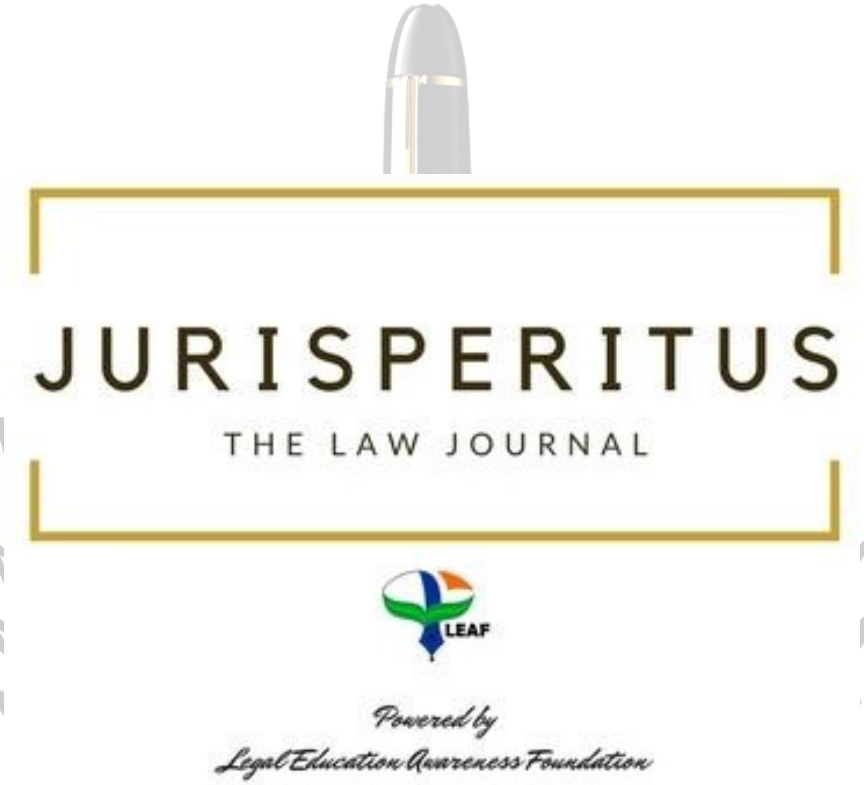

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With this thought, we hereby present to you

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PAROLE- THE REFORMATIVE INSTRUMENT OF PUNISHMENT IN PRISONIZATION

- RASHMI GUPTA

ABSTRACT:

Parole is a social control weapon to the implementation of the reformative or the rehabilitative measures, through which the" humanity" aspect; even towards the criminals is reflected. Prisonisation symbolizes a system of punishment and also a sort of institutional placement of undertrials and suspects during the period of trial. To deal with the criminals, prisons are established; in which the aspect, scope, and ambit of" punishment" prove or can be stated as one of the pivotal instruments or weapons or machinery to treat the criminals. The parole system in the Indian Prison Administration is an agency to transform our prisons into rehabilitative institutions wherein the prisoners are treated humanely and wherein one's personality is nurtured and is trained to transform oneself from a criminal into a responsible citizen of our country. Parole is an integral part of the correctional process. It is a kind of consideration granted to the prisoners to help them to come back into the mainstream of life. It is nothing but an instrument of social rehabilitation of the prisoner. The Government of India is legislating as well as trying to execute further reforms in the Parole System for the upliftment of humanity amongst the prisoners to prove it to be a strong weapon of rehabilitation.

KEYWORDS: Parole, Prisoners, Prisonisation, Rehabilitation, and Welfarism

INTRODUCTION:

Those of us who have had to inspect a jail where executions are carried out have firsthand knowledge of the agony and horror that a condemned prisoner undergoes every day. The very terminology used to identify such prisoners, death-row inmates, or condemned prisoners, with their even more explicit translations in the vernacular– tend to remind them of their plight every moment of the day. In addition to the solitary and lack of privacy concerning even the daily ablutions, the rattle on the cell door heralding the arrival of the jailor with the prospect as the harbinger of bad news, a condemned life a life of uncertainty and defeat. In one particular

prison, the horror was exacerbated as the gallows could be seen over the wall from the condemned cells. The effect on the prisoner on seeing this menacing structure each morning during their daily exercise in the courtyard, can well be imagined."[1] Parole is a social control weapon to the implementation of the reformative or the rehabilitative measures, through which the "humanity" aspect; even towards the criminals is reflected. It is a welfare mechanism to the prisoners that even amid the purview of punishments and its sufferings, it helps in maintaining and implementing the minimal aspects of fraternity, equality, liberty, justice, and democracy[2]; within the ambit of the Indian Jails or the Indian Prisons; (in our country India.)

There can't be a society without crimes. Man essentially is a fighting creature, thus to think about a crimeless society is meaningless. Talking, there is no society without the issue of wrongdoing and wrongdoers. Since the time the beginning of human progress wrongdoing has been an astounding issue. There is not any society that isn't assailed with the issue of wrongdoing. A society made out of people with saintly characteristics would not be liberated from infringement of the standards of the society. truth be told, wrongdoing is a powerful idea changing with the social change. It is contended that wrongdoing is an important component of each society as it is a key state of social association. Various gatherings have variable and regularly inconsistent interest in the society which offer ascent to clashes in the end bringing about the frequency of wrongdoing. The idea of wrongdoing is worried about the social request. Notably, man's advantages are best secured as an individual from the local area. Everybody owes certain obligations to his men and simultaneously has certain rights and advantages which he anticipates that others should guarantee for him. This feeling of common regard and trust for the privileges of others controls the direction of the citizenry bury se. Albeit a great many people trust in "fall back on toleration when in doubt" guideline yet there are a rare sorts of people who, for reasons unknown or the other, stray from this ordinary standard of conduct and partner themselves with against social components. This forces a commitment on the state to keep up the harmony, security, and regularity in the society. The exhausting undertaking of securing the honest residents and rebuffing the crooks vests with the state which performs it through the instrumentality of law. Laws are the guidelines of activities managing the direction

[1] Supreme CourtYearly Digest 2009, Justice H.S. Bediin Jagdish v. State of Madhya Pradesh (2009) 9SCC495 Para 53.
[2] Constitution of India 1950.

of people in the public arena. The behaviors which are made passable under the law are treated as legitimate. The miscreant carrying out wrongdoing is rebuffed for his blame under the Rule that everyone must follow.

Thus it can be stated that, The Institution of Prison is indispensable for every country (India) to punish, the convicted criminals and maintain law and order, peace and security, and a balanced ambiance in a country.

Prisonisation symbolizes a system of punishment and also a sort of institutional placement of undertrials and suspects during the period of trial[3]. Since there cannot be a society without crime and criminals, the institution of prison is indispensable for every country. According to Oxford English Dictionary, the term 'Prison' means a building used to confine criminals or people awaiting trial; and the term 'Prisoner' means a person kept in prison or a person captured and kept confined; respectively. Prisoner is generally used to imply the criminals in context to the Prison System of a country (India). Again according to Oxford English Dictionary, the term" Criminal" means a person who has committed a crime. Howard Becker, an American Sociologist[4] labeled the criminals / the lawbreakers as 'outsiders'.Howard Becker (1963) developed his theory of Labelling (also known as Social Reaction Theory) on the assumption that people are likely to engage in rule-breaking behavior as essentially different from the members of rulemaking or rule-abiding society. The lawbreakers see themselves at odds with those who are law-abiding. Becker labels the lawbreakers as 'outsiders' and holds the view that they accept the label attached to them and they begin to view themselves as different from the 'mainstream' of the society. Thus, similarly, Frank Tannenbaum and Edwin Lemert have also stated some aspects of the 'deviance' by the deviants i.e. the criminals.

To deal with the criminals the prisons are established; in which the aspect, scope, and ambit of 'punishment' proves or can be stated as one of the pivotal instruments or weapons or machinery to treat the criminals. According to Oxford English Dictionary, the term punishment means imposing of penalty on someone for an offense. Thus, it can be regarded that, the concepts of criminals (outsiders/deviants), prison, and punishment are very much interlinked and

[3] P. D. Sharma – PoliceandCriminal JusticeAdministrationin India (1985) 145.
[4] The Labelling Theory and (its perspective) – Propounder.

interdependent to one another to maintain and preserve a disciplined, peaceful, lawful, and just society.

To punish criminals is a recognized function of all civilized countries for centuries. But with the dynamism pattern of the society, the very approach of the penologists towards punishment has also undergone a radical change. The penologists today are concerned with the crucial problem, regarding the very 'end of punishment' and its place in the penal policy. Though there are various opinions regarding the aspects of punishments of the offenders from the traditional times to recent modernism, practically and broadly stating, there are four types of views that can be distinctly found to be in action or are prevalent. Modern penologists refer to them as 'the theories of punishment.' They are as follows:

1. The Deterrent Theory.
2. The Retributive Theory.
3. The Preventive Theory.
4. The Reformative or the Rehabilitative Theory.

Thus, the prison may serve to deter the offender or it may be used as a method of retribution or vengeance by making the life of the offender miserable and difficult. The isolated life in the prison and the incapacity of inmates to repeat crime in the prison fulfill the preventive purpose of punishment. That apart, prison may also serve as an institution for the reformation and rehabilitation of the offenders.[5]

The disposition of society towards detainees may differ as per the object of discipline and social response to wrongdoing in a given local area. If the detainment facilities are intended for requital or discouragement, the condition inside them will be reformatory in nature perpetrating more prominent agony and enduring and forcing extreme limitations on detainees or detainees. Then again, if the jail is utilized as a foundation to regard the criminal as a degenerate, there would be lesser limitations and power over him inside the organization. Nonetheless, the advanced reformist view sees wrongdoing as a social illness and favors treatment of guilty parties through non-correctional strategies, for example, probation, parole, open prison, and so on[6]

[5] Prof.N. & V.Paranjape ,Criminology and Penology with Victimology.
[6] Ibid.

All things considered, Parole has arisen as quite possibly the most adequate type of restorative gadget in present-day penology. It has been generally perceived as quite possibly the most proper strategy for the treatment of wrongdoers for their renewal and restoration in the typical society after the last delivery. Moreover, it extensively helps in diminishing congestion in detainment facilities. One of the proper strategy for detainees to have the option to enter the local area and take an interest in useful work is to deliver them on parole. Even though there is consistently a risk for the general public concerning the ex-detainees' conduct and disposition; parole is one such gadget that tries to secure society and help the ex-detainee in re-changing himself to an ordinary free-life locally.

"Thus, parole has a dual purpose, namely, protecting society and at the same time bringing about the rehabilitation of the offender."

THE CONCEPT OF PAROLE:

Historically, parole is ac concept known to military law and denotes the release of a prisoner of war on promise to return. These days parole has become an integral part of the Anglo-American criminal justice system, intertwined with the evolution of changing attitudes of the society towards crime and criminals. Parole has resulted to be a pivotal part of the prison administration in the developed and the developing countries of the world. In case of parole, part of the sentence/imprisonment is served and it is then the convict is released on parole on condition of good behavior and if he is found to have improved and has abstained from criminal conduct, he gets remission of the rest of the sentence and for some time at least a part of the sentence.[7] Parole is based on the principle of individualization of treatment of offenders and includes a program of guidance and assistance to the delinquents i.e. the prisoners who are sentenced with imprisonment.

Parole is also known as a pre-mature release of offenders after a strict scrutiny of long term prisoners, under the rules laid down by various governments. Premature release from prison is conditional subject to his behaving in society and accepting to live under the guidance and supervision of the parole officer. The conditional release from prison under parole may begin any time after the inmate has completed at least one- third of the total term of his sentence but

[7] J.P.S. & Sirohi, Criminology and Penology.

before his final discharge. Parole is an act of grace and it is not a matter of right. The Supreme Court in *Smt. Poonam Latav. Wadhaman & others*[8]. It is stated that parole is a grant of partial liberty or lessening of restrictions to a convicted prisoner, but released on parole does not in any way, change the status of the prisoner. It is a provisional release from confinement but is deemed to be a part of the imprisonment. "*Parole is the process in the prison administration which is necessarily intertwined with the aspect of imprisonment."* It seems the word 'Parole' which means "*a term to designate conditional release granted in a penal institution*" in the encyclopedia of the social sciences, is used in different senses in different *States of India*. The States of Uttar Pradesh, Madhya Pradesh, Punjab, and Haryana have legislation on this subject. A set of Parole Rules have been framed sometimes ago by the Crime Advisory Board on correctional services to preserve a basic uniformity of approach in the country.[9]

PAROLE DISTINGUISHED FROM FURLOUGH:

It can be distinctly stated that parole and furlough are the parts of the penal and the prison system for humanizing prison administration but the two have different purposes. The distinctions are as follows:

1. Parole is a matter of grace whereas furlough is a matter of right (although not an absolute right as it is allowed periodically). Furlough is to be granted to the prisoner periodically irrespective of any particular reason merely to enable him to retain family and social ties and avoid the ill- effects of continuous prison life. But, on the other hand, it is not so in the parole system. Parole can be denied to the prisoner if the parole board consisting of the parole officers after supervising (like the prisoners' behavior, attitude, etc.) finds out that his release on parole would cause a threat to the security of the society. "*For instance, Sanjay Dutt who is convicted in the Bombay Blast Case, has been sent to the prison for punishment and it is found that the has been granted 'furlough' and it is not the parole."* Furlough is to be granted to every prisoner irrespective of any reasons or supervision, without even because priorly inmate has already been released on parole for once[10]. (But, for the sake of the security of the society, sometimes even furlough can be rejected on the rarest of the rare case.)

[8] Smt. Poonam Lata v.Wadhaman & others AIR1987 SC1383.
[9] Journal of Social Defence, 1972, 13.
[10] Bhikhabhai Devshi v. State of Gujarat, AIR1987 Guj. 136.

2. The period spent on furlough is treated as a period spent in the prison. But it is not so concerning parole. The period spent on parole is not counted as remission of sentence. (As decided in *State of Maharashtra and v. Suresh Pandurang Darvekar*.[11])

HISTORICAL BACKGROUND:

The 'Parole framework' in the jail organization developed in relationship with crafted by various people who headed the various detainment facilities of the better places/nations of the world during the time frames from 1840s to 1867. They incorporate Alexander Maconochie, Brockway Zebulon, and Walter Crofton. Initially, the idea of parole in the jail organization was first presented based on the idea/measure known as 'ticket of leave' allowed to the then detainees as a system of communicating the humankind feelings towards the purported people the detainees from the four dividers of the jailor jail cells. The 'Parole framework' in the jail organization initially started in an arrangement worked out by Alexander Maconochie (who was the Governor of the Norfolk Island Prison which is situated off the shore of Australia) in the year 1840. When Alexander Maconochie was filling in as the Governor of the Norfolk Island Prison the conditions in this corrective province was so terrible particularly for the individuals who were serving life term detainment, consequently, a jail structure was presented whereby the detainees who showed up in the prison were first put under severe detainment with exacting observation, and afterward the detainee was allowed a ticket of leave which he procured through his great conduct and work. Subsequently, *Walter Crofton* (who was the Governor of the Irish Prison) has introduced the parole system in the prison administration in the year*1854.*

Furthermore, the parole system in the United States of America was introduced by *Brockway Zebulon* (who ran the Elmira penitentiary in New York) in the year *1867.* He introduced the parole system in the prison administration of the United States to reduce the overcrowding in the prisons (jails) and at the same time used it as an instrument to rehabilitate prisoners by encouraging them to make their way out of the prison through their good behavior.[12] Parole in

[11] State of Maharashtra and anr v. Suresh Pandurang Darvekar. AIR 2006 SC 247.
[12] Barnes and Teeters, New Horizons in Criminology, 566-567 (3rdEdn.).

its developed form was first adopted by New York State in the law of *1869* authorizing the Elmira Reformatory.

Thus, it can be stated that *Alexander Maconochie, Brockway Zebulon, and Walter Crofton* were the pioneers in advocating the concept/the system of parole, in the prison administration. With the march of time, in the subsequent years the various other countries of the world like that of our very motherland *India,* has borrowed the concept of the parole system in the jail/prison administration; from the parole system administered in the prisons of Ireland, England and the United States of America; to shower the humanely- touch towards the prisoners who in reality experience the most depressing and horrified sufferings in the jails. (Jails are considered to be one of the most mysterious section of the prison system.[13]

EVOLUTION OF THE CONCEPT OF PAROLE IN THE JURISPRUDENTIAL CONTEXT:

The concept of parole has its birth root in *the Positivist School or the Analytical School of Jurisprudence* which confines to the study of law as it exists i.e. positus[14]. The Positivist School of Jurisprudence opined that the people are free to choose their conduct. While committing any crime, an offender always calculates his gain, his pleasure; at the cost of other's pain. So he must be *punished* based on *the Utilitarian principle i.e. "the greatest happiness of the greatest number of people in the society; and the maximum pleasure to be enjoyed and minimum paint of suffered by the people"*[15].But the Positivist School argues that based on different circumstances an individual is forced to commit a crime. So, he must get an opportunity to be rehabilitated. Thus, from this view; the thought of the concept of parole has developed, or on the other hand; it can be stated that "*the womb of the concept of parole is there habilitative or the reformative aspect of punishment."* It provides a second chance to the prisoner to rehabilitate himself. The offender might have committed an offense, but it is not desirable or reasonable that he must always be labeled as an outsider [16] or a deviant[17] must not be given many chances to rehabilitate himself. Its objectives are twofold: the rehabilitation of the

[13] Sutherland and Cressey.: Principles of Criminology, 568 (6th Edn.).
[14] Barnes and Teeters, New Horizons in Criminology, 329 (3rd Edn.).
[15] J.L.Gillin.: Criminology and Penology, 339 (3rd Edn.).
[16] Edition Taft and England: Criminology, 485, (4th Edn.).
[17] Sutherland and Cressey.: Principles of Criminology, 575. (6th. Edn.).

offender and the protection of society. It is a means of helping the inmate to become a law-abiding citizen, while at the same time ensuring that he does not misbehave or commit crimes.

DEFINITION OF PAROLE:

The term parole has been defined at different times by different scholars. As defined by *J.L. Gillin*," parole is the release from a penal of reformative institution, of an offender who remains under the control of correctional authorities, in an attempt to find out whether he is fit to live in the free society without supervision. It is the last stage of the correctional scheme of which probation may probably be the first and foremost one. Again another criminologist named, *Donald Taft* characterizes parole as a release method that retains some control over prisoners, yet permits them more normal social relationships in the community and provides constructive aid at the time they most need it. According to him, Parole is a release from prison after part of the sentence has been served, the prisoner remaining in custody and under stated conditions until discharged, and liable to return to the institution for violation of any of these conditions.[18] Further, *Dr. Sutherland* considers parole as the liberation of an inmate from prison or a correctional institution on the condition that his original penalty shall revive if those conditions of liberation are violated.

With the introduction of parole into the penal system, all fixed-term sentences of imprisonment above eighteen months are subject to release on license. It is an act of grace and the convicted prisoner may be released on condition that he abides by the promise to return. "*There lease on parole is considered to be an instrument for the implementation of the reformatory process in respect to the prisoners to provide them with the opportunity to transform them into the law-abiding citizens of the country (India).*"

PAROLE IN INDIA:

Jail is one of the most mysterious section of the prison system. The prisons were present thousands of years back from today, but before the eighteenth century, they were seldom used to incarcerate convicted offenders. The surroundings and the very environment of the prisons were very dehumanizing where imprisonment presented different objectives of punishment

[18] Bhikhabhai Devshi v. State of Gujarat, AIR1987 Guj.136.

such that of deterrence, retribution or vengeance and prevention. In India, the prison reforms emerged as an outcome of the worst conditions of treatment faced by the inmates in prisons during the period of their imprisonment. With the march of time and with the dynamic nature of the society, the reformative trend was gaining momentum in the field of penology all around the world and it paved the way to the cause of correctional method of treatment of offenders in India. It was realized that confining the convicts in the closed prison cells hardly serves any purpose. Numerous protests were held to develop the jails of India into a humane place to live in and to dispense justice to the prisoners concerning their violation of human rights. It was only that during the latter half of the twentieth century the significant reforms in the prison administration of India could be felt and experienced.

With the development in the planned penal program in our country India; the concept or the process of parole system has been introduced which seems to conform with the existing Indian penal laws. Thus, in the Indian prison system, the concept, nature, and scope of parole has proved to be a very successful mechanism of social control in society and it has also proved to be an aid in promoting the reformative aspect of punishment; and mold up the criminals into a responsible and law-abiding citizen of the country. The criminals are to be treated rather than to be punished. Moreover, parole has been utilized as a weapon to narrow down the gap between prison life and the free life of the outside world.[19]

Thus, parole is a constructive device used in the Indian Prison Administration in the present context of the society.

THE OBJECT OF PAROLE:

"*A door separates them from the world outside. They watch the dark, moonless sky; the only link between them and the other world. Years of waiting, life could end here, far from civilization and the world where they were born. Their identity a serial number*"- Kumkum Chadha…

[19] Hand Book on Pre- Release Preparationon Correctional Constitutions, New York, American Correctional Association, 1950.

In such a dehumanizing environment; parole is a penal device that seeks to humanize prison justice. It enables the prisoner to return to the outside world on certain conditions. The main objectives of parole technique as stated in the Model Prison Manual are:

1. To enable the inmate to maintain continuity with his family and deal with family matters;
2. To save the inmate from the evil effects of continuous prison life;
3. To enable the inmate to retain self-confidence and active interest in life.[20]

The main object of parole is to adjudge the adjustability of responsive inmates to normal society by offering them suitable opportunity to associate themselves with the outside world.

CONDITIONS OF PAROLE:

The main purpose of parole is not to express leniency towards the prisoner but to seek his rehabilitation in future life. Parole is a rehabilitative phase of law enforcement. The system essentially involves two considerations, namely:

1. Watchful control over the parolees (the prisoners who are granted the ticket of leave from the prison) so that he could be returned to prison institution from which he was paroled out if the interest of the public security so demanded; and
2. Constructive help and advice to parolee by securing him suitable work to develop self-confidence in him and finally to guard him against exploitation.

FUNDAMENTALS OF A GOOD PAROLE:

"*Release on parole is a wing of reformative process and is expected provide opportunity to the prisoner to transform himself into a useful citizen*" The fundamental process which is to be followed for a good parole system are:

Preparation The preparation for parole must start from the moment the convict sentenced with imprisonment enters the prison. In the institution of prison, there must be a trained staff which includes social workers, psychiatrists, psychologists, and others concerned with the task of understanding the prisoners through which the preparation for parole usually resumes to function immediately and systematically. The American Correctional Association has compiled a handbook dealing with pre-release preparation for parole consideration.

[20] Sutherland and Cressey.: Principles of Criminology, 586, (6th edn.).

Parole Section An ideal selection method is a necessary ingredient for a good parole system. A prisoner who is to be set free on parole is to be very careful and reasonably selected. It is an aspect in the (Indian) Prison Administration that every prisoner should be released sometime before the expiration of maximum sentence, intending to provide an opportunity to the prisoners to mold up their personality to adjust with the outer world after he leaves the prison institution. Except under certain circumstances (i.e. he is either broken in spirit or deeply embittered against society) the inmate becomes a social liability and he is denied parole.

Supervision Supervision is another vital method for a successful parole system. The very crux of a successful parole is supervision. The supervision of a parolee is a sine qua non for a productive parole system in prison administration (India.) There are the parole officers who are entrusted with the responsibility to supervise the parolees; concerning provide help, counsel and guide the parolees/ clients throughout the parole mechanism. The parole officers wear the shoe of the policemen in context to the aspect that the parole officers have to keep an eagle's eye regarding the occurrence of the parole violations by the parolees which aids in maintaining a healthy and optimistic parole system. Similarly, sometimes the parole officers must treat the parolees as their friends in need, or sometimes must play the role of an advisor who thoroughly understands the individual parolee's problems arising therefrom his term in the prison. The real challenge of the officers in the field of supervision of the parolees is their capacity to make the parolee/client fit for rehabilitation in the community.

An ideal parole system transforms a criminal/prisoner into a reformed human being without hampering the security and welfare in a country like India. The combination of both supervision and assistance (by the parole officers through the parole board) is inevitable for the implementation of an ideal parole system. The functioning of the concepts of supervision and assistance are very much interdependent with one another for the proper implementation of the parole system in the prison administration. Excessive supervision over parolees without proper guidance would virtually mean that the parole authorities are performing the police functions of keeping a close watch on the prisoner under threat of punishment taking it for granted that the parolees would repeat the crime if not kept under surveillance. Conversely, assistance to parolees without proper supervision will also yield poor results. It is erroneous to think that the parolees came from themselves merely by affording them easy freedom. It is a part of the parole

officer's duty to ensure that the parolee makes the best use of the opportunities placed before him after his release from prison. While handling the parolees, priority must be given to the protection of the country against crime rather than the undue leniency towards the parolees.

CONTROL OVER THE PAROLE VIOLATION:

It is human nature, to commit mistakes. There is a famous saying that "*To err is human"*. In such a circumstance; the prisoner being a human may at times deviate himself from the conditions on which he was released, the outcome of which is the parole violation and he is liable to be returned to the prison from where he was paroled out. To implement the parole system reasonably, judiciously, and constructively there must be the provision of the control mechanism over the scenario of violation of the parole system.

The procedure to be followed when the conditions of parole are violated

At first, a warrant of arrest is issued and served to the parole- violator and he is arrested and brought back to the prison by the parole authorities without the necessity of a fresh trial in his case. "*He is then given a "parole violation hearing" and is offered every opportunity to defend his case in person or through a counsel"*[21]. If he unable to justify his conduct, he is made to undergo the unexpired term of his sentence. If he has violated parole conditions by committing another crime, then concerning that case, he shall be tried for the new offense and sentenced accordingly[22]. But he shall not be granted the opportunity to receive the ticket to leave for the second time i.e. while undergoing a term of sentence for his subsequent offense. In India, it is provided that if any prisoner fails without sufficient cause to observe or follow any of the conditions as laid down by the Parole Board on which the release on parole is granted to him, he shall be deemed to have committed a prison offense under Section 48-A of the Act.[23] Such parolees shall be proceeded against under the appropriate law for the parole – violation.

To prove the parole system as one of the essentials' in the Indian Prison Administration; the control mechanism at the times of parole violation is of great necessity. Thus, the parole system in the Indian Prison Administration is an agency to deal with the dehumanizing state of an

[21] Principle of Natural Justice is implemented.
[22] The Constitution of India 1950, Art. 20(2).
[23] The Prisons Act (IX of 1894), Sec. 48-A.

environment wherein the prisoners' human rights are being violated daily and wherein the inmates undergo extreme harshness and sufferings in the jails or prisons (India).

CONCLUSION AND SUGGESTIONS:

Thus, parole is a system and a constructive device used in the Prison Administration for the reformation and rehabilitation of the prisoners which was evolved and developed particularly in the prisons of Ireland, England, and the United States of America long years back. Further with the march of time it has been developed and adopted in the Indian Prison Administration as an agency to deal with the dehumanizing state of an environment wherein the prisoners' human rights are being violated daily and wherein the inmates undergo extreme harshness and sufferings in the jails or prisons (India); thus maintaining humanism and welfarism in our egalitarian society.

The parole system in the Indian Prison Administration is an agency to transform our prisons into rehabilitative institutions wherein the prisoners are treated humanely and wherein one's personality is nurtured and is trained to transform oneself from a criminal into a responsible citizen of our country.

In India, The Government of India has to legislate as well as execute further reforms in the Parole System for the upliftment of humanity amongst the prisoners to prove it to be the strong weapon of rehabilitation. Certain strong guidelines have to be laid down to execute the parole system in a very progressive manner. Parole is an integral part of the correctional process. It is a kind of consideration granted to the prisoners to help them to come back into the mainstream of life. It is nothing but an instrument of social rehabilitation of the prisoner in the ambit of prisonization.

HUMAN RIGHTS OF SENIOR CITIZEN

- PREM PRAKASH

Older adults are the fastest-growing segment of the population and this is not expected to change anytime soon. With baby boomers now in their retirement years and living longer than previous generations, we're entering a new era that requires much more planning for our aging citizens. And with people living much longer than ever before, we know that health care for seniors will be an important issue as we head into the future.

Many of us don't realize how much these issues will affect our lives as well as those around us. Luckily, there are things you can do to help advocate for senior rights now so that one day you can live comfortably in your retirement years too! Here are some ways to help strengthen the rights of our senior citizens.

1. Help seniors live in dignity

One of the best ways to advocate for senior rights is to make sure they live in dignity. This includes ensuring that seniors have access to quality, affordable housing, transportation, food, and healthcare. The number of people over 65 will soon equal the number of children under 18 in the US. Making sure these seniors are living in dignity will be a challenge for everyone involved.

If you want to help promote this cause through your business or personal work, there are many ways you can do so. You could volunteer at a local nonprofit organization that helps seniors find housing or donate money to organizations that do this work. There are also many other ways you can help. For example, you could donate old clothes so that seniors have something nice to wear or give them rides to get their prescriptions filled.

2. Planning for the future

The first step is to understand the importance of long-term care and make a plan for yourself or your loved one. For seniors who need help with daily tasks like bathing, dressing, and cooking, it's important to make arrangements for care now. If you still work and could put off retirement, you may want to consider not doing so and instead working part-time. This will provide stability for your family as well as give you more time to spend with your loved ones.

Additionally, if you don't work full-time, find ways to volunteer in the community. This could be anything from helping at a local nursing home to organizing activities for seniors in your area.

Consider these actions before we hit 2040 when older adults will surpass children as the largest living generation!

3. Protecting seniors' rights

As a society, we need to be more aware of the rights of seniors and do our best to protect those rights now. This is the only way we can ensure that we will have secured these rights for ourselves in the future.

If you know someone who is nearing retirement age, it's important to start talking about these issues with them today so they're prepared for what comes next. It can also help them to learn more about how they can better advocate for themselves and their peers as we move into this new era of life and healthcare.

The first step you can take today is educating yourself on senior citizens' legal issues by reading up on relevant legislation and understanding the legal system as it stands for seniors. Resources like the National Council on Aging's Legal Guide For Seniors are helpful in this regard, as it provides information such as the difference between Social Security benefits and Social Security Disability Insurance (SSDI) benefits, ways retirees may qualify for SSDI, and seeking free legal advice from your state attorney general's office.

We also want to make sure we're doing our part in advocating for senior citizens' rights now by voting appropriately and contacting legislators about these important issues. Remember: aging happens all at.

4. Keeping seniors healthy

In order to help seniors, stay healthy and age comfortably, we need to make sure they have access to quality health care and nutrition.

Many seniors still think of Medicare as their only option for healthcare. But there are plenty of different options out there, whether it's Medicare or a private insurance plan. And with the right care and attention, seniors can live healthier lives for many more years to come.

Moreover, food insecurity is also a major problem among our aging population. This means that many seniors do not have enough money or access to food that meets their nutritional needs. So, it's important that we take steps now to ensure that every senior has the chance to eat well and maintain a healthy lifestyle after retirement.

Ways to advocate for senior citizens now so you don't have to in the future:

There are so many ways to get involved with the senior rights movement and it's important for everyone to do their part. But how can you get started? Here are a few things you can do today:

1. Sign up for an advocacy group in your area and attend meetings.
2. If there isn't an advocacy group in your area, start one yourself.
3. Change your Facebook profile picture to the #LivingLonger logo
4. Write a letter to your local representative about the importance of protecting senior citizen rights.
5. Share this post with at least one person who will be interested in learning more about this issue.

National Efforts:

1. Constitutional Protection:

Art. 41: Right to work, to education and to public assistance in certain cases: The State shall, within the limits of economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Art. 46: Promotion of educational and economic interests of …… and other weaker sections: The State shall promote with special care the educational and economic interests of the weaker sections of the people...and shall protect them from social injustice and all forms of exploitation.

However, these provisions are included in the Chapter IV i.e., Directive Principles of the Indian Constitution. The Directive Principles, as stated in Article 37, are not enforceable by any court of law. But Directive Principles impose positive obligations on the state, i.e., what it should do. The Directive Principles have been declared to be fundamental in the governance of the country and the state has been placed under an obligation to apply them in making laws. The

courts however cannot enforce a Directive Principle as it does not create any justiciable right in favour of any individual. It is most unfortunate that state has not made even a single Act which are directly related to the elderly persons.

2. Legal Protections: Under Personal Laws:

The moral duty to maintain parents is recognized by all people. However, so far as law is concerned, the position and extent of such liability varies from community to community.

i. Hindus Laws:

Amongst the Hindus, the obligation of sons to maintain their aged parents, who were not able to maintain themselves out of their own earning and property, was recognized even in early texts. And this obligation was not dependent upon, or in any way qualified, by a reference to the possession of family property. It was a personal legal obligation enforceable by the sovereign or the state. The statutory provision for maintenance of parents under Hindu personal law is contained in Sec 20 of the Hindu Adoption and Maintenance Act, 1956. This Act is the first personal law statute in India, which imposes an obligation on the children to maintain their parents. As is evident from the wording of the section, the obligation to maintain parents is not confined to sons only, and daughters also have an equal duty towards parents. It is important to note that only those parents who are financially unable to maintain themselves from any source, are entitled to seek maintenance under this Act.

ii. Muslim Law:

Children have a duty to maintain their aged parents even under the Muslim law. According to Mulla:

a. Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.
b. A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.
c. A son, who though poor, is earning something, is bound to support his father who earns nothing.

According to Tyabji, parents and grandparents in indigent circumstances are entitled, under Hanafi law, to maintenance from their children and grandchildren who have the means, even

if they are able to earn their livelihood. Both sons and daughters have a duty to maintain their parents under the Muslim law. The obligation, however, is dependent on their having the means to do so.

iii. Christian And Parsi Law:

The Christians and Parsis have no personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under provisions of the Criminal Procedure Code.

3. Under The Code of Criminal Procedure:

Prior to 1973, there was no provision for maintenance of parents under the code. The Law Commission, however, was not in favour of making such provision.

According to its report:

The Cr. PC is not the proper place for such a provision. There will be considerably difficulty in the amount of maintenance awarded to parents apportioning amongst the children in a summary proceeding of this type. It is desirable to leave this matter for adjudication by civil courts.

The provision, however, was introduced for the first time in Sec. 125 of the Code of Criminal Procedure in 1973. It is also essential that the parent establishes that the other party has sufficient means and has neglected or refused to maintain his, i.e., the parent, who is unable to maintain himself. It is important to note that Cr.P.C 1973, is a secular law and governs persons belonging to all religions and communities. Daughters, including married daughters, also have a duty to maintain their parents.

4. Governmental Protections:

1. The Government of India approved the National Policy for Older Persons on January 13, 1999 in order to accelerate welfare measures and empowering the elderly in ways beneficial for them. This policy included the following major steps :

(i) Setting up of a pension fund for ensuring security for those persons who have been serving in the unorganized sector,

(ii) Construction of old age homes and day care centers for every 34 districts,

(iii) Establishment of resource centers and reemployment bureaus for people above 60 years,

(iv) Concessional rail/air fares for travel within and between cities, i.e.,30% discount in train and 50% in Indian Airlines.

(v) Enacting legislation for ensuring compulsory geriatric care in all the public hospitals.

2. The Ministry of Justice and Empowerment has announced regarding the setting up of a National Council for Older Person, called age well Foundation. It will seek opinion of aged on measures to make life easier for them.

3. Attempts to sensitize school children to live and work with the elderly. Setting up of a round the clock help line and discouraging social ostracism of the older persons are being taken up.

4. The government policy encourages a prompt settlement of pension, provident fund (PF), gratuity, etc. in order to save the superannuated persons from any hardships. It also encourages to make the taxation policies elder sensitive.

5. The policy also accords high priority to their health care needs.

6. According to Sec.88B, 88D and 88DDB of Income Tax Act there are discount in taxfor the elderly persons.

7. Life Insurance Corporation of India (LIC) has also been providing several scheme forthe benefit of aged persons, i.e., Jeevan Dhara Yojana, Jeevan Akshay Yojana, Senior Citizen Unit Yojana, Medical Insurance Yojana.

8. Former Prime Minister A.B.Bajpai was also launch ‘Annapurana Yojana’ for the benefit of aged persons. Under this yojana unattended aged persons are- being given 10kg food for every month.

9. It is proposed to allot 10 percent of the houses constructed under government schemesfor the urban and rural lower income segments to the older persons on easy loan.

The policy mentions:

The layout of the housing colonies will respond to the needs and life styles of the elderly so that there is no physical barriers to their mobility; they are allotted ground floor; and their social interaction with older society members exists.

Despite all these attempts, there is need to impress upon the elderly about the need to adjust to the changing circumstances in life and try to live harmoniously with the younger generation as for as possible.

It may be pointed out that recently the Madurai Bench of the Madras High Court has ruled that the benefits conferred on a Government employee, who is disabled during his/her service period, under Section 47 of Persons with Disabilities (equal opportunities, protection of rights and full participation) Act, 1995 cannot be confined only seven types of medical conditions defined as 'disability' in the Act. The seven medical conditions are blindness, low vision, leprosycured, hearing impaired, locomotor disability, mental retardation and mental illness. A Division Bench comprising Justice F.M.Ibrahim and Justice K.Venkataraman said : "We feel that the court cannot shut its eyes if a person knocks at its doors claiming relief under the Act. In a welfare State like India, the benefits of benevolent legislation cannot be denied on the ground of mere hyper technicalities. It may be noted that this Act is not directly related to aged person but seven medical conditions which prescribed in this Act are the common symptom of the aged person.

Need For A Change In Approach:

In the older times, after the completion of 50 years of life, one had to detach oneself from the responsibilities of a 'Grihastha' and switch over to the third stage of human life which was known as 'Vanpristha' which referred to the devotion of the next 25 years of life by the 'Vanpristhi' by mana, vachana and karma to the selfless service of the suffering humanity and the larger society in return to the services received form society during the first 50 years of life.

Certain strategies and approaches at different levels of policy making, planning and programming etc. will have to be adopted in order to harness this vast human resource for promoting the involvement and participation of senior citizens in socioeconomic development process on a much larger scale.

This participation must result in an end to their social isolation and an increase in their general satisfaction with their life. Any attempt to secure the help of the elderly in offering their service to the nation must simultaneously ensure some sort of package of services aimed at arranging for them a better quality of life and a well-designed social security network for the senior citizen. The society and the state in India need to accept the challenge of their effectively focusing their attention on the following twin issues of:

(i) How to provide a fair deal to the senior citizens so that they are able to peacefully, constructively and satisfactorily pass their lives; and

(ii) How to utilize the vast treasure of knowledge and rich life experience of the older people so that they are able to utilize their remaining energies and contribute to the all- round development of their nation.

