to be not able to comprehend the fatal consequence of female foeticide as a result of sex determination or the moral issues behind the same.[357]

Doctors are routinely prosecuted for the incomplete filling of "Form F", of not displaying a copy of the PC &PNDT Act. Clerical errors are not synonymous with sex determination. A doctor's focus during an ultrasonography has to predominantly be on ruling out congenital malformations and other abnormalities which could affect the mother and baby. Harassment of doctors doing obstetric ultrasound will dissuade youngsters from entering this branch of medicine which cannot be good for society.[358]

Secondly, ultrasound is an indispensable medical tool without which, no doctor or hospital can work. The control of ultrasonography through the PC&PNDT Act and the harassment of doctors under this did not prove effective to have better control over the declining sex ratio in the two decades.[359] Doctors working in independent, small and medium healthcare establishments, without any government subsidy or support were mostly affected by the provisions of the Act of 1994.

Moreover, the PC&PNDT Act is now used as a tool to keep these medical professionals in check. Having power to seal the ultrasound machines, the authorities use this power liberally to browbeat already-compliant doctors into further submission. Families who compel pregnant women to undergo sex determination tests and women, who come of their own volition, are often let off, in sheer violation of the PC&PNDT act.[360]

Conclusion Analysis of the position of the medical practitioners

From the above discussion it is clear that the MTP and the PC & PNDT Acts were amended as a measure for prevention of the crime of female foeticide, but it is unfortunate that in most of

[356] ibid
[357] supra, at 149
[358] supra, at 410
[359] ibid
[360] supra, at 403

the occasions these Acts are misinterpreted and the medical practitioners take advantage of the liberal attitude of the government towards abortion.

On the other hand, the doctors who are serving honestly and do not want to involve themselves in the activities of female foeticide, have to deal with some other difficulties which can be summarized under the following heads-

In rape cases

In rape cases where a woman gets pregnant, even though abortion is permitted by the government[361], no doctor is ready to admit such lady because of social burden. Along with it, there are also instances where false rape cases are brought by the family members of the pregnant woman and the doctor is not in a position to refuse abortion.[362]

Fear of suspicion

There are cases when some doctors are not ready to make ultrasound of woman who already has two daughters. It does not make difference for a doctor to ascertain whether the child is congenial, anomaly or not. In such cases if doctors agree to do ultrasound, then they will be under suspicion that the doctor has done that for checking the sex of child.[363] Further, there are also cases where illegal child, premarital pregnancy was aborted in the clinics as per the MTP Act, 1971 and records of the same are maintained by the doctors. In case of abortion of pre-marital pregnancy, rape or illegal child the records are maintained. In some districts some miscreants recover the said records in disguise of observers and blackmail the concerned doctor and parents. The very result is nothing but financial loss to the family of victim and at the same time it is an easy source of income to the miscreants.[364]

In extortion cases

There are also cases of extortion, where the doctor is threatened by showing knife and is compelled to check the sex of the child. If the doctor refuses to do so, the relatives of the women wrongly publicize that the doctor is indulged in sex determination and the doctor has no option but to determine the sex and abort the child as per the will of the concerned people.[365]

[361] The Medical Termination of Pregnancy Act, 1971
[362] Tejaswini Patil(2012), Save babies…Save Doctors; Indian Bar Review [VolumeXXXIX(4)], p 212
[363] supra, at 223, p.213
[364] ibid
[365] ibid

To sum up, while discussing about the role of doctors played for the prevention of the crime of female foticide and infanticide, certain important points should be taken into consideration-

Firstly, the importance of the medical community cannot be denied while there is any issue relating to the participation of the medical fraternity in the campaign against female foeticide.[366] Medical professionals should themselves desist from conducting sex determination tests and should realize the fact that such harmful practices are leading to severe imbalance of male-female sex ratio in the Indian society

Secondly, it is the ethical duty of doctors to prevent their patients from accessing those services to those they are not entitled. Medical study should include ethics, gender sensitivity and accountability in doctors.[367]

Lastly, medical practitioners should respect the sanctity of the code of medical ethics. Likewise the persons employed in genetic centers and clinics should also respect the code of conduct for them.[368] If the medical practitioners and their employees firmly resolve not to disclose the sex of fetus and assist in sex selection, those who seek pre natal sex determination will be disabled from seeking such services.

There is urgent requirement of change in mindset of government as well as public to curb the menace of foeticide is the need of the hour. Making doctors the scapegoat, violating their fundamental human rights and committing a slow systematic genocide of sonologists won't be the right approach to prevent the commission of the crime of female foeticide.[369] Although the medical fraternity is expected to give their service in a dignified way, in certain cases there may be exceptions. As we are the citizens of a democratic country, we have every right to go to the highest judiciary if there is a case of violation of our fundamental rights. We the people of India with the help of our government can make people aware of the evil consequences of the crime of female foeticide and can appeal for appropriate penalty before the competent judiciary if any medical practitioner is indulged in these activities.

[366] Lalit Dadwal and Kusum Chauhan(2001), Female Foeticide: A Synoptic view of Socio-Legal Aspect. Indian Socio Legal Jounal, 7(2001), p 49

[367] Dr. Meera Mohini(2012), Law against Sex Selection in India. The Criminal Law Journal(Volume 4, October-December), p.304

[368] Prof. Dr. K.C. Jena(2012), Female Foeticide and Infanticide in India: The Emerging Issues. Indian Bar Review, Volume XXXIX(1), p.17

[369] ibid

ITS TIME FOR JUDICIARY TO COME OUT OF CLOSET

- SUNIDHI RATHOD

ABSTRACT-

The following article is written in the hope that one day same-sex marriage will get decriminalized in India "The love that dare not speak its name has many enemies and fewer friends historically. Tamil Literature has not even acknowledged the humour, let alone gay love or sexuality. But, present Tamil Nadu formed Third Genders Welfare Board and appointed the first Trans-woman in State Development Council and Madras High court directed to register a marriage between a man and a transgender woman. LGBTQ community has always been the source of not just ridicule but political violence" development takes time but lets not forgets to move forward in every possible way and not back words in the name of religion and traditions and culture just because everyone have different thoughts and opinions and believes.

INTRODCUTION

We all say India is a developing country and will be completely developed one day soon and every decision every step taken by the citizens, law, government is for the betterment and safety of the country and its citizens. People from all over the world even admires the tradition and culture of India they love it so much that in many countries people stared to study and understand Indian culture and adapt it and even converted into Hinduism and other Indian cultures every word of it is true but the concerning thing is in which ways India is actually developing itself what are we all putting efforts into what are our exact goals cause let's be honest India is developing with technology and even trying to get economically better and trying to improve education system but is this enough machines, books, money I don't think so in India everything is developing except for the mentality of peoples living in it I'm not here to talk about world right now but to talk about my country because I'm a proud citizen of it. But if we say that our country is developing then we should even try to adapt few more things not just keep going on with old traditions and thoughts, but we really need to think about how world is changing and try to take it in a positive way and encourage it. One of most important thing of all the things is to accept LGBTQ+ community cause in this department ancient India

is better than the developing one definitely the time before British people became the part of our beautiful Country

Lets talk a little bit about the ancient time and see how things were back then The ancient Indian text Kamasutra which is written by Vatsyayana dedicates a complete chapter on erotic homosexual behaviour. According to Doniger, the kamasutra discusses same-sex relationships through the notion of the Tritiya Prakriti, literally "third sexuality or third nature". The text states that there are two sorts of " third nature", one where a man behaves like a woman and in the other a woman behaves like a man. The Kamasutra also describes fellatio technique between a man dressed like a woman performing fellatio on another man. The text also mentions same-sex behaviour between two women. Svairini, a term Danielou translates as a lesbian, is described in the text as a woman who lives a their life with another women or by herself fending for herself, as they are not intrested to have a husband. Additionally, the text has some fleeting remarks on bisexual relationships. Then in Arthashastra it mentions that a wide variety of sexual practices which were performed with a man or a women were punishable with lowest grade of fine while homosexual intercourse was not sanctioned and was even treated as a very minor offence the author exactly knows how impossible it is to believe in it but every word written here is very true. Heterosexual intercouse were punishable very severely back then but homosexual intercourse between men could be made up for merely with a bath and with one's clothes on and a penance of eating the five products of the cow and keeping one-night fast. Here the penance being a replacement of the traditional concept of homosexual intercourse resulting in a loss of caste. During Medieval period Homosexuality was rare in medieval society with Al-Biruin cause it was greatly disapprove of under Muslim rules. But it grew more with the Sultans of Delhi Sultanate themselves establishing relationships with men despite the prohibition against it in Sharia. Then during the time of Mughal Empire in India things went south pretty soon. The noble class of Mughal who were engaged in Homosexuality were latter considered as "Pure Love" it took the author quite a while to accept that in India this was not at all a rife in those days. After a Dutch traveler Johan Stavorineus reported about male homosexuality among Mughal living in Bengal the Fatawa-e-Alamgiri of the Mughal empire mandated common sets of punishments for homosexuality which involves death by stoning for a Muslim in particular. There were many Homosexual Muslim men but few of them were Ali Quli Khan he was the governor of burhanpur and was murdered by a boy servant with

whom he tried to be intimate he also had a record of having many homosexual relationships with males the other one was Sarmad Kashani a Hindu boy who's father also allowed them to be together then in British colonial period during 1858 to 1947 CE the British Raj Criminalize sexual activities "AGAINST THE ORDER OF NATURE" including Homosexual activities under section 377[1] of IPC which entered into force in 1861

When people of opposite sex gets married they have to fill registration forms get marriage certificates to legalize their wedding and they are treated respectfully for the rest of their life it is everyone's rights except for the ones who want to marry the person of their own sex. In India when it comes to marriage everyone has the right to choose their partner except got the LGBTO+ people cause marrying the love of their life is illegal in India. The author while doing the research came across the fact there there are not as many article on same-sex marriage as there are for other things. This is 20th century and people are yet not comfortable to talk about all these things out publicly they kind of feel same even to say lesbian or gay and proudly thinks about other unnecessary things. About this one thing we all should really think what India would have been today for the LGBTQ+ people if Britishers would have never came to India and imposed Sec.377 in first place

The courts in India are yet to realize the problems which materially affects the lives of the Queer community. According to psychology and years and years or research there are evidence that shows that the psychological and social aspects of people who are in committed relationships mostly between same-sex couples largely are as same as those of heterosexual partners. No matter if a relationship is between straight couples of same-sex couples they all experience same kind of problems like having deep emotions, attachment issues, trust and commitment issues, stability and loyalty and many other things. The Empirical research shows that relationships between lesbians and gays have a great level of relationship satisfaction than those of heterosexual couples.

ABVA is an NGO who filed petition in Delhi HC seeking repeal of Sec.377 after Tihar male inmates were denied condoms, and was fail to follow through. In 2001 one PIL by Naz foundation was filed in Delhi HC seeks to repeal of the British-era of Sec. 377 since 1862. Then from 2004-2008 HC use to dismisses petition back and forth. All the activists moved to

Supreme court asking for consideration. The contradictory affidavits were filed by home and health ministers. The centre submits that gay sex is immoral and argues against decriminalization after that HC shoots down immoral arguments and calls for scientific evidence. So the center asks parliament to take a decision and finally on July 2, 2009 the Delhi HC decriminalized homosexuality. From 2009-2012 all the religious groups and many other individuals challenge Supreme courts decriminalization verdict so on December 11, 2013 Supreme court sets aside 2009 Delhi High court orders, and leaves the matters for parliament to decide. On 2015 Lok Sabha voted against the private members bill by congress MP Shashi Tharoor to decriminalize homosexuality. On August 2017 Supreme court upholds right to privacy by saying sexual orientation is an "essential Component of identity" and the rights of LGBTQ+ peoples are "real rights founded on sound constitutional doctrine". On January 2018 Supreme court bench headed by Chief Justice of India Dipak Misra and said that by 2013 ruling will be reconsidered, and sends it to large bench. On July 2018 the Supreme court says it's up to bench to take a call on the 150-years- old ban on gay sex. After treating this decision like a dodgeball game for so many years finally on September 6th 2018 the Supreme court decided to decriminalize Homosexuality.

Fortunately, this first step has in fact has been taken by a gay and lesbian couple whose respective marriage registrations under the Foreign Marriage Act[2], 1969 and the Special Marriage Act[3], 1954 were denied by the state authorities. Both sets of couples have filed petitions in the Delhi High Court which are pending adjudication. A similar petition has also been filed by a gay couple in the Kerala High Court for recognition of homosexual marriages under the Special Marriage Act, which is an Act that governs civil marriages or colloquially known as "court marriages"., but in the recent decisions of the High Courts of Orissa, Punjab & Haryana and Uttarakhand expressly recognizing and enforcing the rights of same sex couples to live together, even if not in "holy matrimony", does give some hope of the courts being receptive and active to the rights of same sex couples.

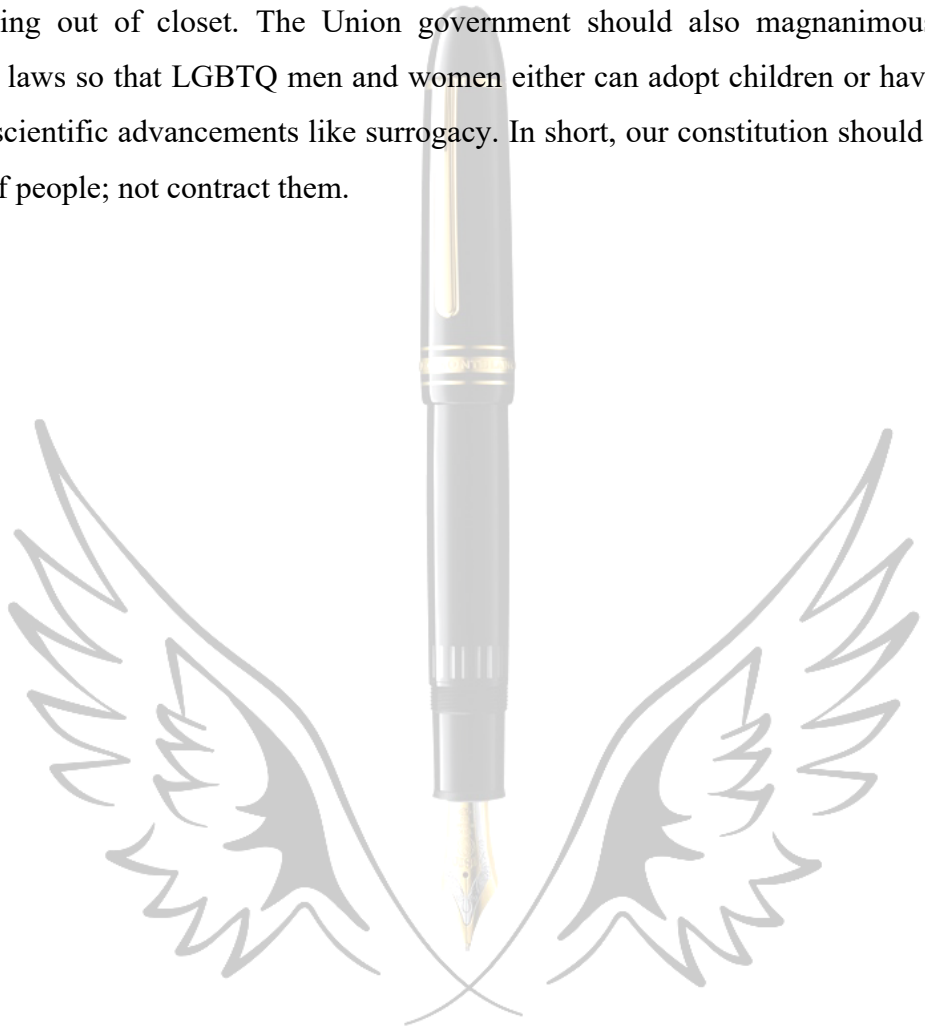
The truth is that the battle of equality is such a big task specially with the state opposing petitions on every steps on the grounds that Indian law and culture do not recognize same-sex marriage. I can only hope that one day Indian states would someday take as pragmatic a view as the court have in this battle for equal rights and dignity. But at points the courts have held

such prohibition violative of the right to dignity, privacy, and freedom of expression under Article 19(1)(a)[4] and equality under article 14. Even though the court is only concerned itself with the constitutional validity of sec 377, the concurring opinion by Dr. D Y Chandrachud J. did relay on the Shafin Jahan and Shakti Vahini case on the question of freedom of choosing a life partner of one's own choice and recognize the " Sexual Anatomy of an Individual".

The authors thinks who are the haters, the politicians, the sexist people to decide who should love whom, who should marry whom, who should compromise the love of their life just because it is difficult for the society to just accept one simple thing that being a lesbian or gay is not a choice this is how they are its something natural. Many citizens of India specially the young ones are exploring a lot about their sexuality and getting to know more about things through internet or international web series and few of them even takes risk of coming out of the closet even after knowing that after that there no guarantee that they will be safe out there in the society cause their family gives them hard time and then support them all they do is to kick them out or make them forcefully marry someone they don't want to. In many urban and metro cities families are dealing with this in a very good way as compared with the people in rural areas. We all know what marriage is and how important it can be in someones life cause its kind of a commitment. "researchers constructed a measure capturing the average level of anti-gay prejudice in communities using data on prejudicial attitudes from the General Social Survey, conducted by the National Opinion Research Center since 1972 and often considered one of the primary sources of social indicator data. The researchers then linked the information on sexual orientation and community-level prejudice to mortality data via the National Death Index, from 1988 through 2008. By the end of the study, 92 percent of LGB respondents in low-prejudice communities were still alive, compared to only 78 percent of the LGB respondents living in high-prejudice communities. The researchers also found that suicide, homicide and cardiovascular diseases were all substantially elevated among sexual minorities in high-prejudice communities. " Lets face the fact in India people who have access to marriage life can be really good for them as compared to the life of same-sex cause they have to put on with the pressure from their friends and family.

It is unfortunate that India has not yet seen the conjugal rights of people LGBTQ+ community under the prism of "right to privacy" to decriminalize them. In few parts of infdia people have started to accept that sexuality is neither a choice nor a lifestyle and its a spectrum and not a bicameral chamber of gender. It is a right to feel like a man or a woman as a fundamental right.

That's why the author thinks that the State Government should give a thought of starting residential educational institutions just for LGBTQ+ teenagers who are kicked out of the family after coming out of closet. The Union government should also magnanimously remove restrictive laws so that LGBTQ men and women either can adopt children or have their own child via scientific advancements like surrogacy. In short, our constitution should expand the liberties of people; not contract them.



AN INTRODUCTION TO IPR AND THEIR IMPORTANCE IN INDIAN CONTEXT

- KOPAL TEWARI

ABSTRACT

Every genuine work of the individual understanding, such as a creative, philosophical, technological, or scientific product, is considered intellectual property. The legal rights granted to the developer or artist to safeguard his discovery or creativity for a set length of duration is known as intellectual property rights. These legal rights allow the originator or his assignee the unique right to completely employ his discovery for a certain duration of time

INTRODUCTION

It is widely acknowledged that intellectual property plays a critical role in today's economy. It has also been proven decisively that the intellectual work involved with invention should be prioritised so that public welfare can be attained. There has been a significant increase in the price of research and development, as well as the resources needed to bring an unique product to society. The risks for technology developers have risen dramatically, and protecting information from unauthorised usage has proved necessary, at least for the moment, to assure the reimbursement of research and development and other connected expenses, as well as appropriate earnings for continued research and development initiatives. Intellectual property rights is a powerful weapon for protecting the originator of an intellectual property because it offers the originator an absolute right to utilise his discovery for a specific duration. As a result, intellectual property rights contributes to a state 's financial prosperity by stimulating fair market, industrial progress, and financial wellbeing. During the last two decades, intellectual property rights have progressed to the point that they now occupy a significant part in the world progress. Many countries significantly updated rules and regulations in this sector in the 1990s. The TRIPS Agreement, went into force on January 1, 1995, is the largest comprehensive multinational arrangement on intellectual property to know.[370] The effective completion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the World Trade Organization resulted in increased preservation and implementation of IPRs to the level

[370] https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

of major worldwide engagement. Intellectual property covers a large area. Trademarks, designs, copyrights, and patents have all been recognized for centuries. New kinds of protection are also emerging, aided by the rapid development of technology and scientific activity. The TRIPS Agreement encompasses all forms of intellectual property in general and aims to provide comparable and stronger levels of security as well as functional implementation on a domestic and global scale.[371] It discusses the application of broad GATT norms as well as clauses in international intellectual property treaties. It also establishes criteria for Intellectual Property Rights in terms of range, application, availability, implementation, procurement, and management. It also covers the processes for preventing and resolving disputes.

SCOPE OF INTELLECTUAL PROPERTY

Intellectual property rights have a wide range of applications; Patents, trademarks, trade names etc are examples of industrial properties. A patent grants the proprietor the sole right to utilise the Intellectual Property in order to profit from the discovery. An invention is an unique concept, method, technology, or production in and of it. Copyright does not grant you sole ownership of a concept, but it does preserve the presentation of discoveries that are not patentable. copyright comprises a wide range of topics.[372] Copyright regulations apply to music and multimedia creations as well. After the demise of the author, copyright security lasts for 60 years . In contrast to patent laws, copyright laws do not need a regulatory mechanism.

Scope of Intellectual Property

- Intellectual property is a commodity that can be acquired and managed with, according to the law . Because intellectual property is a property right, it can be owned, purchased, donated, licenced etc. The proprietor of an intellectual property right has a sort of property that he can employ anyway he wants under specific circumstances, and he can initiate legal activity over anyone who uses his creation without his permission, and he can obtain damages against actual property.

[371] https://msfaccess.org/spotlight-trips-trips-plus-and-doha
[372] https://www.upcounsel.com/scope-of-intellectual-property-rights

- Intellectual Property's major distinguishing feature from different types of property is its intangibility. While there are numerous distinctions among various varieties of Intellectual Property, one factor they all have in common is that they preserve intangible things like concepts, discoveries, marks, and facts, whereas intangible assets and personal connections are physical. They are ingrained in the environment. It permits inventors to profit from the economic usage of their creations.

- Intellectual property creates not merely property rights but also responsibilities. The intellectual property proprietor has the authority to conduct specific actions in connection with his work. He has the sole right to create the material, produce duplicates of it, promote it, and so on. A right exists to restrict third parties from executing their legal rights.

- In regard to a specific purpose, various sorts of intellectual property rights can coexist. Under the Design Act, a design can be safeguarded, and it can also be included into a trademark. There are numerous parallels and distinctions among the numerous intellectual property rights that might coexist. There are similar bases between patents and industrial designs, for example; trademarks and geographical indicators, and so forth. Some intellectual property rights are positive rights exist, while the others are negative intellectual property rights.

- The doctrine of exhaustion applies to intellectual property rights broadly. Exhaustion simply implies that after the first sale the right holder's or the exhaustion authority's power to prevent subsequent circulation of the goods. As a result, after an intellectual property rights holder has provided a physical product with intellectual property rights applied, it cannot prohibit the product from being resold. The right expires when the first permission is given.[373] This idea is founded on the notion of free movement of products, which is in effect due to the rights holder's approval. The special right of sale of products cannot be applied on the exact commodities again. The right to restrict

[373] https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_inf_5_rev.pdf

subsequent operations has lapsed because the right holder has already gained his portion by positioning items for the opening trade in the market.

- Intellectual property right is undergoing continuous improvement. As technology advances in many aspects of human life, the field of intellectual property expands as well. New objects are continuously included to the purview of intellectual property right, and the range of its protection is being enlarged, in order to meet the needs of scientific and technological growth.

KINDS OF INTELLECTUAL PROPERTY

There are six distinct broad categories of discoveries that are entitled for intellectual property protection under Indian law.

1. Patents are a collection of special rights awarded to an innovator for the creation, sale, and use of an invention. The Patents Act of 1970, the Patent Rules of 2003, and the Patent Amendment of 2005 constitute the backbone of Indian patent law. Compulsory licencing, the government's authority to determine pricing for patentable goods, and the exclusive use of particular patents etc are all covered by the Patents Act. Patent law recognises a patent holder's absolute right to commercially benefit from his creation. A patent is a particular privilege awarded to the developer of an idea to produce, utilize, and promote the invention, as long as the innovation complies with certain legal requirements. A patent holder's exclusive right means that no one else can make, use, or promote an invention without his or her permission. This special patent privilege is only valid for a limited period. An invention must be within the limits of the patent domain and meet the three regulatory conditions of novelty, inventive step, and industrial applicability to be eligible for patent security. The novelty and necessity requirements are generally met if the patentee is the initial to develop the asserted invention. Previous release or usage can be used to establish novelty. A simple finding isn't enough to qualify as an innovation. Any concept or principle is not eligible for a patent. Patent law exists to promote scientific study, technological innovation, and industrial development. Patent knowledge has economic worth since it offers business with technical specifications that can be utilized for commercial reasons. If there is no

shielding, there may be sufficient motivation to take advantage of someone else's effort. This power to free-ride decreases the opportunity to create something new because the patentee may not be inspired to create due to an inadequacy of rewards.

