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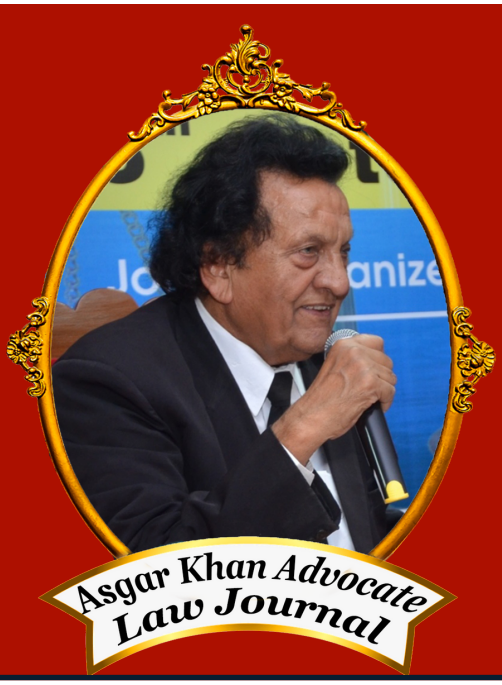

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UNDERSTANDING THE REFUGEES RIGHT TO WORK AND UPLIFTING THEIR HUMAN RIGHTS BY PROVIDING A PROPER REHABILITATION[*]

ABSTRACT:

"Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safety and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum".[1]-United Nations High Commissioner for Refugees

Immigrants have the right to be respected decently and not as convicts or prisoners, as per customary international law and related agreements. They get the right to be saved and recovered and taken to security if they are in difficulty at seas. If they're already immigrants, they get the freedom to not be transported to a country where they would be tormented, to seek asylum, and to not be transported to a country where they would be tortured. Illegal migrants, on the other hand, are victims of not only traffickers but also of a lot of governments that strive to avoid their ethical and practical responsibilities.

KEYWORDS: Human Rights law, Refugee laws, UNHCR, immigration, discrimination, equal treatment, refugee rights, Refugee Convention.

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1 Statement made at the 50th session of the UN Commission on Human Rights (1994) Quoted in UNHCR, *Human Rights and Refugee Protection, Part I: General Introduction* [Accessed on 1st June, 2021]

LITERATURE REVIEW:

(Jha, 2003) This article tells how refugees commenced appearing and how did they acquaint and altered the Magna Carta of the international refugee convention in the year 1951 as different as the United States, Israel and Iraq. The extent of the convention existed primarily for the refugees in Europe and to the circumstances that happen before the new year, i.e., 1st January 1951. The United Nations High Commissioner for Refugees (UNHCR) was the guardian to it, which was recently formed by the then period.

(Rathod, 2014) This document shows the relationship between the labour union betwixt the United States and Immigrants' rights. They egressed themselves to be secondary to the conventional labour unions. Nevertheless, the reciprocal influence between immigrants and labour altogether failed to remould the trajectory despite reproductive collaborations.

(Vijayaraghavan, 2020) his article tells the situation of the migrants who are both international and national migrants in India. Many people migrate within India from one state to another in search of better facilities in terms of education, occupation, technology or for better everyday lives. India continued to be a safe asylum for many immigrants.

Place of Origin	Number
Tibet	108,005
Sri Lanka	95,230
Myanmar	21,049
Afghanistan	16,333
Other	3,477
TOTAL	**244,094**

Note: Numbers from Tibet and Sri Lanka are for refugees registered and assisted by the government of India; others are for refugee and asylum seekers registered with the United Nations High Commissioner for Refugees (UNHCR).[2]

2 UNHCR, India: 31 January 2020, fact sheet, UNHCR, Geneva, accessed online [Accessed on 3rd June,2021]

INTRODUCTION:

Rehabilitation has oftentimes been seen as a disability-specific benevolence requisite by only a few of the group of population. Despite its personal and social welfares, rehabilitation has not been hierarchized in nations and is under-resourced. We portray worldwide, territorial, and country information for the designated number of individuals who would advantage from rehabilitation to the lowest degree of once amid the course of their disqualifying unwellness of health or injury. Despite its overcrowding, the Indian government continues to accept refugees, with millions of people who live in squalor and without access to basic services. There is, however, no universal legal structure in place to safeguard refugees. The 1951 Convention Relating to the Status of Refugee, sometimes known as the Refugee Convention, is the primary source of refugee law.

There seems to be no legislation in India that allows the government to execute or execute international agreements and treaties, including International Humanitarian Law (IHL). The Geneva Convention Act of 1960 seems to be the only piece of national legislation that explicitly addresses the concept of IHL. The Act's principal goals are to put the 1949 Conventions' provisions on penalty for serious violations into effect, as well as to prohibit and penalize the use of the Red Cross in other symbols. It does provide passive security by establishing treaty branch offices. The Agreements are not rendered actionable against the administration, and the Act does not allow any parties a right of action to implement the Agreements. As a result, the Constitution of India has simply agreed to obey the Conventions governing the behaviour of civilians, but there has been no protection established in respect of safeguarded individuals that the Judiciary has been urged to implement.

The administration's handling of the estimated 250,000 present migrants and asylum seekers has been haphazard, putting many in misery and mistreatment. Due to a lack of accessibility to many government-issued documents, humanitarian immigrants are frequently excluded from official social and economic inclusion systems and may find themselves on the outskirts of the city, harming not just themselves but subsequent generations.

Because the Constitution of India does not specify who qualifies as a refugee, the government can label all refugees and asylum seekers as "illegal migrants." India's lack of a clear legal framework, both at home and abroad, has permitted it to pursue an ad hoc refugee policy.

BASIC HUMAN RIGHTS OF REFUGEES

Definition of local integration:

As a long-term solution, local integration incorporates three domains. To begin with, it is a legal proceeding through which refugees gain a broader variety of rights in the host country. Second, it is an economic part of constructing long-term livelihoods and a living level equivalent to that of the host community. Finally, it is a socio-cultural adaptability and welcoming procedure that allows refugees to participate in the everyday life of the local nation without fear of being discriminated against.[3]

Refugees are victims of human rights breaches by definition. As per Article 1(a) (2) of the 1951 United Nations Convention Relating to the Status of Refugees (hereafter denoted to as the Refugee Convention), the term "refugee" refers to any persons who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".[4]

Professor James Hathaway described persecution as "the continuous or persistent violation of essential human rights indicative of a lack of governmental protection," despite the fact that the concept is not specified in the Refugee Convention. ' However, according to him, a well-

3 Alexandra Fielden.,(2008), *Local integration: an under-reported solution to protracted refugee situations*, UNHCR, available at https://www.unhcr.org/486cc99f2.pdf [Accessed on 31st May, 2021]

4 Article 1, definition of the term "refugee" *United Nations Convention Relating to the Status of Refugees, 1951* available at: https://www.unhcr.org/en-in/3b66c2aa10 [accessed on 1st June 2021]

founded worry of persecution occurs when one legitimately expects that failing to leave the nation would result in significant damage that the state authorities cannot or will never prohibit. Persecution includes both state and non-state entities harassing individuals.[5]

(Convention relating to the Status of Refugees)In international refugee law, the notion of local integration is understandably demonstrated. The 1951 UN Refugee Convention recognized the significance of local integration in finding long-term remedies, emphasizing the necessity of citizenship. Article 34 of the Convention states: "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall, in particular, make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."[6]

1. RIGHT TO PROTECTION AGAINST REFOULEMENT

According to Oxford Dictionary, Refoulement is defined as "the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution"

Article 7 of International Covenant on Civil and Political Rights says: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." [7]

Article 33 Of The Refugee Convention, 1951: Prohibition Of Expulsion Or Return (Refoulement) says: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

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5 B.C. NIRMAL.,(2001) *Refugees And Human Rights*, ISIL Year Book of International Humanitarian and Refugee Law, available at: http://www.worldlii.org/int/journals/ISILYBIHRL/2001/6.html#Footnote1 [Accessed on 1st June, 2021]

6 Article 34 of the 1951 *Convention Relating to the Status of Refugees*, 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950; available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.23_convention%20refugees.pdf [Accessed on 31st May 2021]

7 Article 7 of *International Covenant on Civil and Political Rights*, [accessed on 4th June, 2021] Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[8]

2. RIGHT TO SEEK ASYLUM

"Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it".
Article 14 of the Universal Declaration of Human Rights states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."[9]

3. RIGHT TO EQUALITY AND NON-DISCRIMINATION

Article 15 of the Universal Declaration of Human Rights states that "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality"[10]

Article 2(1) of International Covenant on Civil and Political Rights states that, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In accession, all warranties specifying security against circumstantial classes of discrimination such as nationality and gender-specific favouritism are also applicable to refugees.[11]

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8 Article 33 Of *The Refugee Convention*, 1951, available at: https://www.unhcr.org/4ca34be29.pdf , [accessed on 4th June, 2021]

9 Article 14 of *Universal Declaration of Human Rights*, Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights, [accessed on 4th June, 2021]

10 Article 15 of *Universal Declaration of Human Rights*, Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights, [accessed on 4th June, 2021]

11 Article 2(1) of *International Covenant on Civil and Political Rights*, Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, [accessed on 4th June, 2021

4. RIGHT TO LIFE AND PERSONAL SECURITY

Article 9(1) of the International Covenant on Civil and Political Rights states that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[12]

Article 13 of Universal Declaration of Human Rights states that, "Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country."[13]

5. RIGHT TO RETURN

Article V of the 1969 OAU Convention states that, "Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return."[14]

6. RIGHT TO REMAIN

The Turku/Abo Declaration on Minimum Humanitarian Standards also states in Article 7 that, "The displacement of the population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased. Every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose

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12 Article 9(1) of *International Covenant on Civil and Political Rights,* [accessed on 4th June, 2021], Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

13 Article 13 of *Universal Declaration of Human Rights,* Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights, [accessed on 4th June, 2021]

14 Article V of the *convention governing the specific aspects of refugee problems in africa,* 10th, September 1969, Available at: https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf [accessed on 4th June, 2021]

members wish to remain together must be allowed to do so. The persons thus displaced shall be free to move around in the territory, subject only to the safety of the persons involved or reasons of imperative security. No persons shall be compelled to leave their own territory."[15]

INTERNATIONAL ORGANIZATIONS THAT ARE IN FAVOUR OF REFUGEES AND THOSE WHO HELP THE REFUGEES:

There are quite a number of international organizations for refugees all over the world.

Some of them are listed down below:

- **WORLD HEALTH ORGANISATION:**

World Health Organization (French Organization Mondiale de la Santé) was established in April 1948. World Health Organization defined rehabilitation as, *"**a set of interventions designed to optimize functioning and reduce disability in individuals with health conditions in interaction with their environment**"*. To frame plainly, rehabilitation assists an individual, adult or elder person to be as independent as imaginable in day to day human activities and alters participation in education, occupation, recreation and meaningful living roles such as taking care of family. It executes so by communicating underlying conditions (such as pain) and modifying the way a person works in ordinary life, supporting them to overcome difficulties with the thought process, vision, hearing, inter-communicating, ingestion or tossing around.[16] According to WHO, 1 in 3 people is estimated to be living with a health condition that benefits from rehabilitation.

- **INTERNATIONAL REFUGEE ORGANISATION:**

International Refugee Organisation was enacted on 15th December, 1946 and came into force on 20th August, 1948. This instrument was terminated in the year 1952. The International Refugee Organization (IRO) was established as a temporary specialized agency of the United Nations. In between official founding in 1946 until its dissolution in January 1952, it aided immigrants and displaced individuals in a variety of Asian and European nations who either were unable to return to their country of origin or do not want to go due to political reasons.

15*Declaration of Minimum Humanitarian Standards*, 2 December 1990, [accessed on 4th June, 2021], Available at: https://www.ifrc.org/Docs/idrl/I149EN.pdf

The IRO took over the activities of its major predecessor agency, the United Nations Relief and Rehabilitation Administration, on July 1, 1947. The IRO provided services such as campsite maintenance and upkeep, vocational training, relocation orientations, and a comprehensive tracking program to locate missing kin. It also took over the constitutional security and redress obligations.[16] The refugees arrived from a total of 30 nations, the majority of which were Eastern European. Between July 1947 and January 1952, the IRO assisted in the resettlement of almost 1 million immigrants in third countries, repatriation of 73,000, and arrangements for 410,000 refugees who remained in their home countries.[17]

- **UNITED NATIONS RELIEF AND REHABILITATION ADMINISTRATION:**

United Nations Relief and Rehabilitation Administration (UNRRA), is an administrative body which was formed on 9th November, 1943 and dissolute in 1947. It is a 44 nation. a large-scale social-welfare initiative that aided post-World War II countries. Its efforts focused on delivering emergency necessities such as food, clothes, fuel, housing, and medications, as well as supplying relief services using experienced employees and assisting with agricultural and economic rehabilitation. It also supplied camps, staff, and foodstuffs for the after-war care and rehabilitation of millions of displaced individuals and refugees. In 1947, UNRRA was terminated and ceased operations; unfinished projects were transferred to the International Refugee Organization, the World Health Organization, and the United Nations International Children's Emergency Fund (now known as UNICEF).[18]

- **THE INTERGOVERNMENTAL COMMITTEE ON REFUGEES**

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16 Britannica, T. Editors of Encyclopaedia (2012, March 2). International Refugee Organization. Encyclopedia Britannica. Available at https://www.britannica.com/topic/International-Refugee-Organization-historical-UN-agency [Accessed on 4th June, 2021]

17 *Fact Sheet No.20, Human Rights and Refugees*,[Accessed on 3rd June, 2021] Available at: https://www.ohchr.org/Documents/Publications/FactSheet20en.pdf

18 Britannica, T. Editors of Encyclopaedia (2018, December 20). United Nations Relief and Rehabilitation Administration. Encyclopaedia Britannica. Available at: https://www.britannica.com/topic/United-Nations-Relief-and-Rehabilitation-Administration. [Accessed on 4th July,2021]

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- **UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES:**

The United Nations (UN) General Assembly approved the establishment of the United Nations High Commissioner for Refugees in 1951 as the successor to the International Refugee Organization (IRO; 1946–52) in the aim of providing political and legal security for immigrants until they could obtain citizenship in new countries of domicile. The League of Nations initially offered international refugee assistance in 1921, underneath the leadership of Fridtjof Nansen, the League's Commissioner for Refugees. The United Nations Relief and Rehabilitation Administration, which was superseded by the International Rescue Organization in 1946, was founded in 1943 to aid those that have been affected and dislocated by World War II. The UNHCR, a philanthropic and non-political organization, received the Nobel Peace Prize in 1954 and 1981.

The UNHCR gets involved with numerous national parliaments to make sure these basic rights as liberty from arbitrary expulsion, obtain access to the judicial system, take a job and access to proper education, and acquirement of identification and transport records, including its headquarters located in Geneva, Switzerland, and branch offices in important asylum-seeking nations. Initially, the UNHCR concentrated its efforts on assisting Europe's upwards of one million refugees and orphaned individuals following World War II. Since the 1960s, the UNHCR's focus has switched to accepting refugees in Africa, Asia, and Latin America who have been displaced by conflict, political unrest, or natural catastrophes. It collaborates

19 Britannica, T. Editors of Encyclopaedia (2012, March 2). International Refugee Organization. Encyclopedia Britannica. Available at: https://www.britannica.com/topic/International-Refugee-Organization-historical-UN-agency [Accessed on 3rd June,2021]

with other UN agencies, notably the World Food Programme and the World Health Organization, as well as humanitarian groups and regional organizations, to give shelter, food, and material support, as well as support with rehabilitation and resettlement. The High Commissioner, who is responsible for reporting to the General Assembly through both the Economic and Social Council on a yearly basis, has emerged as a prominent media personality in the drive to garner worldwide support for refugee programmes.[20]

- **THE INTERNATIONAL RESCUE COMMITTEE**

The International Rescue Committee (IRC) is a non-profit organization located in the United States and Europe that provides humanitarian assistance across the world. The International Rescue Committee (IRC) was founded in 1933 at Albert Einstein's proposal to help German refugees and opponents of Nazism. Since then, the IRC has aided a wide range of organisations that have been tormented or displaced as a result of ethnic disputes, war, or natural calamities. The IRC maintains branches in New York City, Washington, D.C., London, Brussels, and Geneva, as well as branch offices in a number of other countries. Emergency services, medical care, sanitary systems, child protection services, and educational facilities are all provided by the IRC. It also aims to keep local authorities and civic society in good shape. For migrants seeking asylum in the United States, the group provides relocation and educational assistance. Throughout history, the IRC has assisted sufferers of several of the world's most devastating disasters and wars. Supplying the residents of West Berlin during the Soviet blockade of the city in the 1940s, supporting immigrants in the aftermath of Rwanda's massacre and civil war in the 1990s, and supporting immigrants affected by the Iraq War in the early twenty-first century were all examples of relief initiatives. Because the IRC has significant resources and is well-known globally, it is frequently among one of the first groups to respond in a catastrophe.

CASE LAWS RELATED TO REFUGEES:

- N. D. Pancholi Vs state of Punjab and others, Supreme Court of India, 09, june,1998[21]

20 Mingst, K. (2019, November 13). *Office of the United Nations High Commissioner for Refugees*. Encyclopedia Availableat: Britannica. https://www.britannica.com/topic/Office-of-the-United-Nations-High-Commissioner-for-Refugees [Accessed on 3rd June, 2021]

- Malavika Karlekar v. Union of India and Another, Supreme Court of India, 25 September 1992[22]
- The Mailwand's Trust of Afghan Human Freedom v. State of Punjab and Others, Supreme Court of India, 28 February 1986[23]
- National Human Rights Commission vs State Of Arunachal Pradesh & Anr, Supreme Court of India, 9 January 1996[24]
- Sarbananda Sonowal v. Union of India, Supreme Court of India, 5 December 2006[25]
- State of Arunachal Pradesh v. Khudiram Chakma; Khudiram Chakma v. State of Arunachal Pradesh and Others, Supreme Court of India, 27 April 1993[26]

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21 N.D. Pancholi v. State of Punjab and Others, -Writ Petition (Crl.) No.243 of 1988 (for Prel. Hearing), India: Supreme Court, 9 June 1988, available at: https://www.refworld.org/cases,IND_SC,3f4b8e224.html [accessed 4 June 2021]

22 Malavika Karlekar v. Union of India and Another, Writ Petition (Criminal No) 583 of 1992, India: Supreme Court, 25 September 1992, available at: https://www.refworld.org/cases,IND_SC,3f4b8d334.html [accessed 4 June 2021]

23 The Mailwand's Trust of Afghan Human Freedom v. State of Punjab and Others, Writ Petition (Crl.)No.125 and 126 of 1986, India: Supreme Court, 28 February 1986, available at: https://www.refworld.org/cases,IND_SC,3f4b8cfd4.html [accessed 4 June 2021]

24 National Human Rights Commission vs State Of Arunachal Pradesh & Anr , 1996 AIR 1234 1996 SCC (1) 742 JT 1996 (1) 163 1996 SCALE (1)155, India: Supreme Court, 9 January 1996, available at: https://www.refworld.org/cases,IND_SC,5c62ce034.html [accessed 4 June 2021]

25 Sarbananda Sonowal v. Union of India, Writ Petition (civil) 117 of 2006, India: Supreme Court, 5 December 2006, available at: https://www.refworld.org/cases,IND_SC,52ca8c974.html [accessed 4 June 2021]

26 State of Arunachal Pradesh v. Khudiram Chakma; Khudiram Chakma v. State of Arunachal Pradesh and Others, 1994 Sup (1) Supreme Court Cases 615; Civil Appeal Nos. 2182 and 2181 of 1993,, India: Supreme Court, 27 April 1993, available at: https://www.refworld.org/cases,IND_SC,3f4b8ca44.html [accessed 4 June 2021]

- Ktaer Abbas Habib Al Qutaifi And...Vs Union Of India And Ors., Gujarat High Court, 12 October, 1998[27]
- Mr. Louis De Raedt & Ors vs Union Of India And Ors, Supreme Court of India, 24 July, 1991[28]
- Central Bank Of India vs Ram Narain, Supreme Court of India, 12 October, 1954[29]
- Rev. Mons. Sebastiao Francisco ... vs State Of Goa, Supreme Court of India, 26 March, 1969[30]

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27 Ktaer Abbas Habib Al Qutaifi And...Vs Union Of India And Ors., 1999 CriLJ 919, Gujarat High Court, 12 October, 1998, available at: https://indiankanoon.org/doc/1593094/ [accessed 4 June 2021]

28 Mr. Louis De Raedt & Ors vs Union Of India And Ors, 1991 SCR (3) 149, Supreme Court of India, 24 July, 1991, available at: https://indiankanoon.org/doc/488726/ [accessed 4 June 2021]

29 Central Bank Of India vs Ram Narain, Supreme Court of India, 1955 SCR (1) 697, 12 October, 1954, available at: https://indiankanoon.org/doc/426664/ [accessed 4 June 2021]

30 Rev. Mons. Sebastiao Francisco ... vs State Of Goa, 1970 SCR (1) 87, Supreme Court of India, 26 March, 1969, available at: https://indiankanoon.org/doc/998459/ [accessed 4 June 2021]

CONCLUSION:

Approximately 2.4 billion individuals worldwide are now suffering out of a medical problem that may advantage from rehabilitation. With changing population healthcare and features occurring throughout the world, the predicted need for rehabilitation will only grow in the future years. This rising need for rehabilitation is, for the most part, unmet in many regions of the world. Upwards of half of persons who needed rehabilitation treatments in several poor and middle-income countries do not obtain them. To summarise, India requires a definite and comprehensive refugee strategy and law to address the situation. Leading to a shortage of internal and overseas legal requirements, India's ad hoc refugee policy and strategic legal uncertainty enable nations to distinguish among various categories when addressing migrants and prioritise other interests above humanitarian considerations.

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SPECIALISED DEFENCES UNDER INTERNATIONAL CRIMINAL LAW[*]

ABSTRACT

The possibility of criminal responsibility of any individual for the commission of any international crime is pardoned in self-defence. The crime carried out by the accused which is grave in nature will not work out as the demonstration was illicit by all accounts which is the infringement of the basic freedoms. ICC referenced different defences for barring the criminal obligation like military necessity, duress or coercion, self-defence, intoxication, order from superior, mental incapacity. Aside from it, there are different case-laws in which courts and councils have deciphered the defences in moderating the sentence. The base of criminal law lies on certain premises, for example, 'an individual will be blameless until proved guilty' and 'the court will consider whatever defences set forward by the people who are being tried' and 'free trial'. A solid defence is a fundamental part of a fair trial. The Defence groups address and secure the privileges of the defendant (accused or suspect). All defendants are presumed blameless until they turn out guilty without question beyond the actual doubt of the Court.[1] Every defendant is qualified for public, reasonable proceedings directed fairly and in a sense of equality. The Rome Statute provides the defendant exclusive rights, including: the right of information regarding the charges; to have sufficient time and ways to set up their defence; to be tried without unusual delay; to openly pick an attorney; to look at witnesses and present evidence to not be constrained to affirm or to admit guilt; to stay quiet; to get from the Prosecutor evidence which the individual in question accepts shows or will in general show the innocence, or to alleviate the guilt of the accused; to have the option to follow the procedures in a language the person completely comprehends, and consequently to have a translator and interpretations as required.[2]

Keywords: Defences; Self-Defence; Rome Statute; Superior Order; Intoxication; Military Necessity; Duress; Mental Incapacity

*Written By:Yash Krishna Pandey

1 https://www.icc-cpi.int/about/defence

2 https://www.icc-cpi.int/about/defence

INTRODUCTION

The word ‘defences’ can be used to describe a range of justificatory explanation to a criminal charge, or as ‘basis for exempting criminal responsibility’, as per Article 31 of the Rome Statute of the International Criminal Court.[3] Under the Rome Statute in Article 31-33, defences related to International Crimes are discussed, as this can be viewed as a definitive assertion of those defences which are as of now acknowledged in International Criminal Law. The Rome Statute permits the judges of the ICC to consider defences not discussed in the Statute expressly, for example, those that might be drawn from the International law of armed rivalry or general standards of law got from public frameworks.[4] This methodology is with regards to the International Criminal Tribunal for the former Yugoslavia(ICTY) point of reference whereby the United Nations Secretary General had supported that silence in the instrument didn't imply that different defences couldn't be thought of, 'drawing upon general standards of law perceived by all countries'.[5]

DEFENCES RELATED TO INTERNATIONAL CRIMES

Superior order

According to Article 33 of ICC Statute, the fact that a crime under the jurisdiction of the Court has been perpetrated by an individual in accordance to an order of a government or of a superior, regardless of whether military or civilian, will not exempt that individual of criminal obligation except if:

(a) The individual was under a legal obligation to obey orders of a superior or the government in question.

(b) The individual did not know that the order was unlawful; and

(c) The order was not indubitably unlawful.

3 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 2187 UNTS 90 (1998)

4 Rome Statute, Art. 31(3), referring to Art. 21.

5 Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para. 58.

But as per this Article of ICC Statute and the Rome Statute, orders to commit crimes against humanity and genocide are indubitably unlawful.

Self-Defence

Although not discussed in its Statute, the ICTY believes self-defence to be a material defence under standard International Law, tracking down that the ICC Statute definition reflects arrangements found in most public codes and as such comprises standard International Law.[6] Notwithstanding, self-defence can't be utilized to pardon an intentional assault upon a civilian population.[7] For excluding criminal liability, defence of another person, yourself and property can be the grounds under the Rome Statute. But there must be an imminent threat and unlawful use of force and the accused must have reacted equivalently and reasonably to the imminent threat. Defence of property must be raised as a defence to an atrocity, and just concerning property that is vital for the survival of the accused or someone else, or for achieving a military mission.[8]

Necessity and Duress

The ICTY Statute does exclude an arrangement on necessity and duress. However, the jurisprudence of the ICTY has managed this matter. Most of the ICTY Appeals Chamber has held that duress doesn't provide for a total defence to a soldier accused of crimes against humanity or atrocities in international law when the taking of innocent lives is included, yet it very well might be considered in moderation of retribution.

The Rome Statute perceives duress as a defence when an accused acts under duress from an imminent danger of death or in continuation or inevitable genuine bodily harm of the accused or someone else. The accused's activities probably have been brought about by the danger, and they have acted essentially and sensibly to keep away from the danger. In addition, the accused can't have planned to cause more mischief than the damage they were attempting to stay away from. Dangers can be made by someone else or can emerge from different

6 Dario Kordić, Case No. IT-95-14/2-T, Trial Judgement, 26 Feb. 2001, ¶¶ 449-451.

7 Milan Martić, Case No. IT-95-11-A, Appeal Judgement, 8 Oct. 2008, ¶ 268.

8 Statute for the International Criminal Court, Art. 31(1)(c).

conditions not in control of the accused.[9]

Mental Incapacity

At the ICC, this defence applies if the accused, at the time of his conduct, experiences a defective mental level that annihilates his capacity to either comprehend the unlawfulness of or control his action. The defence is apparently restricted to "mental", not psychic, aggravations. Likewise, the mental state should be "annihilated", not only decreased, to fill in as a defence. Decreased mental capacity isn't specifically referenced in the Rome Statute, yet under Article 31(3), it very well may be considered as a defence.[10]

On the off chance that the defendant raises the issue of absence of mental capacity, he is challenging the assumption of mental stability by enforcing a plea of insanity. This establishes a total defence to the charge. In raising this defence, the defendant bears the onus of setting up that at the time of the conduct of criminal act he was working under such a defect of reason, from illness of mind, as not to know the nature and nature of his action or on the other hand, if he knew it, that he didn't realize that what he was doing wasn't right. Such a plea, in case effective, is a finished defence to a charge and it prompts an acquittal.

Intoxication

Intoxication can likewise exempt criminal liability at the ICC. On the off chance that the accused, at the time of criminal act, was intoxicated to the point that they couldn't comprehend the lawfulness of or control their conduct, they can't be held guilty. It is to be established that intoxication should annihilate the accused's mental capacity—disability, regardless of whether outrageous, isn't sufficient. The defence doesn't make a difference if the accused was deliberately intoxicated and knew, or dismissed the danger, that they would probably carry out a crime under the jurisdiction of the ICC whenever intoxicated.[11]

Military Necessity

The "rule of military necessity" grants estimate which are important to achieve a genuine

9 Rome Statute, Art. 31(1)(d).

10 Rome Statute, Art. 31(1)(a).

11 Rome Statute, Art. 31(1)(b).

military reason and are not in any case restricted by international humanitarian law. Because of an outfitted struggle the lone genuine military object is to debilitate the military capacity of other parties to the rivalry.

Military necessity by and large contradicts humanitarian exigencies. Subsequently the motivation behind humanitarian law is to find harmony between humanitarian exigencies and military necessity.

It must be noted that the lawful explanation of military necessity isn't equivalent to "military advantage" (which is a genuine descriptor of the result whereupon activities are predicated). In total, "military necessity" is best characterized as the prerequisite, in some random situation, for the use of equipped power (as per different principles of the law of outfitted struggle) to accomplish real military targets.[12]

12 https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0008.xml

New Dimensions of Judicial review of Constitutional Amendments. A Study with special reference to Articles 31- A, 31- B and 31- C R/W IX Schedule of the Constitution of India. *

Abstract

This Research Paper aims to explain the concept of Judicial Review, its history and origin, its impacts on the Constitutional development in India, with a special reference to Article 31-A, 31-B, and 31-C of the Indian Constitution. This paper also explains the concept of judicial review in the context of various constitutional amendments and judicial decisions with regards to property and estate. This paper traces the transition of the judiciary from the era of Judicial Restraint to that of Judicial Activism. It also explains the Articles and various constitutional provisions from which the courts derive the power of Judicial review in India, after taking into consideration the difference between the Indian concept and American interpretations of judicial review. It also considers the background behind the first amendment and the ninth Schedule, along with giving a study of various judgements that followed it. Article 31-A, 31-B and 31-C have also been studied with reference to the basic democratic principles and the Kesavananda Bharati v. State of Kerala Judgment. A few other judgments like the ADM Jabalpur Case, the Maneka Gandhi Case, with some judgments of foreign judicial courts, like that of the Federal Supreme Court have been included in this paper to give the readers a clear understanding of the topic of research. For the convenience of the readers, references have been provided for all important judgment facts, quoted in this Research Paper, along with a crisp Conclusion Section at the end of that summarises the entire Research Paper in a clear-cut manner.