Palliative Care: Need of the hour : According to a pilot survey, 70% of city's elderly population is undergoing some kind of medication. The average spending per day ranges between Rs. 3 to 200. However, nearly half of the money goes waste. The reason is absence of proper palliative care in the country. World Health Organization has marked October 7 as a day to create awareness about the importance and need for hospice and palliative care. "Access to the best quality care, while facing terminal illness is a human right. Ironically, many people in the world are denied this right. The bitter side is that government in many countries does not even realize the important of this right" said geriatric physician Dr. Abhishek Shukla.

Conclusion

It may be concluded by saying that the problem of the elderly must be addressed to urgently and with utmost care. There is urgent need to amend the Constitution for the special provision to protection of aged person and bring it in the periphery of fundamental right. With the degeneration of joint family system, dislocation of familiar bonds and loss of respect for the aged person, the family in modern times should not be thought to be a secure place for them. Thus, it should be the Constitutional duty of the State to make an Act for the welfare and extra protection of the senior citizen including palliative care. There are various problems faced by senior citizen of our country like lack of proper care, good medication and negligence from the part of family members as well as the society and various acts which may affect even their life and property as well. Government has implemented various schemes and projects like pension scheme in favour of the senior citizens of the society. Above all such benefits, they are in need of love, care and affection from their relatives and the society. We have to just keep this in our mind that our attitude towards them should be positively changed so that they also will have a better tomorrow. Democracy is for all and should be for all.

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THE VULNERABILITY OF INDIGENOUS PEOPLE DUE TO CLIMATE CHANGE

- DR. ARTI ANEJA

ABSTRACT

With millennium development goal and sustainable development goals setting targets for countries to tackle climate change and protect the environment, globalisation on the other hand has been promoting healthy competition. in either of the case, nature has its own way of giving back which may sound very poetic, but natural disasters like floods, draughts, extreme changes in weather conditions are some instances which put people's life at stake. The worst affected are always the indigenous people. The people already impacted by the social and most importantly economic vulnerabilities find it difficult to pass through repercussions of climate change. The increasing emissions of greenhouse gases by both developed and developing nation have been affecting the climate, which in turn affects the poor people, specifically in developing countries. The issue is not a current one but has been in light in the 20th century when international organization prepared a special report for helping in the adaptation by the poor, which highlighted the interrelationship between poverty and climate change.

A poor person while struggling for the basic necessities for life finds it extremely difficult to be the most vulnerable to the actions of development undertaken by the nation. This paper argues for the betterment of the indigenous people: the methods and recourse available alongside the legal instruments in various countries. The exploitation of natural and renewable resources by the stronger, is always against the weaker, creating a negative impact on growth of the country. It studies the interrelationship between both along with conceptual framework and understand if it can be related to violation of human rights which was raised against US by the Inter-American Commission of Human rights.

KEYWORDS: Vulnerable, Indigenous people, Recourse, Interrelationship, Climate Change

INTRODUCTION

"Climate change is no longer some far-off problem, it is happening here, it is happening now."

-Barack Obama

The increasing amount of green house gases has put a statement of worry for countries across the globe. It is threat not only to the earth but to humans, to development and to human rights. the growing attention of green house gas emissions from developed countries like united states of America and Europe which has impacted the poor countries.[24] The topic was specifically taken up by OECD in 2003, including world bank and various other international organizations, which aimed at reducing the vulnerability of the poor through Adaptation,[25] reportedly after which the united nations convention on climate change came into force in 2002.

The focus for 21st century should not only aim to reduce poverty but to reduce the aftermaths of extreme climatic changes which renders the people in a hopeless situation, from where they have to be redeemed to normal social and economic conditions by giving them a lifeline. The interrelationship between climate change and rights of individual needs to be reiterated and revived to the better survival of the weaker sections of the society. Climate change is continuing to impact the sustainable development and the target of reduction of poverty. Considering the 21st century, a lot of damage has already been done and countries are continuing to do the same i.e., create a negative impact on the climate. The sustainable development goals aim to reduce the industrialized activities which will in turn not disturb the temperature for future. The damage already caused, has to be dealt with, it is to adapt to the changing conditions which is the damage caused as a result of changing climatic condition.

[24] Etchart L (2017) The role of indigenous peoples in combating climate change. *Palgrave Communications*. 3:17085 doi: 10.1057/palcomms.2017.85.
[25] ibid

For deeper understanding, the indigenous people are most occupied with the geographical development of the area like cultivating of the local crops and earning a livelihood from the same, who suffer deeply with changing climate. With the development of science, many modern technologies which promoted hybrid crops, has impacted the livelihood of the indigenous people.[26] even though the primary contributors to the climate change are not the people who suffer the most due to changes which are done to the people. there are more 3500 million indigenous people divided in different tribes who continue live in more than 70 countries all over the world. The vulnerability of the indigenous people can be of various types or can be based on the circumstances as well, like the use of land and resources in a particular geographical area for livelihood and for inhibition. They may be treated vulnerable when the face the direct repercussion of any change in the land or geographical condition, and yet have the insecurity of rights of land, resources, and institutions. They continue to have inadequate representation even in cases where they are the most impacted, being subject to weak governance and policies, unequal treatment of authorities.

Climate change results in the natural hazards, which may be of a short duration, but which leaves its aftereffects for an exceedingly long period of time, sometimes even generations like the leading example of Bhopal gas tragedy, which though was not an impact of climate change but caused irreparable damage to the people of the area. Exploitation of natural resources, depletion of natural resources, loss of land, loss of crops, draught, etc. are some of the examples which will be of importance. It leads to the violation of human rights causing threats to the economic conditions.[27] Migration is common phenomena who then suffer from vicious trap of trafficking or suffer from unorganized labor work. Traditionally, only the climate change was considered to be the disaster, but now the social changes associated needs to be handled in detail.

CLIMATE CHANGE

[26] Shalanda H. Baker, Mexican Energy Reform, Climate Change, and Energy Justice in Indigenous Communities, 56 NAT. Resources J. 369 (2016).

[27] George William Mugwanya, Global Free Trade Vis-a-Vis Environmental Regulation and Sustainable Development: Reinvigorating Efforts towards a More Integrated Approach, 14 J. ENVTL. L. & LITIG. 401 (1999).

Climate change brings about changes in the freshwater sources of water, melting of glaciers, disturbs the human settlement, excessive change in weather (extreme cold, extreme heat) which makes survival in the area difficult. The sustainable development goals (goal 13) which aims to reduce the temperature of earth by 2 degree centigrade, which seems like the best possible recourse, but will also require highest measures of mitigation mostly for the indigenous people. In India, Article 21 of the Indian Constitution of 1950 deliberates upon right to life and personal liberty. The judiciary has interpreted Right to life in an overly broad sense meaningfully to include right to health, water, proper sanitation, food, housing. It also requires the man to have a standard of living and not just mere animal existence. A massive hydroelectric project in a local area of a village, will have enough repercussions to adversely impact the human rights. apart from the damage caused due to the project as a result of climate change, there will issues with resettlement of the people, who may be displaced out of their own safe zone and may also result in violation of human rights.

The two ways which have been adapted constantly in dealing with the climate changes are mitigation, which means to avoid or minimize the damage, which is caused and other being adaptation, which helps in developing ways to defy the risks associated. The problem is not as simple as it appears on the face of it: like energy sector, it comes up with projects which use the natural resources and gives it dimensions for human consumption putting it to daily use, in the whole process, they also create employment opportunities for both men and women, as per the ILO report of 2018. So, when it is damaging the environment, it is creating competition and opportunities for others, but at the same time, many people are devoid of their rights, or are displaced or face serious human rights violations. Thinking like any other normal person, to see the action as having positive or negative impact, the aim would be to weigh on its pros and cons, pros being creating employment opportunities, adding to the resources of the country, and cons would be violating the human rights of the indigenous people and causing deforestation, creating conditions, which may lead to change in climatic conditions of the place.

Forest and management of forest is especially important to moderate the temperature of the earth surface. As the number of forests covers continues to decrease, giving a chance to the

developmental projects. As an Indian State, Goa iterated that large forest cover, just is not contributing to the growth of the state or adding to the economy or GDP, so they should be used for constructing of railway lines for transportation of material. Such ideology of the people in power, gives them income at the cost of destruction of livelihood of indigenous people. It is also predicted that if climate changes continue at this pace, the overall annual rainfall will decrease near to 20 percent. This is not only disturbing, but then the economy and food conditions will be impacted as lack of adequate rainfall or no rainfall during the season will cause irregularities in production of crops, then other than the farmers livelihood at stake, the food supply of entire nation will suffer, which will lead to increase in the prices of available goods and the hybrid measures of cultivating them.

IMPACT ON INDIGENEOUS PEOPLE

Every region has its type and nature of impact on the people. for the polar regions in Alaska and the Himalayas in India will have different impact. Somewhere the impact is due to forest fire, somewhere due to melting of glaciers, somewhere due to increased rainfall and somewhere due to no rainfall. The reasons of suffering may vary and so it's impact, but the people and their struggle remain the same, expressed in changing dimensions. In a research conducted by the international labour organization, six features specific to the indigenous people have been identified which explains their positioning with respect to climate change policies and its impact.

1. They are most vulnerable to the impacts of climate change because they are already in the bottom in the list of economic conditions.
2. Changes in climatic conditions has a direct impact on the natural and renewable resources which is the primary source of livelihood for the indigenous group, which again exposes them to the maximum risk.
3. Migration is quite common amongst the indigenous people, because instead of fighting with the cause, they avoid it and change their place of habitation, change their livelihood, and start afresh.
4. Due to lack of having enough information, access to resources and support of institution, they often are excluded from the decision-making process, which results in

inadequate representations, and not having voiced their concerns, expecting a recourse does not feel as the right way.

5. They share the most complex relationship with the ecosystem and thus continue to be the worst affected by the climate change.
6. Indigenous women are subject to discrimination based on their gender which is not causally related to climate change but is exaggerated by the actions of climate change.

Considering the fact that indigenous people are already in vulnerable position due to vivid reasons like economic conditions, social treatment, inequalities, are faced by the consequences of climate change as not the only reason but are put to even more challenging conditions. The question which arises is does climate change impact the people directly, the answer will be positive. Justifying the answer in a way the change in the climatic conditions is caused by the human activities, so the sufferers are also the human. The only point of difference being, the one who causes the damage is not the one who suffers damages, which finds express mention in intergovernmental panel on climate change. The panel reiterates that indigenous people do not only suffer for climate change as a reason but, the other reasons added with climate change serve a collective result.

The indigenous people were actually the victims, who were not treated like one, as they suffered the most and yet had no participation in the decision-making process and were side lined deliberately. University of Oxford conducted a symposium in 2007 which indicated the measures for responding to the situation by indigenous people, plan of action laid down for regions and countries in specific[28]. Destabilizing the long-established ecological and agronomic knowledge structure of indigenous people might potentially endanger losing the most viable and effective instruments we have in tackling climate change. Therefore, specialists have recommended the advancement of collaboration amongst indigenous communities, researchers, and policy experts to operate collectively for reforming agricultural practices with reduced carbon and significant environmental footprints.

[28] Oviedo, Gonzalo (2008): Indigenous and Traditional Peoples and Climate Change: Vulnerability and Adaptation. Summary Version. – IUCN, Gland.

LEGAL INSTRUMENTS: DOMESTIC AND INTERNATIONAL

Climate change being a matter of concern, as not left the arena of human rights to debate upon. Climate change has serious repercussions of the survival and of the basic necessities of human life. basic necessities have been guaranteed under the fundamental rights or under the international instruments like UDHR[29], ICCPR and ICESCR, which aim to provide a standard of living to every person in the society. It includes access to food, right to life, right against exploitation, right to livelihood, etc.[30] This restricts their access to remedies, boosts their susceptibility to climate change, weakens their ability to alleviate and adapt to climate change, and subsequently poses a risk to the advances made in protecting their rights. for example, the ICESCR which provides for fundamental freedom of food to every person, but the same is affected by loss of agricultural land, by saltwater intrusion, by drought or by flood, all of which are results of climatic changes. A change in rainfall pattern or quantity in an area impacts the right to life, right to health, and the means of subsistence all of which guaranteed under Article 6 of ICCPR, Article 12 of ICESCR, and Article 1 of ICESCR, respectively. When the sea level in a particular area increases due to reasons like flood, salination, sea surges, erosion, etc, it impacts the loss of agricultural land, the availability of food, the injury to the person and a threat to the livelihood to the indigenous people. the actions have its reactions, and impact right to life, right to property, right to culture, standard of living right to water, right to health so enshrined in various documents like UDHR< ICCPR, ICESCR, UNDRIP, CEDAW, etc.

Viewing the indigenous people as a source of victim or nothing at all, was the biggest drawback in the system, whereas they could have been treated as an important source of knowledge and local expertise and techniques. The Kyoto protocol was adapted to reduce the emission of the greenhouse gases which leads to the temperature rise. Ever since, the Indigenous people's group continued to push for playing a role in the process of decision making.[31]

[29] United Nations (1948): Universal Declaration of Human Rights. http://www.un.org/Overview/rights.html
[30] Salick, Jan & Byg, Anja (2007): Indigenous Peoples and Climate Change. http://www.tyndall.ac.uk/publications/Indigenouspeoples.pdf
[31] United Nations Permanent Forum on Indigenous Issues official website: http://www.un.org/esa/socdev/unpfii/index.html

The Kyoto protocol[32] has failed to do justice to indigenous people where they wanted to voice their opinion about the impacts of fossil fuel industries. They wanted to speak about the destruction of caribou herds which reduced by 15 percent due to changes in climate, which hampered them culturally, spiritually, and physically.[33] Kyoto protocol focused on the clean development mechanisms paving a way for funding of projects so as to reduce the rate of emission in developing countries. The forests continued to burn, glaciers continued to melt, marine life was diseased, and due to the continuing industrialized activities. In 2004, the involvement was introduced with the UNFCCC[34]. International indigenous day is celebrated at 9th of August, their knowledge of climate change is traditional and deep rooted, and they are known to adapt unique ways to understand the land and take care of it.[35] Due to climate change, age old techniques have been forced out of actions, fostering way for new agricultural methods to still be able to help people with the activities of generating livelihood. UN has been playing an active role to involve the indigenous people and understand their ways of contribution to build independency of energy.[36]

The international organization which from the very beginning remain vocal about the rights of indigenous people is the international labor organization, which voiced the "convention concerning indigenous and tribal peoples of 1991. The United Nations declaration on the rights of indigenous peoples (UNDRIP), 2007 was based on the convention. The representations grew stronger since 2013 in international and national forums where they did not just advocate the protection of their own rights but also the protection of the environment. In the 2015 report submitted by DOCIP (Indigenous People's Centre for Documentation, Research, and Information)[37] highlighted their role of being centrally responsible for promotion and grabbing

[32] United Nations (1998): Kyoto Protocol to the United Nations Framework Convention on Climate Change. http://unfccc.int/kyoto_protocol/items/2830.phpudhr

[33] Heidi Bachram, "Kyoto Fails indigenous peoples on climate justice" (1St Dec 2005) Available at https://www.tni.org/es/node/10481

[34] UNFCCC (United Nations Framework on Climate Change) (2004a): United Nations Framework Convention on Climate Change- The First Ten Years.

[35] Charters, Claire. "The Rights of Indigenous Peoples." *New Zealand Law Journal (*October 2006): 335–337. http://www.apc.org.nz/pma/cc001006.pdf

[36] UNFCCC, "Indigenous Peoples Central to Climate Change Action" (9Th Aug 2016) Available at https://unfccc.int/news/indigenous-peoples-central-to-climate-action

[37] doCip (Indigenous Peoples' Centre for Documentation, Research, and Information) (2008): UPDATE 81. September / November 2008. http://www.docip.org/Update-online.168.0.html

media attention to relevant issues and creating a positive role. The Rio declaration of 2012 (3rd Earth Summit), in relation with UNDRIP seemingly understood the importance of indigenous people in sustainable developmental goals achievement. They were excluded to be a part of the MDGs but were accepted as their own in the SDGs of 2015 and its drafting.

UNDRIP[38] is a very essential document which voices for the collective rights of the groups which may not be present in other specific charters governing human rights, which came into force after 25 years of efforts by the UN members states and the indigenous groups. The need of enacting a charter so peculiar was necessary because of the existing discrimination which was faced. The right to strengthen the economies is relevant for our topic in concern. Some of the leading nations like Australia, Canada[39], United States, New Zealand are not signatories to this treaty, which creates tension, as it does not have an international instrument to protect their rights, but this positioning seemed debatable in 2010. Speaking of security on issues such as lands, territories, resources, self-determination, traditional organizations, conflict-resolution systems, socio-political organizations, and maintenance of cultural integrity and diversity, is a critical part of building and enhancing resilience to impacts that are likely to be of considerable magnitude and which could endanger the very survival of the peoples at risk.[40]

UNDRIP advocated for the indigenous people's rights but was kept away from the mentions in global climate change agreements and even in the Paris Agreement of 2015. After which, it forced the creation of Indigenous Peoples Forum on Climate Change (IIPFCC) to voice their opinions as a side event in their own platform.[41] This was a step back, as they felt included and yet excluded which is a worse situation then no inclusion at all. As in case of no inclusion, the claim could be voice remaining unheard. But now the voice is ignored not thinking to be

[38] United Nations, "History (brief)." https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html
[39] Paul Joffe, "Global Implementation of the *U.N. Declaration on the Rights of Indigenous Peoples*—and Canada's Increasing Isolation," September 2009.
[40] Supra at 6
[41] CCBA, Climate, Community & Biodiversity Project Design Standards. 2nd edition. CCBA, Arlington, V.A. December 2008. www.climate-standards.org

important enough. At the UNPFII 2017 symposium[42], indigenous peoples represented themselves as key participants in the achievement of SDGs 13, 14 and 15, which involve combating climate change, sustainably controlling forests and halting biodiversity loss (UNPFII, 2017).

They take various actions to represent themselves and let their voices be heard, they have not been treated as mandatory as an expert even when their territorial rights are violated most by the enterprises, primarily by fossil fuel extraction and consumption which damaged the water resources in collusion with various human rights group. To achieve a win-win situation, the reduction of greenhouse gases is as essential as inclusion of indigenous groups participation and to protect their rights and promote their wellbeing. Right to life, food, water, health, housing, livelihood, self-determination, speech and expression are all violated in case of climatic changes and in case of not voicing the opinions of the indigenous people.

Mitigation remains the first step to prevent the damage to the rights of the people, an example of which is the REDD (Reducing Emissions From deforestation and degradation)[43] which impacts the indigenous lives across the globe.[44] REDD functions in complement with the UNDRIP, UNDG guidelines, rights-based approach and FPIC. It aims to consider the knowledge and rights of the indigenous groups by fulfilling the international as well as national obligations. It fulfills the right of obtaining consent, providing equitable benefits, conflict resolution, and ensure participation remains the most important one. The attempt is to reduce deforestation and its impact caused to safeguard the people from future damage. The aim was to integrate the environmental justice principles into the framework for climate change targeted to reduce the emissions caused from deforestation and degradation. Passing of guideline though is the first step, the most important step is the implementation and monitoring and

[42] Henderson, James Sa'ke'j Youngblood. *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition.* Saskatoon: Purich Publishing, 2008.
[43] Peskett, Leo; Huberman, David; Bowen-Jones, Evan; Edwards, Guy & Brown, Jessica (2008): Making REDD work for the Poor. Prepared on behalf of the poverty Environment Partnership (PEP).
[44] FAO (2008): Indigenous peoples threatened by climate change. World day highlights fundamental role of indigenous peoples in food security.

compensating. Who should be compensated for the damage caused by individual to the nature, but when along with the nature, the local group suffers.

There have been many significant developments which were worked out to eradicate the fallacies of the climate change, which though in issue, continued to be ignored. The environmental law principles have been the focal points of discussions for implementing the rules regarding climate change. Like the sociologist Robert Bullard highlighted a theory where the minority and poor communities are more likely to be chosen as sites for locally unwanted land users.[45] This theory continued to exist throughout the 1990s and has claims for in the environmental and civil rights law. Ranging from the Bali Action Plan for incorporation of comprehensive measures and strengthening cooperative actions, the issue has intensified in the minds of policy makers specially for indigenous people, and to give them a voice which should be heard. Even after many international instruments, the author feels that both the issues of climate change and its impact on indigenous people has still not been comprehensively addressed. When the global impact of climate change came to be recognized, and it was advocated by many jurists that the issue cannot be handled in a national level and requires international involvement, the impact of climate change was recognized, but the impact of climate change on the marginalized, or the indigenous people is still not recognized, and they continue to struggle for representation of their voices.

CONCLUSION

As suggested already in the report, there are three vital components for the adaptation of the climatic changes, especially for the protection of indigenous groups. First, the improvement in governance, second, empowering the communities, and lastly, access to information related to climate. Information is more empowering of them all because it allows to make a person correct and informed decision, by considering the exact situation. The common people across the globe

[45] Rebecca Tsosie, "The Climate of Environmental Justice: Taking Stock: indigenous people and environmental justice: the impact of climate change, 78 U. COLO. L. Rev., (2007)

should also be given the opportunity to not be a spectator but to also have a role in the decision-making process and be responsible for the compulsive actions and empowerment scheme of the government.

The essence of the moment would be the essential public and private institutions make move to support the indigenous people and incorporate their efforts to have safeguarded and to be allowed to claim their right in the decision-making process and understand their ways of adaptation and mitigation for catering the fallacies of climate change. The international instruments to which various countries are signatories for the welfare of the indigenous people should take the requisite action and fulfil their duty towards the vulnerable class. It is important to include indigenous people in the decision-making process because they know and understand the situation more than any more expert, where the expectation can be to speak for the nature and for themselves, to be beneficial even to the current economic conditions.

AN ANALYSIS OF ETHICAL CONSUMERISM IN THE CONSUMPTION OF LUXURY GOODS

- SAKSHI SHANKAR

INTRODUCTION

Consumers are becoming increasingly aware and concerned about the environmental and social effects of their purchases. Ethical consumerism can be defined as the purchase of commodities based on moral and personal beliefs and social factors rather than just on economic considerations. "Ethical consumerism has increased considerably in the last few decades as consumption preferences and practices are increasingly shaped by the consumers' awareness of ethical issues concerning particular products or firms."[46] This comprises of the purchasing selections on the basis of a company's ethical trading practises, labour standards (wage rates and working conditions), and the good's environmental responsibility. It is also generally observed that the consumers are generating conscious practises in order to maintain and purchase products that promote organisational development, and as a result, they are adopting a more forceful position against unethical organisational activities through demonstrations, boycotts, and non-consumption.

Additionally, it has been contended that we may be experiencing an "ethics era," wherein an increasing number of customers are now becoming cognizant consequences of the commodities they consume and are changing their purchasing preferences as a consequence. Such ethical consumers are mindful of the consequences of their purchase decisions individually as well as on the external environment around them. They evaluate the ecological and sustainability implications of the whole distribution chain in delivering such products to market, in addition to the product itself. However, in most market segments, ethical items account for less than 1% of overall market share[47], showing that this "ethics era" may have a greater implication theoretically rather than practically.

[46] Harrison A, and Scorse J, 'Multinationals And Anti-Sweatshop Activism' (2010) 100 American Economic Review

[47] The Co-operative Bank. (2009). The ethical consumerism report 2009.<http://www.co-operative.coop/ethicsinaction/sustainabilityreport/Ethical-Consumerism- Report/>

Although the application of ethical consumerism can be observed in every product, Most of the empirical data and studies on the concept of ethical consumerism focuses on moderately valued commoditised products which include everyday products such as food and clothing. Comparatively, ethical consumerism with respect to luxury products is notably limited. the purpose of this research paper would be to analyse further the application of this aforementioned concept with respect to luxury goods with respect to patterns of buying criteria, ethical implications differentials and regularity, etc. Considering various theories and concepts, the intent of the paper is to scrutinise and observe the differences in literature as well as practice of ethical consumerism.

ETHICAL CONSUMERISM

The ethical consumer behavior can be interpreted as the process of "decision-making, purchases and other consumption experiences that are affected by the consumer's ethical concerns"[48] and has been recorded to rapidly grow over the past decade. The main source of observation for such a rise is available in the Ethical Consumerism Report wherein the growth of utilization of such products have gone from £13.5 billion in 1999 to £36 billion in the UK. With ethical consumerism, consumers often communicate personal issues or perspectives towards human health or the environment by their purchasing behaviour. Several researches have thus focused on dispositions toward ethical consumption as a prelude to ethical purchasing behaviour. Although estimates differ, Vermeir and Verbeke (2006)[49] analyze and interpret that approximately 30 percent of the sampled consumers have a positive attitude toward ethical consumption, which corresponds with grey literature such as Futerra (2005) and Ipsos Mori (2009)[50], where it recognises that 30 and 26 percent of consumers, respectively, share the attitude that ethics are very important in purchasing.

[48] Cooper-Martin, E., & Holbrook, M. B. (1993). Ethical consumption experiences and ethical space. Advances in Consumer Research, 20, 113–118.
[49] Vermeir, I., & Verbeke, W. (2006). Sustainable food consumption: Exploring the consumer ''attitude–behavioral intention'' gap. Journal of Agricultural and Environmental Ethics, 19, 169–194.
[50] Futerra, S. C. L. (2005). The rules of the game: The principals of climate change communication. London: Department for Environment, Food and Rural Affairs.

One of the main example that can be considered to examine the ethical consumerism concept is by the means of the Diamond Industry. The ethical implications and criticisms have been observed greatly in the diamond industry by the international governmental and non-governmental organizations with respect to abuse of human rights and unethical business practices. An example of this would be child labour and slavery being systemic and not isolated as observed by multiple studies regarding this issue. Considering that "civil wars in Angola, Liberia, Sierra Leone, and the Democratic Republic of Congo have been partially funded by the sale of diamonds, although the usefulness of extracting rough diamonds and other natural resources to fund rebel groups has been debated." Moreover, systematic human rights violations associated with the procurement and mining of rough diamonds have exacerbated the heinousness of these disputes. In one case, claims arose that the Zimbabwean military killed 200 diamond miners, accompanied by stories of illicit commerce, severe human rights violations, corruption, and the discovery of a detention facility. Similarly, accusations of rampant corruption and human rights violations afflict the Angolan diamond sector. This led to the establishment of the Kimberley Process Certification Scheme.

1. The Kimberly Process Certification Scheme (KPCS)

KPCS is a collaboration between the government, civic society, and business to halt the flow of diamonds used to fuel war. Conflict diamonds, according to the KPCS, are those used to fund conflicts against states. Under the KPCS, all members meet once a year to assess member conduct, discuss any issues that have developed, and seek to improve the system. To keep conflict diamonds out of the legal diamond supply chain, the tripartite organisation has established safeguard restrictions and surveillance of raw diamond imports and exports. The Kimberley Process Certification Scheme guarantees and verifies conflict-free diamonds.

"However, the KPCS mainly attempts to sanitize the industry within the marketplace by enhancing, suggesting through the certification of diamonds, an adherence to transparency in the process of diamond extraction, thus enabling consumers to 'buy diamonds with a clear conscience', and encouraging consumers to buy certified diamonds rather than conflict diamonds."[51]

[51] Hofmann, H.; Schleper, M.C.; Blome, C. Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-Tier Supply Chains. *J. Bus. Ethics* 2018, *147*, 115–141

The project's main critique is that it is voluntary: that, as a 'soft law', it is "based upon a series of promises by government authorities" and that "it is unclear what consequences, if any, will be enforced to transgressors."[52] As a result, consumers are unsure if the diamonds they come across are conflict-free or not, and even if they are conflict-free according to KPCS's definition, there is no mention of whether they are ethically sourced.

ETHICAL LUXURY

According to Bendell and Kleanthous, luxury companies "have both the potential and the duty to encourage sustainable consumption."[53] The premise in their comprehensive research for the WWF and a similar report prepared by DeBeers (2009) wherein the increase in the ethical consumption would automatically transfer into the creation of markets for ethical-luxury goods. However, through considerable research in the field of consumer behavior, it is observed that customers seek a specific set of advantages when acquiring luxury goods as opposed to basic purchases. As a result, it is probably reasonable to anticipate slightly differing opinions on ethical consumption of luxury products when compared to common products.

The economic perspective differentiates between luxury and need, wherein the luxury products satisfying a realm of want rather than an essential need, as observed in Groth and McDaniel's (1993) Exclusive Value Principle. "The psychodynamic theory investigates the intra- and inter-personal context of luxury consumption, focusing on peer and self-perception."[54] According to Vickers and Renand (2003)[55], luxury products are founded on representations of individual identity, and are distinguished by the aspects of expressionism and interactionism. The commercial approach then integrates the preceding views with the goal of determining how to

[52] Hilson, G.; Clifford, M.J. A 'Kimberley Protest': Diamond Mining, Export Sanctions, and Poverty in Akwatia, Ghana. Afr. Aff. **2010**, 109, 431–450.
[53] Bendell, J., & Kleanthous, A. (2007). Deeper luxury <http://www.wwf.org.uk/deeperluxury/_downloads/DeeperluxuryReport.pdf.>
[54] Mason, R. S. (1992). Modeling the demand for status goods. Working paper. Department of Business and Management Studies. Uni- versity of Salford, UK. New York, NY: St Martin's Press.
[55] Vickers, J. S., & Renand, F. (2003). The marketing of luxury goods: An exploratory study, three conceptual dimensions. Marketing Review, 3(4), 459–478.

generate and sustain an experience of luxury in marketing and branding perceptions. According to Wiedmann et al. (2007)[56], the structure of a brand's financial, individual, and functional utilities influences luxury value perception and incentive for luxury purchase.

Indeed, it could be anticipated that customers who can buy more luxury products subsume greater attention to ethics, either for the purpose of self-identity or peer identity, as discussed previously in terms of both the psychology and marketing perspectives on ethics. "As a result, it is surprising to see that ethical-luxury is not reflected in either the ethical consumption or luxury consumption literature."[57] Premium brands like as Stella McCartney and Swan Marked Diamonds are publicly available, each with its own set of ethical commitments, but have garnered little scholarly attention.

Notwithstanding, the customers regard ethics as significantly essential when acquiring luxury goods, it may be an even more serious issue that is nearly the inverse of the 'Separation Fallacy.' According to Freeman (1994) and Harris and Freeman (2008)[58], the segregation of ethics and business creates the misconception that ethics invariably results in higher pricing for the customer. It may be the exact opposite of this problem in luxury spending, where the ambitious and reputational aspects of luxury items, combined with an already high price, produce a "Fallacy of Clean Luxuries." Essentially, consumers perceive that luxury products do have certain adverse social or environmental consequences as they are considered as prestige, high-value products.

CONCEPTUAL COMPOSITION AND ANALYSIS

Some of the implications of the basis of ethical consumerism can be analyzed hereon:

1) Buying Criteria

[56] Wiedmann, K. P., Hennings, N., & Siebels, A. (2007). Measuring consumers' luxury value perception: A cross-cultural frame- work. Academy of Marketing Science Review, 7, 1–21.
[57] Davies, Iain A., et al. "Do Consumers Care About Ethical-Luxury?" Journal of Business Ethics, vol. 106, no. 1, Springer, 2012, pp. 37–51, http://www.jstor.org/stable/41413243.
[58] Harris, J. D., & Freeman, R. E. (2008). The impossibility of the separation thesis. Business Ethics Quarterly, 18(4), 541–548.

Ethical manufacturing circumstances are far less essential in luxury consumer choices than they are in general commodities. Furthermore, ethical manufacturing standards are the lowest priority buying parameter for luxury items. Price, brand, value, and quality are all more significant than ethics in commodity purchasing choices, according to Boulstridge and Carrigan (2000) and Carrigan and Attalla (2001)[59]. However, when it comes to luxury, we may also include status, product pleasure, consciousness, and convenience. It is apparent that ethical luxury would have a more difficult time coming into the market with an ethical message than commodity equivalents. Consequently, when it comes to purchasing luxury products, ethics is not placed particularly high on the list of customer considerations. It is specifically imperative for ethical-luxury label managers to maintain the integration and value of the product are maintained when developing ethical derivatives, because if Bhattacharya and Sen (2004)[60] and Auger et al. (2008)[61] discover that consumers are unwilling to risk quality for ethics, then luxury consumers will be even more selective about their purchase decisions.

2) Ethical Implications

The subject of ethical awareness in luxury purchases reveals a substantial obstacle to ethical luxury since luxury items score uniformly lower on all measures of moral intensity and considerably lower. This is due to ethics not being regarded as a concern in luxury purchases (the Fallacy of Clean-Luxury), or, more precisely, the ethical implications of luxury companies have less significance for customers during decision-making. This notion was reinforced by qualitative evidence, which revealed that luxury was seen as ineffective.

3) Purchase regularity

[59] Boulstridge, E., & Carrigan, M. (2000). Do consumers really care about corporate responsibility? Highlighting the attitude–behav- ior gap. Journal of Communication Management, 4(4), 355–368. And Carrigan, M., & Attalla, A. (2001). The myth of the ethical consumer—do ethics matter in purchase behaviour? Journal of Consumer Marketing, 18(7), 560–577.

[60] Bhattacharya, C. B., & Sen, S. (2004). Doing better at doing good: When, why, and how consumers respond to corporate social initiatives. California Management Review, 47(1), 9–24.

[61] Auger, P., Devinney, T. M., Louviere, J. J., & Burke, P. F. (2008). Do social product features have value to consumers? International Journal of Research in Marketing, 25(3), 183–191.

Purchase irregularity is connected to resource acquisition fatigue—a percentage of self-identified ethical consumers have observed that it is too time consuming to study each and every product they buy. As a result, they focus their resourcing on regular transactions while disregarding irregular ones. In many respects, this demonstrates Shrum et al(1995).'s[62] hypothesis that only active information searchers would convert from existing brands to less effective but environmentally safer alternatives.

4) Lack of information

Customers are unaware of both ethical concerns and accessible goods due to a lack of knowledge. This is consistent with Sproles et al. (1978)[63], who stated that optimal decision-making needs customers to be sufficiently briefed; yet Boulstridge and Carrigan (2000) discovered that most consumers lack knowledge to determine whether or not a corporation has acted ethically. This appears to be an even bigger issue with luxury products due to the irregularity of the transaction and hence the information salience. This highlights the inherent challenge with information salience in unusual purchases such as luxury goods.

5) Price-quality variance

Cost differentials in luxury items look higher to customers (e.g., for Swan Marked diamonds), even if they are relatively close in percentage terms to commodity products. This contradicts Bendell and Kleanthous' (2007) claim that pricing differentials in luxury products are not viewed as important by customers. It instead verifies Elliott and Freeman's (2001) results that, consumers are prepared to pay greater proportion of ethical premiums for lesser value items, implying that as overall product price inflation, intention to buy premium decreases.

6) Availability

Most luxury products do not tend to have ethical counterparts accessible at point of sale, and as Carrigan and Attalla (2001) discovered in commodities markets, there are relatively few

[62] Shrum, L. J., McCarthy, J. A., & Lowrey, T. M. (1995). Buyer characteristics of the green consumer and their implications for advertising strategy. Journal of Advertising, 24(2), 72–82.
[63] Sproles, G. B., Geistfeld, L. V., & Badenhop, S. B. (1978). Informational inputs as influences on efficient consumer decision-making. Journal of Consumer Affairs, 12, 88–103.

buyers prepared to expend excessive time or personal expenditure to identify ethical alternatives.

7) Lack of implication of luxury goods

Producing less of a difference with luxury items was not initially considered a concern in ethical consumption. However, it was later recognized that because commodity products were purchased more often and in greater volume, developing country manufacturers would gain more. There was a widespread perception that because luxury products did not have as many developing producers, more of any markup would remain with Multinational organizations rather than being passed on to producers or used to improve natural environment maintenance.

CONCLUSION

Consequently, if, as Bendell and Kleanthous (2007) and Wenzel and Kirig (2005) imply, there's a market demand for ethical-luxury items, it will most likely be relatively smaller than the sectors now open to subsistence type products. Consumers are less likely to switch brands based on ethics since ethics is ranked lower in the purchase decision than every other factor investigated in this research. Based on the "Fallacy of Clean-Luxury," the inconsistency of purchase, and a lessened impression of societal norms, customers are also less likely to recognize or experience high moral sensitivity to ethical flaws in luxury items. Ethical-luxury businesses also had substantial challenges, such as less premium pricing mobility, less active search of knowledge by ethical buyers, and a lesser sense of ability to achieve social change. As a result, it can be concluded that Ethical luxury is unlikely to keep up with the expansion of ethical items at this time.

A deeper analysis of the concept and its implications does further suggest that customers are concerned about ethical luxury, even if it hasn't always had a big impact on their purchasing decisions. We believe that with tenacity, a clear message, and accessibility, customers could regard ethics to be a more essential consideration in their luxury purchases. This effectively places luxury in the same product lifespan position as commodities were approximately 15 years ago. The consequence is that, while some ethical luxuries may emerge in the coming

years, they are improbable to be as widely adopted owing to recourses, information acquisition, and information salience constraints.

MODES OF CREATION OF AGENCY UNDER INDIAN CONTRACT ACT 1872

- ABHISHEK KHANDELWAL

ABSTRACT

It is impossible to complete all chores on our own in the age of trade and business. At some point in time and at some point in the business, you will need someone to represent you in front of a third party with whom you are interacting. That individual is referred to as the "Agent." An agent engages in a variety of commercial operations such as dealing with business, estate, and sales affairs, among others. They benefit the principal since agents make the work easier for them. A contract of Agency establishes a legal connection between two individuals in which one is permitted to act on the other's behalf. The person who approves is known as the "principal," and the person who acts on the principal's behalf is known as the "Agent." We will also review several cases that have played a significant part in the inception and evolution of the Agency Contract. A contract of agency is a fiduciary relationship between an employer, known as the principle, and a person who is permitted to do any act or serve as the principal's agent when dealing with a third party. The contract between them is an agency contract. This paper is an attempt to examine how the contract of agency is established as well as different ways of agency creation.