2. Trademarks are recognised symbols, patterns, or statements that distinguish a producer's items / products from those of others. The Trademark Act of 1999 in India was a rewritten edition of the Trademark and Merchandise Marks Act of 1958 that expanded trademark protection to include services. In India, trademarks are protected for ten years from the time of filing, with a 2010 change to the legislation allowing participants to take use of clauses in the Madrid Protocol, a treaty that safeguards trademarks in many countries by submitting a single application with a specific institution. A trademark is a sign of origination. It's a particular indication that 's employed to establish the origin of goods and services known, as well as to differentiate items / solutions from other businesses. This creates a connection between the owner and the product. It depicts product's type and characteristics. A trademark's primary role is to identify the source of the items to which it is linked or in connection to which it is employed. It recognizes the product, ensures its authenticity, and aids in its marketing. The trademark also serves as an objective indicator of a company's credibility. A trademark can be created by any symbol or collection of signs effective of differentiating the goods or services of other company. A grid can be made up of any arrangement of a title, term, phrase, image, pattern, style, tone etc. Trademark registration can be renewed continuously.
3. Copyrights are a type of intellectual property that gives a creative work's owner unique marketing rights for a defined duration. In 1914, India passed its first copyright law, which was patterned after the British Act of 1911. Post-independence, India's copyright legislation experienced extensive amendments, culminating in the Indian Copyright Act of 1957, which incorporated a 50-year increase of copyright rights. Ever since, the statute has been revised several times, with additional increases of the copyright duration, modifications to accommodate the modern world, and protection for various media forms and so on. Copyright law is concerned with the preservation and utilisation of tangible expressions of thoughts. With evolving notions about creativity and new forms of transmission and technology, copyright has developed over several decades.

In the world today, copyright law protects not only the conventional recipients of copyright, such as authors, composers, and artists, but also the publisher needed for the formation of work by massive cultural companies, such as cinema, telecast and documenting etc. It can be found in literature, theatrical, lyrical, and cultural creations, as well as in authentic cinematic movies and audio-visual works. The concept must be conveyed in its natural version in order to be safeguarded as a copyright. The owner's financial and ethical interests are recognised under copyright. The right to copyright, according to the principle of fair use is a benefit for individuals who do not have the copyright owner 's approval to use copyrighted subject matter. The law of copyright integrates private and societal values by using the idea of fair use.

4. For the purposes of intellectual property, a geographic indication emphasizes a product's region of origin and may be directly tied to the apparent worth of the product. Darjeeling tea, Mysore rasam are instances of geographic indicators. The Geographic Indications of Goods (Registration and Protection) Act of India is a comparatively recent law, having been passed in 1999 to meet requirements under the GATT, to which India is a participant. The goal is to keep unauthorised people from exploiting geographic indications and to safeguard consumers from being misled by things that aren't tied to any geographic place. The certification of such indications is effective for ten years and can be extended for additional ten-year durations in the future. It is a term or symbol applied on specific commodities that relates to the product's geographical place or source.[374] The usage of geographic location may operate as a verification that the item contains certain attributes according to the conventional way . The connection between things and place has grown so well established that any mention of that location conjures up images of goods produced there, and vice versa. It serves three purposes. First, they recognise the products as coming from a specific area, or that province; second, they recommend to buyers that the commodities come from a geographical area where a specified efficiency, prestige, or other feature of the commodities is largely credited to their area of origin; and third, they encourage the goods of local sellers. They imply to the buyer that the items are from this place, and that a specific character, image, or other attribute of the goods is mostly related to the

[374] https://blog.ipleaders.in/ipr-description/

geographical region. It is critical that the product's strengths and prestige are derived from that location. Because those characteristics are dependent on the geographic area of production, there is a distinct connection between the commodities and their source.

5. Industrial designs focused on the distinctive appearance or sensation of an innovation, such as its layout, form, or material, are also protected under Indian law. Design-related IP rights can be bestowed on fourteen groups of commodities for the purposes of registration. The design is valid for fifteen years once it is registered, with five-year renewal. The design becomes accessible and public property after fifteen years. It is a type of IPR that safeguards the graphic elements of a product that isn't being used only for its intended purpose. It entails the application of structure, arrangement, design, decoration, or a composition of patterns or colours to any item in two or three dimensions. The Semiconductor Integrated Circuits Layout Design Act and Rules of 2000 strives to provide particular security for semiconductors in the domain of design. For a duration of 10 years, this statute grants a proprietor the exclusive right to produce layout style. The statute allows the owner to commercialise their work and seek redress under its terms in the event of violation.

6. The Protection of Plant Varieties and Farmers' Rights Act of 2001 covers IPR linked to agricultural and plantation research in India. This law aims to create an effective framework for the conservation of crop variations, producers' and plant innovators' interests, and to foster the production of new crop variants. The span of time that certified varieties are protected varies depending on the nature of plant. The security period for trees and vines is eighteen years, whereas the security period for others are fifteen years. Existing variants are also protected for fifteen years from the date of notice. Plant variety must be original, unique, and comparable to existing kinds to be qualified for protection, and its key traits must be consistent and permanent under the Plant Protection and Protection Act, 2001. The Sui Genis method is used by countries to safeguard novel plant types. The overall goal of preservation is to enable those who want to make, sell, or utilize such things to do so, especially if they wouldn't function otherwise. The Protection of Plant Varieties and 'Farmers' Rights Act 2001 is a result of India's obligation under article 27(3)(b) of the TRIPs Agreement of 2001, which

requires members to safeguard plant variations through patents, an effective sui generis system, or a blend of the two. India had turned down to safeguard plant varieties through a sui generis law, namely the Plant Varieties Act.

ADVANTAGES OF INTELLECTUAL PROPERTY RIGHTS

In different parts of the world, the value of intellectual property protection varies. Almost every government that relies on foreign trade protects its intellectual property rights aggressively. Strong intellectual property laws benefit both the country's aggregate economic system and the financial system of their individual state. Intangible assets, unlike tangible assets that can be locked away, enclosed in are always explicitly accessible and can be conveniently replicated or imitated by anybody. Self-protection is conceivable in some instances by combining tangible and intellectual property assets. Intellectual property rights have increased the inherent worth of a wide range of items, as original creations and concepts have become an increasingly crucial part of every company. Unauthorized use of someone else's novel thoughts has become one of the most widespread felonies in recent years. Even when an intellectual property accounts for a significant portion of a company's worth, many firms still struggle to recognise the worth and hazards connected with it. As a result, failing to take any remedial measures to preserve intellectual property could be damaging to the company's overall success.

1. Ideas have minimal or no significance on their own. Intellectual property offers a lot of unexplored opportunity when it comes to turning your concepts into economically viable products and services. Having your patents and copyright registered can bring in a continuous flow of income and additional money, which can help one's company financial position.
2. Intellectual property is essential for establishing a company's own character. It makes it easier to distinguish one company’s products and activities from those of others in the industry and to advertise those to the right clients.
3. Intellectual property resources can be monetized by selling them, licencing them, or using them as security for debt financing. Moreover, intellectual property identification is beneficial when applying for government or public financing, mortgages, or assistance.

4. Intellectual property also improves a company's ability to compete in the overseas industry. An intellectual property right holder can utilize these trademarks or concepts to promote commodities and operations in other countries, and can enter into a franchise deal with a foreign company or export the copyrighted products.
5. When someone has a distinctive concept or work, there will always be those who strive to copy it for financial benefit. As a result, protecting intellectual property resources before they are fraudulently copied upon by a third party is critical. Intellectual property protection is available for businesses of all types and sizes. So, based on the business requirement and conditions, a person can determine which Intellectual Property Protection can be utilised to protect various categories of Intellectual Property.
6. It is critical for small businesses to protect their distinctive products or services, which might be leveraged by rivals to steal market share, leading to slow but consistent growth and profit. Lacking market share early in a company's life cycle can be detrimental to its long-term viability. It is critical to remember that the owner is alone responsible for protecting his intellectual property from violation by any person or entity, as no one else will attempt to notify you if your intellectual property rights have been breached.

CONCLUSION

Intellectual property rights are monopolistic privileges that provide holders unrestricted usage of revenue from cultural representations and discoveries for a certain time. Individuals' interaction with varied field expertise, such as science, medical, finance etc is required for different types of IPR, as well as diverse treatment, management, planning, and tactics. Intellectual property rights have societal, financial, technological, and cultural consequence. It is clear that the management of intellectual property and IPR is a multi-disciplinary task and calls for many different functions and strategies that need to be aligned with national laws and international treaties and practices. It is no longer fully driven from the national point of view. With the use of IPRs leaders in accelerating advancement, globalisation, and strong competitiveness can protect their inventions from violation. However, intellectual property rights are still being violated. The administration is likewise working to put an end to it. For which there are laws in place to protect intellectual property rights from exploitation.

THE PANDEMIC AND PRISON ADMINISTRATION IN INDIA: AN OVERVIEW

- SAMEERA KHAN & SYED FARAZ AKHTAR

Abstract

The Covid-19 Pandemic had a significant impact on the entire human race. The prisoners lodged inside jails and the prison staff handling them also came under the web of the Pandemic. In a country like India, where the prisons are overcrowded and underdeveloped, the effect was monumental. The occupancy rates of the prisons in India were 118% as per the data of the Prison Statistics Report. This led to huge difficulties for the Prison Administration when it came to managing the prisoners and ensuring their own safety as well as that of the prisoners. The atmosphere of fear that had been created by the Pandemic had an adverse impact on the mental health of both the Prison Personnel and the prisoners. The Supreme Court of India took cognizance of the matter and directed the states to compile lists for the prisoners that can be temporarily released. Moreover, other governmental bodies also played the role by researching ways to deal with the Pandemic and providing crucial inputs to the governmental authorities. This research article analyses the impact of the Pandemic on the Prison Administration in India. The article in detail covers the various problems the jail administration had to face along with the issues and challenges faced by the prisoners. It analyses the solutions proposed and implemented by the Government to curb the spread of Covid-19 in Prisons. It also provides suggestions which will help improve the Prison System as a whole, so that it is ready for such precarious situations in the future.

Keywords: *Covid-19 Pandemic, Prisoners, Prison Administration, Overcrowding, Prison Management.*

1. Introduction

Prisons are one of the most important institutions for the maintenance of peace and harmony in a society.[375] They are a place where the social deviants and criminals are given the

[375] Teesta Setalvad, *The Pandemic has put the spotlight on inhumane conditions in Indian prisons,* The Indian Express, 26 May 2021, available at https://indianexpress.com/article/opinion/columns/the-Pandemic-has-put-the-spotlight-on-inhumane-conditions-in-indian-prisons-7330342/ (last accessed on 21st Nov 2021).

opportunity to reform and in most cases be reintegrated into the society. Therefore, the conditions of a prison and its administration plays a vital role in determining the success of a State. India is the largest democracy of the world and takes pride in the freedom it affords to its citizens. It is also the second most populated nation in the world which also translates it into having one of the largest prison populations of the world. The Indian Prison System is not adequately equipped with the staff or the facilities to deal with such large number of prisoners which leads to overcrowding, poor sanitary conditions and lack of room for actual reform. Moreover, the courts also have not helped since the slow speed of trial meant that nearly 70% of the prisoners are undertrial.[376] In this aspect, the Administration System of the Prisons plays a key role in ensuring that the prisons are able to fulfil their desired role despite all the limitations.

The Pandemic of Covid-19 further compounded the problems of the Prison Administration since it had to deal with the danger of spreading of the virus in the heavily crowded prisons. There was an atmosphere of fear and the inmates of the prison feared the worst since they were already excluded from the society and felt they had little hope for a recovery in case the Pandemic struck the prisons. This had an adverse effect on their mental health who were vulnerable to fear. This could potentially disturb the law and order situation inside the prisons as well. In addition to this, the Prison Administration also faced the monumental task of ensuring Covid-19 compliant behaviour in crowded prisons while also being in danger themselves. This article discusses the effect of the Pandemic of Covid-19 on Prison Administration in India.

2. Conditions of Prisons during the Pandemic

The dismal conditions of the prisons in India were brought to the attention of the Supreme Court during the Pandemic. It gave directions as to how to handle the situation in prisons and gave directions to the State and the Central Government. It directed all of them to constitute a ***High-Powered Committee*** which consists a list of the categories of prisoners who can be released in the light of the Pandemic.[377] The SC observed that the occupancy rate of prisons in India is 117.6%. Moreover, the ingress and egress of lawyers, prisoners, prison staff was quite

[376] Vijay Raghavan, Prisons and the COVID-19 Pandemic, 22 May, 2021, available at: https://www.epw.in/journal/2021/20/comment/prisons-and-covid-19-Pandemic.html. (last accessed on 29tht Nov 2021).

[377] *Re: Contagion of Covid-19 Virus in prisons,* Suo Motu Writ Petition (c) No. 1/ 2020.

high. Due to this reason, the SC noted that prisons were the *"fertile breeding grounds for incubation"*[378] of Covid-19. Further, the report released by the India Justice Report 2020 provided a good analysis of this overcrowding issue and observed that the occupancy rate of under trial prisoners was nearly 70% and this figure is constantly increasing in few states and UTs.

2.1 Impact of the Measures Undertaken

The Supreme Court further directed the ***Under Trial Review Committee*** to meet every week to take necessary adequate measures to consider the release of under trial prisoners which have been lodged in jail unnecessary.[379] After this decongestion drive ordered by the SC, The Commonwealth Human Rights Initiative (CHRI) observed the cumulative percentage of the occupancy rate came down to 93%.[380] This decongestion drive proved to be successful in bringing down the rate of spread of Covid-19 infection.

The SC relied on its earlier decision of *Arnesh Kumar* v. *State of Bihar*[381], in which it had held that bail is the rule and jail is the exception. In the month of February, 2021, when the number of Covid-19 cases started decreasing, the SC again started directing the prisoners who were earlier released on interim bail or prisoners to start surrendering themselves before the appropriate authorities.

The Commonwealth Human Rights Initiative (CHRI) collected data about the spread of Covid-19 is prisons and its online tracker initiative reported that 1,567 prisoners and prison staff were tested positive for Covid-19 during the second wave and total positive cases comprising both prisoners and prison staff since May 2020 were reported to be 19,724. Post this order, 90% prisoners were already reported to have returned to their respective prisons by March 2021.[382]

[378] Shivkrit Rai & Shubham Airim, 'How Indian Prisoners Stand to Lose the Most During Coronavirus Pandemic', Outlook available at outlookindia.com (last accessed on 20 Nov 2021).
[379] What Covid-19 taught us about state of our prisons, Hindustan Times, 23rd Feb 2021, available at https://www.hindustantimes.com/india-news/what-covid-19-taught-us-about-state-of-our-prisons-101614046131817.html (last accessed on 20th Nov 2020).
[380] *Ibid.*
[381] *Arnesh Kumar* v. *State of Bihar* (2014) 8 SCC 273.
[382] Teesta Setalvad, 'The Pandemic has put the spotlight on inhumane conditions in Indian prisons', The Indian Express, 26 May 2021, available at https://indianexpress.com/article/opinion/columns/the-Pandemic-has-put-the-spotlight-on-inhumane-conditions-in-indian-prisons-7330342/ (last accessed on 21st Nov 2021).

This issue becomes critical due to the shortage of medical and prison staff in prisons. The preventive steps taken by the Government to contain the spread of virus in the prisons have their adverse implications. The increase in anxiety among prisoners and prison staff due to rise in the number of positive cases in prisons along with social unrest and disruption in the lives of inmates whose families are no longer permitted to visit prison to meet them. Further, after the above directions of the SC, the prisons have introduced the facility of video-conferencing. However, still this facility becomes inaccessible and difficult.[383]

2.2 Vaccination in Prisons

In addition to this, another issue which raised concerns was the mechanism of vaccination which could be adopted to vaccinate the prisoners. To redress this issue, an SOP was issued by the Union Ministry of Health and Family Welfare, based on the representations from the state and UTs governments.[384] Ultimately, it was decided that prison officials from prisons and nodal officers for the shelter homes for women, beggar's homes, old age homes, etc., can register for vaccination on their behalf. Where, these directions issued by the Supreme Court and High Courts and advisories released by the Government are much laudable and deserve appreciation, still the real change on the ground level will take place only when the courts will start considering the method of releasing the prisoners on parole and bail especially those prisoners who are vulnerable to diseases, for instance patients above 50 years or some peculiar medical history like prisoners with low immunity, HIV Aids, pregnant women, women inmates living with their children and patients suffering from tuberculosis. It cannot be denied that prisoners in prison must have faced difficulties even with basic necessities when the people outside the prisons were complaining about their delayed essential services. This raises concern about the deliberate violation of the right to life of prisoners. Therefore, it becomes the duty of the Government and the constitutional courts to devise a permanent mechanism to decongest prisons and simultaneously, duty of the press to report authentic information about the condition of prisons.

[383] Krishnadas Rajgopal, Supreme Court orders immediate de-congestion of prisons, The Hindu, 8th May 2021, available at https://www.thehindu.com/news/national/covid-19-surge-supreme-court-orders-immediate-de-congestion-of-prisons/article34513158.ece (last accessed on 21st Nov 2021).

[384] No. 17013/17/2020-PR, Government of India, Ministry of Home Affairs, 20th April 2021.

3. General Issues Faced by Prison Administration in India

3.1 Outbreak of Covid-19

The worst fears of the prison authorities came true when there were Covid-19 cases inside the prisons themselves. As per the latest available data, it is recorded in 2018 that Indian prisons have the highest number of occupancy rate in past five years. The data projects that since 2014, Uttar Pradesh was the most overcrowded state and Sikkim recorded the highest relative increase in inmate population.[385]

Despite several measures that had already been taken by the prison officials in highly affected states which included the provision of masks, sanitizers, turmeric milk for immunity boosting and release of some of the prisoners as per the orders of the Supreme Court. There were reports of three deaths in three different jails. Moreover, in the Arthur Road Prison itself the virus infected 26 prison and 158 inmates. In Jaipur, there was a major incident where 130 prisoners tested positive for the virus. These further alleviated the issues faced by the prison authorities.[386]

Prison	State	No. of positive inmates
Guwahati Central	Assam	435
Tihar Central	Delhi	221
Ballia District	U.P.	225
Nagpur Central	Maharashtra	219
Mumbai Central	Maharashtra	182
Jhansi District	U.P.	120
Jaipur District	Rajasthan	100
Akola District	Maharashtra	97
Anantnag District	J&K	96
Bareli	M.P.	64
Solapur District	Maharashtra	62
Vadodara Central	Gujarat	60
Parappana Agrahara	Karnataka	51
Sabarmati Central	Gujarat	47

Prison	State	No. of positive inmates
Sabarmati Central	Gujarat	47
Etah District	U.P.	36
Puzhal Central	T.N.	30
Yerwada Central	Maharashtra	29
Ludhiana Central	Punjab	26
Perurani District	T.N.	25
Cuddalore Central	T.N.	18
Madurai Central	T.N.	15
Baruipur	W.B.	15
Thane Central	Maharashtra	6
Sitarganj	Uttarakhand	6
Kishanganj District	Bihar	3
Bhagalpur District	Bihar	3

[385] Susmant Sen and Naresh Singaravelu, S Data | Overcrowded jails and the COVID-19 contagion, The Hindu, 29th July, 2020, available at https://www.thehindu.com/data/at-least-2191-prison-inmates-infected-by-covid-19/article32218622.ece. (last accessed on 21st Nov 2021).

[386] Sreedevi Jayarajan, How the Pandemic has affected India's overcrowded prisons, The News Minute, 28th May, 2020 https://www.thenewsminute.com/article/how-Pandemic-has-affected-india-s-overcrowded-prisons-125448. (last accessed on 21st Nov 2021).

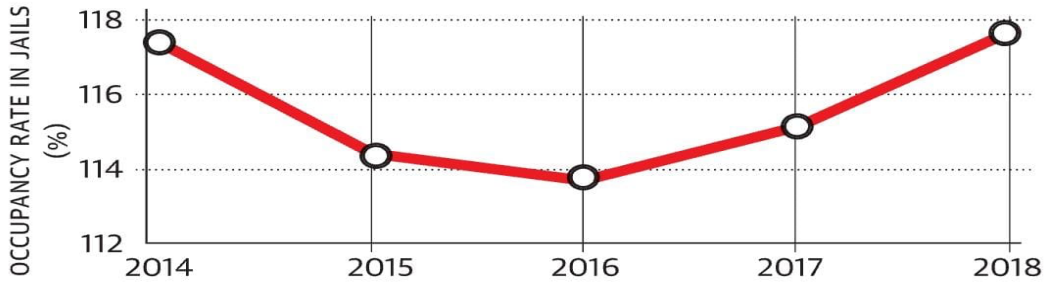
Table Description: Inmates Found Positive in select jails

Source: The Hindu[387]

This data is significant as it shows the number of positive inmates across different jails during the Pandemic. The figures show that there were more than 100 cases in several jails which depicts the gravity of issues faced by the prison authorities.

3.2 Overcrowding and Prison Discipline

There were 478,600 prisoners in 1350 prisons against the official capacity of 403,739 prisoners in India in the year 2019.[388] This means that the capacity of the prisons was exceeded by nearly 20%. This was a major challenge before the authorities even before the advent of the Pandemic since they faced hygiene issues, sanitary problems and a lot more. It led to an increase in diseases contracted by prisoners, had an adverse effect on their mental health and also affected their chances of reintegration into the society. Their misery had increased even further during the Pandemic where they were expected to enforce social distancing, cleanliness and Covid norms. This led to increased issues related to prison discipline, mental health and maintenance of the prisons. The staff itself was in danger of contracting the virus and had to work in a hostile environment in order to do their duty.

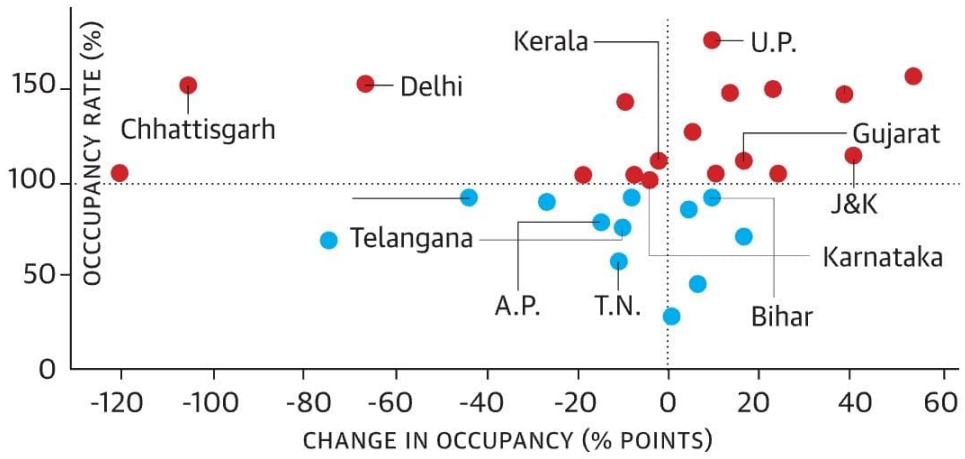


[387] Susmant Sen and Naresh Singaravelu, S Data | Overcrowded jails and the COVID-19 contagion, The Hindu, 29th July, 2020, available at https://www.thehindu.com/data/at-least-2191-prison-inmates-infected-by-covid-19/article32218622.ece. (last accessed on 21st Nov 2021).

[388] Prison Statistic in India, 2019 by National Crime Records Bureau, Ministry of Home Affairs, available at: https://ncrb.gov.in/sites/default/files/PSI-2019-27-08-2020.pdf. (last accessed on 22nd Nov 2021).

Graph Description: Occupancy rates in jails over the years, Source: The Hindu[389]

This data shows that the prisons of India had always been overcrowded in recent times. The number of prisoners kept increasing which led to further issues for the prison authorities.



Graph Description: Change in Occupancy rates in prisons from 2014 to 2018

Source: The Hindu[390]

This data shows the varying performance of states over the year with respect to the occupancy rates in the prison. The increase in densely populated states signifies the need for prison reforms and decongestion.