KEYWORDS: Judicial Review, amendment, Schedule IX, Article 31-A, Article 31-B, Article 31-C

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INTRODUCTION

Four decades ago, it was Justice Chandrachud, who in the landmark *Minerva Mills Judgment*[1], observed that, everything in India is under Judicial Review. It was indeed the sheer wisdom and knowledge of the learned Supreme Court justice that could easily explain one of the most complex, yet powerful concept of law, in such a lucid terminology.

In layman terms, the term Judicial Review, means the authority given to the courts to review and evaluate legislative actions. Under this concept, any act of the administration can be brought under the scrutiny of the judicial organ of the government.

However, the scope and definition of Judicial review is indeed broad. To begin with, judicial review is not only confined to laws framed by the legislature, but to the way they are implemented. Judicial review is that very concept of law that has resulted in the courts being proactive and playing a significant role in upholding the democratic principles.

ORIGIN OF JUDICIAL REVIEW

It is interesting to note that a concept that is of colossal weightage in a democratic system of checks and balances has no mention in the constitution any major democracy in the world, atleast, the constitutions of the two largest democracies, India, by the number of people and the United States, by area, are silent when it comes to Judicial Review.

However, it is again, a consequence of the judiciary playing an active part in the democratic process that the concept of Judicial review was born.

In the year 1803, the American Federal Supreme Court decided the case of *Malbury v Madison*[2], the biggest constitutional judgment in American law. It was Chief Justice Marshall, who coined the term judicial review, a concept that allowed the judiciary to declare laws passed by the legislature as void, if they abridged the constitution.

Although, the founding fathers while drafting the Indian Constitution, a century after the US Supreme Court judgment, did not put the concept of Judicial Review expressly in the constitution, the same power was to be derived by the Indian judiciary using several articles of the constitution.

For instance, Article 13 of the Constitution of India declares that any law, ordinance, by law,

1Minerva Mills Ltd. V. Union of India, (1980) 3 SCC 625 : AIR 1980 SC 1789.

25 U.S. 137 (1803).

order, amendment that violates Part III of the Constitution would be void. Therefore, in simpler terms this article states that any legislative order that abridges fundamental rights of the citizens is not a law and is bound to be struck down by the judiciary.

Of many other articles from which the judiciary derives it is authority of Judicial review one is Article 32, described as fundamental of all fundamental rights, this article allows citizens to approach the Supreme Court to get their fundamental rights enforced, in case they are violated. This article also provides writ jurisdiction to the Supreme Court.

Article 227, that garners similar powers to issue writs to the High Courts of the country also acts like an inspiration to draw authority of Judicial Review. Article 135 allows the Supreme Court to nullify any pre constitutional law on grounds it violates the constitution and thus helps the Indian courts to employ the usage of the concept of judicial review.

Scope of Judicial Review in India and a Comparison of Due Process of Law and Procedure Established by law

As per Justice Quadri, the power of Judicial review can be trifurcated based on its applicability:

A. Judicial Review of Constitutional Amendments: the Indian judiciary can quash any amendment in the constitution, if it violates Fundamental Rights under Part III,
B. Legislations passed by the Parliament and State Legislative Assemblies: the court can nullify any law passed by any legislature, on the grounds of it being unconstitutional,
C. Administrative actions of the State and other authorities: All authorities which are included in the definition of the State, under Article 12, all corporations that fall under the definition of the State as per Ajay Hasia Judgment etc. and all their actions can be scrutinized by the Judiciary and declared invalid if they violate the constitution.

The concept of Judicial Review has been borrowed from the United States' constitution. However, the two concepts with their applicability are not identical in both democracies. The approach of the judiciary is different in both the nations.

In the nation of its origin, the United States judiciary uses the due process of law while scanning any governmental action under judicial review. The concept of due process of law, not only considers the substantive aspects of the applicability, but also considers the reasonableness, justness, and the applicability of principles of natural justice to the law.

For instance, in the case of *Lawrence v Texas*[3], it was the American Judiciary that allowed the petitioner to engage in homosexuality and declared the punishments for homosexuality void and unconstitutional.

Thus, the American Supreme court has a very wide scope of Judicial review and therefore is called the super legislature.

Unlike the American courts, the Indian courts employ the concept of procedure established by law. It is not the concern of the Indian judiciary whether a law is reasonable or just, what the Indian judiciary is concerned with is, the substantive grounds.

In the *ADM Jabalpur Case*[4], the Supreme Court with a 4:1 majority held that that the courts cannot protect against the arbitrary action of the legislature, but can protect only against the arbitrary action of the executive.

Judicial Review: Evolution from Restraint to Activism- *The Maneka Gandhi Case*[5]

Until this judgment, the Indian judiciary was known to follow the concept of Judicial Restraint. However, after this judgment the judiciary became more liberal while applying the power of Judicial Review.

It was in the landmark case of *Maneka Gandhi v UOI*, when the Supreme Court while deciding a plea in which the petitioner's passport was seized, held that laws should not only confer to the substantive aspects but should also be reasonable and just. The supreme court declared Right to Reasonability, a fundamental right under Article 14 of the constitution of India.

The Supreme Court also held that the procedure should follow the principles of Natural Justice as well.

Thus, after the *Maneka Gandhi* judgment, the concept of due process of law is same as that of procedure established by law and the Indian courts are also as competent as the courts of the United States while application of the concept of Judicial Review.

TRACKING THE COURSE OF AMENDMENTS

Originally embedded in Article 19(1)(f) and Article 31 of the Constitution of India, the Right to Property has always been a matter of question and debate. Both the Articles were omitted by the

3539 U.S. 558 (2003).

4ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521 : AIR 1976 SC 1207.

5Maneka Gandhi v. Union of India, (1978) 1 SCC 248: AIR 1978 SC 597.

44th Amendment Act, 1978, but before that the laws went through several, 1st, 4th, 7th, 25th, 39th, 40th and 42nd Amendments. Before talking about Articles, 31 a, 31 b, 31c, tracking down the modifications of the repealed Articles is important for a better understanding of the Constitutional developments.

Article 19 clause (1)(f) constituted the Right to Property as a fundamental right. It guaranteed the freedom to acquire, hold and dispose property. The four ways to acquire property are through possession, prescription, agreement, and inheritance and the words to hold and dispose mean to own and to pass over to someone else, respectively. However, the term property is of wide connotation and embraces within itself both corporeal and incorporeal rights. property as a legal concept in the case of a tangible property, for instance, is a bunch of prerogatives compiled together, like right to enjoy, right to destroy, right of possession and more.

Article 31 on the other hand, has been amended 6 times, before being stuck down.

- The first amendment that was done to secure the constitutional validity of zamindari abolition and other agrarian reforms in general and in certain specific acts added two explanatory Articles – Articles 31-A and 31-B. But there were major loopholes with the both introduced Articles, while Article 31 was confined to acquisition of estates, Article 31-B was not open to judicial review as it was mentioned under the ninth schedule.
- The second time, changes were more substantial. Clause 2 of Article 31, Article 31-A and Article 31-B were amended. Whereby clause 2 was substituted by clause 2 and clause 2-A, four new categories of legislation under clause 1 of Article 31 as were added and the ninth schedule of the constitution was enlarged by 7 more acts being added to the same.
- This was followed by the 17th amendment act where 44 acts were added to the ninth schedule to validate the acts struck down by the Supreme Court with regards to different agrarian acts and 31-a was modified as well.
- 25th Amendment Act saw the amendment of Article 31 clause 2 as a new clause 2-b was added and Article 31-c was inserted.
- Two more acts were added to the Ninth Schedule in 25th amendment act
- 34th Amendment Act saw another 17 acts being brought under schedule nine
- 41 Acts were brought under the ambit of 39th amendment act
- 64 enactments were inserted in the 40th amendment act, Article 31-c was amended and a new Article 31-d was inserted.

- Article 31-d however was deleted in the 43rd amendment act
- And finally, 44th amendment act happened, taking away the right to property from the fundamental rights. Under this amendment act, Article 19(1)(f) and Article 31 were deleted, Article 31(1) was substituted by Article 300a and entries 87,92 and 130 were omitted from ninth schedule.

EMERGENCE OF ARTICLE 31-A, 31-B, AND 31-C

Article 31-A mentions about saving of laws providing for acquisition of estates etc.

Article 31-A clarifies that no law providing for the acquisition by the state of any estate or of any rights therein, or the taking over of property by the government for limited period for management or in public interest or, the amalgamation of two corporations for either management or in the favour of public or, the extinguishment/modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations or shareholders for that matter or, extinguishment/modification of any rights by virtue of any lease for purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license, would be void on the ground of any instability with any of the fundamental rights contained in Article 14, 19 and 31, provided that, if it is a state made law, it has not received the assent of the president.

This Article was introduced by the first amendment to secure the constitutional validity of zamindari abolition and envisages laws concerning agrarian reforms. Later, the Article was amended a few times and deals with the land tenure called estate.In *Kavalappara Kottarathil case*[6], it was held that Madras Marumakkathayam (Removal of Doubts) Act,1955 did not enable the state to divest a proprietor of his estate and was not protected by Article 31-A. Similarly, in *P. Vajravelu Mudaliar's case*[7], the SC pronounced that Land Acquisition (Madras Amendment) Act,1961 was not protected under Article 31-A as it provided for acquisition of land for a housing scheme. In *Commr. v. Durganath Sarma*[8], the Assam Acquisition of Land for Flood Control and Prevention of Erosion Act, 1955 was also pronounced not to be protected under Article 31-A, as it provided acquisition of lands for controlling flood and preventing soil erosion. In the case of

6 Kavalappara Kottarathil Kochuni v. State of Madras, AIR 1959 SC 725 : 1959 Supp (2) SCR 316.

7 P. Vajravelu Mudaliar v. Collector (LA), AIR 1965 SC 1017: (1965) 1 SCR 614.

8 Commr. V. Durganath Sarma, AIR 1968 SC 394 : (1968) 1 SCR 561.

Balmadies Plantations Ltd. V. State of T.N.[9], it was clarified that Article 31-A envisages only laws concerning agrarian reforms. In *State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*[10], the SC affirmed that the private forests were in the ambit of janmam right and hence, protected under Article 31-A(2)(a)(i). In *Ajit Singh v. State of Punjab*[11], it was held that acquisition for common purposes is not acquisition by state, the same was reiterated in *Kanwar Lal*'s case and it was explained that such acquisition is not entitled for compensation.

Constitutional validity of Article 31-A was upheld on the test of basic structure in the case of *Ambika Prasad Mishra v. State of U.P.*[12]The judgement in *Minerva Mills case*[13] saw the Article being described as impregnable based on stare decisis.

Immunity under Article 31-A qua Articles 14 and 19.—The expression "law", as defined in Article 13(3)(a), includes an Ordinance, rule, regulation, notification, and custom or usage having in the territory of India the force of law and therefore, when the expression "order" is used, it would take colour from Ordinance, rule, regulation, notification, which are all legislative in nature, and not administrative. Further, the Central Government's order passed under Section 396 of the Companies Act, 1956, directly impacts the rights and liabilities of the companies, their shareholders, and creditors, sought to be amalgamated under the order and such order is not an order in general which applies to all such companies, but only to the particular companies sought to be amalgamated and there is no general rule of conduct, without reference to the case that is laid down by such an order. Further, the Central Government order impugned herein, ultimately, makes a specific direction qua two specific companies which are to be amalgamated. Thus, such an order is not in the nature of legislation or delegated legislation. *63 Moons Technologies Ltd. v. Union of India*[14].

Article 31-B deals with the validation of certain acts and regulations.

Article 31-B was inserted in the first amendment along with Article 31-A however, it is not governed by Article 31-A and stipulates that no legislation or provision of any law in the Ninth Schedule shall be deemed to be invalid, for not being consistent with, or takes away or abridges any of the Fundamental Rights. It is retrospective as made clear in *N. Krishnaraju Reddiar's*

9 Balmadies Plantations Ltd. V. State of T.N., (1972) 2 SCC 133 : AIR 1972 SC 2240.

10 State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd., 1973 2 SCC 713 : AIR 1973 SC 2734.

11 Ajit Singh v. State of Punjab, AIR 1967 SC 867.

12 Ambika Prasad Mishra v. State of U.P., (1980) 3 SCC 719 : AIR 1980 SC 1762.

13 *Supra note 1*.

14 *63 Moons Technologies Ltd.* v. *Union of India*, (2019) 18 SCC 401.

case.[15]In *Prag Ice & Oil Mill's case*[16] it was elucidated that when the government places an Act or regulation in the ninth schedule, it is assumed to have considered the pros and cons of the same, and such an assumption cannot in the very nature of things be made in the case of an order issued under an act or regulation in the ninth schedule. In Waman Rao's case[17], the court held that amendments in the ninth schedule made before 24 April 1973 were not challengeable. The same was reaffirmed in *Minerva Mills case*[18] and in *I.R. Coelho*[19] case it was unanimously decided that any laws violative of fundamental rights which were introduced after the date of *Kesavananda Bharati's* judgement is open to judicial review in the lieu of being against or violative of the basic structure of the constitution.

Article 31-C Saving of laws giving effect to certain directive principles.[20]

Article 31-C was inserted by the 25th amendment act in the CoI. It talks about that any law made by the state that secures the rights contained in Part IV of the constitution cannot be declared void or judicially reviewed on the basis of Article 14, Article 19, or Article 31.

Article 31-C of Indian Constitution focuses on two main objectives –

(i) Any law made to give effect to Article 39b and Article 39c of Indian Constitution will avoid the scrutiny of courts even if it violates Article 14 and Article 19 of the Indian Constitution.

(ii) Courts will not have the jurisdiction to decide whether the law enabled really gives effect to the principles mentioned in Article 39b[21] and 39c[22] of the Constitution.

Constitutionality of Article 31-C (as amended by 42nd Amendment Act), held unconstitutional to the extent of change made by 42nd Amendment Act, *Minerva Mills Ltd. v. Union of India*[23]. *Sanjeev Coke Manufacturing case*[24], interpreting Article 39-B of the Constitution referred to

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[15] N. Krishnaraju Reddiar v. Authorised Officer, Land Reforms Vellor, AIR 1967 Mad 352.

[16] Prag Ice & Oil Mill v. Union of India, (1978) 3 SCC 459 : AIR 1978 SC 1296.

[17] Waman Rao v. Union of India, (1981) 2 SCC 362 : AIR 1981 SC 271.

[18] *Supra note 1*.

[19] I. R. Coelho v. State of T.N., (2007) 2 SCC 1 : AIR 2007 SC 861.

[20] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : AIR 1973 SC 1461.

[21] Article 39b of Indian Constitution reads –that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

[22] Article 39c of Indian Constitution reads –that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

[23] *Supra note 1*.

[24] Sanjeev Coke Manufacturing ... vs Bharat Coking Coal Ltd., (1983) 1 SCC 147.

larger Bench, *Property Owners Association v. State of Maharashtra*[25]. Legislative declaration of nexus between the law and Article 39 is inconclusive and justiciable. Court can tear the veil, if necessary, to examine the allegation of colourable legislation or abuse of power, *Tin-sukhia Electric Supply Co. Ltd. v. State of Assam*[26].

9TH SCHEDULE LAWS UNDER JUDICIAL REVIEW

The First Constitutional Amendment Act of 1951 inserted Article 32-A to create the IXth Schedule in the Constitution. This Schedule, as per Article 32-A granted an immunity to laws kept under it, from the scrutiny of the judiciary.

Therefore, as per the amendment, any law that abridges the fundamental rights of the individuals cannot be challenged in the court of law, provided it is in the IXth schedule. Originally created to promote agrarian reforms, the number of laws in this Schedule increased substantially between 1951 and 2007.

This Schedule became a tool for various governments to draft laws that violated the fundamental rights of the individuals without fearing judicial scrutiny and action.

However, it was the landmark judgment of *Kesavananada Bharati v State of Kerala* that changed the course of Indian constitutionalism and hence is truly regarded as the case that saved democracy.

The largest constitutional bench till date, a thirteen-judge bench of the Supreme Court of India created the famous basic structure doctrine to prevent the building blocks of the constitution from being amended by the parliament.

However, the IXth Schedule remained untouched and protected by all these developments by the judiciary and legislature. The Parliament kept on using the schedule to draft laws that could be immune from being challenged in the courts. Thus, the Schedule that contained only 12 laws in the 1951, had around 284 Laws by 2020.

Therefore, in the landmark judgment of *IR Coelho Case*, the apex court ruled the laws under IXth Schedule cannot escape from being challenged in the court. Since Judicial Review is a part of the basic structure of the Constitution, no law can be immune from it.

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[25] *Property Owners Association v. State of Maharashtra,* (2001) 4 SCC 455.

[26] *Tin-sukhia Electric Supply Co. Ltd. v. State of Assam,* (1989) 3 SCC 709.

CONCLUSION

The concept of judicial scrutiny has allowed the Judiciary of this land to have been able to maintain the democratic principles, protect the people from the actions of the legislature, have declared several laws void, on the basis of being abridging to the constitution. It is because of this concept that a system of checks and balances has been able to function in this democracy.

It was the first amendment that also inserted Article 31-A and Article 31-B, that aimed at abolition of the zamindari system and promotion of agrarian reforms. The Right to Property, originally a Fundamental Right, was omitted by the 44th Constitutional Amendment.

The IXth Schedule, was added to the Constitution in 1951, along with Article 31-B, and 25th Constitution (Amendment) Act inserted Article 31-C to enable the parliament to make laws that are immune from judicial scrutiny. However, after the Kesavananda Bharati judgment, and later in the IR Coelho case, the Supreme Court diluted this schedule.

Hence, the Indian Judiciary has employed the concept of Judicial Review to safeguard the people of India and their fundamental rights, guaranteed by the constitution, on many occasions and has thus protected them from the actions of the legislature and the executive.

A STUDY OF RIGHT TO EQUALITY WITH SPECIAL REFERENCES TO EMPLOYEE RIGHTS IN INDIA*

When the constitution framers set out to write the constitution, they wanted to purposefully imbue it with the commitments they had made. The constitution is beyond a set of rules and regulations for running the newly formed nation. It represents the hopes and dreams of the leaders and representatives that worked for years to write this document. With the birth of a new nation came new expectations, it involved soothing the country from its colonial history. It was very important to diminish the gap between the public and their leaders in the democratic regime. This was addressed via the introduction of some basic inalienable rights or freedoms for the citizens of the country.

The underlying idea behind granting certain liberties to the people that cannot be revoked by the government was to take it out of the hands of ruling power. Since the parties are reliant on political majorities to win, they are very impermanent in nature. Therefore, it has been commonly accepted in contemporary times that these basic rights have to be lodged in such a fashion that they shall not be obstructed by a repressive government.

These rights, called Fundamental Rights, are characterized in Part III of the Constitution. The rights given include "right to equality, freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies". The essential rights given to citizens under this moniker are applicable to regardless of race, religion, caste, sex, place of birth, etc. We shall be specifically focused on the Right to Equality which is covered in Article 14 to 18 of the Constitution of India.

Article 14

Equality has been considered an essential attribute of the constitution, so far entrenched that it is mentioned in the preamble too. Article 14 provides a general blanket protection against discrimination and warrants equality before law. The right given under the article is dual in nature, as it offers equality before law and equal protection of laws. Equality before law ensures that all citizens are treated equally before law, no one shall be given special treatment and deemed to be above the law pertaining to their status or position of power. There are certain exceptions to the rule, which indicate that this is not an absolute rule. Another interpretation of the article is that equals must be treated equally. Thus, the best way to go forth with this rule is

*Tripti Jaiswal

treating people in similar situations equally. Equal protection of laws extends the previous principle to encapsulate the treatment of individuals.

Article 15

Article 15 tackles discrimination based on particular factors such as “religion, race, caste, sex or place of birth”. This article focuses on the treatment of individuals in public places and social, political, economic and cultural spheres. This provision is multifaceted and aims for equality in all spheres of life.

Article 15 (1) barrs the state from being discriminatory to any individual on grounds of “religion, race, caste, sex or place of birth”. It guarantees security against State's bias on the grounds of just “religion, race, caste, sex, place of birth”. Hence, any law segregating on any of these grounds would be nullified. Additionally, the assurance under the proviso can be conjured only when segregation has been done by the State and not something else.

Hence, the State on its part is totally forbidden from treating any individual negatively simply on the ground that he has a connections to a specific religion or caste however on some other ground, a thought of differential arly qualification for some work, on better arrangement for the training of women or based on place of residence.

Also, the State is explicitly cautioned that religion can't be the ground for any exclusion or separation in any open matter. State cannot offer inconsistent treatment to any resident in light of his race. Similarly, any enactment dependent on casteist treatment would negate Article 15 (1). However, special provisions can be formulated for the betterment of women.

Article 15(2), then again, identifies with State as well as private activities. It restricts class separation in public settings, and warrants that the individual gets unbiased admittance to shops, eateries, inns and spaces of entertainment in possession of private sector. It manages places of retreat which are either kept up by State reserves entirely or to some extent; or allocated for public use. [1]

Prejudice operated on the basis of morality or health is not restricted. However, instances of inequity with regard to 'race' are totally restricted at a public place and the word ‘caste’

[1] Aparna Ramamoorthy, *Right to Equality: Concept and Explanation | Article 14-18* , LEGAL BITES LAW & BEYOND (2020), https://www.legalbites.in/right-to-equality-article-14-18#_ftn4 (last visited May 4, 2021).

endeavours to improve the Hindu social framework by abrogating a few social wrongs. The Untouchability (Offenses) Act, 1955, is a step toward this goal.

However, nothing in Article will obstruct the state, as per Article 15(3), from making special provisions for women and children. This is paired with Article 14 to ensure that the so formed provisos are not irrational or non-arbitrary. Lastly, the state is not barred from making special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 15(4) makes particular plans for the progression of socially and educationally weak sections or for the Scheduled Castes or Scheduled Tribes and such an arrangement can't be tested on the ground of it being biased.

This proviso was embedded in the Constitution because of the First Amendment Act of the Constitution in 1951. This alteration itself was the consequence of judgments of courts which were looked to be invalidated in their belongings. Along these lines, it was acutely felt that except if the State holds some extraordinary ability to improve the part of the oppressed masses of India, it can't bear this exceptional duty productively.

Provision (4), hence, tries to align Articles 15 and 29 with Articles 16 (4), 46 and 340 to make it established for the State to save seats in the instructive organizations for the individuals from in reverse classes, Scheduled Castes and Scheduled Tribes. Despite the fact that few arrangements of the Constitution have given insurance just as a booking for the discouraged classes in the governing bodies and administrations, it has been a troublesome issue to set out a specific model to decide the socially and instructively in reverse classes. It is on the grounds that socially in reverse gatherings are found as much as in the upper standings as in the lower ranks.[2]

Notwithstanding, every exceptional arrangement should be inside sensible cutoff points and not at the expense of the interests of the country in general. It is the obligation of the State to advance the instructive and financial interests of the more vulnerable segments of individuals and shield them from social treachery and all types of misuse. In the current day conditions, majority rule government can never succeed except if and until the vote based guideline of monetary uniformity is genuinely applied to the general public. All together for the advancement of human character, monetary fairness is a base whereupon an entire of the social construction is raised. Thus, the primary goal of a vote based society is to decrease the

[2] The Constitution of India, arts. 14, 15.

partition and divide between the rich and the poor.

Article 16

Article 16 provides equality of opportunity in matters of public employment. The state must treat everyone equally when it comes to employment. As the term ‘equal opportunities’ can have contrasting meanings, there is an elaborate interpretation of this article.

Article 16(1) states that all citizens have equal right to opportunity subject to public employment. Borrowing from the principle of treating equals equally from Article 14, the equality refers to members of the same class of workmen, not different ones. Article 16(2) proclaims that any form of discrimination done regarding employment on the previously mentions grounds (religion, race, etc.) is a fundamental rights violation. Article 16(3) allows the parliament to make law that requires the employees to hold residence within the state as a condition for recruitment.

Article 16(4) gives the state the power to reserve positions or recruitments in favour of backward class which may not be adequately represented within the positions offered by state. Provisions 4A and 4B deal with reservations in promotions and procedure regarding unfilled reserved vacancies respectively. Lastly, Article 16(5) states that the offices related to religious institutions shall only be reserved for candidates of that particular religion only.

Articles 17 is concerned with the abolishment of Untouchability. Finally, Article 18 states that no citizen shall be given a title, exception being a military or academic distinction.

Right to work

The interpretation of right to equality cannot be undermined, however, the right to work is an essential element of living a financially sufficient livelihood. It has not been acknowledged as a fundamental right. It can been found in the DPSPs of the constitution in Article 41 of the constitution. Unfortunately, the non-enforceable nature of Directive Principles of State Policies renders it unusable in the courtroom. Despite of the absence of an exact phrasing of the ‘right to work’ in the Constitution under the heading of Fundamental Rights, it got transformed into a ‘fundamental right’ through an interpretation originating from adjudication.[3]

[3] *Id.* at p. 2.

The wider understanding of Article 21 provided by the Supreme Court stemming from their decision in *Olga Tellis and Ors. v Bombay Municipal Corporation and Ors*[4], 'right to work' was perceived as a key right characteristic in the 'right to life'. It can be traced back to a writ petition filed under Article 32 against the Maharashtra State government and Bombay Municipal government (BMC) for their act of demolition of dwellings and slum situated on the pavements. The petitioner argued that the destruction lead to voiding the right to livelihood. The court observed that the people living in slums and dwellings on the pavements did so out of economic compulsion, their only chance at survival was living in meagre conditions inside the city so they can have better access and shorter commute their places of work.

Expressly clarifying the topic of the 'right to livelihood' as raised by the applicants of the case, the court had remarked that to continue living a meaningful and financially fulfilling life, a person ought to have a path for gaining employment, they must have a livelihood to fall back onto. If the right to employment was not added as a part of right to life, its absence would be a grave mistake. Depriving a person of their right to livelihood endangers their right to life as well.

The Court held that the means of life, which makes contribute to the existence of a conceivable living experience, should be considered to be a crucial privilege necessary for living. Incase a person is deferred from his right to work, he will be thus restrained from his right to life, this is because as revered under Article 21, right to life is implied to be more than animalistic existence.

'Right to work' was perceived in consideration of the complementary quality of the Fundamental rights and DPSP as for one another. Right to life should incorporate the entitlement to work as clarified above by the Supreme Court. The DPSP, accommodates the state's obligation to guarantee that all individuals have means to satisfactory methods for occupation. Keeping the non-enforceable nature of the DPSPs in consideration, the Court had held that DPSPs align with the goals of the government and subsequently potential advances ought to be taken for its progress.

Henceforth, 'right to work' is a result of an amicable understanding of the fundamental rights and directive principles of state policy.

[4] AIR 1986 SC 18.

It must be recognised that the government cannot be strong-armed into fulfilling the demand for jobs or work to the individuals via affirmative action. To put it another way, no individual can file a suit against the State for not giving him a paying employment. Yet, on the off chance that a person is held back from his right to livelihood for reasons unlisted by the provisions, the person can challenge the offense under the right to life as presented in Article 21. The milestone judgment of the Supreme Court in the Olga Tellis case in this way acknowledged that the right as being inalienable in Article 21. In spite of the fact that ‘right of work’ is certainly not unequivocally referenced in Part III of the Constitution of India, it is currently perused alongside the 'right to life' under Article 21.

The Olga Tellis judgement was invoked in State of Uttar Pradesh v. Charan Singh[5], the latter involved a case wherein the respondent was terminated from his position of permanent employment. The industrial tribunal had ordered for the reinstatement of the respondent, after which the case was appealed in higher courts; inadvertently the case was in court for four decades. Reviewing the case, the apex court reckoned that the case had been going on for an unreasonably long time. The court held that taking away an individual’s source of employment for such extra ordinate amounts of time was unreasonable. It recalled the Olga Tellis judgement to reiterate that right to work is absolutely fundamental, and held the state liable for employment deprivation of the respondent.

Labour and employment laws

A year ago (2020), the legislature joined 25 labour law acts into three codes, i.e., the Social Security Code, Industrial Relations Code and the Occupational Safety, Health and Working Conditions Code. Also, the Wages Code (2019) coalesced four pertinent work laws.

The latest codes should be viable from 01 April 2021. But, in consideration of the ascent in COVID-19 cases and the possible effect of the regulations on per worker costs for undertakings; the execution of new codes has been deferred to a future date. The rules are yet to be notified by the state and centre. The new legitimate arrangements will be viable once notified. Let’s look at the provisions that are currently in effect.

[5] AIR 1967 SC 520.

Equal Pay

Equivalent Remuneration Act, 1976 has the requirement that the employers have to pay equivalent compensation to labourers for same work or work of a comparable sort with no segregation based on sex. They are, therefore, required to compensate their workers for their work at rates that are not lower than the ones offered to the workers of the opposite sex for identical or similar work. The Act constraints are framed so that the rate of payable wages will not be reduced to comply with the equal remuneration laws.[6]

The Wage Code additionally forbids differential treatment based on gender regarding issue of wages and enlistment of workmen for a similar work or work of comparable nature. Work of comparative nature is characterized as work for which the ability, exertion, experience, and duty required are basically the same. Businesses are disallowed from lessening the wages of a labourer on the ground of sex or biased recruitment besides in situations where employing women is limited or restricted under the law.

Non-discrimination

The Indian Constitution ensures fairness and disallows segregation on grounds of religion, race, caste, and sex, place of birth or residence. The Constitution ensures equal opportunities for all residents in issue identifying with work or arrangement to any office under the State. No resident can, on grounds just of religion, race, rank, sex, drop, spot of birth, home or any of them, be considered unqualified for any form of employment or position.