INTRODUCTION

It is a common premise of contract law that only the contract's parties gain rights and responsibilities. The idea of agency is a well-known exception to this general norm. In this case, a representative known as a "agent" contracts with third parties on behalf of another person known as the "principal." Under such a contract, the "principal" acquires rights and obligations. The legal connection between the principal and the agent is referred to as "agency." The agent's conduct and agency influences the principal's legal standing towards other parties, which is a crucial component of an agency relationship. The Indian Contract Act of 1872 oversees the relationship between an agent and a principal since it is legal and needs specific

terms and conditions to be met. The "Law of Agency" is a legal document that outlines the criteria required for the formation and termination of an agency, the obligations of the Principal, the duties of the Agent, the liabilities of the Principal and the Agent, and so on. The main criteria and restrictions that must be followed when drafting an Agency contract are outlined in Chapter X of the Indian Contract Act of 1872. Section 182 of the Indian Contract Act of 1872 states that "an agent is a person engaged by any other person to undertake any act, or to represent him in front of another person (third party) in business dealings or such." The individual who is represented by that agency is referred to as the "principal." *(Sethi, 2018).*

RESEARCH QUESTIONS

1. What is Contract of Agency?
2. Who is an “Agent” and who is a “Principal”?
3. How creation of agency takes place?
4. What are the different modes of creation of agency?

RESEARCH METHODOLOGY

Present Research work is the work of Doctrinal Research and is based upon secondary data in form of Journals, articles, research papers, News columns, government legislations, judicial decisions.

REVIEW OF LITERATURE

1. Pollock & Mulla, The Indian Contract Act,1872, 15th Edition
2. Contract & Specific Relief by Avatar Singh, 12th Edition
3. Principles of Law of Agency by Howard N. Benett

AGENCY UNDER INDIAN CONTRACT ACT 1872

Section 182 of the Indian Contract Act defines the words 'Agent' and 'Principal.' An agent is a person authorized by a principle to represent him or act on his behalf, and an agency is the contract that establishes a connection between them. The Madras High Court concluded in *P. Krishna v. Mundila Ganapathi* [64]that agency exists only when an agent serves as the other's representative in business talks, that is, in the formation, modification, or termination of contractual obligations between that other and a third party. *Section 183* states that anybody of age of majority and sound mind can appoint an agent, while *Section 185* states that anyone can act as an agent between the principal and the third party. Because he is operating on behalf of the principal and so is not directly answerable to other parties, even a minor can be designated as agent. When a person has the ability to act on behalf of another and establishes a contractual connection between the other and a third party, agency exists. The creation of an agency is not subject to examination under section 185. The fact that the principle decided to appoint and be represented by an agent is sufficient harm to the principal to justify the agency contract. In *Carr v. Hunt*[65], it was determined that permission is required for this connection and that it must come from both parties, as it demonstrates their objectives for the partnership.

MODES OF CREATION OF AGENCY

The contract of agency is created when the principal hires someone to act on his behalf before a third party, and the agent accepts or consents to fulfill the duty. The contract of agency can be made in one of four ways:

1. **Agency by Express Agreement** - Appointment of a Agent can be made by express appointment, which means it can be done in writing or orally. However, in Indian law, the concept of an agent's employment is much broader than it is under English law. Under section 182 of the Indian Contracts Act, 1872, an agent may be employed by any person permitted by law. Under English law, the will of the other is necessary for the agent's employment. Basically, the principle should have the majority of the will, and

[64] AIR 1955 Mad 648
[65] 651 S.W.2d 875 (Tex. App. 1983)

he should be ready to hire the other person as his agent. However, the principal cannot compel the individual to become his agent; rather, the permission of both parties will be considered in order to form a formal connection. Each of them must provide their approval, whether explicitly or implicitly.

A deed-based appointment is referred to as a power of attorney. There were three principals of a single agent in the case of *Sayed Abdul Khader v Ram Reddy*[66], and it was debated whether the contract formed a legal agency contract or not. It was questioned how three people could become the principals of a single agent with a single power of attorney. However, it was concluded that this may happen, despite the fact that it is against the contract Act.

The laws of England, on the other hand, took a broader view and said that two principals can jointly engage a single agent, who will be jointly liable to both of them and also have the right to sue the agent collectively.

2. **Agency by Implied Authority -** Aside from the stated contract of agency, an implied contract of agency can also be made. The term "implied contract" refers to when a contract is formed as a result of a person's behavior or activities. It is considered to be implied Appointment when a person permits another person or sets him in a situation where it might be understood that he is permitted or allowed to do a given activity on behalf of the person. For example, if A enables someone to drive his vehicle for a few days while taking care of the expenditures and upkeep, that person might be considered an implied agent of the principle. This is because, by his actions, he implicitly empowers the other person to act as his agent.

Agency by Estoppel - Estoppel is the well example of implied agency. The principal of estoppel holds that a principal is estopped as against the third party to whom the agent is representing the principal if the principal himself leads an agent to think that he is permitted to execute a certain conduct in such a scenario. The principle assumes that he has the apparent and real power to perform his function in the firm. In *Pickering v Busk* [67]involved a broker who was

[66] 1979 AIR 553
[67] 15East. 38

tasked with purchasing and selling hemp and sold the hemp that the customer entrusted him to retain in his custody. The principle claimed that he did not give the broker permission to sell the hemp. However, the court determined that the principal is obligated by the sale and receipt of money since he delegated apparent authority to the agent to sell and acquire hemp. In the event of an implied contract of Agency, the seeming authority can be interpreted as actual authority, and so it is obligatory on the principal.

Agency of holding out - Such an agency exists when a person's affirmative or positive behavior induces third parties to assume that a person acting on his behalf is acting with authority. Example: B is A's servant; B purchases things on credit from C, and A pays for them on a regular basis. B purchases the products on credit from C for personal use. A is obligated to make payments to C.

3. **Agency by Necessity -** In the lack of an express contract, there may be an emergency circumstance in which one person acts for another. At that moment, doing the act becomes required in order to spare the other person from any future danger or loss. In that circumstance, the agent is justified in acting outside the extent of his authority. In the event of a medical emergency, when medical attention is required immediately, the individual can act as an agent. There are different conditions for the required agency. In *Gwiliam v Twist*[68], it was shown that necessary authority does not take place when the agent can communicate with the principal. Indeed, if the agent is able to contact the principal, he can ask him for further instructions as to what to do and what not to. The servant was driving the defendant's bus, the officer thought the driver was drunk and ordered him to stop driving. The conductor and the conductor ordered someone else to drive instead of a quarter mile from the defendant's yard. The court dismissed the claimant's claim on the grounds that there was a possibility of communication between the respondent and the owner and that was why no necessary authority took place.

[68] (1885) 2 QB 84

4. **Agency by Ratification -** If a person (i.e., the supposed agent) acts on behalf of another person (i.e., the principle), the pretended agent acts without the principal's knowledge or approval, and the principal then accepts such act. Then, through ratification, Agency is established. *Suraj Narain v. N.W.F. Province* [69]decided that if the obligation for passing a certain type of order is conferred in specific authority by legislation. Ratification must be exercised within a reasonable amount of time. Ratification must be exercised within a reasonable period of the act supposed to be ratified, and "ratification" must be undertaken in every case within a reasonable time.

Ratification's Effects

- The acts ratified by the principle bind him as though they were conducted by his authority.
- Ratification refers to the actual date of the ratified act, not the day the act was ratified.

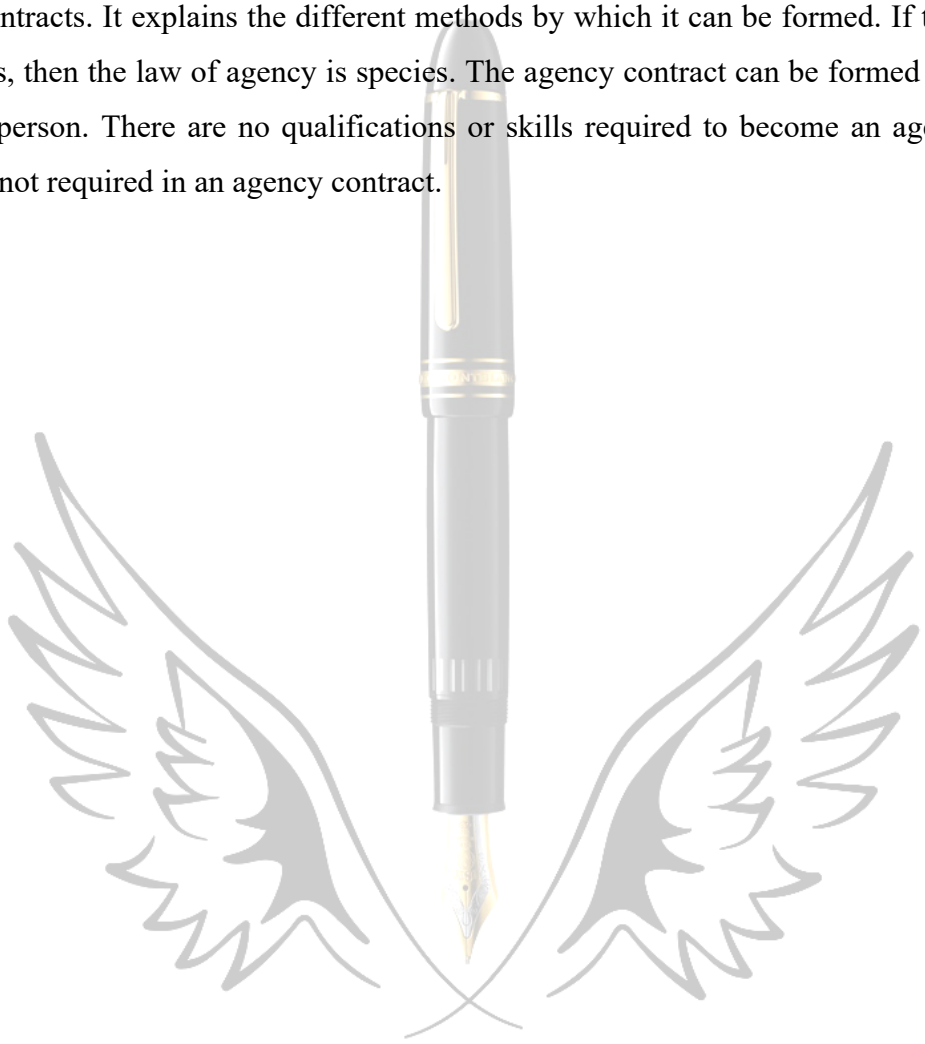
5. **Agency by operation of law-** It occurs when the law considers one person to be an agent of another.
    - When a partnership is formed, each member becomes the agent of the other partners. This type of agency is believed to be created through the functioning of the law.
    - When a company is formed, its promoters are its agents by operation of law.

CONCLUSION

Chapter X of the Indian Contracts Act (ICA), 1872 deals with agency law. An agent is a person appointed by the principal to represent him or her on his behalf and the contract that creates a relationship between them is called an agent. Consideration is not a necessary element of an agency contract. There are different methods of creating agent, it depends on the main method he wants to apply. Under section 186, the powers of attorney may be expressed or implied. An express agency contract can be done verbally or in writing and on the other hand, the tacit

[69] (1949) 51 BOMLR 425

agency act is done by gesture or action. This article has attempted to point out many aspects of agency contracts. It explains the different methods by which it can be formed. If the contract is in genes, then the law of agency is species. The agency contract can be formed by an adult and sane person. There are no qualifications or skills required to become an agent. Even a partner is not required in an agency contract.



COVID- 19 PANDEMIC: JUSTICE DEMANDS FOR INCREASING DETERRENCE IN INDIA

- DR. PRIYANKA JOSHI

ABSTRACT

Covid-19 has brought entire humanity to its knees but still, people are fighting with full dedication to restrict the spread of such a deadly virus. In India too, similar situations have appeared where the states have taken several spontaneous steps to ensure better safety of their citizens, yet a few are seen to be committing atrocities like intentionally trying to spread this virus, or obstructing the measures meant for preventing such spread thereby causing a threat to the lives of the entire citizen. Therefore, it becomes essential to have strict laws for creating deterrence in the minds of such offenders and also to provide justice to those who are sincerely performing their duties.

KEYWORDS: *Covid-19; Deterrence, Justice, Offences, and Punishment*

INTRODUCTION

In the times of the COVID-19 pandemic, when India is under lockdown and all commercial activities are halted, the government is taking relevant steps to protect the citizens and to avoid the mass spread of this virus. Even the Indian citizens are rallying behind its government and supporting every decision taken by the government in the majority. But, instances of some people trying, either knowingly or unknowingly, to spread this virus or to restrict activities meant for preventing the spread of it can be noticed. To deal with such cases in India, the law provides for penalties under the Epidemics Act[70] and also under Sections 269, 270, and 271 of IPC.[71] Section 269 of IPC deals with negligent acts that are likely to spread disease dangerous for life while Section 270 IPC deals with malignant activities likely to spread such deadly

[70] The Epidemics Diseases Act 1897, (No. 3 of 1897, Acts of Parliament, India).
[71] Indian Penal Code 1860, (No. XLV of 1860, Acts of Parliament, India).

disease and Section 271 IPC covers cases of disobedience of quarantine rules. Further, to deal with such miscreants during the spread of the epidemic and to protect healthcare professionals, the State as well as the Central government derives all necessary powers from The Epidemic Disease Act. But, a few questions that are being raised by the legal academia and judicial activists regarding these legal provisions, like- Whether the penalties provided against offenses for deliberately spreading such virus to harm others or to take revenge are sufficient enough to provide deterrence? Whether the new ordinance which has been brought in 2020 to amend the Epidemic Disease Act is sufficient enough to provide Justice to the healthcare workers and doctors who are attacked on duty? Whether the legislature needs to bring in a new act to deal with instances of such nature?

SPREADING OF DISEASES DANGEROUS TO LIFE WITH MENS REA

Mens Rea is an essential element in Indian Jurisprudence for constituting an offense punishable under the law.[72] Mens Rea means guilty intention which if interpreted in cases of deliberately spreading of Covid-19, will mean an intention of causing loss to the nation by posing a threat to the lives of the Citizens. To deal with such instances, the law keeping authorities invoke IPC and Section 270 IPC. Now to book any individual under Section 269 IPC and Section 270 IPC, it is required that the disease concerned must be infectious. Infectious diseases are those which can spread from one person to another directly or indirectly.[73] It is a fact that respiratory diseases are spread through droplets.[74] Since COVID-19 is a respiratory disease, it is likely to be spread when someone comes in direct or indirect contact with infected surfaces or person. Now in this pandemic when people spit on others deliberately, they might cause the spread of the coronavirus which is dangerous to life, thereby risking public health and safety. Their acts of spitting on others with intention of spreading the virus make them liable under the above Sections. For a better applicability of these Sections, authorities need to demonstrate that the

[72] Prof. S.N. Mishra, Indian Penal Code 1860 (19th, ed., Central Law Agency, 2014).
[73] World Health Organization, Infectious diseases, Geneva: World Health Organization, (Oct. 2020, 18, 10:35 PM), https://www.who.int/topics/infectious_diseases/en/.
74 World Health Organization, Modes of transmission of virus causing COVID-19: implications for IPC precaution recommendations, Geneva: World Health Organization, (Oct. 2020, 18, 10:35 PM), https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommenQueen-Empress.

person committing such acts knows that their action might cause the spread of infection and yet are not taking any reasonable precautions rather are going ahead with it. For a better understanding of the situation where these Sections can be applied, few previously decided cases can be referred to. In 1886, Madras High Court in a case held an individual guilty under Section 269 IPC for traveling by train despite being suffered from Cholera. The court also held the man who bought his ticket guilty for abetment.[75] In a similar case, the accused was held guilty under Section 269 IPC for negligently traveling on a train after coming in contact with a plague patient. To understand the difference between negligently spreading the virus under Section 269 IPC and malignant spreading of the virus under Section 270 IPC we can refer to a few recent cases. A case of negligent spreading of the virus appeared when Bollywood singer Kanika Kapoor allegedly hid her travel history and went to a public gathering but was later found to be Covid-19 positive, putting others at risk through her negligence.[76] While a case of malignant spreading of this virus appeared when a man in Kashmir was arrested and was sent to quarantine after people complained that he was spitting on the gates of their homes.[77] This is not an isolated case. There are many reported cases in India where people were arrested for trying to spread the coronavirus in the community. Like two men were arrested in Mohali for allegedly spitting on notes before buying dairy products.[78] There are also several cases where people intentionally tried to spread the coronavirus amongst Corona Warriors (Front line workers fighting against Covid-19 Pandemic) by spitting on them like in Delhi where a man spat on the police officer after he was stopped from roaming around without a mask[79] and all these cases are of malignant spreading of the virus. The difference between Section 269 IPC

75 Queen Empress v. Krishnappa And Murugappa, (1883) ILR 7 Mad 276.
76 PTI, Coronaviruserve police serves notice on Bollywood singer Kanika Kapoor, The Hindu, (Oct. 2020, 20, 12:25 PM), https://www.thehindu.com/news/national/coronavirus-up-police-serves-notice-on-bollywood-singer-kanika-kapoor/article31444885.ece.
77 Press Trust of India, Man from Kashmir arrested after complaint of spitting on gates in Jammu, Business Standard, (Oct. 202, 20, 01:15 PM), https://www.business-standard.com/article/pti-stories/man-from-kashmir-arrested-after-complaint-of-spitting-on-gates-in-jammu-120040700016_1.html.
78 Manjeet Sehgal, Coronavirus: Two held for spitting on currency notes outside dairy shop in Mohali, India Today, (Oct. 2020, 20, 03:15 PM), https://www.indiatoday.in/india/story/coronavirus-two-held-for-spitting-on-currency-notes-outside-dairy-shop-in-mohali-1666329-2020-04-13.
79 Sakshi Chand, Man arrested for spitting on cop in Delhi during lockdown, Times of India, (Oct. 2020, 22, 08:30 PM), https://timesofindia.indiatimes.com/city/delhi/man-arrested-for-spitting-on-cop-in-delhi/articleshow/75122018.cms.

and Section 270 IPC is that the latter punishes those who do an act with deliberate intention. Section 270 IPC is just an aggravated form of Section 269 IPC.

GRAVITY OF OFFENCES AND THEIR EQUIVALENT PUNISHMENTS

Looking at the consequences that coronavirus can bring to a particular Nation, it can be rightly held that a person who is infected with the virus, if intentionally attempts to spread it amongst others could be more dangerous than suicide bombers since a suicide bomber can kill only a few individuals within a definite territory, while a person infected with coronavirus can not only kill a large number of people but can also seriously threaten the lives and livelihoods of the people of the entire nation, indirectly breaking the economy of the nation. But on comparing the gravity of such offenses to the punishment prescribed, then it becomes clear that there is a serious imbalance between the two. The maximum punishment is still 2 years under Section 269 IPC and Section 270 IPC even after it has been observed by the Law Commissioner that the person who causes the malignant or malicious act of disseminating the virus it could be traced, then shall be charged with homicide. However, to date, such recommendations have not been adopted. Now in cases where an individual flouts the quarantine rules, (s)he can be booked under Section 271 IPC. The maximum punishment prescribed under this section is 6 months. Also, in cases where Section 144 Cr. P. C.[80] is imposed in an area of containment zones and if a person violates it or any provisions of the Epidemic Act then (s)he could be booked under Section 188 IPC. Section 188 IPC prescribes punishments for those who violate order promulgated by the public servant. As per Section 188 IPC such disobedience that puts health, safety, and human life at risk, will be punished with an imprisonment maximum of up to 6 months or a fine up to 1,000 rupees or with both. So, it seems that in India it does not matter even if an individual violates quarantine rules or disobeys government orders and goes to places where there were previously no cases of infection but subsequently, such person spreads the infection and puts a large number of people's lives at risk, since (s)he is likely to get a maximum punishment of only 6 months or fine or in certain cases maybe both. In this fight against the coronavirus, the doctors and frontline workers are getting most visible and

80 Code of Criminal Procedure 1974, (No. 2 of 1974, Acts of Parliament India).

vulnerable to attacks, assaults, and abuses. In a country where its Prime Minister called the healthcare workers and doctors as "incarnation of God"[81], there are several reports around the country showing that such professionals are being spat at, chased away, and even ostracised by their neighbours. In one of the incidents, a mob hurled stones on two female doctors in Indore who were wearing personal protective equipment.[82] They came under attack when they went to check one suspected person. Similarly, there are several reports of attacks on doctors and nurses that came from the southern city of Hyderabad and the western city of Surat.[83] Reports of such attacks were not only directed towards the healthcare personals themselves but also their family members. In one such incident, Delhi AIIMS doctors appealed for help when they were asked by their landlords and housing societies to evict their homes.[84] Now the government of India to protect the healthcare professionals amended the Epidemic Disease Act by bringing an Ordinance recently. This Ordinance provided for protection to the healthcare-service personals by increasing the punishments up to 5 years and with fine up to 2 lakhs rupees against any person who commits or abets to commit acts of violence against any health-care service professional. And further, if any person causes grievous hurt to such personals, then that person will be punished with a fine, not below 1 lakh but up to 5 lakhs rupees, and imprisonment not below 6 months but up to 7 years.[85] This is a laudable step taken by the government of India to protect the healthcare professionals and penalize those people who commit such acts of violence. But, even the newly brought Ordinance is alleged to have failed to address the issues of imbalance between the gravity of offenses and punishment prescribed. Under Section 3B of the said Ordinance,[86] offenses amounting to violence against healthcare service workers have been made compoundable. This means that if someone deliberately attack, abuse, or assault the

[81] Deepshikha Ghosh, Those In White Coats God's Incarnation: PM Modi Condemns Harassment Of Doctors, NDTV, (Oct. 2020, 22, 08:50 PM), https://www.ndtv.com/india-news/pm-narendra-modi-on-coronavirus-amid-lockdown-mahabharata-was-won-in-18-days-war-against-coronavirus-2200607.

82 Healthcare workers who visited to screen COVID-19 infection attacked by locals in Indore, The Statesman (Oct. 2020 ,22, 12:07 PM), https://www.thestatesman.com/coronavirus/healthcare-workers-who-visited-to-screen-covid-19-infection-attacked-by-locals-in-indore-1502872775.html.

83 Stigmatised: India's coronavirus 'heroes' come under attack, ALJAZEERA, (Oct. 2020, 23, 10:00 AM), https://www.aljazeera.com/news/2020/03/india-coronavirus-heroes-attack-200327070916157.html.

84 Swati Gupta, Doctors evicted from their homes in India as fear spreads amid coronavirus lockdown, CNN, (Oct. 2020, 24, 11:15 PM), https://edition.cnn.com/2020/03/25/asia/india-coronavirus-doctors-discrimination-intl-hnk/index.html.

[85] The Epidemic Diseases (Amendment) Ordinance 2020, (No. 5 of 2020, President of India India).

[86] Ibid.

healthcare personals or workers, irrespective of how much harm is caused to such personals or the public at large by obstructing the work of healthcare workers who are trying to contain the spread of disease, charges can still be dropped against him/her. To deter offenders from committing such serious offenses which could affect all the people of the country and its economy, laws need to be strict or otherwise, the above provisions provided, to protect the healthcare workers and doctors or to punish those individuals who are flouting quarantine rules or breaking government orders or those who are maliciously trying to spread the disease, will have no deterrence.

CONCLUSION AND SUGGESTIONS

Covid-19 Pandemic has triggered a mass migration of laborers[87] and due to lockdown, these daily wage workers have no options left other than to go back to their native state or suffer from hunger. And all these uncertainties have caused frustration amongst such laborers forcing them in certain cases even to commit suicide. While in the same country, few individuals are deliberately trying to spread the virus to harm others and in a way putting the whole country at a risk. Such a person should not only be booked under Section 269 and Section 270 IPC but also be charged with homicide. It becomes necessary that to deter such acts strict laws are required but under current provisions, the maximum punishment is only 2 years which could be given to such individuals who are deliberately trying to spread a virus that is dangerous to life. And in cases of breaking quarantine laws under Section 271 IPC or violating government order under Section 188 IPC the maximum prescribed punishment is only 6 months. So, it defeats the very purpose of the provisions that is deterrence. The new ordinance which was brought to protect healthcare workers and doctors seems to have failed in its very purpose by making offenses under it compoundable. All this has made justice very cheap for those doctors and front-line workers who are facing abuses and attacks even after sincerely sacrificing everything for their Nation. There is an urgent need for new legal provisions for offenses of the above-mentioned gravity and to have a balance between the gravity of offenses and their

[87] Soutik Biswas, Coronavirus: India's pandemic lockdown turns into a human tragedy, BBC (30 Mar 2020), (Oct.2020, 27, 09:00 PM), https://www.bbc.com/news/world-asia-india-52086274.

punishment. The law must take into account the consequences wilful spreading of this virus can bring and thereby shall equate such offenses with that of other offenses like- Offences against the State, Offences of Attempt to Murder, Offences of Grievous Hurt, Offences of Polluting the Environment and Creating Public Nuisances of serious nature, and shall make such offenses punishable by life imprisonment irrespective of the fact whether such acts caused any loss of life or carry forwarded the infection in the respective communities. Even recently the Chief Minister of Sikkim announced that those who will illegally cross its border will be charged with offenses under Section 307 IPC.[88] However, exceptions are to be made considering those who are breaking the Rules out of necessities, since necessity cannot be bound by law and India has a significant number of poor populations.

[88] Bikash Singh, Government to slap case of attempt to murder under section 307 IPC against those who enter to Sikkim illegally: CM. P.S. Golay, ET Bureau, (Oct. 2020, 24, 09:45 PM), https://m.economictimes.com/news/politics-and-nation/articleshow/75607790.cms

FORENSIC PSYCHOLOGY: NEED OF THE HOUR IN INDIAN CRIMINAL INVESTIGATION

- NEHA BHURANEY

Whenever we talk about any crime whether its trivial or grave, ranging from negligence to murder there is always an aspect of a criminal structure which is deemed to be more important than anything else in the process of commission of crime which is "mens rea" or malice in intention, the reason or the motive which drives a person to comitia penal offence.

There have been various examples where it has been questioned and debated upon as to why a person commits an offence or what drives them to give in to their darkest desires. whilst talking about Indian Penal Code the motive of any offence does not matter but the intention behind committing any offence takes up a huge part of defence of any accused in the court of law.

During any criminal trial in India there is always a special place in the arguments as well as the witness questioning which is the opinions of the experts in regards to the investigation and solving the questions raided by the criminal justice system in India in proving a crime beyond reasonable doubt.[89] Here comes various official whose sole function is to prove the glimpses of corrective reality that elude the court of law in better understanding the aspects of law. In this paper we shall be discussing the importance of one such expert which are forensic psychologist and what roles they play in defining the reality of criminal justice system.[90]

WHAT ARE THEY AND WHAT DO THEY DO?

Forensic psychology is a very important part of psychological behaviour which indicates certain red flags that needs to be taken care of in the investigation of a criminal nature and to utilizes all of the psychological tools which contends the mindset of a person ranging from the glimpses of being a sociopath to being extremely guilty as a onetime offender, this branch of psychology comes in aid to the cases of grave importance in India such as from crime against children , in case of child abuse ,child custody disputes to assessing the mental and physical

[89] C.R. Bartol & A.M. Bartol, Introduction to Forensic psychology- Research and Application (2nd ed. Barnes & Nobles, NY, 2008).

[90] Ainsworth, P. B. (2000). Psychology and Crime: Myths and Reality. Harlow, Essex : Longman.

conditions of a person ability and competency to stand trial, to advise judges in matters relating to sentencing to name a few. As per the American Psychological Association (APA)[91] ,2000. "Forensic psychology is the professional practice done by the psychologists in the area of clinical, counselling, neuro and school psychology, when they are engaged regularly as experts and represent themselves as such. Mainly to provide professional psychological expertise to the judicial system

ROLE OF FORENSIC PSYCHOLOGY

a.Clinical

These psychologists are called upon by the court to aid the investigation as a n expert witness to assess the accused on all ground of mentality and morality. The psychologist could use interviews, assessment tools or psychometric tests i.e., special questionnaires) to aid in his or her assessment. these question tries to identify different markers in an individual, through their choices and their conceptual understanding to any situation and their go to response on the same like for example if a person is put in a position where he has been insulted by someone inferior to him, will the go to response be violent or otherwise, such assessment makes up a profile for the person so that it could be better understood by the court before the judgement is given on the person These assessments can inform the police, the courts, or the prison and probation services about the psychological functioning of an individual and can therefore influence how the different sections of the criminal justice system process the individual in question. For example, a Forensic Psychologist may be asked to assess individuals in order to determine whether they are fit to stand trial or whether they have a mental illness which means that they would not understand the proceedings.

b. Experimental[92]

This function is more of researched base in nature where there are study of lot of finding, study of primary data wherein the forensic psychologist tend to designing experiments in different parameters where they test the vulnerabilities of the person(In this case the test subject)

[91] Gudjonsson, G. H. and Haward, L. R. C. (1998). Forensic Psychology: A guide to practice. London : Routledge

[92] Alison, L. (2005). The Forensic Psychologist's Case Book : Psychological Profiling and Criminal Investigation. Cullompton, UK : William

designing such scenario wherein the attributes f he person are duly tested and a combined report is then resented to the courts to aid in the further investigations.

c. Actuarial[93]

In this context the word 'actuarial' relates to the use of statistics in order to inform a case. This function is used quite often in the courts of law a s an expert opinion where they want to know what a response of a person will be in situation put forth to them, like for example what is the statistical probability of an offender to become a reoffender even after the rehabilitation process have been don, or how a person will respond to being targeted only on their sexual orientation, this form of function is very closely related to the clinical function of forensic psychologists In such a case, a Forensic Psychologist could be called upon in order to inform the pre-sentence report to the court.

d. Advisory[94]

As the word itself suggest the role of forensic psychologist is that of mere adviser where they share different techniques and tools of how to proceed forward with the suspect ,what line of questioning shall be better so as the garner more responses and answers from the suspect. These experts also come in handy for the both counsels on how to the cross examination so that appropriate answered court be garnered in the court of law. This role involves the use of the psychologist's expertise in order to advice the police, courts or prison and probation services. As you can see, psychologists thus can be used in a variety of different scenarios within the criminal justice system and for a number of different reasons.[95] This list of roles, however, does not claim to be exhaustive, as there are many more ways in which psychologists play their part. We have therefore chosen the most well-known roles in order to give an indication of what kinds of roles and functions Forensic Psychology involves

CASE STUDY OF FORENSIC AUTOPSY OF DEATH OF MRS SUNANDA PUSHKAR

[93] Alison, L. (2005). The Forensic Psychologist's Case Book : Psychological Profiling and Criminal Investigation. Cullompton, UK : William

[94] Ibid

[95] Alison, L. (2005). The Forensic Psychologist's Case Book : Psychological Profiling and Criminal Investigation. Cullompton, UK : William

The Special Investigation Team (SIT) probing the mysterious death of Sunanda Pushkar relied heavily on the forensic psychological autopsy of seven people close including her husband Shashi Tharoor, personal staff Narain Singh and son Shiv Menon to conclude that she committed suicide, sources said.

Investigating the case for more than four years, the Delhi Police on filed a charge sheet in a Delhi court accusing Pushkar's husband Tharoor of abetting her suicide.[96]

The medico-legal and forensic evidence were analysed during the investigation but after carrying out the psychological autopsy, the investigators came up to the conclusion that Pushkar committed suicide and booked Tharoor for abetment of suicide and for subjecting her to cruelty.

Special Commissioner of Police Dependra Pathak said, "The charges have been filed on basis of out psychological autopsy."

The test was carried out last year and the SIT had also informed the Delhi High Court about it. This test is carried out usually in those cases where death is unexplained, and no accused has been named.

Psychological autopsy is a tool to examine the state of mind of the people close to the deceased in order to reconstruct events leading up to the death.[97]

Tharoor, Narain Singh, Shiv Menon and four friends of Sunanda went through the test last year in December.

"A series of questions were asked in an interview format and the police tried to reconstruct the state of mind of the people when the crime took place," said Pathak.[98]

Through this test, the police gathered information on the cognitive functioning, psychological well-being, state of physical health and her Sunanda's social behaviour. The tests were carried at CBI's forensic lab in Delhi. However, AIIMS experts stated the test helps the investigators in their probe but the report not admission-able in the court.[99]

[96] DNA India, https://www.dnaindia.com/delhi/report-sunanda-pushkar-death-case-sit-relied-on-forensic-psychological-autopsy-2615149(last visited 1at Jan 2022)
[97] Ibid
[98] Ibid
[99] Supra Note 9

The findings of forensic psychological tests cannot be used as evidence like the lie detection test is not admissible. These tests cannot be used as evidence under the Evidence Act.[100]

As per the experts, the psychological autopsy is one of the effective tools for providing information and answers in suicide cases.

Like a physical autopsy, the psychological autopsy attempts to explain why a person has taken their life by analysing medical records, interviewing friends and family, and conducting research into a person's state of mind prior to their death

WHERE DOES INDIA STAND?

It has been established in previous sections of the paper that forensic psychology as a branch have been rising rapidly and is very crucial in the investigation procedures and the court of law. It thus becomes important to question India's position regarding this area of specialization. India is still considered to be on the stage where forensic psychology is merely a developing or an emerging field.[101] Even though it is correct to say that in India the field of psychology is developing rapidly but still India is far behind from those countries where the forensic psychology forms an integral part of criminal investigation and without the expert opinion of these psychologist the cases are not deemed to be closed. This is not to say that India has no use of psychology in the field of law. Various governmental as well as non-governmental organizations almost in all cases have a department dedicated to psychology. However, the problem lies with how limited the scope of this area of expertise is in India. Today, most of the forensic psychologists in India are mainly used for the administration of polygraph examination and narco-analysis.[102] While these things are the job of a forensic psychologist, limiting their knowledge and skill set of such professional to only evaluating such tests is wrong. Such restrictions do not allow these professionals to aid investigators in a much better manner. Even when assistance has been taken from forensic psychologists in various high-profile cases it has been of no avail. One example of this would be the Aarushi Talwar murder case, in which S.L.

[100] DNA India, https://www.dnaindia.com/delhi/report-sunanda-pushkar-death-case-sit-relied-on-forensic-psychological-autopsy-2615149(last visited 1at Jan 2022)

[101] Vimala Veeraraghavan, Handbook of forensic psychology, (Select Scientific Publishers, New Delhi, 2009)

[102] S. Karandikar, The Case of India's Missing Forensic Psychologists, Live Mint, https://www.livemint.com/Sundayapp/tI8ge5WBhG0HXxCW9mKzNM/The-case-of-Indias-missing-forensicpsychologists.html (Dec 19, 2021, 5 PM),

Vaya, a renowned psychologist provided his expertise.[103] However, the Central Bureau of Investigation largely disregarded his testimony. Later on, after various polygraph tests by the suspects, the theory stated by Dr. Vaya is believed to be largely correct. Moreover, all behavioral profiles of offenders, created by forensic psychologists in India is by non-governmental organizations. Governmental agencies in India, till this date do not have expertise for such profiling. This has resulted in low efficiency of criminal investigations in the country. While other countries such as Netherlands, Australia and the United States are known to have mandatory forensic psychologists assisting legal organizations India is far lagging behind[104]. Thus, it is not incorrect to say that the use of forensic psychology in profiling in India is at a nascent stage. Countries such as UK even have forensic psychologists at prisons conducting interviews with the offenders and assisting the law-making bodies in deciding the basic treatment plan for such offenders

However, in India, forensic psychologists in prisons have largely been unheard of. What makes it even more difficult for forensic psychology to bloom in India is that the evidence provided by forensic psychologists is merely corroborative.

CONCLUSION

Due to the lack of any kind of standardized guidelines for this field by the government and no mandatory provisions for the same, the state of both forensic psychology and profiling in India is worrisome. The following section of the paper provides with suggestions to make this situation better for India and its legal justice system

This paper elaborated upon how the weight of legal footprints of forensic psychology is not as strong or heavy as it should be. Thus, it is of extreme importance for this field to be given more weightage in India. The following suggestions must be considered for the same:

1. it is important that the legal machinery along with the advised legal official should lay down certain set of rules and guidelines and list of detailed scenarios where it would be absolute for

[103] Ibid

[104] Havovi Hyderabadwalla, Forensic Psychology in India- where we are and where we are going, Indian Mental health http://www.indianmentalhealth.com/pdf/2018/vol5-_issue2/Viewpoint_Article_Forensic_Psychology.pdf (Dec 19, 2021, 3.30 PM),

the court to takes into advisement the forensic psychologist and how their opinion will be integrated into the formation of judgement.

2. as a pat of primary investigation it should be considered that police stations should have one forensic psychologist on the team to provide assistance when an wherever it necessary, this will also be helpful to create jobs.

3. Further, special training of this subject shall be imparted to police officers in case a station does not have a forensic psychology expert on board.

4. Considering the fact that every crime is man-made, each forensic laboratory in the country shall also have one forensic psychologist to assist the team.

5. Public awareness regarding this field shall also be created by spreading information on an educational level. In order for the Indian criminal justice system to be able to solve crimes most efficiently, a functional ecosystem within the field of justice has to be formed. The focus should be on harmony of professionals working in a collaborative manner rather than a competitive manner. Only then will India be able to have efficient legal mechanism. Thus, forensic psychology, a subject which has been undermined for long in India needs to be given more importance due to its efficacy and worth.

RIGHT TO HEALTH: IS IT A FUNDAMENTAL RIGHT?

- NIKHIL SEBASTIAN

As the SARS-CoV-2 better known colloquially as the Covid-19 Pandemic rages across the world, it has left all of us cooped up in the confines & safe spaces of our homes. The Pandemic has changed and impacted our lives in ways we could have never imagined. This whole pandemic situation has once again opened our eyes and minds to the needs & benefits of good health and a robust immunity. All of us have time and again heard the age old saying, "Health is Wealth" but this pandemic has proved itself to be a true testament to this statement.

As Nations across the Globe continue their battle against the virus, India's battle has proven to be unprecedently tougher than expected. The notorious "2nd wave" as it is known now ravaged the nation in the months of April and May of this year and left us with many unforgettable sights and memories. As people lost their loved ones to the virus, we witnessed the nation collectively run from pillar to post desperately in search of oxygen and ventilator beds to the horrid and saddening sights of abandoned corpses floating in our holy rivers, we saw it all and it awakened us to the grim reality of our health infrastructure.

The Pandemics impact on our health infrastructure once again threw open the doors to discussions and serious debates on the question of – Right to Health. How well are the rights to good health and wellness of 1.4 Billion Indians protected and looked after in this country? Our Constitution never makes a mention of Right to health yet today it is accepted that right to health is a part and parcel of Article 21 of the Indian Constitution. It is often at times considered to be a fundamental right even though not being expressly mentioned as one. There has always been a shroud of ambiguity and confusion with regard to this subject and now seems the apt time to once and for all finally bring about a sense of clarity, open discussion and make policy changes to solve this conundrum.