3.3 Mental Health Issues

The World Health Organisation in the month of March, 2020, declared Covid-19 as Pandemic. All the countries faced difficulties regarding preventing spreading of the virus, immobilisation, infrastructure issues, rising health concerns, rampant loss of human life, economic loss and social distancing. However, the Government was occupied with fulfilling its duty of protection towards those who were living a free life. The attention towards the plight of prisoners during this outbreak was drawn much later by the courts. Indian prisons are already infamous for overcrowding and hygiene issues. This makes the job of the prison staff more difficult in

[389] Susmant Sen and Naresh Singaravelu, S Data | Overcrowded jails and the COVID-19 contagion, The Hindu, 29th July, 2020, available at https://www.thehindu.com/data/at-least-2191-prison-inmates-infected-by-covid-19/article32218622.ece. (last accessed on 21st Nov 2021).
[390] Ibid.

managing the prisons especially during such an outburst where humans were sceptical to remain even close to each other. The prison staff had the bigger challenge to maintain the health conditions of all the prisoners who are already living in the atmosphere wherein even if one case was detected, then the spreading would have become incapable. Owing to their multidirectional role of maintaining custody of prisoners, hygiene, providing care to them, providing opportunities of corrective behaviour issues. The probability of risk regarding mental health was much higher in the prison staff. The mental stress among the prisons staff is increasing on a daily basis, leading to increased medical problems, thus making them vulnerable to issues like substance abuse, depression, divorce and in some cases suicide also. Blaming peculiarities of prisons such as overcrowding, lack of resources and staff may be appropriate to some extent, especially when prison staff feels undervalued or unsupported due to the above concerns.

4. Identification of the issues

However, more worrisome is the risk of exposure of prisoners and prison staff to the Covid-19 virus. They face high probabilities of getting infected, spreading the infection to their families, unavailable adequate medical attention, inadequate protection and most importantly mental health issues. The disruption in their social life brought due to risk of the virus adds to their mental stress. In a handbook by NIMHANS[391] , following reasons were identified for increasing COVID-19 related Mental Health Issues among prisoners and prison staff-

- Long working hours
- Lack of information and communication
- Lack of medical support
- Social exclusion from their families.
- Concerns regarding personal protection equipment.
- Constant fear and anxiety for family welfare, care and protection in case they are quarantined, isolated or sent for medical treatment.

[391]NIMHANS, Dealing with Mental Health Issues in Prison Staff during COVID-19: A HANDBOOK, available at https://nimhans.ac.in/wp-content/uploads/2021/07/Prison-Staff.pdf. (accessed 28th November, 2021)

- Lack of support for personal and family needs remains unattended due to unplanned long working hours aggravated by the fact of prisons being understaffed.
- Uncertainty about extent of support from the department and authorities.

The study also identified the following indicators of mental health concerns at work-

- Restlessness.
- Getting irritated too easily.
- Drowsiness.
- Decreasing efficiency both physically and mentally at work.
- Drug abuse, intoxication and reporting to work in a similar state.
- Change in pattern of communication with colleagues and prisoners.
- Reduced productivity.
- Unpredictable behaviour, sudden changes in mood, crying, sudden outbursts, aggression etc.
- Absenteeism.

Further, COVID-19 has its own mental health concerns, which the authors have tried to identify and summarise below. The prison staff constantly feel such mental stress or pressure that they will contact infection even when they have taken all the possible precautions. It becomes more worrisome when they are unable to control worrying about it even when they are deliberate about the fact that they are overthinking. Therefore, it might be said that they gradually start losing control over their mental faculties. Due to the above two factors, they eventually start feeling nervous and anxious and unfortunately shift towards the edge of depression. This further leads to inability to concentrate, losing control over their physical actions as they feel restless and start facing difficulties in sitting at a particular place for even a short period of time. Due to this, they also start feeling incompetent at work.

Further, they also become mentally stressed, they excessively follow social media regarding COVID-19 updates and protocols. This increases their mental stress elsewhere when they come across news regarding COVID-19 related deaths on social media. Lack of sleep and loss of appetite are also one of the indicators of COVID-19 related mental health issues.

4.1 Management

NIMHANS gave an interesting and effective model for identification and management of Covid-19 related mental health issues in prisons, called the ***Gatekeeper Model***. For identification of mental health issues among prison staff, they were divided into four different categories, ***G-PAHG: Gatekeepers- Prison Administrators, Healthcare workers and Guards.***[392]

4.2 Strategies for the Mental Health Promotion

4.2.1 Awareness among Prison Staff regarding importance of Mental Health and related concerns

Under this head, it becomes the duty of the senior officials of the Prison Administration such as officers like Inspector General of Prisons, Directed General of Prisons and relevant ministries to promote mental health awareness among prisoners and prison staff. They should take appropriate measures to conduct stress management workshops, classes and seminars inside the prison premise for everyone. They should conduct periodic review of behaviour patterns and performance of prison staff to monitor identification of mental health concerns among the prison staff. Further, drafting of proper protocols for appropriate diagnosis of mental health and treatment of prison officials and staff. This will help in the identification of budding concerns at an initial stage itself and prevent it from getting aggravated.

4.2.2 Communication

The senior officials and administrators should make efforts to maintain trust and confidence of their subordinates that they are always open for communication and counselling. Effective communication will certainly help in the early identification and redressal. Establishing a

[392] Vijay Kumar, NIMHANS suggests 'Gatekeeper Model' to prevent suicides in prisons, The Hindu, 24th July, 2021 available at https://www.thehindu.com/news/national/nimhans-suggests-gatekeeper-model-to-prevent-suicides-in-prisons/article35497482.ece. (Accessed 29th November, 2020).

dedicated department or officer regarding mental health concerns might bring fruitful results in the early detection and prevention. Also, the State Governments should take suo motu cognisance to deal with matters regarding mental health of prison staff. The concerned department can also frame standard and periodical guidelines for the same.

4.2.3 Workplace Arrangements

Measures like periodical staff rotation from high stress positions to low stress positions and vice versa should be incorporated in Prison Administration to prevent and redress mental health issues. Duty shifts, constant breaks, weekly breaks if practically possible should also be given to the prison administrators and staff to ensure that they get some time for recreation and family which will help in reducing their stress considerably. However, focus should definitely be on effective long-term measures and adequate training of staff in mental health related issues.[393]

4.2.4 Ensuring support during the times of distress

At the outset, prison staff who have a history of mental health distress should be given additional support from the department and if required, must be referred for advanced treatment at concessional rates or free treatment, if practically possible. Effective counselling measures must be taken, and a buddy system can be introduced in prisons. Recognition and credit system should also be introduced which will encourage the staff to work with more enthusiasm and zeal in expectation of rewards, i.e. appreciation and some incentives. The buddy system ,a system in which two colleagues of same level are paired up with each other during and after work hours, mentioned above will serve the following objectives-

- Improving confidence
- Trust bond
- Two buddies looking after each other
- Enabling them to discuss issues within each other and vent out their emotions
- Reduces the chances of isolation especially during the Pandemic times
- Workplace bonding

[393] NHRC India, IMPACT OF COVID-19 ON HUMAN RIGHTS & FUTURE RESPONSE: ADVISORY ON THE RIGHTS OF THE PRISONERS, 5th October 2020.

- Boosting up their morale

4.2.5 Yoga and Meditation

The prison authorities should conduct regular yoga and meditation exercises for prison staff which will help in reducing their mental stress and workload pressure. For instance, the Delhi Police organised virtual yoga sessions for all the police personnel during the lockdown recognising the fact it takes a lot of mental toll to be present on the roads away from their families in the tough times.

5. Various Advisories Issued by the Government

It cannot be denied that the Government was equally committed to the conditions of prisons and the health of prisoners and prison staff during the Covid-19 induced Pandemic.

5.1 Advisory issued by the Ministry of Home Affairs regarding "Prevention and Control of Covid-19 in Prisons and Correctional Homes- in continuation of Advisories dated March 12, 2020 and May 2, 2020[394]"

At the outset, it should be made clear that this advisory was issued under the *"Most Important Time Bound"* category. This Advisory was issued in consultation with the Ministry of Health and Family Welfare, directing the state and UTs prison authorities to take all the necessary measures to promote following the Covid-19 related protocol and strictly enforcing the wearing of masks, use of sanitizers, social distancing by the prison staff as well as the prisoners. The Ministry also directed to ensure rapid testing inside the prisons and make adequate arrangement for isolation and treatment for those who have tested positive. They were also directed to raise awareness among prisoners regarding the symptoms of Covid-19 and preventive measures. In addition to the above, certain other general directions were given such as proper scanning of all the visitors, ensuring sanitation and hygiene at all times, sanitization and spread of disinfectants in cells, kitchen, bathrooms, etc.

[394] No. 17013/17/2020-PR, Government of India, Ministry of Home Affairs, 20th April 2021.

5.2 Challenges

In an interview with the TNM, Santosh Kumar, Deputy Inspector General (Prisons), Kerala said that most challenging for the authorities was the proper testing and lodging of new entrants in the prisons.[395] The Kerala Government directed the authorities to conduct random testing of the inmates and to lodge only those prisoners who were tested to be negative and asymptomatic. However, the officer said that testing is not an issue, but real difficulty lies in the lodging of positive and symptomatic prisoners due to limited infrastructure. Also, results of the RT-PCR testing also takes almost 2 days for which there is no provision or direction about dealing with the new inmates. Also, he said that hospitals are bit skeptical to admit the positive cases from prisons and they explicitly deny admission to symptomatic prisoners as they only give admissions to positive cases.[396]

5.3 Infructuous Laws

The rights of prisoners have been most of the time kept in abeyance. This brings us to two major issues, i.e. Indian prisons still administered through infructuous laws which date back to early 1900s and second being the ignorance of the mental health issues of the prisoners and prison staff in the prisons. Even the recent laws such as the Model Prison Manual, 2016 are largely infructuous in nature. **Rule 13.73 of the Model Prison Manual**, 2016 specifies elaborate guidelines and directions for prison authorities regarding dealing with epidemic. These include provisions for separate sheds for every prisoner, segregation of infected prisoner from other prisoners and proper disinfection of the cell of the infected prisoner and his clothing etc. Similar rules are also provided in the Model Prison Rules, 2016 and Delhi Prison Rules, 2018.[397]

However, these laws are left inoperative due to logistic and infrastructural issues. Most of the prisons are overcrowded. For instance, as of now, Delhi has around **17,500 prisoners lodged**

[395] https://www.thenewsminute.com/article/how-Pandemic-has-affected-india-s-overcrowded-prisons-125448.

[396] Aditya Ranjan, Token Temporary Measures to Decongest Prisons Can't Save Inmates from Covid-19, The Wire, available at https://thewire.in/rights/token-temporary-measures-to-decongest-prisons-cant-save-inmates-from-covid-19 (last accessed on 22nd Nov 2021).

[397] Neetu Chandra Sharma, Shortage of medical staff puts Indian prisoners at high risk of Covid-19, livemint, available at https://www.livemint.com/news/india/shortage-of-medical-staff-puts-indian-prisoners-at-high-risk-of-covid-19-11595248789662.html (last accessed on 22nd Nov 2021).

inside prisons, 7,500 prisoners above the specified capacity of 10,000 prisoners. Even after the decongestion drive ordered by the SC, situation remained grim inside the prisons.[398]

Similar is the case in the state of Uttar Pradesh. The state has a total of 70 jails, with the capacity to lodge 58, 400 prisoners. However, the actual number of prisoners being lodged in these jails goes up to 96, 383 as per the Prison Statistics Report, 2018. The occupancy rate was recorded to be 165%. However, around 11,000 prisoners were released post the decongestion drive by the SC. Unfortunately, still the situation is not satisfactory and prisons still remains overcrowded.

5.4 Lack of Focus on Mental Health of Prisoners

The already infructuous laws are largely silent on the matter of mental health of prisoners. This issue has been advocated time and again by the courts in their judicial pronouncements. However, the situation in reality is grim and there is very less discussion which has taken place regarding the mental health of prisoners and this issue largely remains ignored. Various reports which have been cited in the previous parts of this article have shown that the condition of mental health of the prisoners has worsened which already remains weak in prisons. This is because the frequency of their family visits have reduced or almost prohibited. In addition to this, the frequencies of judicial proceedings have also reduced due to which they have becoming restless and uncertain about their lives. This worsens their mental health condition more. Jail authorities have cancelled all the social activities of the prisoners due to which they have completely isolated. Though, this is the need of the hour, but it has serious implications on the mental health of the prisoners.

The Outlook cites the example of the prisons in Italy. Owing to the Pandemic and Covid-19 protocol, Italy also prohibited the family visits, social isolation of prisoners etc. This resulted in prison riots, leaving some of the prisoners and prison staff dead. Similarly, superpowers like the United States and the United Kingdom also faced issues like violent riots, hunger strikes and suicide in the prisons.[399]

[398] *Ibid.*

[399] Death toll rises from Italy's Deadly Corona virus prison riots, available at https://www.reuters.com/article/us-health-coronavirus-italy-prisons-idUSKBN20X2DG (last accessed on 23rd Nov 2021).

In India, as discussed above, laws have provisions regarding health of prisoners, but problem lies in their implementation due to limited resources. For instance, **Rule 15.03 of the Model Prison Manual**, 2016 safeguards the mental health of the prisoners. It also provide for setting up of arranging psychiatric help for those who need it. Similarly, the Mental Healthcare Act, 2017 under section 103(6) requires the State Government to set up mental health establishments in the medical wing of at least one prison in each State and Union Territory. However, again these provisions were rendered infructuous because of various reasons. In some situations, the authorities failed to comply with these provisions whereas in some cases, even when they were willing to implement them, they were rendered helpless by issues like lack of trained medical staff, prison staff, infrastructure etc.

6. Conclusion and Suggestions

The Covid-19 Pandemic posed a grave challenge on the Prison Administration in India. The plight of the administration and the prisoners was also recognized by the Supreme Court of India which issued detailed guidelines for the resolution of the same. It allowed for the reduction of prison crowd which helped the Prison Administration deal with the issues in a better way. These measures were effective when implemented. However, the decision of the Supreme Court to recall the prisoners back after the outbreak was questionable as the Pandemic still looms large and the second wave showed how it can multiply rapidly. There has been a lot of discussion about the effect on the rights of prisoners. However, it also needs to be realised that the Prison Administration was faced with the most challenging task which was the smooth functioning of prisons during the Pandemic. There worst fears came true when the infections spread in jails. It created an unprecedented situation for the Prison Administration who had to ensure law and order in the prison and ensure that the health of the prisoners is also given due consideration.

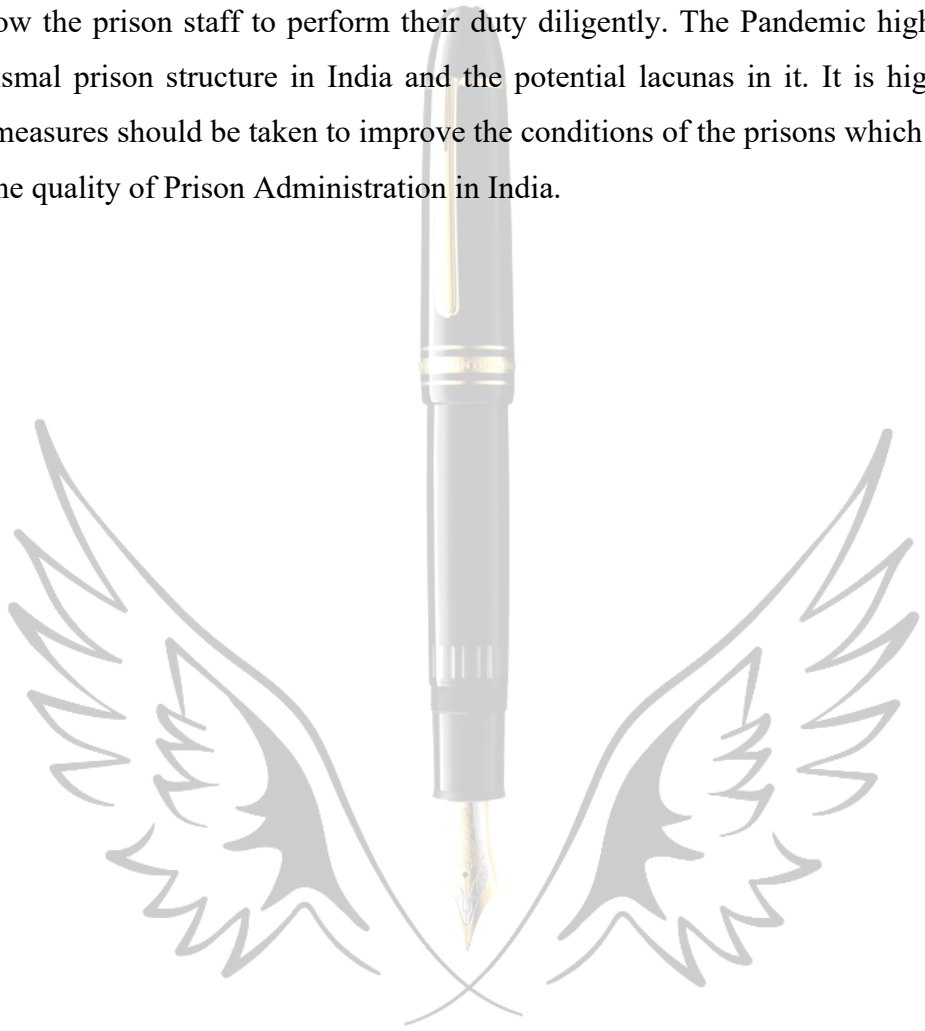
It can be seen that the various States resorted to short term measures which were the need of the hour. However, it is high time to realise that certain long term serious reforms are required to be introduced in the Prison Administration and infrastructure. Nevertheless, owing to the commitment of the State to tackle the present Pandemic, we should agree that this issue can be taken post Pandemic. However, there is a dire need to consider the mental health issues of the prisoners and the prison staff.

Recently, the Prisons in Punjab and Rajasthan introduced the ***E-Mulakat Programme***, wherein prisoners can talk to their families through video call. This will certainly help in reducing the mental stress among prisoners and will increase their social interaction among themselves also. Similar initiatives are required to be taken by other states also. They should realize the available resources to the maximum extent. The States need to realize that though we have successfully fought the battle against Covid-19, but the deteriorating mental health of the prisoners still remains a long-term concern having serious ramifications and need to be tackled at the earliest. In addition to this, there are several issues faced by the Prison Administration which need to be resolved with the help and guidance of the Government.

Below are some ***suggestions*** which can be implemented for effective Prisons Administration and Welfare in India:

- A network with the nearest hospitals in order to expedite the treatment of the prisoners and the prison staff.
- Regular health check-ups for prisoners must be conducted. This will help in the identification of any illnesses developed in prison. The causes can also be identified by the doctors and the prison authorities can be informed immediately. Proper steps can be taken to improve the existing situation in order to prevent the spread of infection. Moreover, the doctors can also check for evidence of violence and provide a way to the prisoners to communicate with the authorities.
- The Prison Personnel and prisoners can be given sessions regarding hygienic practices that are to be followed both inside and outside prisons. This will help reduce the advent of diseases in prisons.
- The prisons should be renovated and made more spacious to accommodate a greater number of prisoners. There can be creation of some isolation cells in prisoners to house the ones with communicable diseases.
- There should be sessions with psychologists for the prisoners occasionally in order to ensure that the prisoners are keeping good mental health.
- There should be attention paid to the mental health of the prison staff as well. They should be allowed to submit a list of requirements for the facilities they lack in order to take adequate measures to ensure the appropriate functioning of prisons.

If these suggestions are implemented properly, they will help in improving the conditions of prison staff and prisoners. The administration of the prisons will also be made more effective. It will allow the prison staff to perform their duty diligently. The Pandemic highlighted the already dismal prison structure in India and the potential lacunas in it. It is high time that effective measures should be taken to improve the conditions of the prisons which in turn will improve the quality of Prison Administration in India.



WHAT ARE THE MERITS AND DEMERITS OF PATENTS, COPYRIGHTS AND TRADEMARKS AND THE VIEW OF INDIAN LEGAL SYSTEM ON THEM?

- ADITYA

Introduction –

In recent years, Intellectual Property Law has been the fastest expanding legal specialty. It goes without saying that without assurances of security regarding one's invention, creative works, or brand, firms and people are reluctant to invest their time, effort, and money in such ventures. As a result, robust intellectual property laws and increased creativity go hand in hand. Intellectual property is a wide field. However, a thorough grasp of the most prevalent rights afforded by IP protection is vital. The following are the most often requested: TRADEMARK, COPYRIGHT and PATENT.[400]

Any company trying to develop a presence in India should begin by protecting and maintaining its intellectual property rights (IPR), which should be integrated as a key component of the company's asset growth plan. Intellectual property that distinguishes your company from rivals may help you stand out from the crowd and become an important element of your marketing strategy. A piece of intellectual property may also be sold or licenced in order to create income for you or your organisation. It is important to note that there are many sorts of intellectual property in India, each of which is protected by an unique set of laws. The registration of intellectual property, as a consequence, requires negotiating complicated procedures and the submission of several papers. This requires specialised knowledge and familiarity with procedural standards in order to guarantee that registration is completed quickly and efficiently.[401]

[400] IPR in India: Difference between Copyright, Patent & Trademark, Legalwiz, https://www.legalwiz.in/blog/difference-between-trademark-copyright-patent-ipr-in-india, Accessed on – 7 November 2021

[401] Intellectual Property Rights in India: Laws and Procedures for Registration, India Brifing, Vasundhara Rastogi https://www.india-briefing.com/news/intellectual-property-rights-india-laws-procedures-registration-14312.html/, Accessed on – 7 November 2021

Patents -

Patents are, at their most basic level, a collection of exclusive rights given by a government to an inventor or the inventor's assignee for a certain length of time in return for the disclosure of an invention. Patents provide you the legal right to keep others off your market, and they usually cover the invention of a novel and beneficial technique. Keep in mind that patents do not guarantee financial success. Patents may, in fact, be liabilities rather than assets in certain cases.

Benefits of having a Patent -

To begin with, patents protect a design that is practical or useful. Patent owners are granted monopoly protection by the government for the duration of the patent's statutory life. The patent's monopolistic character establishes an artificial market constraint or scarcity for technology that implements the patent's claims. Artificial market limits enable the patent owner to increase prices beyond the market clearing price, resulting in abnormal profits for the patent owner.

Furthermore, when purposeful infringement occurs, patents provide greater rights. a patent owner may be entitled to damages if the infringement is determined to be intentional by a competent authority. Of course, the economics of such an arrangement are self-evident. If a court concludes that a rival has deliberately infringed on a patent and that the infringement resulted in damages, the patent owner may seek damages against the competitor.

Drawbacks of Patents -

To begin with, patents are costly to obtain, with prosecution frequently costing huge amounts of money thousands of dollars. Costs include both hard costs (such as an inventor's time) and soft costs (such as time spent describing the invention to the patent attorney and patent officials). If the application involves international jurisdictions, the fees will skyrocket.

Second, compared to other forms of intellectual property, patents have a very limited economic life. A patent's legal life begins on the date of the patent application's earliest effective filing date and ends 20 years later. Patents are unusual among IP kinds in that the award procedure takes a large chunk of the patent's economic life, since the earliest effective filing date is really the triggering point for commencing the statutory clock. This has administrative and financial consequences.

Finally, the government mandates that the inventor reveal the specific nature of the innovations specified in patents, such as how the inventions operate, what issues they solve, and how the designs vary in a new manner from previous art, in return for the monopoly safeguard. Of course, the disadvantage of this condition is that rivals now have accurate and detailed knowledge of how the ideas specified in the patents operate, making it easier for them to adopt the designs without any fear of legal penalties in areas where patent protection is not available.

Copyrights -

Copyrights are similar to patents in that they represent nothing but a collection of exclusive rights given by a government to an individual or entity for the invention of something. Copyrights, in contrast to patents, which are focused on an invention or anything of function or usefulness, are applied to works of authorship. Copyrights provide the creator the exclusive right to use his or her work for a certain length of time.

Benefits of copyright protection -

Copyrights offer a number of benefits over other forms of intellectual property, including a substantially longer legal life. Many copyrights will not create any economic activity for at least the duration of the author's statute of limitations, if not longer.

Additional benefit of copyright is that the owner is eligible to real damages as well as any extra profits made by the infringement, or statutory damages, if the copyright is violated. When comparing a copyright lawsuit to a patent lawsuit, it is possible that the computation of damages will be simpler.

Last but not least, Copyrights are affordable and straightforward to get and register. At the time at which an author fixes a copyrightable work in a physical medium, the author gains protection and ownership of the work. In this way, the copyright owner is protected immediately after that moment, without the need for any further action on the part of the government agency.

Drawbacks of copyright protection -

It is important to note that copyrights protect the representation of an idea rather not the concept itself, which is a significant drawback. Ideas are often protected by patents and trade secrets. The distinction may be slight, but it is nevertheless significant in the context of this article. For example, an innovator may write an essay outlining a new technique and post it on the internet. The method in which the author expressed the innovation in the article is protected by copyright law; nevertheless, the actual invention mentioned in the article is not protected by copyright law.

Trademarks -

Brands, phrases, logos, and other similar objects are all protected by trademarks, which are legally protected by law. In general, trademarks are considered to be the most valuable kinds of intellectual property (IP) in the market. The Coca-Cola logo and the Nike swoosh are both symbols of brands that demand a premium in the marketplace, despite the fact that practical differences between nonbranded and branded items seem to be nonexistent or small.