The Equivalent Compensation Act additionally precludes separation in recruiting, payment and work for men and women employed as workers engaged in work that is same or similar in nature (unless the contrasting handling of workers is commanded or allowed by law).

Equal Choice of Profession

As per the Constitution, each resident has the privilege to practice any calling, or to continue any occupation, exchange or business subject to sensible limitations forced under the law.

Females in India can't work in similar enterprises as men. As per the Factories Act 1948, ladies can't be utilized in any piece of a factory for squeezing cotton in which a cotton-opener is grinding away. The Act further expresses that the everyday work hour exception can't be

[6] Equal Remuneration Act, 1976 (Act 25 of 1976) s. 4.

conceded for female laborers and night work is likewise disallowed to them. In addition the Act precludes work of ladies in “hazardous” occupations.[7]

In Uttarakhand, through a notice dated 14.11.16, arrangements for female labourers to work between the long periods of 07.00 PM to 10.00 PM and 05.00 Am to 08.00 AM have been made. This involves the accompanying:

- They can’t work somewhere in the range of 10pm and 5am.
- They cannot work over 9 hours per day.
- The factory supervisor will organize and pay for the movement of the woman employee at these odd hours.
- The lady can’t be eliminated from business in the event that she will not work during the evening.
- A food service should be accommodated night dinners.
- Prior to requiring ladies labourers to work these movements. The area’s factory monitor should be educated and should be given at any rate 7 days to confirm.
- The offspring of these women laborers should be given childcare administrations.
- Satisfactory security should be accommodated them.

Conclusion

The principle of right to equality may not explicitly include the right to work in the fundamental rights, but it is read to be a part of article 21 (right to life) as per judicial interpretation. Individuals venture out to seek employment it is the responsibility of the government to ensure that the rights are protected. There are several acts in legislation that create near rules and terms of employment and working conditions in the country. The terms of employment and working conditions of the Indian labour market were rather tumultuous. The introduction of labour laws brought structure and uniformity to the Indian labour market, hereby mitigating the industrial conflicts. The codification of laws allows for clear delineation of conditions related to employment, as they are based on standing orders which are issued and aptly authenticated.

[7] The Factories Act, 1948 (Act 63 of 1948) ss. 27, 66, 87.

Commercialization of Human Body and Bodily Materials*

Abstract

This article considers some of the ethical and legal issues relating to the ownership and use – including for commercial purposes – of biological material and products derived from humans. The discussion is divided into three parts: after first examining the general notion of ownership, it moves to the particular case of possible commercial use, and finally reflects on the case in point in the light of the preceding considerations. Units of cord blood donated altruistically for transplantation and which are found unsuitable for storage and transplantation, or which become unsuitable while stored in bio banks, are taken as an example. These cord-blood units can be discarded together with other biological waste, or they can be used for research or the development of blood-derived products such as platelet gel. Several ethical questions (eg, informed consent, property, distribution of profits, and others) arise from these circumstances. In this regard, some criteria and limits to use are proposed.

Keywords: bioethics, biological specimen banks, cord-blood stem cell transplantation, ethics, informed consent, legislation

***Vikas Khokhar**

Introduction

The management of biological material (cells and tissues) requires a number of considerations, including technical–scientific, organizational, ethical, and legal.[1]

Biological samples are collected and stored for widely differing purposes:[2],[3] diagnosis or treatment of the person from whom they are collected (eg, clinical treatment), altruistic donation for therapeutic purposes (eg, blood donation), and donation for purposes of research. The boundaries between purposes may blur, as will be explained below; changing circumstances may lead to samples collected and stored for one purpose being subsequently used for others.[4]

Biological materials may vary according to the purpose for which they are collected. For example, a biological sample collected for therapeutic reasons, such as a biopsy, is very different from those referred to as surgical leftovers. The fate of biological samples will also vary according to the indications specified in the written information given by the physician/researcher to the individual concerned and for which informed consent is given. Additional differences will depend on the various statutory arrangements of different nations. For example, there are wide variations between states in the ways in which “donations” are considered.

It is thus clear that general guidelines valid for every situation are not feasible. Some generic criteria are certainly valid as a general rule (eg, consent based on adequate information), but other, more specific considerations should be applied on a case-by-case basis.

One example of how different considerations overlap is that of cord blood, a source of stem cells[5],[6] which is donated for altruistic purposes to the public bio bank network for

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[1] Nuffield Council on Bioethics. *Human Bodies: Donation for Medicine and Research.* London: Nuffield Council on Bioethics; 2011. [Accessed June 1, 2012].

[2] Elger BS, Biller-Andorno N, Mauron A, Capron AM, editors. *Ethical Issues in Governing Biobanks Global Perspectives.* Aldershot: Ashgate Publishing; 2008.

[3] National Bioethics Advisory Commission (NBAC) *Research Involving Human Biological Materials: Ethical Issues and Policy Guidance.* Springfield, VA: NBAC; 1999.

[4] Warwick RM, Fehily D, Brubaker SA, Eastlund T, editors. *Tissue and Cell Donation An Essential Guide.* Chichester: Wiley-Blackwell; 2009

[5] Wyrsch A, dalle Carbonare V, Jansen W, et al. Umbilical cord blood from preterm human fetuses is rich in committed and primitive hematopoietic progenitors with high proliferative and self-renewal capacity. *Exp Hematol*

transplantation[7] and may subsequently be found to be unsuitable for this purpose or become unsuitable after a period of storage. Roughly 90% of donated cord-blood units are not suitable for use in transplants.

There are several specific circumstances that dictate the need for cord blood to be treated separately rather than as just another biological sample stored in a biobank, including that:

- cord blood is donated for altruistic purposes to be transplanted into persons suffering from diseases that can be cured through a transplant of cord-blood stem cells;
- the purpose for which the blood was donated may be found (on first testing) to be, or may later become, impossible to achieve;
- informed consent is given not by the individual from whom the sample was taken, but by another person exercising parental authority (the problems of "parental authority" and of "child assent" recur frequently in the debate on pediatric treatment and research); and
- If the unit of blood is initially found to be suitable for transplantation, it enters the national and international networks organized to source and use blood for transplants.

Cord blood that is not suitable for transplantation can be discarded as waste, used for research, or used for the development of blood-derived medicines. It may be necessary to discard blood units for a number of reasons, such as infection, contamination, or deterioration. If disposal is not necessary for a particular reason, discarding it as refuse is a waste of potentially useful biological material.[8] The possibility of using cord blood for research must be clearly included in the information given prior to obtaining consent. The issue of using biological samples stored in

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[6] Kinzfogl JM, Broxmeyer HL. Brief historical overview of hematology, cord blood, and links between the nervous and hematopoietic systems. In: Broxmeyer HE, editor. *Cord Blood. Biology, Transplantation, Banking and Regulation.* Bethesda, MD: AABB Press; 2011. pp. 1–6. (Advancing Transfusion and Cellular Therapies Worldwide)

[7] Gluckman E, Ruggeri A, Volt F, Cunha R, Boudjedir K, Rocha V. Milestones in umbilical cord blood transplantation. *Br J Haematol.* 2011;**154**(4):441–447. [PubMed]

[8] Regan DM. Cord blood banking: the development and application of cord blood banking processes, standards and regulations. In: Broxmeyer HE, editor. *Cord Blood. Biology, Transplantation, Banking and Regulation.* Bethesda, MD: AABB Press; 2011. pp. 633–645.

biobanks for research purposes has been amply addressed in the literature[9] and will not be considered in this article.

The possible use of discarded blood units to prepare blood-derived products raises several ethical issues, the main issues being informed consent, ownership, patents, and distribution of profits. Most of these ethical dilemmas derive from the controversial situation that arises when human biological material that has been donated for altruistic purposes is used to develop products that can potentially be exploited commercially. The situation thus created is ethically debatable, though it should not be immediately branded unacceptable. The possibility of using such material commercially should be explicitly disclosed during the informed-consent procedure and the donor should have the choice of refusing consent; any units unsuitable for transplantation could accordingly either be discarded or, if consent has been specifically given, used for research. A possible strategy to help avoid the ethically problematic passage from an altruistic donation to the possibly of for-profit use of donated material could be to allow the development of blood- derived products but limit their use to nonprofit therapeutic purposes. The products could, for example, be used for therapeutic purposes within a national health service or within the health care structure in which the blood was originally collected and donated.

The principal elements that should be indicated in consent forms[10] are included in guidelines published by authoritative organizations, and a proposed model for a consent form is available in the literature.[11]

At present, as we have seen, only a small number of cord-blood units are suitable for storage and use in transplants; the possibility of not wasting this precious biological resource is a valid opportunity for making the most of the altruistic gesture of donation.[12] Blood that is not suitable for transplantation can be processed to give blood components, particularly platelet gel.[13] This

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[9] Bordet S, Minh NT, Knoppers B, Isasi R. Use of umbilical cord blood for stem cell research. *J Obstet Gynaecol Ca.* 2010;**32**(1):58–61.

[10] NetCord Foundation, for the Accreditation of Cell Therapy (FACT) *Net- Cord-FACT International Standards for Cord Blood Collection, Banking and Release for Administration.* 4th ed. Jan, 2010. [Accessed June 1, 2012].

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[12] Annas GJ. Waste and longing – the legal status of placental-blood banking. *New Engl J Med.* 1999;**340**(19):1521–1524.

[13] Parazzi V, Lazzari L, Rebulla P. Platelet gel from cord blood: a novel tool for tissue engineering. *Platelets.* 2010;**21**(7):549–554.

blood product may be of either autologous or allogeneic origin; obtained by aggregating concentrated platelets with calcium and biological or pharmacological proaggregation factors (such as thrombin), this product can be applied topically. This method of using the gel is facilitated by the plasticity and ease of molding it at the site of application, where it encourages and accelerates the repair of both cutaneous and bone tissues.[14] The gel is used most frequently in maxillofacial surgery, orthopedic and plastic surgeries, and in the treatment of some forms of cutaneous ulcers. Because of its reparative properties,[15] the potential uses of platelet gel have expanded steadily into different fields of medicine.

More recently, this concentration of platelets has also been used in aesthetic medicine and surgery, for tissue reconstruction and to cure thinning hair, as well as for biorevitalization and skin rejuvenation. However, scientific studies on the use of platelet gel in aesthetic medicine have not been performed according to the rigorous procedures (involving criteria generally used to assess clinical studies and experiments) required to demonstrate the clinical efficacy of these treatments. Specifically, there is still no definite agreement regarding the characteristics or standards of the product, the method of application, or the frequency and seriousness of side-effects and adverse events.

The following paragraphs examine the legitimacy, in ethical and legal terms, of patenting and exploiting for commercial purposes products derived from units of cord blood that are donated and subsequently discarded. The analysis is divided into three parts: general comments on the ownership of the body and its parts, analysis of patentability, and, finally, an evaluation of special peculiarities.

Ownership of the body and its parts

The question of the ownership of the body is a very complex one, both in ethical and legal terms. Although there is now nearly worldwide recognition that no person can own another person, as this would constitute slavery and violate Article 4 of the Universal Declaration of Human Rights,

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[14] Everts PA, Knape JT, Weibrich G, et al. Platelet-rich plasma and platelet gel: a review. *J Extra Corpor Technol*. 2006;**38**(2):174–187.

[15] Greppi N, Mazzucco L, Galetti G, et al. Treatment of recalcitrant ulcers with allogeneic platelet gel from pooled platelets in aged hypomobile patients. *Biologicals.* 2011;**39**(2):73–80.

this fundamental right is not always guaranteed in practice; the exploitation of child labor is but one grim example.

The question of a person's ownership of his or her own body is more complicated and has generated an ample output of literature, including from the philosopher John Locke, according to whom, "every man has a property in his own person." Other philosophers have proposed a different angle, which Stephen Munzer summed up in the phrase "persons do not own their own bodies but [...] they do have limited property rights in them."[16]

In the case of a person's dead body, or of parts of it that have been removed and treated or processed in some way, the scenario is very different. Aside from the philosophical angle, the legal aspect is clearly important. The principle that a deceased human body cannot legally be owned has been in existence for centuries. A 1614 ruling (Haynes' case),[17] which held that "there can be no property in a corpse," provided the basis of a notion of ownership (or lack thereof) of a corpse that remained unaltered in Common Law until 1908.

In 1908, the case of Doodeward v Spence was heard in the High Court of Australia.[18] Doodeward had purchased the preserved corpse of a two-headed fetus with the intention of exhibiting it publicly. The local police seized it, whereupon Doodeward appealed and demanded its return. In the resulting legal dispute, the prosecution argued that, because there is no right of ownership in corpses, Doodeward had no legal right to possess one. The Court ruled that the body should be returned to Doodeward because it had undergone "the lawful exercise of work or skill so [...] that it has acquired some attributes differentiating it from a mere corpse awaiting burial." In other words, since the body had been preserved in a bottle "with spirit," it should no longer be considered a nonentity and was therefore legally protected.

The issue was addressed again in English jurisprudence in 1998 in relation to a theft at the Royal College of Surgeons. With the help of an employee of the College, the artist Anthony-Noel Kelly had stolen some body parts preserved there. The parts were used as molds for sculptures, which were later exhibited in a London art gallery. In order for Kelly to be accused of theft, it was necessary to recognize that body parts could be owned; this was achieved by applying the same

[16] Munzer S. *A Theory of Property.* New York: Cambridge University Press; 1990. p. 41. [Google Scholar]
[17] Haynes' case (1614) 12 Co Rep 113 77ER.
[18] *Doodeward v Spence,* 6 CLR 406 (1908).

exception already established in the Doodeward case. Because the parts had been the object of "skilled work" of a previous generation of surgeons, they could be considered the property of the Royal College of Surgeons. Passing sentence, Mr Justice Rose stated:

We return to the first question, that is to say whether or not a corpse or part of a corpse is property. We accept that, however questionable the historical origins of the principle, it has now been the common law for 150 years at least that neither a corpse, nor parts of a corpse, are in themselves and without more capable of being property protected by rights.[19]

Kelly had to serve 9 months in prison.

Application of the notion of "skill" as an exception to the traditional Common Law approach was taken up again in 2004 by the English High Court in the case of AB and Others v Leeds Teaching Hospital NHS Trust, concerning the preservation of organs. The sentence delivered by Mr Justice Gage stated:

In my judgement the principle that part of a body may acquire the character of property which can be the subject of rights of possession and ownership is now part of our law. In particular, in my opinion, Kelly's case establishes the exception to the rule that there is no property in a corpse where part of the body has been the subject of the application of skill such as dissection or preservation techniques. The evidence in the lead cases shows that to dissect and fix an organ from a child's body requires work and a great deal of skill, the more so in the case of a very small baby [...]. The subsequent production of blocks and slides is also a skilful operation requiring work and expertise of trained scientists.

These cases help us to understand the current legal perspective regarding the legitimate removal of cells, tissues, and organs. It is generally recognized that once the biological material has been removed from the donor, the recipient acquires the right to possession and use, regardless of whether he or she is also the owner. In the event the recipient has also processed the material in some way, he or she acquires an additional series of rights, including, at least in some cases, a right of ownership.

[19] *R v Kelly & Lindsay,* Q.B. 621 (1999).

The ethical implications of property rights in blood and other parts of the human body are discussed elsewhere.

Possible Commercial use- General Aspects

The regulatory aspects regarding authorizations for the processing and distribution of blood- and plasma-derived products are highly complex and lie outside the scope of this article. One of the reasons for their complexity is the fact that these products are often governed both by regulations regarding blood and blood products and by regulations relating to pharmaceutical products, two very different fields from the legislative point of view.[20] The issues become even more complicated if an international dimension is involved; legislation concerning the donation of biological material and possible remuneration for donors may vary widely in different nations.

Given this situation, the following reflections on the ethical implications relating, in particular, to informed consent and the rights of donors leave aside the regulatory aspects relating to authorizations.

The principle that the human body and its parts cannot, as such, be an object of commercialization or a source of profit is enshrined in numerous authoritative documents. One of the most important is the Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, which is a cornerstone of bioethics and biorights. Article 21 of the Convention, headed "Prohibition of financial gain," states: "The human body and its parts shall not, as such, give rise to financial gain." Article 22, under the heading "Disposal of a removed part of the human body," dictates that:

When in the course of an intervention any part of a human body is removed, it may be stored and used for a purpose other than that for which it was removed, only if this is done in conformity with appropriate information and consent procedures.

[20] Valverde JL. The political dimension of blood and plasma derivatives. *Pharmaceutical Policy and Law.* 2005;**7**:21–33.

The Explanatory Report to the Convention clarifies the meaning of “body parts,” which includes “organs and tissues proper, including blood,” but excludes “hair and nails, which are discarded tissues, and the sale of which is not an affront to human dignity.” Blood is thus explicitly included in Articles 21 and 22. This is consistent with, among others, European Directive 2004/23/EC, which uses the term “donor” to designate “every human source, whether living or deceased, of human cells or tissues.”

Other important documents also reaffirm that the human body and its parts, including blood, should not give rise to financial gain; some declarations by the United Nations Educational, Scientific and Cultural Organization, particularly the Universal Declaration on the Human Genome and Human Rights, the International Declaration on Human Genetic Data and the Universal Declaration on Bioethics and Human Rights,[21] repeat the principle of non-commercialization and the prohibition of the use of the human body for profit. For example, Article 4 of the Universal Declaration on the Human Genome and Human Rights states that “The human genome in its natural state shall not give rise to financial gains.”

Among the documents that refer explicitly to cord blood, the principle of non-commercialization recurs, for example, in “Opinion 19 – Ethical aspects of umbilical cord blood banking,” published on March 16, 2004 by the European Group on Ethics in Science and New Technologies (established by the European Commission): “There are several fundamental ethical principles and values which can be considered relevant for the opinion: The principle of respect for human dignity and integrity, which asserts the principle of non-commercialisation of the human body [...].” In fact, the issue of commercialization and financial gain in this document is concerned less with the production of blood products or other patentable products than with the comparison between storage in public biobanks for altruistic purposes and private storage in commercial biobanks.

With regard to possible financial gain, the regulations governing the patentability of biological samples have also to be considered.

[21] United Nations Educational, Scientific and Cultural Organization (UNESCO) *Universal Declaration on Bioethics and Human Rights.* Paris, France: UNESCO; 2005.

A patent is a form of intellectual property in an invention, giving the holder exclusive title to use it. This exclusive right is limited in scope, duration, and geographical area of validity. Any type of invention that satisfies the requisites of novelty and originality and that can be applied industrially can be patented.

For the European Union, the key reference document for the biotechnology sector is Directive 98/44.[22] According to European Union legislation, the following are patentable, provided they satisfy the requisites of novelty and originality and are susceptible to industrial application: biological material which is isolated from its natural environment or produced by means of a technical process, even if it previously occurred in nature; any technical process by means of which biological material is produced, processed, or used, even if it previously occurred in nature; any new application of biological material or of a process already patented; and inventions relating to an element isolated from the human body or otherwise produced by means of a technical process, even if its structure is identical to that of a natural element, provided that its function and industrial use are disclosed in the patent application.

All commercial rights or patents apply to the results of research and not to the samples collected, for which no rights of ownership are typically legally recognized. The key rights and duties of the promoter of the research, the researcher, and the individual from whom the biological material was taken must be disclosed prior to consent.

It is not within the scope of the present article to examine the ethical issues relating to the possible patenting of human biological materials and derivatives, on which there is in an ample body of literature. The comprehensive report by the Nuffield Council entitled The Ethics of Patenting DNA contains useful comments regarding not only DNA, but also other types of biological material, such as blood.

Three significant examples

Legal disputes regarding the commercial use of biological material or its derivatives are widely discussed in specialist literature. The three well-publicized cases described briefly below concern

[22] European Parliament, Council of the European Union. Directive 98/44/EC of the European Parliament and of the Council of July 6, 1998 on the legal protection of biotechnological inventions. *Official Journal of the European Communities.* 1998;**L213**:13–21. [Google Scholar]

different circumstances from those that are of interest here, but nonetheless provide useful considerations for the case in point.

Moore v the University of California

This case concerned John Moore, who in 1976 underwent a splenectomy at the University of California Los Angeles (UCLA) Medical Center. Between 1976 and 1983, John Golde, the medical supervisor of Moore's case, in agreement with a researcher, Shirley Quann, asked Moore repeatedly to return to UCLA for blood tests. On April 11, 1983, Golde asked Moore to sign an informed consent form authorizing Golde to carry out research on blood samples. Golde and Quann used the biological material taken from Moore, which was "of great value in a number of commercial and scientific efforts," but failed to inform Moore.[23] Golde and Quann developed a cell line from Moore's T-lymphocytes and patented this cell line (registration number 4,438,032). Between 1984 and 1990, the patent earned more than three billion dollars. When Moore learned of this, he sued Golde, UCLA, and two biotechnology companies, claiming the right to share in the proceeds obtained from the biological material taken from him. The judges of the Supreme Court of California were divided, but they rejected Moore's claim for three main reasons: the lack of precedents to support Moore's claims; California legislation on the disposal of human tissues; and the fact that the patented cells were different from those taken from Moore and could therefore no longer be considered as his property.

Greenberg v Miami Children's Hospital (MCH) Research Institute

This case was initiated by Daniel Greenberg, who had approached the physician and researcher Rueben Matalon, who was seeking to identify the genes associated with Canavan disease in order to develop a prenatal test. Matalon collected biological material (blood, urine, and tissue samples) donated by Greenberg and other donors. The result was the development of a prenatal diagnostic test, thanks in part to support from several nonprofit organizations. In subsequent research, supported by MCH, Matalon isolated and cloned the gene associated with Canavan disease. MCH obtained a patent for the gene and related applications, including a prenatal

[23] Hakimian R, Korn D. Ownership and use of tissue specimens for research. *JAMA.* 2004;**292**(20):2500–2505.

diagnostic test. The annual royalties from the patent amounted to approximately $350,000. In 2002, Greenberg and other donors filed a suit against Matalon and MCH, claiming that the donors had not been informed of the developments, as it was their right to be, and that had they known of Matalon's intention of exploiting the genetic material and the test developed from it commercially, they would not have donated their biological material. The Court acknowledged that the physician/researcher always has a duty to provide information and to ask for consent, but held that this duty does not extend to economic interests. In a note to the sentence, the Court noted that the Code of Medical Ethics of the American Medical Association requires that the physician/researcher should declare his or her economic interests, but that this did not apply in the case in question as the Code had been adopted after the research had begun. The Court argued that the duty to obtain informed consent, if conceived in line with the plaintiffs' interpretation, would have pernicious effects on scientific research and that "it would give each donor complete control over how medical research is used and who benefits from that research." To impose such a duty retroactively would "chill medical research," as it would force researchers constantly to evaluate whether a "disclosable event" had occurred. The Court further found, as in the Moore case, that a research product developed from human tissue is factually and legally distinct from the original tissue and as such becomes the property of the researcher, while the donor retains no rights.

Washington University v Catalona

William Catalona, a well-known surgeon and researcher, habitually asked his patients for consent to use tissues and other biological material removed during prostate surgery for research. The patients signed one of several consent forms, in which they declared, among other things, that they were aware of making a "free and generous gift" to research that might benefit society and that they waived all rights in the biological material donated and in any product obtained through research on that material,[24] (as provided in the Uniform Anatomical Gift Act). The biological bank of Washington University (WU) collected biological samples from approximately 30,000 patients, about 3000 of whom were patients of Catalona. The dispute arose when Catalona transferred a large number of the samples to a private laboratory. The University

[24] Andrews L. Who owns your body? A patient's perspective on Washington University v. Catalona. *J Law Med Ethics.* 2006;**34**(2):398–407.

objected on the grounds that he had taken material of a value of approximately $100,000, including about 3500 samples of tissue, 100,000 of blood, and 4000 of DNA. Because of the dispute, Catalona decided to leave WU and accept a position at the Northwestern School of Medicine. He informed his patients of his decision and asked for their authorization to transfer their biological samples to Northwestern. A large portion of the patients consented, but WU refused to authorize the transfer and sued Catalona, claiming ownership of the samples. Numerous patients were involved in the lawsuit and declared themselves in favor of the transfer to Northwestern School of Medicine so that Catalona could continue his research on prostate cancer. They further declared that they had consulted Catalona for medical reasons and had not gone to WU in order for the university to make a profit. They also claimed to retain rights of ownership in the samples.

The Eighth Circuit Court of Appeals held that the patients had donated the biological material for research and no longer retained either property rights in it or the right to authorize its transfer. They had, according to the sentence, donated the material to WU.[25] This sentence, like the two described above, thus held that the donor loses the rights to ownership and control of the use of biological material as soon as the material is donated for research purposes.[26]

It would seem from these three cases that case law is generally oriented towards recognizing that:

- donors of biological material have a right to be informed of its possible uses and, in particular, of potential commercial spin-offs;
- the right to control the biological material taken from a donor ceases at the moment of donation;
- donors cannot claim rights of “ownership” in biological material; and
- The recipient has the right to commercial exploitation of any products developed from the processing of biological material received, in accordance with current legislation.

The need for guidelines

[25] *Washington University v Catalona*, 490 F.3d 667 (8th Cir 2007), cert. Denied, 128 S. Ct. 1122. 2008

[26] Piccolo KM. In the wake of Catalona: an alternative model to safeguard research participants’ interests in their biological materials. *Univ Pitts Law Rev.* 2008;**69**:769–788.

Documents that address general ethical issues often provide useful suggestions to deal not only with general problems, but also with more specific situations on a case-by-case basis. However, in order to address specific circumstances, it is important to be able to refer to general operational guidelines.

With regard to cord blood, standards set by accreditation authorities are an essential point of reference for those involved in the collection, storage and use of blood units. The guidelines provide useful indications for the management of discarded units but do not address the matter of their possible use to develop blood-derived products or their possible commercialization (see, for example, paragraph “D9 disposal” of the NetCord guidelines21 on the subject of discarded cord blood units).

With regard to patentability and relevant operational criteria in particularly complex cases such as in the case of cord blood, in which biological material is used to develop products that can potentially be exploited commercially, it is important that even when a patent is granted, detailed information on the limits to possible uses should be indicated. This is recommended, for example, by the Organisation for Economic Co-operation and Development (OECD), which provides that “license agreements should define the roles and responsibilities of the parties in the commercialization, if any, of the products and services arising from the use of the licensed genetic invention” (paragraph 1.8).[27] Although the guidelines refer to genetic material, the general principle is certainly applicable to other types of biological samples.

Proposed criteria for the case in point

With reference to yet another authoritative document, it may be helpful to examine paragraph

2.8 (“Commercial use of human tissue”) of the Code of Medical Ethics published by the American Medical Association (Council on Ethical and Judicial Affairs) already referred to,59 which states:

[27] Organisation for Economic Co-operation and Development (OECD) *Guidelines for the Licensing of Genetic Inventions*. 2006.

Physicians contemplating the commercial use of human tissue should abide by the following guidelines:

- Informed consent must be obtained from patients for the use of organs or tissues in clinical research.
- Potential commercial applications must be disclosed to the patient before a profit is realized on products developed from biological materials.
- Human tissue and its products may not be used for commercial purposes without the informed consent of the patient who provided the original cellular material.
- Profits from the commercial use of human tissue and its products may be shared with patients, in accordance with lawful contractual agreements.
- The diagnostic and therapeutic alternatives offered to patients by their physicians should conform to standards of good medical practice and should not be influenced in any way by the commercial potential of the patient's tissue.

The paragraph entitled "Ethical considerations" of the report Who Should Profit from the Economic Value of Human Tissue? An Ethical Analysis[28] refers mainly to the use of tissues for research purposes rather than to donations given for transplant purposes and subsequently found unsuitable. Some of the comments in the report could nonetheless be applied to cord blood, such as:

Typically, patients who consent to the use of their tissue for biomedical research do so with the expectation that the donated tissue will be used to further scientific knowledge and to enhance the health and well-being of other patients. The tissue is given by the patient as a gift, on the assumption that it will be used in good faith for the medical benefit of others. Patients' perceptions of such donations might be very different if it is known that commercial profits are a potential objective of the research to be conducted. Patients, therefore, cannot provide fully informed consent to the use of their organs or tissues in clinical research unless potential commercial applications of the tissue and its products are disclosed. Disclosure of potential commercial applications is further indicated because of the conflict of interest created by the physician's economic interest in the value of extracted tissue [...]. Patients may fear, for

[28] American Medical Association (Council on Ethical and Judicial Affairs) *Who Should Profit From the Economic Value of Human Tissue? An Ethical Analysis.* Chicago: American Medical Association; 1990.

example, that their physician's economic interests will influence the type of care they receive or ultimately result in their exploitation [...]. With respect to the equitable distribution of profits derived from human tissue, patients must be permitted to decline commercial use of products developed from their cellular material, as an exercise of control over the terms and conditions of their participation in clinical research. Alternatively, patients may choose to share in the profits from commercial ventures that utilize their tissue or its products by entering into contractual agreements with physician researchers. For example, physicians may offer patients a small percentage of any profits that are realized on products derived from the patient's cells. Although the recommendations of the American Medical Association do not refer explicitly to cord blood, they are a helpful reference for the case in point, particularly where patients' rights and informed consent are concerned. In the case of cord blood, for example, some donors may be prepared to give their consent for potential commercial exploitation, but with certain limitations, such as for exclusively therapeutic purposes, but excluding cosmetic uses.

The ethical problems raised are similar to those associated with another issue that is currently highly debated in specialist literature, by those responsible for healthcare policies, and by public opinion, which is the possibility of compensating so-called donors.[29] The expression "remunerated donation" is widely used, despite being an obvious example of oxymoron. There is also the problem that the legal framework concerning human biological material is still ill-defined in many nations and must be consolidated.