Right to Health: An outlook on what International laws and Conventions say –

Before we undertake a detailed analysis of right to health with respect to the Indian context, it is necessary to have a brief yet detailed understanding of right to health in the global

perspective with regard to the international laws, conventions, customs and the legislations of various countries.

On a Global scale, right to health is given immense importance and significance as a right that encompasses broader economic, cultural & social rights and one that is the basic entitlement of every human being that is alive. The World Health Organization (WHO) in its constitution first articulated an idea of a right to health and regarded that "the possibility of attaining the highest obtainable standard of health is a rudimentary right of every human being."[105] The Universal deceleration of Human Rights of 1948 is the elementary document that aims to uphold the rights of every man, and it correctly recognises right to health as fundamental part of the right to an adequate living as mentioned in Article 25 of the declaration. These are not the only international conventions that state the significance of right to health, the International Covenant on Economic, Social & Cultural rights, a multilateral treaty ratified by a 170 countries and adopted by the United Nations[106] also recognises the right to health. Article 12 of the covenant recognises the right to physical and mental health. Various other such international conventions as well as covenants have also recognised the importance of right to health and a lot of allied global organizations and NGOs' are actively engaged in promoting and opening up discussion on the same and pushing for legislative & policy changes to incorporate right to health as a fundamental right of all human beings.

Even though countries around the world are signatories to the various conventions that recognise right to health as an essential and basic right of man, many of the States lack an explicit constitutional provision that recognises the need for a right to health.

The United States constitution for instance does not have a constitutional provision that recognises the right to health. Former US President F.D. Roosevelt once considered adding health care into the constitution as a part of the Second Bill of Rights but it never materialised. As such, today instead of a health care system, the US depends heavily on a Health Insurance system. Just like the United States, the English constitution does not have explicit provisions on Right to health but the Human Rights Act of 1998 does recognise the need to maintain a

[105] WHO Constitution-22 July 1946 enacted by 61 original representatives at New York.

[106] GA. Resolution 2200A (XXI), 16 Dec 1966.

high standard of health and also recommends the public authorities to emphasise on the need to maintain good health.

Right to Health: An Indian interpretation and what our laws say –

The Challenges we face -

India's growth is among one of the fastest in the modern world with rapid urbanization and industrialisation along with a steady growth of our population figures, we are soon set to overtake our next door neighbours China as the most populated country in the world. But, our health infrastructure and health care systems have failed to keep pace with India's unhindered growth and population explosion and in some instances, our health systems remain dilapidated and unable to cope with the requirements and demands our population poses. India spends a mere 3.54 % of its 3 Trillion GDP on health expenditure and the government's spending is a further low of about 1.29 % as estimated by the World Bank.

Challenges to good health and healthcare are not new in India; Indians have been haunted by obstacles like malnutrition, lack of clean drinking water, imbalanced diet, infanticide, communicable diseases, lack of environmental & sanitation standards and an ever increasing population for centuries now, but the biggest cause of concern today is the need for a better and more viable health infrastructure built up by both the public & private sector in cooperation with each-other to handle the load the population puts on them.

Indians access to healthcare and health infrastructure is very poor even today. There exists an imbalance and unequal distribution of health resources among the population. In a study undertaken, it was identified that rural populations in India face a severe shortage of quality health care and access to health care facilities and as such, are forced to outright ignore their health or rely on private healthcare facilities that pinch the pockets of the poor.[107] A study conducted had identified that a majority of the doctors in the country (as much as 74%) practise in and around urban centres while a small minority (28%) are practising around the rural regions of India.[108]

[107] Das J, Hammer J, Leonard K-The quality of medical advice in low-income countries. *J Econ Perspect* (2008) 22(2):93–114.

[108] "Issues of creating a new cadre of doctors for rural India". International Journal of Medicine and Public Health. 3 (1): 8.

In urban areas, there are much more health care facilities available and the access is better but there is a substantive shortcoming in the quality of health care offered. Studies have found that many a times, rather than accessibility, it is the lack of quality care that results in deaths of Indians. A study undertaken by the Lancet on quality of healthcare placed India one of the worst performing states in the 136 states that were surveyed in quality of healthcare provided and the study found that in 2016 alone, 1.6 million Indians succumbed to below par & inferior quality of health care than to lack of access to health care.[109]

The time has never been more apt than this to engage in and bring about policy changes and give right to health and healthcare the due recognition and importance it warrants.

What our Laws say –

The makers of our constitution surprisingly never added right to health as a fundamental right for the people of India under Part III while drafting the constitution and quite frankly, it is a bit odd to believe that the constituent assembly during its hour long debates and deliberations, somehow forgot the idea of right to health especially with context to India that has had a long standing plight with keeping its population healthy and availing basic healthcare to its staggering and ever growing population.

Well the truth to the matter here is that, No: right to health was not forgotten by our constitution makers but rather understood to be a part of the larger and more broader and encompassing Right to Life. Article 21 is considered to be an important pillar of the Indian Constitution in that it gives the most basic right to the citizens of our country, The Right to Life and life can only exist if there is a healthy body that can sustain the life. The makers of our constitution found no need to incorporate right to health as a separate fundamental right when in simple sense; right to health would be a part & parcel of the broader right to life as guaranteed as a fundamental right under Article 21 of the Indian Constitution. This view today is more or less, an accepted view not just by legal thinkers and scholars but also by the Indian judiciary. The Hon'ble Supreme Court in the landmark case Bandhua Mukti Morcha vs Union of India & Others,[110] also held the same view that right to health falls within the ambit of the larger right

[109] The Lancet-Volume 392, Issue 10160, P2203-2212, Nov 17, 2018.

[110] 1984 AIR 802; 1984 SCR (2) 67

to life as mentioned under Article 21 of the constitution and as such can be interpreted within the same.

On the Contrary, it is however incorrect to state that the constitution makes absolutely no mention of people's right to health and healthcare. Though not mentioned explicitly in the fundamental rights, the theme of health appears in the Indian Constitutions Directive Principles of State Policy. Part IV of the constitution incorporates the aspects of DPSP as provisional guidelines that the legislature is expected to adhere to during policy formulation. Article 39(e) directs the state to ensure good health of workers. Article 41 seeks to ensure public assistance to all who suffer from disability & sickness. Article 42 of the constitution which is a part of the DPSP seeks to ensure the maintenance of appropriate nutritional levels to ensure a healthy lifestyle which in turn can also enhance public health. The Directive Principles of state policy are however unenforceable and cannot be justified in a court of law, they remain as "policies" or "guidelines" that are aimed as just directives the state should adhere to ideally while framing the policies. Even though they are considered to be mere non enforceable guidelines, they have a persuasive and idealistic value that the state should duly implement while drafting various policies. This opinion was held by the hon'ble Supreme Court while deliberating on the Bandhua Mukti Morcha vs Union of India & Others.

Apart from the Indian Constitution, there are several other statutes and legislations that have been enacted with regard to health such as the Mental Health act of 1987, Maternity benefit act 1961, Persons with disabilities (Equal opportunities, protection of rights & full participation) Act, 1995 etc. have all been enacted with an aim to further enhance right to health & healthcare in India. The Constitutional & Statutory provisions and procedures have in parts and places made explicit and implicit mentions of the right to health and healthcare for the people of the country.

View of the Indian Judiciary & Judicial system –

Health is a subject that is mentioned in the State list and thereby being the duty of the state government along with the Central government to maintain health & healthcare services. The idea of right to health being considered as an implicit part of the Indian Constitution was propounded by the Indian judiciary and the legal systems of our country. In a way, it can be

right to say that it was the Indian judiciary through its various landmark judgements furthered the interpretation of right to health being an important part of our fundamental rights and an important aspect and a basic right of the people of India. The Judiciary identified right to health as an essential part of the right mentioned under Article 21 of the Constitution. Many prominent Judges and Jurists also upheld the same view countless times. The hon'ble Justice K.G. Balakrishnan while addressing a national seminar held that the right & responsibility to promote & protect health of the citizens is not just in the hands of the healthcare professionals but also in the hands of public authorities such as judges and administrators.[111]

The Supreme Court in the following prominent judgements elaborated the meaning of what Article 21 of the Constitution means and how Right to health and healthcare is a part and parcel of right to life under Article 21. In Francis Coralie Mullin vs The Administrator, Union Territory of Delhi,[112] the Supreme Court held that Article 21 does not simply just mean right to life but involves the right to live with dignity and not just existence as an animal. Article 21 is a broad concept and right to health remains a fundamental part of article 21. In Paschim Banga Khet Mazoor Samity v. State of West Bengal,[113] the hon'ble Supreme Court held that every government has the responsibility to provide necessary medical aid to all persons to ensure public health & welfare at large is maintained. In the judgement held by the court in State of Punjab & Ors v Mohinder Singh Chawla,[114] the court once more reaffirmed its earlier opinion on Article 21 substantiating that right to health is a paramount aspect of right to life. Maintenance & improvement of health among the public is the obligation of the state, this was held in Unnikrishnan J.P. vs. State of Andhra Pradesh.[115] The same was also held in State of Punjab & Ors v Ram Lubhaya Bagga.[116] In Consumer Education and Research Centre v. Union

[111] National Seminar on 'Human right to health' addressed by Justice K.G. Balakrishnan organized by the Madhya Pradesh State Human Rights Commission (At Bhopal) on September 14, 2008.

[112] AIR 1981 746

[113] 1996 SCC (4) 37

[114] (1996) 113 PLR 499

[115] AIR 1993 SC 2178

[116] Review Petition (C) No. 1627 of 1998 in CA No. 1111 of 1998

of India,[117] the Supreme Court held that for a meaningful right to life, health and medical rights are necessary and needed for a vigour-full life. These landmark judgements were milestones in judicially enforcing the ambit and scope of Article 21 of the Indian Constitution and that it includes in itself, a right to health as well and it is the obligation of the State to provide health services and facilities to its people and uphold the people's right to health.

The judiciary has not just passed judgements on the applicability of health within Article 21 of the Constitution but also on ensuring the availability of health care services and facilities. In Pt Parmanand Katara v. Union of India,[118] the Supreme Court held that doctors whether in employment in a public or private sector healthcare has the obligation to extend his or her skills and services to safeguard and protect a life. In Mahendra Pratap Singh v. State of Orissa,[119] the hon'ble court held that the population that lives in the rural areas of the country such as India may have some hindrances but can always aspire to have access to healthcare in their areas of living and it is the duty of the government to aid the people to get treatment and have a healthy life.

The Judiciary has over the period of time further passed more judgements in relation to health and its importance. The hon'ble court in Vincent vs Union of India[120], held that the body is the backbone of human life and activities and hence an obligation of the state to create good conditions for maintaining health. Virender Gaur vs State of Haryana[121] was another landmark judgement that spoke about the need for environmental standards and its interrelation to health standards. The hon'ble Supreme Court in the judgement observed the need to upkeep environmental standards and to effectively check the pollution of water, air etc. and failure to do so are all in violation of right to health that falls within Article 21 of the Constitution. This was a landmark judgement because not only did it highlight the need to fight of pollution and

[117] AIR 1995 SC 636

[118] AIR 1989 SC 2039

[119] AIR 1997 Ori 37

[120] AIR 1987 SC 994

[121] 1995 (2) SCC 577

maintain an ecological balance but also accepted right to health to be an important aspect of Article 21 of the Indian Constitution.

The above judgements give us a clear picture of what the opinion of the Indian Judiciary is with regard to right to health and healthcare and the wider inclusion of right to health under right to life as per Article 21 of the Indian Constitution. The Judiciary has an undeterred view on right to health and has always held right to health to be a fundamental and basic right of the people of India even if it is not mentioned as a part of the fundamental right as mentioned under Part III of the Indian Constitution.

The views held by our Constitution, our Laws & Legislations and our Judiciary are all clear on the topic of right to health and allied healthcare. Though not a fundamental right explicitly, it is well accepted that right to health is the elementary right of the people & an inseparable part of right to life and thereby is a fundamental right even if it isn't mentioned as one.

Changes towards the Right Direction –

Today, right to health and the people's right to avail quality healthcare has been realised as a basic necessity and right of the people. A clarion call to make right to health a fundamental right has started to gain wide scale debate and discussion. In 2109, a high level group involved with the health sector submitted a report to the Fifteenth Finance Commission of India and recommended the inclusion of right to health into part III of the Indian Constitution as a fundamental right.[122]

International Conventions and Laws as well as the provisions of various global organizations such as the United Nations (UN), World Health Organization (WHO), and the Universal Declaration of Human Rights (UDHR) etc. have all recognized the right to health & healthcare as a basic, elementary & fundamental aspect of human life. The Indian Judiciary has also identified the prominence of international laws and conventions as having authority over all judicial precedents. In CESC Ltd. v. Subash Chandra Bose[123], the hon'ble court banked on international provisions to conclude right to health is a fundamental right of all men and the international laws can be taken into consideration as important legal precedents.

[122] Report by HLG on health sector before the 15th Finance Commission of India, 2019

[123] (1992) 1 SCC 461

The Indian Government has also commenced various schemes and policies to strengthen the people's right to health and access to healthcare. The Indian government in the 12th plan set up the National Health Mission both at the urban & rural level to strengthen India's health infrastructure. Another scheme set up by the Indian government is the Pradhan Mantri Jan Arogya Yojana (PM-JAY) to provide health coverage to the weaker sections of India's population. Public & Private players have also initiated cooperation amongst themselves to create a Public-Private Partnership initiative (PPP) to further solidify India's health infrastructure in the hopes of achieving the United Nations Millennium Development Goals.
The ball has started to roll in the right direction and there is a renewed hope and change in policies being made to strengthen India's health care and infrastructure and to realise right to health as a fundamental right.

Conclusion –

The famed French thinker Voltaire once said, "There can be no happiness without good health." Health remains the underlying key to all of life's happiness and pleasures. Every human being has the right to a good life and that can only be achieved with good health. It is the duty of the state and its functionaries to ensure that the people have a right to achieve the highest attainable health possible.

The current pandemic scenarios the country faced has once again brought up the discussion on the peoples need to attain good health and access to quality healthcare and we can all only hope that necessary policy and reformative changes are undertaken to ensure that our varied country and its population remains healthy and our people are never denied the right to health.

CAVEAT EMPTOR AND ITS EXCEPTIONS

- ATISHAY AGARWAL

Abstract:

Caveat emptor is a Latin expression that means "let the consumer beware." Like the phrase "sold as is," it emphasizes that the customer accepts the risk that a product will not meet their expectations or have faults. To put it another way, the caveat emptor principal acts as a warning to buyers that they have no recourse against the seller if the product does not fulfil their expectations. Before the commercial Revolution, caveat emptor was the rule for many purchases and property transactions, though sellers took significantly greater responsibility for the purity of their product within the gift day. Before the seventeenth century, people consumed far fewer products and did so more regularly from native sources, resulting in only a few clients' protection laws (mostly restricted to weights and measures). Rory von boo 2007 See "Product Liability: Background" for additional historical data regarding the principle of principle. In the market nowadays buyers do not have much safety because of bad companies who provide fake exchanges so to prevent buyers from that kind of forgery the committee started educating the society about buyer behavior but still there are many problems occurs even today in the market which tends to say that the awareness is not that effective still, hence the null hypothesis of this study is been fulfilled.

Introduction:

Caveat Emptor, a Latin phrase that meaning "let the buyer beware," is a rule in commercial law that states that the buyer buys at his own risk without an express assurance in the contract. The govern was suited to purchase and offering going on in the open commercial center or among close neighbors, according to an early custom-based law proverb. The Roof E. Jeffery said That increasing volatility of modern trade has caught the buyer off guard. He's forced to rely more and more on the dealer's and maker's ability, judgement, and honesty. The most recent commercial law recognizes this and protects the buyer by offering various exceptions to the criterion of admonition emptor. As a result of a deal by test, the law infers a requirement in

the agreement that the majority of the stock will correspond to the quality example and that the purchaser will have a reasonable opportunity to inspect the majority of the stock.

When a sale is subject to this warning, the buyer accepts the risk that the item may be defective or unsuitable for his or her needs. This lead is not designed to protect merchants who engage in fraud or lack honesty management by making false or deceptive representations about the quality or condition of a certain item. It simply eliminates the need for a customer to inspect, judge, and test an item before purchasing it. In any event, the relevance of this run the program-me has been diminished by the most recent shift in consumer protection legislation. Despite the fact that the consumer is still expected to influence a reasonable evaluation of products prior to purchase, the dealer has been given more responsibilities, and the concept of proviso venditor (Latin for "let the merchant be watchful") has become increasingly prevalent. Unless the purchaser and the merchant agree otherwise, there is a legal assumption that a dealer will provide certain assurances. The Implied Warranty of Merchantability is one such warranty. When a man buys cleanser, for example, there is an implied guarantee that it will clean; similarly, when a guy buys skis, there is an implied guarantee that they will be safe to use on the slopes.

Meaning of Caveat Emptor:

The phrase caveat emptor is a Latin term which means "let the buyer beware," which suggests that the buyer owes it to the seller to provide him with knowledge about his needs, and the seller will meet those needs.

A commercial transaction involves two parties, namely the seller and the buyer, who must each safeguard their own interests and rights. When purchasing products, the buyer should inspect them thoroughly because the vendor is not obligated to provide the entire truth about the goods.

“Qui ignorance debuit qoud jus alienum emit: let the buyer beware”

The enactment of English sales of goods act, 1893 and later modified by English sale of goods act, 1979 the exceptions to the rule of caveat emptor have become more prominent than the rule itself. The doctrine of caveat emptor is set out in section 16 of sales of goods act, 1930.

The provisions correspond to section 14 of the English act of 1893. The doctrine of caveat emptor is formed upon the fundamental principle that at one time a buyer is contented with the product's suitability, then he has no such following right to lose such product. It means the buyer themselves is the responsibility for their choice.

Doctrine of Caveat Emptor:

The principle of Caveat emptor is explained in Section 16 of the Sale of Goods Act 1930 which states that there is no implied condition or warranty as to quality or fitness for any particular purpose of goods supplied."

This is a general law applied to the sale of goods. It is a Latin term meaning "let the seller beware," in contrast to the more widely known saying caveat emptor (let the buyer beware). It means buyers beware. It is the principle that the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made. When a person buys goods, the onus is thrown by law on the buyer to see that the goods are free from any sort of defect and that they are suitable for his purpose. The term is commonly used in real property transactions but applies to other goods, as well as some services.

Caveat Emptor is a principle in commerce: without a warranty, the buyer takes the risk. The increasing complexity of modern commerce has placed the buyer at a disadvantage. The seller is responsible for any problem that the buyer might encounter with a service or product. "Without a warranty, the buyer must take the risk" is the basic meaning of the phrase caveat emptor. The buyer himself is responsible for the choice he made. Thus, buyers are responsible for testing and examining those products before purchase. So, Caveat emptor is a fundamental principle in commerce and contractual relationships between a buyer and a seller.

Example:

A common example is a used car transaction between two private parties. The only exception was if the seller actively concealed latent defects or otherwise made material misrepresentations amounting to fraud. The buyer must take on the responsibility of thoroughly researching and inspecting the car—perhaps taking it to a mechanic for a closer look—before finalizing the sale. It is the duty of the buyer to check the quality and the usefulness of the

product he is purchasing. If something comes up after the sale, maybe a transmission failure, it is not the seller's responsibility. If the product turns out to be defective or does not live up to its potential the seller will not be responsible for this. Therefore, the buyer assumes the risk of possible defects in the purchased product.

Statement of Caveat Emptor:

Under Section 16 of the Sale of Goods Act 1930 incorporates the principle of caveat emptor which reads as- "Subject to the provisions of this act or any other law for the time existence in power there is no implicated state or warranty as to quality or fitness for any provided purpose of goods supplied." The principle of caveat emptor can be justified where there is disproportionate of power between the seller and the buyer. It shows the responsibility of the buyer before making a purchase. "Ignorance of law has no justification," so a customer should be vigilant about the stuff the law allows him to remain that way.

History of Caveat Emptor:

In the 19th century, the attitude of common law towards the buyer can be understood by the maxim Caveat emptor which means let the buyer beware. This maxim explains that a purchaser must carefully examine and judge what is best for him. The purchaser should not take the risk of the condition and quality of the object which he needs to buy, he must protect himself by a warranty. The philosophy behind the rule of Caveat emptor basically was that buyer shall apply his own skill and judgment before buying. It is based on the fundamental principle that when a buyer is satisfied with the suitability of the product for his use, no subsequent right will be left with him to reject the same. When the rule of caveat emptor originated, it was quite rigid and there was no scope for any subsequent change in the rule. In English Sale of Goods Act, 1893, it is highly noticeable and evident that the seller's duties as to requirements of disclosure when a product is sold was minimal. There was no duty upon the seller to provide information and proper examination of the goods by the buyer was considered over and above any other duty. The Concepts which could be used to shift the burden as to quality and fitness on the seller such as 'fitness of goods' and 'merchantability', were not encouraged. Another strong statement which was present in Section 11(1)(c) in the said Act, which mandated that the buyer

could not reject the goods on any ground in cases where there was sale of 'specific' goods. Thus, it is highly noticeable that the law was bent towards the seller and in those times, one could not even find a corresponding rule which would put the burden on the seller.

The Fallacy and The Need for Change:

At the time of its origin the rule of Caveat emptor prevailed in its absolute form but it was later categorized as detrimental to the development of commerce and trade. Rule of Caveat emptor in its absolute form was highly detrimental to the buyer because of the absence of the element of reasonable examination. Therefore, a buyer would have no recourse against the seller who is aware of the latent defect but did not aware the buyer about the same and the buyer cannot detect that defect (as it cannot be detected by reasonable examination).

Another strong reason for the fallacy of the rule of Caveat emptor, is the need for providing protection to the buyer who purchases the goods in good faith, that is, where the buyer purchases goods from the seller by relying on his skill and judgment. Thus, the rule was subsequently diluted so as to give proper recognition to the relationship between the seller and the buyer and in order to give rise to a scenario wherein commercial transactions are encouraged.

How it changed to Caveat Venditor?

For the aforementioned reasons, the rule of Caveat emptor for the first time suffered backlash in the case of **Priest v. Last**[124], wherein reliance was placed on the buyer relying on seller's skill and judgment and the buyer was allowed to reject the goods for the first time. In this case the buyer purchased a hot water bottle relying on the seller's skill and judgment. It was observed that if a buyer purchases an object relying on the seller's skill and judgment then the buyer will be allowed to reject the same on the occurrence of any defect. This was the first ever decision in common law in which importance was given to the buyer's reliance on the seller's judgment and skill.

[124] [1903] 2 KB 148

Gradually this rule gained prominence and the seller's obligations have been given a proper shape along various case laws and statutes limiting the rule of Caveat emptor to 'reasonable examination'. In cases like milk containing typhoid germs, contaminated beer, the Courts have been generous enough to establish that where the defects would not have been traced by reasonable examination in ordinary circumstances, the buyer will be exempted from this duty. Further, in **Harlingdon & Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd**[125], the buyer claimed that he had the right to reject the painting as it was not of the original painter. So, it was observed that where the buyer has more expertise in a given field and is more reasonable than the seller then it would be completely wrong to suggest that the buyer would have the right to reject the purchased object. Therefore, the seller is bound by the duty to make known to the buyer all the defects in the goods and the information relating to the usage of goods. This obligation of the seller is irrespective of his own judgment and skill because what matters is what he is expected to have and not what he has.

Section 16 of the Sales of Goods Act:

Implied conditions as to quality or fitness. Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: -

1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.
2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied

[125] [1991] 1 QB 564

condition that the goods shall be of merchantable quality: Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Exceptions to the rule of Caveat Emptor:

- **Fitness for buyers' purpose [Section 16(1)]**

Section 16(1) of the said Act provides that in situations where the seller is aware either expressly or by necessary implication of the purpose for which a buyer needs to purchase a specific product, further, the goods are of such description which the seller supply in his ordinary course of business and by relying upon the judgment and skill of the seller, the buyer purchases that product, then the goods should be in accordance with the purpose. In other words, this section explains the circumstances where the seller has an obligation to supply the goods to the buyer as per the purpose for which he intends to buy the goods.

Requirements of Section 16(1) are as follows: -

- The buyer should explain the particular purpose for which he is making the purchase to the seller.
- The buyer should rely on the seller's skill and judgment while making a purchase.
- The goods must be of a description which the seller in his ordinary course of business supply.

In **Shital Kumar Saini v. Satvir Singh**[126], a compressor was purchased by the petitioner with one year warranty. The defect in the product appeared within three months. The petitioner sought a replacement. The seller replaced it but did not provide any further warranty. The State

[126] (2005) 1 CPR 401

Commission stated that an implied warranty was guaranteed under section 16 of the Sale of Goods Act, 1930 and allowed it to be rejected.

- **Sale under Trade Name [Proviso to S. 16(1)]**

In some cases, a buyer purchases goods not by relying on the skill and judgment of the seller but by relying on the product's trade name. In such cases, it would be unfair that the seller is burdened with the responsibility of quality. The proviso to Section 16 deals with such cases. It provides that:

"Provided that, there is no implied condition as to fitness for any particular purpose in the case of a contract for the sale of a specified product under its patent or other trade names.

- **Merchantable quality [Section 16(2)]**

The second most important exception to the rule of Caveat emptor is incorporated by Section 16(2) of the Act. The Section imposes a duty upon the dealer to deliver the goods of merchantable quality.

Section 16(2) states that there is an implied condition that when goods are purchased by description from a seller who deals in the goods of that description, the goods shall be of merchantable quality.

Meaning of Merchantable Quality: It implies that when the goods are purchased for resale, the goods must be capable enough of passing in the market under the name by which they are sold.

Merchantable quality depends on the following two factors: -

1. Marketability- Merchantability does not mean that the goods are saleable just because the goods look all right, but they shall be marketable at their full value. "Merchantability does not mean that the goods are saleable even if it has defects which makes it unfit for its proper use but is not noticeable on ordinary examination.

2. Reasonable fitness for general purposes- "Merchantable quality" means, that if goods are purchased for self-use, they must be fit for the purpose for which they are generally used. Example: A person bought a hot-water bottle which is generally used for the application of heat. The bottle burst to scald the person's wife. The seller was held to be liable.

- **Examination by buyer [Proviso to S. 16(2)]**

The proviso to S. 16(2) provides that "if upon examination of the goods to be purchased, the defects ought to have been revealed, then no implied condition as regards to the defect will exist." The requirement provided in the proviso would be considered as satisfied fully when the buyer was given full opportunity to examine the goods and the argument that the buyer did not use that opportunity will not make any difference, an existence of opportunity is sufficient in such cases.

- Purchase by description: The rule of caveat emptor does not apply in a case where goods are brought by description from a seller in such situation there is an indirect circumstance that the goods shall communicate with the description. It is a condition which moves to the radicle of the contract, and the violation of it qualifies the buyers to failure the goods.
- Goods purchased under brand name: When the buyer buys a product under a trade name or a branded product the seller cannot be held responsible for the usefulness or quality of the product. So, there is no implied circumstance that the goods will be suitable for the cause the buyer intended.

- **Conditions implied by trade usage [Sec. 16(3)]**

Section 16(3) gives statutory force to the conditions implied by the usage of a particular trade. It states: "An implied condition or warranty as to the quality or fitness for any particular purpose may be annexed by the usage of trade." There is an implied condition or warranty about the standard or the suitability of goods/products. But if a purchaser diverged from this

then the rules of caveat emptor end to apply. For example, A brought goods from B in a sale of the contents of a ship. But B did not inform A that the contents were sea damaged, and so the rules of the doctrine will not apply here.

- Sale by sample: If the purchaser buys his goods after inspecting a representative then the rule of doctrine of caveat emptor will not apply. If the rest of the goods do not resemble the sample, the buyer cannot be held responsible the seller will be the responsible person.

For example: A places an order for 50 cello pens with B. He checks one sample where the pen is red. The rest of the pens turn out to be blue. Here the doctrine of caveat emptor will not apply and B will be responsible.

- Fraud and misrepresentation by the seller: This are an important exception. If the seller acquires the agreement of the purchaser by fraud, then caveat emptor will not apply. Also, if the seller hides any material influence of the goods which are behind time find on closer examination, then existence the purchaser will not be accountable. In both cases, the purchaser will be the guilty party.

In the case of **Peter Darlington Partners Ltd v Gosh Co Ltd**[127], a contract for the sale of canary seeds was subjected to the custom of trade and held that if there exist any impurities in the seeds the buyer will get a rebate on the price but he would not reject the goods. However, a custom which is unreasonable will not affect the parties' contract.

Case Laws:

Harlingdon & Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd

Facts:

The claimant purchased a painting from the defendant for £6,000. The painting was described in an auction catalogue as being by German impressionist artist Gabrielle Munter. Both the

[127] [1964] 1 Lloyd's Rep. 149

buyers and the sellers were London art dealers. The sellers were not experts on German paintings whilst the buyers specialized in German paintings. The purchasers sent their experts to inspect the painting before agreeing to purchase. After the sale the buyers discovered that the painting was a fake and worth less than £100. They brought an action based on s.13 Sale of Goods Act in that the painting was not as described.

Held in the case:

By sending their experts to inspect the painting this meant the sale was no longer by description. S.13 only applies to goods sold by description and therefore the buyers had no protection.

Shital Kumar Saini v. Satvir Singh

Facts of the case:

The petitioner brought a compressor with one year guarantee. The fault materialized within three months. The petitioner requested for renewal. The seller replaced it but without on condition that any further warranty.

Held in the case:

The State Commission permitted it to be refused of expressing that there was an implied warranty guaranteed under Section 16 of the Sale of Goods Act, 1930 that the goods should be sensible fit for the purpose for which they are sold.

Priest V. Last

Facts of the case:

B went to S a chemist and demanded a hot water bottle from him, S gave a bottle to him telling that it was meant for hot water, but not boiling water. after few days while using the bottle B's

wife got injured as the bottle burst out, it was found that the bottle was not fit to be used as hot water bottle.

Held in the Case:

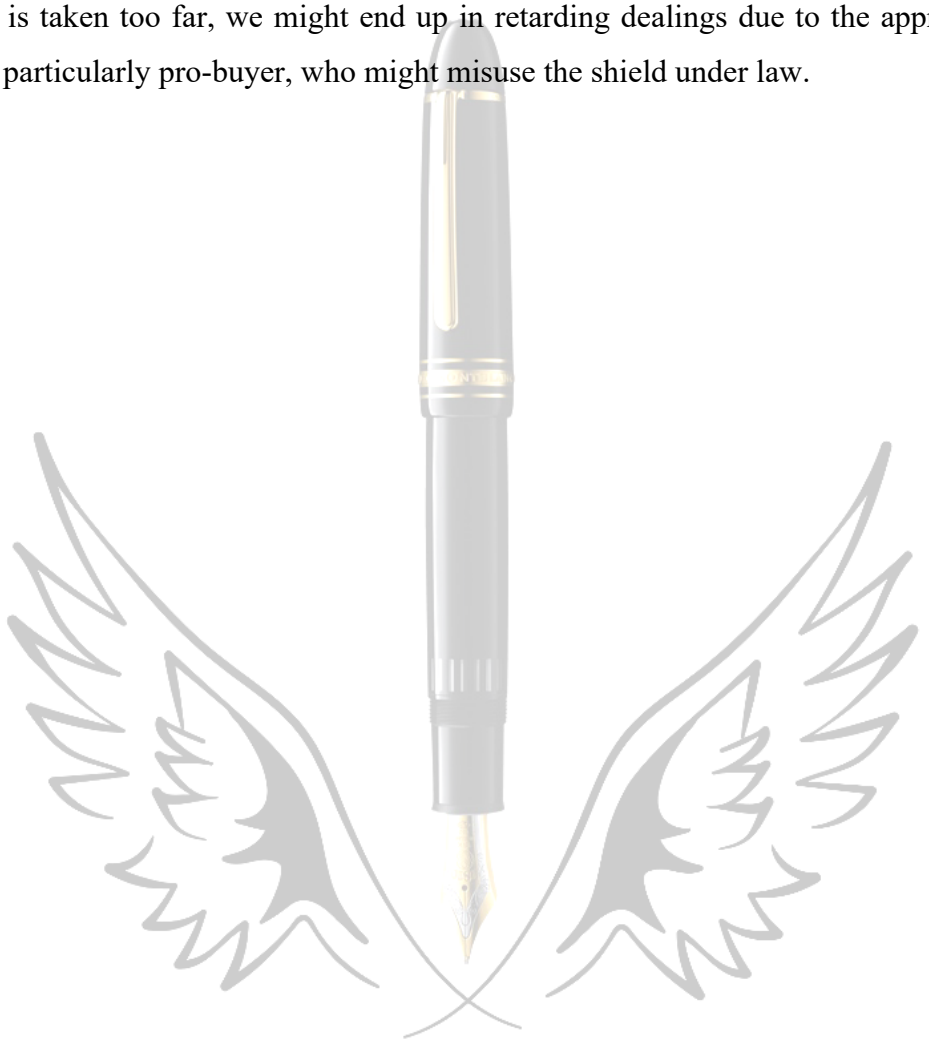
The court held that the buyer's purpose was clear when he demanded a bottle for hot water bottle, thus the implied condition as to fitness is not met in this case.

Conclusion:

As per Advanced Law Lexicon, Caveat emptor means "Let the purchaser beware." It is one of the rules, applying to a buyer who is bound by actual as well as constructive knowledge of any fault in the thing purchased, which is evident, or which might have been known by proper diligence. This rule is used with reference to sale or sales of the properties where the purchaser is expected to exercise proper caution and to inform himself as to its quality and encumbrances. In a simpler word we can say that the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made. In other words, buyers need to know their rights and be vigilant while making any purchase which implies that the purchaser must take care to examine and ascertain the kind or quality of the article he is purchasing, or provide against any loss he may sustain form his ignorance of the kind or quality of the article sold, or from his inability to examine it fully, by an express agreement of warranty.

The rule of 'Caveat Emptor" is being slowly taken over by 'Caveat Venditor", the transform being recognized to a more consumer sovereign market wherein commercial transactions are being encouraged. Such a change, no doubt would help to create an appropriate balance between the rights and obligations of the seller and the buyer. In this context the comments of Lord Wright which are relevant reproduced here. The "old rule of Cavate emptor had been superseded by Caveat Venditor, such change being "rendered necessary by the conditions of modern commerce and trade" Let the buyer beware' is not a phrase that julges une very often nowadays. The ancient rule of Caveat emptor rule, which has its origin in the law, has over the period undergone foremost changes. As the rule was being given a solid shape, its exceptions also grew with time. Therefore this conceptual change would center around the balancing point of the necessity of disclosure of information by the seller on one side and implications of

reasonable inspections done by the buyer on the other. But it should be noted that of this drift of change is taken too far, we might end up in retarding dealings due to the approach, then becoming particularly pro-buyer, who might misuse the shield under law.



ANALYSING LAW AND LITERATURE IN CHARLES DICKENS NOVELS: BLEAK HOUSE AND THE PICKWICK PAPERS

- NISHIKA TANDON

ABSTRACT

Purpose: The purpose of this paper is to analyse the themes revolving around law and society in the literary texts written by Charles Dickens namely Bleak House and The Pickwick Papers.

Research Implications: The paper provides a preliminary analysis of the various themes observed in the novels with reference to law and society.

Findings: The relevance of law in the literary texts written by Charles Dickens is shown through the book Bleak House while an uncommon perspective of Charles Dickens towards society and the sufferings of the lower class is seen in Pickwick Papers. The two texts are then analysed together in terms of their similar themes which were found to be injustice and society and class.

Originality/Value: The paper discusses the themes relevant to law and society in the books of Charles Dickens.

Keywords: Victorian, Charles Dickens, Justice, Chancery, Lower-class.

1. INTRODUCTION

1.1 Aim

The purpose of this paper is to analyse the themes surrounding law in the literary piece written by Charles Dickens. For the purpose of this paper, Bleak House and The Pickwick Papers are the two works that would be analysed. The themes as well as the social structure revolving around and, in the works, would be discussed while determining the similarities between them.

1.2 Charles Dickens

The author is known to entail a number of personal experiences in the form of his character plots and has been able to make the readers associate with his characters such as David Copperfield, Pip, Esther Summerson and Little Dorith as well as instil no strong admiration for

characters such as Vholes, Jaggers and Stryver who played lawyers in these novels. His experience as an attorney's apprentice gave him a lot of exposure to the legal world while making him hate a number of practices being followed in the judicial system. His disgust and critique of the legal systems is evident in his novels wherein he uses satire to attack the judicial system and highlight its flaws to the public readers.

1.3 Research Objectives

- To analyse the social and legal themes in Bleak House.
- To analyse the social and legal themes in The Pickwick Papers.
- To determine the similarities or differences between the two works.

1.4 Research Methodology

The researcher adopted the secondary data method in order to carry out the research for the topic. Given the vastness of the topic, the researcher referred to the books Bleak House and The Pickwick Papers, along with scholarly journal articles and review articles. Academic websites were also referred to for understanding the themes of the two books and gaining insight about the social construct during the time these books were written.

2. REVIEW OF LITERATURE

i) Patriarchal Order in Bleak House[128]

The literature provides an insight of how the novel of Bleak House shows a deep rooted system of patriarchy with extreme control and no escape. The narratives are said to be displaced with accommodation and compromise as well as manipulation and exploitation of the wealth and status disparities between individuals. The narratives around the stories of Esther and Jarndyve as well as Ada and Richard showcase the patriarchal exploitation of women treating women as mere objects which could be bought in the case of Jarndyce and Esther where as in the case of Ada and Richard, marriage is used as a way to exploit the woman's finances.

ii) The character of Esther and the Narrative Structure of "Bleak House" [129]

[128] Barbara Gottfried, *Household Arrangements and Patriarchal Order in Bleak House*, The Journal of Narrative Technique Winter, 1994, Vol. 24, No. 1 (Winter, 1994), pp. 1-17

[129] John P Frazee, *The character of Esther and the Narrative Structure of "Bleak House",* Studies in the Novel , fall 1985, Vol. 17, No. 3 (fall 1985), pp. 227-240

The ending of Bleak House established Esther's happiness with her marriage but also gave the surprise twist with Lady Dedlock's death. The ending is found to be sentimental yet inadequate response to the moral and social problems depicted in the course of the entire novel. The quality of the narrative is focused outward and her principles are undermined. Esther is not the only narrator in the novel, alternately a narrator in third person is also seen in many chapters.

iii) Seeing through the Fog: Love and Injustice in "Bleak House"[130]

Through the novel Bleak House, the author depicted the consequences of the justice system trying to live beyond their moral means and the setbacks of having a commitment to do good deeds which remains unchecked. The social irresponsibility of the Chancery court and the chaos it causes has been analysed in the literature. The interaction between Injustice and Love has been critically analysed and it was concluded that in the sixty-seven-chapter novel the theme of evil effects of social injustice is repeatedly brought to light through the various character stories. The fog described in the novel is of an aggressive nature which presents a destructive character. The lives of the city dwellers are left tainted by this fog that obscures the vision and cruelly leads to their destruction.

iv) Mr Pickwick's Innocence[131]

The central theme of action of the novel The Pickwick Paper is described to be a quest in the literature. The character arc of the protagonist develops from a person who is naïve and eccentric and forms the club and goes on to experience innocent pleasurable experience while learning from his servant Sam Weller about the real world. The character faces deceit at the hands of tricksters such as Jingle as well as corruption in Eatanswill and later injustice in Fleet. Critics believe the character of Mr Pickwick undergoes a widescale of transformation through his experiences during the quests which further reflect the real-life oddities faced by a person and grow with them. However, the change in personality is not shown in Mr Pickwick's character but in the narrative style adopted by Charles Dickens.