Benefits of trademarks -

The most significant benefit of trademarks is that there are no legislative constraints on the length of time that they may be used. In the United States, trademarks have a statutorily limited life span as long as the trademark owner keeps the trademark registered, uses the trademark in commerce, and protects the trademark owner's rights.

Second, trademark registration at a trademark office is a reasonably affordable and straightforward process. To register a trademark, the trademark owner must complete a

registration form and put in a nominal registration fee. Because of this, although the cost of trademark registration is more than the cost of copyright registration, it is still comparatively affordable when compared to the expenses of patent prosecution.

Finally, trademarks are one-of-a-kind in that they may be used to brand and generate demand for otherwise boring or commodity things, enticing a consumer to pay a premium for something that might otherwise be obtained for a lower price.

Drawbacks of trademarking your product or service -

Trademarks are used to symbolize some of the most well-known brands in the world. However, like with boxers and wrestlers, the larger they are, the more difficult it is for them to tumble. Trademarks may be quite volatile in the market, especially in the early stages. In a flash, markets and perceptions may shift, and these shifts can have a significant impact on the value of a company.

In addition, popular trademarks are vulnerable to genericide, which happens when the public learns to link a brand with widely available alternatives that provide the same function. For example, the phrases Xerox and Kleenex didn't start off as popular words. At first, they were branded items, but over time, the public started to identify them with more generic products. Because of genericization, the value of these brands has diminished. [402]

Intellectual Property Rights Systems in India –

Copyright -

In any case, it could be a smart option to register your copyright since doing so may assist in proving ownership in the event that criminal actions against infringers are brought against you.

[402] What are the advantages and disadvantages of patents, copyrights, trademarks, and trade secrets?, BVRESOURCES, https://www.bvresources.com/blogs/intellectual-property-news/2018/03/12/what-are-the-advantages-and-disadvantages-of-patents-copyrights-trademarks-and-trade-secrets, Accessed on – 7 November 2021

In the majority of situations, however, registration is not required in order to sustain a copyright infringement claim in Indian courts. Registration with the Copyright Office may be completed in person or via the use of a representative. Since 2016, the Ministry of Commerce and Industry in India has been in charge of copyright policy. The Department for Industrial Property and Promotion is now in charge of all intellectual property rights. Internet piracy of movies, songs, video games, and software, as well as unlawful copying of physical books, is a problem in India today.

In India, copyright ownership does not need official registration. It is, nonetheless, advisable to get a copyright registration certificate. If a disagreement over copyright ownership develops, the certificate and the entries made within may be used as evidence in a court of law. The following is the copyright application process: Fill out the application completely and attach copies of your work. Following the submission of the application, the work is examined and any objections, if any, are made. Within 30 days, a response to the objection must be submitted. The certificate is issued by the copyright office when any objections have been resolved to the Copyright Registry's satisfaction.

Patents -

The Patents Act of 1970, the Patent Rules of 2003, and the Patent Amendment Rules of 2016 provide the legal framework for patents in India. Utility model patents are not permitted in the United States, as they are in the United Kingdom.

Patent registrars are overseen by the Controller General of Patents, Designs, and Trade Marks, which is a division of India's Ministry of Commerce and Industry. The Patent Registrar is responsible for overseeing the registration of patents. Patents are valid for 20 years from the date of submitting an application, after which they must be renewed on an annual basis.

Generally speaking, India's patent law functions on the basis of the 'first to file' concept, which means that if two persons apply for a patent on an identical creation, the patent would be given to the one who filed their application first.

Filing a patent application and having it numbered is the first step in the patent registration process. Fill out a form to request publishing. If no request is made, the patent specification will be published in the official journal 18 months following the date of application. On the other hand, patent specifications may be published within one month after submitting the form

if a request is made. Within 48 months of the patent application's filing date, submit a request for inspection. By paying an additional cost, a request for accelerated evaluation of a patent application may be submitted. The initial examination report is given within 12–24 months following making a request for examination. This study has the potential to establish substantive and procedural issues to the patent. If objections are expressed, the patent applicant has six months from the date of the report to respond to the statement of objections. The patent is awarded and put up for opposition if the official objections are addressed in a timely manner. For a period of one year from the date of publication, the patent is accessible to third-party objection. A patent is valid for 20 years after it is issued, and it must be renewed every year starting in the third year from the date of application.

Trade marks -

Registrable trade marks - The Trade Marks Act of 1999, as well as the Trade Marks Rules of 2002 and 2017, form the basis of India's trade mark legislation. The Controller General of Patents, Designs, and Trade Marks, which is part of the Department of Industrial Policy and Promotion, is the regulating authority for patents. To better enforce trade mark legislation, the police now have more powerful tools at their disposal, including the authority to inspect premises and confiscate products suspected of being counterfeit without first obtaining a court order. This authority is tempered, however, by the necessity that the police get the opinion of the Trade Mark Registrar on the registration of the mark before taking any further action. Additionally, counterfeit items may be withdrawn from the market or sold as a consequence. If you want to trade under your own surname, you may register your trade name as a trademark in India, which gives you protection regardless of whether or not there are other trademarks for that name registered. In light of the widespread practise of 'cybersquatting,' which is the registration in bad faith of trademarks by third parties who register domain names for certain well-known marks with the intent of selling them to the original rights owners, it is recommended that rights owners register their domain names in India in the same manner as

their trademarks. Up to two years are required for registration. In India, a trade mark is valid for 10 years, following which it may be renewed indefinitely for further ten-year terms. [403] The Procedure for registering is - a trademark Search must be done. You may use the national trademark database online to find a fully unique trademark. Submit the trademark registration application together with the required costs. In line with the Trade Marks Act, the Trade Marks Registry sends the "Official Examination Report" after the mark is registered, asking for any clarifications. After the application is approved, it is published in the 'Trade Marks Journal,' a government publication intended to elicit public objection, if any exists. The registration is authorised if the application is not contested within four months. Registration is issued only when the matter is settled in the event of an opposition. The Trade Marks Registry issues an official letter informing the application's approval as well as the trademark certificate when all necessary consideration has been given. The whole procedure takes 15 to 18 months. The trademark is valid for 10 years from the date of the certificate's issuing. It may be renewed for another ten years if the required costs are paid.[404]

CONCLUSION –

People's knowledge of intellectual property rules has risen dramatically over the years. Mostly all business interacts with IP rights, which must be protected in order to protect a company's/valuable enterprise's assets. From a company's brand name to any inventions it has made to the website it possesses, patents, trademarks, and copyright not only protect the rights, but they also offer an opportunity for better creative expression and are a major motivator for people to invest in research & development projects all over the world. Intellectual property is a fortune-creating engine that grants a person or firm legal ownership while also projecting a

[403] Intellectual property right in India, Assets Publishing, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627956/IP-Rights-in-India.pdf, Accessed on – 8 November 2021

[404] Intellectual Property Rights in India: Laws and Procedures for Registration, India Brifing, Vasundhara Rastogi https://www.india-briefing.com/news/intellectual-property-rights-india-laws-procedures-registration-14312.html/, Accessed on – 8 November 2021

trustworthy image. Today, every company depends on intellectual property rights, and many companies spend a tones of money to protect their intellectual property.

The value of intellectual property and its preservation is widely recognised as critical to economic success across the globe. In line with global trends, India has acknowledged the importance of intellectual property, which has been backed up by lawmakers, judges, and business. India has officially ratified a number of IP treaties and agreements. This has aided India in becoming more aware of global practises and attitudes regarding intellectual property protection. India has already made measures to meet its TRIPS requirements, and its IP law framework is almost identical to that of many wealthy countries. In the past, India's enforcement of intellectual property rights has been ineffective. Recent court judgements and actions by different enforcement authorities, on the other hand, show that India is preparing to effectively safeguard and enforce IPRs. Special IP cells have been formed by the Indian police, with professionally trained police personnel assigned to monitor IP infringement and cybercrime. Various Indian firms have also grown more aggressive in safeguarding their intellectual property rights. The Indian Music Industry, for example, is an organisation of music firms led by a former senior police officer that has adopted similar aggressive measures to fight music piracy. Overall, India has made significant progress in upgrading its IPR system, and it is anticipated to do much more in the future years to align itself with best practises in the area of intellectual property rights.[405]

BIBLIOSGRAPHY

1. http://www.nishithdesai.com
2. https://assets.publishing.service.gov.uk
3. https://www.india-briefing.com
4. https://www.legalwiz.in
5. https://www.bvresources.com

[405] Intellectual Property Law in India, Nishith Deshi, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Intellectual_Property_Law_in_India.pdf, Accessed on – 8 November 2021

INTERNET ACCESS AS A FUNDAMENTAL RIGHT: WITH SPECIAL REFERENCE TO FAHEEMA SHIRIN V. STATE OF KERALA

- SAURAV UNIYAL

An Introduction:

The term internet originated in 1970s from inter-'reciprocal, mutual'+ network which means denoting a computer network connecting two or more smaller networks.

"It is a global computer network providing a variety of information and communication facilities, consisting of interconnected networks using standardized communication protocols [406]." The main emphasis of this paper is to study about the citizens' right to access the internet. When Robert Kahn and Vint Cerf discovered the internet protocol even they would not have imagined that one day this invention would become a necessity for the people. In this 21st Century, one simply can't imagine his/her life without internet. Internet makes the world smaller. People can connect with one other even being far away. In the past, people used to send letters to each other and it would take days and at times months to reach the other person. Now with the help of internet one can simply send a message or an e-mail which won't take even a minute to deliver. Even various household bills are now paid online via internet. From mothers learning different recipes from YouTube to students getting an online class, internet has been indispensable for the people at large. The users of internet have rapidly increased in the world especially in India. "With over 560 million users of internet, India ranked 2nd in largest online market in the world".[407]

A society with main focus on internet evolution and development was formed in 1992, for the expansion of internet services across the globe, known as the Internet Society. Since the evolution of the Internet Society, the internet has been of premier importance to the government, business organizations, and individuals alike. The ARPANET (Advanced Research Projects Agency Network) which was the first internet network, led to the rise of E-

[406] meaning of internet, (August 10, 2020, 09:12 AM) retrieved from https://www.lexico.com/definition/internet

[407] Sandhya Keelery, *Internet usage in India - statistics & facts,* (August 13, 2020, 10:37 PM) retrieved from https://www.statista.com/topics/2157/internet-usage-in-india/

mail as a medium of communication via computers, subsequently e-mails led to increase in the development of internet. The development of internet has also led to the evolution of search engines the main focus of these search engines was to organize the information on the internet which can be easily accessible to the people using internet. There have been noteworthy developments in this field starting from the Archie search engine to Yahoo and then Google.

Digital Literacy and Inequality

Digital literacy is all about using technologies confidently as you live, learn and work in a digitally advance world but it's more than that being a digitally literate student means having capabilities in five associated areas you need to be able to search navigate and locate information in digital environments after finding your information it's an ideal opportunity to assess examine and apply your basic reasoning aptitudes.

Digital literacy is basically a path towards knowledge. The employees in the corporate sector and even the students nowadays had to research create and share digital content and that too with full attention and care. Today being digitally literate is crucial for the people at large. People who are digitally literate know how to find and consume the information. Now with the emergence of campaigns like Digital India, the government has clearly indicated its intention to move towards digital literacy at urban as well as rural areas. With the campaign of Digital India, the government ensures that their services are available to citizens digitally. Some of the key initiatives under Digital India include Digi Locker under which a person can store his essential documents in the clouds like Aadhar Card, Pan Card etc. and eHospital which enables the people to avail the benefits like online registration, payment of hospital fees, booking of appointments etc.

India has second largest internet user base in the world with more than 630 million users which is more than United States, United Kingdom, Russia and South Africa put together. India also has the cheapest prices for mobile data due to which the internet and other online services are used increasingly in the past few years. With cheap mobile data prices, the people nowadays prefer to watch movies and large video files on their mobiles and laptop which was not the case earlier due to high prices. Adding to the reduction in data prices, there is also a boom in over-the-top (OTT) platforms like Netflix, Hotstar etc. at an affordable price where one can watch movies, listen to music at a single platform. However, with all of this excitement there is also a different side or the sad reality of India's digital divide. "Digital divide is a term that refers

to the gap between demographics and regions that have access to modern information and communications technology, and those that don't or have restricted access. This technology can include telephone, television, personal computer and the internet."[408] There are various factors that specify the accessibility of internet services by a person like his income, gender, location, language, education etc. Digital divide is usually seen among the people living in agricultural and remote areas. Almost all the people in rural areas are engage in activities like farming, animal husbandry, fishing etc. due to which they sometimes don't feel the need to be digitally literate. The internet density of India is 48.4 according to the reports of Telecom Regulatory Authority of India which means out of 100 people there are 48.4 internet subscribers. But what's shocking is disparity between the internet subscribers in rural and urban areas. Internet density in rural areas is 25.3 in comparison to 97.9 in urban areas even though the population in rural areas is around 66%.[409] These stats raise serious questions about the effectiveness of Digital India. Along with this rural-urban divide the other factors are equally responsible for digital divide in our country and the geographic condition is one of them. The deserts of Rajasthan, the mountains of Uttarakhand and Himachal Pradesh and the forests in Madhya Pradesh all face significant digital exclusion. There is also a difference in the internet usage between the genders. According to a 2019 report of GSMC (Global System for Mobile Communications) only 16% of women are using mobile and internet services in India. There is combination of cultural, social and economic factors for the same. Due to lower position in the household and been engaged in domestic work, the chances of women owning such gadgets are naturally reduced and even though the prices of internet have gone down but the costs of android and other internet enabled handset is still high. Along with this, lower rate of literacy among the women, lack of digital knowledge and restricted imposed on the use of mobile by women especially in rural areas are also the barriers for the women to be digitally literate.

The global pandemic of COVID-19 has also widened the digital gap in India. The pandemic has led to a new dependency on digital connectivity. During the lockdown period in India, the people were required to work from their home and even the students were having online classes and exams. Most of the businesses were shut down and everything was done digitally. But COVID-19 has exposed the reality of digital divide in India especially between the government

[408]Meaning of digital divide, (August 15, 2020, 07:58 AM) retrieved from https://whatis.techtarget.com/definition/digital-divide

[409] Smriti Parsheera, *India's on a digital sprint that is leaving millions behind*, BBC News, (August 16, 2020, 10:12 PM)

and private education institutions. Due to lack of e-learning solutions the government educational institutions were facing lot problems to provide easy learning to the students without losing their time on the other side the private institutions were able to cope with the situation more smoothly. The educational institutions situated in the remote areas suffered the most due to lack of network in the area and the students do not have the facility of Wi-Fi at home so they have to rely on the mobile data for their classes which isn't sufficient to endorse online classes and meetings.

Right to internet access and Article 19

Article-19[410] of Indian constitution talks about protection of certain rights of citizens with respect to freedom of speech etc. It gives the citizens "right to freedom of speech and expression, to assemble peaceably, form unions, move throughout and reside in the territory of India and to practice any profession or carry on any trade or business." Fundamental rights given under the constitution is not absolute and even "Article-19"[411] has certain reasonable restrictions imposed on the exercise of freedom of speech and expression. In a landmark case of "Anuradha *Bhasin V. Union of India"*[412], the hon'ble Justice N.V. Ramana and V. Ramasubramanian held that "the right to internet as a part of right to freedom of speech and expression as well as right to practice any profession, or to carry on any occupation, trade or business" expressly given under Articles 19(1)(a) and 19(1)(g) of the Indian constitution.

Anuradha Bhasin V. Union of India

In this case, the government of India started imposing restrictions on internet and movement of the people in Jammu and Kashmir. On 2nd August, 2019, the tourists and the travelers were asked to leave the city. Then on 4th August, the landline connections, internet services and mobile networks were shut down and even the schools and workplace were ordered to stay shut. Additional restrictions were imposed under Section 144 of Criminal procedure Code[413] on the movement of the people. Finally on 5th August, the government of India abrogated Article 370 under which Jammu and Kashmir used to enjoy special rights like having their own constitution and restriction on the people from other states of India to purchase land or any property in Jammu and Kashmir etc. These restrictions on the movement of the people and

[410] INDIAN CONST. art. 19
[411] Id
[412] Anuradha Bhasin V. Union of India, [WRIT PETITION (CIVIL) NO. 1031 OF 2019]
[413] The Indian Penal Code, 1860, S. 144

especially shutting down of internet created a state of panic and disturbance and the reporters and writers were facing difficulties to publish their work. There were many petitions filed in Supreme Court challenging the government's order.

Ms. Anuradha Bhasin, an editor of the newspaper, filed a petition arguing the impact of internet shutdown and how she was not to publish her newspaper and argued that the government didn't look at the proportionality and reasonableness of their aim of shutting down of internet. An intervenor contended that the restrictions on internet shutdown were expected to be temporary in nature but it lasted for more than 100 days and also the State must prove that it is essential to prohibit right of the people to express their views. Even Mr. Gulam Nabi Azad, a member of parliament, filed a petition against the state orders stating various points like "the restriction in internet not only affected freedom of expression but right to trade as well and also the official orders of the State shouldn't be kept as a secret by the State." He also contended that the prohibition on movement must be specific on the people who may create disturbance but not on people in general.

Conversely, the Attorney General stated that the restrictions were imposed in order to prevent terrorist acts and internal militancy that has caused continual distress in Jammu and Kashmir. Solicitor General reiterated the contention and said that the most important duty of a State is to ensure protection of citizen's life and security. He argued that this issue was already a subject of speculation even before the order of abrogating of Article 370 was issued. Regarding the internet shutdown, the Solicitor General argued that there was no restriction on internet in the regions of Jammu and Kashmir and added that social media at times is used as a means to persuade violence. It can allow people to give false information news and images to spread violence or create anxiety and fear among the people. Furthermore, he asserted that the "dark web" has allowed an individual or groups to buy weapons and illegal material easily. Lastly, the Solicitor General rejected the contention saying that "the standards of free speech as they relate to newspaper applied to the internet on the grounds that their difference was too great."

The Apex Court of India held that an uncertain internet suspension would be unlawful under Indian law. However, the government could suspend the internet services but the orders for internet shutdown, it must be in consistence with the tests of necessity and proportionality. Freedom of expression and freedom to practice any profession online was protected under Indian Constitution, but could be restricted in the name of national security. The restrictions

under Section 144[414] of the Code of Criminal Procedure cannot be used to suppress legitimate expression and are subject to judicial scrutiny. The Court likewise held that "though the Government was empowered to impose complete internet shutdown, any order(s) imposing such restrictions had to be made public and was subject to judicial review." Nonetheless, the Court did not lift the restrictions in internet services but it directed the government to review its orders against the tests outlined in its judgment and lift those restrictions which were not required or did not have a temporal limit.

Doctrine of Proportionality

In present time, both the government and the statutory authorities have broad range of discretionary powers which should be exercised by the authorities in public interest. The discretionary powers given to the authorities become a problem when these powers are abused or wrongly exercised. In such a case, doctrine of proportionality plays a vital role which is evolved from the concept of unreasonableness. It is one of the most notable grounds for judicial review where the courts have the powers to quash the discretionary power where the target which is tried to be accomplished and the methods used to accomplish that end has no reasonable relation. So, any arbitrary action which discriminates will be quashed by the court. In "*Om Kumar V. Union of India"* [415]the doctrine of proportionality was adopted where the Supreme Court was asked to re-evaluate the quantum of punishment which was given to four civil servants, the Apex Court rejected the same as the punishment was not "Shockingly Disproportionate" to the mischief committed by the civil servants. In the case of "*Coimbatore District Central Coop. Bank v. Employees Assn"*[416]. Supreme Court extensively talked about the doctrine of proportionality. In this case, the bank employees went on a strike which was unlawful although they were dismissed from their jobs but their cumulative increment of 1-4 years was taken away. When the matter went to labour court, it refused to set aside the punishment given to the employees. Then the appeal was filed before the High Court and the court consider the punishment as harsh saying it was too excessive compared to the conduct and charges proved against them and reduced their punishment. The Apex Court held that High Court was not justified in reducing the punishment because it failed to look at the misconduct

414 *id*
415 *Om Kumar v. Union of India,* AIR 2000 SC 3689
416 Coimbatore District Central Coop. Bank v. Employees Assn, (2007) 4 SCC 669(India)

done by the respondents and the High Court lowered the punishment on sympathetic grounds that the respondent has family to look after and increment is essential for their wellbeing. The Supreme Court further said that under Article 226 of Indian Constitution[417] the High Court cannot substitute the discretionary powers given to the administrative bodies by its own.

Article 21 and Right to Internet Access

Article-21 of Indian Constitution[418] talks about "right to life and personal liberty". Supreme Court has described Article 21 as the "heart of fundamental rights". The right under Article 21 has been provided against the State only which includes the local bodies, government departments, the legislatures, etc. Right to access the internet is also an integral part of right to privacy and right to education under Article 21 and Article 21A. Nowadays internet is playing an important role especially in education sector. Students get relevant information from various articles and papers available on internet which enhances their knowledge. Today, most of the students are receiving online education through online classes. Any restrictions on the use of internet will hamper the leaning process and development of students. In a landmark judgment of "*Faheema Shirin RK V. State of Kerala and others"*[419], the Kerala High Court held that "the right to access internet has become a part of right to privacy and right to education under Article 21 and Article 21A."

Faheema Shirin R.K. vs State of Kerala and Ors. [W.P. (C). No. 19716 OF 2019(L)]

Petitioner: Faheema Shirin

Respondents: 1. the State of Kerala

2. The University of Calicut

3. The Deputy Warden and Matron of the Women's Hostel

4. The Principal of Sree Narayaguru College

5. The University Grants Commission (UGC)

Date of Judgment: 19th September 2019

Bench: Justice P.V. Ashaigh, Court of Kerala

Facts of the matter are as follows:

[417] INDIA CONST. art. 226

[418] INDIA CONST. art. 21

[419] Faheema Shirin R.K. vs. State of Kerala and others [W.P. (C). No.19716 OF 2019(L)]

The petitioner, an 18 years old student named Faheema Shirin of Sree Narayanaguru College, Chelennur, Kozhikode, pursuing B.A. degree filed a writ petition before the Kerala High Court aggrieved by non-reasonable expulsion of her from the college hostel. Being a resident of the college, she was facing gender discrimination along with other residents of the girls' hostel. According to Faheema, the hostel of the college which was affiliated to the University of Calicut laid down rules prohibiting the usage of mobile phones from 10 o'clock in the night to morning 6 o'clock which later on changed to 6 p.m. - 10 p.m. Furthermore, the undergraduate students were also restrained to use their laptops. Shirin claims that the Deputy Warden of the hostel did not care about the complaint made by the petitioner along with other inmates who requested for a meeting with regard to such restriction. A meeting was arranged a week later but there were no discussions on the restriction of mobile phones and laptops. Rather, the Warden circulated a message stating the expulsion of those inmates who did not follow the rules laid down by the hostel. Aggrieved by the steps taken by of the Warden, Shirin wrote an application to the principal pleading her to reduce the restrictions. Instead, the principal informed her parents that an order has been issued to her for vacating the hostel in 12 hours for non-compliance with the rules of the hotel. Shirin has to travel 150kms daily from her house to college, due to which she was not able to attend the lectures on time. When she came back after four days, the hostel authorities didn't allow her to take her personal belongings from the hostel.

The issues contended in the case are as follows:

- Whether there has been a violation of Faheema Shirin's fundamental rights by prohibiting the use of mobile phones in the college hostel?
- Are the restrictions imposed against the right to education and the right to privacy?
- Is internet access a basic human right?

The arguments advanced from the petitioner are as follows:

1. As per the authorities of the hostel, a parent-teacher association meeting was conducted wherein the parents were informed about the restrictions which were about to be imposed on the students and also it was said that the restrictions were imposed on the request of some of the parents but no information was given to petitioner's parents about such meeting and also they weren't notified about the restriction on electronic devices before implementing these regulations.

2. Since the restrictions were imposed only on girls' hostel, it's a clear sign of gender discrimination practiced by the college authorities which is violation of the guidelines of University Grants Commission, which very specifically states in clause five that the college and universities have to obey a non-discriminatory policy with their students, whether the discrimination is on the basis of gender, religion, colour, place of birth or any disability as well as protecting the students from any kind of harassment or victimization, thus safeguarding the interests of the students.
3. The restriction on the use of electronic devices is arbitrary in nature as it hampers the quality of learning of the students in girls' hostel. The rules are violating the Universal Declaration on human rights which forbid women discrimination and make the state members liable to take appropriate actions. "The Beijing Declaration and the Conventions on Elimination of All Forms of Discrimination against Women, 1979" also lay down guidelines against such discrimination.
4. It is also contended that the time when so many efforts are being made towards online learning, the petitioner is being denied to gain knowledge through internet which is consequently hampering her learning experience. Since she is being expelled out of the hostel and it took her 150 kilometers to travel from her residence to college, she was not getting enough time to concentrate on her studies. It is also her case that "the right to internet access" is a fragment of 19(1)(a) of the Indian Constitution which gives every citizen of India the right to freedom of speech and expression. Furthermore, Article 19(2) of Indian Constitution has imposed certain reasonable restrictions on Article 19(1)(a), but the restrictions imposed on the residents of girls' hostel are not covered under Article 19(2).
5. So as to make digital learning a feasible experience, the Education Department of India is making efforts to familiarize the scanning of Q.R. Codes in textbooks which will help the learners to get thorough understanding of their lessons by watching the videos on their mobile phones, laptops or tablets. The learned counsel argued that expelling the petitioner and the constraints imposed are illegal as they are violating her fundamental right to privacy guaranteed under article 21 of Indian Constitution. The petitioner claims that since she is an adult and well above 18

years, the college and the hostel authorities have no right to forcefully confiscate the electronic devices of the residents of hostel.