In light of the above, it would seem appropriate, from the ethical perspective, to recall a crucial aspect regarding possible commercial spin-offs arising from units of cord blood donated for transplantation purposes and subsequently discarded; the biological material is donated, without compensation, for altruistic purposes, such as for transplantation in persons affected by pathologies that can be cured through the use of hematopoietic stem cells, and any conversion of an altruistic donation into material for commercial use is likely to generate concern. In other words, the fact that the procedure whereby the products are developed from cord blood (particularly platelet gel) may have been patented would seem perfectly legitimate. Nonetheless, the possible exploitation for financial gain of blood donated for altruistic purposes for which

[29] WHO Expert Group. Expert Consensus statement on achieving self-sufficiency in safe blood and blood products based on voluntary non-remunerated blood donations (VNRBD) *Vox Sang.* 2012 Epub June 13, 2012.

consent is not given directly by the person from whom the blood is taken but by another person exercising parental authority may give rise to controversy. Use of the products thus derived could perhaps be restricted to the health care facilities in which the blood units were collected, and their commercialization excluded. This strategy could offer, in both ethical and regulatory terms, a means of reconciling the different concerns raised by the development of potentially commercial blood-derived products from material donated altruistically for therapeutic purposes. The informed consent forms would naturally provide all requisite information and offer both the option of refusing consent to any use that may lead to the development of medicines or blood-derived products and the option to set certain restrictions.

COMPETITION COMMISSION NIPS LITIGATION AT THE BUD – DISMISSES CASE AGAINST OLA AND UBER*

ABSTRACT

This paper analyses four different information registered by the Meru Travel Solutions Pvt. Ltd. (MTSPL) against Uber Technologies International Inc., Uber India Systems Pvt. Ltd., Uber Technologies International Inc., and ANI Technologies Pvt. Ltd. (Ola) to the Competition Commission of India. The information was filed against the alleged contravention of section 3&4 of the competition act, 2002 by these companies in different cities namely, Hyderabad, Mumbai, Chennai and Kolkata in India. The paper deals with the issues raised by the informant about the anti-competitive environment made by ola and Uber enterprises through the lucrative incentives that are provided to their drivers who are alleged to be locked in in their agreements, setting predatory prices through their deep pockets acquired by funding. It tries to elucidate all the antitrust issues such as predatory pricing, dominance in market that are prevalent in the market and are claimed in this case. It gives an insight in the decision of the Competition Commission of India while taking in view all the precedents and prior cases with similar facts. It explains the decision of the commission in view of all the laws relating to the information alleged by the informant in the Competition Act, 2002. It further derives a conclusion of whether or not the decision of the commission was in accordance to the precedents that has been established by the other higher judiciaries and larger benches of the courts. It also lays emphasis of the difference in approach of the industries in the present times with the growth of E-Commerce and explains the growth over profit approach of the businesses.

Keywords: predatory prices, Ola, Uber, dominance, Competition

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BACKGROUND

The informant is a group holding company operating in the radio taxi service sector under the name of Meru Cab Company Pvt. Ltd. And V-Link Automotive Services Pvt. Ltd. Which are it's fully owned subsidiaries. The informant launched it's operations of the services in 2007 following which he started operating in several cities in India. (Placeholder1) The Informant claims that the OPs, with their vast wallets, have engaged into agreements with drivers and used enticing incentive models to lock the drivers into a single network, incentive model of delivering a fictitious reward for the drivers adding to inexpensive fares and discounts that are provided to the customers aims to achieve a large market share, therefore it repudiates market competition by putting up hurdles to access. The incentive policies are claimed to be devoid of any corroboration except to persuade driving partners to stay loyal to their company, this is a sound business justification. It is also claimed that the OPs were likely to afford such large amounts of money on attractive discounts and incentives as a result of the massive funding they received. The Informant has used data to suggest that OPs have on average spent 130 billion on the driver incentives. (Meru Travel Solutions Private Limited v. Uber India Systems Private Limited , 2017) Therefore, it was alleged by the Informant that such anti-competitive agreements are in contravention of the section 3(4) read with section 3(1) of the competition Act, 2002. The opposing parties were also accused of playing a dominant position in the market thus violating section 4 of the competition act, 2002. (M/s. Mega Cabs Pvt. Ltd. v. M/s ANI Technologies Pvt. Ltd., 2017)

PRICE FIXING

The informant had previously lodged an Information with the Commission stating that the online cab operators Ola and Uber were exploiting their algorithms to assist price fixing among drivers. the informant said that drivers colluded through companies, who allegedly employed algorithms to set prices that the drivers were obligated to accept. According to the source, Ola and Uber's algorithmic pricing completely removes personal freedom of the drivers to negotiate with the customers and tantamount to price fixing through a "hub and spoke" cartel-like system. (Sharma, 2020)

Uber is the hub, and the spokes, or drivers, have agreed to a vertical restraint by consenting to set rates. Here, the drivers are willingly signing into an arrangement with Uber, despite the fact that they are aware of the risks. Uber would get into a similar agreement with all of the other drivers. The any individual driver has no option rather than to accept Uber's terms,

which include price fixing, or he will be barred from the agreement. If the driver decides not to engage with any platform and goes on it alone, he will be directly penalised I n a shared economy, competing with a cartel which might result in significant losses. The action of drivers of the Taxi services is unlawful in and of itself since it is a horizontal agreement, as defined by Sec-3(3)(a) of the Competition Act of 2002, that has a significant adverse effect on competition. Section 3(3) (a) forbids any agreement between two or more individuals or groups to dictate the cost of a purchase or sale, either actively or passively. The manner in which drivers form an agreement with Uber to establish the sale price, despite the knowledge of the fact that Drivers who have already agreed to a similar arrangement help to determine the sale price indirectly. Under Section 3(3) of the Act, this cooperation is considered to have a significant detrimental effect on competition. (Basa, 2018)

DOMINANT POSITION

The Informant claimed that all earlier cases filed by any Radio Taxi companies were dismissed on the grounds that Ola and Uber pose a significant competition to each other. The CCI initially laid forth this complete chain of logic in the 2015 cases of Fast track v Ola and Meru v Ola. However, in order to come to the conclusion that Ola did not really have a dominating status in the market segment, the CCI looked into additional elements listed in Section 19 (4) of the Act. In each of the earlier cases, one of the significant variables that the CCI overlooked when searching for dominance was the financial strength and financial resources of the opposing parties. (Walia, 2020). Because the CCI did not find Ola or Uber—as the matter may be—to be dominant, bound by the provisions of Section 4 of the Act in any of the cases, the CCI was unable to determine whether the OPs' below-cost pricing practise constituted to predatory pricing or not. This means that if oppsing parties pricing conduct was unfair, it would be permitted to proceed unchecked, negating the point of an antitrust legislation. The CCI observed in the case of Fast Track and Meru v Ola:

The Commission does not fully disagree with the informants that the low prices of OP are not fully because of cost efficiency, but because of the funding it has received from the private equity funds.

However, because Ola wasn't really deemed to be dominating, the Provisions of the Act prohibited the CCI from investigating the validity of Ola's pricing policy from the start. The

Competition Appellate Tribunal (COMPAT) has overturned the CCI's prima facie order in Meru v Uber81 and directed a probe of Uber's suspected AoD. The COMPAT stated, among other things, that the CCI's only emphasis on market share criterion to evaluate Uber's domination was erroneous, because several other elements contained in Section 19 (4) of the Act, including an enterprise's financial strength, should also have been considered. The COMPAT held that:

though it cannot be said definitively that there is an abuse inherent in the business practices adopted by the respondents but the size of discounts and incentives show that there are either phenomenal efficiency improvements which are replacing existing business models with the new business models or there could be an anti-competitive stance to it.

The Supreme Court of India upheld the COMPAT's order by dismissing Uber's appeal. By defining the rule of reason methodology for determining whether a given below-the-cost pricing conduct is exploitative or not, predatory pricing might theoretically be forbidden by the Competition Law without having to type it into the AoD. As we can perceive in almost all of the previous cases pertaining to the radio taxi services market the CA 2002 had also permitted sustained below-cost pricing by keying predatory pricing to AoD and dominance being determined solely on the subjective satisfaction of the CCI.

The Informant has questioned this study, claiming that Section 4 of the Act only allows for examination of ‘competitors,' not a lone competition. Thus, the existence of two firms who impose competitive restraints on each other might not be enough to guarantee competition in the market. Furthermore, the Informant has contended that both Ola and Uber are singularly dominating in the market, based on economic testimony, the legal structure of the Act, judicial precedent, precise interpretation, global precedents, and so on.

COMMON INVESTORS

In respect of common ownership, it is claimed that because Ola and Uber have shared investors, namely Tiger Global Management LLC and DidiChuxing, it is probable that they will wind up as members of the very same grouping as defined under Section 5 of the Act. They would then be considered underneath the heading of ‘group' for the purposes of Section 4. furthermore, the Informant has emphasized some latest events in common ownership in the additive detail filed on April 12, 2018. It is stated, based on press sources, that SoftBank's recent investment in Uber, which includes a purchase of 12-20 percent of the company, adds to the problem. Because common investors own significant shares both in Ola and Uber (the

OPs) and SoftBank candidate directors serve on their individual boards competitors in the relevant marketplaces will be harmed. It was also said that the information and statistics supplied in the four sets of data show that OPs constitute a market share of more than 90%. In such a situation, SoftBank's fresh investment in Uber would bolster the OPs' aggregate market position while weakening competition in the market, putting them at risk of being probed.

RULING OF THE COMMISSION

Regarding individual dominance of the enterprises in the market, the Commission stated that the market share calculation used was based on market research provided by Tech Sci, a privately owned research firm. The Commission relied on its past rulings and stated that "high market shares by themselves may not be indicative of dominance," without getting into the veracity of the research report. Although market share is a significant signal of a lack of competitive restraints in theory, it is not a definitive predictor of dominance in practise.

Concerning to the collective dominance, the Commission restated its previous position, stating that Section 4 of the Act plainly allows only one firm or group to hold a dominating position.

"The usage of words 'operate independently' appearing in the aforesaid definition clearly shows that the concept of 'dominance' is meant to be ascribed to only one entity. Further, the underlined words in the above explanation indicates that the whole essence of Section 4 of the Act lies in proscribing unilateral conduct exercised by a single entity or group, independent of its competitors or consumers. In the presence of more than one dominant entity, none of those entities would be able to act independent of one another."

Concerning the issue of the common investors, it was said that Ola and Uber were dominating as a group due to common investors such as "SoftBank, Tiger Global Management LLC, Sequoia Capital, and Didi Chuxing" holding shares in both companies. The fact that ordinary people own shares could indicate that they have more money. The CCI looked at whether mutual investors in Ola and Uber could stifle competition between the two companies. According to the CCI, the two primary problems coming from common ownership would be, first, an increase in price and, second, a decrease in quality (which, while unfavourable for the business, may benefit investors) Second, there are "coordinated

effects," in which there may be incentives to collaborate and make collusive benefits. According to the CCI, shared ownership could lead to a "softening of competition." However, in the lack of convincing proof, an unfavorable finding based on "conjectures and apprehensions" could not be established.

It was acknowledged that common investors could cause competition to lessen; nonetheless, due to the lack of proof on the anti-competitive damages of common investors to businesses and shareholders, an unfavourable conclusion could not be reached in this case. It goes on to explain that it would keep an eye on whether the companies had implemented mechanisms to guarantee that the pooled investments did not jeopardise competition.

While it might be a 1st for the Indian competition regulator, the question of common ownership's possible anti-competitive repercussions has long been a source of worldwide dispute. The problem lately surfaced in the Dow/DuPont dispute before the European Commission (EC), where the EC stated that rivals are uncertain to compete vigorously in terms of technology in circumstances with significant levels of shared shareholdings. In reality, given the danger of future potential damages, the European Commission has been debating whether non-controlling minor investments must be included inside the scope of its acquisition control framework. It's worth noting that the CCI's decision-making process on the subject of a non-controlling minority shareholding appears to have mellowed. The CCI's position has been that non-controlling minority funds that might alternatively be eligible for the "funding alone and basic practicum of business" or "less than 25% acquisition" unofficial dispensation given in the CCI's Combination Regulations should be informed to the CCI if the shareholder has present holdings in different competitive entities, because such funds lose their "investment only or ordinary course of business" or "less than 25% acquisition" informal exemption. (Khan, 2018)

The CCI concluded that Ola and Uber's dominance still can’t be demonstrated based on the foregoing findings. The issue of exploitation would not emerge if dominance did not exist. As a result, the CCI determined that there has been no prima facie basis to warrant a probe. It's also worth noting that, the CCI did not go into great detail about platform markets and the impact of network effects in dismissing the case as it had already been elucidated in previous cases.

In the issue of predatory pricing, the CCI heard an intriguing claim, based on the MCX-NSE case, that these pricing could be a signal of dominance. The CCI observed that the administration of an enterprise

"can only be used as a complement rather than a substitute for comprehensive analysis of market conditions"

To gain a position in the market even non-dominant enterprises and newcomers could use tactics like below-cost pricing and loyalty discounts. If this view of domination is adopted, even a newcomer with a skewed consumer base could be considered dominating. To avoid making such mistakes, the Act's factors for determining dominance should be followed. Simultaneously, the Commission highlighted worries about Ola's cheap costs, pointing out that such rates could be the result of private funding sources rather than cost-cutting. However, there was no conclusive proof that such funding was not distributed fairly.

ANALYSIS

The Supreme Court's decision is similar to the CCI's decision in the MCX-NSE60 case, among the initial platform market cases. In the MCX case, it was argued that restrictive behaviour in the guise of predatory pricing showed an enterprise's economic power. The CCI's order stated that NSE's zero transaction fee, despite enormous losses, suggested that the exchange was in a leading position. However, the CCI clearly denied this notion of control in the Meru v. Ola Bengaluru decision because it would result in contradictions in competition law. The law appears to have completed complete circle with the Supreme Court's decision. The two elements of Section 4 – dominance and abuse – seem to have been blended once more, with the latter now being considered suggestive of the former. Rather than establishing whether the company has dominance based on the characteristics specified in Section 19(4) and then moving on to establishing whether the claimed behaviour is abusive, the Supreme Court has taken a circular approach, examining the firm's activity as a signal of dominance.

This strategy, according to the author, is troublesome. To determine dominance, business conduct could not be used alone as a replacement for a thorough review of market conditions. Market power analysis necessitates a comprehensive examination of all important aspects. The Supreme Court's rationale that loss generating pricing can influence the relevant market in the appellant's favour, suggesting dominance, is contrary to recognised legal principles. If

the explanation of dominance is based on "the ability to affect consumers/competitors/relevant market," as stated in the Meru v. Ola Bengaluru case, it must be remembered that in several markets, there will still be enterprises with differing levels of dominant position by virtue of which they can influence other consumers, competitors and relevant market in their best interest. A new entry with a fresh concept, commodity, or innovation that upsets the status quo in a market and moves the consumer market in its advantage may be mistakenly seen as dominating if they perceive dominance in this way. This is especially concerning in marketplaces with network effects, where strong rivalry may exist in the initial phases of network construction until the market stabilizes in benefit of one enterprise.

Whilst significant network effects can culminate in the "tipping" or transition of a marketplace with multiple suppliers into a highly condensed market, market dominance is insecure and transitory in the early stages of such markets' growth, and market leadership is not always about domination. The Act establishes a comprehensive structure and includes many variables for identifying dominance, particularly potential importance of competitors, entrance hurdles, and opposing influence, in order to avoid such inconsistencies in judging dominance. The Supreme Court's decision is thus in conflict with Section 19(4) of the Act, which specifies the considerations to be examined in determining dominance. (Raychaudhuri, 2020)

To build a presence in the market, many companies opt for a growth-over-profit approach. With the help of funding by corporations, new businesses are embracing such techniques. When analysing circumstances where new businesses are giving cheap services to gain a footing in the industry, antitrust regulators must be cautious. Making the mistake of confusing competitive rates for predatory pricing would stifle price competition in the economy. On the other side, mistaking predation for competitiveness may result in increased rates in the longer run as a result of rising saturation. In light of the above findings, regulatory agencies must not take immediate action except if the presence of predatory pricing can already be ascertained with a fairly reasonable degree of precision, and they must understand that it will be preferable to have no clear and specific law forbidding predatory pricing than to structurally restrict it. In such cases, antitrust authorities must use caution while enforcing the effort to monopolise notion, and it is critical to examine the firm's intentions. (Yadav, 2020)

CONCLUSION

The CCI's jurisdictional practise has been shifting over time, as may be seen. Previously, the CCI would dismiss complaints if there was no clear evidence of the firm's market dominance, such as a lack of market share. Furthermore, consumer welfare was taken into account, as predatory pricing methods were really helpful to customers. However, in recent cases, the CCI has taken notice of corporations employing business practises such as offering large discounts to clients and providing free services in order to eliminate competitors. Their market power and predatory prices aren't reflected in their market shares. (Payel Chatterjee, 2016)

This ruling is notable for the Commission's departure from its earlier Fast Track order, which dealt with the identical issue. In Fast Track, the Commission relied on the only study presented to it, that of TechSci Research Private Limited, and based on this analysis, the Commission was of the prima facie opinion that the Opposing Party's predatory pricing was intended to drive other actors out of the market, and that it contributed to abuse of dominant position. It's worth noting that the opposing party was never heard in the FastTrack case, and the Commission instructed the Director-General to probe. In all of the other situations listed above, however, the opposing party showed up to the Commission and challenged the report, and the Commission acknowledged these arguments. While the Commission refused any provisional order under Section 33 of the Act in Fast Track, it will be fascinating to see if it will exercise its authority to review in light of apparently different conclusions premised on analogous facts in other cases in which an order instructing inquiry by the Director-Generator has been issued. It is thus essential of the Commission to take into cognizance the precedent and rulings of the higher judiciaries and larger benches whilst giving it’s judgements.

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CASE COMMENT ON CHOWGULE AND COMPANY PRIVATE LIMITED V. GOA FOUNDATION & ORS.

Tulika Biswas*

INTRODUCTION

India is one of the leading producers of iron ore. In particular, the State of Goa has seen a boom in the mining industry over the past years. Goa's economy is heavily dependent on the iron ore industry. A major share of the State's income comes from the mineral industry and its allied activities, such as the trade and transport of iron ore. Various stakeholders such as the government, mining industry, environmentalists or NGOs have played a key role in providing solutions for the path ahead for mining in the coastal state.

The mining sector also faced a burden following environmental concerns arising out of it. Various petitions were filed challenging the companies involved in the rampant exploitation of natural resources in the iron ore mining sector. In the case of the Goa Foundation-I[1], it was held that any mining operation carried out by mining leaseholders after November 2007 was illegal. Subsequently in the Goa Foundation – II[2], the apex court had quashed several mining leases as they were in violation of mining procedures and various other statutes. The court ordered the state government to issue fresh leases instead of renewing the existing ones.

While the court decided to restrain and suspend all the mining operations in the State, the question of transportation of iron ore arose. The mining leaseholders were directed to stop all mining operations beyond March 15, 2018. But it did not give a clear statement regarding the transport of iron ore which was mined before the date. Various appeals were filed regarding the issue of transportation.

1* The author is a student of LL.B 2nd Year, Lloyd Law College, Greater Noida Goa Foundation v. Union of India, (2014) 6 SCC 590 (India)

2 Goa Foundation v. Sesa Sterlite Ltd., (2018) 4 SCC 218 (India)

In the landmark case of Chowgule and Company Private Ltd. v. Goa Foundation[3], the Supreme Court passed a judgement in favor of the Appellants, allowing the mining companies to transport iron ore mined in Goa before 15 March 2018, "which may be lying at jetties, stockyards or pitheads, provided royalty is paid to the state".

FACTS IN BRIEF

In this case, Chowgule and Company Private Ltd (Petitioner) is a firm involved in controlling of mining operations, amongst various other businesses. It had been seeking the nod of the apex court to commercially use and transport the mined ore in Goa. The mining firm's plea was vehemently opposed by the NGO 'Goa Foundation'(Respondent). They argued that the company had been carrying out mining operations in violation of various statutes.

In the case of Goa Foundation v. Sesa Sterlite Ltd. & Others (Goa Foundation-II), the mining leaseholders who were granted the second renewal, were permitted to continue their affairs of mining operations until 15 March 2018. In paragraph 154. 6 of the judgement, they were directed to stop all mining operations with effect from 16 March 2018 until fresh mining leases were granted. The State of Goa decided to permit the mining leaseholders to pay the royalty on the mineral which was already mined till 15 March 2018 and transport the same. A petition was filed against this decision and the transportation of all minerals was suspended by an interim order passed by the Division Bench of the Bombay High Court at Goa.

The petitioners in the present case argued that while the Order had directed to suspend all mining operations from 16 March 2018, it did not intend to stop the transportation of ore already mined before the date. It was contended that the view taken by the High Court stopping appellants from transporting iron ore was not correct. Chowgule and Company proceeded to challenge the interim order of the Bombay HC before the Supreme Court through a petition for Special Leave.

ISSUE ADDRESSED

The main issue presented before the Honorable Court was as follows:

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3 Chowgule and Company Private Limited vs. Goa Foundation & Ors., (2020) SCC Online SC 103

- Whether the iron ore and the minerals that were mined before 15 March, 2018 could be permitted to be transported by the mining leaseholders or not?

PETITIONER'S ARGUMENT

- The learned senior counsel appearing for the Appellants argued that the direction given in Goa Foundation II did not postulate restriction on transportation of iron ore. The intention of the order was only to suspend the mining operations and not the transportation of the ore already mined before March 2018.
- The counsel relied on Rule 12(1) (gg) of the Minerals Concession Rules, 2016[4] and stated that taking consideration of the legislative policy, it was necessary that the mining leaseholders be permitted to transport the iron ore mineral which is already mined before expiry of the lease.
- The learned counsel of the State of Goa submitted that the State had no objection for transportation of the mineral mined prior to March 2018, on which the royalty is paid to the Government.

RESPONDENT'S ARGUMENT

- Learned counsel for Goa foundation appearing for the respondents vehemently opposed the appeals and stated that the leases expired already in 2007 and leaseholders were illegally continuing their operations.
- He submitted that the Order of the Division Bench of the High Court in Goa Foundation II included all activities relating to mining and transportation.
- He submitted that if permission is granted to transport iron ore, it will amount to giving a premium for illegal activity of the leaseholder.

JUDGEMENT

4 Minerals Concession Rules, 2016, Rule 12(1) (gg), The Gazette of India, pt. II, sec. 3, sub- sec.(ii) (March 4, 2016)

On January 30, 2020, the judgement was pronounced. The crucial points of the judgement are as follows:

- Taking view of paragraph 154.6 (supra) of the judgement in Goa Foundation II case, and the legislative policy granting six months' period for removal of the mineral for the benefit of the lessees, it is of the view that the decision taken by Bombay HC suspending the transportation of minerals was not correct.
- The impugned judgment and order suspending transportation is set aside. The decision of the State of Goa permitting transportation of mineral/iron ore which is mined prior to March 2018 is upheld.
- The ore which has been permitted to be transported is on condition of payment of royalty. There was no reason as to why the owners should not be allowed to transport their own ore.
- The appellants/mining leaseholders would be permitted to transport the royalty paid ore/mineral from the jetties/stockyard or pitheads on the basis of the valid transit permits issued to them by the competent authority of the State Government.
- Thus, appeals were allowed.

JUDGEMENT ANALYSIS

The judgement of the Supreme Court set aside the Order which suspended transportation of mined ore. The Court held that the only prohibition imposed by paragraph 154.6 of Goa Foundation –II (supra) was for carrying out mining operations and not transportation. It also upheld the decision of the State of Goa which permitted the mining firm to transport iron ore within six months' period from the date of verdict, provided loyalties have been paid to the authorities.

Various petitions were filed questioning the direction given in the Goa Foundation- II case. While it directed that mining operations should be suspended beyond 16 March 2018, it nowhere mentioned the suspension of transportation of mined ore. It was about time that this issue was clarified. The Supreme Court in the case concluded that since the ore "has been permitted to be transported is on the condition of payment of royalty, we see no reason why the owners should not be allowed to transport their own ore". It also relied on the legislative policy mentioned in

Rule 12(1) (gg) of the Minerals Concession Rule, which allows a period of six months for the lessees to remove all ore extracted, on expiry of the term of the lease.

I think the Court took a correct stand in this case and also gave a proper reasoning to back their decision. The bench gave a concise twofold explanation of the Direction in question. It clearly ascertained the meaning of the terms “manage their affairs” and “mining operations” given in concerned paragraph. I see no reason as to why the transportation of ore which had already been excavated, was put to a stop.

This judgment cleared the intention of the Direction given in Goa- Foundation II case. It only implied the suspension of mining activities and not the suspension of transport of iron ore, excavated before the date mentioned in the verdict. Considering the reasoning provided by the Court and the fact that ore permitted to be transferred is on condition of payment of royalty and only allowed if holding a valid license, I believe the decision is justified.

CONCLUSION

The excavation of Iron ore has no doubt raised many environmental issues in the present day. It called for the need of using more sustainable means of mining. Numerous petitions challenging companies carrying out mining activities had been filed. The Government took a major decision when it suspended all mining activities in the State. The decision was taken with a view to protect the State's ecology from deteriorating, caused due to irregularities and illegal mining.

However, this decision also took a toll on the State as Goa's economy is highly dependent on its mining industry. Ever since mining was shut down in the State, many mine workers, managers, truck owners, truck drivers, etc. who cater to the mining industry were displaced. It has affected the livelihood of lakhs of people in the State. Presently, the situation has worsened with the outbreak of COVID – 19 pandemic as the State is suffering from huge job and revenue loss.

Transportation process in mining operations allowed ore to be exported to different states/ countries and thus contributed significantly to the State's economy. While mining activities have not resumed in the State, the Court's decision in Chowgule and Company Private Ltd. v. Goa Foundation, which permitted transportation of already mined ore lying unused at various sites in Goa, brought a relief to the mining firms as well as to the workers affected by the impugned order. It gave them the scope to revive their livelihoods and will also benefit the State's economy in the long run.

INDEPENDENT DIRECTORS: A CRITICAL ANALYSIS OF THEIR ROLE, RESPONSIBILITIES AND DUTIES*

INTRODUCTION

Corporate Governance was almost unknown subject to the public till three decades ago. The rules and responsibilities of board of directors for governing companies in India was a debatable issue. The emergence of the concept of independent directors has to be seen in the light of evolution of the term corporate governance over time. Since 1980s a number of studies have been carried out, which underlined the weaknesses of the legal and institutional systems in the country. Just about the turn of the 21st century, there has been a global upsurge in the governance activity. When an investor invests money in a corporation, he reposes confidence and faith in the ability of the corporation's management. He expects the board and the management to act as trustees and ensure the safety of capital and also earn a rate of return that is higher than the cost of capital. The directors are responsible and accountable to various stakeholders, especially the shareholders. "The corporate governance is a system of making directors accountable to the shareholders for effective management of the corporation with an adequate concern for ethics and values."

1.2 OBJECTIVES OF STUDY

Good corporate governance practices and the concept and role of independent directors have come under the spot light in view of the collapse of some major companies across the globe in recent years. The recent revelations of fraud at Satyam- a perceived corporate governance leader, raise many questions about corporate governance in India.

- To evaluate the process of selection and training of the independent directors;
- To evaluate their contributions to strategic planning, risk management, corporate ethics and corporate social responsibility.
- To discuss the conceptual framework of Independent directors;
- To make a well organized structured and independent board which is strong and strengthened enough to make logical and objective decisions on the basis of appropriate and adequate information. Such decisions must be material and very much related to affairs of company;
- The objective behind inclusion of independent directors on the Board is to bring transformation. The present study would examine the rate of success achieved by independent directors in performing its duties.

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*Written by:Divyansh Choudhary, A student of LLM at Manipal University Jaipur

1.3 HYPOTHESIS

In the recent past there has been a significant increase in the corporate scandals all around the world despite rules and regulations. Corporates owe their existence to shareholders and the long term sustainability of companies depends on winning their confidence through disclosures and transparency. The present rules and regulations in terms of disclosure and transparency are inadequate.

Independent and objective boards committed to the welfare of the company and equitable treatment of all its shareholders is the cornerstone of good corporate governance. Strengthened board ambience of independent directors help better performance of the company, all its stakeholders including shareholders provided their appointment is based on no conflict of interest with company. The endeavour on the part of independent director is lacking due to improper training and induction programs.

1.4"INDEPENDENT DIRECTORS- EVOLLUTION, APPOINTMENT AND CONTINUANCE"

"The success of a company depends, to a very large extent, upon the competence and integrity of its directors. It is, therefore, necessary that management of companies should be in proper hands." [1]

In the year, **1999**[2], the Securities and Exchange Board of India (SEBI) set up a Committee under the chairmanship of Kumar Mangalam Birla to promote and raise standards of corporate governance in India. The recommendations put forward by the KM Birla Committee led to the addition of "Clause 49-Corporate Governance" in the Listing Agreement in the year 2000. In the Report, the Committee defines independent directors as:

"*Independent Directors are directors who apart from receiving director's remuneration do not have any other material pecuniary relationship or transaction with the company, its promoters, its management, or its subsidiary, which in the judgment of the Board may affect their independence of judgment*".

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1 "*See*, the judgement of YOUNG J in *Indian states Bank Ltd v Sardar Singh*, AIR 1934 All 855"

2 "http://companydirectors.co.in/wp-content/uploads/2020/05/gn_on_independent-director.pdf" (accessed on January 24, 2021).

Accordingly, in the year **2002**[3], the Government of India appointed Naresh Chandra Committee which among other recommendations in line with international best practices, recommended that the present definition of independent director should be made more precise. Another major development took place in the year 2002, when a Committee was formed by SEBI under the chairmanship of N R Narayanamurthy for reviewing the implementation of corporate governance code by listed companies.

"In January 2013, SEBI came out with 'Consultative paper on Review of Corporate Governance Norms in India' proposing various new provisions for better governance practices. The approved provisions are to be effective from October 1, 2014. The concept of independent directors was proposed in the legislation by means of the Companies Bill, 2009 which was finally enacted in the form of the Companies Act, 2013." The Act and the relevant Rules made thereunder contain extensive provisions dealing with independent directors. In fact, a whole schedule, namely Schedule IV has been prescribed under the Act which contains the "Code for Independent Directors".

1.5 AN INDEPENDENT DIRECTOR: MEANING

Independent directors in India are governed by the Companies Act, 2013 ("Act").