3. BLEAK HOUSE

3.1 Summary:

[130] Joyce Kloc McClure, *Seeing through the Fog: Love and Injustice in "Bleak House"*, The Journal of Religious Ethics, Spring, 2003, Vol. 31, No. 1 (Spring, 2003), pp. 23-44.

[131] Philip Rogers, *Mr Pickwick's Innocence*, Nineteenth-Century Fiction, Vol 27 No 1, pp. 21-37 (1972)

The story revolves around the Jarndyce family who were involved in the long-running lawsuit of Jarndyce and Jarndyce for a matter of inheritance. The book is a satire on the Chancery Court system in England wherein cases were left pending and stretched for decades and were complicated by the legal manoeuvring. The book opens in the High Court of Chancery wherein the case has been going on for so long that no man living knows what the case stands for.

Ester Summerson is the narrative voice of the novel and had Mr Jarndyce as her guardian in her childhood along with two other characters Ada Clare and Richard Carstone. She was asked to act as a governess of Ada by Mr Jarndyce. Ester is made to believe her mother, Lady Deadlock, had abandoned her due to which she had to stay with her aunt Miss Barbery. However, Lady Deadlock believes her daughter is dead. On her arrival at Bleak House, the estate of John Jorndyce, William Guppy become her admirer. He is a clerk in Mr Jarndyce's solicitor office. William suspects Esther and Lady Deadlock for their similar appearances. A number of interactions take place in the cemetery between Lady Dedlock and Esther before their connection is recognised by Lady Dedlock however they do not reveal to anyone their connection.

Ada and Richard fall in love and decide to turn the case in their favour to gain the inheritance. The secret of Lady Dedlock is discovered by the lawyer Tulkinghorn. He is later killed by his spy and Lady Dedlock's maid Hortense as a revenge for firing her but the blame falls on Lady Dedlock. Through the help of Esther and Inspector Bucket, Lady Dedlock is found next to Captain Hawdon's grave, dead from illness.

The case is closed on the introduction of a new will that transfers the inheritance to Ada and Richard. However, the lengthy legal proceeding ate up a large part of the inheritance. Richard dies of tuberculosis and Ada is married to John Jarndyce while Esther married Woodcourt and starts a family at the Jarndyce estate.[132]

3.2 Background and Social Set-up of the Book

The novel is mostly focused on places in and around London during the 1850s. The neighbourhoods, working situations, dressing style as well as the streets such as Holborn district, are shown in their most authentic style. The fog becomes the most famous literary fog

[132] *Bleak House Summary*, Super Summary (July 28, 2021 12:45am) https://www.supersummary.com/bleak-house/summary/.

described as dense and long-lasting blankets which were yellowish or yellow-brown with pollutants which signified the coal-burning London. [133]

The setting changes as per the development in the story, moving from London to its suburbs while incorporating their elements in each plotline. Portraying the aristocratic estate of Chesney World as haunted and that of Bleak House as a traditional middle-class house is seen to be a depiction of the decline of aristocracy in England. The Tom-all-Alone's portrayal is linked to the slum where Jo's struggles are shown.[134] The plot and characters are generally depicted and conveyed through the use of settings.

3.3 Themes

- ***Law and Justice:***

Fog everywhere. Fog up the river, where it flows among greenaits and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty)city. Fog on the Essex marshes, fog on the Kentish heights. Fog creep-ing in the cabooses of collier-brigs; fog lying out on the yards, and hov-ering in the rigging of great ships. . .

Charles Dickens, Bleak House 1 (Wordsworth Classics ed. 1993) (1853).

The second paragraph of the novel describing the fog became a famous in literature since it was a symbolic representation of the court system when seen through the author's eyes.[135] The meaning conveyed is of deceit, crookedness, useless due to bureaucracy. The central lawsuit of Jarndyce and Jarndyce which was in the court for decades and had taken inspiration from a real-life case. The model of the Chancery in the novel is a satire on the actual Chancery courts who have made little or no progress in their cases yet have charged a fortune for their services.[136] They are portrayed as useless courts that have provided people with nothing but reasons for suicide and ruined the lives of the people involved as well as their families by stretching a case for years while charging enormous fees.

[133] *Bleak House Setting*, Shmoop (July 27, 2021 10:30pm) https://www.shmoop.com/study-guides/literature/bleak-house/analysis/setting

[134] *Ibid.*

[135] *Ibid.* at 6.

[136] *Critical Essay Setting of Bleak House*, Cliff Notes (July 27, 2021 10:50pm) https://www.cliffsnotes.com/literature/b/bleak-house/critical-essays/setting-of-bleak-house

The chancery system is blamed to corrupt the lawyers and prolong the legal processes even though the lawyers have the duty towards their clients to secure them with justice and equitable relief. This is depicted through the character of Mr Vholes who becomes Richard's legal representative. Mr Vholes encourages Richard to invest resources in the suit instead of keeping his client's best interest above his greed and in turn leads Richard into bankruptcy. Through the character of Mr Vholes, lawyers are showcased as predators who have the least intention of helping their clients or solving the matter and tend to deliberately complicate the case to stretch the proceeding to a number of years.[137]

Chancery is a self-serving profession as depicted in the novel. No real justice or relief is assured or provided by the court. The 19th century public was against the reforms in Chancery practices since they believed it would harm the lawyers such as Mr Vholes and be unfair to their service to the support they provide to a family.

the legatees under the will are reduced to such a miserable condition that they would be sufficiently punished, [as] if they had committed an enormous crime in having money left them
John Jarndyce quoted in Charles Dickens, Bleak House n 104. (Wordsworth Classics ed. 1993) (1853)

The quote portrays the effect of the lawsuit on litigants showcasing the destruction cause in the case of Richard Carstone who is consumed by the lawsuit by robbing him of his inherited money as well as other savings due to the fees of the legal proceedings.

It is believed by literate laurates that literature can be a tool in helping the readers gain a more contextual understanding regarding the legal interpretation and the novelists could do so by providing a deeper insight into the experiences and conflicts of characters.[138]

Bleak House becomes important from the perspective of providing views of the way every character responds to the legal system as well as other characters involved in a case.[139]

- ***Bureaucracy***

The character of Mr Bucket is written in contrast to the Chancery courts while representing the criminal branch of law. He is a private detective hired for solving the murder mystery of the

[137] Nicole Thompson, *Follow the Reader: Literature's Influence on the Law and Legal Actors*, University of Otago (2012)
[138] *Ibid.*
[139] *Ibid.* at 10.

lawyer Mr Tulkinghorn. He operates alone and uses his wit and observations in order to solve the crime effectively. He is able to solve the murder case with a speed so fast it might put the Chancer court to shame. The character can be seen as a symbol of effective law enforcement. [140]

The detective was seen to lack social responsibility since he apprehended Horstense due to the reward offered by Sir Leicester. Legal proceedings thus become necessary in criminal cases even though they were not timely in giving judgements. They prevent an innocent like George from being accused of a murder.[141]

- ***Society and Class***

The Victorian Era in which the book is situated showcases the failures of the society in regards to the poor and their conditions of living, the middle class and its desire to achieve aristocracy and the happiness and wealth that they assume to come along with it. The social struggles have been showcased through the character of Mr Turveydrop who tried stealing money from his own son to lead the life he idealized with the best clothes and live a lavish life. He refused working hard for the money to afford his idealized lifestyle since he thought of working to be beneath him. His immoral practices are hidden by the fake generosity he puts on to appear like the aristocrats. [142]

The men such as Allan have been shown to be affected by the matrimonial considerations of money when he is seen to be hesitant in marrying since he does not think he has the means to furnish a 'Household goddess' due to the disparity in incomes.[143] Guppy pursues Esther for the monetary gains he might be a partner of since he suspected Esther's connection with Lady Dedlock. Captain Hawdon and Lady Dedlock themselves could not be married due to the difference in their ranks and fortune.

- ***Patriarchal Disorder***

[140] *Law vs Justice Theme Analysis*, Lit Charts (July 28,2021 1:05am) https://www.litcharts.com/lit/bleak-house/themes/law-vs-justice

[141] Jack Millward, *Social Status and the Nature of Crime in Bleak house*, Prison Voices, https://jackmillwardprisonvoices.wordpress.com/2017/10/26/social-status-and-the-nature-of-crime-in-bleak-house-charles-dickens/

[142] *Ibid.*

[143] Barbara Gottfried*, Household Arrangements and Patriarchal Order in Bleak House*, The Journal of Narrative Technique Winter, 1994, Vol. 24, No. 1 pp. 1-17 (1994).

The story saw the couple Sir Leicester and Lady Dedlock who portray the image of an aristocratic couple and the disintegration of their relationship through the introduction of Lady Dedlock's illegitimate daughter with Captain.[144] The depiction of both female character in the novel have been to be extremely contrasting to each other. While Lady Dedlock is shown as the society lady with her husband's wealth securing her, Esther is the illegitimate child facing hardships and surviving through her own means.

The narrative voice lent by Esther provides evidence of a patriarchal culture that has defined her to speak from a place of powerlessness and silence. [145]

The unequalness in the power and money relations can be seen in the relationship shared between Esther and John Jarndyce. John Jarndyce has the believe that he is capable of 'buying' a favour from Esther just as he does to gain anything else that he desires. Esther's narrative depicts how she is aware of her debt to Jarndyce for helping her through her orphaned years when she was left without a guardian. Despite her feelings of care towards him, she is not 'grateful enough' since his exploitation of their wealth differences disturb her.[146] The inequalities are further exploited during the use of money in return of agreeing to marry Esther. This act of Jarndyce showcases his patriarchal privilege which he feels entitled to exploit at any given point.

The marriage of Ada and Richard is also based on a few patriarchal hints. Ada had offered Richard financial help which was refused by him. On marrying Richard, the financial assistance became Richard's legally. The irony lies that her act of love left her penniless in the end when Richard dies and she had to come back to the Bleak House either as Jarndyce's wife or be forced to live in poverty while raising her child.[147]

4. THE PICKWICK PAPERS

4.1 Summary

[144] Barbara Gottfried, *Household Arrangements and Patriarchal Order in Bleak House*, The Journal of Narrative Technique Winter, 1994, Vol. 24, No. 1 (Winter, 1994), pp. 1-17
[145] *Ibid.*
[146] *Ibid*. at 17.
[147] *Ibid.* at 17.

Samuel Pickwick is the head of the Pickwick Club in London who decides to set up a society with four members who travel around England and prepare their travel reports on these expeditions. Mr Pickwick is a claimed philosopher without any revelatory thoughts as well as a retired business man who is accompanies by Tracy Tupan. The other two member of this club are Augustus Snodgrass who's a poet without any poems of his own and Nathaniel Winkle a sportsman without any skills.

Their first adventure takes place during their journey to Rochester where they are joined by the trickster Alfred Jingle who pushed Winkle into a duel with a military man. The next adventure takes them to Chatham during which Tupan and Snodgrass develop an interest in their host Mr Wardle's sister Rachael and daughter Emily respectively. The trickster elopes with Rachael and is followed by Samuel and Mr Wardle to stop their marriage.

The protagonist, Samuel Pickwick, gets involved in two lawsuits over the course of the novel. In case of the first lawsuit, he was blamed of breach of contract filed by his widowed landlady Mrs Bradwell who mistook his explanation for hiring a valet as a proposal for marriage. The court finds him guilty and gives him two months to pay damages which he refuses and is put in the debtor's prison. Mrs Bradwell too eventually joins him there since she is unable to pay the lawyers. The second is lawsuit presided over by Jingle's friend Mr Nupkins. Mr Pickwick exposes Jingle as a philander who was also eyeing the judge's daughter and is thus set free.

By the end of the book, all characters except Pickwick are shown to be settled and the club ceases its operations.

The story is an example of the picaresque style of storytelling wherein the adventures of a rough yet likable hero are followed throughout the narrative. The club members encounter a number of interesting characters along their various journeys. The protagonist of the book often gets confused with Sam Weller which is Charles Dicken's forte.[148]

4.2 Background and Social Set-up of the Book:

The book is set in southern England from the years 1827 to 1831 and provides insight intro the period of 'coaching days' in England.[149] During the time this book was being written, the

[148] *Book Summary: The Pickwick Papers*, Cliffnotes (July 28, 2021 1:05am) https://www.cliffsnotes.com/literature/p/the-pickwick-papers/book-summary.

[149] *Critical Essays Setting Coaching Days*, Cliff Notes (July 28, 2021 12:08am) https://www.cliffsnotes.com/literature/p/the-pickwick-papers/critical-essays/setting-coaching-days.

railroads where destroying the coach era which has been significantly romanticized by Charles Dickens in the novel. A sense of nostalgia for the coaches, coachmen and wayside inns is witnessed in the novel. These rides have been described in detail and give rise to the thrill and exhilaration experienced by the readers in the novel. Since the coaches transport the club to their various adventure locations, they form a part of their journey and become the link between the club and their adventure.[150]

The locales used in the novel have been given an emotional colouring, each of which is different from the other and is in accordance to the events that transpire in those locales. London initially is home for Mr Pickwick where he returns after all his adventure and where his education has taken place. Over the course of the novel, London's atmosphere as depicted in the novel changes as Mr Pickwick's character development arcs. His moral developments are shown through the means of external events[151].

Debtor's prison is a personal touch since Charles Dickens' father was also put into one when he was a child. Dickens had to quit school and work in a boot-blacking factory since the family suffered after his father was imprisoned and the bills were not being paid.[152] The legal knowledge acquired by the author during his time at a law firm has been used in the novels. A Chancery prisoner has been introduced in this novel and this legal component has been dealt with in detail in the Bleak House novel. The novel was the first attempt to highlight the hypocrisy of people in power such as the lawyers.[153]

4.3 Themes:

- ***Social Hierarchies:***

Unlike most of the books written by Charles Dickens', the Pickwick Papers had left out the mention of class through a large part of the book. The characters are portrayed from the perspective of an upper class. The servant of Mr Pickwick, Sam Weller, is shown to be extremely content with his post of a servant and is willing to be sent to prison if it means he

[150] *Ibid.*
[151] *Critical Essays Locale in Pickwick Papers*, Cliff Notes (July 28, 12:01am) https://www.cliffsnotes.com/literature/p/the-pickwick-papers/critical-essays/locale-in-pickwick-papers.
[152] *Pickwick Papers Context*, Course Hero (July 28, 2021 12:04am) https://www.coursehero.com/lit/The-Pickwick-Papers/context/
[153] *Ibid.*

can be by his master.[154] The absence of any commentary is a hint at one in itself. It's a reassurance to the middle-class working people and provides them with an escape from the trials and troubles of their lives.

The difference between the other books written by Charles Dickens' and The Pickwick Papers is the images created to depict the lower class. Most of his novels have been known for their depressing narrative around the sufferings of the lower class. However, with the Pickwick Paper the narrative was shifted to a more comical tone. The social commentary is depicted through the characters of lawyers Dodson and Fogg as well as the prison plotline.[155] The narrative is less direct and severe as seen from the experience Mr Pickwick has in the prison wherein, he can ask for a dining table, roast leg of mutton and a meat pie with sundry dishes of vegetables and pots of porter.[156] The narrative suggests an air of comfort even in the prison. The image of the British society is one that depicts their stand post the Industrial Revolution. This is vividly seen on their adventure while traveling to Muggleton,.

- ***Victorian Nostalgia:***

We write these words now, many miles distant from the spot at which, year after year, we met on that day, a merry and joyous circle. Many of the hearts that throbbed so gaily then, have ceased to beat; many of the looks that shone so brightly then, have ceased to glow; the hands we grasped, have grown cold; the eyes we sought, have hid their lustre in the grave; and yet the old house, the room, the merry voices and smiling faces, the jest, the laugh, the most minute and trivial circumstance connected with those happy meetings, crowd upon our mind at each recurrence of the season, as if the last assemblage had been but yesterday. Happy, happy Christmas, that can win us back to the delusions of our childish days, that can recall to the old man the pleasures of his youth, and transport the sailor and the traveller thousands of miles away, back to his own fire-side and his quiet home!

Charles Dickens, The Pickwick Paper n .361 (Penguin Classics ed 1999) (1836).

[154] Cortney Lollar, *Challenging Social Hierarchies in Pickwick and North and South*, The Victorian Web (July 28, 2021 11:15am) https://victorianweb.org/authors/dickens/pickwick/hierarchies.html

[155] *Ibid.*

[156] Charles Dickens, *The Pickwick Paper* n .716 (Penguin Classics ed 1999) (1836).

The Industrial Revolution, though helpful to England in the long run, got many authors around that time to reminisce the past and was also a strong theme in the Pickwick Papers. The nostalgia portrayed by Dickens is of an old man who is reliving the pleasure of his youth. [157] The vivid portrayal of the Georgian England before the coach system was disrupted by the railways which bring about the romanticised depiction of the Victorian era is another satire on the reform of the political structure.[158]

5. FINDINGS

The findings of the research paper have been provided in the form of the similarities observed between the themes of the two novels. They are as follows.

5.1 Injustice

The lives of a number of characters in Bleak House were ruined by the legal case of Jarndyce and Jarndyce which could see no end in sight given the number of knots present in the case. It was a critique of the real situation in the British legal system. The failure of justice and its implications have been highlighted throughout the text. The judicial blindness is the core reason for the injustice in the novel Bleak House.[159]

While there was not much backlash for the courts in the book of the Pickwick Papers, the inability of the judicial system to carry out its function precisely has been depicted briefly during the trial between Mr Pickwick and Mrs Bardell. The suit is filed on the grounds of a breach of promise, a promise that had actually never been made. Mr Pickwick was trying the explain his reasons for hiring a valet while Mrs Bardell, his landlady, mistakenly understood it to be a proposal for marriage. It was clearly a case of mistake and did not bind Mr Pickwick. However, he was accused guilty and given two months to pay damages for not fulling a promise he never made. On non-payment of the same, he was sent to the Debtor's prison.

5.2 Society and Class

[157] Alexander Egevary, *Light Darkness and Nostalgia*, English 151, Brown University, 2003 (July 28, 2021 2:01am) https://victorianweb.org/authors/dickens/pickwick/egervarymt1.html

[158] Stephen Bates, *The Pickwick Papers made me laugh out loud*, The Guardian (July 28, 2021 1:30am) https://www.theguardian.com/commentisfree/2014/aug/28/charles-dickens-pickwick-papers-book-changed-me

[159] Joyce Kloc McClure, *Seeing through the Fog: Love and Injustice in "Bleak House"*, The Journal of Religious Ethics, Spring, 2003, Vol. 31, No. 1 pp. 23-44. (2003).

Bleak House focused on the class discourse problems by critiquing the narratives of two kinds namely constitutional and marriage plot. The middle class and their political agency are displayed using the continuity of aristocracy and the constant exclusion in society. The social struggles have been showcased through the character of Mr Turveydrop who tried stealing money from his own son to lead the life he idealized with the best clothes and live a lavish life. The social disparities were further exploited by John Jarndyce with Esther to marry her.[160]

In the Pickwick Papers, the class and dialect relationships are witnessed in a number of stories. The narrative dialect aims at pointing at the dissimilarities resulting from the social hierarchy. A class struggle can be observed between Mr Jingle and Mr Pickwick which is a further representation of a conflict between aristocracy and merchants during the Industrial transformation.[161] While Sam Weller depicts the nature of the servants unaltered by the change in social dynamics, Job Trotter shows the nature of those servants post the Industrial revolution which lead to the social place of their class to be weakened. Weller realises his loyalty towards his master however calls for the need to redefine the relationships between the servant class and their masters. Aristocratic system is favoured by Dickens by showing the traits in Mr Pickwick and depicting his release from prison due to these traits and his good character.[162]

5.3 Marriage

The plot revolving around marriage in Bleak House is aimed at solving the conflict between class disparities that appear between the aristocrats and the middle-class families. The narratives around the stories of Esther and Jarndyce as well as Ada and Richard showcase the marriage theme while also highlighting their social disparities. In the case of Jarndyce and Esther, Jarndyce exploits his dominant wealth position to get Esther to marry him where as in the case of Ada and Richard, marriage is used as a way to exploit the woman's finances.[163]

Three marriages are shown in the Pickwick Papers namely between Winkle and Arabella Allen, Snodgrass and Emily, and Weller and Mary. The endings in the form of marriages were aimed

[160] Barbara Gottfried, *Household Arrangements and Patriarchal Order in Bleak House*, The Journal of Narrative Technique Winter, 1994, Vol. 24, No. 1 (Winter, 1994), pp. 1-17

[161] William R Terpening, *The Impact of the Industrial Revolution on Servant-Master Relationships*, The Victorian Web (July 28, 2021 12:20pm) https://victorianweb.org/authors/dickens/pickwick/wrt.html.

[162] William R Terpening, *The Impact of the Industrial Revolution on Servant-Master Relationships*, The Victorian Web (July 28, 2021 12:20pm) https://victorianweb.org/authors/dickens/pickwick/wrt.html.

[163] Barbara Gottfried, Household Arrangements and Patriarchal Order in Bleak House, The Journal of Narrative Technique Winter, 1994, Vol. 24, No. 1 pp. 1-1 (1994).

at establishing the sense of well being and inclusiveness.[164] The marriages however, are between people who are equal in their social status. Weller and Mary extend their social positions in order to make their marriage more beneficial.

"Sam Weller kept his word, and remained unmarried, for two years. The old housekeeper dying at the end of that time, Mr Pickwick promoted Mary to the situation, on condition of her marrying Mr Weller at once, which she did without a murmur."[165] This signifies the growth in the social standing of Weller and the promotion given to Mary increases her position in society to be well fitted for Weller who earns his own living. [166]

6. CONCLUSION

The fog of the Chancery was a warning in the beginning of the novel Bleak House that the search for truth is a hopeless venture with the useless judicial system. The book appears as both a detective as well as social fiction which deals with a number of issues such as wills, inheritance, class discourse, disparities in status, exploitation of the weaker sections, patriarchy and the failure of justice.

Pickwick Papers presents the adventures of a club through a third person narrative. The portrayal is witty and observant while being adaptable to many moods and situations. Comedy takes a dominant role in the novel and props up sentiments at certain intervals. The plotline concerning the prison time of Mr Pickwick is the perfect integration of sentiment throughout the text.

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INSOLVENCY AND BANKRUPTCY CODE 2016 – A PARADIGM SHIFT IN LAW

- SHOURYADITYA

ABSTRACT

The introduction or the enactment of Insolvency and Bankruptcy Code, 2016 proposed a radical change in the whole Indian regime for insolvency and bankruptcy. The Insolvency and Bankruptcy Code has been drafted in such a manner that the corporates need not go into initiating the liquidation process thusly. Just like in any other nation of the World, the startling pandemic circumstances presented different financial issues in our nation too. Several amendments were made in the CIRP Regulations and Liquidation Regulations too. Regulation 40C was brought into the CIRP Regulations and Regulation 47A14 was brought into Liquidation Regulations which introduced relaxation to the course of events during the lockdown time frame. Consequently, the lockdown period will be prohibited for the computation of the absolute timetable for the CIRP and liquidation process. Insolvency law can fill in as an apparatus to secure financially troubled debtors impacted by COVID-19, to assist them with safeguarding the worth of the firm, restructuring of their debts. Without a doubt, the IBC has been compelling generally up until now, be that as it may, consistence to courses of events stays an issue.

KEYWORDS : Insolvency, Bankruptcy, Liquidation, CIRP

INTRODUCTION

The enactment of a completely new legislation always comes up with a set of pros and cons, new opportunities and obstacles but more importantly, it definitely changes the status quo. The introduction or the enactment of Insolvency and Bankruptcy Code, 2016 proposed a radical change in the whole Indian regime for insolvency and bankruptcy. It was indeed a significant underlying change in the Indian bankruptcy system wherein there was combination of all the insolvency and bankruptcy laws in a newer structure with new infrastructural set up unlike the already existing design in India which was in a dissipated form. The Corporate Insolvency

Resolution Process (CIRP) under the IBC, which works without the intercession of the court and in a period bound way, makes it remarkable when compared to the previous scenario. Similar to the situations in other nations in the World, the sudden unforeseen pandemic circumstance presented different financial issues in our nation too. This unparalleled circumstance has adversely affected the whole insolvency and bankruptcy regime also.

Insolvency impacts the stressed or debtor organization as well as different partners, stakeholders including the lenders and employees and ultimately the whole economy accordingly. Here comes the need and importance of having a vigorous and productive Insolvency structure to resolve the issues of corporate disappointment, restructuring and failure. The Insolvency and Bankruptcy Code has been drafted in such a manner that the corporates need not go into initiating the liquidation process thusly. The choice of restructuring is given before that. It is just on the failure of the CIRP that the organization goes into liquidation. The primary target incorporates expansion of value of assets, to advance business and entrepreneurship, accessibility of credit and stability of the interests of the stakeholders. An arrangement of Corporate Insolvency resolution plays a significant part in an economy in managing the debtor companies. Corporate failure might be expected to be a monetary or business failure. Subsequently, trouble in an organization can be either a direct result of monetary misery, where the organization has a suitable business however unviable monetary design, or can be a financial pain, where the organization business itself is unviable. The essential job of a Corporate Insolvency Resolution Process is to generally save the feasible organizations, rather than going into liquidation and to exchange the unviable organizations. Thus, we wanted a productive arrangement of corporate insolvency goal wherein corporate bankruptcy can be settled at the soonest and in a most proficient way. Here comes the importance of Corporate Insolvency Resolution Process (CIRP) fused under part II of the Insolvency and Bankruptcy Code, 2016.

Chapter II of the IBC, 2016 accommodates for the resolution process where a default has been submitted by the corporate debtor. The term ‘creditors’ has been classified into two types i.e.

financial creditors[167] and operational creditor[168] under IBC. The application to initiate the Corporate Insolvency Resolution Process (CIRP) by either 'financial creditor' is provided under section 7 or by an operational creditor under section 9 of IBC. The corporate debtor can also apply for initiating the CIRP and can also invoke the provisions for the same under section 10 of the IBC. Consequently, the Corporate Insolvency Resolution Process can be summoned by the financial creditors, operational creditors or the corporate debtor itself by taking the initiative and filing an application before the Adjudicatory Authority, for example the NCLT. After the application has been admitted by the Adjudicating Authority, the whole process has to be completed within the time limit of 180 days that can be extend to 90 days if the Adjudicating Authority is satisfied by the fact that more time is needed, but not more than 330 days. The whole process is completed according to sections 6 to 32 which comes under part II of Insolvency and Bankruptcy Code. The interesting characteristic of this code when compared with the earlier legislations is that it is made without the obstruction of courts. After the application is acknowledged by the NCLT and is finally accepted, an Insolvency professional is designated who will establish a council known as Committee of Creditors (COC), comprising of all the financial creditors. The interim resolution professional then becomes the resolution professional who can be the interim resolution professional himself or a new person with the required qualifications of the resolution professional. This resolution professional can supplant the board of directors and the business will be proceeded as a going concern. In the meantime, the Committee of Creditors (COC) can arrive at a certain goal. After that the resolution plans can be acknowledged from the resolution applicant and will be kept before the COC for its endorsement. The resolution plan must be accepted and approved by at least 66% of the voting rights of the COC which shall be put before the Adjudicating Authority i.e., NCLT for the final decision. When it is likewise approved by the NCLT it must be executed. Yet, there can be possibilities wherein the proposed resolution plan is either not endorsed or approved by the

[167] Insolvency and Bankruptcy Code, 2016, section 5 (7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.
[168] Insolvency and Bankruptcy code, 2016, section 5 (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; section 5(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment]of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

COC or dismissed by the NCLT or that they can't arrive at a resolution plan or the final plans are not received by any means within the time limit prescribed under the provisions of the IBC then this mandatorily goes to the liquidation cycle under sections 33 to 54 of Chapter III, Part II of the IBC. The Liquidator is then designated, and all the procedures are accomplished according to the provisions of the Code[169].

Henceforth it very well may be seen that the IBC accommodates a two-step process. Initially, a chance for the restoration of the company is given where it must be reached before a predefined time period. This can stay away from the superfluous delay, which was one of the significant downsides of the previous legislative arrangement. Whenever it is tracked down that the resolution process can't help then, at that point, obligatorily, it goes to the subsequent step, that is the liquidation process. Therefore, making it valuable for the stakeholders associated with it that it can surely get what is left with the organization, and furthermore a simple exit for a monetarily unviable company which eventually will help the economy.

IBC and the Coronavirus pandemic

Just like in any other nation of the World, the startling pandemic circumstances presented different financial issues in our nation too. This extraordinary circumstance affected the insolvency system also. The lawmaking body has proposed various amendments and mandates to resolve the issues encompassing the insolvency system during this pandemic emergency. Measures were taken by the Central Government in the form of notifications and few amendments.

In exercise of the powers provided under Section 4 of IBC,2016 the focal government expanded the limit from Rs one lakh to Rs one crore for the minimum amount of default to conjure the provisions of the code.[170] This was done basically with the objective of saving the Micro Small and Medium Enterprises (MSMEs).

Nevertheless, this particular notice created a disarray since it didn't indicate whether it is retrospective or prospective in nature. At this point, NCLT benched at Kolkata and Chennai

[169] Insolvency and Bankruptcy Code, 2016.
[170] Ministry Of Corporate Affairs Notification 24th March, 2020,available at https://www.ibbi.gov.in/uploads/legalframwork/ 48bf32150f5d6b30477b74f652964edc.pdf.

concocted an explanation. In the case of Foseco India Limited v. Om Boseco Rail Products Limited[171] the Kolkata NCLT bench came up with the view that the notification by central government dated 24th March, 2020 was planned in nature since the notice does not determine anything, by applying the basic rule of Interpretation of Statues, that a Statute will be believed to be prospective except if indicated to be retrospective either explicitly or by suggestion. Likewise, the Chennai NCLT in Arrowline Organic Products Pvt. Ltd. v Rockwell Industries Ltd[172] held that the notice must be considered as prospective in nature.

Another important issue is that since this isn't retrospective in nature, the prior limit of Rs one lakh would be relevant to the forthcoming cases. Provided that this is true, what might be the position of cases forthcoming at various stages like, in case they are anticipating confirmation by the NCLT, if they have as of now sent the demand notice however have not documented the application before the NCLT.

It is to be noticed that this limit was talked about even before in the Report of the Insolvency Law Committee[173], where it is referred that this low edge has made strain on the Administrative Authorities (NCLTs) with countless cases, and that since going through CIRP involves significant expenses, brings about imperfect result, and consequently to build the cutoff to 50 lakhs and for MSME a base default worth of Rs 10 lakhs at which the operational creditors can start CIRP[174].

Several amendments were made in the CIRP Regulations[175] and Liquidation Regulations[176] too. Regulation 40C was brought into the CIRP Regulations and Regulation 47A14 was brought into Liquidation Regulations which introduced relaxation to the course of events during the lockdown time frame. Consequently, the lockdown period will be prohibited for the computation of the absolute timetable for the CIRP and liquidation process.

[171] CP(IB)No. 1735/KB/2019
[172] CP(IB)1031/CB/2019.
[173] Report of the Insolvency Law Committee. Ministry of Corporate Affairs. February 2020.
[174] Report of the Insolvency Law Committee. Ministry of Corporate Affairs. February 2020.
[175] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Amendment dated 29.03.20, available at https://ibbi.gov.in//uploads/press/92797aa5f444ab7215707834d4821409.pdf.
[176] the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020., Amendment dated 20.04.2020.

Section 10A was inserted in the Insolvency and Bankruptcy Code for the termination of sections 7,9,10 of IBC,2016. It reads as follows:

"*Section 10A. Suspension of Initiation of corporate insolvency resolution process. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf: Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*

Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020"[177]

This particular provision puts a sweeping prohibition on the application for inception of CIRP for any default happened at the very latest 25th March 2020 which was at first implied for a long time, and later on expanded further for one year. It precludes the commencement of CIRP by the financial creditor, operational creditor and corporate debtor

The utilization of the term that no application will "at any point be recorded" for commencement of corporate insolvency resolution process makes hardships/disarrays in circumstances wherein default emerges during the time of the ban, that is the pandemic time frame, and it proceeds from there on too.

Insolvency law can fill in as an apparatus to secure financially troubled debtors impacted by COVID-19, to assist them with safeguarding the worth of the firm, restructuring of their debts[178]. A few writers have even contended that insolvency law isn't the issue however the

[177] Insolvency and Bankruptcy Code, 2016, Section 10A, suspension of initiation of corporate insolvency resolution process.

[178] Gurrea-Martínez, Aurelio, Insolvency Law in Times of COVID-19 (June 9, 2020). Ibero-American Institute for Law and Finance, Working Paper 2/2020, Available at SSRN: https://ssrn.com/abstract=3562685 or http://dx.doi.org/10.2139/ssrn.3562685.

solution[179],particularly for enormous companies. Concerns which come up are as for the circumstances of forthcoming cases wherein currently the resolution plans are endorsed. In cases wherein the pandemic circumstance gets financial requirements and trouble to continue with the all-around endorsed plan comes, it becomes hard to accomplish the genuine evenhanded as tried to accomplish by the code. Similarly, the lower edge limit and the sweeping prohibition on documenting application can unfavorably influence the operational creditors of the corporate debtor. There can likewise be circumstances of headstrong default during this frozen period, consequently expanding the shot at abuse of these provisions.

Besides chances of abuse of these provisions are higher as it has not been given anyplace as to decide whether the default has been happened because of the Covid-19 issues. While taking a gander at the legislative measure taken at different nations like Singapore had concluded that an assortment of assessors will decide if the failure to play out the contractual commitments for which the help is being looked for by a party, has been caused due to the pandemic. Comparative drives can be taken in India, where this power could be given to the administrative courts, furthermore, this methodology will guarantee that alleviation is given distinctly to the party deprived without demonstrating its powerlessness to play out its obligation. While insolvency law can go about as an apparatus for the financially troubled organizations that it assists with protecting worth as well as it assists with rebuilding its obligations, it has a ton of constraints during the current pandemic circumstance. Suspending of the multitude of privileges as a sweeping boycott can't be considered as a proper measure. It can just bring the contrary impact of what is expected. Steps must be taken to make it more versatile to the circumstance like to carry greater lucidity to the holes/lacunae in the all around presented measures. A total prohibition on documenting of an application for CIRP must be lifted, and a few strategies to screen the certifiable and destitute cases must be picked like it has been taken in different locales. A few authorizations can even be forced to debtors entrepreneurially utilizing these uncommon rules. Also, the pandemic circumstances and the progressions in the current insolvency system has made the option rebuilding strategies under different laws open. Thus, measures to utilize elective strategies for rebuilding/re-association in the best way has additionally to be investigated

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BEFORE IBC

SICA

The Sick Industrial Companies (Special arrangements) Act, 1985 characterized the idea of the debilitated organization and a possibly wiped out organization. The arrangements under the Act characterized the organization as debilitated when there was a finished total assets disintegration. The Act characterized the debilitated organization as any organization that existed for somewhere around five years and the collected misfortunes surpassed or approached total assets of any monetary year.

The semi legal bodies under the SICA were the Board for Industrial And Financial Reconstruction and the Appellate Authority for Industrial and Financial Reconstruction as characterized under Section 3(b) and 3(a) of The Sick Industrial Companies (Special arrangements) Act, 1985.[1] Section 15 of the SICA given to reference to the Board for Industrial and Financial Reconstruction, had the organization turned into a debilitated modern organization inside sixty days from the date of conclusion of the appropriately examined records of the organization. The SICA flopped because of its regressive methodology in managing the chapter 11 issues. There was a monetary record way to deal with identify a wiped out unit rather than the imminent income approach. It consumed most of the day for the total assets to disintegrate, and the grave liquidity issues were rarely tended to.

The Companies (Second Amendment), Act 2002

The organizations second Amendment Act, 2002 purchased about changes which coordinated to supplant BIFR and AAIFR with NCLT and the NCLAT as the arbitrating specialists. Segment 424A and 424L were presented in the Indian Companies Act, 1956 to manage recovery, but they were rarely upheld.

Sick Industrial Companies (Special provisions) Repeal Act of 2003

The wiped-out Industrial Companies (Special arrangements) Repeal Act of 2003, [2] broke up the redrafting authority and the Board set up under The Sick Industrial Companies (Special

arrangements) Act, 1985 i.e. The BIFR and the AAIFR. Anyway because of the deferral in the constitution of the NCLT, SICA repeal Act was rarely told.

The Recovery of Debts due to Banks and Financial Institutions Act

Under this Act, the Tiwari Committee comprised with the target of taking care of the issue of recuperation by the Banks and the Financial Institutions, proposed foundation of the specific Tribunals, called the Debt Recovery Tribunals and the Debt Recovery Appellate Tribunals who might help with opening the gigantic measure of public cash and to move towards legitimate usage of the assets for the improvement of the country.

The arrangements of this Act didn't matter to those Banks and Financial Institutions where the sum due is under ten lakh rupees. Segment 2(g) of the RDDBFI Act, 1993 characterized obligation which incorporates any sum asserted by the Bank and the Financial Institution over the span of any business action whether got or unstable, relegated or payable under any pronouncement or request. The RDDBFI Act, 1993 under segment 19(19) likewise gave capacity to the Tribunals to give authentication of recuperation against the organization enlisted under the Companies Act, 1956, to the recuperation officials uncommonly assigned under this Act. The different methods of recuperation as represented by Section 25 of the Act.

The SARFAESI Act, 2002

The Securitization and Reconstruction of Financial Assets and implementation of the Security Interest Act, 2002 was set up with the motivation behind the requirement of the security interest made for just the got bank, as per the arrangements of the Act. Area 13 of the SARFAESI Act, 2002 arrangements with the implementation of Security Interest by the tied down leaser in the wake of giving due notice to the gatherings for the release of their liabilities inside sixty days of the date of notice bombing which they got bank can make moves as specified under Section 13(4) of the Act.