6. The hostel authorities cannot impede with the freedom of the petitioner to use electronic devices when the Government of Kerala is taking initiatives for making the internet within the reach of all its citizens. In order to make the Digital Kerala Vision a success, the Kerala Government has taken steps to adopt mobile phones as a primary methodology for e-governance services by referring to the government's I.T. policy, 2017. Additionally, Faheema argued that the restrictions imposed on the residents of girls' hostel imposed on the request of the students' parents are also infringing their personal freedom.

The arguments advanced from the respondents are as follows:

1. The learned counsel of the respondents argued that using mobile phones is prohibited in the college premises as well as the hostel as per rule 14 of the hostel rules. When Faheema was admitted in the hostel, an application was signed by the petitioner and her father consenting to obey the rules and regulations of the hostel and also conform to the orders of the hostel authorities. The respondents further argued that had taken steps and made rules well within their power as it is their prime duty to maintain discipline in the college.
2. The college principal stated that the parents were not happy about the time students spend on their cell phones and disproportionate use of cell phones in the girls' hostel. It was commonly agreed in the girls' hostel meeting that a restriction would be made on students' from using their electronic devices from 6 o'clock to 10 o'clock at night from 20th June 2019 onwards to ensure that the students are using their time for learning purposes only. Furthermore, the principal denied that the hostel inmates were not restricted to use their laptops.
3. Further arguments were made from the respondents that Faheema did not complain about the difficulties faced by her on the imposition of the restriction and there was no request on part of the hostel inmates to hold any meeting. Further respondent contended that the hostel rules relating to restriction on the use of electronic devices in the college premises were relaxed with some time wise limitations. Shirin's parents contacted the authorities only after Shirin expressed her unwillingness to

obey the rules and on the contrary, her father spoke very rudely to the Deputy Warden disregarding the fact that she is a teacher and the Warden of the hostel.

4. The Deputy Warden of the women's hostel complained to the principal explaining the discomfort and embarrassment she felt while Shirin's father was shouting at her. Also, when Shirin's father was told either to follow the rules or to vacate the hostel, he started yelling at the college principal in front of other parents, teachers and students blaming them for prohibiting the use of mobile phones and other electronic devices in today's modern era.
5. It was further stated that out of 40 students residing in the hostel, only Shirin was not willing to surrender her mobile phone and the other 39 had consented to accept and follow the rules laid down by the authorities**.** The principal also denied the allegation levied against her that she did not order Shirin to check out of the hostel within 12 hours. Shirin's parents acted very indecently with the Vice-President of the parents-teachers association. The allegations of gender discrimination were also denied and argued by stating that the students of the boys' hostel were also not allowed to use mobile phones from 6 o'clock to 9 o'clock in the morning and from 4 o'clock to 6:30 in the evening excluding Sundays. The library in the college have more than thirty thousand books and one cannot say that the restrictions on the students was unreasonable and even if any student feel that he/she want to collect more information via internet, then they are free to do so by using their laptops.

The Kerala High Court held that:

1. The High Court bench looked into whether a student of the college has any rights with respect to their stay in the hotel. It was also considered whether the college or university has any responsibility to allow or disallow the stay of their students in the hostel. It was decided that according to the Calicut University First Ordinances, the students who do not live with their parents or guardians have to stay in the college hostel. The High Court held that students are compelled to stay in the residences of the college while obeying the disciplinary rules and regulations of their respective wardens.
2. The High Court also looked into whether there was breach of fundamental rights of the students when the college authorities levied restrictions on the students controlling the use of cell phones in the course of their studies. The High Court underlined the benefits of online learning in the present era and how the electronic devices have further

simplified online learning with the options of enhancing our knowledge through various study related content available on the internet and through digital learning the students have the option of engaging themselves in University Grants Commissions online initiatives. Further, the court held that after the students are into universities or college, it is their responsibility to give adequate time to their studies. Mobile phones should be used as a medium to increase our knowledge to accomplish our desired goals.

3. Further the High Court of Kerala considered "the resolution of the Human Rights Council and the United Nations" which targets the significance of internet access to information, thus encouraging and delivering vast options for inexpensive and easily attainable knowledge. As the outcome, the High Court decided that "the right to internet access becomes the part to right to education as well as the right to privacy under Article 21 of the Constitution of India".
4. As decided in the case S. Rengarajan and others v. P. Jagjivan[420] that sensor should be sensitive to technological and social changes keeping in mind that freedom of speech and expression has not been infringed, keeping in mind the reasonable restrictions of Article 19(2) of the Constitution of India, the court pointed that in spite of the disciplinary role of the warden or the principal, the rules and regulations have to be in consistent with the growth in technology and have to be altered in accordance with the needs of the present day generation.
5. The High Court held that the Human Rights Council which is a part of the United Nations has considered internet access as a right to fundamental freedom, any regulation which prohibits internet access of the students cannot be allowed as it would be a violation of their right to education. It was held that the regulation prohibiting the use of cell phones from 6 o'clock to 10 o'clock in the night as well as the orders of restriction of the electronic devices completely violates the fundamental right to privacy defined under Article 21 of the Constitution of India and will have a negative impact on the academic career of the hostel residents who want to improve their knowledge. On the other hand, students who do not live in the hostel will always be ahead of hostel inmates in terms of acquiring information and enhancing their knowledge because of the imposed restriction. Thus, such constraints cannot be consented to be sanctioned.

[420] S. Rengarajan and others v. P. Jagjivan Ram[(1989) 2 SCC 574]

6. The important advantages of using a mobile phone should be considered when the point of discipline is being advocated. The restraint should be in accordance with the disciplinary measures and in this case since there is no proof of disobedience on part of Faheema, such restraints cannot be laid down. The contentions by the college that other residents of the hostel did not complaint against the restrictions which were imposed will not make the restriction valid. Further, the parents of the students have to understand that their children are old enough to know what is right for their future and cannot be controlled by them or the college authorities anymore, especially when it comes to using mobile phones and other electronic devices.
7. The undergraduate students are expected to be attentive about their own good and they should not be restricted to use their mobile phones, the students themselves should decide that in what manner they want to use the gadgets for improving and raising their knowledge and learning. There shouldn't be any time restriction imposed on the students because everyone has their own time for studying which suits them. Provided the students are not causing any disturbance to other inmates, no such restrictions can be imposed. Students as well as the parents should to be counseled, making them completely aware of the negative effects of misuse of mobile phones.
8. On the other hand, the Court also highlighted the fact that the parents of the students have no right to misbehave with the principal, teacher or warden, even if the parents disagree with the steps taken by the college authorities. Screaming at the faculty of the college, and that too in front of other students and parents, is not how educated parents should behave. Also, the restriction is completely inconsistent because of which Shirin was asked to move out of the hostel. Hindering the means to achieve excellence cannot stand in the way of administering discipline.
9. In the end, the Kerala High Court held that the restrictions imposed on Shirin are in violation of fundamental rights and accordingly the respondent is obliged to re-admit the petitioner in the college hostel without further delay. Also, Shirin's parents under no circumstance can behave in a demeaning manner with the college authorirties. Further, no hostel resident, including Shirin, can create any sort of disturbance or nuisance to other inmates in the hostel by using mobile phones.

Other Countries Which Have Declared Internet Access as a Basic Human Right

➢ Canada: The country's telecom commission recognized access to the internet with unlimited data option as a fundamental right in the year 2016. With high-speed internet all around the nation, Canada has been successful in providing these services to the rural areas also.

➢ France: The apex court of France declared access to the internet as a basic human right in 2009 and condemned internet shutdowns which were prevalent as a measure against those who downloaded banned content after warning them twice.

➢ Estonia: Declaring the internet as essential for the 21st century, In the year 2000, the Estonian government-initiated schemes to provide access to the internet to the countryside.

➢ Costa Rica: In 2010, the Supreme Court stated that information technology and communication occupy a notable place in our lives. As a result, access to these technologies, especially the internet, is included in the fundamental rights as it has now become the primary medium of communication.

➢ Spain: The Spain government contracted with a telecom company to provide access to the internet throughout the country, at no less than one megabit per second speed.

➢ Finland: The transport and communication ministry of Finland acknowledged providing an internet connection to every individual at the speed of 1 megabit per second by the year 2010 which would further increase to 100 megabits per second by the year 2015.

➢ Greece: The Greek Constitution provides for their right to become a part of the Information Society and makes it the State's duty to dispense access to any information which is conveyed online.

United Nation's take on Right to the Internet as a Basic Human Right

In 2003, the United Nations, with intent of sharing and exploiting the information in hand to be used by people with the aim of betterment of their standard of life, draw their attention to the importance of Information and Communication Technology[421]. In order to promote its objective of "Sustainable Development", the United Nations created an information society. In 2010-11, "BBC world service poll" conducted a survey asking whether fundamental rights include access to internet or not, result of which was that 80% of votes were cast in favor of it. Online surveys were also conducted to know the viewpoint of people about internet access as

[421] About the U.N., (August 17, 2020, 05:18 PM), retrieved from https://www.un.org/en/about-un/

a basic human right to which only 14% people disagreed with this fact. In 2016, the United Nations released a resolution reprimanding any voluntary suspension of internet services by the stated without any reasonable cause. The resolution was built on the United Nation's prior statements on digital rights, reaffirming the organization's stance that "the same rights people have offline must also be protected online," particularly Article 19 of "Universal Declaration of Human Rights"[422] which covers freedom of expression. Even though this resolution is not legally binding on the member countries, the United Nation still intend to condemn the practices of voluntary suspension of internet services which have become more and more common these days. In the past few years, internet shutdowns have taken place for trivial matters like; stopping students from cheating, against enforcement of controversial laws, etc. Iraq has been the worse hit when it comes to number of hours of internet shutdown which amounts to 263 hours for the same year. Over 235% increase was seen in losses in economic terms as they now reached $8.05 billion, which were only $2.4 billion for the year 2015-16. In the recent years, India has also seen maximum number of internet shutdowns. In 2019, the internet shutdowns have costs huge losses to India, which amount to over $1.3 billion as it was experienced for around 4200 hours. While the total number of internet shutdowns crossed 1 hundred[423], When Article 370 was revoked and the State of Jammu and Kashmir was divided into two branches into Union Territory of Jammu and Kashmir and Ladakh, Jammu and Kashmir experienced the major internet blackout which lasted for 213 days straight from August 2019 to March 2020.

Dependency on Internet during Pandemic

One major thing that the global pandemic of coronavirus has revealed us is how desperately dependent we have become on our gadgets, whether it's a phone mobile or a laptop or if we look at bigger picture dependency on internet access. We all knew the importance of internet but nobody thought that one day it will play the role of ray of hope for us. During the pandemic, internet is considered as a savior for over 480 million internet users across the country. According to Director General of Cellular Operators' Association of India (COAI**) "**the country

[422] James Vincent, *UN condemns internet access disruption is a human rights violation*, (August 17, 2020, 07:08 PM), retrieved from https://www.theverge.com/2016/7/4/12092740/un-resolution-condemns-disrupting-internet-access
[423] Longest Shutdowns, (August 18, 2020, 03:16 PM), retrieved from https://internetshutdowns.in/

is going up by at least 20-30 per cent in data consumption due to increase in dependency on internet."[424]

Due to lockdown in India, there was suspension on all the activities related to public gathering like cancellation of all the events, closing of schools, colleges and offices etc which means everybody has to shift to internet.

After shutting down of gyms and parks, the internet comes to the rescue of the people who are determined to be in good shape. People can now watch online workout videos and yoga asanas to keep their bodies in good shape. Many fitness trainers and health consultants have also opened their pages to give online training to their clients. Fitness apps like CureFit and Fittr have started live workout classes for the users on social media platforms and on their apps.

"The OTT (over-the-top) platforms" have also been benefitted due to enforcement of lockdown and saw a substantial rise in viewership and app downloads as the cinema halls were closed and new movies and shows are streaming on OTT platforms. OTT platforms provide variety of content which a user can see at any time with just one click away via internet connection.

Internet has also become vital for those who are scared to step out of their houses to buy essential commodities and also for those who are bored of eating homemade food. There are different apps like Swiggy, Zomato and Dunzo which are able to break to boredom of home-cooked food and also apps like Grofers and Bigbasket have played a crucial role in delivering groceries safely at one's doorstep.

Internet has also shown its substance in the recruitment process adopted by the companies where the process of selection of an employee is started through video call interviews. For conducting the interview, the Human Resource Manager use online platforms such as Skype. But recruiting a person for a high position through video call isn't easy for the Human Resource Manager, but due to the pandemic of Covid-19 the HR has shaped their recruitment process according to the circumstances.

Schools, colleges and other various institutions are teaching online through different online platforms likes Zoom Cloud Meetings and Ms Teams. Due to increase in number of internet users in lockdown, the demand for router and other networking devices is on the boost.

[424] *how internet is helping people to survive coronatimes*, financial express, (August 20, 2020, 04:57 PM) retrieved from https://www.financialexpress.com/lifestyle/coronavirus-lockdown-heres-how-internet-is-helping-people-to-survive-conronatimes/1920163/

The recent lifestyle of new normal and staying at home has turned the attention of the people towards buying and selling online. The pandemic of Covid-19 played an instrumental role in the success of E-commerce business industry all around the world. Before the outbreak of Covid-19, the platforms of E-commerce business were not in attention because the people had the liberty to move and interact in various businesses. The fear of getting infected by the virus is the prime ground for the increase in demand and growth of online shopping and the reason why E-commerce businesses are having the upper hand over other businesses.

Conclusion

"Technologies have represented and still represent a development of freedoms; more in details, freedoms have significantly extended their scope to new frontiers of human acting by virtue of the recent technological developments."[425] The value of internet has grown over the last 15 years and has become a necessity of life just like mobile phones, television etc. Our Human Right to Internet Access cannot be restrained and as it grows, we will be able to express our political and social concerns to a wider sphere. We are experiencing a digital millennium and we must navigate ourselves into a respectable Information Society. Internet is a result of our technological advancements and desires to make the world a better place.

Even our Prime Minister Mr. Narendra Modi has initiated a drive known as Digital India[426] Movement on July 1, 2015, with the aim of promoting and providing digital literacy along with high-speed internet as well as a promising digital infrastructure to rural households. As a large portion of the Indian population is typically rural, the aim was to provide these rural households with digital literacy by equipping them with the latest technology. Services like e-banking, e-learning, e-hospitals, e-governance, etc. are being made familiar with the rural sector of the nation.

With the ability to connect and share information, the goal of preserving Human Rights becomes an easier practice. Strong dependency has been created on the internet and not only personal but political and economic news are also read and shared through internet. Seeing the benefit of internet and how it is being used in a large scale, many people believe that internet should be provided free of cost by the government. Providing free Internet access to everyone would result in a significant amount of monetary loss for the governments, especially for the

[425] Tommaso Edoardo Frosini, *The Internet Access as a Fundamental Right*, 14 SLRM 5, 5(2014)
[426] About digital india, (August 30, 2020, 02:39 PM), retrieved from https://digitalindia.gov.in/

developing countries during the times of economic crisis. Hence, this cannot be considered as an appropriate solution to connect each individual into society. Instead, the governments should provide it to everyone but not free of cost, as the amount of monetary expenditure required for this would put too much strain on resources of the government. This finance could, in turn, be used for even more serious problems like poverty and starvation. Instead, privatization of internet services would mean providing to it to everyone as well as at reasonable prices. Before the development of the internet, people had access to different modes of communication and information gathering like phones, newspaper and television, but nowadays internet has taken place of all these modes of information. The present times further necessitate the availability and accessibility of the internet to all citizens, not only in India but also globally. It is a road available for us to take with nearly any device, be it computer, smart phone, or some new technology in the future. With the ability to connect and share information, the goal of preserving Human Rights becomes an easier practice.[427]

[427] Thomas D. Sniadecki, A Road compared to a Horse: An Examination of Internet Access as a Human Right, URCP
15-16, (2014)

PASL WIND SOLUTIONS PVT LTD V GE POWER CONVERSION INDIA PVT LTD

- GAURI KANODIA

Introduction

The Supreme Court decided whether two Indian parties might pick a foreign arbitral seat in PASL Wind Solutions v GE Power Conversion Pvt Ltd[428]. The court favoured party autonomy and stated that two Indian parties might select a foreign arbitral seat, and any award resulting from the arbitration proceeding is enforceable in Indian courts. The court also decided that Indian Parties might seek Interim Relief from Indian Courts in foreign-seated arbitrations under section 9 of the Arbitration and Conciliation Act.

Factual Matrix

The Companies PASL Pvt Ltd (herein after referred as Appellant) and Ge Power Conversion India Pvt Ltd (herein after referred as Respondent) drew a settlement agreement executed on 23.04.2014. The dispute resolution clause mutually agreed to carry their arbitration proceeding in compliance with ICC Arbitral Rules in Zurich, Switzerland. Eventually, certain disputes arose regarding warranty of the convertors. The appellant sent the notice of arbitration to begin the arbitration process before the International Chamber of Commerce following a settlement agreement. However, respondent refused to accept the arbitration due to the ICC's lack of jurisdiction, stating that competing Indian parties could never choose a foreign seat of arbitration. The Appellants dismissed Respondents' argument, claiming that the Arbitration Act does not preclude Indian parties from seeking arbitration in a foreign country. Tribunal dismissed respondent's claims but to some extent, tribunal ordered the proceedings to be held in Mumbai to economize it. Finally, tribunal passed the verdict in favour of respondent.

Enforcement proceeding before Gujarat High Court

GE Power filed a case for the enforcement of arbitral award with the Gujarat High Court under Articles 47 and 49 of the Arbitration Act. PASL defied enforcement procedures because the arbitral seat is in Mumbai, and Indian parties choosing a foreign location is against public

[428] *PASL Wind Solutions v. GE Power Conversion India, Civil Appeal No. 1647 of 2021.*

policy. The court upheld execution of the arbitration award, but rejected the grant of interim relief under section 9 of the Act on the ground that the phrase 'International Commercial Arbitration' under section 2(1)(f) of the Act does not fulfil the condition of one foreign party.

Decision of the Supreme Court

- Question on the seat of arbitration

The Appellant, PASL claimed that the enforcement proceedings commenced under Sections 47 and 49 of the Act only applied to foreign awards and these provisions did not apply in this case based on the closest connection test, the seat of arbitration was Mumbai (rather than Zurich). As a result, it contended that the award was not a foreign award but rather Indian-seated. The Supreme Court clarified that closest connection test cannot be applied because it applies only when the arbitration seat is unknown, which is not the case here. The Supreme Court further held that tribunal had previously stated that the main reason for choosing Mumbai as the venue of the arbitration was to economise the proceedings.

- Meaning of International Commercial Arbitration and Enforcement of Arbitral Award

According to the Supreme Court, Part- I of the Arbitration Act is a complete code which deals with appointment of arbitrators as well as commencement of arbitration, and contesting an arbitral award's validity and enforceability. Therefore, it did not acknowledge foreign seated arbitrations. Similarly, Part II is concerned with the enforcement of foreign awards except section 45, which deals with parties who resort to arbitration**.** The Supreme Court ruled that the meaning of the phrase "International Commercial Arbitration" in section 2(1)(f) differed from that in section 44. Section 2(1)(f) defines term 'International Commercial Arbitration' as a party- centric in which at least one of the arbitration agreement's parties is a national or habitually resident of a country other than India. However, the phrase "International Commercial Arbitration" in section 44 is seat- centric. Thus if an arbitration proceeding is commenced between the two parties outside the India, the New York Convention would apply, and such arbitration will be called as International Commercial Arbitration. Therefore, an award passed in such proceedings would be recognized as Foreign Awards and made enforceable under Part II of the Arbitration Act.

- Indian Contract Act and concept of Public Policy

In contrast to their previous stance, the appellant claimed that two Indian Parties choosing a foreign arbitration venue would violate section 23 and 28 of Indian Contract Act. Exception 1

to Section 28 of the Contract Act specifically prohibit an arbitration agreement from interfering in legal proceeding. In Atlas Export Industries v Kotak & Company[429] , the Supreme Court ruled that exception 1 to section 28 of the contract statute specifically protects the arbitration of disputes between two parties, regardless of the nationality of others who may resort to arbitration in the case. Further while dealing with section 23 of the Contract Act and the question of whether submitting to a foreign jurisdiction for arbitration is directly in violation of Indian Public Policy or not, the court held that in order to invoke S. 23 vis-à-vis "public-policy" parties must show that failing to declare the proceeding infructuous will result in serious harm to public. The Supreme court further held that in this case, there is no harm in allowing two parties to opt for a forum outside India to settle their disputes.

- Availability of Interim Relief from Indian Courts

According to Supreme Court section 9 of the Arbitration Act continues to apply when two parties pick a foreign seat of arbitration. The proviso to section 2(2) of the Arbitration Act made certain sections (such as Section 9 for Interim relief from Indian Courts) that were previously applicable to domestic arbitrations are now applicable even to International Commercial Arbitration. The Supreme Court ruled that the phrase International Commercial Arbitration does not apply in context of section 2(1)(f) (which is party-centric), but rather is seat-centric and refers mainly to arbitrations held outside India. On this premise, the Supreme Court ruled that even though no foreign parties are involved in the arbitration proceedings held outside India, relief under section 9 is available.

- Section 28(1)(a) of the Arbitration Act

The appellants claimed that a mutual agreement between two Indian parties to resolve their disputes through arbitration in a foreign jurisdiction is not valid because it violates Article 28(1)(a) of the Arbitration Act. The Supreme Court held that the prohibition under section 28(1)(a) applies when the arbitration take place in India. In International Commercial Disputes, a single interpretation of section 28(1)(a) is insufficient, a combined reading of Ss. 2(2), 4 and 2(6) is required. The Court further opined that legislators aim was never to force parties to adhere to Indian Laws, and that section 28(1)(a) of the Arbitration Act does not mention arbitral proceeding taking place outside of India, parties can easily submit themselves to a neutral forum.

[429]Atlas Export Industries v Kotak & Company [1999] 7 SCC 61

Conclusion

The Supreme Court judgment is significant on numerous fonts. Firstly, it recognises the concept of party autonomy and emphasis that there is no legal impediment to two India domiciled parties choosing a foreign seat of arbitration.

Secondly, it lays to rest many conflicting High Court and maybe even Supreme Court rulings on the subject. The Madhya Pradesh High Court addressed this question for the first time in Sasan Power Limited v. North America Coal Corpn. India Ltd[430], finding that Indian Parties are permitted to incorporate a foreign location of arbitration. While reaching at its conclusion, the court considered Atlas Export Industries v Kota & Company[431], Supreme Court decided the fact that the arbitration took place in a foreign jurisdiction was insufficient to invalidate the parties' arbitration agreement. Moreover, Exception 1 to Section 28 of the Contract Act protects adjudication, and arbitration, as a form of judicial adjudication, does not restrict the parties right to legal consequences.

In Adhar Mercantile Pvt Ltd v. Shree Jagdamba Agrico Exports Pvt Ltd[432]., the Bombay High Court took the opposite view. It referred the case of TDM Infrastructure[433], in which two Indian Parties were unable to agree on an International arbitral bench.

In Reliance Industries Ltd v Union of India[434], possibly a Division Bench of Supreme Court swept away an obstacle to an arbitration award coming from such a foreign seated arbitration involving two Indian parties. While the Supreme Court did not rule on whether either of the two parties may pick an overseas arbitral seat, it did reject the dilemma over the arbitration judgments, stating that they were legitimate under Indian law.

Thirdly, the judgment is expected to accelerate the trend of Indian parties holding arbitrations in foreign jurisdiction and will have a substantial influence on the negotiation of arbitration agreements in India- related transactions.

[430] Sasan Power Limited v. North America Coal Corpn. India Ltd [2016] 10 SCC 813
[431] Supra note 2
[432] *Adhar Mercantile (P) Ltd. v. Shree Jagdama Agrico Exports (P) Ltd.,* [2015] SCC Online Bom 7752.
[433] *TDM Infrastructure Pvt Ltd v UE Development India,* [2008] 14 SCC 271
[434] Reliance Industries Ltd v Union of India [2014] SCC 0518

RECENT INFORMATION TECHNOLOGY (IT) RULES AND ITS CONSEQUENCES – CHILLING EFFECT ON FREEDOM OF SPEECH?