"An independent director, in corporate governance, refers to a member of a board of directors who does not have a material relationship with a company and is neither part of its executive team nor involved in the day-to-day operations of the company."[4]

Basically, we can say that an independent director is a non- **executive director** of a company who helps the company in improving corporate credibility and governance standards. He/ She does not have any kind of relationship with the company that may affect the independence of his/ her judgment.

The term "*Independent Director*" has been defined in the Act, along with several new requirements relating to their appointment, duties, role, and responsibilities.

1.6 "WHO CAN BE AN INDEPENDENT DIRECTOR / ELIGIBILITY CRITERIA: [Section 149(6)][5]"

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3 "http://companydirectors.co.in/wp-content/uploads/2020/05/gn_on_independent-director.pdf"

4 "https://corporatefinanceinstitute.com/resources/careers/jobs/independent-director/"(accessed on Jan24)

[An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director],—

(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

I who has or had no [pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. Of his total income or such amount as may be prescribed] with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

[(d) none of whose relatives—

(i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. Of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;

(ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, for an amount of fifty lakh rupees during the two immediately preceding financial years or during the current financial year;

(iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for an amount of fifty lakh rupees during the two immediately preceding financial years or during the current financial year; or

(iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. Or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii);]

(e) who, neither himself nor any of his relatives—

5 "The Companies Act, 2013 as amended by The Companies (Amendment) Act, 2020"

(i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

[Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.]

(ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—

A. a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

B. any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. Or more of the gross turnover of such firm;

(iii) holds together with his relatives two per cent. Or more of the total voting power of the company; or

(iv) is a Chief Executive or director, by whatever name called, of any non-profit orporateon that receives twenty-five per cent. Or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. Or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

1.7 "TOTAL NUMBER OF INDEPENDENT DIRECTORS TO BE APPOINTED"

[Section 149(4)][6]

❖ **[Listed Public Company]**

Every listed public company shall have

- at least *one-third of a total number of directors* as independent directors.

Any fraction contained in that one-third shall be rounded off as one.

❖ **[Unlisted Public Company]**

The Central Government may prescribe the minimum number of independent directors in case of any class(es) of public companies.

6 "The Companies Act, 2013 "

"As per **Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014**, the following classes of companies shall have at least **2 directors as independent directors"**–[7]

4. Public Companies having paid-up share capital of Rs. 10 crores or more; or

II. Public Companies having in aggregate outstanding loans, debentures, and deposits, exceeding Rs. 50 crore.

III. Public Companies having turnover of Rs. 100 crore or more; or

Note 1– The amount existing on the last date of latest audited financial statements shall be taken into account for calculating the paid-up share capital or turnover or outstanding loans, debentures and deposits.

Note 2– In case a company covered under this rule is required to appoint higher number of Independent Directors due to composition of its Audit Committee, such higher number of independent Directors shall be applicable to it.

CONCLUSION

"The Act empowers independent directors with proper checks and balances, so that such extensive powers are not exercised in an unbridled manner, but in a rational and accountable way. The changes are a step in the right direction. They should enhance CORPORATE GOVERNANCE and ensure the management and affairs of the companies are conducted in the interest of stakeholders. It is expected that these changes will thwart corporate scandals in future and insulate shareholders interest."

"However it is also important to keep in mind that good corporate governance is not just the outcome of appropriate selection and effective functioning of ID's. Every director, whether independent/non- independent, executive/non-executive has a distinct role in the functioning of the company. It is only when the entire board functions effectively which results to good corporate governance and benefit minority as well as majority shareholder in its long term which maintains a good corporate image in the market."

7 "https://taxguru.in/company-law/independent-director-companies-act-2013-detailed-analysis.html "(accessed on January 24, 2021).

“STATUS OF INDEPENDENT DIRECTORS: DETERMINING FACTORS & RELATIONSHIPS”

2.1 INTRODUCTION

With the explosion of scandals pertaining to corporates due to mismanagement and fraud in recent years, the regulators all over the world have been implementing a series of policies aimed at improving corporate governance and ensuring that companies follow ethical and normative rules of business.

“The point about the independent directors is that they are drawn from a pool of professional who have had wide industry experience and are qualified to sit on the boards of the companies. What makes this process appealing to the regulators is that these independent directors can bring the much needed perspective that is objective and balanced since they are not connected to the company nor its management and hence do not have hidden agendas.”

Independence of independent directors assist in connecting the management’s interests with that of shareholders’ and improve the quality of judgement in decision-making. Also since independent directors are individual unknown to the management, an objective analysis of company performance will ensure good corporate conduct and governance practices across the globe. “Evolution of corporate scandals like Satyam gave rise to the introduction of the concept of Independent Director and mandatory appointments in certain companies under the Companies Act, 2013.” [8]The importance and the need for Independent Directors has arisen with each and every corporate scandal and financial crisis across the globe.

[Section 149(7) of the Companies Act, 2013, ask for the submission of a self-declaration by the Independent Director to meet the criteria of independence.]

As per the Section 149(7)[9] “Every Independent Director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an Independent Director, give a declaration that he meets the criteria of independence.”

2.2 ROLE OF AN INDEPENDENT DIRECTOR

Independent Director acts as a guide, coach, and mentor to the Company. The role includes improving corporate credibility and governance standards by working as a watchdog and help in

8 https://www.managementstudyguide.com/role-of-independent-directors.htm (last visited on January 30, 2021)

9 “The Companies Act, 2013”

managing risk. Independent directors are responsible for ensuring better governance by actively involving in various committees set up by company.

2.2.1 Role of Independent Director in Board meeting[10]

1. Should give Independent judgement on any matter of the Board;

2. Should prevent the management from taking decisions that is likely to affect the interest of the shareholders as large;

3. To ensure that there should not any unethical behavior or fraudulent practices adopted by the board;

4. To ensure that there should not violation of any company's policy.

"Separate meetings: The independent directors of the company shall hold at least one meeting in a year, without the attendance of non-independent directors and members of management."

2.2.2 Role of Independent Directors in this Meeting

1. To review the performance of non-independent directors and the Board as a whole;

2. To review the performance of the Chairperson of the company, taking into account the views of executive directors and non-executive directors;

3. To assess the quality, quantity and timeliness of flow of information between the company management and the Board that is necessary for the Board to effectively and reasonably perform their duties.

"Audit committee: Section 177(2) of the Companies Act, 2013 specify that the Audit Committee shall consist of a minimum of 3 directors with Independent directors forming a majority."

2.2.3 Role of Independent Director in Audit Committee

1. To recommend for appointment, remuneration and terms of appointment of auditors of the Company;

2. To review and monitor the auditor's independence and performance, and effectiveness of audit process;

3. To examination of the financial statement and the auditors' report;

4. To review annual financial statements with reference of accounting policies and practices.

10 https://cleartax.in/s/independent-directors-applicability-roles-and-duties (last visited on January 30, 2021)

"Nomination and remuneration committee: According to Section 178(1) of the Companies Act, 2013 and rules made thereunder, every listed public Company and certain other Companies shall constitute Nomination and Remuneration Committee consisting of 3 or more non-executive directors out of which not less than one-half shall be Independent Directors."

2.2.4 Role of Independent Director in Nomination and Remuneration Committee

1. Determine appropriate levels of remuneration of executive directors, key managerial personnel and senior management and have a prime role in appointing and where necessary recommend removal of executive directors, key managerial personnel and senior management;

2. Formulation of Succession plan to ensure corporate governance, stability and sustainability of the business;

3. To ensure that appointment and succession planning on merit basis.

2.2.5 Duties of independent director for prevention of fraud

Independent Director should:

1. Ascertain and ensure that the company has an adequate and functional vigil mechanism and the interests of a person who uses such mechanism are not affected on account of such use;

2. Report about unethical behavior, actual or suspected fraud or violation of the company's code of conduct or ethics policy;

3. Act within his authority, assist in protecting the legitimate interests of the company, shareholders and its employees;

4. Not disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans, unpublished price sensitive information, unless such disclosure is expressly approved by the Board or required by law.

2.3 DUTIES OF AN INDEPENDENT DIRECTOR

The Independent Directors shall :

1. undertake appropriate induction and regularly update and refresh their skills, knowledge, and familiarity with the company
2. attempt to attend company's general meetings and attempt to attend BOD's meetings and board committees meeting being a member
3. have adequate knowledge about the company and the external environment in which it operates

4. report matters concerning the unethical behavior, actual or suspected fraud or violation of the company's code of conduct or ethics policy
5. acting within his authority, assist in protecting the legitimate interests of the company, shareholders and its employees
6. not to unfairly obstruct the functioning of the company or committee of the Board & participate in the Board's committee being chairpersons or members of that committee
7. not to disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans, unpublished price sensitive information, unless such disclosure is expressly approved by the Board or required by law.

3.4 CONCLUSION

To conclude it is evident that Independent directors are thought to bring with them a number of advantages, including independence in their views and the ability to bring an outside perspective into the Board meetings. Further, as their primary function is to comment on corporate strategy and to direct general policy and overall supervision of the company, they can help to provide effective leadership. Independent directors also aid in the balancing of the interests of the shareholders, employees and creditors. This balancing role is particularly important in situations where conflicts arise between the interests of the executive directors and the shareholders. The presence of independent directors serves in bringing about impartiality in the Board as a whole. Such impartiality effectively means that considered advice would be provided and developed for the purposes of steering the company strategy as a whole by the board of directors.

"CASE STUDY"

THE SATYAM SAGA

Satyam Computer Services Ltd was founded in 1987 by Ramalinga Raju and his brother Rama Raju as a private company with just 20 employees to develop software and provide consultancy services to large corporations. On January 7, 2009, B.Ramalinga Raju, the founder and then Chairman of Satyam Computer Services, confessed to having orchestrated an accounting fraud on Satyam books. Satyam Computer Services Ltd a publically traded private company was one of the most reputed software companies in the country. Being a listed company, Satyam's shares were traded in Bombay Stock Exchange, National Stock Exchange in India and also New York Stock Exchange in United States. This means that Satyam had to comply with Clause 49, Sarbanes Oxley Act and all such prescribed rules and regulations. Even though public, Satyam remained a company dominated by its cofounder cum Chairman Ramalinga Raju, who was

conferred with the 'IT Man of the Year 2000 Award' by Dataquest. In 2008, the company received 'Golden Peacock Award' for excellence in corporate governance from London based World Council for Corporate Governance. The company had an optimum combination of non-executive directors and executive directors, an independent audit committee, a nomination committee and remuneration committee consisting of independent directors.

Satyam's spiraling downward effect was discovered in two phases. One, an aborted related party transaction involving company's promoter and two, fudging of accounts in Satyam's books of accounts. Problems in Satyam begin when on December 16th, 2008 its Chairman in a surprise move announced a $1.6 billion bid for two Maytas companies i.e. Maytas Infrastructure Ltd and Maytas Properties Ltd. These two companies had been promoted and controlled by Raju's family[11]. Despite concerns raised by some of the independent directors, the Board adopted a unanimous resolution to proceed with the proposed acquisition. Satyam notified the stock exchanges of the board approval as required under the listing agreement[12]. The market reacted badly to the news and within eight hours of the announcement, Satyam was compelled to withdraw the Maytas proposal.

Ironically, Satyam which means "truth" in Sanskrit, but Raju's admission along with his resignation, depicts the image of the company that had been *asatyam* i.e. untruth, regarding disclosures of its financial performance to the investors, shareholders, clients and employees. At last on 8 January, 2009, B. Ramalinga Raju made a shameful confession of over Rs. 7800 crore financial fraud and ultimately resigned as Chairman of Satyam. He also admitted that 'it was like riding a tiger without knowing how to get off without being eaten.' Raju and his brother hid the fraud from the company's Board, senior managers, and auditors. Ramalinga Raju faked figures to the extent of Rs. 5040 crore of non-existent cash and bank balances as against Rs. 5361 crore in the books, accrued interest of Rs. 376 crore non- existent, understated liability of Rs. 1230 crore on account of funds raised by Raju and an overstated debtor's position of Rs. 490 crore. Hence, no one except the family members had access to complete information. From being India's

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11 On 16 December, 2008, Satyam's Board convened a meeting to consider the proposed acquisition of Maytas Infra Limited and Maytas Properties Limited, companies focused on real estate and infrastructure development. Two major issues in the proposed transaction surfaced. First, the Maytas companies were focused on real estate and infrastructure development- two industries unrelated to Satyam's core IT business. Second, the Raju family owned approximately 30% of the Maytas companies. At this time, Ramalinga Raju served as Chairman of the Board, and B. Rama Raju served as the Managing Director and Chief Executive Officer. This made the proposed deal a – related party transaction.

12 Varottil, Evolution of Independent Directors, Umakanth Varotil, Evolution and Effectiveness of Independent Directors In Indian Corporate Governance, *Hastings Business Law Journal* Summer, vol. 6, no. 2, 2010, p. 281., at 335

fourth largest IT Company with high profile customers, Satyam was entangled in the nation's biggest scam. The case of Satyam's accounting fraud has been dubbed as "*Indian Enron*".

TATA SONS

Decision to remove Mr. Cyrus Mistry from position of chairman of Tata Sons has created some sort of a crisis and has threatened the perceived ethically numero uno position enjoyed by house of Tata in India Inc. Independent Directors on IHCL (Indian Hotels Company Limited) Board have unanimously reposed faith in Mr. Mistry. Since Boards have collective responsibility so the independent directors along with Mr. Mistry are equally responsible for mis-governance as well. Mr. Cyrus attributes all problems as legacy problems and hotspots. On what basis, independent directors of IHCL and Tata Chemicals have decided to back Mr. Mistry? Do they know the truth? If yes, why they kept mum for all these years and allowed problems to persist? Why are they supporting Mr. Mistry when they are collectively responsible for affairs of IHCL from year 2000 onwards? Does the decision of independent directors to support Mr. Mistry fulfills the objective of good governance? Is their action protecting shareholders value? Can a divided board enhance shareholder value or it destroys the same. The corporate structure of Group which prevailed under the leadership of Mr. J. R. D. Tata for over 50 years and thereafter Mr. Ratan Tata for over 20 years, exemplified the best corporate governance practices. Mr. Mistry consciously dismantled this long established corporate structure by identifying himself as the only Tata Sons representative on boards of Tata operating companies. It is relevant to mention that under Governance Guidelines Framework which Mr. Mistry himself introduced in 2015, there is a clause to the effect that all employees of a Tata company should, after their employment ceases, immediately resign from Boards of all Tata companies where they are functioning as NonExecutive Directors. Therefore, Mr. Mistry, on ceasing to be the Executive Chairman of Tata Sons, should have immediately resigned from Boards of all other companies under his own guidelines. Yet he has chosen not to do so in willful breach of Governance Guidelines Framework.

CONCLUSION & SUGGESTION

Satyam episode is proven to be tragic for the Indian corporate world, but it should be considered as a wake-up call to many. The Satyam case brought out the failure of the present corporate governance structure, in which independent directors failed to perform their responsibility effectively. As in Satyam case independent directors lacked commitment; they failed to live up to the stakeholders' expectations. The only way independent directors can stop wrong doing by acting collectively.

Independent Director help in bringing Independent judgement and act as a bridge between management and shareholders by encouraging the principles of Corporate Governance through providing transparency, accountability and disclosures in the working of the Company.

The indication behind the new approach seems that the Ministry wants the Independent Directors to become more aware and cautious about their roles and responsibilities towards stakeholders so that Corporate Governance can be enhanced. A start of the progressive step towards better Corporate Governance Practices has begun. However, this is the beginning and we will have wait to see how will it practically lead the desired results.

On the basis of literature reviewed, studied and analyzed the following suggestions deserve consideration:

- Training: Independent directors are known to be independent, objective and skillful and the normal expectations are they may not need any training. But to make them effective it has to be ensured that they build their knowledge about organization in which they serve through proper and regular training on risk management strategies of the organization. To have a better clarity on the issues facing the business and the upcoming challenges in the industry, companies should arrange formal and tailored induction program for their new directors. Further they should have proper orientation and training on strategic issues to enhance their performance in the boardroom.
- Selection Process: The process of nomination and appointment of independent directors should be based on an open, fair and rigorous process by identifying individuals of suitable quality 251 and background to some laid down guidelines. The independent directors should be selected on there being no conflict of interest with the company.
- Effective communication: Independent directors should listen to and openly communicate with stakeholders about their respective concerns and contributions and the risks that they assume because of their association with the company. They should try to understand what actions are necessary to protect shareholder and stakeholder value. All stakeholders should be aware of enterprise protection strategies and understand their roles and responsibilities.
- Transparency: Transparency in reporting and full disclosures should be the norms. The Board should ensure adoption of appropriate accountancy standards in the preparation of company's accounts and material changes to be fully discussed and justified. Board procedures and practices should be transparent and decisions should be informed, independent and objective. Researcher is of the view that the board should keep the shareholders informed of the relevant developments of the company as their money is at stake.
- Liability: Independent directors cannot be held liable unless they are proved guilty of wilful default, gross negligence or fraud. It is submitted that if independent directors are to be held responsible for all wrongs done by the management and hauled up by the courts like a common criminal, who would like to accept position of an independent directors in a company. Government has to ensure that full protection will be available to person who agrees to act as independent directors, as otherwise it will be more and more

difficult for corporates to find the right people to take risk to become independent directors. Government need to take a proactive step in this behalf immediately, otherwise it will be difficult to get good deserving persons who enjoy high esteem and reputation in the society to agree to become independent director. However, the position of an independent director is not all hunky-dory since acts of negligence on their part may not go unpunished. Hence prudence must be the watchword for independent directors. As long as the Independent directors show due diligence, the law should exempt them from all types of liabilities for the actions of the board or the managing director they may not be aware of.

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Divorce and Gender Justice under Muslim Law in India*

➢ ABSTRACT

Group-specific family laws are said to provide women fewer rights and impede policy change. India's family law systems specific to religious groups underwent important gender-equalizing changes over the last generation. The changes in the laws of the religious minorities were unexpected, as conservative elites had considerable indirect influence over these laws. Policy elites changed minority law only if they found credible justification for change in group laws, group norms, and group initiatives, not only in constitutional rights and transnational human rights law. Muslim alimony and divorce laws were changed on this basis, giving women more rights without abandoning cultural accommodation. Legal mobilization and the outlook of policy makers— specifically their approach to regulating family life, their understanding of group norms, and their normative vision of family life—shaped the major changes in Indian Muslim law. More gender- equalizing legal changes are possible based on the same sources.

Women's rights in Muslim personal law are currently a contentious topic. Muslim women's rights, particularly those relating to triple talaq divorce, inheritance, and maintenance, are receiving a lot of attention these days. Despite the fact that the Indian Constitution guarantees equality and freedom from discrimination on the basis of gender or religion, there are still a number of behavior's that are founded on a callous traditional culture. As we all know, much of Muslim personal law is still uncodified, and most legal decisions made by courts are based on standards found in the Quran and hadith. The major issue over how Muslim personal regulations should be interpreted has both positive and bad features. Muslim personal laws have provided Muslim women many rights such as marital choice, inheritance, and so on, according to some authors. Others believe that there are a number of behavior's that are in violation of the Indian Constitution's spirit. In this line this research paper attempts to analyse the on-going debate on the implications of Muslim Personal Law in India and suggests various solution to empower Muslim women. Therefore, certain anomalies need to eradicate by giving a true essence of Holy Quaran for the benefit of the Muslim women's rights. Moreover, the focus of this research paper would be on certain areas of reform in Muslim personal law like Polygamy, divorce, maintenance after the divorce, etc.

*Vaibhav Hiwale

➢ INTRODUCTION

Ethnic diversity is recognized by the application of different family laws to different cultural groupings. Multicultural institutions frequently provide residents with unequal rights, violate individual rights, obstruct policy reform, and limit cultural interchange. Some contend that such consequences are unavoidable consequences of multiculturalism. Such complaints are especially directed at multi-jurisdictional family law systems.[1] This is due to the fact that most organisations' standards provide in family life, men and women have uneven rights, or at least did when numerous families existed. Initially, legal systems took formed. Policymakers paid special attention to this. When gender equality was not a priority during the early stages of state formation, they incorporated gender-inequal norms into group law (Kandiyoti 1991; Glendon 1989; Hooker 1975).

Multicultural institutions and policies are especially vital for addressing India's cultural diversity along axes including religion, language, caste, sect, and geography. One way that culturally inflected interests are reflected is through the adoption of different family laws to the colonial state established a somewhat centralized system of plural family laws, in which state courts and various community courts shared adjudication powers. To accommodate cultural minorities, particularly Muslims, the postwar political elite kept much of colonial-era family law. Because all of India's family law systems give unequal gender rights in various ways, there were contradictions between this option and constitutional pledges to promote gender equality. gulate various religious groups and some tribal groupings.

Despite the fact that the Indian constitution has a requirement to Indefinitely homogenize family law, resulting to a Uniform Civil Code Policymakers have not taken this path, according to the Uniform Commercial Code (UCC). The judicial system has fought calls to amend the numerous family laws in a systematic way. Constitutional rights and international human rights law are

[1] Okin et al. (1999) offered a controversial version of this claim, to which many offered critical responses in the same volume. Parekh (2006) presented a more balanced account.

mentioned. The plural family law system is one of India's multicultural institutions that has received the greatest criticism.

One of the system's objections is that It only allows for minor legal changes. The assertion that group law is ineffective Keeping up with societal change appears to be especially important when it comes to regulations affecting cultural minorities. This is because policymakers argue that the affected groups should initiate changes in the legislation, yet conservative religious and political elites are frequently seen as the relevant group representatives, and they are usually hesitant to do so (Sunder Rajan 2003; Jacobson 2003; Menon 1998; Cossman and Kapur1996; Parashar 1992).

The major family rules have changed more in the recent generation than their critics claim. The majority of the reforms were brought about by judicial action, with legislation coming in second. Although the legislature focused on improvements in the Hindu religious majority's laws in the first postcolonial decade, legal changes during the 1970s have also extended to religious minorities' laws, reducing gender imbalance in these laws. They brought several aspects of the various group laws closer together, albeit they nevertheless differed in many of their provisions and relied on rather diverse jurisprudential underpinnings.

- **IDENTITY, GENDER JUSTICE, AND MUSLIM PERSONAL LAW REFORM IN INDIA**

In India, Muslim women frequently find themselves torn between religious or ethnic allegiances and a desire for more freedom and equality as women within those groups. They have considerable challenges in balancing these opposing forces, and many of them do it while living in poverty. On the one hand, traditionalists within Muslim communities in India seek to universalize and ossify interpretations and practices of Islam that maintain women's status as second-class citizens with far fewer rights than men, as Zoya Hasan points out.4 On the other hand, traditionalists within Muslim communities in India seek to universalize and ossify interpretations and practices of Islam that maintain women's status as second-class citizens with far fewer rights than men. Resistance to conservative interpretations of Islam is portrayed as betrayal, and it can call into question a

Muslim woman's entire identity within her community.[2] On the other hand, Muslim women's commitment to emancipation and gender justice is called into question by their allegiance to Islamic interpretations and ideas that are blatantly gender-biased. 5 Women who are economically disadvantaged have these experiences exacerbated.6 Despite these contradictory influences, Muslim women at the crossroads and fringes of Indian and Indian-Muslim society continue to speak out for their rights. Muslim women have made progress, but they still have a long way to go. Women are still subject to a distinct system of religious family law that has never been modified since being codified nearly seventy years ago. Out-of-date. Muslim women continue to be discriminated against under this code.' This article contends that, in order for Muslim women to be truly liberated from an unjust and discriminatory family law, they must have their own distinct legal status. position and experience at the crossroads of gender discrimination and sexual harassment Discrimination based on religion must be considered. 8 Proposals for reform that do not balance communal religious commitment and the importance of Muslim-Indian identity with individual gender rights would be rejected by the vast majority of Muslims. 9 This article contends that Muslim Personal Law has become so intertwined with Muslim identity that repealing or even changing it would be a threat to that identity. This is true even if the formal law's practical influence on Muslims' daily life may be minor. Furthermore, the way secularism works in India fosters religious identity and preserves religion in the public arena. India's founding fathers incorporated respect for all religions into the constitution, based on the ancient precept sarva dharma sambhava, or "all religions are valid."

As a result, each religious group can be governed by its own set of rules. a collection of family laws, whereas a secular law that is widely applied All other areas of the law are governed by it. This reverence for religion, on the other hand, many women's rights have been sacrificed in the sake of plurality. 10 As a result, Muslim Personal Law remains in a mixed condition, subject to both governmental involvements, through codification and enforcement, and non-intervention, as part of Muslims' private religious realm. This article examines the deadlock and its implicationsfor formal gender injustice and inequality in Muslim Personal Law in the areas of dower, marriage, divorce, and maintenance.

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[2] ZOYA HASAN & RiTU MENON, THE DIVERSITY OF MUSLIM WOMEN'S LIVES (2005) [hereinafter DIVERSITY OF MUSLIM WOMEN'S LIVES].

CHANGES IN MUSLIM LAW

Alimony

During the colonial and early postcolonial times, Muslim males were only expected to provide for their ex-wives for three months, in addition to returning their dower, which was usually controlled by the man's family while the pair was married. Only in extreme situations, such as where marriage contracts mandated it, was maintenance ordered for lengthier periods of time (Muhammad Muin-ud-din v. Jamal Fatima 1921). The length of time the man was required to support his ex-wife was determined by when the divorce was finalized by the courts. When witnesses attested that the man pronounced divorce (even if in the absence of the wife), when the man wrote a divorce statement, when the woman was informed of the divorce, or when the man stated in court that he had repudiated the woman, courts ruled unilateral male repudiation (the most common form of divorce among Indian Muslims) took effect.

The males were then compelled to furnish support for three months following the divorce's effective date. 12 The 1973 change to Section 125 of the Criminal Procedure Code, which required men to pay perpetual alimony to all religious groups, was intended to apply to all religious groups. However, under Section 127(3)(b) of the Cr. P. C., any sum the husband may have already given his ex-wife—in accordance with the rules of the couple's personal law—was removed from the payment the husband owed. This phrase was added in response to some Muslim legislators' demands that the dower be deducted from Muslim men's maintenance duties (Parashar 1992, 164–68). 13 Some Muslim men, however, claimed that the condition merely required them to support their ex-wives for three months. Between 1973 and 1985, state high courts responded to such pleas in a variety of ways. In more of these cases, the spouses were ordered to pay permanent alimony until 1985, and three Supreme Court judgements from 1979 to 1985, including one by a Constitution Bench, lent this inter- pretation authority. 14 In all maintenance cases after 1973, Hindu men were ordered to pay permanent alimony, in contrast to their varying answers in analogous cases involving Muslims. They reduced the maintenance

payments that Hindu husbands had already provided, based on statutory or uncodified Hindu law, from the additional amount the husband owed the wife in some, but not all, circumstances.

➢ Dower, Divorce, and Maintenance

Some academics believe that Muslim marriages are mostly contractual in character. There are three steps in the process: offer, acceptance, and consideration. However, it would be a mistake to reduce marriage to a mere commercial formality akin to a service or commodities contract. Marriage is regarded as a religious institution, and all capable Muslims are encouraged to participate.' 0 ' It plays a crucial role in the organisation of group life and, as a result, gender relations. 0 2 Furthermore, Muslim marriage regulations reflect a traditional concept of how spouses relate to one another and establish a set of responsibilities and rights for each partner. '03' These responsibilities and privileges begin with the need of mahr, or consideration, which must be given or promised before a marriage can be solemnized. The groom's mahr (dower) is money or property given to the bride as part of the wedding ceremony. The property's or money's value can be any quantity less than 10 dirhams. ten five the amount might be decided before the wedding, during the ceremony, or afterward. ten six the mahr money is payable to the wife and becomes her own property, as opposed to family property, her father's property, or her husband's property after a second marriage. 107 She is entitled to the whole amount after consummation of the marriage or upon the death of her husband and where "a claim is made for an amount named in a contract of dower the court will award the full amount provided in the contract." 10 8 If she divorces her husband before consummation, she is entitled to half of the dower.109 If her husband dies without paying the mahr, it must be paid out of his estate before his heirs can inherit and upon his wife's death, the mahr is payable to her heirs.

The Indian codification of Muslim law allows for a variety of mahr payment arrangements, which families can pick from when the mahr is negotiated. The mahr might be paid in part at the day of the wedding and the rest at a later date. It can also be paid in full at the time of the wedding or at a later time. If the mahr is not specified at the time of marriage and a disagreement arises, the wife receives an amount established by custom and rationality. 12 In any case, there is a minimum amount of mahr that must be present for a marriage to be legitimate. A wife in her

majority, on the other hand, can remit or renounce her dower, pursuant to case law Non-payment of the mahr, like any other debt, gives the wife many options for enforcing her rights. If the marriage has not yet been consummated, she has the right to decline to cohabit with the husband or enter his household. 14 ' She may even refuse to have sexual relations with you until the mahr is paid. 15 ' Any suit by the husband for reinstatement of conjugal rights is barred if the dower is not paid. 1 6 If the marriage has been consummated, the court may grant recovery of conjugal rights in exchange for the dower payment.". As a result, the Muslim wife has a viable legal claim to reclaim her debt while her husband is still alive. If her spouse died before paying the mahr, the widow might file a claim against his property in the form of a widow's lien.

In general, the goal of mahr is to ensure that a wife is able to support herself after marriage, even though she has the right to proper maintenance and support from her husband. In other words, she has the option of keeping her full dower and bequeathing it to her heirs or disposing of it at her leisure without jeopardizing her right to be supported by her husband. Such a contract could be considered one of the first pre-marital agreements, a sort of contract that has only lately been popular in the United States. 120 Mahr is negotiated in the same way as pre-nuptial agreements in the United States, except with the wife's father or male guardian acting in her best interests instead of a lawyer. She is obligated to the bargain established on her behalf in the case of divorce. The question of whether a parent or guardian can be trusted to strike a reasonable deal and if that deal reflects the wife's preferences is beyond the scope of this article, but it is one that deserves its own discussion. Apart from that, mahr agreements protect the wife against financial ruin in the event of the breakdown of her marriage or the death of her spouse. As a result, in the lack of a sufficient welfare system, mahr provides crucial religiously and legally sanctioned financial resources to Muslim women.