The CDR and SDR mechanisms

The corporate obligation rebuilding component was first given in 2001 for execution by the banks. The CDR instrument was simply restricted to the banks and the monetary foundations that had a total openness not surpassing 10 crore rupees. The component was a non-legal deliberate framework or understanding entered between the lenders and borrowers for rebuilding of the obligation.

Key Debt rebuilding was reported by the RBI on June 8, 2015 and the fundamental target of the plan was the adjustment of the administration of the organization to manage the focused-on resources. The quantity of cases that were settled by such plans ended up being very few and the ideal outcomes couldn't be accomplished.

Benefits

First and foremost, the Code has had the option to cut down the normal long periods of goal of an indebtedness issue from 1500 days to 380 days! According to the IBBI, the code has brought about an astounding 191% acknowledgment to monetary lenders when contrasted with liquidation esteem. Till date in excess of 250 organizations have been resuscitated and 4008 indebtedness applications have been documented, of which 277 procedures have been closed under CIRPs and 1025 organizations were shipped off liquidation. The absolute monetary acknowledgment is Rs.1.90 lakh crore (till September 2020). Be that as it may, this isn't the genuine story here. The genuine story is concerning how in excess of 250 organizations have been resuscitated and a help stretched out to large number of activity leasers, accordingly seizing great many employment misfortunes and NPAs, and forestalling lakhs of crores of rupees in misfortunes for the economy. The Code has likewise assisted India with ascending from the 130th to the 63rd position in the worldwide simplicity of working together positioning. All things considered, this is only a hint of something larger, with many advantages to follow.

Preceding the presentation of the IBC, 2016, the course of goal of bankruptcy cases was dissipated, wearisome, aimless and un-prudent. The way that the IBC was presented by

canceling two Laws and altering 11 others shows the number of laws represented the indebtedness procedures. The Code has smoothed out the interaction, made now is the right time bound and gave a one-stop arrangement.

Obviously, the essential target of the Code is to restore bothered debt holders. The Code addresses the solitary change in business administrative laws: from retroactive to proactive, from after death analyzation to proactive recovery of business. It perceives indebtedness as a state where resources are lacking to meet the liabilities, and comprehends that an untreated bankruptcy will prompt insolvency (non-corporates) and liquidation (corporates). To forestall this, the Code accommodates a period bound bankruptcy goal process, to be finished inside 330 days, including any suit. Notwithstanding, because of deferral in court processes, in all actuality the normal number of days is around 380 days.

The great goal of the IBC is to save corporate account holders in trouble. The Code determines a period bound indebtedness goal process, including any prosecution, which should be finished inside 330 days. The satisfaction of IBCs targets is obvious from the cases that have seen effective goals. Albeit the quantity of organizations under liquidation is right multiple times that of those protected, esteem shrewd the resources of the 250 saved organizations are multiple times that of the 955 organizations under liquidation.

Without a doubt, the IBC has been compelling generally up until now, be that as it may, consistence to courses of events stays an issue. The prior conceived time period of 180 days (+90 days expansion) was expanded to 330 days for settling issues. Regardless of the expansion, goal plans keep on intersection the cutoff time. By and large, it requires 380 days for goal intends to arrive at a resolution. By and large, this is because of postponement in court procedures, as the NCLT and National Company Appellate Tribunal (NCLAT) are overburdened- - the quantity of seats is 16 and the all-out number of seat individuals is just 20.

The interaction additionally includes various partners with contending interests, which further makes goal complex and tedious. Also, as of late, various issues has been raised by different

partners in regards to valuers with unknown degrees being enrolled as enlisted valuers by IBBI. Such oddities influence the valuation calling and its believability.

Another test is that the sole position lies with the council of lenders to control the RPs, with practically no rules. The need of great importance is to improve institutional limit of the NCLT seats and acquire more straightforwardness in the choice of RPs.

The IBC is a pivotal underlying change, which whenever carried out viably and in a timebound way can deliver significant additions for the corporate area and the economy in general. All things considered; it assumed an undeniable part in further developing India's Ease of Doing Business (EODB) positioning from 130 out of 2016 to 63 of every 2020.

Latest amendment

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 was declared on the fourth of April, 2021 as an alteration to the Insolvency and Bankruptcy Code, 2016 presenting the original Pre-bundled Insolvency Resolution Process. This was done because of a need of great importance, an effective bankruptcy goal process. Before long, on 26th of July, 2021, the Insolvency and Bankruptcy Code (Amendment) Bill, 2021 was postponed in the Lok Sabha, booked to be moved for the House's pondering as a substitution to the Ordinance. On 28th of July 2021, the Bill was passed by the Lok Sabha, prominently, with no conversation from the resistance. On the third of August, 2021, Rajya Sabha continued to pass the Bill after a concise discussion and a voice vote. On the eleventh of August, 2021, the Bill got the consent of the President accordingly authorizing the Insolvency and Bankruptcy (Amendment) Act, 2021 considered to have come into power on the fourth of April, 2021.

Throughout the long term, there has been a developing necessity felt of working on the cycle specified by the Insolvency and Bankruptcy Code, 2016 . This need has been fundamentally seen in instances of more modest bothered business, inferable from the generally extensive measure of time and cost spent in seeking after chapter 11 procedures. All things considered,

the past Ordinance tried to handle this by presenting substitute bankruptcy goal process for Micro, Small and Medium Enterprises [MSMEs] with defaults up to INR 1 crore.

The Amendment delivers the Pre-bundled Insolvency Resolution Process' [PIRP] as a technique for handling endeavors in pressure, viably filling in as an option in contrast to the Corporate Insolvency Resolution Process' [CIRP]. In facilitation of this, the Act presents Chapter III An in the IBC establishing areas 54A to 54P.

Instead of CIRP where aside from the corporate borrower itself, essentially the banks of an organization can start the indebtedness process,4 PIRP anticipates use of commencement of goal exclusively by the Corporate Debtor [CD].5 In the last option, it is the CD that readies a goal plan that goes through a two-layered endorsement instrument for example first with the Committee of Creditors [CoC], and afterward the Adjudicating Authority.

The clever system has been acquainted with restricted application with troubled MSMEs as characterized under the MSME Act, 2006. It should be noted, there has been a modification in the meaning of MSME as an outcome of the Atmanirbhar Bharat Economic Stimulus.

According to the MSME Ministry, an element might be viewed as a Micro Enterprise' in case speculation is up to INR 1 crore and turnover doesn't surpass INR 5 crores. For Small Enterprises', the limits are INR 10 crores and INR 50 crores individually. For Medium Enterprises' the qualities are INR 50 crores and INR 250 crores individually. The changed agreement amplifies the inclusion of the term to almost close to 100% of the organizations enrolled with the GST.6

The Amendment adjusts Section 4 of the Code forcing a default roof of INR 1 crore. This suggests, for defaults adding up to any esteem between INR 1 lakh and INR 1 crore, PIRP is the ideal and suitable interaction. Nonetheless, the Central Government is in a situation, via warnings in the Official Gazette, to adjust the base edge of INR 1 lakh to any sum beneath as far as possible.

Instead of the CIRP, where the commitment of dealing with the administration and issues of the corporate indebted person are vested in the Resolution Professional [RP] (Section 17, IBC),

in the occurrence of PIRP, Section 54H specifies that the administration of the corporate debt holder's issues will keep on screening in the Board of Directors or the accomplices who will put forth their most extreme attempt to save and secure the worth of the CD's property as a going concern.

This specification is anyway molded. Per Section 67A, if after commencement of PIRP, the NCLT observes that an official of the CD deals with its undertakings with a plan to swindle loan bosses it might punish the official anyplace between INR 1 lakh and INR 1 crore.

Anytime during PIRP, if the Committee of Creditors vote with somewhere around a 66% greater part of the democratic offers, they might select to vest the administration of the corporate indebted person with the RP and he will make an application in such manner to the NCLT. Furthermore, if the NCLT sees there is a deceitful administration or gross botch of the CD's issues, it will vest the CD's administration with the RP.7

It should be noted here, the vesting of the executives with the RP in such an exigency, or the scarcity in that department, doesn't influence the PIRP in any way at all.

The RP is compelled by a solemn obligation both previously and during the PIRP. As per Section 54B, the goal proficient is to set up a report on whether the CD satisfies the qualification measures under Section 54A and regardless of whether the base arrangement is legally solid. This and other determined obligations emerge after the date the CoC supports the arrangement. The RP's second arrangement of obligations emerging are recorded in Section 54F. This incorporate check of cases, observing the CD's administration, establishing the CoC and other indicated obligations. The arrangement further sets out the RP's powers to guarantee a smooth interaction. To start the interaction, the debt holder requires its monetary loan bosses' assent addressing 66% of monetary obligation, to record an application with the NCLT under area 54C. Segment 54A further orders the account holder to supply a base goal plan to the CoC preceding endorsement.

According to Section 54C, the application to the Tribunal should have the composed assent of a proposed goal expert and his report on the corporate debt holders' qualification to seek after this other option.

Once stopped with the NCLT, the Tribunal will inside a time span of 14 days, pass a request for confirmation or dismissal relying upon whether or not the application is finished. Preceding passing a request for dismissal, the NCLT is compelled by a solemn obligation to tell and allow the candidate to redress the application's imperfections inside 7 days.

It is at this stage; that of confirmation by the Tribunal, that the PIRP authoritatively initiates. The Tribunal in this manner reports the PIRP commencement and declares a ban. The whole cycle needs to finish up inside 120 days of initiation.

Inside two days of the initiation, the corporate debt holder is needed to present the base goal plan to the RP who then, at that point, presents it to the CoC. The Committee may, according to Section 54K, either permit the CD to alter the arrangement, welcome contending goal candidates (Swiss Challenge strategy), or endorse it with no guarantees.

On endorsement of a goal plan by the CoC, the goal proficient will present something very similar to the NCLT inside a time of 90 days from the indebtedness initiation date. In any case, if inside this specified 90 days, the Committee neglects to endorse a goal plan, the goal proficient will on the expiry of such period, record for the end of PIRP.

In the occasion the Committee supports a goal plan inside 90 days and the RP presents something very similar to the NCLT, the Tribunal is to endorse the arrangement inside 30 days of receipt. The request for endorsement will have an impact as given under sub-segments (1), (3) and (4) of Section 31. If the Tribunal isn't happy with the arrangement, it might end something similar under Section 54N of the IBC.

Simultaneously, preceding the Committee's endorsement of the arrangement, if the Committee votes by 66% greater part of the democratic offers, it might have the RP cozy to the NCLT the Committee's goal to end the PIRP.

Conclusion

Insolvency and Bankruptcy Code acquired many changes the huge business situation in the country. Presented to diminish the time it takes to manage the issue of chapter 11, the code has transformed into something driving this country towards another period of economy. In any case, what this street of development may prompt is yet to be seen. Everything we can manage is ensuring that our accounts are all together and we never go indebted. Preceding IBC the

absence of a compelling goal system deterred moneylenders from loaning their cash since they were uncertain of their recuperation of obligation which in a manner decreased money accessibility and thus upheld just a less suitable undertakings. The way of life of not taking care of credits and moving away with next to no discipline must be broken. In case IBC was not there, the borrower would have no impetus to reimburse. As a level of cases, banks recuperated on normal 42.5% of the sum documented through the IBC in the monetary year 2018-19, against 14.5% through the Sarfaesi goal instrument, 3.5% through Debt Recovery Tribunals and 5.3% through Lok Adalats. Against Rs 1.66 lakh crore claims required under IBC, the recuperation was Rs 70,819 crore.

One needs to remember that adjustments of credit culture take time...it's not a short-term peculiarity. At the point when you are attempting to change the way of life, the individuals who were profiting from the old culture will attempt to keep up with the state of affairs. In any case, the main concern stays that India’s credit culture is improving

ROLE OF UN IN THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

- SUVEER DUBEY

ABSTRACT

The protection of human rights has been acknowledged to varying extents across time, but since the Second World War, the universality of human rights has been recognized by the United Nations as inherent in the very nature of human beings as a reflection of their common humanity. In recent years, there has been an upsurge of international attention on the role of National Human Rights Institutions (NHRIs) in the promotion and protection of human rights. This growing interest is explained by an increased understanding and recognition among states, international and nongovernmental organizations of the important role NHRIs play in promoting and protecting human rights. My paper evaluates the extent of the promotion and protection of human rights by the local legislations that are directly or indirectly influenced by the UN conventions.

Keywords: Human Rights, United Nations, Legislations

INTRODUCTION

Human rights constitute a set of rights and duties necessary for the protection of human dignity, inherent to all human beings, irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Everyone is equally entitled to human rights without discrimination. As such, human rights are universal, interrelated, interdependent and indivisible and constitute the basis of the concepts of peace, security and development[180].

The consequences of World War II and the damages sustained there from can undoubtedly be said to be the reason behind the creation and formation of the United Nation Organization. The

[180] P. Anand, S. Bhatt, and Rahmatullah Khan, Law, Science and Environmen (New Delhi, India: South Asia Books, 1987), https://www.barnesandnoble.com/w/law-science-and-environment-r-p-anand/1001406106

war which lasted for about 7 years, from 1939 to 1945, and as the end drew near, cities throughout Europe and Asia lay in smouldering ruins. Millions of people were dead; millions more were homeless or starving. Human rights are at the core of all work of the UN system and – together with peace and security and development – represent one of the three, interlinked and mutually reinforcing, pillars of the United Nations enshrined in the Charter[181].

The principal institutional framework for furthering human rights in the world community is the United Nations (UN), the only intergovernmental structure with a general mandate for realizing all human rights in all countries. The UN is a tool of geopolitics for some and a beacon of hope for others.

It is the promise of human rights in and under the UN Charter[182] to set the stage for explaining the UN's strengths and weaknesses as a force for the realization of human rights in the global community.

HUMAN RIGHTS IN THE UN CHARTER

The term "human rights" was mentioned seven times in the UN's founding Charter, making the promotion and protection of human rights a key purpose and guiding principle of the Organization.

In 1948, the Universal Declaration of Human Rights lay down the principles that brought human rights into the realm of international law. Since then, the Organization has diligently protected human rights through legal instruments and on-the-ground activities.

The founders of the UN, not content to treat human rights as merely one among many shared objectives of UN member governments, implicitly articulated a theory of peace according to which respect for human rights and fundamental freedoms is a necessary condition for peace within and among nations.

[181] Jane Connors and Markus Schmidt, "United Nations," in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), Textbook on International Human Rights Law (Oxford University Press, 2d edition, 2013): 371.

The Charter's Preamble places "faith in fundamental human rights" immediately after its aim "to save succeeding generations from the scourge of war." Yet the Charter does not apply this theory to the relative powers of the UN's main organs. Instead, the human rights provisions are relegated, in the chapter on the purposes of the UN, to achieving international cooperation (art. 1(3)) and, in the chapter on international economic and social cooperation, to promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (art. 55).

The UN General Assembly (UNGA) may initiate studies and make recommendations for the purpose of "assisting in the realization of human rights" (art. 13(1)) and the Economic and Social Council (ECOSOC) may make recommendations and draft conventions on human rights (art. 62(2) & (3)) as well as set up commissions, including to promote human rights (art. 68), which it did in 1946 by establishing the UN Commission on Human Rights (replaced in 2006 by the UN Human Rights Council or HRC)[183].

The Charter language was deliberately weak, emphasizing "promotion" rather than "protection" by the General Assembly and ECOSOC, while granting to the UN Security Council (UNSC) sole authority to render binding decisions and require states, under the threat of economic, military, or other sanction, to modify their aggressive behaviours.

Articles 55 and 56 of the Charter stipulate that the member states pledge themselves to take joint and separate action in cooperation with the Organization to "promote . . . universal respect for and observance of human rights." In practice it has meant mainly promotion rather than protection but has nonetheless resulted in an impressive body of international human rights law, as well as studies and public information on a wide range of human rights and related issues. However, the widely recognized principles of territorial sovereignty and non-intervention into "matters which are essentially within the domestic jurisdiction of any state"

[183] See UN General Assembly Resolution 68/2 of 20 September 2013,

(art. 2(7)), have prevented the UN from taking decisive action to stop governments from mistreating their populations in violation of their Article 56 pledge[184].

United Nations also plays a pivotal role in the field of human rights by exercising general political pressure. Within the United Nations, the General Assembly (according to the art. 10 and 13 of the Charter) and the Economic and Social Council (according to the art. 62 Para 1 and 2 of the Charter) could ask the Member States of the United Nations for information or reports on the status of human rights and fundamental freedoms in their respective countries. As a result, the General Assembly as well as the Economic and Social Council can make recommendations.

To fulfil better its function, the Economic and Social Council established the Commission on Human Rights as its subsidiary body. It is composed of 53 States that meet each year since 1947 in regular session in March and April for a period of six weeks in Geneva. Over 3,000 delegates from member and observer States, as well as from various non-governmental organizations participate.

Apart from its regular sessions, the Commission can also meet exceptionally, to consider urgent human rights situations, between its regular sessions in a special session, provided that a majority of the members of the Commission so decide. Until now, there has been already 58 regular and 5 specials sessions of the Commission. During its regular annual session, the Commission adopts about a hundred resolutions and additionally, some decisions on matters of relevance to rights of the individual. It is assisted in this work by the Sub-Commission on the Promotion and Protection of Human Rights, a number of working groups and a network of individual experts, representatives and rapporteurs mandated to report to it on specific issues.

These special procedures and mechanisms of the Commission on Human Rights are mandated to examine, monitor and publicly report either on human rights situations in specific countries or territories (known as country mechanisms or mandates) or on major phenomena of human rights violations worldwide (known as thematic mechanisms or mandates)[185].

[184] United Nations reform: measures and proposals. Note by the Secretary-General, UN Doc. A/66/860 (26 June 2012): 37-95.

[185] Beth A. Simmons, Mobilizing for Human Rights: International Law , (Cambridge: Cambridge University Press, 2009): 363.

To promote the work under Special procedures and the Commission as such, for the last couple of years, some Member States have introduced a standing-invitation to the Special Procedures of the Commission to visit the country and to monitor all aspect of human rights within their mandate.

PROTECTION AND PROMOTION OF HUMAN RIGHTS

The space for UN action in a wide range of human rights concerns has been opened over that last thirty years owing to a political willingness to limit the scope of Charter Article 2(7) (domestic jurisdiction) and expand that of the Article 56 (cooperation with the UN to achieve human rights).

The UN does much today that would have been deemed "intervention" by most states a few decades ago, e.g., investigation of abuse, adoption of resolutions by the UNGA and Human Rights Council explicitly denouncing countries by name, sending special envoys and rapporteurs, receiving complaints from individuals, addressing urgent appeals to governments, and conducting inquiries. Indeed, the range of UN action to realize its Charter mandate to promote and protect human rights covers at least three means of preventing harm (education and information, standard-setting and interpretation, and institution building within Member States) and five tools to respond to human rights situations and protect human rights (monitoring through reporting and fact finding, adjudication, political supervision, humanitarian action, and coercive action). Taken together, these means and methods for promoting and protecting human rights describe what the UN can do to move from the lofty words of the UDHR to action that affect human lives[186].

Originally, the principal body responsible for human rights in the UN was the Commission on Human Rights. It carried out the bulk of the standard-setting activity of the early years following the adoption of the UDHR.

In the 1950s and early 1960s, the first human rights treaties adopted by the UN related to trafficking and prostitution, the political rights of women, the nationality of married women, and consent to marriage, minimum age for marriage, and registration of marriages. A major

[186] Human Rights Council Resolution 21/1, 26 September2012; Situation of human rights in Eritrea, 26 September 2012

milestone was the adoption in 1966 of the two international covenants—International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)—which together transformed the aspirational rights of the UDHR into binding treaty law[187].

A second milestone was the systematic advancement of women's rights in the Declaration on the Elimination of Discrimination against Women of 1967, followed by the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In the 1970s and 1980s the UN adopted other core human rights treaties on racial discrimination, torture, children's rights, and, in the 1990s and 2000s, rights of migrant workers and persons with disabilities. For all their shortcomings, the expansion of the thirty articles of the UDHR into a considerable body of treaty law, with an impressive amount of interpretative work by nine treaty-monitoring bodies is an undeniable UN accomplishment.

The Commission, consisting of 53 governments elected by ECOSOC to which it reported, was replaced in 2006 by the Human Rights Council, consisting of 47 governments elected by the UNGA, to which it reports. Before and following the 2006 reform, there has arisen an array of mechanisms based either on the Charter and applicable to all UN member states or on treaties binding only states that have ratified them and which are administered by the Office of the High Commissioner for Human Rights (OHCHR).

It has thus become traditional to distinguish Charter-based procedures and treaty-based procedures. Promoting and Protecting Human Rights through Charter-Based Procedures Most of our discussion of the Charter-based procedures relates to the principal UN organs with responsibility over human rights, namely, the UNGA (especially its subsidiary body the UNHRC), ECOSOC, and the Secretariat (principally the OHCHR). However, other units of the UN secretariat have significant human rights responsibilities, such as Office for the Coordination of Humanitarian Affairs (OCHA), Department of Political Affairs (DPA) and Department of Peacekeeping Operations (DPKO).

Moreover, other main organs of the UN occasionally address human rights, such as the International Court of Justice (ICJ) and the Security Council (discussed below in relation to

[187] UN General Assembly Resolution 68/268, adopted 9 April 2014.

use of coercive force for human rights purposes). In addition, there are funds and programs of ECOSOC and the UNGA, which engage in human rights work, such as the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the United Nations Fund for Population Activities (UNFPA), the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women).

Among the 14 Specialized Agencies, which are autonomous organizations coordinated by ECOSOC and the UNGA, the International Labour Organization (ILO), the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Health Organization (WHO) contribute in various ways to human rights. OHCHR and six other agencies (UNDP, UNICEF, UNFPA, UNESCO, WHO and FAO) adopted in 2003 the "Common Understanding among UN Agencies on a Human Rights-Based Approach to Development Cooperation," which defined a number of criteria for a UN standard Human Rights-Based Approach (HRBA)[188].

The United Nations promotes respect for the law and protection of human rights in many ways, including. This State-driven process provides an opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.

The United Nations promotes respect for the law and protection of human rights in many ways, including: There are 10 human rights treaty bodies, which are committees of independent experts, that monitor the implementation of the core international human rights treaties, including the Convention on the Rights of the Child.

Under the United Nations Human Rights Council, the Universal Periodic Review is a review of the human rights records of all Member States. This State-driven process provides an opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.

UNICEF actively engages with the Universal Periodic Review as it can provide a powerful tool for child rights advocacy and action. The United Nations also has an Office of the High

[188] Kofi Annan, "Introduction: The United Nations and Human Rights," in The United Nations and Human Rights (UNESCO, 2005),

Commissioner for Human Rights that is mandated to promote and protect the enjoyment and full realization by all people of human rights.

The United Nations may also appoint experts (sometimes called special rapporteurs, representatives or independent experts) to address a specific human rights issue or particular country. These experts may conduct studies, visit specific countries, interview victims, make specific appeals and submit reports and recommendations.

These procedures include two child-specific procedures and many broader procedures which increasingly make reference to children's rights. Child specific procedures include the Special Rapporteur on the sale of children, child prostitution and child pornography; and the Special Rapporteur on trafficking in persons, especially women and children.

Many broader procedures increasingly include references to children's rights in the context of their particular mandates. Such procedures include the Special Rapporteurs on the right to education; on torture; on the environment; on disability; on extrajudicial, summary or arbitrary executions; on violence against women; on freedom of religion or belief; and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and also an Independent Expert on human rights and extreme poverty[189].

Violations of children's rights have also been singled out by country-specific Special Rapporteurs (who focus on the human rights situations in particular countries and regions and can receive individual complaints) and thematic Special Rapporteurs, including the Special Rapporteur on human rights and the environment. Other relevant mechanisms include Working Groups on Enforced or Involuntary Disappearances and on Arbitrary Detention.

In addition, the Special Representatives of the Secretary-General on Children and Armed Conflict, Violence Against Children utilize their specialized mandates to act as global independent advocates for and on behalf of children.

As far as the international human rights instruments are addressed to states, and as a rule treaties do not require a contracting state to bestow rights on individuals. The obligation imposed on a state by a human rights instrument is to take steps within its domestic law to meet the prescribed

[189] Situations Referred To The Human Rights Council Under The Complaint Procedure Since 2006, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf

goals of that instrument: what is necessary is that a state brings its domestic law into line with international human rights standards. Thus, the role of UN, helps in protection and promotion oh human rights, by ensuring compliance by member countries, by caring out studies of the domestic scenario, while being conscious of the international human rights issues as well.

HUMAN RIGHTS IN INDIA

Globally, India is considered as the largest democracy but it does not have any proper record of human rights. In last few years, by agreeing with worldwide movements the human rights are supposed to have special significance in fabricating the Indian society.

By enacting the protection of Human Rights Act 1993 a technique for developing a legal system of human rights has acquired a new stimulus. With regular changes in social realities, it has been measured as an essential factor which the Human Rights commissions at the National and States level and courts of human rights in District level are expecting[190].

The plain subject of the Protection of Human Rights Act, 1993 is created on the basis of human beings' requirement for leading a life so that the integral self-respect of a human being will get protection and respect[191].

Under the 1993 Human Rights act, The National Human Rights Commission of India has been established in the same year, 1993, acts as an instance for "institutionalizing the human rights concepts besides supplies fundamental rights which are preserved in the Indian Constitution". The formation of National Human Rights Commission took significant initial activities while setting the agenda, Rule Making and Norms, policy initiatives, and evaluation and application of human rights in India. The Indian opinion regarding human rights does not originate from natural civil rights policy from the west or from the theory of an assumed fact; because it has its own references in early Indian civilization and culture.

In India, the influence of reforms and renaissance movements, Islamic religion, the national ideology and British colonialism has played an important role in the practice and prospect of human rights.

[190] Role of the India in Human Rights" https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_5_english.pdf.

[191] https://www.unesco.de/c_humanrights/I.php

CONCLUSION

The idea of human rights protection coming under the auspices of the UN was sown in the Preamble to the UN Charter. It was further reflected in the provisions of the UN Charter and the UDHR. Human rights were then spelled out in the two UN Covenants, the ICCPR and the ICESCR, which represented much refining of the rights and freedoms set forth in the UDHR. The relatively recent introduction of the Second Optional Protocol on the abolition of capital punishment highlights that human rights are not static; they continue to evolve.

United Nations system of the promotion and protection of human rights and fundamental freedoms is complex in both senses – the form and the methods. There can be two different forms of protection, the direct and the indirect protection. The indirect protection includes the creation of an international environment that is conducive to the realization of human rights, as well as the elaboration of norms and standards; education, teaching, training, research and the dissemination of information and the provision of the advisory services in the field of human rights.

As an example of the direct action, United Nations may provide protection by way of food, shelter, and medical care to a population in distress from armed conflict. All these direct and indirect actions are taken with the agreement of concerned Member States and within the international law[192]. In order to safeguard and defend basic human rights and fundamental freedoms, United Nations seeks to use all available methods. These may be anticipatory, preventive, curative, mitigatory and or remedial.

[192] United Nations reform: measures and proposals, Note by the Secretary-General, UN Doc. A/66/860, 26 June 2012, p. 21.

ALIENATION OF PROPERTY BY GIFTS

- ALKA SINGH

ABSTRACT

In this article, we shall understand the concepts of coparcenary, coparcenary properties, and their alienation or transfer. Alienation of property by gift means when we are giving our property or alienation that property in a way as git.So under this research paper we will be discussing about the different forms or the types of the alienation which are done and not only this how all those alienations and under what circumstances they are done. All the transfers of the intestate assets, after the death of a male ancestor in a Hindu joint family, are guided by the rule of the coparcenary.

Under this research paper the subject matter is alienation so there are different form of alienation and which are done by members-

- Father's power of alienation
- Karta's power of alienation
- Coparcener's power of alienation
- Sole surviving coparcener's power of alienation

So these are some of the powers of alienations under this people have the power so that they can alienate the joint family property but in favour of the family and for the benefit of the family. If they want to invest in some work from which the benefit will arise and that will come in joint family then they can invest in that. Like fathers has the power of alienation of the joint family property to daughter for love and affection as a gift but he cannot alienate the whole joint family property. He can only give as a gift. So the main focus is on the father's power of alienations.

INTRODUCTION

The word alienation means the transfer of property it can be done by gift, sales and the mortgage because of the alienation the importance has been added in Hindu law as ordinarily earlier no one neither coparcener nor Karta do not have the full power of alienation in the joint family property or over his interest in the joint family property, but as we know that under

dayabhaga school of Hindu law a coparcener has the full right of alienation of property of joint family of his own interest. As we know that the alienations of the separate property by the Hindu it's not like that if it is governed by the Mitakshara then only have the full rights over that property it's in both whether it is governed by the Mitakshara school of law or the dayabhaga or the sub school, it has the full and the absolute power over it. Such alienations are governed by the transfer of property act. The most important and the distinguishing features of this power that traditionally it was given to the Karta and the father, but the power itself is near autocratic because it allows father and the Karta to sell, gift or mortgage the whole joint family property even without the consent of the any coparcener that's why there were several conditions which specified in the ancient text which alone would justify such acts of the manager of the joint family. So all these conditions have been changed over the centuries so that to keep a track as with the changing conditions time to time and it was also that the Privy Council had modified the ancient rules in accordance with the principles of equity, justice and good conscience.

FATHERS POWER OF ALIENATION

So, as we know that the father has the more power as compared to the Karta of the Hindu joint family because there are many more situation comes when the only father has the authority to make the alienation not the Karta of the family or anyone else. Also under the dayabhaga school the father has been provided the absolute power regarding the alienation of the joint family property for e.g.- he has the power to alienate the joint family property whether it is a movable or immovable according to his wish, he has the absolute power of alienation to his and also the ancestral property.as according to the dayabhaga school of thought the sons do not get the property by birth so father does not need the sons consent for the alienation of the property but at the same time under the mitakshara school the sons get the right over the ancestral property by birth itself so in that case the father has to take the consent of the son then only he can alienate the property.

In the case of the Ramkumar vs. Krishnakumar, it was held by the sudder court that when a father has gifted his whole estate to his younger son even during the life of elder son was valid and also it was immoral; however, the which was of whole ancestral property it was forbidden.

While we see under the Mitakshara law , while it has been a settled law that in this the father has a full power that he can alienate his separate movable property but at the same time there was an conflicting views in the court that the father has the power of alienation in his separate immovable propertyies.so this controversy was set at rest in 1898 by the privy council in the case of the Rao Balwant Singh vs. Rani Kishori and in this case it was held that the father has full power of alienation over his separate property in both movable and immovable property.
so, as we have seen above that the father has the power of alienation in the separate and the joint family property but in the following two cases only-

1. Gift of love and affection
2. Alienation for discharge of his personal debts

Gifts of love and affection

The father has the power to make an alienation of the Hindu movable joint family property as a gift of love and affection. And he cannot make this alienation to everyone such alienation can be done for his daughter, his own wife, son in law etc. but he can do a small portion not the whole property. Because its already stated that the alienation has to be made of love and affection.

Two gifts are necessary for the validity of such gifts-

1. The 1st and the most important that the gift has to be of love and affection means the father has some relation with the person whom he made the gift of love and affection.
2. The gift should be of small portion of the Hindu joint family property it cannot be a big portion because it's a joint family property everyone has right over that property.

So as we see in the case of the Basho vs. Man kore Bay, a gift which was made to the daughter was about Rs 20000 and this was held by the privy council valid because as the total value of the estate was 10-15 lakhs. As in the case of the Subbarami vs. Rammamma there was an important principle which was laid down that these types of gifts are not made by the will, since as soon as a coparcener dies, then he cannot enjoy or alienate the joint property and also, he loses the interest and also, he knows he cannot alienate the joint property.

Gifts of immovable property

Such gifts cannot be made of immovable property. As we have seen in the case of guramma v. malappa in that case the father has made a gift to his daughter of immovable property after the marriage of her daughter and still that was held valid in the court. So, it was submitted that the gift of love and affection cannot be made to sons from immovable property or the Hindu joint family property but in the supreme court it was confirmed that the gift the gift of immovable property to daughters it can be made but only to daughters.

Alienation for the discharge of his personal debts

As we have read that the fathers have the power that he can alienate the joint family property so that he can discharge his antecedent debts, but there is also case that those debts should not be immoral or illegal and if they are then he cannot do that or alienate the joint family property, and also the sons are under the pious obligation to discharge the debts of their fathers.

So, it is written above that the father can only alienate the joint family property for the discharge of his antecedent debt in only two conditions-

1. The debts have to be antecedents
2. The debts should not be avyavharika means illegal or immoral.

In these two conditions only he can use the family property. The two rules previously mentioned were extracted from ancient Mitakshara text and these two rules were also laid down in the case of Brij Narain vs. Mangla Prasad.

KARTA' S POWER OF ALIENATIONS

Although no individual coparcener has the power of alienation of Hindu joint family property even not with Karta if anyone wants to alienate the property then they have to take the consent of all the family members, it is recognised by the dharmshastra that there are some circumstances in which they can alienate the joint family property.

As according to the vijnaneshwara it was recognised three exceptional cases in those cases the Karta of joint family has the power of alienations-

1. The first and the most important is the LEGAL NECCESSITY (this also includes Vijnaneshwara's Apatkale as well as a part of Kutumbarthe, i.e., for the sake of members family.)
2. The second one is Benefit of estate (this includes the other part of Kutumbarthe, i.e., for the sake of family property.)
3. The third and the last one is Acts of indispensable duty (this includes the entire head of Dharamarthe.)

However, the Karta of the joint family can alienate the property with the consent of all the adult coparceners in existence at such alienations irrespective of legal necessity or benefit of estate. The law differs from state to state and somewhere it is necessary to have consent of all a coparcener and somewhere the consent of few coparceners not all therefore it is said that it is not uniform in all the states. As per the law in Bombay and the madras in these both states the share of the consenting coparceners would be bound. However, as we have seen in the west Bengal and the Uttar Pradesh in both these states coparceners cannot alienate his own share even without the consent of all the coparceners and such types of shares which is without the consent of all the coparceners would not even bind the share of the consenting members.

LEGAL NECESSITY

Legal necessity is also known as the apatkale so the simple meaning of this is when the things necessary for the family. Under vijneshwara the term apatkale means the property of the joint family can be alienated at the time of distress means such as at time of famine, epidemic etc. then at all such situation the property can be alienated. And not otherwise and it was also recognised by the modern law that the necessity can also be extended. The following are held to be as the family necessities-

1.The first and the most important is the maintenance of the joint family expenses like for the medical care of all the members of the family.
2.If in a joint family then the payment of taxes, government revenue.
3.Payment of debts which are incurred for the necessity of the family or the family business
4. In the performance of ceremonies, sradhas and upanayana

5.Expenses which are needed in the marriage of the male coparceners and also in the marriage of the daughters of the male coparceners.

6. Last and the most important the cost which is incurred for the defines of the members of the family who are involved in the serious criminal charges.

PARTIAL NECESSITY

In the case of krishandas v. Nathuram, privy council was of the view that the money recovered by alienation of property is not only meeting the legal necessity of Rs 3000 but also generating the surplus money by the act done in good faith by the purchasers. Therefore the privy council held the alienation valid. In this case by the mortgage of family property a manager can borrow the amount for necessity.

BENEFIT OF ESTATE

Sometime the alienation of property can be affected for the benefit of estate too but since there was no clarity in the benefit of estate as the court has not defined clearly the concept of benefit of the estate. Therefore the alienation can be modified for the benefit of family. The benefit of estate was first time found in the case of Palaniappa vs. Deivasikamony in which the judge's observation in this regard was clearly described and suggested to include precise nature of things like preservation of the estate from extinction and to safeguard from the any rancorous litigation which may affect the benefit to the estate.

INDISPENSABLE DUTIES

So as the term indispensable duties describes that the performance of religious, pious or charitable acts. Such as marriage, grihpravesham, Shradha etc. all these are acts which are needed to be performed they cannot be separated. And as we know that a Karta of the family can also alienate the property for the performance of the charitable and the marriage of the family members etc.

COPARCENER'S POWER OF ALIENATION

Under this it is divided under two heads:

1.Involuntary Alienation.

2.Voluntary Alienation.

Involuntary alienation

Alienations of the undivided interest in execution proceedings is known as the involuntary alienations. The Privy Council clarified the issue in 1873, finding that the purchaser of an undivided interest in property at an execution auction during the life of the debtor of his distinct obligation obtains his interest in such property, with the capacity to ascertain and realise it by partition. This provision is limited in that it cannot be used against a coparcener after he has paid his obligation. However, if his interest was connected during his lifetime, it can be sold after his death in a court sale.

Voluntary alienation

Once it was established that a coparcener's undivided interest may be attached and sold in order to enforce a money judgement against him, it was only a matter of time before the principle was extended to voluntary alienation. So, as we know that when the real owner of that particular property transfers it willingly, then it is called as voluntary alienation. To do something when a coparcener is forced then at that time, he should be allowed to do it himself not anyone else and then the notion somehow extended to voluntary alienations.

Voluntary alienations may be made in the following forms-

1. Gifts
2. Sale and mortgage
3. Renunciation

Gifts

It is very clear that under Mitakshara family the gifts by the coparceners of their undivided interest in the family is totally invalid. As it’s known that coparceners do not have any power to make gift of the undivided family property. They cannot make to anyone not a stranger nor to the relative except the purpose which are warranted under the special text then in that case only he can gift.

Sale and mortgage

As according to the high courts of the Bombay, Madras and the Madhya Pradesh, it's very clear that the coparceners have the power to sell mortgage or alienate his undivided interest even without the consent of other coparceners, no one will stop him from doing that but as in the case of the Mitakshara school of thought in the coparceners do not have any power to sell mortgage or alienate the property without the consent of the all-other coparceners.

Renunciation

As above we have written that somewhere the coparceners have the power to alienate in some where he does not but as in the case of the renunciation the coparcener has the power that he can renounce his share in the joint family property. Like if a coparcener has given a gift of his undivided interest in favour of other coparceners, then that is valid whether that is with the consent of all the coparceners or one coparcener as a renunciation in favour of all. And also as we see that with a condition to pay the maintenance to the coparcener who is giving his share then renunciation is valid. Any coparcener can renounce his share in the favour of family members with the consent of few coparceners but cannot do this in the favour of only one and it's not valid too.