- JANNAT BAMAL

INTRODUCTION

A compliance officer must be appointed by IT platforms in order to ensure that the rules are followed. As part of this, law enforcement agencies must be contacted to appoint nodal and grievance officers. India's law enforcement agencies should be contacted for all of these positions. Furthermore, these new regulations require social media platforms with over 50 lakh users to assist the government in tracing the "originator" of messages upon its request. In his petition, Krishna contends that the regulations governing social media platforms, which are part II of the rules, violate his rights as a social media user. As a creator of online content, the musician contends that part III of the rules, which regulates social sharing and digital news media, violates his rights. Organizations that publish only online should be covered by the new IT regulations, according to the Digital News Publishers Association. As a result of the new rules, oldest newspapers and news channels cannot operate their own online news sites.[435]

YouTube, Instagram, Facebook, and other apps are used to broadcast live feeds on social media. Known as the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) or IT Rules for 2021 (the "Intermediary Rules"), the rules change the way the internet is used in India. Users of the Internet in India lost their right to privacy and freedom of speech. Prakash Javedkar (minister of information and broadcasting) and Ravi Shanker prasad (minister of electronics and information technology) had announced on 25th February the new rules related to the integrated monitoring of social media, digital media, and OTT platforms.[436]

IT (information technology) rules are introduced because intermediaries like Netflix, Amazon prime, WhatsApp, Facebook, and YouTube, among others, are having a large impact on citizens in either a good or a bad way. Due to their bad and sensitive content, they tend to show

[435] SCROLL.IN, https://scroll.in/latest/1004575/new-it-rules-dont-have-a-chilling-effect-on-freedom-of-speech-centre-tells-madras-hc (last visited 12 october 2021)

[436] AYUSH Verma ," Impact of IT Rules 2021 on live streaming content on social media", BLOGIPLEADERS, (October 12, 2021; 2:00 PM) https://blog.ipleaders.in/impact-it-rules-2021-live-streaming-content-social-media/

more negative impact than positive impact. People are more likely to get affected by bad content. The government will be able to warn the citizens if any harmful effects of these new IT rules affect citizens.

In recent years, law enforcement officials have faced new challenges in fighting crime and anti-national elements using social media. These types of social media apps are often used for scams, frauds, cheatings, etc. Therefore, the IT (information technology) rules 2021 have been implemented to prevent these types of problems. Social media is playing a vital role in live streaming at the present time in our society. One can also gain knowledge through live streaming. Videos describing products or tours of different places, for example. Some of these factors, however, have only a negative impact on society due to certain reasons. Examples include showing mature content, slandering critics, and making fun of peers. We created these new IT rules for social media to prevent these types of bad impacts on live streaming.

IMPACT OF IT RULES 2021[437]

a. It appears that the new rules diminished the responsibility by reducing the need to be the best to achieve the goal from what was deemed necessary.
b. The new IT Rules will help to reduce the scope of unlawful content to include only material that committed sexual abuse, child sexual abuse, or duplicated already removed content. Among the issues addressed by these rules are scams, defamation, etc., which are problems faced by a lot of people.
c. Criminals from around the world, offenders, lived freely among us and reaped many benefits by using the same intermediaries. By encrypting their information, the government can monitor and capture them easily as per new IT rules 2021.
d. Article 21 of our constitution guarantees the right to privacy, which is violated by the newly implemented IT rules of 2021, such as implementing rules to check messages (WhatsApp) etc.
e. It will be necessary to weaken end-to-end encryption on WhatsApp, Telegram, and Signal for them to be verifiable.
f. Also, these new IT rules are going to trample on people's privacy, which is the main negative consequence.

[437] AYUSH Verma ," Impact of IT Rules 2021 on live streaming content on social media", BLOGIPLEADERS, (October 12, 2021; 2:00 PM) https://blog.ipleaders.in/impact-it-rules-2021-live-streaming-content-social-media/

g. These rules may result in cyber-attacks if they are not adopted by stakeholders in a timely manner.
h. Probably the most tightly controlled platforms on social media. Affects digital firms wherever they are located.
i. The Indian internet market is by far the largest, with a lot of users, which makes it difficult to implement these new rules in IT (information technology).
j. There are many issues associated with live streaming before the implementation of the new IT (information technology) rules 2021. Apps such as Facebook, YouTube, Instagram, and others are commonly used for live streaming. The live stream involved much bad content that negatively impacted the lives of the audience. Their stream negatively affected the audience in a very negative way. A lot of live streaming is done on sexual content, which primarily affects children and youth. Live streams of other people's insults or harassment were sometimes used.
k. The live streams are not all terrible, but some of them are. People may be badly affected by fake news without any proof if they are passing it on to others. For preventative purposes, the government has implemented new IT rules, such as messages and so on being managed by the government.

NEW IT RULES 2021[438]

- As a result of the notification of the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, the deadline for compliance was pushed back to March 2021.
- In addition to empowering digital platform users, the rules strive to hold companies accountable should they violate their rights.
- Social media can remain a healthful medium in the future thanks to these guidelines.
- Digital news media organizations, OTT platforms, and social media companies are included in the New IT Rules.
- Media organisations that report digitally, however, are already bound by the Press Council of India's code of ethics.

[438] DRISHTI IAS, https://www.drishtiias.com/loksabha-rajyasabha-discussions/the-big-picture-social-media-new-rules-implications (last visited October12,2021)

- In ***Prajwala v/s the union of India***[439], the Supreme Court (SC) ordered the government to develop guidelines/Steps for Screening Content that would eliminate all child pornography pictures (and videos), rape and violence imagery, and sites from content hosting platforms.
- As part of ***Tehseen S. Poonawalla***[440], 2018, the Supreme Court granted the government full authority to stop or diminish the distribution of irresponsible and explosive messages on social media platforms that can act as catalysts for mob violence and lynchings.
- Describes the types of intermediaries in social media. Intermediaries in social media fall into these categories:
    - RSMIs (Regular Social Media Intermediaries)
    - SSMIs (Significant Social Media Intermediaries)

An SSMI is an intermediary with more than 5 million users (or 50 lakh).

- It is required that SSMIs appoint the following officers, who are all Indian citizens:
    - A Chief Compliance Officer
    - A Nodal Contact Officer who should be available 24*7
    - A Resident Grievance Officer.
- Redress mechanisms for complaints. According to the guidelines, social media platforms are expected to have a grievance redressal mechanism, so that, should content shared violate public order or do not meet regulatory standards, a complaint may be lodged with the Grievance Redressal Officer.
- Upon receiving the complaint, the officer should acknowledge it within 24 hours and resolve it within 15 days. The court must resolve complaints concerning crime against women within 24 hours in the case of specific crimes against women.
- Reports on complaints. Monthly reports are also required by the SSMIs to state the number of complaints received and actions taken in response.
- A voluntary verification mechanism is also required for social media platforms, like Twitter's blue-tick for verified users.

[439] Prajwala v/s the union of India, WP(C) 576 of 2004
[440] Tehseen S. Poonawalla v UOI, WRIT PETITION (CIVIL) NO. 754 OF 2016

- New rules require platforms such as WhatsApp, Signal, and Telegram to identify "originators" of "unlawful" messages and to take down these messages within a set period.
- SSMIs that don't comply with these laws may lose the 'safe harbour' protection offered by Section 79 of the IT Act.
- This policy protects third party users from criminal and civil liability for content they post on social media platforms.

FREEDOM OF SPEECH AND NEW IT RULES 2021

Every democracy relies on freedom of expression on a fundamental level. All freedoms are not unlimited. As the Constitution was adopted, balancing fundamental rights with reasonable restrictions has always been a continual challenge. Digital development has brought this issue into the limelight. There is likely to be extra complications ahead before optimal solutions can be reached between private, tech giants who own a substantial amount of Big Data, governments desirous of imposing reasonable restrictions, and consumers concerned about issues related to data privacy and constraints on freedom of speech. Despite regulations addressing citizens' concerns, IT Rules 2021 maintains digital sovereignty while maintaining their privacy and freedom[441].

Article 19(1) (a) of the Constitution of India[442] states that, "all citizens shall have the right to freedom of speech and expression". In the Constitution's preamble, it is found that it is a solemn resolution to secure the freedom of expression for everybody. In accordance with Article 19(2) of the Constitution of India, however, this right may be exercised with "reasonable limitations" when exercising it for certain purposes.

An appeal by the *Digital News Publishers Association*[443] - a collective of the nation's biggest news media companies - challenged the constitutional validity of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules, 2020). According to the petition, these rules violate Article 14 (equality), 19 (1) (a) and 19 (1) (g) of the Constitution (right to freedom of speech and expression).

---

[441] Debopama Bhattacharya," The Information Technology (IT) Rules, 2021", Manohar Parrikar Institute for defence studies and analyses, (October12, 2021; 3:00 PM) https://www.idsa.in/idsacomments/it-rules-2021-dbhattacharya-040621

[442] Constitution of India,art.19(1)(a)

[443] Live Law Media Private Limited and others v Union of India and Another, W.P.(Civil) No. 6272 of 2021

On hearing the interim order application, Chief Justice Sanjib Banerjee and Justice Senthilkumar Rama Moorthy stated that there is "sufficient basis for the petitioners'...concerns that coercive actions may be taken" by the Court under such provisions and sought an order seeking restraint of operation of Rules 12, 14 and 16 Rule 16 of the Rules give the Secretary, I&B, emergency powers to restrict public access to any information or part thereof without notifying the intermediary hosting the data. A self-regulatory body for publishers is stipulated in provisions 12 and 14, while the I&B Ministry is tasked with establishing an inter-departmental committee consisting of other Ministries' representatives.

A recent IT-guideline update has prompted concerns about the freedom of speech on Twitter. Organizers stated they would adhere to all applicable laws, but if guided by principles of transparency and freedom of expression. As the result of an allegation of non-compliance with the new IT policies[444], the Delhi High Court issued an order on May 31 to the microblogging site.

If the rules aren't followed, the 'intermediary' status could be removed from the company's hands (a safe harbour to avoid liability for what their users post) and the law may punish the company. Although the draft rules were made public for comments, several individuals, organizations, and industrial associations responded. Thus, the government says the rules are neither arbitrary nor sudden. A detailed analysis was conducted after which an inter-ministerial meeting was held.

End-to-end encryption is the very opposite of traceability of content. Users' fundamental Rights to privacy are violated by traceability of content originators and content. In the rules, the Government is called upon to adjudicate objectionable speech online. That hampers the freedom of expression. Additionally, these rules promote Internet access that is open and transparent[445].

[444] Rahul Srivastava, 'On new IT rules, Twitter says it will strive to comply with applicable law in India', India Today, October 12, 2021. https://www.indiatoday.in/technology/news/story/on-new-it-rules-twitter-says-it-will-strive-to-comply-with-applicable-law-in-india-1807716-2021-05-27

[445] DRISHTI IAS, https://www.drishtiias.com/loksabha-rajyasabha-discussions/the-big-picture-social-media-new-rules-implications (last visited October12,2021)

ROLE OF WHO IN THE ENFORCEMENT OF HEALTH LAW

- SHUBHRANSHU TRIPATHI

Abstract

The World Health Organization (WHO) was founded in 1948 with a yearning goal – 'the fulfillment with the aid of anybody corporations of the greatest conceivable diploma of well being'. Its charter characterised wide-walking capacities, of which the primary turned into 'to head approximately as the coordinating and co-ordinating professional on worldwide wellbeing work'. Starting round 1948 severe things have modified in the realm of global well-being, mainly the substantial number of recent drives and groups made that assignment who's task as a coordinating and making plans authority. fashions incorporate the passage of the arena financial institution into wellness region loaning for a massive scope during the 1980s; the formation of latest associations like UNAIDS, the GAVI Alliance (prior the worldwide Alliance for Vaccines and Immunization), the worldwide Fund to battle AIDS, Tuberculosis and Malaria (the worldwide Fund) and UNITAID, made to deal with express defilement inconveniences; and new open private organizations for thing progression, for instance, the meds for Malaria undertaking or medications for not noted diseases pressure. inside the interval who is incorporated financing from councils has disintegrated and it has arise as relying upon purposeful responsibilities from states and uncommon performers for the most part saved for exact proactive tasks willing towards by the provider. as of now, the bill and Melinda Gates establishment has develop to be one of the best intentional allies of WHO. because of the extraordinary financing pressures, Director-wellknown Margaret Chan initiated in 2010 the dispatch of what changed into a spic and span artworks to exchange how the alliance limits. there are numerous requests in regards to how WHO need to find itself in sync with this new and amassed institutional environment. How should it unravel or rethink its introduced work? As an intergovernmental affiliation, how might perhaps it effectively attract with these new performers, which incorporate NGOs, charitable establishments and the private spot? Is WHO exceptionally a regularizing, general-setting association, an information agent and seller of records and proof, and ally for overall prosperity? Or alternatively is it basically a dealer of specialised assist to kingdom run administrations in distinctive well-being related circles? Likewise, wouldn't it be a great concept for it to be a perform of undertakings normally backed

thru reserved intentional commitments from funders? what's the nice harmony among those capacities? Do they conflict? What does this infer for the affiliation of WHO with its outstanding design of semi-independent provincial offices? This paper surveys the historic backdrop of past endeavors at trade in WHO and the essential questions that emerge in characterizing who is task inside the international well being framework as it has now developed and the way should affect its very own management, affiliation, the board and financing.

Introduction

The 21st century overall wellbeing scene requires fruitful worldwide leisure activity anyway globalization of trade, venture, measurements, essential opportunities, contemplations, and sickness. the fresh out of the plastic new worldwide prosperity time is additional plural, comprising of various key performers, and requiring additional coordination of effort, needs and adventures. the area wellness association (WHO) expects a central part inside the worldwide organization of prosperity and sickness; because of its middle international factors of putting in place, observing and upholding worldwide requirements and norms, and making plans various entertainers closer to shared objectives. global wellness administration calls for WHO authority and compelling execution of who is center global capacities to assure higher viability of all well-being entertainers, but carrying out this international mission can be hampered through restricting sporting events and economic plan redistributions from middle worldwide capacities.[446]

Also developing prosperity and having a tendency to prosperity lopsided characteristics and externalities requires convincing worldwide interest on wellbeing that includes central worldwide wellbeing limits past what individual nation states can get, despite external help. worldwide limits can be analyzed from public or sub-public limits in that they're past man or lady states' ability and include such illustrations as; necessities and rules, overall interest, capable organization, financial resource pass, coherent test limit, and leadership. Worldwide health performers play various components steady with these worldwide limits. overall health limits can similarly be perceived as exercises taken to progress worldwide boundless prosperity items; checks that are furthermore past the compass of individual councils and free social

[446] U.S. Department of Health and Human Services, www.pandemicflu.gov/, general/#impact (Last Accessed on Oct 23rd, 2021).

occasions, but that advantage every global area, even at the U.S.A degree eight overall prosperity items incorporate: worldwide sponsorship for prosperity; the use of bio-moral and fundamental freedoms units; editorial for contaminations and hazard; direct overall action; premium in fundamental clinical circumstances; and the use of necessities and standards. Instances of such cut-off points range from a worldwide wellbeing association (WHO) 2001 worldwide wellbeing Day spin around mental flourishing as a worldwide wellbeing need, to who's movement of overall morals and fundamental opportunities through overall lawful devices, and to WHO the chiefs in making overall standards and principles, for instance, the general Code of advancing and promoting of Breast-milk Substitutes, the Framework show on Tobacco control and the WHO by and large Sanitary systems.[447]

What is Health Law?

Health law is the broad edge of guideline that directs the stock of medical care administrations. wellness guideline oversees the connection between people who offer medical care and individuals who get hold of it. there are various subjects and subtopics involved inside the arrangement of medical care law like arrangement of contributions, contracts, business law and misrepresentation. wellness legal counsellors may likewise acknowledgment on one district of medical care guideline, or they'll offer total criminal types of assistance for a medical services supplier.

Healthcare Issues and Challenges:

The Indian healthcare framework is a declining country. Costs seem to be constantly rising which makes it very expensive to create a large number of people. Since the end of the Indian Health Progress (IHP) organization it has talked about what the Indian health care framework needs power and ways to improve it. India is the second most populous country in the world and with a base of medical services that is deeply concerned about the ever-growing population, many difficulties India's new public health system includes disease progression (increasing persistent weight. and children, HIV / AIDS and other infectious diseases actually work very hard on extended health systems.

WHO COMMISSION ON SOCIAL DETERMINANTS OF HEALTH

[447] www.whitehouse.gov/homeland/nspi_implementation.pdf, p. 153, (Last Accessed on Nov 1st, 2021).

The WHO Commission on Public Health Decisions (CSDH) provides a special issue that is relevant to all the aforementioned developments. The CSDH has mobilized experts and schools to discuss available information on social welfare decisions and to promote cultural dialogue and development programs to reduce health inequalities within and between countries. Thus, CSDH fulfills the task of establishing a WHO program, recognizing human coexistence. Social decisions as a problem of the need for international cooperation with the work of government, and the work of the WHO such as investigating, planning and disseminating general welfare and reasonable public data on this problem of need. The latest CSDH has issued its final report and is currently in the process of disseminating its results to reduce global health inequality. The truth will come out in the end whether its proposals are compelling, yet there is no doubt about the WHO's global work of integrating and integrating this point into the construction of global public goods in order to improve global health. Highlighting social welfare decisions has informed the Medium Term Strategic Plan. Of the thirteen key objectives, goal seven is "Addressing social and economic welfare decisions through strategies and projects that enhance social value and linking the support of the poor, sexual responses, and basic freedom-based approaches."

WHO CONSTITUTION, CORE FUNCTIONS, AND PROPOSED REFORMS

The WHO's design is reflected in its Constitution, which divides the WHO's institutional capacity into three categories:

(1) capabilities, including exhibitions and international arrangements, guidelines and non-restrictive policies and recommendations;

(2) communication and planning skills, including the well-being of all people, needs and health, and exercise of essential medicines and its specific infection programs;

(3) special screening and participation activities, including the eradication of illness and disaster. In recent years or somewhere in the region, the WHO has undergone various changes to focus on different aspects of these categories, and its effectiveness in doing so has been the subject of criticism and criticism.

For instance, in one of the WHO's most exhaustive exploration, WHO, sufficiency, vital choices, change of regional exchange and constrained battling, and its restricted functional impediments in propelling the British Medical Journal articles during the 1990s. at about a similar time, WHO-charged self-concentrate on disturbed associations' endeavors to

accomplish their institutional abilities and pushed diminished changes, particularly in reinforcing its extraordinary limits and its worldwide wellbeing and arranging activities. [448]Also in 1996-1997, the WHO Executive Board held meetings. 6 remarkable things to concentrate on the Constitution, chooses to audit WHO's institutional ability to underline co-activity, wellbeing system advancement, qualities and rules, support the prosperity, all things considered, and uncommon backing and cooperation. In the late 1990's, a conference of health researchers and and health professionals around the world are flocking to Pocantico, New York to withdraw the "Improving Performance. of International Health Institutions" in order to assess whether the construction of a center for global well-being has been sufficient for a century. Health relationships around the world. The Pocantico report concludes, "the importance of the WHO is primarily reflected in its global measurement capabilities that need to be strengthened and revitalized," that "the promotion of special aid always undermines regulatory work", that "WHO should be the 'controlling heart' of global welfare" and and that "WHO must recognize authority in achieving rational thinking and greater importance in the system." Reasonable emphasis was placed on WHO's global power, especially regulatory, power. This point of view is repeated in the article of Jamison, Frank and Knaul, who argue that the WHO has two different types of skills: institution (counting the normal global work) and profit (counting special participation). Although the interest of these two genres has expanded, the majority of new health artists around the world talk about performance skills, making it a very important requirement of the WHO institution worldwide.[449]

The role of WHO in public health

WHO fulfils its objectives through its core functions:

Giving organization on issues essential to prosperity and taking part in associations where joint action is required;

- Framing the assessment plan and fortifying the age, translation and spread of significant data;
- Setting guidelines and standards and progressing and noticing their execution;
- Articulating moral and evidence based course of action decisions;

[448] U.S. Department of Homeland Security. (2004). National Response Plan. ESF #8-3.
[449] U.S. Department of Homeland Security. (2004). National Response Plan. ESF #8-1.

- Offering specific assistance, catalyzing change, and building legitimate institutional breaking point; and
- Noticing the prosperity situation and assessing prosperity designs.[450]

The WHO agenda

The WHO works in an obviously intricate and quickly evolving climate. The constraints of general wellbeing work are covered up, contacting different regions that influence social transparency and results. The WHO reacts to this test utilizing a six-point plan. These six methodologies center around two wellbeing objectives, two fundamental requirements, and two methods of activity. The WHO's standard display will be estimated by the effect of its work on the prosperity and strength of ladies in Africa.

1. Encouraging turnaround events

Over the past decade, welfare has achieved unquestionable quality as an important promoter of financial development, and more goods than ever before are added to life resources. Poverty, however, continues to add to chronic poverty, and chronic poverty keeps many in poverty. Social development is governed by a moral code of conduct: Access to life-saving negotiations or progressive welfare should not be denied for a variety of reasons, including those with financial or social roots. The obligation in this law ensures that WHO exercise-focused health promotion provides a need for well-being resulting in poor, overweight or weak circles. The achievement of the Millennium Development Goals for health-related, prevention and treatment of chronic diseases and the care of neglected tropical diseases are fundamental to the health and well-being program.

2. Promoting social security

Shortcomings partook in security hazards mentioning incorporated work. Maybe the best danger to worldwide security comes from the rise of plagues. Such flare-ups happen in expanding numbers, driven by variables like fast metropolitan development, catastrophic events, the manner in which food is delivered and showcased, and the manner in which enemies of contaminations are utilized and mishandled. The world's capacity to forestall fires has been reinforced since June 2007, when the International Health Regulations came into power.

3. Strengthening health structures

[450] Public Health Act, 1875.

For social development to work as a means of reducing poverty, health authorities must reach out to the poor and marginalized. Health agencies in many parts of the world are unable to do so, focusing on strengthening WHO health systems. Districts intended to integrate a satisfactory number of well-prepared staff, adequate funding, appropriate frameworks for data collection, and the adoption of appropriate innovations including basic medicine.

4. Using tests, data and evidence

Evidence provides a basis for setting requirements, measurement strategies, and measurement outcomes. The WHO creates accurate health data, in consultation with driving professionals, to set standards and norms, develop evidence-based strategic decisions and assess progressive health conditions around the world.

5. Organizational development

WHO is completing its work with the help and concerted effort of many participants, including UN offices and other international organizations, beneficiaries, the general public and the private sector. The WHO uses significant evidence strengths to empower participants who run programs within nations to turn their trials into special rules and procedures, just as there are international needs.

6. Improving performance

The WHO is participating in ongoing reforms aimed at performance in its production and entry, both at the global and international level. The WHO is committed to ensuring that its most supported resources - its employees - operate in a thrilling and satisfying climate. The WHO designs its financial system and applies it to results-based management, with the clear expectation that the results should measure the execution of national, provincial and international standards.

Trends in WHO leadership

In spite of the arising understanding that diverse generally clinical issues require clearly by and large flourishing blueprints, particularly in the space of generally surveillance, standards and headway, coordination of new by and large players, and overall success law, thinking at WHO under the past Lee affiliation mirrored a move the substitute way. The WHO Commission on Social Determinants of Health (CSDH) might be a critical extraordinary case for this model. In what follows, we incorporate several key system changes at WHO in the previous decade,

which mirror this change of prioritization of WHO's centre cut-off points and a confining of WHO's thriving arrangement.[451]

PLURALISM IN GLOBAL HEALTH

In the initial few years, not many years after the establishing of the United Nations (UN) and the WHO, there were relatively few central participants all throughout the planet who had political impact and expanded subsidizing to add to worldwide projects. The WHO, the Rockefeller Foundation, the United Nations Children's Fund (UNICEF) and right in the course of recent many years, World Bank in the past fundamentally affect worldwide wellbeing needs for testing, methodology and expectation. In the limitless universe of the globe, regardless, one more worldwide government assistance structure arises; one seldom squeezed by a couple of associations, however one that incorporates different wellbeing specialists all throughout the planet. The WHO is currently being joined by many different players - some with the ability to primarily speculate financially and others with the ability to work out integrated financial strategies. Health talks are out in the private area and with the WHO, and are right now part of the G8 and other global gatherings. The World Economic Forum has upheld the thought of treatment issues going from HIV/AIDS and inoculation to tobacco control and control. The UN Security Council is focused on HIV/AIDS and the private and non-benefit climate internationally affects youthful players like the Global Fund for AIDS, Malaria and Tuberculosis (TB), the Bill and Melinda Gates Foundation., and prescription relationship, for example, Merck, Pfizer, Novartis and GlaxoSmithKline have the principle parts. More than 50 private neighborhood have been set up to oversee preventable diseases or sickly wellbeing. Others like the Global Alliance for Vaccines and Immunization (GAVI) have plans to consume billions of dollars. Overall Non-Governmental Organizations (NGOs) including Médecins Sans Frontières (MSF), Oxfam and CARE are at this point working on disaster risk abatement and clinical issues and are adding to the headway of frameworks on issues like getting central medicines. Living admirably all throughout the planet has benefited incredibly from these new garments, drive and diversion.[452] This assortment, or rather, has achieved the fracture of

[451] Wild smallpox was eradicated worldwide in the 1970s (www.bt.cdc.gov/agent/ smallpox/overview/disease-facts.asp), (Last Accessed on Oct 21st 2021).