Conclusion

India has drifted further away from the ideal of a uniform civil code as a result of the continuous politicization of law and the conflation of religious law with identity. However, it is unjust to hold religious minorities completely responsible for this terrible trend. As previously stated, the growth of Hindu nationalism in the 1990s and continuing to the present has resulted in the use of "secular" law as a punitive, 1 28 1 Tevernacular of Hindutva assimilative tool against minorities. The and the judiciary's endorsement of it has reserved the very identity of "Indian" for Hindus, while establishing Muslims, Christians, and Jews as "other." Worse, the co-opting of secular institutions—including the court, which has long been seen as the state's least political institution —for the aim of propagating Hindutva gives minorities very genuine grounds to be skeptical of a rapid shift toward more secular laws. Furthermore, the Right's co-opting of the issue of women's rights has made it impossible for women's organisations’ to campaign for a standard civil code without associating with the Right.

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1. See TAHIR MAHMOOD, PERSONAL LAWS IN CRISIS 6 (1986). Article 246 (2) states: "Notwithstanding anything in clause (3), Parliament, and subject to clause (1), the Legislature of any state also, have power to make laws with respect to any matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List")." INDIA CONST. art. 246(2), available at http://lawmin.nic.in/coi.htm. List III of the Seventh Schedule, Entry 5 is comprised of "marriage and divorce; infants and minors; adoptions; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." INDIA CONST. list III, available at http://lawmin.nic.in/coi.htm.
2. e DESAI, supra note 90, at 129-30. Note that for the Muslims who marry non-Muslims (or, for Muslim men, outside the Abrahamic faiths) that marriage is not void ab initio but irregular. Id. But c.f Narain, supra note 9, at 52 (stating that for Muslim men interfaith marriages are permitted but not encouraged, while for women they are void ab initio.
3. The divorce was dated when the man declared that he divorced the woman in Sarabai v. Rabiabai (1905), Ma Mi v. Kallander Ammal (1927), and Ahmad Giri v. Masarat Begha (1955); on the date of the man's written divorce statement in Asmata Ullah v. Khatun-unnisa (1939), Chandbi v. Bandesha (1961), Mohammad Haneefa v. Pathummal Beevi (1972), and Jaitunbi Mubarak Shaikh v. Mubarak Fakhruddin Shaikh (1999); when the woman learned of the divorce in Kathiyamma v. Urathel Marakkar (1931) and Abdul Khader v. Aziza Bee (1944); and the day the man told the court that he had divorced the woman in Syed Jamaluddin v. Valian Be(1975) and Shaikh Jalil v. Bibi Safrunnisa (1977).
4. Conservative Muslim legislators did so although Islamic legal traditions clearly distinguish the husband's obligation to pay dower from his maintenance obligations. Judges nevertheless, distinguished between the two obligations in Hamira Bibi v. Zubaide Bibi (1916), Syed Sabir Husain v. Farzand Hasan (1938), Mohammad Ahmed Khan v. Shah Bano Begum (1985), and Abdul Khader v. Smt. Razia Begum (1990).

5. Some of the high court cases following this pattern were Khurshid Khan Amin Khan v Husnabanu (1976) and Mehbubabi Nasir Shaikh v. Nasir Farid Shaikh, (1976). The relevant Supreme Court judgments were Bai Tahira v. Ali Hussain Fisalli Chothi (1979), Fuzlunbi v. Khader Vali (1980), and Mohammad Ahmed Khan v. Shah Bano Begum (1985). The courts required the payment of maintenance for just three months in other cases such as Rukhsana Parvin v. Sheikh Mohammad Hussain (1977) and Aluri Sambaiah v. Shaikh Zahirabi (1977).

CASE COMMENT ON THE SUPREME COURT JUDGEMENT OF M SIDDIQ (D) THR LRS V. MAHANT SURESH DAS & ORS*

India is a unique country that has developed rapidly and is also known for its diversity. In India, people have strong feelings and respect for their religion and religious rituals.
In a country like India, disputes with respect to religion is not a hidden phenomenon. India has adopted the principles of secularism in its constitution to safeguard, protect and preserve the culture and traditions of all religions. However, people's different mentalities and different beliefs lead to social disharmony, which further leads to violence and destruction.

The M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors case, commonly known as the Ayodhya dispute case is the second longest case which had a 40 day hearing period, even though the dispute started long back. This is the second most longest hearing after the Keshvananda Bharti case for which the hearing lasted for a period of 68 days.

DATE OF DECISION – November 9, 2019
CASE NUMBER – CA 10866- 10867/2010
COURT – Supreme Court of India
JUDGES – Ranjan Gogoi, Sharad A Bobde, D.Y. Chandrachud, Ashok Bhushan, Abdul Nazeer
PARTIES -PETETIONER: M. Siddiq (deceased), Maulana Asshad Rashidi, Sunni Waqf Board.
-RESPONDENT: Mahant Suresh Das and Others, Nirmohi Akhada, Bhagwant Shri Ramlalla Virajman, the State of Uttar Pradesh, District Collector (Faizabad), All India Mahasabha, Arya Maha Praseshik Sabha, All India Sanatan Dharam Sabha.

FACTS

By looking into the Epic,Ramayana, it is believed that Ayodhya was the birthplace of Lord Ram i.e. Shri Ram Janmabhoomi. It was also the Hindu belief that an ancient Ram temple was situated at the birth place(12^{th} century). But the temple was demolished by the first Mughal Emperor, Babur in 1528 and on that spot built a mosque, Babri Masjid. Subsequently it was demolished in the year of 1992 by the kar sevaks. This construction and demolition of religious structures created the dispute between Hindus and Muslims where both the communities claimed that the disputed site belonged to their religious denomination.
1528 –Mughal Emperor Babur demolished the Ram temple and constructed Babri masjid.

1859 –Colonial British Administration made a separate area by fencing the site for worshiping by both Hindus and Muslim.

*Vasudha Gupta

1949 –The idols of the gods were placed inside the dome of the mosque. Suits were also filed from both the sides under **Section 145 of the CrPC**, i.e., the procedure of disputes concerning land or water which is likely to cause breach of peace. Whenever an Executive Magistrate is convinced by a police officer's report or other evidence that there is a conflict likely to result in a violation of peace involving any land or water or its borders within its local jurisdiction, he can make a written order specifying the reasons for his satisfaction and also mandating the involved parties to attend the court in person or by a pleader at a stated date and time in such dispute.

The Faizabad Court passed an order by placing the disputed site under the custodial responsibility of the state Government. Further the court of Additional Magistrate under his preliminary order directed that the disputed site to be under the receivership of the Chairman of Municipal Board.

Suit (suit no. 1) was filed by Gopal Singh Visharad (worshipper) claiming the right to worship Lord Ram.

1959 – the **Nirmohi Akhada filed the title suit(suit no.3)** and claimed for management right and possession of the Janmabhoomi.

1961 – the **Sunni Waqf Board also filed the suit (suit no. 4)** and claimed possession of the area.

1984 – a committee was formed by the Hindu group which in turn started a movement to build the temple at the disputed site.

1989 – **Another suit (suit no. 5) on behalf of Ram Lalla** was filed by senior advocate Deoki N Agarwal. A foundation of new temple was laid adjacent to the disputed structure by Vishwa Hindu Parishad.

1992 – on **6th December 1992**, the Babri Masjid was demolished by the 2,00,000 Kar sevaks who were associated with the Vishwa Hindu Parishad and other organisations. This demolition led to large communal riots around the country.

2010 – In the **2: 1 majority**, the Allahabad High court ruled that the disputed land to be **divided into three parts** i.e. between Sunni Waqf Board, Nirmohi Akhada and Ram Lalla. Where the **area of inner court yard (Ram Murti) went in the favour of Ram Lalla**, next the **area of Sita Rasoi and Ram Chabutra went in the favour of Nirmohi Akhada** and the rest one third partition went in the favour of **Sunni Waqf Board (Outer Courtyard).** This portion was divided after the adjustment of the extra land which went to the Government.

2018 – on **27th September** the three-judge bench decided that the bench will continue to hear the dispute on the question whether the dispute should be referred to the larger bench i.e. Constitutional Bench comprising five- judges. Herein, the three judge bench was not ready to refer the case to a larger bench, but due to the exclusive power of then Chief Justie of India, Ranjan Gogoi, the case was transferred.

2019 – On assuming the post of Chief Justice of India after the retirement of Chief Justice Dipak Mishra, on 8 January Ranjan Gogoi assigned the dispute to the larger Bench (five- judge Constitutional Bench) and started the hearing.

ISSUES

1. Whether Suit 3, 4 and 5 is barred by limitation?

2. Whether Shebaits have an exclusive right to sue?

3. Whether the Ram Janmabhoomi is a juristic entity?

4. Whether the temple exist beneath the disputed structure? If yes, whether existence give title to the Hindu parties?

ARGUMENTS

PETITIONER

Arguments on behalf of the Sunni Central Waqf Board

a. No deities were installed within the premises of Babri Masjid until the idol was surreptitiously brought in on the night between 22-23 December 1949. The written statement denies the presence of a presiding deity or of —any Asthan.

b. Regular prayers were offered in the mosque up to 22 December 1949 and Friday prayers until 16 December 1949.

c. The colonial government continued grants for the upkeep and maintenance of the mosque originally given during the time of Babur.

d. Even in the absence of an express dedication, the long use of the disputed site for public worship as a mosque elevates the property in question to a waqf by user. It contended that since the construction of the mosque by Emperor Babur in 1528 till its desecration on 22/23 December 1949, namaz has been offered in the mosque. Hence, the disputed property has been the site of religious worship.

OTHERS

a. It was urged that during Babur‘s invasion of India, several temples were destroyed, including the temple constructed by Vikramaditya at Ayodhya. He contended that during the Mughal period, the territory now known as India was under foreign occupation –

Hindus were not permitted to exercise their religious rights and, upon the adoption of the Constitution of India, the wrongs of the Mughals are liable to be rectified.

b. It was further urged that as the land of a deity is inalienable, the title of the plaintiff deities from the twelfth century continues to be legally enforceable today.

c. The 1928 edition of the Faizabad Gazetteer, in support of the plea that the ancient temple, called the Ram Janmabhumi temple, was destroyed by Babur in 1528 and on its site, a mosque was built largely with the materials of the destroyed temple, including the Kasauti pillars. Yet, according to the plaint, the worshippers continued to worship Lord Ram through symbols such as the Charan and Sita Rasoi and the idol of Lord Ram on the Ramchabutra within the enclosure.

d. No valid waqf was ever created or could have been created. Despite occasional trespass by the Muslim residents, it has been stated that title and possession vested in the plaintiff deities. It is alleged that no prayers were offered at the mosque.

e. Proceedings under Section 145 to which the plaintiff deities were not parties.

f. Deities have been in possession and any claim of title adverse to the deities stands extinguished by adverse possession.

g. Suit 5 was necessitated as a result of the deity not being a party to the earlier suits and based on the apprehension that in the existing suits, the personal interests of the leading parties were being pursued without protecting the independent needs and concerns of the deity of Lord Ram, is well and truly borne out by the proceedings as they unfolded in the proceedings before this Court.

RESPONDENTS

Nirmohi Akhara

- The Nirmohi Akhara represents a religious sect amongst the Hindus, known as the Ramanandi Bairagis. The Nirmohis claim that they were, at all material times, in charge and management of the structure at the disputed site which according to them was a temple until 29 December 1949, on which date an attachment was ordered under Section 145 of the Code of Criminal Procedure1898. In effect, they claim as shebaits in service of the deity, managing its affairs and receiving offerings from devotees.
- The claim of Nirmohi Akhara is in the capacity of a shebait and as a manager of the temple.

- It was submitted that the denial or obstruction of Nirmohi Akhara‘s absolute‘ shebait rights of management and charge was a continuing wrong and by virtue of Section 23, a fresh cause of action arose every day.
- Nirmohi Akhara opposed the maintainability of Suit 5 on the ground that as a shebait, it alone was entitled to represent the deity of Lord Ram.
- It denied the locus of the next friend as the third plaintiff to represent the deities. The third plaintiff, it had been asserted was not a worshipper of the deity and was a Vaishnavite and had no locus to represent the deity or the —so-called Asthan.
- It specifically denied the status of the second plaintiff as a juridical person. According to the written statement, Asthan simply means a place and was not a juridical person.
- Suit 3 was barred by limitation, a dismissal of that suit only extinguished the remedy of Nirmohi Akhara to file a suit for possession but did not extinguish the Nirmohi’s rights as shebaits. Therefore, Nirmohi Akahara continued to be shebaits and possess an exclusive right to sue on behalf of the idols of Lord Ram even in 1989.
- It was the submission of Nirmohi Akhara that by virtue of their long-standing presence at the disputed site, and their exercise of certain actions with respect to the idol, they were shebaits de facto.
- Although a deity is treated as a minor because of its inability to sue except through a human agency, a deity is not a minor for the purposes of limitation.
- Nirmohi Akhara set up the plea that the trust which had been set up in 1985 was with an obvious intention to damage the title and interest of the Nirmohi Akhara.

Ram Lalla Virajman

- The written submission on behalf of Ram Lalla Virajman said that the court should give all of the lands in dispute to Ram Lalla.
- The statement stated that no part of the disputed land should be given to the Nirmohi Akhara or the Muslim parties.

Ram Janambhoomi Punar Sudhar Samiti

- Only a Ram temple should be allowed to be built on the disputed site in Ayodhya.
- Once the temple is built, a trust must be formed to manage it.

Gopal Singh Visharad

- Gopal Singh Visharad, whose ancestors had performed rituals on the temple site for centuries, argued that it was his constitutional right to offer prayers to Ram Janmabhoomi.
- His statement said that there should be no compromise in the Ram Janmabhoomi case.

Hindu Mahasabha

- The Supreme Court was expected to form a trust to oversee the management of the Ram temple to be built on the disputed site in Ayodhya.
- The Supreme Court pronounced to appoint an administrator in order to deal with this trust.

Shia Waqf Board

- During their relief casting before the High Court of Allahabad, they said that the Muslim parties should give up their claim on the disputed land and hand it over to the Hindu parties to build a Ram temple.
- In a written submission, the Shia Waqf board of directors said that a Ram temple should be built on the disputed site in Ayodhya.
- He stated that the Waqf Shiite council is the lawful owner of the disputed land, not the Waqf Sunni council.
- The land that was given to the Sunni Waqf Council in the High Court order should now be given to the Hindu parties.

JUDGEMENT

The **bench of five judges** of the Supreme Court heard the litigation cases on the title from August to October 2019. On **9th November 2019**, the Supreme Court, led by Chief Justice Ranjan Gogoi, announced its verdict; he quashed the previous ruling and ruled that the land belonged to the government on the basis of the tax records. He further ordered that the **land be turned over to a trust for the construction of the Hindu temple**. He also ordered the government to **donate another five-acre piece of land to the Waqf Sunni Council to build the mosque**.

Following are the **top ten points** that were highlighted in the Judgement of this case:-

- The Supreme Court granted the entire 2.77 acres of disputed land in Ayodhya to the deity Ram Lalla.
- The Supreme Court ordered the government of Central and Uttar Pradesh to allocate 5-acre alternative land to Muslims in a prominent location to build a mosque.

- The court asked the Center to consider giving some sort of representation to Nirmohi Akhara for setting up a trust. Nirmohi Akhara was the third party to the Ayodhya conflict.
- The Supreme Court rejected the plea of Nirmohi Akhara, who sought to control all of the disputed lands, claiming that it was its custodian.
- The Supreme Court ordered the Union government to create a trust in 3 months for the construction of the Ram Mandir on the disputed site where Babri Masjid was demolished in 1992.
- The Supreme Court said that the structure below the disputed site in Ayodhya was not an Islamic structure, but the Assistant Sub-Inspector (ASI) did not establish whether a temple was demolished to build a mosque.
- The court also declared that the Hindus regard the disputed site as the birthplace of Lord Ram while the Muslims also say the same thing about the site of Babri Masjid.
- The court also declared that the Hindus' belief that Lord Rama was born on the disputed site where Babri Masjid once existed, could not be challenged.
- The Supreme Court also declared that the 1992 demolition of the 16th-century Babri Masjid mosque was a violation of the law.
- While reading its judgment, the Supreme Court declared that the UP's Waqf Central Sunni Council had not established its cause in the Ayodhya dispute and that the Hindus had established that they were in possession of the outer courtyard of the site in dispute.

The Constitution postulates the equality of all faiths. Tolerance and mutual co-existence nourish the secular commitment of our nation and its people. While determining the area of land to be allotted, it was necessary to provide restitution to the Muslim community for the unlawful destruction of their place of worship. Having weighed the nature of the relief which should be granted to the Muslims, it was directed that land admeasuring 5 acres be allotted to the Sunni Central Waqf Board either by the Central Government out of the acquired land or by the Government of Uttar Pradesh within the city of Ayodhya.

The Central Government shall, within a period of three months from the date of this judgment, formulate a scheme pursuant to the powers vested in it under Sections 6^1 and 7^2 of the Acquisition of Certain Areas at Ayodhya Act 1993. The scheme shall envisage the setting up of a trust with a Board of Trustees or any other appropriate body under Section 6. The scheme to be framed by the Central Government shall make necessary provisions in regard to the functioning of the trust or body including on matters relating to the management of the trust, the powers of the trustees including the construction of a temple and all necessary, incidental and supplemental matters.

Suit 3 filed by Nirmohi Akhara had been held to be barred by limitation. Nirmohi Akhara's claim to be a shebait stood rejected. However, having regard to the historical presence of Nirmohi Akhara at the disputed site and their role, it was necessary for the Court to take recourse to its powers under Article 142 to do complete justice. Hence, it was directed that in framing the scheme, an appropriate role in the management would be assigned to the Nirmohi Akhara.

CONCLUSION

- This case is important because this is a prolonged case in the history of the Indian Judiciary and witnessed all the Prime Minister of India, from Jawaharlal Nehru to Narendra Modi. Finally, this dispute was resolved on dated 9th November 2019.

- Answering the issue of limitation, all suits except suit no. 3 are maintainable. It was held that suit no. 3 filed by Nirmohi Akhada was barred by the Limitation Act and shall be dismissed.

- It was held that suit no. 4 filed by the Sunni Waqf Board was within the limitation and the judgment of Allahabad declaring it to be barred get reversed.

- It was held that suit no. 5 filed on behalf of Ram Lalla was within limitation and is maintainable. The court also held that the title of the possession is awarded to the deity of Shri Ram Virajman.
- The result of the case was based on the archaeological survey which said that proof of massive structure had been found below the remains of demolished Babri Masjid where in the survey the presence of wall and pillars of temple-like structure was also found. But the possession shall remain with the statutory receiver of the Central Government until further notification comes. The Central Government will be given three months from the date of judgment for formulating a scheme under S. 6 and S. 7 of the Acquisition of Certain Area at Ayodhya Act,1993 where the scheme shall focus on the setting up of trust or any other body under S.6.
- Sunni Waqf Board was also allotted 5 acres of land for the construction or mosque in Ayodhya.
- Further after the formation of Trust under the Acquisition of Certain Area at Ayodhya Act,1993, Nirmohi Akhada should also get representation.
- It was held that Asthan Ram Janmabhoomi is not a juristic entity
- It must be held that Suit 5 is instituted within the period of limitation.

ATTITUDES OF INTERNATIONAL LAW TOWARDS THE CONCEPT OF SELF-DETERMINATION: HOW CAN A FAIR BALANCE BETWEEN THE INTERESTS OF MINORITIES AND THE INTERESTS OF OTHER PEOPLE BE SET?*

INTRODUCTION-

SELF–DETERMINATION

According to the international encyclopedia of Political Science, “self-determination is a highly contentious concept that encompasses a variety of meanings and political claims. Each of these claims are based on the theory that particular population groups possess an inherent right to control their own political institutions.”

The right of self-determination remains one of the most romantic of rights within the human rights agenda. Enshrined as Article 1 of both the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant Economic, Social and Cultural Rights, it is considered essential before any other rights can be recognised. This dynamic presents an extremely difficult problem since Article 1 is framed:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Self-determination is exercised in ways that include self-governance, democracy and freedom from outside influence and pressure. It is both a norm of international law and a political principle and its related to concepts of territorial integrity, sovereignty and democracy. It has internal and external aspects. In essence, self-determination is the right of peoples to freely determine their own destiny. In particular, their own political status, economic culture and social development. The rights of self-determination is recognized in international law as belongs to peoples and not to States or Governments.

***Sayani Pachhal**

The natural questions that comes up are ‘who are the peoples that have the right of self-determination?’ ‘how is self-determination implemented?’ and ‘what does self- determination mean today?’ Furthermore, self-determination has evolved within the past century and in order to answer the questions and fully understand self-determination, it’s important to understand the historical context in which the rights of self-determination has evolved. It can be divided into roughly three periods, the age of nationalism from the late 18th century to the great World Wars. The second phase the age of decolonization post World War 2 to the end of the late 20th century when the United Nations refined self-determination from what it was understood earlier. The third phase the post-colonial, is what we are in now where claims of self-determination conflicts with the principle of territorial integrity.

Nationalism is a highly contested concept and in a general sense “nationalism is a strong attachment to a nation as a human collective”. A nation, another contested concept in the general sense “a community of people united based on real or perceived characteristics such as culture, ethnicity, language, history, citizenship, etc.” With the rise of nationalism in Europe in the 18th century, European nationalist advanced self-determination in a collectivist sense by arguing that all nations were entitled to the rights of self-determination, the right to form their own States. They seek to create national States out of the large multi ethnic empire such as Austria, Hungary and the Ottoman Empire. The nationalist conceived self-determination as the right belonging to nations which was based on ethnicity, language, history and cultural heritage. Perhaps the most well- known advocate of self-determination was U.S. President Woodrow Wilson who argued that there could be no justice or order if nations were denied the right to self-determination. He articulated this political vision for the new European orders in a series of speeches known as the ’14 points address’, ‘the 4 principles’ and the ‘5 particulars’. However, it’s important to understand that self- determination at this time was a political principle and not accepted as an international norm or rights by many other States. It was only applied for newly formed States and to the defeated powers after World War 1. The term self-determination did not even make it into the Covenants of the League of Nations. Self-determination would not be an international norm until post WW2, where it became part of the United Nations Charter in Article 1 and 55.

In the UN Charter the references to self-determination were very vague and referred to principles of equal rights and self-determination of people without explanation of what that exactly meant. This would change in the 1960s where self-determination soon became understood as a norm of international law. The key document to illustrate what self-determination came to mean was the declaration of granting of independence to colonial countries and peoples adopted by the General Assembly Resolution 1514 of December 14, 1960. Within a decade its provision became accepted

as customary law by all United Nations members. The declaration states “The subjugation of peoples to alien subjugation, domination and exploitation constitutes denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.” The second paragraph is the one that became the expression of the norm of self-determination in international law – “All the people have the right to self- determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This paragraph made its way in positive international law when the General Assembly directed that it would be included in the first Article of the two Covenants of human rights in 1966.

An important question is what did the Article mean by “all peoples”? Does it mean that every ethnic group has the right to self-determination? Did peoples refer to only peoples of colonial territories? Well, more than 50 cases of self-determination make it very clear that self-determination is territorial and applied to entire population of external colonial territories. It is not the same as the national self-determination claims of the mid-18th and early 20th century, self-determination became a right for colonized peoples of geographically distinct non-self-governing territories. The development of self-determination being linked to non-self-governing territories can be traced back to Article 73 of the UN Charter which created a sacred trust between non-self-governing territories and the administering powers. Whereas the administering power or develop the territory until it became self-governing. It loosely described non-self-governing territories as “…territories whose peoples have not yet attained a full measure of self-government…” This definition is vague and contains no specific criteria for knowing when a non-self-governing territory has attained a full measure of self-government.

In 1952 UN Resolution 637 titled “The rights of peoples and nations to self-determination” linked self-determination with non-self-governing territories. This made it clear that defining non-self-governing territory which is in essence who would be recognized as possessing the right to self-determination. There were two main camps that had different possessions on what constituted a non-self-governing territories. Those who advocated the ‘Salt Water Thesis’ argued that only external colonies or non-self-governing territories who are geographically distinct, separated by the blue water from the colonizer have the right to self-determination in opposition to the Salt Water Thesis, the Belgium Thesis argued that the concept of non-self-governing territories should also apply to non-geographically distinct colonies to internal colonized peoples within the borders of independent States. In the end Salt Water Thesis won as many States do not want their own contiguous territories broken up. The Salt Water Thesis was enshrined in UN Resolution 1540 of

December 15, 1960 titled “Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter”. A non-self-governing territory is territories which are known to be a colonial type “…geographically separate and is distinct ethnically and/or culturally from the country administering it.” “…[and] the relationship between the metropolitan state and the territory concerned in a matter which arbitrarily places the letter in a position or status of subordination.” Therefore, subgroups within already existing sovereign States or in newly independent colonies had no UN sanction eight to self-determination, for example, in 1960 when Katanga declared secession from Congo the State of Katanga was not formally recognized by the international community as legitimate and the UN backed the central government of Congo. Another example is Biafra which broke off from Nigeria in 1967. The majority of Biafra were ethnically distinct from the other ethnic groups in Nigeria and they wanted their own State. However, once again their State was largely unrecognized by the international community and subsequently reintegrated with Nigeria in 1970 after a civil war.

Furthermore, Resolution 1541 outlines the three political status option that satisfy a non-self-governing territory to reaching full self-governance “A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State. (b) Free association with an independent State, or (c) Integration with an independent State.”

A shift from a nation based agreement for self-determination to a decolonization based argument to summarize “The principle of national self-determination has enjoyed a measure of international support since the mid-20th century, recognized by United Nations but tightly circumscribed to apply only to existing States or to colonial territories (by the Salt Water Doctrine whereby colonies are by definition separated from the colonizer by a sea) and not to nationalist movements within consolidated States especially when these are democracies.” While it seems intuitive to think that self-determination is implemented through a referendum or as the eligible people directly vote for their preferred political status. The majority of self-determination referendums were held after the 1990s up until then the majority of colonies were granted independence by administering powers either willingly such as Sierra Leone and Burkina Faso or only after wars of national operation such as Angola and Indo-China. Thus, implementing the rights of self-determination decolonization and satisfying the requirement of self-governance.

Regarding self-determination, the following conclusions are offered, which ought to provide us with a framework for understanding and critiquing the principle:

- The right, initially expressed in the American and French revolutions at the end of the eighteenth century, was considered as one of guaranteeing democratic consent within an entity.
- While this notion of 'democratic entitlement' was central, in Wilsonian interpretation it was applied to minorities, with a view to giving them a choice of political lineage, determined through plebiscites.
- Self-determination made a reappearance in the UN era as it became the vehicle of choice of the decolonisation movement. • The 1960 Declaration on colonial peoples gave this further legitimacy and became the basis for its expression in post war international law.
- Three options were identified in clarification of its parameters in 1960 namely: a) secession to form a new state; b) association with an existing state; c) integration into an existing state.
- The transformation from political tenet to legal norm was completed with its expression as the first human right in the Covenants of Human Rights in 1966.
- The 1970 Declaration sought to enshrine this legal norm into a guiding principle of the United Nations, though it is clear that the context for that document remained traditional colonisation.
- Modern self-determination leaves open several vital questions: (a) whether it still has validity in a post-decolonisation45 phase; (b) who is entitled to self-determination as currently expressed, and

(c) to what extent should the availability of appropriate solutions temper the appropriateness of the legal norm.

INDIGENOUS PEOPLES AND MINORITIES: DEFINITIONS AND ENTITLEMENTS

Self-determination and the rights of minorities evolved around two fairly disparate axes and were inseparably linked by Wilsonian thought in the aftermath of World War I.[1] Within the United Nations system, and as reflected in Article 1 of the Human Rights Covenants, it can be categorically, but rather unhelpfully stated that 'peoples' are entitled to self-determination. As demonstrated above, who the 'peoples' are remains ambiguous. With the dynamics of 'peoplehood' left undefined in law, and with several vulnerable groups (primarily within postcolonial states) facing states determined to maintain their external boundaries, with national identities forged around dominant cultures, minorities and indigenous peoples have sought to step

1.Anthony Whelan, 'Wilsonian Self-determination and the Versailles Settlement' (1994) 43 International and Comparative Law Quarterly 99.

into the breach and declare their peoplehood to further their claims to self-determination.[2]Human rights law is extremely wary of such claims. The wariness stems from the fear of a continuously available process whereby groups within groups constantly seek to renegotiate their identity and their rights, until being finally satisfied with their bargaining position vis-à-vis other groups. Thus, the prime question sought to be addressed in this section is whether minorities and/or indigenous peoples can be considered to be 'peoples' in the sense of Article 1 of the International Covenants.

When asked who minorities in international law are, the High Commissioner on National Minorities of the Organisation for Security and Co-operation in Europe famously stated, 'I recognise a minority when I see one'.[3] For the last few decades, human rights lawyers, lawmakers and academics have been unsuccessfully struggling to find a concise legal definition for a 'minority'. The definition used by the Special Rapporteur Francesco Capotorti is generally regarded as the best working definition in international law. It identifies a minority as: "[a] group numerically inferior to the rest of the population of a State, in a nondominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language."[4]The fundamental criteria required by this definition are clear: a minority has to be a group that exists in a non-dominant position. Its composition must be based on a shared ethnic, religious or linguistic identity which is distinguishable from mainstream society. In addition, the group needs to either implicitly or explicitly reveal a sense of solidarity towards preservation of its identity. While this definition remains problematic and attempts have been made to suggest other definitions, it nonetheless does capture the essence of the debate and is therefore proposed as being allowed to stand as a working hypothesis for the purpose of this paper.[5] Regarding the right of minorities to self-determination, the question posed is whether such groups based on their distinct ethnic, religious or linguistic groups can be regarded as 'peoples'. The argument is relatively logical since the dimensions of peoplehood are unclear and in any case, peoplehood itself is constituted on bases very similar to that of minority groups.From existing human rights documents it can be categorically stated that minorities do not have the right to self-determination.[6] The reference to 'all peoples' in Article 1 of the Covenants is interpreted as applying to 'whole peoples' and not segments thereof, with

2Fernand De Varennes, 'Minority Rights and the Prevention of Ethnic Conflicts'. Paper prepared for the 6th session of the Working Group on Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2000/CRP.3 (2000).