SOLE SURVIVING COPARCENERS POWER OF ALIENATION

In a case when all the coparceners die except one then at that point of time such coparcener is regarded as the sole surviving coparcener and also after the death of all the coparcener the property of the joint family passes with such coparcener then that property will become the separate property, provided that such coparcener do not have any sone he is sonless.

After reading various judicial decisions or the judgements of the courts so have found 3 views which are in relation to the power of the sole surviving coparceners in alienating the property of the Hindu joint family-

1.He is fully entitled to alienate the joint family property if there is no other coparcener is left but if at the time of alienation a coparcener is present in the womb then he can challenge after attaining the age of majority.

2.The power of the sole surviving coparcener is unaffected any of the subsequent adoption of a son who is by the widow of another coparcener

3.The interest of the female cannot be alienated by the coparceners and such interest has been vested on her by the virtue of the section 6 of the Hindu succession act,1956.

CONCLUSION

From the above analysis, it is very clear that the coparcenary relationship is exists in the joint family of Hindu, which is starting from the senior most member till the four degrees and such senior most male member we called as a Karta of the Hindu joint family. Alienation of property by gifts mainly done by the father's power of alienation in the joint family property in the form of gifs by love and affection. There are some exceptions also that he cannot alienate the whole joint family property in the form of gifts to his close ones. Under this we have read and written the KARTA and COPARCENERS and also the sole surviving coparceners power of alienation, so basically the power of alienation has been covered in this research paper.

MARITAL RAPE- AN INDIGNITY TO WOMEN

- PAWAS

ABSTRACT

Marital rape is one of the evilest forms of violence against women in India, and it is considered one of the threats to gender justice and equality. In Indian society, marital rape has never been a concern because the society is inclined towards the patriarchal belief that upon marriage, a wife's right to personal and sexual autonomy ceases to exist, and her husband has a superior right over her with respect to her body and status. The primary issue is that there are no effective laws in India as far as marital rape is concerned, and whatever laws are there, they are not good enough to abolish such acts of sexual violence. It is the onerous duty of the Indian legislature to enact laws for the safety and protection of every individual from violence, but the legislature has miserably failed to eliminate such evils from the country. This research paper provides a comprehensive review of the current situation of marital rape and discusses the scope and effect, the laws related, the laws it has violated, the importance of criminalising marital rape and lastly, the conclusion and suggestions.

Keywords: Marital rape, gender justice, sexual violence, the Indian legislature

In a tradition-bound society of ours, marriage is a sacred bond that not only ties two individuals but two families together. It is regarded as a partnership of equals, each of whom has separate integrity and dignity. However, there is a massive difference between this perception and reality. In India, marriage is viewed as a bond that legitimises sexual intercourse and any sexual acts, and even non-consensual sexual acts are legal. Marriage is a way to get access to the notion of implied consent of a woman, and because of this mentality of people, they engage in committing acts like marital rape.

WHAT IS MARITAL RAPE?

Rape is the most heinous crime committed against the dignity of women in Indian society. Section 375 defines rape as unlawful sexual intercourse that involves penetration against the

will of the person who is incapable of giving consent because of mental illness, intoxication, deception, or unconsciousness.

The term 'marital' means 'related to marriage', and 'rape' means an act of forceful un-consented sexual intercourse. Therefore, marital rape, in simple words, can be defined as an act of forceful sexual intercourse by a husband upon his wife without her consent. The fundamental element of marital rape is the relationship of husband and wife between man and woman. It is considered one of the many acts of domestic violence and sexual violence.

If rape is the genus, marital rape is one of its species. The difference between the two is that where rape is considered a punishable offence under IPC, marital rape is perfectly legal as there is no legal provision that acknowledges it as a crime.[193]

In our Indian society, the accusation of rape against a husband is hard to believe because marriage is viewed as an irrevocable consent to the sexual act. It is considered that being a part of the wedlock permits the man to have sexual intercourse with his wife even if she does not give her consent. The right to have sexual intercourse must be consensual and not an obligation of the wife.

Society has been governed by a conservative patriarchal and stereotype mindset for ages where women, either married or unmarried, have been kept under male domination and do not have equal rights in any aspect of life because of which man exploits and subjugates women.[194] So, the widespread gender inequality and discrimination prevailing in our society can be one of the reasons for marital rape as a wife in a household is seen as inferior, which leads to the suppression of women. Marital rape also occurs because of a man's sexual perversion and desire to assert superiority over women.

Another reason for marital rape is economic dependence and reliance for monetary purposes of women over her husband because of which women are unable to protect themselves from the practice of marital rape and are forced to bear the violence.

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[193] Yatin Gaur, A critical analysis of the constitutionality of the non-criminalisation of marital rape in India (September 10, 2021) <https://www.theleaflet.in/a-critical-analysis-of-the-constitutionality-of-the-non-criminalisation-of-marital-rape-in-india/> accessed on 21st January, 2022.

[194] iPleaders, Marital Rape in India (November 14, 2018) <https://blog.ipleaders.in/marital-rape-india/> accessed on 19th January 2022.

The most crucial cause of marital rape is the absence of legal provisions recognising marital rape as an offence that gives the husband immunity from any charges against him for sexually assaulting or even raping his wife.[195]

LEGAL PROVISIONS

The Supreme Court has defined the offence of rape as "deathless shame and the gravest crime" against humanity. There are stringent laws to protect women from rape, and severe punishment has been provided for the offenders. In India, rape is a penal offence under section 375 and section 376 of the Indian Penal Code, 1860.[196] Section 375 generally talks about the conditions which lead to the commission of rape. Section 376 provides for punishment of rape, which is rigorous imprisonment for not less than seven years and may extend to imprisonment for life (which shall be construed as imprisonment for the person's remaining life till his natural death), including fine. The purpose of section 375 is to protect every woman from violation of their bodily integrity, dignity and privacy.

However, marital rape is treated as an exception under section 375 of IPC. Exception 2 of section 375 exempts sexual intercourse by a man on his wife without her consent, either forcefully or by using threat or coercion of physical harm from the offence of rape provided the wife is above 15 years of age.[197] Hence marital rape is not considered an offence in India. Exception for marital rape is based on an outdated concept of marriage presuming consent. After marriage, the idea that a woman is presumed to deliver perpetual consent to have sexual intercourse with her husband is deeply embedded in our society.

The biggest disappointment is that even the law presumes that a wife is subordinate to her husband's wishes, including sexual intercourse, which she cannot resist or defy, and it is her responsibility to fulfil all his demands without any questioning. The absence of legal provisions indicates that the law safeguards the husband from the offence of rape upon his wife because of the marital relationship.

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[195] Anirudh Pratap Singh, The impunity of marital rape, The Indian Express (18/12/2020) < https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/> accessed on 21st January 2022.

[196] Indian Penal Code [45 of 1860], Section 375

[197] Section 375, Exception 2- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

In many instances, the government itself has argued before the court that marriage is a sacramental or a contractual relationship between a man and a woman, which gives them legitimacy to have sexual intercourse but criminalising marital rape would destroy the marital relationship. In fact, the act of rape itself would destroy the institution of marriage. Such argument is based on the presumption that a woman implicitly gives irrevocable consent to sexual intercourse upon marriage.

A section of society feels that once marital rape is criminalised in India, the law can be misused by filing false charges against husbands, especially in cases of divorce and alimony. However, the possibility of misuse cannot be a reason to deny the victim to seek any legal help.

The Justice J.S. Verma Committee report of 2013, while evaluating the current rape laws, recommended the government to remove the exception and include marital rape as an offence under section 375 of the IPC, but the government did not accept this suggestion.

The Chhattisgarh High Court discharged a man from facing trial for raping his wife, stating that the charge of rape framed under section 376 is erroneous and illegal as it complies with exception 2 to section 375. However, he was charged under section 377 of the IPC for unnatural sex.[198]

After the Criminal Law Amendment Act 2013, section 375 was amended wherein the age of consent to sexual intercourse was raised to 18 years of age. However, no amendments were made in exception 2 of section 375, which is an exception to the marital rape of the wife who is 15 years of age or above. Therefore, the act permitted the husband to have forced sex with a minor wife between 15 to 18 years of age.

Later, in the case of *Independent Thought v. Union of India, 2017*, the Supreme Court held that sexual intercourse with a girl below 18 years of age, even by the husband, would constitute rape.[199] The issue of marital rape still remains uncurbed for the wives who are 18 years of age or above; however, the judgment was hailed as a landmark stand in a bid to stop child marriages.

Therefore, we can say that the non-criminalisation of marital rape is an example of how the law denies the rights to women and legally safeguards the husband in incidents of marital rape.

[198] Dilip Pandey and ors v. State of Chhattisgarh
[199] Independent Thought v. Union Of India [2017] SSC 1222 (SC)

CONSTITUTIONAL VALIDITY

The Constitution of India is a grundnorm. The fundamental right of equality, right to life and personal liberty, right to dignity of human life, freedom of speech and expression are the basic principles of the Constitution. Every law has to adhere to these basic principles of the Constitution to exist, and any law that contradicts any of the basic principles is ultra-vires and should be held invalid.

The marital rape exception is an insult to the Constitutional goals of individual autonomy, dignity and gender equality enshrined in fundamental rights such as Article 14 and Article 21 of the Constitution. It clearly violates a woman's right to bodily integrity, right to sexual privacy, right to equality etc. When the Indian Penal Code was drafted in 1860, it did not consider a married woman an independent legal entity, and she was considered to be a chattel of her husband. The marital rape exception was drafted based on Victorian Patriarchal norm, which denied equal rights to husband and wife. Married women were not allowed to own property, and the identities of husband and wife were merged under the "Doctrine of Coverture".

Violation of Article 14

Article 14 provides "the state shall not deny to any person equality before the law and equal protection of the laws within the territory of India.[200]" Section 14 provides that all persons should be treated equally in privileges conferred and liabilities imposed in all circumstances. The provisions of the Constitution guarantees equality to all citizens, but the Indian legal system discriminates against married women who have been raped by their husband.

The marital rape exception categorises women into two classes based on their marital status and thus gives immunity to the actions perpetrated by the husband against his wife. In doing so, the exception withdraws to protect married women for no reason other than their marital status from becoming a victim of rape while protecting unmarried women from the same act. A married woman can approach the court in case of rape by a stranger, but they have no legal recourse in case of rape by the husband.

[200] The Constitution of India,1950' Universal's Bare Act,2016, Article 14: Equality before the law "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth."

Another reason why the distinction between married and unmarried women violates Article 14 is that the classification created has no rational relation to the underlying purpose of the statute. The Supreme Court in the case of *Budhan Choudhary v. State of Bihar*[201] and *State of West Bengal v. Anwar Ali Sarkar*[202]; observed that classification is subject to a test of reasonableness which can be passed if there is valid ground and rational objective behind such classification. The exception defeats the purpose of section 375 of IPC. Exempting husbands from punishment is completely contradictory because whether a woman is married or unmarried, the consequences of rape are the same. Therefore, the exception does not pass the test of reasonableness because there is no rational nexus between the classification created by the exception and the underlying purpose of the act and thus, violates Article 14 of the Constitution. Thus exception 2 of section 375 distinguishes between a married and unmarried woman arbitrarily and unreasonably and violates Article 14 of the Constitution and therefore must be struck down.

Violation of Article 21

Article 21 guarantees the "Right to life and personal liberty" to every citizen of India.[203] Article 21 includes a cluster of other rights such as "Right to health, Right to live with human dignity and a safe environment", which is grossly violated by the exception provided in section 375.

In the case of *Justice K.S. Puttuswamy v. Union of India*, the nine-judge bench had held that privacy is a fundamental right.[204] The court observed that the "right to privacy includes decisional privacy that is reflected by an ability to make intimate decisions primarily consisting of one's sexual or procreative nature and decision in respect of intimate relations."

In many instances, the government has tried to justify that sexual relations between a man and a woman is a private affair, and any interference in it will be an encroachment on their privacy. This view of the government was opposed by the court, stating that matters of privacy cannot be used as an overlay for the abuse of the woman and the assertion of the patriarchal mindset.

[201] Budhan v. State of Bihar, AIR (1955) SC 191

[202] State of West Bengal v. Anwar Ali Sarkar, AIR (1952) SC 75

[203] The Constitution of India,1950' Universal's Bare Act,2016, Article 21: Protection of life and personal liberty "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[204] Justice K.S. Puttuswamy v. Union of India [2017] AIR 2017 SC 4161

Right to privacy means "the right over an individual's body, whether it is the husband or any other person", and if such right of a woman is violated, then the offender must be punished irrespective of the relationship between the two.

The Supreme Court in *Suchita Srivastava v. Chandigarh Administration* stated that the right to privacy includes the "right to make choices to engage in sexual activities along with the right to personal liberty, bodily integrity and dignity which is a part of Article 21 and forcefully engaging in sexual intercourse with a woman even within a marriage is a violation of fundamental rights.[205] It was also stated by the Andhra Pradesh High Court that the right to privacy of women is not lost because of the marital relationship and that a decree of restitution of conjugal rights under the Hindu Marriage Act, 1955 is unconstitutional as it could be misused by the husband to enforce sexual intercourse upon his wife and thus offends the inviolability of body, mind and integrity of such a person and invades marital privacy.[206]

In *Joseph Shine v. Union of India,* the Supreme Court held that the offence of adultery was unconstitutional because it was found on the principle that a woman after marriage is her husband's property.[207] The marital rape exception betrays a similar patriarchal belief that upon marriage, a wife's right to personal and sexual autonomy, bodily integrity and human dignity are surrendered, and her husband is her sexual master, and his right to rape her is legally protected.

A recent judgment by the Kerala High Court was highly appreciated for showing a progressive outlook wherein it was held that marital rape amounts to mental cruelty and, therefore, stands as a good ground for divorce. Although the legal provisions do not recognise marital rape as an offence, it does not inhibit the court from recognising it as a form of cruelty and granting a divorce.

Thus, the above discussion reflects that exception 2 to section 375 is a clear violation of the Constitution's Article 14 and Article 21.

[205] Suchita Srivastava v. Chandigarh Administration [2008] 14 SCR 989 (SC)
[206] T. Sareetha v. T. Venkata Subbaiah [1983] AIR 356 (AP)
[207] Joseph Shine v. Union of India [2018] SC 1676

CONCLUSION AND SUGGESTION

Marital rape, though not defined as a crime in India, is one of the most debatable and divergent issues. Under IPC, sexual intercourse without consent is an offence under section 375 IPC, but an exception to the offence of rape is provided under exception 2 of section 375 IPC wherein un-consented sexual intercourse by a husband upon his wife does not amount to the offence of rape provided she is over the age of 15 years.

Any provision of law that is not reasonable, just, fair, and against the spirit of Article 21and Article 14 of the Constitution is discriminatory and arbitrary and must therefore be declared unconstitutional. The Supreme Court has in many judgments recognised the right of a woman to abstain from sexual activities irrespective of her marital status, but the Indian legislature has terribly failed to provide any law to protect married women from offences like rape.

It is high time that the legislature needs to take cognisance of this legal infirmity and eliminate section 375(exception 2) of IPC to bring marital rape within the purview of rape laws.

The misconception of marriage and marital life has led to an increase in the cases of marital rape. There is a need to make the institution of marriage fairer and more equal. A marriage in which a woman has no say and no rights is not worth preserving. A wife is no more seen as a subservient chattel of her husband. A woman is a woman before or after marriage, and if the woman was unwilling and the man imposed himself upon her, an offence has occurred; therefore, a marital relationship between the two cannot be a valid reason not to charge the husband under section 375 of IPC. Consent is the most essential aspect of any physical relationship. Every woman, married or unmarried, consent is required to establish a sexual relationship irrespective of the relationship, be it husband or any other person.

A woman is guaranteed the same rights as given to a man under the Constitution, and therefore no woman should be discriminated against based on marital status from seeking legal help if her rights are violated. It is also essential to create awareness among women to help them recognise their legal rights and the laws provided for their protection against crime.

There is an immediate need to declare marital rape a criminal offence and bring it under the legal system because the act of marital rape degrades the mental and physical health and humiliates the integrity, dignity, and modesty of a woman. As a progressive society, the

difference between rape and marital rape should be struck down so that a married woman can also recognise her rights and live her life with integrity and dignity.

IMPLEMENTATION OF BENEFIT-SHARING SCHEMES AND PROTECTION OF BIOLOGICAL RESOURCES IN INDIA

- GURURAJ D. DEVARHUBLI & BUSHRA SARFARAJ PATEL

Introduction

The last decades of the 20th century witnessed inter alia, increased recognition of the value of genetic resources, expansion of plant variety protection (PVP), liberalization of agricultural policies and North-South political discord which led to the replacement of idea of common heritage of mankind' with state sovereignty as one of the overarching legal principles guiding treatment of traditional knowledge (TK) and genetic resources worldwide. Further, in the meantime, the Convention on Biological Diversity, 1992 (CBD) led to a shift in viewing genetic resources not as common heritage rather as the sovereign right of nations and benefit sharing" is formulated as a means to assert this sovereign right. The state sovereignty over natural resources meant that rights vested in the international community by the Food and Agricultural Organization's (FAO) undertaking are now entrusted to state discretion. The Convention calls for national protection of TK that is associated with bio-diversity, provided that such protection is deemed by each contracting party to be possible and appropriate. It was concluded in World Summit on Sustainable Development, 2002 that the destruction of biological diversity would continue unabated unless the custodians of this natural wealth are benefited for its conservation. Thus, it was implicitly realized in the summit that benefit arising out of use of genetic resources should be shared with concern indigenous communities.

The 'suit of actions as suggested by the FAO Undertaking's successor, the International Treaty on Plant Genetic Resources (ITPGR) for Food and Agriculture closely corresponded with those provided for in the CBD, such as the protection of TK, the right to equitably participate in sharing of benefits, and the right to participate in decision-making relevant to TK and genetic resources, reflecting a move towards an ownership approach. It is important to note here that the role of individuals in conserving plant genetic resources may not be much recognized as it is a collective effort and the conservation of such resources is the result of

collective/community efforts. The emphasis on sovereign rights over genetic resources and associated knowledge presaged greater regulation of access to natural resources and prompted the development of 'Access and Benefit Sharing Systems (ABS) as a means of facilitating transactions between industry and indigenous communities, a process which has come to be known as 'bio-prospecting"." In order to ensure legal certainty on both sides of these transactions, ABS structures have introduced concepts of 'property, exclusivity and exclusion' to traditional agricultural communities. Indeed, ABS structures fail to address the fundamental conceptual differences between traditional practices based on free exchange and indigenous community knowledge and intellectual property rights (IPR) structures based on private property. The paper examines enormous values getting generated increasingly with the help of technological development out of use of biological resources for well-being of man-kind from different perspectives. The article also focuses on the concept of benefit-sharing for those who are contributing in conversation, development and making available such biological resources. It critically analyses scheme of benefit-sharing available under the Biological Diversity Act, 2002.

Biological Resources and Needs of Mankind

Gandhi Ji's famous quote, 'the earth provides enough to satisfy every man's needs, but not every man's greed' is such a perfect summation to understand the need and importance of biological resources to mankind. Biological resources are genetic resources, organisms or its parts, populations or any other biotic component of ecosystems that have actual or potential value or use to humanity." The components of biodiversity are the source of all our food and many of our medicines, fibres, fuels and industrial products. The direct uses of the components of biodiversity contribute substantially to the economy of a nation. The economies of most developing countries depend more heavily on natural resources, and biodiversity-related sectors contribute larger shares of their Gross Domestic Products (GDPs)." Biological resources including TK/indigenous knowledge is information based on experience and adaptation to a local culture and environment "It fundamentally covers knowledge that has been accumulated through generations by virtue of tradition. Thus, the knowledge possessed by current generation by virtue of tradition, qualifies as TK. Further, it also includes developments or adoptions of such knowledge made from time to time depending on the

changing needs of the society." These developments act as an addition to existing knowledge and form part of knowledge passed on to the next generation, thereby collectively shaping the nature of TK for the next generation. This knowledge is used to sustain the community and its culture and to maintain the genetic resources necessary for the community's continued survival " For example, the use of turmeric in India for wound healing and so on

From legal perspective, there is no agreed definition of TK and it is a term of many facets. It is a wide umbrella, which brings within its purview, practices ranging from artistic expression, like traditional songs, dances and clothing to traditional medicine and healing knowledge, which have survived and benefited communities over the ages. Thus, the vastness, the dynamicity and diversity that forms the very nature of the TK has made it very difficult for many to crystallize a definition for TK." However, the World Intellectual Property Organization (WIPO), in its fact-finding report" uses the term TK to refer to: "Tradition based literary, artistic or scientific works; performances inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields." In yet another definition by WIPO, TK has been referred to as "All tradition based intellectual creation and innovation, in the very broadest sense, which are constantly evolving, in response to a changing environment and are generally regarded as pertaining to a particular people or territory."

Traditional or indigenous knowledge are being used since time immemorial by indigenous and local communities under local customs and traditions. It is transmitted and evolved from generations to generations. Such knowledge has played, and is still playing, an important role in vital areas such as food security, the development of agriculture and medical treatment. However, States have neither recognized significant value of such knowledge, nor any obligations associated to its use, and have passively consented to or accelerated its loss through the destruction of the communities' living environment and cultural values. Greaves notes that, indigenous cultural knowledge has always been an open treasure box for the unfettered appropriation of items of value to Western civilization. While we diligently protect rights to valuable knowledge among ourselves, indigenous people have never been accorded similar rights over their cultural knowledge.20 Existing Western intellectual property laws support,

promote and excuse the wholesale, uninvited appropriation with no obligation to allow the originators of the knowledge a share in the proceeds."

The Nagoya Protocol on access to genetic resources and fair and equitable sharing of benefit arising from their utilization builds on access and benefit-sharing provision of the CBD by creating greater legal certainty and transparency for both providers and user of genetic resources. It does this by more predictable condition for access to genetic resources and helping to ensure benefit-sharing when genetic resource leave the contracting party providing the genetic resources.

The Agreement clarifies the access and benefit-sharing scheme of the CBD. The CBD allows for benefit-sharing between those who take genetic resources from the environment and the countries that harbor those genetic resources. One of the concerns leading to the CBD was that foreign commercial interests, such as pharmaceutical companies, could take natural product sources and TK from less developed countries without compensating them. The Nagoya Protocol addresses these and related concerns."

A. Indigenous People/Communities and Value of Biological Resources

The use of biological resources has increased the interest of different stockholders in natural resources for the development of agro-products worldwide." It has brought the resurgence of interest in TK and associated genetic resources and treated it as raw material. This interest has been stimulated by the importance of TK as a lead in development of new products. The raw materials provided by indigenous people for further development of plant biotechnology are the most important thing for the application of this technology. Now TK is extensively used to apply this technology and also to ensure more and more production in the interest of humanity.

According to CJR Also, biological diversity has an intrinsic value, and the conservation of species, genetic resources and ecosystems is important for the maintenance of natural ecological processes. In addition, biological diversity performs a number of ecological services for us, which implies economic, aesthetic and recreational values, representing arguments of human interest or anthropocentric arguments.

Genetic resources have also contributed to the production in modern economy and played significant role in the R&D programs of different industries worldwide. However, it is argued that the anticipated benefit arising out of commercial use of genetic resources have largely been

exaggerated and not yet realized. The national regulations are created in anticipation of commercial benefit, particularly in many countries that are rich in biodiversity, and have curtailed biodiversity research by in-country scientists as well as international collaborations. On the other hand, with the advent of technology, TK is being commercialized at the cost of rights of indigenous people. The biggest problem facing the future of TK comes from the misappropriation of this knowledge from the local communities and tribal people who should be its rightful owners." Realizing the importance of such people and communities in conserving and making available genetic resources for benefit of humanity there is an urgent need to recognize the ownership rights of such people and communities over biological resources including TK.

B. Misappropriation of Biological/Genetic Resources

Biological resources have always been an easily accessible treasure and thus have been susceptible to misappropriation. One of the major reason being the common assumption that it falls in public domain. Bio-piracy is defined as phenomenon where bio logical resources and TK associated with indigenous peoples are used in an irregular, illegal, unfair and inequitable manner." Indigenous knowledge originating with indigenous people is used by others for profit, without permission from and with little or no compensation or recognition to the rights of indigenous people." Bio-pirates benefited and prospered from the plundering of natural resources from the developing and less developed countries without paying any royalty to the source countries at all. The stealing of biological resources and indigenous knowledge would affect food security, livelihood of indigenous people and consumers' choice." Developing and least developed countries, which are rich in biological resources, are vulnerable to this bio-piracy. One of the methods to overcome this problem may be the recognition of their community rights over such resources.

There are several cases of bio-piracy of TK in India. Bio-piracy in India is seen in common plant varieties like *Haldi*, *Basmati*, *Neem* and so on. Bio-piracy of Indian TK continues; since the information is available in different languages, consequently, the patent offices are unable to search this information, such as prior art, before granting patents. The reliability of the traditional medicine systems coupled with the absence of such information with patent offices provides an easy opportunity for interlopers for getting patents on these therapeutic

formulations derived from traditional medicine systems. Traditional Knowledge Digital Library (TKDL) provides information on TK existing in the country, to patent examiners so as to prevent the grant of patents in case of bio-piracy.

Right to Access and Benefit-Sharing under International Instruments

The right to access and benefit-sharing to the indigenous people is of great value for recognizing contribution of indigenous communities in conservation, development and making available of biological resources. Indigenous people involved in conservation and preservation of such resources require right to access and benefit-sharing against unauthorized use or access of their knowledge. The concept of benefit-sharing allows for payment of compensation in case of use of genetic resources to such communities. In particular, it includes the opportunity granted or availed for participation in R&D on genetic resources and making available the findings of such R&D or the transfer of technology.

The CBD, 1992 recognizes the close and traditional dependence of many indigenous and local communities over biological resources, and the desirability of sharing equitably benefits arising out of the use of biological resources and TK. It is one of the objectives of the Convention that there must be fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Further, recognizing the sovereign rights of States over their natural resources, each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim of sharing in a fair and equitable way the results of R&D and the benefits arising from the commercial and other utilization of genetic resources with the contracting party providing such resources and such sharing shall be upon mutually agreed terms." The governing body of the Convention agreed on the Bonn Guidelines on Access and Benefit Sharing, 2002 to assist parties in developing overall ABS strategies based on prior inform consent. This was reinforced by the call of the World Summit on Sustainable Development, 2002. for countries to negotiate within the framework of the Convention, in international regime to promote and safeguard the fair and equitable sharing of benefit arising out of the utilization of genetic resources.

Further, it is not clear in the context of benefit-sharing, what 'fair and equitable means, since these terms are to be agreed mutually and since there is no effective international arbitration envisaged to help determine this outcome. This means that these genetic resources can be accessed without any obligation to share benefits with the source countries. In some cases, the

benefits are directly made from the sale of the resources, when natural resources are necessary to make the end products, and thus, cannot be synthesized." But in most cases, the importance of the resource lies in the information contained inside the resource, be it genetic, biological or purely chemical, Access to those resources, therefore, is a one-time event and the bio-prospector collects a few samples of the resource and the information it contains is later extracted and reproduced synthetically in laboratories." Countries should try to detect when those who have had access to their genetic resources have been able to develop useful products and services, so that the sharing of benefits can be requested, some countries have proposed that all industrial property titles that may derive, directly or indirectly from genetic resources should identify the origin of those resources.

In the context of relationship between bio-diversity and IPRS there seems con flict between the objectives of CBD, 1992 (CBD) and the Agreement on Trade-Related Aspect of Intellectual Property Rights, 1994 (TRIPs Agreement). The CBD, on the one hand provides for protection of natural resources. It specifically obliges parties to take necessary measures for fair and equitable sharing of benefits arising from the commercial and other utilization of genetic resources and TK." The TRIPS Agreement, on the other hand, does not prevent a person from claiming patent rights on an invention based on biological resources and TK that are under the sovereignty of the country of origin. The TRIPs Agreement is indifferent to acts of bio-piracy and results in systemic conflicts with the CBD and thus, a conflict would necessarily follow. However, Article 29 of TRIPS Agreement contains an obligation to disclose details of such inventions as well," so that the TRIPs Agreement and the CBD may be implemented in a mutually supportive way They should not undermine each other's objectives.

To reconcile the interface between the TRIPS Agreement and the CBD, several proposals have been made. In one of the proposals India has noted that while the TRIPS Agreement obliges members to provide patent protection for micro-organisms and for non- biological and microbiological processes, and to provide for the protection of plant varieties, the CBD explicitly reaffirms that states have sovereign rights over their own biological resources, recognizes the desirability of sharing equitably the benefits arising from the use of these resources as well as TK, innovations and practices relevant to the conservation of biological diversity and its sustainable use, and acknowledges that special provisions are required to meet

the needs of developing countries." India suggested that the innovators must share with holders of TK the benefits arising from its exploitation, through material transfer agreements/transfer of information agreement. which would be necessary where the inventor wishes to use the biological material and a transfer of information agreement would be necessary where the inventor bases himself on indigenous or TK Such an obligation could be incorporated through inclusion of provisions in Article 29 of the TRIPs Agreement requiring a clear mention of the biological source material and the country of origin.

Benefit-Sharing Schemes Available in India

Biological diversity has significant economic value that is both implicit and explicit. Most of these values are often not captured by the market. Hence, the potential of bio diversity is often underestimated. Such an underestimation is considered as one of the factors for rapid depletion of biodiversity and loss of habitats and species. To protect biological resources and TK and to deal with the problem of bio-piracy different initiatives have been taken by the Government of India. The following part of the paper briefly examines benefit-sharing schemes available under the Biological Diversity Act. 2002 and the PPV&FR Act, 2001

A. Under the Biological Diversity Act, 2002

The Biological Diversity Act, 2002 provides for equitable sharing of benefits arising from the commercial use of TK associated with biological resources. It mainly deals with access to genetic resources and to determine benefit-sharing arising from its commercialization." It prohibits certain persons from obtaining any biological resources knowledge occurring in India for research or for commercial utilization. The Act pre vents any person from transferring the results of any research for consideration without previous approval of the National Biodiversity Authority (NBA) " Section 6 the Act is key provision dealing with IPRS on biological resources and associated knowledge. which provides that no person shall apply for any IPRs in or out side India for any invention based on such research or information on a biological resource obtained from India without obtaining prior approval of the NBA

It has been realized that a system of royalties for use of genetic resources would heighten the trust of developing countries that the use of their biological resources will be given recognition in the form of benefit-sharing. But it is argued that benefit-sharing, both as an incentive for conservation and royalties for access to TK, is turning out to be unreal istic. The Act provides

for determination of equitable benefit-sharing in the form of monetary payment, technology transfer or joint ownership of IP rights by NBA in accordance with mutually agreed terms and conditions between the person applying for local bodies concerned and the benefit claimers." The NBA shall while granting approvals for undertaking certain activities under Section 19. and for transfer of biological resource or associated knowledge under Section 20, ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and associated knowledge in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers The NBA largely determines any benefit sharing conditions in accordance with mutually agreed terms and conditions between the applicants and local bodies concerned and benefit claimants." While this implies a wide-ranging recognition of individually negotiated conditions, Rule 20 of the Biological Diversity Rules explains that "the quantum of benefits shall be mutually agreed upon between the per sons applying for such approval and the Authority in consultation with local bodies and benefit claimers. The Act and the Rules empower the Authority also to impose far reaching conditions, including the granting of joint ownership in IPRS to the NBA itself or to the benefit claimants, technology transfer, requests for production or research and development (R&D) units in areas of the benefit claimants, the involvement of Indian scientists, benefit claimants and local people in R&D activities, the setting up of a venture capital fund for the benefit claimants or the payment of monetary compensation or non-monetary benefits to such claimants at the discretion of the NBA. The formula for benefit-sharing shall be determined on a case-by-case basis and notified in the Official Gazette. If the compensation or benefit-sharing is paid in money, the NBA may direct these funds to individuals, groups or organizations that can be identified as the source of the resource or knowledge. If that is not possible, the benefits shall be deposited in the National Biodiversity Fund (Section 21(3) and Rule 20(8)) Indian citizens or corporations are treated differently under Section 7. Indian citizens and corporations must give prior intimation to their relevant State Biodiversity Board to obtain biological resources for commercial utilization or bio-survey and bio-utilization. For local people and communities

of the relevant area, growers and cultivators of biodiversity and for practitioners of indigenous medicine, even this requirement is dispensed with.

It establishes Biodiversity Management Committee (BMC) at local level for promoting conservation, sustainable use and preparation of People's Biodiversity Register. which shall contain comprehensive information on the availability and knowledge of local biological resources and other TK associated with them." However, this scheme of benefit sharing under the Act may not be beneficial to such people and communi ties until there is mechanism to identify those people and communities Here the only reference available in the Act is that it defines the term benefit claimer as the conserv ers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application. But, mere defining this term is not sufficient to protect them as they have to prove that they fall within this definition, which will always be challenging for them.

B. Under the PPV&FR Act, 2001

During the long process of selection, conservation and cultivation, farmers have gained extensive knowledge on each of the varieties." The Protection of Plant Varieties and Farmers Rights Act, 2001 recognizes the individual and community roles played by the farmers in conservation of varieties. It provides for plant breeder's right (PBR) to the breeders of plant varieties after registration. But every application shall contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been. taken and all such information relating to contribution of farmers and communities in breeding, evolving or developing the variety, and a declaration that the genetic mate rial/parental material acquired for breeding, evolving or developing the variety has been lawfully acquired This Act also provides for benefit-sharing between breeders and farming or tribal communities who have contributed to genetic diversity in detail.

Benefit-sharing would be facilitated through National Green Fund (NGF) to the farmers/community who can prove that they have contributed to the selection and preservation of material used in the registered variety. The authority under Section 26 of the PPV&FR Act, 2001 invites claims of benefit-sharing and Section 41% of the Act recognizes the rights of

communities because of their role in conserving TK in area of farming plant varieties. It provides that any person, group of persons (irrespective of whether actively engaged in farming) or any governmental or non-governmental organization may file claim on behalf of any village or local community which is attributable to the contribution of that village or local community in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community. It is important to note that the Indian law allows claims of benefit sharing only once the breeder's variety is registered. It may be argued that the settlement of benefit-sharing aspect must be a precondition for registration of a variety.

Conclusion

The concept of benefit-sharing seems to provide justice to the indigenous people and communities for their contribution in conserving and making available biological resources for the benefit of humanity. It is easily justified why they need such benefit and international and national legal instruments are now recognizing such benefits to those people and communities to great extent. The jurisprudence of benefit-sharing has got recognition after conclusion of the CBD and its protocols. Following the man dates of the Convention, sovereign States are indeed providing for benefit-sharing in its own jurisdiction Right to access and benefit-sharing have now become pivotal in many national legislations. India has also provided for the same benefits under the PPV&FR Act, 2001 and the BD Act, 2002. But no such legislation provides for mechanism of identification of indigenous people and communities entitled for such benefits. Until we have sound mechanism for identification of those people and communities this ideal concept may not be useful in doing justice to them. If they are asked to establish beyond doubt that they are entitled for such benefits, then the mechanism will serve no purpose as it will be costly and time-consuming for them to establish their entitlement. It is submitted that this fair and equitable benefit-sharing mechanism will only be use ful if they are fairly identified for their entitlements.

GEOGRAPHICAL INDICATIONS

- VAISHNAVI VIJAYSINGH BARGE & DR. NEETA SURESH MOHITE

ABSTRACT:

A milestone was reached when WTO through TRIPS had conceded products to retain its quintessence of the land by permitting appending a geographical indication to merchandise having specialty from the place of origin. Intellectual properties are presently perceived as a strategic asset of the countries. Geographical indications are mechanisms of intellectual property applicable to goods and services characterized by the place where they originated involving environmental, historical, social and cultural specificities.

INTRODUCTION:

Geographical indications serve to play crucial role geographic and climatic factors or human know-how can play in the end quality of a product. Agreement On Trade Related Aspects Of Intellectual Property (TRIPS), recommends least standards of protection of GIs and additional protection for wines and spirits. Article 22 to part II section III of TRIPS prescribe minimum standards of protection to the geographical indication unless that geographical indication is protected in the country of its origin. India did not have such specific law governing geographical indications of goods.

According to the Trade Related Agreement on Intellectual Property Rights of the World Trade Organization: "geographical indications are for the purposes of this agreement, indications which identify a good as origination in the territory of member, or a region or locality in that territory where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin" (Article 22 TRIPs).

HISTORICAL BACKGROUND:

Prior to TRIPS agreement of the Uruguay round which concluded in 1994, there were mainly three international conventions dealing with protection of IGOs i.e., the Paris Convention for the Protection of Industrial property (1883), the Madrid Agreement (1891) and the Lisbon

Agreement for the Protection of Appellation of Origin and their International Registration (1958).

The Paris Convention on the Protection of Industrial Property adopted in 1883 was the first international treaty to provide for the protection of "appellation of origin". Followed by Madrid Agreement for the Repression of False or Deceptive Indications of source of Goods which was the first multilateral agreement to provide specific rules for the repression of false and deceptive indications of source. On 31st day of October, 1958, the Lisbon system was established under the Lisbon Agreement for the Protection of Appellations of Origin and their international registration. It aimed ag facilitating the international protection of appellations of origin offering the international registration of marks also helps to improve the protection of GIs on the international Dias.

In 1995, the WTO Agreement on TRIPS was adopted by all the Members of the WTO. The agreement introduced intellectual property rules into the multilateral trading system. Article 23 provides that interested parties must have the legal means to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication.

INDIAN PERSPECTIVE:

The Parliament enacted a legislation titled Geographical Indications of goods (Registration and Protection) Act, 1999 which came into force with effect from 15th September, 2003 and the Geographical Indication of Goods (Regulation and Protection) Rules, 2002. Section 2(e) of the Act defines a GI as: "geographical indication", in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

The law governing the geographical indications of goods in the country which could adequately protect the interest of producers, to exclude unauthorised persons from misusing geographical

indications and to protect consumers from deception, to promote goods bearing Indian geographical indications in the export market.

NEED FOR LEGAL PROTECTION OF GEOGRAPHICAL INDICATIONS:

The legal protection given to Geographical Indications (GIs) is an issue of growing worldwide interest and concern. The legal protection of this Act plays crucial role in commercial relations at national as well as at international level. The forms of protection that have been put in this category cover those under laws specifically dedicated to the protection of IGOs or those under provisions providing for special protection of IGOs contained in other laws. Some of the means provide sui generis protection for IGOs that relate to products with specifically defined characteristics or methods of production; while other means apply without such specific definitions. The protection provided under this category is stronger than that available under the aforesaid two categories of modes of protection.