[452] Bassuk, E.L. and Gerson, S., 1978. Deinstitutionalization and mental health services. Scientific American [online], 238 (2), 46–53. Available from: http://dx.doi.org/10.1038/scientificamerican0278-46, (Last Accessed on Nov 3rd, 2021).

worldwide wellbeing workplaces and the different, dissatisfied, unique, and conflicting government assistance framework, making an imprint in the general combination and arranging process. In the midst of this horizontal climate, the WHO is aligned with its novel editing capacity as enshrined in its Constitution. It is a central office responsible for creating and implementing international health standards and norms and operates through continuous exchanges between regional components of needs. The benefits of good public service in global health problems, while diverse, can however be affected by changes in WHO's budget allocation and strategic needs from general development around the world to active work at the national level. We consider the consequences of this development of the conclusion of global health management and in particular, the conclusion of the WHO.[453]

Platform for treaty negotiations

The WHO can also lead international health partnerships by operating, where appropriate, such as a coding platform and compliance with key general health law recommendations. Experience in natural law and biotechnology suggests that common medical concerns around the world may be overlooked in a simple and effective way and can rely on substantial institutional closures, critical coverage, invisible connections and basic holes outside of administrative work. The WHO is a major international public organization that combines institutional organization, legal capacity and general health expertise to include code for programs that address general health concerns. In view of the legal issues raised by the media connection and the enactment of legal authority, the question arises as to what types of issues will benefit from coding under WHO support. This should be resolved depending on the situation and there will always be doubts.[454] The WHO, however, is an integral part of the relevant code coding efforts associated with problems, for example, global tobacco control, which cuts across a wide range of global concerns (such as general freedom, trade, culture and climate) yet important WHO General Health directive and past in an institutional campaign of another international community organization.[455]

[453] Gostin, Lawrence O. (Lawrence (2016-02-02). Public health law : power, duty, restraint. Wiley, Lindsay F., 1977- (Third ed.). Oakland, California. ISBN 9780520958586. OCLC 910309614, (Last Accessed on Oct 25th, 2021).

[454] Kerr, T., Small, W., and Wood, E., 2005. The public health and social impacts of drug market enforcement: a review of the evidence. International journal of drug policy, 16 (4), 210–220.

[455] Aalbersberg, P-J. and van Dijk, A.J., 2016. Crafting the domain of policing and public health in Amsterdam. European journal of policing studies, 3 (4), 375–393.

Conclusion

WHO is a specialist in coordinating health and planning within the United Nations framework. It is responsible for authorizing global health issues, formulating a health research program, setting standards and norms, presenting evidence-based planning, providing specialized assistance to nations and patterns of life observation and evaluation.

In the 21st century, well-being is a universal obligation, which includes a fair hearing on basic principles and a combined protection against international dangers. An important part of global health management in the 21st century is an effective, efficient and responsive political framework to promote integrated management as a key change in events and the implementation of international health law strategy. The extent to which the WHO will truly seek to give such authority to the rapidly evolving field of international health law will affect the full capacity of partner organizations to promote compulsory global participation in tackling global health problems.

2021 AMENDMENTS TO INSURANCE LEGISLATIONS

- PROMILA

INTRODUCTION

Two very important Bills related to the insurance sector have been passed by the Lok Sabha which amends the legal framework surrounding insurance regulations. The Bills are the Insurance (Amendment) Bill, 2021 and the General Insurance Business (Nationalisation) Amendment Bill, 2021. The article will further discuss the provisions under both.

THE INSURANCE (AMENDMENT) BILL, 2021

Ms. Nirmala Sitharaman, Minister of Corporate Affairs, introduced the Insurance (Amendment) Bill, 2021, in the Rajya Sabha on March 15, 2021. The Insurance Act of 1938 is amended by this Bill. The Act establishes a framework for the operation of insurance companies and governs the relationship between insurers, policyholders, shareholders, and regulators, i.e., the Insurance Regulatory and Development Authority of India (IRDAI). The main objective of this Bill is to enhance the amount of foreign capital that can be invested in an Indian insurance company.

Provisions of the Bill

The Bill has amended provisions of the Insurance Act, 1938 with respect to foreign investment and investment of assets in the India insurance companies.

- ***Foreign investment***

Foreign investors can own up to 49 percent of an Indian insurance company, which must be owned and controlled by an Indian corporation under this Act. The Bill raises the foreign investment ceiling in Indian insurance companies from 49 percent to 74 percent and removes ownership and control restrictions. However, additional conditions imposed by the central government may apply to such foreign investment.

The term “total foreign investment” refers to both direct and indirect foreign investment.

Foreign Direct Investment refers to money invested directly by a foreigner, whereas Indirect Foreign Investment refers to money invested indirectly by an Indian company (owned or managed by foreigners) in another Indian entity.

A majority of the directors, senior management personnel, and at least one of the chairpersons of the Board, Managing Director, and the CEO of a foreign-invested Indian insurance company must be a citizen of India.

- ***Investment of Assets***

The Act mandates that insurers maintain a minimum investment in assets adequate to cover their insurance claim obligations. If the insurer is incorporated or domiciled outside of India, the assets must be held in a trust in India and entrusted to trustees who must be Indian citizens. This will also apply to an insurer incorporated in India if at least:

1. 33 percent of the capital is owned by investors domiciled outside India, or
2. 33 percent of the members of the governing body are domiciled outside India, according to the Act's explanation.

The Bill removes this explanation.

Importance of the Bill

The implementation of this Bill will serve the following benefits:

- With the increase in foreign ownership to 74 per cent, global best practices in terms of insurance products may be included in the future. It would also aid in the reduction of insurance product costs in India.
- It is beneficial to Indian promoters since it allows them to maintain control over management and the board of directors, and the additional capital inflow will provide them with finances to pursue growth.
- It will benefit minor insurance players or those whose sponsors do not have the financial resources to invest more cash, thereby strengthening them and creating competition in the business.
- It is expected to assist local private insurers in rapidly growing and expanding their footprint across India, which has one of the lowest levels of insurance penetration in the world.

Insurance penetration in India

- India's insurance penetration is currently at 3.7% of GDP, compared to the global average of 6.31%.
- The life insurance industry's growth has slowed to 11-12 per cent from 15-20 per cent till the fiscal year 2020, as the pandemic has prompted customers to save money rather than invest in stocks or life insurance plans.

- There were just 24 life and 34 non-life direct insurers in India as of March 31, 2021, compared to 243 life insurance businesses in 1956 and 107 non-life insurance companies in 1973 when the country was nationalised.

Model Insurance Villages (MIVs)

To increase insurance penetration in rural regions, the Insurance Regulatory and Development Authority of India (IRDAI) has proposed the notion of a "Model Insurance Village (MIV). The objective is to provide complete insurance coverage for all of the key insurable risks that villages face, with affordable or subsidised premiums.

THE GENERAL INSURANCE BUSINESS (NATIONALISATION) AMENDMENT BILL, 2021

On July 30, 2021, the General Insurance Business (Nationalisation) Amendment Bill, 2021 was introduced in the Lok Sabha. The General Insurance Business (Nationalisation) Act, 1972, is being amended by this Bill. The Act was enacted to nationalise all private general insurance companies operating in India. The Bill aims to increase private sector participation in the public sector insurance companies governed by the Act.

The General Insurance Corporation of India was established under the 1972 Act (GIC). The businesses of nationalised companies were restructured under four GIC subsidiaries: (i) National Insurance, (ii) New India Assurance, (iii) Oriental Insurance, and (iv) United India Insurance. In 2002, the Act was changed to transfer ownership of these four subsidiary firms from GIC to the central government, allowing them to operate independently. Since the year 2000, GIC has focused solely on reinsurance.

Provisions of the Bill

The Bill aims to make the following amendments in the respective areas:

- ***Government Shareholding Threshold***

The Act stipulates that the central government's shareholding in the selected insurers (GIC and its subsidiaries) must be at least 51 percent (Section 10B). This clause is removed from the Bill.

- ***Change in definition of General Insurance Business***

The general insurance business is defined by the Act as a fire, marine, or miscellaneous insurance business. Capital redemption and annuity certain businessescent from are not included in the term. Capital redemption insurance entails the insurer paying a lump sum of

money to the beneficiary on a predetermined date after the beneficiary has paid premiums on a regular basis. Certain types of insurance, such as annuity insurance, pay the beneficiary over time. The Bill repeals this definition and instead references the Insurance Act of 1938's meaning. Capital redemption and annuity certain businesses are included in the definition of general insurance business under the Insurance Act.

- ***Transfer of control from the Government***

The Act will not apply to the listed insurers after the central government relinquishes control of the insurer, according to the Bill. Control refers to the ability to appoint a majority of the directors of a specific insurer, as well as the ability to direct its management and policy decisions.

The Act gives the federal government the authority to notify workers of selected insurers about their terms and conditions of employment. The insurer shall be assumed to have adopted schemes devised by the central government in this regard, according to the Bill. The insurer's board of directors has the authority to alter or create new policies.

Furthermore, the central government's powers under such schemes (as defined by the Act) will be passed to the insurer's board of directors.

- ***Liabilities of Directors***

The Bill stipulates that a director of a specified insurer who is not a whole-time director will be held accountable solely for certain acts, which include the following:

- With his knowledge, attributable through board processes.
- With his knowledge or consent, or when he had failed to act diligently.

CONCLUSION

Both the amended Bills are major steps towards the enhancement of the insurance sector in India. The increased foreign investment is expected to bring down insurance costs in India and allow more players to enter the market. While the General Insurance Business Amendment Bill does bring down the Government shareholding to below 51%, Nirmala Sitharaman has claimed that this is not to be mistaken for a privatisation Bill.

REFERENCES

- *https://prsindia.org/billtrack/the-insurance-amendment-bill-2021*

- https://prsindia.org/billtrack/the-general-insurance-business-nationalisation-amendment-bill-2021
- https://www.drishtiias.com/daily-updates/daily-news-analysis/general-insurance-business-nationalisation-amendment-bill-2021

REGULATION OF INSIDER TRADING IN INDIA: DISSECTING THE DIFFICULTIES AND SOLUTIONS AHEAD

- AAYAN MOHAPATRA

Abstract

Trading in equity and bond securities by employees of a company who have access to information that has not yet been made public is known as "insider trading." Taking advantage of market volatility, insiders can profit by making early purchases or sales of shares.

Insider trading has been prevalent in financial markets for as long as anybody can remember. This was notably true in India's early years of the stock market there. Insider trading is common in developing countries like India, where market participants, company officials, and regulatory authorities are all involved. In order to protect the confidentiality of their work, only primary insiders have access to sensitive information. Corporate executives and officers, as well as market participants who gather information on a company's operations, are examples of controlling shareholders. This group also includes government officials with access to secret information. Secondary insiders include acquaintances and family of first-level insiders. As a result of severe occurrences, adaptive regulations help reduce their impact while also reestablishing normalcy.

Indian Securities Market Insider Trading Regulations, Current Trends, and Challenges are examined in this study.

Introduction

Insider trading is illegal as well as unethical because it involves the use of confidential knowledge for the goal of profiting (or avoiding a loss) at the expense of the uninformed public. The expression has become so frequent that its meaning is nearly obvious.[456] Insider trading is a term used to describe trading in securities based on non-public knowledge.[457] To qualify as insider trading, a trader must have information that is relevant to the value of the shares traded, and that information is not previously publicly available or expressly understood by others in

[456]M.L. Gopichandra, "Insider Trading Insights" in Jayshree Bose (ed.) *Insider Trading: Perspective and Cases* 3 (2007).

[457]Dr. Jinesh Panchali and M. Ravindran, "Insider Trading Issues" 1 *Knowledge for Markets* 48 (2011).

the market. This information must be material to the value of the stocks traded.[458] When a person with access to confidential information about a company buys and sells the company's stock without the knowledge of other shareholders or the general public, it is referred to as insider trading. [459]

According to Henry G. Manne, a proponent of the discipline known as law and economics, it is:

"*Insider trading generally refers to the practice of corporate agents buying or selling their corporation securities without disclosing to the public significant information, which is known to them, but which has not affected the price of the security*[460]*"*

New Oxford Companion to Law states:

"Insider dealing occurs when a person with access to information that is precise and not generally available improperly discloses that information or uses it to deal to his advantage in financial securities in public market[461]*."*

The following are the most important traits of insider trading:

(1) In-the-know employees are in possession of information that isn't available to the public.

(2) Using confidential information for personal gain or avoidance of loss is the goal of an insider.

(3) Those without access to information are harmed by the way information is being used.

(4) An insider's actions harmed the company's shareholders.

(5) Materiality dictates that information be treated as such.

Literature Review

[458]M.P. Dooley, "Enforcement of Insider Trading Restriction" 66 *Virginia Law Review* 1(1980).

[459]Lubinisha Saha, "Insider Trading: SEBI Regulation", 50 *Corporate Law Adviser* 76 (2002).

[460] Henry G. Manne, "Definition of Insider Trading" in Fred S. McChesney (ed.) *The Collected Works of Henry G. Manne* 364 (2009).

[461] Peter Cane (ed.), *The New Oxford Companion to Law* 591 (Oxford University Press, Oxford, 2008).

Rishikesh Desai and Yosham Desai (2010) – When an individual gains special knowledge or price sensitive information through a confidential or fiduciary relationship with another individual, they cannot use it for their own advantage or benefit and must account for any such profit derived. This is one of the fundamental and most general principles of law.

C. Koch Von (2014) claims that insiders control the stock market's price and status because they are aware of the firm's state of affairs. Insider trading is largely driven by UPSI, while a lack of oversight, regulation, and oversight have all contributed to the economic collapse of both firms and nations.

Yesha Yadav (2016) The author of the paper "Insider Trading and Market Structure" argues that the emergence of algorithmic trading presents a significant challenge to insider trading law and policy. You'll see that a small group of "structural insiders" control the securities market, which includes traders with millisecond and microsecond response times who engage in what's known as "high frequency trading" (HFT).

Anil K. Manchikatla and Rajesh H. Acharya (2017) To put it another way, the term "insider trading" has a wide range of meanings and connotations, encompassing both legal and illegal conduct. It is legal insider trading when a corporate insider trades in accordance with all regulations, and it is prohibited insider trading if they do so. Insider trading has grown significantly over the last several decades.

Objective of the Study

This research focuses on the premise that in today's international financial system, the security provided against insider trading is regarded insufficient.

Research Methodology

The present study is purely based on secondary data.

The Regulation of Insider Trading in India

India's economy is one of the world's fastest expanding. Because of the tremendous expansion of India's financial system, financial crimes have also risen sharply. Insider trading is by far the most prevalent of these crimes. In order to offer a level playing field for domestic and international investors, having an effective check on India's occurrence in financial markets is essential as one of Asia's fastest expanding countries. In 1992, the former president of the Bombay Stock Exchange opened his speech by making the following observation:

"There is no other kind of trading in India, but the insider variety. It is another matter that by the time the retail guys get the hot tip the real operator is already dumping their holdings"[462]

A notification issued on April 12, 1988, following Indian government reforms in 1991, created the Securities and Exchange Board of India as the first regulatory body in charge of supervising the country's securities markets. With powers delegated by the Prime Minister, the Indian Finance Ministry created SEBI as a temporary administrative body. The Securities and Exchange Board of India Act, 1992 was passed despite the fact that it was quickly realized SEBI needed more legal support. To protect investors' interests, SEBI has a statutory duty under Section 11 to take actions it deems appropriate to foster market development while protecting investors' interests in securities. Protection against insider trading has been listed as a duty in Section 11 (2) (g).

Securities of publicly traded corporations are prohibited by Section 12-A of the Act because it states that "no person should directly or indirectly:

(a) engage in insider trading.

(b) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the Rules or the Regulations made there under".

There is a civil penalty under Section 15-G of the Act for violating Section 12-A, which can be as much as Rs. 25 crore, or three times the number of profits made from insider trading. Section 24 of the Act makes insider trading a criminal offence punishable by imprisonment for a term of up to ten years or by a fine of up to 25 crore rupees, or by both. To combat insider trading, India's burgeoning securities market necessitated more stringent legislation, which was exacerbated by an increase in the number of incidents. Specifically, Section 30 empowers SEBI to issue regulations by notification in the Indian Gazette in accordance with the Act and the rules promulgated thereunder to carry out the purposes of the Act. SEBI used this authority to draught the SEBI (Prohibition of Insider Trading) Regulations, 1992, which included four chapters and three schedules covering 15 regulations.

[462] Sucheta Dalal, "Nabbing Insider Trading: Easier said than done" *The Rediff Columns*, Aug. 16, 2000.

SEBI (Prohibition of Insider Trading) Regulations, 1992

Chapter I dealt with the definitions of regulatory terms such connected individuals, deemed persons, insiders, price sensitive information, and so on.[463].

Chapter II ensured that insiders as specified by the Regulation were prohibited from trading, contacting, or counselling [464].

Chapter III This section of the Regulation outlined SEBI's investigation authority, as well as the prohibitory orders or instructions it may issue against those found guilty and in the name of capital market regulatory compliance. [465].

Listed businesses and other entities were required to follow a code of internal processes and behaviour in **Chapter IV**. Directors, officials and substantial shareholders were required to comply with disclosure rules, and an aggrieved party could appeal SEBI's judgement. [466]

Also known as the tenth largest economy in the world, India's market capitalization stood at over USD 1.6 trillion in November 2014. [467]. More than twenty-three years had elapsed since SEBI released the Regulation, and it was becoming insufficient in view of the fact that since 1992, listed firms and the stock market, as well as overall the economy, had undergone changes. Due to these modifications, it became clear that there were holes in the Regulation of 1992 that were detrimental to shareholder rights and corporate governance standards, which undermined investor confidence in Indian financial markets. As a result, SEBI believed that a new legal regime was required to close the gaps in the legal system, and in order to do so, a thorough study of the current legislation was required. In order to carry out a comprehensive review of the existing Regulations and modify the law on insider trading, SEBI established the 18-member High Level Sodhi Committee under the leadership of former Kerala and Karnataka High Court Chief Justice N. K. Sodhi and former Presiding Officer of Securities Appellate Tribunal. For this reason, SEBI (Prohibition of Insider Trading) Regulations, 2015 replaced

[463] SEBI (Prohibition of Insider Trading) Regulations, 1992, Regs. 1 to 2.
[464] *Id.,* Reg. 3 to 4.
[465] *Id.,* Reg. 4A to 11A.
[466] *Id.,* Reg. 12 to 15.
[467] Samie Modak, "India's market capitalization cross 100 trillion" *Business Standard,* Nov. 28, 2014.

the previous SEBI (Sodhi Committee) Regulations, which were discussed and approved at their meeting on November 19, 2014. It was stated in the 2015 Regulations press release that the primary goal of introducing those regulations was to strengthen legal and enforcement frameworks, align Indian regime with international practices, provide clarity in terms of definitions and concepts, and facilitate legal business transactions. [468].

Chapters, schedules, and regulations make up the 2015 Regulation.

Definitions are the focus of **Chapter I**.

Chapter II discusses the prohibition on insiders communicating or trading.

Chapter III discusses the disclosures that companies must make when trading insiders' securities in those companies' stock.

The Code of Fair Disclosure and Conduct is prescribed in **Chapter IV**.

The provisions in **Chapter V** are diverse.

Deconstruction of the Lacunas of Indian International Trading Laws

The regulation of insider trading has proven to be the most challenging issue for India's securities market regulator to cope with. It's time to reevaluate this subject after the experience of such regulation, which has been dubbed "the unwinnable war." [469]. Insider trading rules are infrequently enforced in several nations, including India. [470]. It's alarming that the SEBI hasn't done anything other than start investigations, and that's usually only after the media brings up the issue. [471]. The majority of the time, instances of insider trading go undetected, and even when they are, the prosecution is unable to prove its case. SEBI has looked into a large number of cases since 1992, but only a small number have resulted in successful prosecution. Years of investigations have gone by with no arrests or convictions. Some suspensions, prohibitions, or even warnings were granted in circumstances of final conviction.

According to SEBI, permission orders were issued in a few instances. However, no one was imprisoned as a result of the convictions, as all of the cases ended with sanctions. There are few legal repercussions for insider trading in India, making it a lucrative business. India lags far behind in this respect in some Western countries. This success storey can be seen most

[468] Press Release No. 130 of 2014 dated 19th November 2014.
[469] A.M. Louis, "The Unwinnable War on Insider Trading" *Fortune* 72 (1981)
[470] Mark Miller, "The Insider: Parasite or Legitimate Profit-Maker?", online available at ccs.in/internship_papers/ 2002/29.pdf.
[471] Naresh Kumar, "How Effective Are the Insider Trading Regulations" 75 *Corporate Law Adviser* 35 (2006).

prominently in the convictions in the United States of Raj Rajaratnam and Rajat K. Gupta. This is just one of many examples of regulatory authorities succeeding in other countries. A circumstance like this makes it obvious that India's current legal system, both in terms of prosecution and enforcement, must have certain flaws. In order to achieve better and more successful implementation and prosecution in insider trading instances, we must address specific difficulties.

The issues that need to be addressed are:

1. Indian insider trading trials have been plagued by a dearth of modern, sophisticated, and technologically advanced monitoring and surveillance mechanisms. This has been an issue. SEBI is technologically challenged in this area, which significantly reduces the effectiveness of the investigation. When it comes to catching insider trading and pursuing an inquiry against it, the SEC and the US stock exchanges excel. Despite the fact that both the SEC and SEBI have completely automated supervision systems for their respective capital markets, the United States enjoys a superior market oversight and surveillance system compared to India, providing it an advantage in finding insider trading charges.
2. Proving insider trading allegations can be difficult because the charges are almost entirely dependent on speculation. Most of the time, the only proof of a link between persons involved in unlawful activities comes from phone records and transcripts. [472]. SEBI lacks a critical investigative authority, namely the ability to listen in on phone calls. Soon after the Raj Rajaratnam-Rajat Gupta case was made public, SEBI requested from the government the ability to monitor phone calls for signs of insider trading and other securities offences. [473]. SEBI, on the other hand, does not have the authority to monitor phone calls because the government has refused to grant it because of the risk of abuse. [474]. Chairman of the SEBI, UK Sinha, stated, "The SEBI does not have the power to tap telephones. Requests for call data records are only permitted in highly suspicious circumstances. Those with the power to tap phones are

[472] Reena Zachariah, "SEBI set to overhaul Insider Trading rules; to form a committee led by former SAT chief" *The Economic Times,* Feb. 25, 2013.

[473] "Insider trading is Rampant on Dalal Street" *The Economic Times,* June 18, 2012."

[474] Santosh Nair, "Insider Trading: SEBI must knock few heads to drive message, online available at http://www.moneycontrol.com/news/market-edge/insider-trading-sebi-must-knock-few-heads-to-drive-message_ 1233505.html.

few and far between in India, with the exception of the Central Board of Direct Taxes. In an inquiry, such a power can prove to be the most decisive piece of evidence against those found guilty. Only 18,000 wiretapped conversations and e-mails from Rajat Gupta's price-sensitive corporate information leak to Mr. Raj Rajratanam in the United States could be used to prove his insider trading.

3. Since the world's economies have become increasingly interconnected, the crime of insider trading has expanded beyond national lines. In this respect, Indian law lags behind because it does not apply beyond of India's borders, i.e. extraterritorial application. National laws have primarily been applied extraterritorially to safeguard domestic markets and resident investors' rights from overseas competitors. [475]. Insider trading is a criminal offence in India, yet there is no penalty or even investigation for the foreign individual who commits it. According to the Regulation, directors of international companies listed on the Indian stock exchange who have engaged in insider trading will face criminal sanctions, but the SEBI Act does not apply to territories outside of India, hence this Act will have extra-territorial effect. [476]. Many industrialised countries, such as the United States, have laws that are extraterritorial in nature, meaning they apply to transactions involving a foreign party.

Furthermore, due to the globalisation of the securities industry, it's possible that an investigation started in India will turn up evidence that's located somewhere else. When it comes to enlisting international help and cooperation, Indian legislation falls short. India and other countries have bilateral agreements on investigative assistance, such as the Mutual Legal Assistance Treaty (with 39 of 196 countries) and a Memorandum of Understanding (with 22 countries out of 196 countries) [477]. Nevertheless, because the vast majority of states are excluded, bilateral agreements with a large number of nations are rare. In other countries where SEBI does not have the authority to investigate financial crimes and has no agreement to share information with them, foreign authorities refuse to cooperate.