3Max Van der Stohl in Makkonen, above n 5, 54.

4Francesco Capotorti, Special Rapporteur, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/384/Rev.1 (1977).

5 For more definitions on minorities see <www.minority-right.org>

6 Philip Ramaga, 'The Bases of Minority Identity' (1992) 14 Human Rights Quarterly 409.

'whole' interpreted in the context of existing states. The Declaration on Minorities[7]avoids the right to self-determination and in Article 8.4 strongly insists that nothing in the declaration should interfere with states' territorial integrity. This attempts to rule out the applicability of self-determination in the secessionary sense at least, as an option for minorities to pursue. Indeed, the only reference to any right of collectively organised destiny is the right for minorities to establish and maintain their own associations, a right that falls considerably short of a right of self-determination. Instead, the emphasis of international minority rights law has been towards seeking to provide access to political participation within mainstream society rather than creating room for the articulation of secessionist ideals.

In this sense international standards regarding minorities are based on equality, nondiscrimination and protection of the right to enjoy one's culture, thus aiming to ensure effective participation and integration within society. It can be argued this is, in a certain sense, the opposite of self-determination which may allow for separatism. International instruments relating to minorities implicitly rule out the entitlement of self-determination to minorities differentiating them in a very fundamental respect from the rights of peoples. Additionally, as suggested by Eide "there is no disagreement that rights of persons belonging to minorities are individual rights, even if most cases can only be enjoyed in community with others. The rights of peoples, on the other hand, are collective."[8] However, this categorical denial of self-determination to minorities is not as clearcut as it might seem. Though international instruments suggest that minorities do not have a right to self- determination, it is important to remember that selfdetermination as a concept is based on the ideal of protecting oppressed peoples living under external oppression. In this sense, one of the arguments for a right to self-determination for minorities is based on the 1970 Declaration as examined above. Passed within the decolonisation process, the declaration invites states to respect the principle of equal rights and self-determination of peoples. Though it reaffirms the fundamental importance of states' territorial integrity, the Declaration strongly insists on the duty of states to respect self-determination drawing a line linking equality and self-determination. As Wright highlighted, the Declaration seems to imply that if a government is not properly representative of all the constituent ethnic groups within its society, self-determination might be the tool to redress the imbalance between majorities and minorities.[9] Thus, self-determination could be viewed as a remedy for minorities or 'the last recourse to rebellion against tyranny'. This view is reaffirmed by the Vienna Declaration of 1993: "[The right to self-determination] shall not

7Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res 47/135 (18 December 1992).

8Asborjn Eide, 'Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', 6th sess, Sub Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1 (2000).

9 Jane Wright, 'Minority Groups, Autonomy, and Self-Determination' (1999) 19(4) Oxford Journal of Legal Studies 605, 605.

be constructed as authorising or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."[10]

This paragraph suggests that people living under a regime that is not respecting equality and non-discrimination might, as a last resort, have a right to break away, thus creating some room for oppressed minorities to make some claim towards people-hood. This indicates that the distinction between a minority and an oppressed people is not always clear. The distinction is blurred further when externally imposed boundaries are factored in. The distinction between 'peoples' and 'minorities' were not considered when boundaries were first drawn in foreign offices in Paris or London under colonial foreign policies. Several minorities within post-colonial states are in minority situations within the existing boundaries of their post-colonial countries as a pure result of colonial boundaries drawn for administrative reasons, having been transformed into international boundaries. As a result, they still claim to be under external oppression.

The only legally binding instrument referring to minorities is Article 27 of the International Covenant of Civil and Political Rights which specifically addresses the protection of minorities. In its General Comment 23 on Article 27, the Human Rights Committee (HRC) has pointed out that the Covenant draws a clear distinction between the right to self-determination and the rights of minorities protected under Article 27. The Committee has highlighted that self-determination is a collective right whereas Article 27 aims at protecting the individual rights of members of a minority group.[11] However, in another General Comment relating more specifically to self-determination, the HRC has pointed out that self-determination as a legal principle is interlinked

[10] Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (1993) (emphasis added).
[11] Human Rights Committee, General Comment 23 on Article 27 (Fiftieth session 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights

with political rights. Though the HRC did not enter the critical discussion of the substantive content of the right enshrined in Article 1 of the Covenant, it emphasised: “The Committee has noted that many [States] completely ignored Article 1, provide inadequate information in regards to it or confine themselves to a reference to election laws...With regard to paragraph 1 of Article 1, States parties should describe the constitutional and political process which in practice allow the exercise of this right.”[12]

Under the mechanism of state reports, the HRC has invited states to enforce the political (para 1), resources (para 2) and solidarity (para 3) dimension of self-determination. In its Concluding Observations on Canada, it stated: “The Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2).”[13]

Another important point can be inferred from the decisions of the HRC. Indigenous peoples have a right to ‘interpretative’ self-determination when enjoying other rights protected by the Covenant. Since there are no cases involving minorities in this evolution of the right to self-determination, it could be argued that indigenous peoples are more entitled to self-determination (at least its interpretative value) than minorities. However, even though the number of cases involving indigenous peoples could invite this conclusion, it is important to keep in mind that the Committee has not specifically closed the door on self-determination for minorities.

[12] Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 (1994) 38 (‘General Comment 12’). 75 Ibid 12.
[13] Human Rights Committee, Concluding Observations, Canada, UN Doc CCPR/C/79/ Add.105, O7/04/1999

NEW CONCEPT OF SELF-DETERMINATION

The principle of self-determination has been conceived in different ways, by different authorities at different times. Starting as a principle guaranteeing ‘democratic entitlement’, it was asserted as a minority right in the Wilsonian era. Realising the folly of such decisions in the face of an absence of clear parameters as to which groups were entitled to self-determination, the UN era saw a restriction of application to cases of decolonisation. As seen above, the human rights committee has continued to emphasise this notion when confronted by minorities and indigenous peoples in cases, and general comments on the subject. This has been backed by a clarification by the Committee for the Elimination of Racial Discrimination, which differentiates between ‘internal’ and ‘external’ self-determination. Arguably, the central flaw with this strict position is that it fails to take into account the fact that the determination of political status is a vital aspect of self- determination. Watering it down to the extent where it seeks only to re-align relations within the state seems grossly unsatisfying. That said, it is clear what motivates the political exception is the fear of a continuously available process through which smaller and smaller groups seek the right to potentially dismember existing states at great cost to the stability of the state system as it currently exists. In stating the parameters of a principle of law, it is important to recognise the limitations of its implementation. However, it seems unsatisfactory to allow the limitations to affect the expression of the principle. For instance, the difficulty of designing effective hate speech legislation has not prevented the international committee from stressing that it is a vital right in the stockpile of tools available to combat racial discrimination. By analogy, it is important to be able to express the principle of self-determination in a definitive manner and to analyse its relevance in different circumstances, mindful of the difficulty for attainment and delivery. The proposed approach to rights of self-determination makes some important differentiations. First, it differentiates between indigenous peoples and minorities, a differentiation readily accepted in the literature and in the law. Second, it brings indigenous peoples within the parameters of ‘peoples’ due to the similarities of their situation with colonial peoples and in recognition of the dispossession of their lands which first led to the creation of sovereign states upon their territories. This is particularly appropriate since dispossession usually occurred through a process of formal law either without consent, or through consent gained by the subterfuge of unequal treaties that failed to satisfy the basic rules of contract as well as customary legal norms at the time, or expressions of the Vienna Convention on the Law of Treaties of 1969.

CONCLUSION

Self-determination as a principle has seen numerous changes since its early expressions. It has regularly transformed itself as a political principle in response to unfolding events. Giving such a principle of uncertain substantive content the authority of a legal tenet was arguably fraught with danger. Yet the forces of romantic self-determination, as well as the processes of classical self-determination recognised the principle as a vehicle for the expression of freedom in the face of oppression. In doing so both the notion of ‘freedom’ as well as that of ‘oppression’ were given the particular hue through the interpretation of the time in question. This temporal element has been the key to the development and growth of the norm of self-determination, and has also been the key to its many manifestations. While some have argued that ‘internal’ self-determination ought to be the modern extent of the right, this paper has argued that by itself, this remains inadequate.

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2. Economic, Social and Cultural Rights, GA Res 2200 (XXI) 21st sess, 1 (16 December 1966). 4 See Alexander Kiss, 'The Peoples' Right to Self-determination' (1986) 7 Human Rights Law Journal 165.
3. Joshua Castellino, 'Liberty, Equality and Fraternity: The Dubious Fruits of National Selfdetermination' (1999) 1 Turku Law Journal 1
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CASE COMMENT ON THE SUPREME COURT JUDGEMENT OF VARADARANJAN V. KANAKAVALLI & ORS.

Vaibhavi Jain[*]

INTRODUCTION

It has been rightly observed by Jackson Burnett - " Justice isn't about fixing the past; it's about healing the past's future." Death is an inevitable truth of the our lives. Basic objective of the civil legality is to deal with the rights and liabilities between the living and the dead arising out of the dispute amongst individuals. What if that dispute is caused by a dead? Or initiated by the person who is no more?

Here, a legal system that faces challenges in bridging the gap between the dead and the living. But there has to be an established procedure that can ensure the conservation of rights of the living person at the time of the initiation of the suit and also after his/her demise the said rights should be restored while the pendency of the suit. Only then, the justice can be done to both.

In the case of *Mohinder Kaur and Anr. v. Piara Singh and Ors.*[1], The concepts of legal representative and heirship of a deceased party are entirely different. In order to constitute one as a legal representative, it is unnecessary that he should have a beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest. Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on whom beneficial interest devolved under the law whether statute or other, governing the parties will be legal representatives.

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1[1] MANU/PH/0197/1981: AIR 1981 P & H 130.

In the instant case of *Varadaranjan v. Kanakavalli & Ors.*[2], the brevity of the order with which the report submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Code of Civil Procedure proceeds upon the view of not imparting any finality to the determination of the question of succession or heirship of the deceased party.

FACTS AND ISSUES OF THE CASE

The order dated 27th November, 2007 passed by the High Court of Judicature at Madras in revision petition Under Section 115 of the Code of Civil Procedure, 1908 is the subject matter of challenge in the present appeal. The revision petition is directed against an order passed by the Executing Court on 19th September, 2005 wherein the possession of the suit property in pursuance of a decree passed in favour of one Umadevi was ordered to be given to the present Appellant as the legal representative of Umadevi. The sister of Appellant's mother filed a suit for partition and separate possession in respect of the suit property as the successor-in-interest of her husband. This suit was decreed and such decree had attained finality. The sister of Appellant's mother sought execution of the decree passed but she died. The Appellant who was the son of deceased 's younger sister filed an application to execute the decree as her legal representative on the basis of a Will. The said application was allowed by the Executing Court. The Appellant filed an application for eviction of the Respondent and to deliver vacant possession of the premises.

The main issues presented before the Honorable Court were as follows:-

1. Whether the appellant is the legal representative of the deceased on the basis of the will executed by her?
2. Whether the appellant is the sole claimant to the estate of the deceased on the basis of the will?

2[2] MANU/SC/0070/2020.

PETITIONER'S ARGUMENT

- The Appellant claims to be the legal representative of Umadevi on the basis of the Will executed by her. He has produced an attesting witness and the scribe of the Will. The witnesses have deposed the execution of the Will by Umadevi in favour of the Appellant who is the son of her sister. In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, when in terms of Order XXII Rule 5 of the Code, the jurisdiction to determine who is a legal heir is summary in nature.[3]
- The appellant further submitted, that impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate, including those not brought on record.[4]
- Further it was submitted, that determination of the question as to who is the legal representative of the deceased Plaintiff or Defendant Under Order 22 Rule 5 of the Code of Civil Procedure is only for the purpose of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.[5]

RESPONDENT'S ARGUMENT

- In response to such petition, the Respondent asserted that the Will is forged and that the son of a sister is not a legal heir as per Section 15 of the Hindu Succession Act, 1956.

3 *Uthirapathi* v. *Ashrab and Ors.*, MANU/SC/0138/1998 : (1998) 3 SCC 148.

4 *Daya Ram and Ors.* v. *Shyam Sundari and Ors.,* MANU/SC/0298/1964 : AIR 1965 SC 1049.

5 ***Suresh Kumar Bansal*** v. ***Krishna Bansal and Anr.*** MANU/SC/1891/2009 : (2010) 2 SCC 162.

- The respondent contended that, as per the Appellant, the decree holder, Umadevi, was driven out of her house by her step son Munisamy Naicker and was staying with her sister for nearly 20 years but the execution of the Will at the last moment is a suspicious circumstance.
- It was further contended that, the very execution of the will has not been proved and it is not genuine, consequently, the legatee under the said will cannot become a legal representative to come on record in order to maintain the execution petition in the place of the decree holder, i.e. the testatrix.[6]
- Further the learned counsel contended, that the legal position that the inter se dispute between the rival legal representatives has to be independently tried and decided in separate proceedings.[7]
- Further it was contended that, when an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case.[8]

JUDGEMENT

On 22 January 2020, the judgment was pronounced. The mere fact that the High Court had a different view on the same facts would not confer jurisdiction to interfere with an order passed by the Executing Court. Consequently, the order passed by the High Court is set aside and that of the Executing Court is restored. The appeal is allowed. Certain crucial points of the judgment are as mentioned:

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6 *Vijayalakshmi Jayaram* v. *M.R. Parasuram* [MANU/AP/0063/1995 : AIR 1995 AP 351].

7 *Mohinder Kaur* v. *Piara Singh* [MANU/PH/0197/1981 : AIR 1981 P & H 130].

8 *Jaladi Suguna (Deceased) through LRs.* v. *Satya Sai Central Trust and Ors.* MANU/SC/7614/2008 : (2008) 8 SCC 521.

1) The legal representatives are to be brought on record within a particular period and if not, the suit could abate, -- is not applicable to cases of death of the decree-holder or the judgment-debtor in execution proceedings.
2) Rule 12 engrafts an exemption which provides that where a party to an execution proceedings dies during its pendency, provisions as to abatement do not apply. The Rule is, therefore, for the benefit of the decree-holder, for his heirs need not take steps for substitution Under Rule 2 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding or they *may file a fresh execution* application.
3) A decision Under Order 22, Rule 5, Code of Civil Procedure, would not operate as res judicata in a subsequent suit between the same parties or persons claiming through them wherein the question of succession or heirship to the deceased party in the earlier proceedings is directly raised.
4) The concepts of legal representative and heirship of a deceased party are entirely different. In order to constitute one as a legal representative, it is unnecessary that he should have a beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest.
5) Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on whom beneficial interest devolved under the law whether statute or other, governing the parties will be legal representatives.

JUDGEMENT ANALYSIS

In the present case, the High Court in exercise of revision jurisdiction has interfered with the order passed by the Executing Court as if it was acting as the first court of appeal. An order passed by a subordinate court can be interfered with only if it exercises its jurisdiction, not vested in it by law or has failed to exercise its jurisdiction so vested or has acted in exercise of jurisdiction illegally or with material irregularity.

With numerous civil provisions being considered and many exhaustive and valuable questions of law being taken into account which has great inferences and outcomes, this judgment was of

outmost importance in establishing the right of the deceased with respect to its legal heirs, or legal representatives.

Undoubtedly, it was a known fact that determination of the question as to who is the legal representative of the deceased Plaintiff or Defendant Under Order 22 Rule 5 of the Code of Civil Procedure is only for the purpose of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.

I believe that the court took a correct stand in this particular case and even gave a proper reasoning to back their claim. The judgment conveyed that the Appellant claims to be the legal representative of deceased on the basis of the Will executed by her. He had produced an attesting witness and the scribe of the Will.

It was deceased who had filed the execution petition but after her death, the Appellant had filed an application to continue with the execution. In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, the High Court was not justified in setting aside the order of the Executing Court, when in terms of Order 22 Rule 5 of the Code, the jurisdiction to determine who was a legal heir was summary in nature.

According to me, in this judgment the court took a much needed remedial stand that the Appellant was the sole claimant to the estate of the deceased on the basis of Will. The Executing Court had found that the Appellant is the legal representative of the deceased competent to execute the decree. In view of the said fact, the Appellant as the legal representative was entitled to execute the decree and to take it to its logical end.

Even though, the mere fact that the High Court had a different view on the same facts would not confer jurisdiction to interfere with an order passed by the Executing Court. Consequently, the order passed by the High Court is set aside and that of the Executing Court is restored. The appeal is allowed.

CONCLUSION

The order dated 27th November, 2007 passed by the High Court of Judicature at Madras in revision petition under Section 115 of the Code of Civil Procedure, 1908 is the subject matter of challenge in the present appeal. The revision petition is directed against an order passed by the Executing Court on 19th September, 2005 wherein the possession of the suit property in pursuance of a decree passed in favour of one Umadevi was ordered to be given to the present appellant as the legal representative of Umadevi.

The appellant filed an application under Order XXI Rule 35 of the Code for eviction of the respondent and to deliver vacant possession of the premises. In response to such petition, the respondent asserted that the Will is forged and that the son of a sister is not a legal heir as per Section 15 of the Hindu Succession Act, 1956.

In view of the case, it is very well construed, that none of the tests laid down in Section 115 of the Code were satisfied by the High Court so as to set aside the order passed by the Executing Court. Mere fact that the High Court had a different view on the same facts would not confer jurisdiction to interfere with an order passed by the Executing Court. Hence, the order passed by the High Court is set aside and that of the Executing Court is restored. The appeal is allowed.

Criminal Procedure Code and Investigation Powers in Cyber Forensics*

Abstract

With the advent of innumerable new technological developments in the last 2 decades, the world has turned into a massive interconnected community on a global scale. It is now easy to share and exchange information and ideas globally through the web, and tangible restrictions like geo-political boundaries now matter far less when it comes to communication and ease thereof. However, it has also seen a rise in the insidious and nefarious elements prevalent in our society, who are masters in cyber or computer crimes. India has witnessed a significant increase in cyber-crimes such as financial fraud, phishing, identity theft or intellectual property theft, etc. Developments in specific technologies like 3D printing and more advanced identity protection tools (especially those that are used on the dark web), has led to significant increase in activities such as counterfeiting – counterfeits are far more similar to originals now than they ever have been. To combat such crimes, experts as well as governments around the world have developed new methods of collecting evidence through computer systems and advanced data analytics and processing. This process of investigating, extracting, documenting and applying digital evidence has developed into a modern science colloquially referred to as 'Cyber forensics'. Computer forensics play a very important role to counteract such crimes. Thus, it is imperative to have standards regarding what constitutes admissible evidence. It enables law enforcement agencies to prosecute not only cases of cyber-crime but other types of crimes as well, which were earlier masked by tech savvy criminals. The rapid developments in the technological world bring about a challenge for law enforcement agencies to train their officers in the most effective manner possible. They are required to keep up with the latest technological trends and innovations and upgrade their core competencies in order to inspect and gather reliable admissible evidence. This research article will analyze the investigation powers and processes involved in cyber forensics, the laws relating to cyber-crimes in the Indian legal system and then discuss some techniques used in digital forensic investigation.

Keywords: Cyber forensics, Cyber- Crime, Forensic investigation, Cyber law, digital evidence

* Written By: Tulika Biswas

Introduction

The term ‘Forensics’, in this context, connotes the application of scientific methods in the investigation of criminal cases. Now, the term is used widely in day to day life. Post the 20th century, the field of forensic science saw many developments with the use of modern forensic methods of investigation. In its literal sense, Forensic science is “the application of scientific knowledge to legal problems”[1] such as criminal trials, civil disputes, and arbitration proceedings to assist the court to understand the facts and deliver the judgement. What makes ‘regular’ crime different from cybercrime is that in the latter, evidence is mainly recorder in digital devices.

Cyber forensics, also known as computer forensics or digital forensics is a fairly recent addition in the family of forensic science. Computer forensics has emerged as an independent branch of study which comes along with its own coursework and certification.

A simple definition of cyber forensics is that “it is the art and science of applying computer science to aid the legal process. With the rapid advancements in technology it quickly became more than just an art though, and nowadays one can even get a cyber-forensics specialization degree on the subject. Although plenty of science is attributable to computer forensics, most successful investigators possess a nose for investigations and a skill for solving puzzles, which is where the art comes in.”[2]

New techniques, procedures and specialized software have been developed with the emerging need for enhancing the process of digital forensic investigations. It is not a simple process either. The investigation officers have to make sure that data is reliable and understandable by the courts. They also have to adhere to the legal system. The scope of this field is wide as new challenges arise with technological enhancements.

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1 *Merriam-Webster’s Collegiate Dictionary* (11th ed., 2009)

2 Christopher L. T. Brown, Computer Evidence: Collection and Preservation, 21 (2006)

Cyber crimes

The rapid growth and digitalization of computers has led to a technological revolution throughout the world. Introduction of new softwares and evolution of Information technology (IT) has led to the emergence of a 'cyber space' where people can access any information, store data or exchange ideas. The developments of e-commerce, e-banking which are carried out through internet has made things simpler but it has also given birth to the relatively newfound problem of cybercrimes.

In the general sense, a crime is "a legal wrong that can be followed by criminal proceedings which may result into punishment". A society where there are high rates of crime cannot grow or develop well as it leads to a negative social and economic consequence. The term cybercrime signifies "unlawful acts wherein the computer is either a tool or target or both". Cybercriminals or hackers who commit such cybercrimes, do it for the purpose of damaging digital evidence or destroying computer systems. They do such acts for financial gain or for political or personal reasons. As internet networks evolve and digital devices gain popularity, hackers aim to penetrate security measures and commit such crimes.

Cyber Laws

It was in the 1970s when the world's first data protection law was enacted by the German state of Hesse in the form of 'Data Protection Act'[3]. In India, while the emergence of technology has proved to be very beneficial, the misuse of such technology creates a huge threat to security. There has been a significant increase in cases of cybercrimes in India by hackers wreaking havoc over the Internet. Over 44.5 thousand cybercrime incidents were registered in 2019 alone. Karnataka and Uttar Pradesh accounted for the highest share during the measured time period.[4]

Such crimes posed a threat to economic and national security to the country. It called for the need of statutory laws to regulate cyber-crimes strictly. Thus the legislature passed the Information

3 *Data Privacy Act: A Brief History of Modern Data Privacy Laws* (2018, April), Eperi, https://blog.eperi.com/en/data-privacy-act-a-brief-history-of-modern-data-privacy-laws

4 Sandhya Keelery, *Number of cyber-crimes reported in India 2012-2019*(Feb 2021) https://www.statista.com/statistics/309435/india-cyber-crime-it-act/

Technology Act, 2000 to deal with technologies in the cyber world and laid down the penalties and punishments of cybercrimes. They are also punishable under the various sections (22, 23, 33, 44 ,96 ,97, 268, 378, 425) of the Indian Penal Code, 1960. Various law enforcement agencies worked with each other with the aim of stopping cybercrimes and to implement the IT Act,2000.

The concept of ‘electronic evidence’ was also introduced through these Acts. According to Section 2(1)(t) of the IT Act, the term "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro-film or computer-generated micro fiche[5]. Section 4 of the IT Act expressly recognizes the validity and use of electronic records in place of ordinary paper-based records.

The procedure by which such electronic evidence is collected, investigated and analyzed by using computers softwares, tools and specialized techniques has been termed as ‘Cyber forensics’. This data collected in a manner which is admissible in a court of law. With the tremendous growth of internet and development of new computer systems and other digital devices, cyber forensics play a key role in investigating digital information in a legal manner.

Why Cyber Forensics?

Technological innovations have made a remarkable impact in the legal field. One area where this impact if felt is the process of acquiring information from computers systems. This information is termed as ‘digital evidence’ and procedure by which such evidence is gathered is known as cyber forensics. Law enforcement agencies carry out investigations to collect and analyze such evidence. Cyber forensics aims to apply science to the legal process. The preservation of computer evidence has become a challenge for most law enforcement agencies as this data can be easy tampered with. They have to hire highly skilled, competent investigations officers and cyber forensic examiners to handle crucial evidence.

Nowadays people are highly invested in making use of technology to carry out day to day activities such as banking, online shopping, online business, etc. The growth of e-commerce, e-banking industries have facilitated convenience to both customers and business owners. However, the internet is also being misused by cybercriminals. The increasing rate of

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5 The Information Technology Act, 2000 §2(1)(t), No.21, Act of Parliament,2000(India)

cybercrimes have put a threat to security of individuals and their identities. Investigation in digital forensics have come to the rescue to handle such security problems arising in the cyber world.

The branch of cyber forensics aims to investigate, collect, analyze and authenticate digital evidence related to cybercrime cases. To deal with such crimes, competent computer skills, research skills and expertise in the field of cyber forensics is much required. When it comes to digital evidence, the biggest challenge is to preserve the data gathered through investigation. Handling massive amounts of data which can contain crucial information for a case is not easy. Investigation is a complex process. Law enforcement agencies and commercial organizations have made and continue to make efforts to successfully carry out effective digital forensic investigations. They cover wide range of cases such as phishing, hacking, transaction fraud, intellectual property theft, child pornography, criminal misuse of data, ransomware, etc. Such crimes threaten not only individuals but also puts a risk to the economic and national security. In India, the number of cybercrimes cases reported has seen a steady annual increase.

With the onset of the Covid-19 pandemic, internet services have been put at a higher security risk. As per the data maintained by National Cyber Crime Reporting Portal (operationalized by The Ministry of Home Affairs), over 3.17 lakh incidents have been reported from August 2019 to February, 2021[6]. As per the 2021 Norton Cyber Safety Insights Report[7], over 27 million adults in India were victims of Identity theft in past 12 months alone. The growth of cybercrimes in India in the past few years make our country, which is moving towards a digital economy, vulnerable. As a response to this, continuous efforts have been made to study the field of cyber forensics and develop useful tools to conduct digital forensic investigations.

Laws enabling Cyber Forensics in India

6 The Hindu, *3.17 lakh cybercrimes in India in just 18 months* (March 9,2021, 4:10 PM), https://www.thehindu.com/sci-tech/technology/317-lakhs-cybercrimes-in-india-in-just-18-months-says-govt/article34027225.ece

7 NortonLifeLock, *2021 Norton Cyber Safety Insights Report* (2021), https://www.nortonlifelock.com/au/en/newsroom/press-kits/2021-norton-cyber-safety-insights-report/

The growing incidents of cybercrimes has led to emergence of various legal issues and problems. This made it necessary to enact and implement laws to deal with digital evidence, the investigations powers in cyber forensics and laws to punish cybercriminals. Various legal measures have been adopted in India. One of the most important being the enactment of the Information Technology Act, 2000. The act provides for a wide range of laws to deal with cybercrimes. The Information Technology (Amendment) Act, 2008 was enacted to keep pace with technology and the model law on E-Signature, adopted by the United Nations Commission on International Trade Law (UNCITRAL).[8]

Various other legal measures were taken to tackle cyber-crimes and several amendments were made in the Indian Penal Code, 1860, the Indian Evidence Act, 1872, The Bankers Books Evidence Act, 1891 and the Code of Criminal Procedure, 1973, etc. Through these amendments, the Acts have tried to include cyber-crime within their ambit. For instance, the law defining 'Evidence' in the Evidence Act, 1872 has been amended to incorporate electronic evidence in Section 3 of the Act. Section 65-B of the Evidence Act deals with the admissibility of electronic records. It states that "Notwithstanding anything contained in the Evidence Act, any information contained in an electronic record, whether it be the contents of a document or communication printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer, it is deemed to be a document and is admissible in evidence without further proof of the production of the original, subject to satisfaction of the conditions set out in Section 65B(2) - (5) of the Evidence Act"[9]. The question of reliability of computer evidence has been cleared by Section 79A of the IT(Amendment) Act, 2008. It empowers the Central Government to notify any department, body or agency of the Central Government or a State Government as Examiner of Electronic Evidence.

Investigation in Cyber Forensics

8 Dr.Jyoti Rattan, *Law relating to E-Commerce: International and National Scenario with special reference to India*(2015), IJSSEI(Jour.), pg 1

9 Indian Evidence Act, 1872, § 65-B, Act No. 1 of 1872, India Code(1872), https://www.indiacode.nic.in/

Cyber forensics is becoming increasingly relevant in India today. The most crucial task in computer forensics is preservation of the electronic evidence in its most original form. Investigation process in cyber forensics goes through various detailed stages. For instance, before a forensic investigation is initiated, an approval form validating the investigation request may be required to be submitted by the Legal department of the agency. If validity of the investigation process is not proved, it might be stopped right way. If the investigation is validated and initiated, then the most challenging process becomes that of handling the evidence gathered. On the part of the requester, they may require the independent cyber forensic investigator to sign a non-disclosure agreement (NDA) as they may be made privy to proprietary information[10].

Once the legitimacy and scope of the investigation is proven, the legal department may give an order to start the investigation. A team of competent and reliable officers are ordered to carry out such investigation. They are entrusted with the task of collecting, investigating and properly analyzing the computer evidence in a legal manner.