SALIENT FEATURES:

- Maintenance of register. Part A contains all registered geographical indications. Part B contains particulars of registered authorized users.
- Registration pf geographical indications of goods in specified classes
- Prohibition of registration of certain geographical indications.
- Provisions for framing of rules by Centra; Government for filing of application, its contents and matters relating to substantive examination of geographical indication applications.
- Registration of authorized users of registered geographical indications and providing provisions foe taking infringement action either by a registered proprietor or an authorized user.
- Appeal against Registrar's decision would be to the intellectual property appellate board.
- Provision relating to offences and penalties.

SCHEME OF THE ACT:

The GI Act is divided into nine chapters:

● Chapter-I is a preliminary chapter, which inter alia, defines the terms used in the Act.

● Chapter II deals with the appointment, powers and establishment of Registry. It also provides for registration for particular goods and areas and prohibits certain registrations.

● Chapter III provides the procedure and duration of registration.

● Chapter IV gives the effect of registration

● Chapter V contains special provisions relating to trademark and describes the concept of prior user

● Chapter VI provides the procedure for rectification and correction of the Register

● Chapter VII relates to appeals and the Appellate Board

● Chapter VII details the penalties and procedure

● The last Chapter IX deals with miscellaneous matters

REGISTRATION OF GEOGRAPHICAL INDICATIONS:

Section 8 of the act a geographical indication may be registered in any or all of the goods, comprised in class of goods classified by the Registrar and in respect of a definite territory of a country or region or territory.

WHO ARE ENTITLED FOR REGISTRATION:

Section 11 any association of persons or producers or any organisation or authority established by or under any law representing the interest of the producers of the concerned goods can apply

for the registration of a geographical indication. The Applicant has to be a legal entity and should be representing the interest of producers of the goods applied for.

An Indian application for the registration of a geographical indication can be made in triplicate in **Form GI – 1(A) for single class and in GI – 1 (C) for multiple classes**. A Convention Application shall be made in triplicate in **Form GI – 1(B) for single class and in GI – 1 (D) for multiple classes**. An Application shall be signed by the applicant or his agent.

CONTENTS OF APPLICATION:

- Statement serves to designate the goods as originating from the concerned territory if the country or region;
- The class of goods;
- Geographical map of territory or locality in which goods are produced;
- The particulars appearance of the geographical indications;
- Particulars of producers;
- An affidavit of applicant;
- Number of producers; and
- Particulars of inspection structures.

Pursuant to Section 18, a registered geographical indication shall be **valid for 10 years** and can be renewed from time to time on payment of **renewal fee**.

WHAT IS GI TAG

A GI or Geographical Indication is a name or a sign given to certain products that relate to a specific geographical location or origins like a region, town or country. Using Geographical Indications may be regarded as a certification that the particular product is produced as per traditional methods, has certain specific qualities, or has a particular reputation because of its geographical origin. Geographical indications are typically used for wine and spirit drinks, foodstuffs, agricultural products, handicrafts, and industrial products.

BENEFITS OF GI TAGS

The Geographical Indication registration confers the following benefits:

- Legal protection to the products
- Prevents unauthorised use of GI tag products by others

- It helps consumers to get quality products of desired traits and is assured of authenticity
- Promotes the economic prosperity of producers of GI tag goods by enhancing their demand in national and international markets

OFFENCES AND PENALTIES:

Following acts are deemed as offences. Section 38 lists two kinds of offences namely;

a. **Falsifying a GI and**
b. **Falsely applying a GI**

• The penalty for falsification of GIs and the circumstances in which a person applies false GI are enumerated in Section 39.

• Selling goods to which false GI is applied as outlined in Section 40.

• Enhanced Penalty for subsequent convictions for the offences of falsifying, falsification of GIs or selling goods with false GIs.

• Falsely representing a GI as registered as listed in Section 42. Misrepresenting the GI as registered, which has not been actually registered is an Offence.

• Improperly describing a place of business as connected with the GIs Registry as listed in Section 43.

• Falsification of entries in the Register as listed in Section 44.

• No offence in certain cases as provided under Section 45.

• Exemption of certain persons employed in ordinary course of business as provided under Section 46.

• Procedure where invalidity of registration is pleaded by the accused as provided in Section 18.

RELIEFS AND REMEDIES FOR GI INFRINGEMENT

A suit alleging infringement of a GI may be filed in a District Court or a High Court having jurisdiction.

The Courts may provide the following reliefs

● Injunction.
● Discovery of documents.
● Damages or accounts of profits.
● Delivery-up of the infringing labels and indications. They may be erased or destroyed. The following remedies are available for GI infringement:
● Both civil and criminal remedies are available
● Criminal action lies in case of falsification and false application of GI
● Civil action lies in case of infringement of a registered GI

Person aggrieved by an order of the registrar may prefer an appeal to the **Intellectual Property Appellate Board (IPAB) within three months**.

INDIAN CASE STUDIES

The status of a Geographical Indication by the Government of India includes Gir Kesar Mango, Bhalia wheat, Kinhal Toys, Nashik Valley wine, Monsoon Malabar Arabica Coffee, Malabar Pepper, Alleppy Green Cardamom and Nilgiris Orthodox Tea. Other examples include Darjeeling Tea, Mysore Silk, Paithani Sarees, Kota Masuria, Kolhapuri Chappals, Bikaneri Bhujia and Agra Petha.

1. **BANAGANAPALLE MANGOES**:

The product received its GI tag in the year 2017. The logo decided by the government features a bright yellow fruit around which the tagline says "Banganappalle Mangoes of Andhra Pradesh," with images of a man and a woman appearing to be farmers. They need to obtain a no-objection certificate (NOC) from Horticulture Development Agency, Represented by Commissioner of Horticulture, Government of Andhra Pradesh. The documents submitted to the Registry stated 'The prominent characteristic of Banganapalle mangoes is that their skin has very light spots, stone is oblong in shape and has very thin seed with sparse and soft fiber all over'. The Government stated the primary centre of origin to be Kurnool District comprising Banaganapalle, Paanyam and Nandyal Mandals and Khammam, Mahabubnagar, Rangareddy, Medak, Adilabad districts in Telangana as secondary centers of origin. Every year

in Andhra Pradesh and about 5,500 tons of Banganappalle mangoes are exported to countries like the U.S., U.K., Japan and the Middle East.

2. **BHALIA WHEAT FROM GUJRAT**:

First shipment of GI certified Bhalia variety of wheat was exported to Kenya and Sri Lanka from Gujrat on July 8, 2021

3. **KASHMIR SAFFRON**:

The Saffron cultivated in the Kashmir valley has received GI Tag. It is to be noted that three other products such as Gorakhpur Teracotta, Kovilpatti Kadali Mittai and Black rice of Manipur also received GI tag.

4. **NEEM- TURMERIC CASE:**

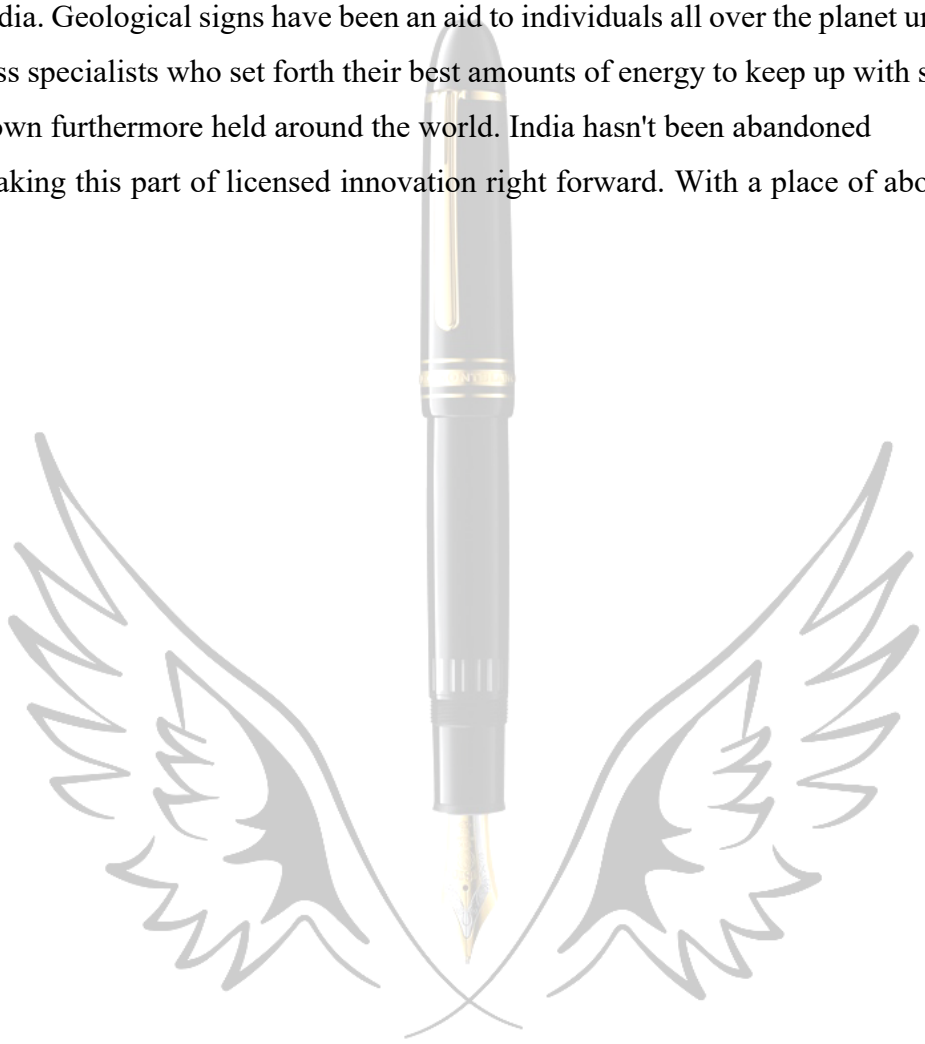
In the case of turmeric, in March 1995, a US Patent was granted to two NRIs at the University of Mississippi Medical Centre Jackson, for turmeric to be used as wound healing agent. This patent was challenged by CSIR at the USPTO on the ground of "Prior Art" claiming that turmeric has been used for thousand years for healing wounds and rashes and hence this was not a new invention. Even CSIR presented an ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association as documentary evidence.

In the case of neem, patents were granted to the US Company WR Grace & Co. for extraction and storage processes. The Indian Government filed a complaint with the US Patent Office accusing WR Grace of copying an Indian Invention but later on they realized that the US based company had in fact created a new invention for the neem extraction process and the patent was not based on traditional knowledge and hence government withdrew its complaint.

CONCLUSION:

A GI tag involves pride to both the maker and customer as an image of value, and guarantee of creativity and security of privileges to the gatherings in question. Licensed innovation privileges covering geological sign has had a spot in India because of the first bits of work in

material, workmanship and specialty yet flavours, film and so on having their country in the limit of India. Geological signs have been an aid to individuals all over the planet uncommonly the helpless specialists who set forth their best amounts of energy to keep up with such quality that is known furthermore held around the world. India hasn't been abandoned
in really taking this part of licensed innovation right forward. With a place of above 400 GIs in India.



PLEA BARGAINING: WAY FORWARD

- TANYA VERMA

'The process whereby a criminal defendant and prosecutor reach a mutually satisfactory disposition of a criminal case, subject to court approval.'

Plea bargaining is essentially derived from the principal of *'Nalo Contendere'* which literary means *'I do not wish to contend'*. Plea bargaining can conclude a criminal case without a trial. When it is successful, plea bargaining results in a plea agreement between the prosecutor and defendant. In this agreement, the defendant agrees to plead guilty without a trial, and, in return, the prosecutor agrees to dismiss certain charges or make favorable sentence recommendations to the court. Plea bargaining is expressly authorized in statutes and in court rules. In most jurisdictions a plea bargain can be arranged at any time after a defendant has been charged with a crime. In some cases plea bargains are even reached when there is a hung jury because most attorneys would rather arrange a plea bargain than go through an additional trial.[208]

Plea bargaining is widely used in the criminal justice system, yet seldom praised. Plea agreements are troublesome because they are something less than a victory for all involved. Prosecutors are loath to offer admitted criminals lighter sentences than those authorized by law. Likewise, most criminal defendants are less than enthusiastic over the prospect of openly admitting criminal behavior without the benefit of a trial. Despite the reservations of the parties, plea agreements resolve roughly nine out of every ten criminal cases. The sheer numbers have caused many legal observers to question the propriety of rampant plea bargaining.

The law commission of India advocated the introduction of Plea Bargaining in the 142th, 154th & 177th reports. The 154th report of the Law commission recommended the new XXI A to be incorporated in the criminal procedure code. Based on recommendation of the Law Commission, the new chapter on plea bargaining making plea bargain in cases of offences punishable with imprisonment up to seven years has been included.

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[208] http://www.lawsguide.com/mylawyer/guideview.asp?layer=3&article=665

Based on the recommendation of the Law Commission, the new chapter on plea bargaining making plea bargaining in cases of offences punishable with imprisonment upto seven years has been included in Crl.R.C and the same has come into effect from 05.07.2006. A consideration of Chapter XXI-A dealing with plea bargaining will show that certain procedure prescribed for plea bargaining under **Sections 265-A to 265-L of Cr.P.C** are to be complied to make it a valid plea bargaining.

Procedure of Plea Bargaining

- As per **Section 265-A**, the plea bargaining shall be available to the accused charged of any offence other than offences punishable with death or imprisonment or for life or of an imprisonment for a term exceeding seven years. Section 265 A (2) of the Code gives power to notify the offences to the Central Government. The Central Government issued Notification No. SO 1042 (II) dated 11-7-2006 enumerating the offences affecting the socio-economic condition of the country.
- **Section 265-B** contemplates an application for plea bargaining to be filed by the accused which shall contain a brief description of the case relating to which such application is filed, including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of the punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a court in a case in which he had been charged with the same offence. The court will then issue notice to the public prosecutor concerned, investigating officer of the case, the victim of the case and the accused for the date fixed for the purpose. When the parties appear, the court shall examine the accused in Camera where the other parties in the case shall not be present, to satisfy itself that the accused has filed the application voluntarily.
- **Section 265-C** prescribes the procedure to be followed by the court in working out a mutually satisfactory disposition. In a case instituted on a police report, the court shall issue notice to the public prosecutor concerned, investigating officer of the case, the victim of the case and the accused to participate in the meeting to work out a satisfactory

disposition of the case. In a complaint case, the Court shall issue notice to the accused and the victim of the case.

- **Section 265-D** deals with the preparation of the report by the court as to the arrival of a mutually satisfactory disposition or failure of the same. If in a meeting under section 265-C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Courts and all other persons who participated in the meeting. However, if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265-B has been filed in such case.
- **Section 265-E** prescribes the procedure to be followed in disposing of the cases when a satisfactory disposition of the case is worked out. After completion of proceedings under S. 265 D, by preparing a report signed by the presiding officer of the Court and parties in the meeting, the Court has to hear the parties on the quantum of the punishment or accused entitlement of release on probation of good conduct or after admonition. Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused, passing the sentence. While punishing the accused, the Court, at its discretion, can pass sentence of minimum punishment, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence. Apart from this, in cases of release or punishment, if a report is prepared under S 265 D, report on mutually satisfactory disposition, contains provision of granting the compensation to the victim the Court also has to pass directions to pay such compensation to the victim.
- **Section 265-F** deals with the pronouncement of judgment in terms of such mutually satisfactory disposition.
- **Section 265-G** says that no appeal shall lie against such judgment.
- **Section 265-H** deals with the powers of the court in plea bargaining. A court for the purposes of discharging its functions under Chapter XXI-A, shall have all the powers

vested in respect of bail, trial of offences and other matters relating to the disposal of a case in such Court under the Criminal Procedure Code.

- **Section 265-I** makes Section 428 applicable to the sentence awarded on plea bargaining.
- **Section 265-J** contains a non obstante clause that the provisions of the chapter shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Code and nothing in such other provisions shall be construed to contain the meaning of any provision of chapter XXI-A.
- **Section 265-K** says that the statements or facts stated by the accused in an application for plea bargaining shall not be used for any other purpose except for the purpose of the chapter.
- **Section 265-L** makes the chapter not applicable in case of any juvenile or child as defined in Section 2(k) of Juvenile Justice (Care and Protection of Children) Act, 2000.

Unless the aforesaid procedure contemplated in Chapter XXI-A is followed the same cannot be a valid disposal on plea bargaining. Even though 'plea bargaining' is available after the introduction of the said amendment is available, in cases of offences which are not punishable either with death or with imprisonment for life or with imprisonment for a term exceeding seven years, the chapter contemplates a mutually satisfactory disposition of the case which may also include giving compensation to victim and other expenses. The same cannot be done without involving the victim in the process of arriving at such settlement.

The provisions also mandate the court to give accused the benefit of Probation of Offenders Act where so ever it is permissible. Thus, if an admonition or a supervisory order is passed under the Probation of Offenders Act, 1958, then Section 12 of the said Act provides that it shall not cast any stigma on the offender. Section 12 of the Probation of Offenders Act, 1958 provides that a person found guilty of an offence and dealt with under section 3 or 4 of the said Act, shall not suffer any disqualification attached to the conviction. Thus, the Government employees who are released on probation under the Probation of offenders Act are saved from the disqualification which is attached to conviction. The Hon'ble Delhi High Court in the case of **Sh. Charan Singh Vs. M.C.D. (Writ Petition (Civil) No. 18725/2005) decided on 05/10/2006** has held that no disqualification on account of conviction could be

attached to petitioner as he had been released on probation. In this case, the Hon'ble Delhi High Court has quoted the case of **Trikha Ram v. V.K. Seth and Anr. AIR1988SC285 wherein the Hon'ble Supreme Court held** that the benefit of Section 12 of The Probation of Offenders Act, 1958 can be extended to the service of the offender.

The Government of India had an occasion to deal with the effect of Section 12 of The Probation of Offenders Act, 1958 through the disciplinary proceedings. The Deputy Director-General (Vigilance), P.&T., D.O. No. 3/16/71-Disc.II, dated 30.8.1971 came out with the following view:

(c) Under Probation of Offenders Act. In accordance with Section 4 of the Probation of Offenders Act, 1958, when any person is found guilty of having committed an offence and the Court is of the opinion that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, it may direct that he be released on his entering into a bond with or without sureties for keeping peace and good behavior for a specified period. Section 12 of the same Act states that a person found guilty of an offence and dealt with under the provision of Section 4 shall not suffer disqualification, if any, attached to conviction of an offence under such law. It has been represented that persons convicted by Courts of Law and released under the Probation of Offenders Act are not liable to be removed or dismissed from service merely on the ground of their conviction in accordance with the provisions contained in Section 12 cited above.

The matter has been considered in consultation with the Ministry of Law and it has been held that the Disciplinary Authority is precluded under Section 12 of the Probation of Offenders Act from dismissing/removing an employee merely because he is convicted of an offence. That Ministry has held that the order of dismissal/removal, etc., of the employee should be on the ground of conduct which has led to his conviction and not the conviction itself.

Concept of Plea Bargaining should be encouraged and the litigant should be encouraged to avail the remedy of plea bargaining to settle the pending cases. For the successful implementation of plea bargaining and to achieve its objectives, the role of judiciary and the bar is very important. The member of the bar should encourage the litigant to opt for the plea bargaining rather than to treat the plea bargaining a threat to their profession. With the changing

world scenario where all the countries are shifting to ADR from the traditional litigation process which is lengthy as well as complex, the plea bargaining may be one of the best recourse as an ADR mechanism to meet the challenges of disposal of pending cases.

"Plea bargaining" falls into two distinct categories depending upon the type of prosecutorial concession that is granted. The first category is "charge bargaining" which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the defendant in exchange for a guilty plea. The second category, "sentence bargaining" refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea. Both methods affect the dispositional phase of the criminal proceedings by reducing defendant's ultimate sentence. The concept of plea bargaining was introduced in India Criminal Justice System in the year 2005 by means of Criminal Law (Amendment) Act, 2005. By this amendment, a new Chapter XXI A has been introduced in the Code of Criminal Procedure.

Plea Bargaining is the result of modern judicial thinking. Prior to the introduction of Plea Bargaining in the criminal justice system, most courts and scholars tended to ignore plea bargaining, and when discussions of the practice occurred, it usually was critical. Most legal experts described plea bargaining as a lazy form of prosecution that resulted in undue leniency for offenders.

Earlier the Criminal Jurisprudence of India did not recognize the concept of "plea bargaining" as such. However, reference may be made to section 206 (1) and Section 206 (3) of the Code of Criminal Procedure and section 208 (1) of the Motor Vehicles Act, 1988. These provisions enable the accused to plead guilty for petty offences and to pay small fines whereupon the case is closed.

The Government was hesitant to take a policy decision on the introduction of the plea bargaining in the criminal justice system due to opposition from the legal experts, judiciary etc. The Hon'ble Supreme Court has criticized the concept of Plea Bargaining in its judgment namely, **Murlidhar Meghraj Loya v. State of Maharashtra, AIR 1976 SC 1929** in the following words:-

"To begin with, we are free to confess to a hunch that the appellants had hastened with their pleas of guilty hopefully induced by an informal, tripartite understanding of light sentence in lieu of nolo contendere stance. Many economic offenders resort to practices the Americans call 'plea bargaining', 'plea negotiation', 'trading out' and 'compromise in criminal cases' and the trial magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, 'trades out' of the situation, the bargain being a plea of guilt, coupled with a promise of 'no jail'. These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof , legal technicalities and long arguments, punctuated by revisional excursions to higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old profession. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food of fences, this practice intrudes on society's interest by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law. The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilt and partly justify it philosophically as a sentence concession to a defendant who has by his plea 'aided in ensuring the prompt and certain application of correctional measures to him' :

In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute….finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or at best a necessary evil. The "State" can never compromise. It must "enforce the law". Therefore open methods of compromise are impossible. [Arnold : Law Enforcement–An attempt at Social Dissection, 42 Yale, L.J.I. 19 (1932)]

(Emphasis Added)"

Further, the Hon'ble Supreme Court in the case of **Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr 1980CriLJ553** strongly disapproved the practice of plea bargain. The

Apex Court held that practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice. Similarly, in **Kasambhai v. State of Gujarat, AIR 1980 SC 854** the Supreme Court had expressed an apprehension that such a provision is likely to be abused.

The Law Commission of India advocated the introduction of 'Plea Bargaining' in the 142nd, 154th and 177th reports. The 154th Report of the Law Commission recommended the new XXIA to be incorporated in the Criminal Procedure Code. The said Report indeed referred to the earlier Report of the Law Commission, 142nd Report, which set out in extenso the rationale behind the said concept, its successful functioning in the USA and the manner in which it should be given a statutory shape. The Report recommended that the said concept be made applicable as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Code. It was also recommended that plea-bargaining can also be in respect of nature and gravity of the offences and the quantum of punishment. It was observed that the said facility should not be available to habitual offenders and to those who are accused of socio-economic offences of a grave nature and those accused of offences against women and children. The recommendation of the 154th Law Commission Report was supported and reiterated by the Law Commission in its 177th Report. Further, the Report of the Committee on the reform of criminal justice system, 2000 under the Chairmanship of Justice (Dr) Malimath stated that the experience of United States was an evidence of plea bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice.

A STUDY ON COVID-19 RESTRICTIONS AND THEIR EFFECT ON FUNDAMENTAL RIGHTS CONFERRED UNDER ARTICLES 19(1) AND 21.

- KARTHIKA ELLANGOVAN

Abstract:

This paper shall discuss the effect of Covid-19 lockdowns and restrictions such as quarantine rules that actively infringe upon fundamental rights conferred under the Indian Constitution. The Covid-19 pandemic witnessed mass impositions of mandatory quarantine rules on the public despite their socio economic conditions. People who were placed unequivocally were also subjected to a curtailment of their freedom of movement and travel, work and their right to a dignified life. These conditions on restraint are seen as excessive and also raise reasonable questions on the protection of fundamental rights. This paper will effectively address the hallmarks and quirks of freedom while recognising the need for a fair distribution of freedom during the Covid-19 pandemic.

The right to life is disguisedly present in soft and hard instruments of law but distinctively present under Article 21 of the Indian Constitution. The language of imposition indicate an absence of collaborative decisions that may indefinitely affect the rights and liberties of individuals. The Rawlsian school of thought prioritises liberty over others and forbids arbitrary actions that can compromise individual liberty. Scholarly opinions and jurisprudence have also indicated that lack of liberty follows a sequential destruction of other fundamental rights. This paper seeks to study the different dimensions of freedom under Part III of the Constitution, specifically the interlocking of Article 19 and 21.

COVID-19 AND CONSTITUTIONAL CRISES

The Covid-19 pandemic has caused widespread distress and hardships across the globe. It was an unprecedented event that took place rapidly and spread across continents within no time. Under the guise of public health and welfare, many jurisdictions witnessed abuses of power by the government and law enforcing agents. The Disaster Management Act, 2005 was enforced

with a view to collaborate state and centre activities. In this paper, a variety of questions will be discussed while dissecting fundamental rights violations, the need for rule of law and the scope and duration of emergency measures. At times like these, with far reaching consequences, there is a dire need and respect for the law. This period witnesses a rise in domestic abuse and violence, and the lockdowns restricted a layman's access to justice and primary care. Serious criminal charges were pressed against people for violating lockdown rules and thereby led to an increase in arbitrary detentions, and sometimes custody deaths. [209] the effects of the pandemic exposed the poverty divide while the "have's" sustained and the "have not's" suffered as their income sources dried up. Governments had to make trade-offs between life and livelihood, and while they went on to protect 'life', in the process, million's lost out on their 'livelihood'. Liberty and freedom may be used as interchangeable terms however, upon the examination of the Rawlsian theory, there is an inherent importance placed for individuals to be liberty and lead their own lives without interference.[210] Individual freedom is characterised by its versatility, as Republican and neo-roman theories define liberty as the ability and capacity of what a person may wish to do, rather than limiting it to a certain space. However, liberty can also be compromised in the absence of active intervention, as arbitrary power[211] when acted upon may also lead to the deterioration of fundamental human rights.

The first restrictive action undertaken by the State was in March, 2020 when a nation-wide complete lockdown was announced without any notice or warning. While state machineries are empowered to enact such laws, there arises a question on whether it has been enacted in accordance with Article 21 of the Indian Constitution, which prescribes 'procedure'. While defining the provision, it is important to take into account relevant jurisprudence that has expanded the meaning and scope of personal liberty in several judicial decisions. While the 1950 dated judgement *AK Gopalan vs. State of Madras*, [212] upheld a restrictive boundary of personal liberty and established exclusivity between Articles 19 and 21, J. PN Bhagwati in the

[209] *See* Custodial Death of Jayaraj and Fennix 2020. The Madurai Bench of Madras High Court.
[210] Rawls, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), and 'Capability and Freedom: A Defence of Sen', *Economics and Philosphy*, 17 (2001).
[211] Phillip Pettit, 'Capability and Freedom: A Defence of Sen', *Economics and Philosophy*, 17 (2001), p.6
[212] AIR 1950 SC 27.

majority opinion of *Maneka Gandhi vs. Union of India*, [213] laid down that freedom and liberty in Article 21 incorporates an assortment of individual rights. The intricacies of rights held under Article 21 are not exhaustive as they extend to include contemporary social and societal rights like 'the right to choose your life partner'.[214] In the case of *Board of Trustees of the Port of Bombay v. Dilipkumar Nandkarni,* [215] the Court held that the 'right to livelihood' is entailed in Article 21, as the right to life. Livelihood is a broad term that may refer to employment, quality or standard of living. If such a right to livelihood is deprived unless through just and fair procedure, it is said to be a violation of one's fundamental right. A deprivation of livelihood will subsequently mean a deprivation of his right to life conferred under Article 21. *Maneka Gandhi* prescribes a procedure for depriving a person of their liberty. This includes arbitrary executive action as well as arbitrary legislative action. Hence, the mere enactment of a law or an amendment to an existing law, is by no means a valid justification to deprive a person's life and personal liberty. Previously, the legal climate in AK Gopalan laid down that any law made by State order can pass a validity test, however, a number of decisions overruled that establishment.

The legal landscape of Article 21 does not permit such impinge of individual autonomy in excessive manners. The duties of the Central government entails management of inter-state migration and quarantine. Political philosopher Georgio Agamben reflects on the governmental action undertaken with the premise and disguise of the virus. With restrictions placed on movement and mobility, Agamben reduces human life to a "naked life" – that which is robbed of political status and citizenship.[216] Extensive lockdowns that were enforced out of the blue force human beings to survive biologically rather than uplifting their own spirits in social circles, thereby changing the meaning of 'what is it to be human'. Aggressive authoritarian intervention has led to an expansion of power exercised by the Centre, which slowly diminishes controls and powers of individual states for an indefinite time period. This transfer of power is not constitutionally mandated and does not rightfully fall under the ambit of 'procedure

[213] (1978) 1 SCC 248.
[214] Shakti Vahini vs. Union of India and Others (2018) 7 SCC 192.
[215] 1983 SCR (1) 828; *See also* Olga Tellis vs. Bomaby Municipal Corporation (1985) 3 SCC 545.
[216] Giorgio Agamben, "The Invention of an Epidemic" https://www.journal-psychoanalysis.eu/coronavirus-and-philosophers/; originally published in Italian on Quodlibet

established by law', as such procedures are accorded with legislative action rather than executive force. These surveillance powers of the Centre were hastily thrusted upon states and abuses governmental power. The right to life and personal liberty is a pivotal right that constitutionally protects and guarantees individual liberty without narrow contours that have been construction within the law.

The question centring healthcare prioritisation has to strikingly balance individual autonomous rights and cannot unilaterally pose lockdown solutions that lack public and state consultation. If we assume consent and a submission of civil rights on the part of citizens, was the national lockdown still lawfully kosher? The government did not declare the Covid-19 pandemic as a 'public health emergency', rather they relied upon two statues namely, the Epidemic Diseases Act (1897) and the National Disaster Management Act (2005). An examination of both statutory authorities establish that their operation does not warrant constitutional rights to be blurred. In fact, both statutory texts provide compensatory standards for relief for aggrieved populations. Most often, statutory powers allow restrictive measures to be passed in areas/ against persons who are vulnerable or hail from affected areas. However, the constitutional concerns arise when such measures are forced *en masse.* The force of law requires legislative authorisations from the Parliament so that governments can be directed to issue guidelines, this principle lies at the heart of the phrase 'procedure established by law'. In essence, it requires a mandate or procedure to be laid down by statute or procedure prescribed by the law of the state.[217] The two statutes that were relied upon does not create a legal basis of justifying interference with civil liberties. The powers to look over the constitutionality of executive practice would remain with the judiciary, as laid down my Dr. B. R Ambedkar in the Constitutional Assembly Debates. [218] the due process clause seeks to strike a balance between the law itself and fundamental principles relating to the rights of an individual. The American legal standard used for the 'due process' clause examines whether the law in contention fulfils requisite elements of reasonable procedure, however, in the present scenario EDA and NDMA do not lay down guidelines for an *en masse* or national lockdown nor place restrictions on

[217] V. N Shukla, Constitution of India (11th ed.)P.199.
[218] Constituent Assembly Debates, December 13, 1946, VOL. 7, P. 1000.

movement upon all citizens unequivocally. Courts have the power to examine the scope of power exercised by the executive force whilst invoking the NDMA or any other statutory authority. In the present matter, serious allegations of fundamental rights violations have been raised against the State, and such situations demand that the judiciary is no more a mere silent spectator.

The overlap between Article 19(1) and 21 has been recognised in Indian jurisprudence, especially in the landmark decision of *Kharak Singh vs. State of UP,*[219] wherein the question on privacy was widely discussed by J. Subbarao. It was established that constant surveillance in the case of Regulation 236, costed the rights of individual freedom and liberty within Article 21 and 19(1) of the Constitution. Similarly, in the case of COVID-19 national lockdowns, there is no law in question apart from NDMA and EDA, out of which, neither mandate *en masse* restrictions. In this manner, there are arbitrary patterns of force practiced by the executive forces. Although J. Iyengar and J. Subbarao differed with specific reasoning, it was unanimously found that unauthorised intrusion on orders restraining movement and freedom was violative of Article 21. The attributes attached to freedom are characterised by plural conducts capable of man. The connotation of "life" is not a standalone mention in Article 21, rather its consonance must also flow to Article 14 and 19 of the Constitution.[220] While the purpose of the national lockdowns seek the desire of safety, there is an abrogation of individual rights and a breach of personal space by tracking and constant surveillance undertaken by the government through digital applications. On the other hand, the social distancing guidelines issued under NDMA can pass the test of Article 21 that entails the existence of a law, regulation or order and the enactment of the same in a fair, just and reasonable manner, not fanciful, oppressive or arbitrary.[221] The nature of this restriction involves physical distancing from other human beings whereas the gravity of a nation-wide lockdown is much more chaotic owing to its demands and hasty execution. While there is no emergency declaration, rather a 'disaster' that is declared under the NDMA, fundamental rights still operate and function at the standard level. The restrictions of a nation-wide lockdown guarantee the intersection of Articles 19(1)

[219] 1963 AIR 1295.
[220] Olga Tellis v Bomaby Municipal Corporation (1985) 3 SCC 545.
[221] *Id* at note 5, p. 45.

and 21 of the Constitution by violating a number of fundamental rights ranging from restrictions of movement, personal liberty, livelihood and privacy.

The method of proving the 'just, fair and reasonable' component of the Article 21 test can require different standards at times but the large consensus remains that the State must show 'rationality' of the law or establish a 'social, moral and compelling public interest in accordance with the law'[222] the exploration of reasonableness lies at the heart of examining Article 21, whereas, the burden to prove a 'compelling state interest' on the side of the law is a higher and stricter standard of scrutiny that may be applied depending upon the context of concrete cases.[223] The thumb rule of restricting individual liberty falls back on permissible restrictions that are undertaken with a greater purview of protection, like in the case of the spread of Covid-19. Besides these two components of the test, jurisprudence has also introduced a third component requiring proportionality and nexus between the law and the desired objective of the State. The extent of interference is another area of concern while determining the constitutionality of the action. There is no standard set for acceptable degrees of violation to secure state interests. Article 21 is construed with procedural safeguards to ensure no abrogation of civil liberties as drawn upon in J. Kaul's "proportionality" test. However, as the name suggests, the third criteria of proportionality within Article 21 seeks to prevent disproportionate encroachment or intrusion as opposed to what the law purports. While social distancing guidelines may possess a non-intrusive nature and effect, the national lockdown was enforced with the view to govern all persons on the territorial boundaries of the country. Establishing state interests and demonstrating proportionality between the law and desired result also requires the law makers to show that such a law was the least intrusive method that could be utilised to seek the same benefits they wish to reap. The proportionality test has also been deployed in the other facets of Article 21, like the right to privacy.

While J. Iyengar in *Kharak Singh* argues no constitutional guarantee of privacy in India, the right to privacy in construed within the ambit of Article 21 as seen in the decision concerning

[222] *See* Majority Opinion of J. Chandrachaud in Justice K.S. Puttaswamy v. Union Of India (2017) 10 SCC 1 p. 33
[223] P. 45 of *id.*

the question on Aadhar cards, i.e., *K.S Puttaswamy vs. Union of India*.[224] It is an inalienable right that continues to operate in testing times and several jurisprudence have established the same to be a constitutionally protected right.[225] The privacy concern raised relates to government surveillance, tracking and contact tracing through the 'Arogya Setu' application which is to be mandatorily downloaded. The nature of this measure is unprecedented as such online applications can only be downloaded through smart phones and similar gadgets. The aim however remains that, infected persons be monitored on their active locations constantly. The accessibility to such applications remains uncertain since we do not have sufficient data to demonstrate that all persons within the territorial boundaries of the country possess smartphones. Therefore this measure is not calculated and does not effectively serve the purpose of tracking. Besides this, a test was developed in the *Puttuswamy* decision as per the majority, to check for state infringement of individual rights. The requirements of the test follow as; the existence of a law, a legitimate purpose of the law, providing procedural guarantees if there an abuse of the measure and lastly, a proportionality standard.[226] The four components place a burden on the state to establish a nexus between the law and its goals, as well as demonstrating that the chosen measure is characterised by less intrusive methods. State interference and purpose, both must contribute towards a minimal infringement of individual rights and negate any arbitrary aspects of the State measure imposed. In *Puttuswamy*, it was also demonstrated that the threshold of data collection by the State is much more stringent operation, since the same standard is not applied when non-state entities collect and use similar data. The court upon examining data threatening measures may strike a balance and test the proportionality and legitimacy of the law or measure at hand, while keeping in mind the dangers posed to liberty in the information era.

In the present matter, the lockdown restrictions may also be challenged under Article 19(1) to be a restriction on movement within the country, continue his profession without interference and reside and settle in any part of the country as given in 19(1) (d), (g) and (e) respectively. A restriction that promotes Directive Principles of State Policies can usually pass the test of

[224] (2017) 10 SCC 1.
[225] *See* R Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632; People's Union for Civil Liberties v. Union of India (1997) 1 SCC 301
[226] *Id* at note 14, p. 70.

reasonableness however, in the given scenario, reasonableness must be established in substantial and procedural terms. The state may succeed by reason of substantial value, however the procedure and execution of such restrictions was not accorded with law. All guaranteed freedoms are not completely unrestricted and therefore have the capacity to be restricted in some sense. The same is done through tests developed in jurisprudence like that of in *Madras v. VG Row,*[227] which examines the right infringed, the purpose of the restriction, the extent of urgency of the legitimate purpose, the proportionality of the restriction and the present conditions. However, it is also argued that such restrictions need not take into account the grounds on which it was imposed, rather its nexus to the fundamental right being violated. While 19(2) does impart limitations on individual freedom, the state still bears additional burden to show how their measure was indeed 'reasonable' and proximally relate to the purposes set out between clause (2) to (6) in Article 19. In that manner, the Covid-19 restrictions, although implemented within the purview of public health concerns, the measures was not enacted through a statutory text passed in the Parliament as seen in some Scandinavian countries. The NDMA and EDA texts do not mandate executive authority to impose restrictions of this nature, that are bound to affect the "have-not's" unequally and displace them of their economic and social well-being. The constitutional point of law requires such state measures to be enacted after due calculation and assessment of risk. The burden borne by the State is also raised to a higher standard than that of to any other non-state entity, which inherently requires a due inspection of the nature and extent of restrictions. Without judicial interrogation, the abrogation of rights conferred under Articles 19(1) and 21, may lead to an increase in arbitrary state power and thereby sequentially deteriorate the quality of constitutional rights.

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