[475] George C. Nnona, "International Insider Trading: Reassessing the Propriety and Feasibility of the U.S. Regulatory Approach" 27 *North Carolina Journal of International Law and Commercial Regulation* 196 (2001).
[476] Amit Kumar Pathak, "How to Tackle Insider Trading in India: An analysis of current law and regulation through judicial decision" online available at http://corporatelawreporter.com/2012/03/28/tackle-insider-trading-india- analysis-current-laws-regulations-judicial-decissions/.
[477] List of MOUs available at http://www.sebi.gov.in/cms/sebi_data/internationalAffr/IA_Bil MoU.html.

4. Insider trading flourishes in India following corporate mergers and acquisitions. [478]. Takeovers are viewed as significant occurrences because of the potential for price movement and the resulting favourable environment for insider trading. [479]. When it comes to insider trading in mergers and acquisitions, Rule 14e-3 of the Securities Exchange Rules, 1942 addresses the issue by making it illegal for anybody with material non-public knowledge connected to the initiation of the tender offer to trade in target company securities. India does not have such a clause.
5. Because the Indian insider trading rules do not also allow the victimised investor the power to bring civil action privately before a regular court, there is no private right of action or class action available to safeguard investors' interests under the Indian laws. It is spelled out in Section 26 of the SEBI Act of 1992 that unless SEBI files a formal complaint, no court shall take cognizance of any offence punishable under the SEBI Act or its rules or regulations. As a result, investors are unable to play a significant role in securities market regulation due to the lack of a private right of action. There are civil remedies available under US law, however, such as Rule 10b-5 and Rule 14e-3 of the Securities Exchange Rules of 1942, as well as Section 16-b and Section 20-a of the Securities Exchange Act, which have proven crucial in discouraging insider trading in the United States. These remedies are available to private individuals.
6. It is only when an intermediary or other person connected to the securities market violates any of the Act's requirements, rules or regulations, or Board orders, that SEBI can begin an investigation. [480]. However, a circumstance could exist in which SEBI learns about a potential occurrence of insider trading via an informant and takes action to prevent it. Anticipatory action to prevent insider trading is not permitted under Indian law; only a follow-up investigation after the leakage of price-sensitive information is allowed.

[478] As concluded by Manish Agarwal and Harminder Singh, "Merger Announcements and Insider Trading Activity in India: An Empirical Literature", online available at http://businessperspectives.org/journals_free/imfi/2006/imfi_en_2006_03_Agarwal.pdf and Rodrigo "Meger Announcement and Insider Trading in India" *The Write Pass Journal*, Dec. 22, 2012.
[479] Vinai Kumar Singh, *Insider Trading: A Comparative Law Analysis* (2002) (Unpublished M.Phil. Thesis, School of International Studies, Jawaharlal Nehru University, New Delhi).
[480] Securities and Exchange Board of India Act, 1992, s. 11 C.

7. As far as I know, no one at SEBI has ever conducted an internal evaluation of its own processes or investigations in unsuccessful insider trading cases. When the US Securities and Exchange Commission (SEC) repeatedly investigates its systems, it performs self-appraisals to learn what went wrong. As an illustration, consider the report titled "Investigation of the SEC's failure to identify Bernard Madoff's Ponzi scheme [481]" looks closely at the SEC's shortcomings to determine how long Madoff was exempt from punishment because of them. Because SEBI has no idea of performance appraisal, the same flaws keep cropping up in investigations.
8. Indian law stipulates that an investigating authority may only require a 'intermediary or any person associated with securities market in any manner' to provide information or produce books, registers, or other documents, or to record before him or any person authorized by it in this behalf under Section 11B (3) of the SEBI Act, 1992, empowering SEBI to conduct investigations. On the other hand, U.K. regulations allow for one or more competent inspectors to be appointed by the Secretary of State who can then require "any person" they believe can provide information about a violation to produce documents, appear in front of them, and provide all other assistance related to the investigation. It is possible that SEBI will be at a disadvantage if the person who needs its help does not fall under Section 11B (3) of the Act, which limits SEBI's investigative power.

9. The SEBI circular no. EFD/ED/Cir-1/2007 dated 20th April 2007 mandated for the first time a consent method for the settlement of insider trading cases in order to reduce costs, enforce the law, and exert effort. Consent orders only require payment of a fine, which is insignificant in comparison to the disputed sum. [482]. It's a common misconception that insider trading has little danger of financial loss, and that incarceration is an unlikely outcome. This may have the unintended consequence of decreasing the anxiety of potential insider traders, making the strategy ineffective and even disastrous. Another issue with this resolution is that it limits future legal

[481] Online available at https://www.sec.gov/news/studies/2009/oig-509.pdf.
[482] Astha Singh and Roshni Chadda, "Internet Law – Insider trading prohibition law in India", online available at https://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2527.

developments in this area and provides no insight into how the initial inquiry order was issued. [483].

10. For the most part, the SEBI is in charge of the stock market in three ways: legislatively (by drafting regulations and circulars), executively (by discovering and investigating allegations of malpractices or misconduct), and judicially (passing of orders imposing fines, restraint, etc). Overburdened with multiple responsibilities, one body is unable to focus fully on any one of its actions. It's a completely different scenario in the United States, where the SEC's role is to find and investigate insider trading before taking it to the appropriate court to seek civil sanctions and criminal prosecution. When it comes to detecting insider trading, the Securities and Exchange Commission (SEC) plans to devote all of its resources exclusively to that task.
11. Additionally, lack of resources and manpower has been an issue when pursuing insider trading prosecutions in India. SEBI is a much smaller and less powerful regulator than the U.S. Securities and Exchange Commission (SEC), which is well-equipped with both human resources and a solid infrastructure to detect and curtail insider trading. There are 3958 people employed by the SEC while only 643 people are employed by SEBI across the country in its various offices. [484].

Flaws in The Current Law That Regulates Insider Trading

There are flaws in the current law that regulates insider trading, including flaws in the structure, method, and draught. These are their names:

1. Many public servants and SEBI employees receive price-sensitive information because of their positions, however neither group is specifically mentioned in the 2015 Regulation as a "connected person" in the term.
2. No acceptable time frame is specified in the Regulation to conclude investigations into insider trading instances. Whenever an investigation takes an unusually long time to conclude, crucial evidence may be lost, giving the white-collar criminals an opportunity to influence the outcome.
3. There is no unique method for investigating insider trading in the Regulation of 2015.
4. Neither the SEBI Regulation nor any other regulation has created an incentive to encourage private citizens to provide information that leads to the exposure of insider

[483] Satvik Varma, "Insider Trading is a criminal offence" *The Economic Times,* Dec. 11, 2011.
[484] Online available at: http://www.sebi.gov.in/acts/EmployeeDetails.html.

trading acts. There is no unique provision in Indian law that rewards persons with knowledge of insider trading for disclosing that information to others.

5. Under the Regulation of 2015 [485], Whoever works for a company, or has worked for the company in any capacity in the six months prior to the concerned act, including being in frequent communication with the company's officers or being a director, officer or employee of the company or holding any position that gives him access to unpublished pricing information. After six months have passed since his/her resignation from a company, an officer/employee/director is no longer considered to be connected and can use the UPSI for trading in stocks without restriction after the six-month term from his/her resignation has expired. Six-month limits are unjustified since certain UPSI may remain prominent for longer periods of time and hence continue to effect stock prices even after their six-month expiration dates have passed. For example, an ex-insider could work together with a former colleague to keep the information secret for over six months in order to carry out the transaction that benefits them.
6. To describe securities about which no UPSI can be disclosed, furnished, or allowed access, Regulation 3 and Regulation 4 of 2015 utilize the term "intended to be listed." In the absence of a definition in the Regulation for the term "intended to be listed," the meaning of the phrase is ambiguous. No one knows if this broad phrase is meant to include firms now undergoing discussions about going public, those with Articles of Association that need to be authorized, those that have submitted a red herring prospectus with SEBI, or those who have already proposed an IPO. As a result, the Regulation's core provisions are unclear as to whether they apply in any given situation.
7. The Regulation of 2015 has one of the most noticeable features in that it greatly expands the position and responsibilities of the compliance officer. In addition to their own employees, they must disclose trades made by all sorts of related persons. To be covered by the disclosure provisions, a corporation must have at least one "employee." In large organisations, the number of employees can be several times greater than the number of high-ranking officials, so the compliance officer's

[485] SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 2 (1) (d).

responsibilities grow to unimaginable proportions. The burden of monitoring and reporting on the behaviour of 'linked persons' appears to be overly broad when it comes to them. Regulation's expansive definition of "connected person" makes the job of compliance officer difficult. Listed companies must interact directly with this large third-party community if they hope to secure their compliance with the disclosure requirements. When a lot of the burden is placed on one person or organisation, it increases the risk of someone not doing their job properly.

8. There are strict rules prohibiting the trading of stocks when an individual has access to insider information. This includes sharing or obtaining that knowledge, as well as dealing in securities when the individual is in possession of it. For lack of clarity in the Regulation on what insider knowledge means, performances or discharges are not permitted for what reasons or in what forms.
9. Any information about a company or its securities that is not generally available and that, when it becomes generally available, is likely to materially affect the price of the securities is defined as unpublished price sensitive information (up to the point of publication). This definition can be found in the Regulation of 2015, Section 2 (1) (n). Nondiscriminatory is used to define "generally available information," however there is no definition for "non-discriminatory" in the Regulations. In order to be considered 'accessible on a non-discriminatory basis,' the legislation requires that the information be distributed in the public domain. Thus, terms like "nondiscriminatory" and questions about whether information found in scholarly journals or niche publications will be deemed to fall under this definition are left open to different interpretations by different investor communities in India. [486]. Given enough news stories or TV episodes, the information broadcast on them could be considered publicly available. As an example, this meaning would apply to an item on a lesser-known website or blog or a local newspaper in a remote part of the country that is usually available to the broad public without regard to race or ethnicity. As a result of this definition, information that has not yet reached the general public may be deemed to be widely available and so subject to UPSI.

[486] Cyril Sheroff, "New Insider Trading Laws In India: How Much Is Too Much?", online available at http://xbma.org/forum/indian-update-new-insider-trading-laws-in-india-how-much-is-too-much/.

10. The Regulation has developed a method for insiders who are "perpetually in possession of UPSI" to submit an investment trading plan ahead of time, detailing the value, number of shares, and date of the transaction. There are some drawbacks to using a trading plan of this type. With no definition of the word "perpetually in possession of," it's unclear to what type of trader this right is available for formulating an investment strategy. In addition, the trading plan's impracticality should be considered. Officials and insiders may have difficulty investing in their own company's stock because of the current situation. Officials' trading plans must be made public before they can be put into action, which could lead to market speculation and investor losses. [487]. People who know, say, that a promoter plans to buy 500,000 shares six months from now will be able to buy those shares before the promoter does so since the plan is irrevocable. [488]. To sum it up, once the trading strategy has been accepted, it is final and cannot be changed. However, no exceptions have been made for unforeseen personal circumstances, such as medical crises.
11. Regulated by 2015, many sections provide annotations reflecting on the legislative intent and reasons for a particular legal requirement's creation. There is no mention or clarification of the notes in the Regulations, even though they are referred to as such in the High Level Sodhi Committee Report. This could have an effect on the appendices to the Regulation's enforceability and dependability.
12. As defined in Regulation 2(1)(l), the term "trading" encompasses more than just dealing (as defined in the SEBI Act, 1992). Therefore, this regulation goes beyond the scope of Regulation 2(1). (l). Extending the definition in this way could raise questions about its meaning in court because it goes beyond what can be interpreted based on current legislation.
13. When in possession of unpublished price sensitive information, the Regulation of 2015 defines 'trading' in a fairly broad manner with the intention of curbing behaviours based on unpublished price sensitive information that are strictly not buying, selling, or subscribing, such as pledging and so on. [489]. Uncertainty and ambiguity will inevitably arise as a result of such a broad definition of "trade".

[487] "Insider Beware" *The Hindu*, Dec. 16, 2013.
[488] Ashley Coutinho, "Company Insiders cold to SEBI's Trading Plans" *Business Standard*, May 3, 2016.
[489] SEBI (Prohibition of Insider Trading) Regulation, 2015, Note to Reg. 2 (1) (l).

14. Including pledge of shares in the note to Regulation 2 (1) (l) has a tremendous impact on financing transactions and the market, since promoters are typically expected to pledge their shares to lenders in the event of seeking financial help. Some industry insiders believe that disclosing every single piece of UPSI that an organisation has before issuing stock will have a significant impact on the entire industry. Furthermore, such a restriction is unjustified because in a financing transaction, financial institutions are solely concerned with the value of pledged shares based on market price discovery and are not operating on a proprietary basis but are merely accepting security instead of lending money.
15. Before purchasing a publicly traded company, Regulation 3 (3) allows for due diligence to be performed (including communication and sharing of UPSI regarding the merger and acquisition transaction) to determine if the target company is a good buy for the acquirer, the potential difficulties, liabilities and dangers of the acquisition, as well as a final price at which the purchase should be completed. In such agreements, it is common for the buyer to opt out of the acquisition altogether if the due diligence, which Regulation 3(3) does not address, turns out to be negative. What will happen to UPSI that was already disclosed with the acquirer in connection with these cancelled transactions? The acquirer will remain an insider and, as a result, should refrain from trading in the target listed company's securities until the UPSI is generally made accessible to the public. In any case, it's not clear how insiders in the acquired company will be treated by the law because they shared information with the acquirer in their capacity. The Insider Regulations are void as a result of SEBI's failure to provide any clarification. [490].

16. Before granting permission to conduct due diligence under the Regulation in the event of an open offer, the Board of Directors must first establish an informed view on whether the transaction is in the company's best interests. A corporation's actual deal drivers are its managers, and if it approaches them early enough, those directors, who are used to cooked deals and not unplanned ones, won't be in a position to determine whether or not the transaction is in the company's best interest at this point. A

[490] Lalit Kumar, "A major omission in Insider Trading Rules" *The Hindu Business Line,* Nov. 25, 2015.

competing bid may cause the board to delay forming an opinion on whether or not selling by the promoter or a majority shareholder is in the company's best interest. In other words, the board's choice to reveal UPSI will have to be weighed carefully by the directors, who will have to strike a difficult balance between commercial interests and their responsibilities to the firm and shareholders. If the planned transaction does not involve an open offer, the UPSI must be announced two days before it goes through. Deals are frequently made using the market's average price over the previous few weeks. Market dynamics and the entire deal structure change when the UPSI is revealed two days in advance. [491].

17. One of the most notable changes brought forth by the Regulation of 2015 was the designation of UPSI communication as a crime. The 2015 Regulation makes it quite clear that even if no trade occurs as a result of the communication, it is an offence. Companies and huge business houses have found it difficult to keep track of compliance with the Regulation now that they are dealing with thousands of employees and dozens of officials to assure compliance.
18. Using the term "connected person" in the definition of "frequent communication" could have another unforeseen consequence. There is no way to prove your innocence if you traded during a time when a merger or acquisition was imminent even if you communicate frequently with someone who is unrelated to the firm's operation. Because he is in frequent connection with a company representative, this would be a challenging scenario for the individual.
19. For better or worse, rather than clearing things up, the Regulation of 2015 has made things more confusing by emphasizing the need to prove mens rea in insider trading offences. The proviso to Regulation 4(1) of 2015 states that 'providing the insider may show his innocence by demonstrating the circumstances including the following....', followed by a list of admissible defenses that are inclusive or illustrative. In addition to the examples provided in the proviso, the Regulation also authorizes the establishment of innocence. Absence of “mens rea”/intention to commit the crime is implied by the usage of the phrase 'innocence.' As noted in the Regulation's

[491] Amit Desai, Senior Advocate in Panel Discussion titled “New Insider Trading Regulations: Are you guilty?” online available at http://thefirm.moneycontrol.com/news_details.php?autono=1288877.

appendices, however, 'the reason or purpose for which he trades or uses the revenues is not intended to be relevant for evaluating whether the person has breached the regulation'. As a result, they rule out the "mens rea" defence as irrelevant. This appears to be an unusual instance in which the Note and the Regulation conflict and further muddy the waters as to the requirement of "mens rea" in the case at hand.

Solutions Ahead

Even though identifying the problem is the most critical first step in finding a solution, doing so without knowledge of possible solutions can be counterproductive.

SEBI should take into account the following proposals in order to combat the challenges created by insider trading in India:

1. **Education / Training / Awareness –** Raising public awareness about insider trading's dangers and the damage it causes can go a long way toward curtailing this form of fraud. Alternatively, SEBI may publish an insider trading manual (booklet) and distribute it to the appropriate section of the general public either by itself or with the help of various NGOs, stock exchanges, companies or intermediaries etc. and also regularly conduct programmes / discussions/ seminars to raise investor awareness of the harmful effects of such abuses and how to protect themselves. Individuals are not the only ones who are ignorant; there are numerous organisations for which SEBI, as well as the Central Government, firm directors, and staff, must devise strategies for teaching the public about the problem and its ramifications. In addition, firm executives, including those linked with the company, must raise knowledge about the applicable rules and requirements among the company's insiders in order to assure full compliance.
2. **Corporate Governance / Prophylactics** - Companies must work together to ensure efficient application of insider trading regulations from the ground up. Because corporate governance is one of the pillars of effective enforcement against insider trading, organisations must conduct self-regulation and take preventative action. The requirement of the day is for firms to maintain constant vigilance and tight reporting and monitoring of their directors and executives. Each company should have an insider trading code that is impenetrable in its governance framework and ensure strict adherence to it as a first line of defence against insider trading, and the compliance officer should monitor employees' personal trading in accordance with industry best practices and regulations.

3. **Multi-Jurisdictional Insider Trading –** For the local market and investors to be adequately protected from insider trading, it was necessary to change the law and extend the reach of Indian legislation beyond the national territory. This requirement is met in the United States by Section 27 (b) of the Securities Exchange Act of 1934, which gives the regulator additional geographical authority. In dealing with insiders who try to dodge the law by committing the offence from outside of Indian territory, SEBI's extra territorial jurisdiction will help.

Problems such as these can be mitigated by maintaining international collaboration between India and other jurisdictions in the investigation and prosecution of transnational crimes. One method to finding a solution is to follow what the US Securities and Exchange Commission (SEC) has done by entering into agreements with its overseas equivalents for mutual legal aid in securities law violations. India has signed MoUs and MLATs with other nations, however this field necessitates more attention from India, including the signing of additional agreements with other countries.

4. **Bounty -** To find out if insider trading is taking place, SEBI should welcome any tip. It should also urge people to report whatever information they have about current insider trading operations with SEBI. Insider trading scams are discovered when those who provide the Securities and Exchange Commission (SEC) with information about them grant Section 21A(e) of the Securities Exchange Act rewards for information that leads to the discovery of the scam.
5. **Private Right of Action –** The time has come to draught legislation similar to that in the United States, which provides a range of civil remedies for private individuals under Securities Exchange Rules, 1942, Rules 10b-5 and 14e-3, and Sections 16-b and 20a of the Securities Exchange Act. If someone is harmed or suffers losses as a result of insider trading, Indian law should give that individual a private right to seek redress from the insider, which will entail compensating the harmed parties for their losses. As long as the enforcement is left completely in the hands of SEBI, insiders often get off scot-free or are only obliged to pay a little fine, compared to the potential profits they could have made. After all is said and done, the insider has made enough money to be happy.
6. **Consent Order** - It is recommended that the use of consent mechanisms be eliminated in cases of insider trading in order to maintain a sufficient deterrent effect. Other than

limiting the development of insider trading judicial jurisprudence, this strategy does not discourage insiders from engaging in the practice because it leads them to believe that insider trading is associated with low risks.

7. **Judicial –** U.S. law combats insider trading by a strong interplay between legislative and judiciary, both of which show extraordinary flexibility when dealing with diverse regulatory issues relating to insider trading. We must adopt and reproduce this vitality and enthusiasm in our regulatory structure. The Indian judiciary should contribute to the development of insider trading jurisprudence by committing itself to the goal of prosecuting those who engage in the harmful conduct. Until now, the courts and the appeal body have interpreted the legislation in a way that gives the alleged violators a generous benefit of the doubt. SAT has overturned SEBI's rare rulings of guilt in insider trading cases since the case of Hindustan Lever until now, which shows this. The Indian judiciary's attitude to insider trading should be compared to that of the United States, where judges support insider trading convictions based on circumstantial evidence and inflict substantial prison terms in accordance with federal sentencing guidelines.
8. **Merger and Acquisition -** For this reason, India requires a restriction similar to US Rule 14e-3 of the Securities and Exchange Rules, 1942 to pay particular attention to trades made immediately before a merger or acquisition announcement or any other company reorganization is announced.
9. **Media hype -** Insiders and others can be persuaded to refrain from insider trading by hyping up and publicizing situations involving insider trading. Successful insider trading prosecutions in India should be publicized in the media by SEBI.
10. **Mens Rea -** Mens rea, a prerequisite in insider trading prosecution that has been ignored for a long time, must now be stated clearly. According to Indian law, an insider trading violation must have criminal intent or mens rea. “Mens rea” is a need for the crime of insider trading in both the United Kingdom and the United States, but the onus of proof is moved to the defendant to show that he had a different intention when he made the trade.
11. **Clarity as to nature of offence** - However, there is no clear view from SEBI or Indian courts on whether a violation of SEBI Regulation is a civil or criminal offence.

Impact of Insider Trader of Economy.

As mentioned in the research above, Insider Trading directly affects the market cap of the countries stock exchange and securities which in turn affects the countries economy and the country's stock markets reputation. The benefits of trading which the countries people should be receiving a foreign entity will be receiving due to an insider. This will actually impact on the economy indirectly if not directly. One potential damage is the public's perception of financial markets as scams. Perception of unethical trading in the stock markets are one of the biggest stumbling blocks which stop savings flows into the market. When the public lose faith in the stock market and put savings elsewhere, firms cannot raise domestic capital via stock issues and hence will affect the economy.

Insider traders and other speculators with private information are able to appropriate some part of the returns to corporate investments made at the expense of other shareholders. As a result, insider trading **tends to discourage corporate investment and reduce the efficiency of corporate behavior.**

Since most informed speculators must operate as short-term traders an economic penalty applied to short-term trading might be helpful. But much more work remains to be done before firm policy conclusions can be reached.

Some Landmark Cases

In ***Rakesh Agarwal v. SEBI*** [492], Insider trading is a criminal offence, and the SAT proceeded accordingly. However, in the case of ***Cabot International v. SEBI*** [493], A lower court in Bombay ruled that all SEBI Act and Regulations infractions are civil in nature, and the Supreme Court affirmed that decision, while concluding that fines under **SEBI Act Chapter VIA** do not require mens rea for imposition in ***SEBI v. Shriram Mutual Fund and Another*** [494]**.** As a result, opinions on whether insider trading is a civil or criminal offence must be clear and consistent. Insider trading can be prosecuted civilly or criminally in India, depending on whether the fundamentals required to prove the case have been met. In the US, insider selling

[492] (2004) 49 S.C.L. 351 (SAT).
[493] (2004) 2 Comp. L.J. 363 (Bom).
[494] AIR 2006 SC 2287.

is punishable under Section 32 (a) of the Securities Exchange Act of 1934 when the defendant's actions expressly constitute a purposeful breach of the securities felony.

Finally, preventing insider trading is not about a set of rules or filling alleged loopholes. It is about a determination to go after illicit trades. Until SEBI shows it is serious about checking insider trading, the activity will continue to thrive unchecked.

Research Finding

When it comes to dealing with this threat, SEBI and the government have done everything they can by introducing new regulations and increasing their investigative resources, but the expected results of the law have yet to be shown with insider trading still being conducted widely in the capital market. In such a circumstance, the legislation as it currently stands should be updated and evolved in order to make it more deterrent so that insiders are stopped from exploiting secret information in any way feasible, keeping investors' interests and losses in mind.

The term "insider" in the Indian context refers to anyone who has a link to a company, either directly or indirectly, who has access to critical pricing information that has not been publicised. Insiders can be individuals or family with ties to the company, but the most important factor to consider is their access to key price information that has not been released.

A person may be labelled an insider if they have any way to gain access to or obtain undisclosed, price-sensitive information about a certain company or set of companies. To be considered an insider under Indian law, one must have access to and possess previously unpublished, price-sensitive knowledge.

To make the Indian financial system more efficient, certain statutory and other adjustments, as represented in the preceding ideas, are required now more than ever before. Insider trading can be better addressed in India if the above proposals are given proper consideration, and this might help the economy provide fundamental economic services to the investing public, helping to retain investors' trust and confidence in the securities market. The threat of insider

trading, however, threatens to harm the efficiency and integrity of the securities markets if the above proposals are not handled swiftly and the issue is left to time without resolution.

At first glance, the aforementioned initiatives may seem overwhelming, but as John F. Kennedy famously put it, "All this will not be finished in the first hundred days, nor in the first thousand days, nor perhaps in our lifetime on this planet earth, but let us begin!"