Unlike paper evidence, digital evidence is generally collected through hard drives, USB drives, zip drive, specialized software, GPS systems and even through social media accounts. The tools specifically made for investigating in cyber forensics play a major role. They are needed to carry out a faster and precise investigation. The protection of evidence is also critical. The investigators have to be careful to ensure that "no possible evidence is damaged, destroyed, or otherwise compromised by the procedures used to investigate the computer; or introduced to a subject computer during the analysis process; extracted and possibly relevant evidence is properly handled and protected from later mechanical or electromagnetic damage; a continuing chain of custody is established and maintained is established and maintained; business operations are affected for a limited amount of time, if at all; and any client-attorney information that is inadvertently acquired during a forensic exploration is ethically and legally respected and not divulged."[11]

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10 Albert J. Marcella, Jr. and Frederic Guillossou, *Cyber Forensics: From Data to Digital Evidence*, 212 (Volume 623 of Wiley Corporate F&A, 2012)

11 Judd Robbins, *An Explanation of Computer Forensics* (2008), http://www.juddrobbins.com/forensics.htm

During the process, investigators and examiners also face a lot of difficulties and hurdles. The use of accurate software and hardware tools determine the authenticity of the investigation. The unavailability of sophisticated tools can cause the process to get slower and makes it difficult to gather and preserve the evidence. Nowadays, cybercriminals use high-end technologies to cause damage to computer or to destroy the evidence. Thus, it is very important to invest in the best and useful tools to tackle such problems. In case of crucial evidence, it must be ensured that data is handled safely.

Another difficulty that arises is the lack of skilled and competent cyber forensic investigation officers. The corporations and law enforcement agencies have to make sure to hire officers with proficient computer skills and expertise in cyber forensics. If they don't possess the sufficient knowledge of standard procedures or lack competent skills, it can lead to the failure of the investigation.

Common Tools used in Cyber Forensics

Highly sophisticated tools are used to collect evidence in a forensic investigation process. Some popular tools of digital forensics[12] used are Disk and data capture tools such as Autopsy which analyzes disk images, perform in-depth analysis of file systems; the Bulk Extractor is tool scans the disk images, file or directory of files to extract useful information; Oxygen Forensic Detective focuses is a tool capable of extracting data from a number of different platforms, including mobile, IoT, cloud services, drones, media cards, etc. KaliLinux – is a software which is maintained and funded by offensive security. It is specially designed software used in digital forensics and penetration testing. There are thousands of other digital forensic tools which are used in investigation. Today, the demand for such specialized tools is very high. The more refined and developed the tools are, the higher the chance of a faster and successful investigation.

Investigation Powers in Cyber Forensics in India

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12 Howard Poston, *Popular Computer Forensics: Top 19 Tools* (2021), https://resources.infosecinstitute.com/topic/computer-forensics-tools/

In India, law enforcement agencies, corporations, criminal investigation officers are slowly getting familiar with the procedures and technical knowhow of cyber forensics. As the country is moving towards a digitalized economy and aims to compete in the global world, the importance of digital media and computer systems has grown over the past few years. The increasing cybercrimes rates has created a huge concern for the national security. Cyber forensics have been adopted to deal with such crimes and to make the investigation process swifter and more authentic. Even though digital forensics tools are not used at the optimum level in India, various enactments and amendments have been made to amplify the investigation process in cyber forensics.

All the laws dealing with cyber-crimes in India find their basis in the guidelines laid down by the statute Information Technology Act,2000. The power to investigate in cyber forensics have been given in Section 78 of the IT Act. It states that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a police officer not bellow the rank of (Inspector) shall investigate offence under this Act"[13]. Clause 3 of Section 78 further clarifies that one officer is ordered to investigate, they may exercise the same powers that an officer in charge of police station exercises in a cognizable case under section 156 of the CrPc, 1973.

In the case of **Mohd. Nizam V. State of U.P**, Hon'ble Pankaj Naqvi, J. stated that "Once exclusivity to investigate an offense is conferred upon a police officer of a certain rank, investigation by an authority lower than rank of the designated authority vitiates such investigation, which is not a curable defect, as non-obstante clause, of Section 78 has an overriding effect over the provisions of the Code…a charge sheet filed by an incompetent authority is illegal/ void in the view of the bar of Section 78 of the IT Act[14]".

While the rules laid down in the IT Act have set the basis to deal with cybercrimes, it has not been sufficient to combat the new variants of cybercrimes that keep growing in the cyber world. Thus besides the IT Act, certain amendments have been made in the Evidence Act,1872, the Indian Penal Code,1860 and the Criminal Procedure Code,1973 to make cyber-crimes punishable under their ambit. In fact, the IT Act and IPC have some parallel provisions as well. For instance,

13 The Information Technology Act, 2000 §78(1), No.21, Act of Parliament,2000 (India)

14 Mohd. Nizam v. State of U.P(Application U/s 482, No. 7151 of 2015), AlHC (2017)

to investigate an act as a cyber-crime u/s 66 of IT(Amendment) Act 2008, that act must be one as defined under Section 43 of the IT Act along with having fraudulent and dishonest intentions in accordance with Section 24 and 25 of the Indian Penal Code. If it doesn't meet the criteria, the act cannot be investigated as a cyber-crime.

Apart from these, other statutes such as the National Investigation Agency Act,2008 also include provisions to punish cybercrimes. Government agencies such as the Intelligence Bureau (IB), Research and Analysis Wing(RAW), Computer Emergency Response Team (CERT-In), National Cyber Coordination Centre(NCC), etc., have been established as measures to address the increasing issues related to cyber security. These agencies took the initiative to develop specialized cyber forensic procedures for the better handling of electronic evidence, to administer cyber laws and to enhance the process of carrying out digital forensic investigations. These enactments, agencies and legislations have played a key role in India to deal with cyber forensic matters and to counter cybercrimes. They confer power upon inspectors to register and investigate cases of cybercrimes throughout India.

Investigation Process

The power to carry out search operations and make arrests is given to Inspectors under Section 80 of the IT Act. It states that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any police officer... may enter any public place, search and arrest without warrant any person, who is reasonably suspected of having committed or of committing or about to commit an offence under the IT Act"[15]. The procedure of collection of evidence from computer systems have to be observed along with the directives to carry out search operations u/s 80 of the IT Act and section 165 of CrPc.

If a company is accused of committing a cyber-crime, then as per Section 85 of IT Act, every person associated with the conduct of business of that company shall be liable to proceeded against and punished accordingly.

In India, a person can make a report of cyber-crime by either filing a written complaint in a Cyber Cell or by lodging an F.I.R. Other initiatives taken by the government allows citizens to

15 The Information Technology Act, 2000 §80(1), No.21, Act of Parliament,2000 (India)

file a complaint of cyber-crime at websites like the National Cyber Crime Reporting Portal (cybercrime.gov.in). After complaint is lodged, the investigation officers carry out cyber forensics investigation by extracting, examining, preserving and inspecting digital evidence form computer systems and other digital devices having storage memory. The preservation of evidence is a primary task. It has to be made sure that there is no tampering with the evidence or destruction of digital evidence. It should remain the same as it was during the time of seizure of evidence. This ensures the probity of the investigation process. After the evidence is analyzed, it is presented in a court of law, for civil or criminal proceedings and for the prosecution of cybercrimes.

In cases of serious economic offences such as fraud transactions, or fake currency notes, e-banking frauds and other such cybercrimes, the Central Bureau of Investigation (CBI) also have the power to conduct investigations. “CBI has become benchmark in crime investigation. It has gained high credibility over the years...people from the most peripheral and remotest regions of the country have trust in the investigation agency”[16]. The Network Monitoring Centre of CBI monitors the web data using specialized cyber forensic tools. If the evidentiary data is located in some other country, the investigation process should be complied with Section 166 of CrPc and the Interpol must be informed the same.

Analysis on Effectiveness of Investigation Process of Cyber-Crime

A number of cyber-crimes cases have been countered with in India. One such successful case was the **Sony.Sambandh.Com Case**[17] in 2013 where an incident of fraudulent transaction had occurred. A complaint was lodged at the CBI against the accused Arif Azim. After the matter was investigated, Arif was arrested. CBI gathered the digital evidence to prove their case and the court convicted him under Section 418,419 and 420 of IPC. This was the first time India saw conviction in a cybercrime.

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16 Union Minister Jitendra Singh at First National Conference on Cybercrime Investigation and Forensics, CBI (2019)

17 Talwant Singh, *Cyber Law & Information Technology*, https://delhidistrictcourts.nic.in/ejournals/CYBER%20LAW.pdf

India is still in the process of getting familiar with the procedures of digital investigation and the field of cyber forensics. It was only in the 2014 case of **Anvar P.V. v. P.K. Basheer** that the importance of Section 65 of Evidence Act was recognized. The section deals with the admissibility of electronic records. It provides for sanctioning secondary evidence in the form of electronic evidence. The Supreme Court in this case held that "an electronic record by way of secondary evidence shall not be admissible as evidence unless the requirements of Section 65-B are satisfied"[18]

One of the biggest challenges with regard to digital forensic investigation that India faces is the lack of specialized software tools for conducting reliable investigations. Cyber law in India is not complete and more enactments could be legislated making the punishment for cybercrimes stricter. The investigation process for such cases should be conducted as quickly as possible since digital evidence in cyber space can be easily tampered with or even destroyed. As per the 2017-2019[19] cyber-crime reports made by the National Crime Record Bureau(NCRB) of India, the crimes rates in India have been continuously increasing. Because of ineffectiveness in investigations, the number of persons arrested in proportion to crimes committed is low. With the onset of Coronavirus pandemic, the reliance on internet systems and websites have increased. This has also caused increase in cases of identity theft, intellectual property theft and banking fraud cases in the country.

If India invests more in developing, importing or even collaborating with International business to create more sophisticated digital forensic tools, it can ensure smoother, faster and trustworthy process of gathering and analyzing electronic evidence. People are slowly opening up to the concept of cyber forensics in the country. However, investing in tools needed to perform computer forensics could be quite expensive too. This makes it difficult for smaller organizations to hire and train their own cyber forensic teams. Once way by which this problem could be solved is by outsourcing tools. It is more cost effective and could prove to be better than paying for the tools. To effectively combat the growing number of cyber-crimes, India must prepare

18 Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473(India)

19 Cyber Crimes(State/UT wise) 2017-2019, NCRB, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%209A.1_1.pdf

itself, impart knowledge and make advancements in the field of cyber forensics. Preserving digital evidence could be a tricky process. Thus, efforts should be made to hire/outsource skilled analysts and use the correct software to ensure legal admissibility of digital evidence.

Conclusion

In today's world, almost everything is dealt with use of information technology - be it online transactions, trade, education, social media, etc. While internet has made it easier to connect with everyone in the digital space or to carry out businesses and other work online, it is unfortunate that internet is also being misused by criminals who commit cyber-crimes like hacking, cyberstalking, identify theft scams, banking frauds, etc. India has witnessed growing number of cybercrimes and the cyber laws have not always been sufficient to deal with these internet crimes. The field of cyber forensics came to the rescue to investigate into cases of cybercrimes. But being a recent concept, cyber forensics is not known on a wider scale. Nevertheless, it has certainly shown efficacy in the lagging criminal justice system of India. Investigation in digital forensics has opened up new and easier ways of gathering and preserving evidence through electronic media. The advent of cyber-crimes which are highly technical in nature, has called for the need of developing and investing in specialized tools and techniques in the field of digital forensics. It is much necessary to ensure accuracy and authenticity in the investigations of cyber-crimes.

THE DOCTRINE OF "MANIFEST ARBITRARINESS"- A CRITIQUE [*]

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* Sakshi Agrawal

ABSTRACT

There has been Shift in the **Article 14** of the Constitution of India which guarantees the "Right to Equality", from the old doctrine of reasonable classifications, according to it if any action violates Article 14 is Arbitrary. Courts have moved towards the new test of arbitrariness. An unhandled exercise of will can also be defined as an act of arbitrary. Equality and arbitrariness are sworn enemies. "Manifest Arbitrariness" Doctrine identifies the unproportionate of the legislative or anything that is done in Legislature whimsically. This manifest alleviates these concerns by finding consistency in its application while restricting the scope of judicial scrutiny. By employing the framework of **"Rules versus Standard"**, In the Indian context, the doctrine traces its evolution from **Article 14 of the Constitution of India.** However, In Indian Constitution, the concept of 'equality' with respect to a legislative review under Article14 has been seemingly equated to just '**reasonableness of classification'** and has been reduced to a mere formula (classification test) ignoring the true essence of the concept of equality.

In the Court of law any action or any legislature which block the Fundamental rights toward the Citizens or any Legislation which have no reason or not able to justify are fall into "arbitrariness".

INTRODUCTION

"Manifest arbitrariness defines something done by the legislature capriciously, irrationally or without any adequate determining principle and also refers to which is done excessive and disproportionate".

In India, every citizen has fundamental rights. This doctrine is used as a weapon for a citizen to enforce his/her Fundamental Rights. According to the Book of **A.V. Dicey "The Constitution of England",** everyone should be treated equally in justice, same is said in the **Preamble** of our Constitution, also given in **Article 14.** This Article contains a powerful statement of values, "Equality Before Law" and "Equal Protection of Laws". Nariman J. Stated in *ShayaraBano v. Union of India*[1] The Case that **Article 14** has two aspects: the first Anti Discriminatory aspect, second Classification and arbitration. Equality belongs to the rule of law where it is arbitrary. When a legislature becomes unreasonable or violates any fundamental rights a state of arbitration will come up on the surface.

The arbitrary situation firstly arose in 1967 before the Supreme Court in ***S.G. Jaisinghani v. Union of India*[2]*.*** In this case, the government body violated the fundamental right "Right to Equality". Later it has been seen in *E.P. Royappa v. State of Tamil Nadu*[3], where the demotion of a police officer had been done as an unreasonable legislature, after the time period of four decades it came upon the *ShayaraBano*[4] case where the triple-talaq matter came up, and thereafter this case the Arbitration was no longer to be *res integra*. After the above-mentioned case, there has been a catena of pending cases that are indulged directly or indirectly in the arbitration.

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[1] (2017) 9 SCC 1.
[2] (1967) AIR 1427, (1967) SCR (2) 703.
[3] (1974) 4 SCC 3.
[4] *Ibid 1.*

JUDICIAL APPROACH

The doctrine of 'Manifest Arbitrariness' was first recognised in case of *E.P. Royappa v. State of Tamil Nadu*[5]. After 4 decades, In *Shayara bano*[6] case, It was taken into consideration by a three judge bench, by giving effect to Article 14 of Indian Constitution. As **Article 14** of the Constitution guarantees "the equal protection of laws". The delay of 40 years between *E.P. Royappa* and *ShayaraBano* case relating to this doctrine of "Manifest Arbitrariness" is because of the contradiction and *per incuriam* of the judgements in some cases. These cases involve constitutionally significant matters. By highlighting some cases, we will show the evolution of this doctrine:-

S.G. JAISINGHANI v. UNION OF INDIA[7]:

This was the first time when arbitrary situation comes, In this case, the question challenged the Income Tax Seniority Rules, in this case, there is an allegation of discrimination in the department, "Subordinate legislation" has a reasonableness classification which is leading to violation of the fundamental rights "Right to Equality". Therefore this case was based on the reasonableness of classification and held the theory "*Rule of law can be formed only when there is absence of arbitrary"*.

Arbitrary has struck down these legislatures as these are falling into the second ground of Court.

MANEKA GANDHI v. UNION OF INDIA[8] :

Maneka Gandhi case is another landmark ruling in the series of progressive judgements. The judgement was a unanimous declaration of the sitting bench of the Supreme Court after the judgement *Satwant Singh*[9] case. Herein it was contended by the petitioners that the Fundamental rights, "*Rights to freedom of speech & expression"*, "*Right to travel abroad", "Right to life and personal liberty*" & "*Right to freedom of movement*" are infringed by the respondent by impounding of the passport on 4th July, 1977 without providing any reason. The Article 14, 19 and 21 are supposed to be read together and there is a need for a procedure established by law which is reasonable, fair and Constitutional. This law is unconstitutional because the right to

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[5] *Supra note 3.*
[6] *Supra note 1.*
[7] Supra note 2.
[8] (1978) AIR 597, 1978 SCR (2) 621.
[9] Satwant Singh Sawhney vs D. Ramarathnam, 1967 AIR 1836, 1967 SCR (2) 525.

travel abroad is generally accepted as a basic freedom covered under personal liberty provided in Article 21. They also argued whether it is procedure established by law or due process of law, there shouldn't be any unreasonability and arbitrability

INDIAN EXPRESS NEWSPAPER v. UNION OF INDIA[10]:

In this case, Article 14, 19(1) (a) and 19(1) (g) of the Indian Constitution, are violated as by the amendment of provisions of Working journalists and other Newspaper Employees and Miscellaneous Provisions. *In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is* ***manifestly arbitrary***. This case relied upon the *ShayaraBano* case, Arbitrariness was propounded here and this legislature should be struck down. The test of manifest arbitrariness founded in this case has been adopted in the *ShayaraBano* case, which states as,

> *"Manifest arbitrariness for invalidating the legislation must be something prescribed to be done by the legislature, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."*

Ajay Hasia and Ors. v. Khalid Mujib Sehravardi[11]:

In this case, Bhagwati J, speaking for a constitutional bench, implicitly equated the level of Article 14 scrutiny in cases of executive and legislative actions. In the Court's words, *"Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."*

[10] (1986) AIR 515, 1985 SCR (2) 287.
[11] (1981) AIR 487, 1981 SCR (2) 79.

K.S. Puttaswamy(retd.) vs. Union of India [12]:

In this case, a nine judge bench court has assembled to discover that privacy is a constitutionally protected value. Herein the issue arrives at the anvil of constitution culture based on the Human Rights Protection and allows the Court to re-analyze the basics principles on which our constitution has been established. The question of whether or not privacy is a fundamental right first arose in 2015 before a three-judge bench of the Supreme Court, considering the constitutional challenge to the Aadhaar framework. The Attorney General had then argued that although a number of Supreme Court decisions had recognised the "right to privacy", Part III of the Constitution does not guarantee such a fundamental right since larger benches of the Court in ***M. P. Sharma And Others vs Satish Chandra***[13] (8 judge bench) and ***Kharak Singh vs The State Of U. P. & Others***[14] (8 judge bench), had refused to accept that the "right to privacy" was constitutionally protected. Consequently, this bench referred the matter to a five-judge bench to ensure "institutional integrity and judicial discipline". Thereafter, this bench referred the constitutional question to an even larger bench of nine judges to pronounce authoritatively on the status of the "right to privacy".

Chandrachud, J., speaking for himself and three other Judges, dealt with the submissions of the Respondent qua "**substantive due process**". It was observed that the history surrounding the drafting of **Article 21** indicates a conscious omission by the Framers of the expression "due process of law".

Justice D.Y. Chandrachud in the first Puttaswamy case has held that substantive due process, as referred to in some earlier judgments, was essentially a reference to a substantive challenge to the validity of a law on the ground that its substantive provisions violate the Constitution. Even if we stick to this ratio, and don't go as far as Shayara went on substantive due process, the substratum of the doctrine is not affected.

E.P. ROYAPPA v. STATE OF TAMIL NADU[15]:

The State action was challenged as being "arbitrary". Herein, demotion of police officer was considered to be hostile and malafide. It is a similar case where arbitration took place and its

[12] (2017)
[13] (1954) AIR 300, (1954) SCR 1077.
[14] (1963) AIR 1295, (1964) SCR (1) 332
[15] Supra note 3.

application with different doctrine which resulted to be struck down as it is violating the law contained in Article 14. J. Bhagwati speaking for the majority, categorically laid down that along with unjustness, arbitrariness is a distinct facet of Article 14.

SHAYARABANO v. UNION OF INDIA[16] :

ShayaraBano's case, was the case which gave stem to the root of arbitration as it described under Article 14 the test of manifest arbitrariness that indicates the wrongdoing of the legislature. *ShayaraBano v. Union of India*, was an authoritative pronouncement of the supreme court. Additionally, the argumentation also relied on international treaties and covenants to which India is a party, such as the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women and the respective references to gender equality, non-discrimination and human dignity therein. Beyond that, it was held that *triple-talaq* was not in tune with the prevailing social conditions, as Muslim women were vociferously protesting against the practice. It was held that *triple-talaq* should be abolished in the same manner as the state had done away with practices once prevalent in the Hindu community, such as sati, devdasi and polygamy. It is also argued that Muslim women in secular India had lesser rights than Muslim women in Islamic state.

According to J. Nariman, despite long elaborations on whether or not triple talaq was "protected" by Article 25, the court did not position itself clearly on the relationship between gender equality (Article 14 and 15) and religious freedom (Article 25). It also refrained from expressively overruling *Narasu Appa Mali*[17]. And since the court only set aside one specific form of talaq, but other forms of talaq do not fulfill the standards of gender equality either, as Muslim husbands are granted a unilateral right to divorce their wives, which Muslim women do not enjoy in the same manner.

STATE OF ANDHRA PRADESH v. MCDOWELL & CO.[18]:

In the Case, Government prohibited the sale and consumption of intoxicating liquors by for the public interest Learned Counsel from the petitioner sought to demonstrate the discriminatory

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[16] (2017) 9 SCC 1
[17] The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[18] 1996 AIR 1627, 1996 SCC (3) 709.

aspects of the amending act in prohibiting the production and manufacture of intoxicating Liquors and the violation of Article 14 of Indian Constitution.

As per the Submission of J. Nariman,:-

A large number of person falling within the exempted categories are allowed to consume intoxicating liquors in the State Of Andhra Pradesh, The total prohibition of manufacture and production of these liquors is "arbitrary" and the amending act is liable to be struck down on this ground alone.

"A law made by parliament or legislature can be struck down by courts on two grounds and two grounds alone viz. (1) Lack of legislative Competence (2) Violation of any other constitutional provision. There is no third ground".

MITHU v. STATE OF PUNJAB[19] VALIDITY OF SECTION 303 IPC:

In the Case, Appellant argued that **Section 303 of Indian Penal Code** is unconstitutional and arbitrary as it propagates deprivation of life by the virtue of a procedure that is highly unfair and unjust. **Section 303** does nothing but lays down provision for capital punishment for an act of murder by a convict already serving punishment of life imprisonment, there is nothing wrong with the section and it must remain valid and operational. It was held in the judgment delivered by the CJI Chandrachud, heading a five constitutional bench that section 303 of the IPC is unconstitutional and void as it stands violative of **Article 14** it also infringes with guarantee of equality along with **Article 21.** The 5 judge bench decided to repeal the Section 303 of the IPC taking into consideration the said reasons. In context to the argument that life convicts are a potent and vile group of humanity, Court said that this was not backed up by any form of scientific proof or justification and so will not be put outside the purview of **Article 14 of Constitution of India.** This section also stands violative of **Section 235(2) of CrPc, 1973**, which guarantees a convict a right to be heard while deciding the question of a sentence. In furtherance, it also infringes **Section 354(3) of CrPc, 1973** whereby the court is bound to provide special reasons for imposing death sentence.

[19] (1983) AIR sc 473.

The Doctrine of 'Manifest Arbitrariness' Applies To Invalidate Tax Statutes

A three judge bench of the Supreme Court, Moderate over by R.F. Nariman, J., Provided its decision in *DCIT v. M/s. Pepsi Foods Ltd*.[20] The issue of Constitutional Validity of the third provison to **Section 254 (2A)** of **the Income Tax Act, 1961,** which was inserted by the Finance Act, 2008, and pursuant to its insertion in the statute book, has been aroused before the Court.

The vires of the said proviso was challenged on the basis that if resulted in the automatic vacation of a stay order granted by the Income Tax Appellate Tribunal on the expiry of 365 days even if the assessee was not at fault for the delay in disposal of the appeal by the Appellate Tribunal. This, in turn, gave a free hand to the taxman to take coercive measures against an assessee on the expiry of 365 days and, thereby, rendered such one right of appeal before the Appellate assessees Tribunal illusory.

The Delhi High Court held the third proviso to **Section 254 (2A)** of **the Income Tax Act** to be violative of the non-discrimination clause of Article 14 of the Constitution of India and, therefore, struck down that part of the said proviso, which did not permit the extension of a stay order beyond the period of 365 days even if the assessee was not responsible for the delay in disposal of the appeal by the Appellate Tribunal. In appeal, the Supreme Court in *DCIT v. M/S. Pepsi Foods Ltd.* upheld the judgment of the Delhi High Court. However, while affirming the judgment of the Delhi High Court, the Supreme Court gave two separate reasons for holding the third provision to Section 254 (2A) of the Income Tax Act to be violative of Article 14 of the Constitution of India.

The first reason given by the Supreme Court was on the line of reasoning adopted by the Delhi High Court. That is, the third proviso to Section 254 (2A) of the Income Tax Act, was violative of the non-discrimination clause of Article 14 of the Constitution of India, inasmuch as, it treated unequals equally and that the object of the said proviso was itself discriminatory. The second reason given by the Supreme Court, and which is relevant for the present discussion, was that the third proviso to Section 254 (2A) of the Income Tax Act was "manifestly arbitrary".

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[20] (2021)

In this context, the Supreme Court applied the doctrine of manifest arbitrariness, revived by it in the celebrated Triple - Talaq case, to strike down the third proviso to Section 254 (2A) of the Income Tax Act as being violative of Article 14 of the Constitution of India. To appreciate the Supreme Court's application of the “manifest arbitrariness” doctrine, it is first necessary to spell out the scheme of Section 254 (2A) of the Income Tax Act and, in particular, its third proviso, which was applicable in the present case.

Consequences of the application of the 'manifest arbitrariness' doctrine:

The grounds of 'manifest arbitrariness' raised for challenging the vires of the said provision and which were subsequently accepted by the Supreme Court were procedural in nature. In this context, an interesting question arises, whether the doctrine of 'manifest arbitrariness' can be used to challenge a substantive provision in a tax statute and, therefore, substantive grounds of 'manifest arbitrariness' can be raised to challenge the vires of such provision. The prescription of a higher rate of tax on Pepsi is capricious and irrational. This question has been answered in the affirmative by the Supreme Court in *DCIT v. M/S. Pepsi Foods Ltd*.. In fact, in an earlier part of the judgment, the Supreme Court had this to say:

> *"14. It is settled law that challenges to tax statutes made under Article 14 of the Constitution of India can be on grounds relatable to discrimination as well as grounds relatable to manifest arbitrariness. These grounds may be procedural or substantive in nature. Thus, in Suraj Mall Mohta and Co. v. A. u Visvanatha Sastri (1955) 1 SCR 448, this Court struck down Section 5(4) of the Taxation on Income (Investigation Commission) Act, 1947 on the ground that the procedure prescribed was substantia//y more prejudicial/and more drastic to the assessee than the procedure contained in the Indian Income Tax Act, 1922. Section 5(4) of the aforesaid Act was thus struck down as a piece of discriminatory legislation offending against the provisions of Article 14 of the Constitution of India.”*

CONCLUSION

In the light of Aforesaid Cases and Judgements, I conclude that, since the inception "arbitrariness" has been a beleaguered doctrine. Although Bhagwati J. very clearly read the principle of 'arbitrariness' under Article 14 and applied it to all kinds of state action without making any attempt to draw distinction between legislative and administrative function. Any legislature which has *"subordinate legislation"* on its applicability or violates any fundamental rights are considered to be arbitrary. All arbitrary state actions are antithesis to the principle of equality. The rule of law in this context means that decisions should be made by applying principles and rules and not on the basis of one's own whims or caprice. Yet for a very long-time "*doctrine of arbitrariness"* was considered to be applicable only in administrative matters and scope of judicial review of legislation on the grounds of 'equality' under Art. 14 were equated to 'classification test'. However, there was lack of framework to test the judicial validity of a legislation where there was no occasion for comparative evaluation yet there is unreasonableness imbibed in the legislation or over a period of time due to change in circumstances its relevance has ceased.

Post Shayara Bano judgement the controversy came to an end. But the significant question posed by this long struggle of four decades to re-establish a well-established doctrine is, Can we afford such prolonged anonymity in constitutionally significant matters? Besides, such per incuriam decisions as in case of McDowell, Rajbala which deviates from established precedents without any legitimate basis leads to inconsistency, contradictions and lack of precisions in defining standards and parameters such decision poses serious threat to 'doctrine of precedent' and ultimately, to the judicial discipline.

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SEXUAL EXPLOITATION OF CHILDREN IN INDIA*

*Written By: Vikas Khokhar

ABSTRACT

Child exploitation has been a problem throughout history. Today's child is the citizen of tomorrow. The condition of a child foretells the future of any society or nation. Children are the real mirrors of society the quality of life of a child reflects how progressive a society is. With the dawn of the 21st century, child exploitation is one of the biggest problems of the planet, which is increasing constantly. Child Exploitation primarily includes Child Abuse and child labour. This article will focus on sex offences against children, as well as the rules, legal loopholes, and the protection of children from abuse. This research article aims to investigate why, despite the presence of legislation. Children in India are still abused today. This is an important question to ask since we use goods that are likely to come into contact with child labour. According to the findings, overpopulation, a lack of education, and the social environment are all factors that contribute to child labour and abuse.

Many of the references used in this article are books and publications on child labour, as well as what can be done to eliminate it and the outcomes of various eradication initiatives. Almost all of these papers were published by the United Nations. Websites such as the United Nations Development Programme, Child Rights Information, and others are among the online sources.

Child labour is a growing source of concern not only globally but also in India. The Millennium Development Goals, enhanced market visibility, and expanded corporate social responsibility strategies and guidelines have all helped to combat child labour and violence. Many children are already oppressed today, and consumers, companies, and governments must continue and strengthen anti-child labour campaigns to ensure that child labour is eradicated globally one day.

Keywords:

Child exploitation, Child Rights Information, social responsibility, overpopulation

INTRODUCTION

According to the United Nations Children's Fund (UNICEF), India has the world's largest number of child labourers under the age of 14 with 12.6 million children engaged in hazardous occupations. This begs the question posed by John Pilger: "Why do we live like this in such a resourceful, wealthy and culturally rich country, with its democracy and memories of great common struggle?" The Indian law stipulates that children must be over the age of fourteen to work. Many children in India, however, begin working at the age of five, be it in the glass, pottery, or clothing industries. Child labour is a significant issue because it has such a huge effect on everyone's daily lives. At one point, it was discovered that children under the age of ten were creating popular clothing brands like Nike and GAP. This article will also look at child trafficking in the realm of prostitution, which is a form of child labour. Children are not mentally or physically capable of working, and it is illegal for children to work anywhere in the world, including India. The question posed in this research paper is, why despite current laws, children continue to be abused in India's workplace to this day.

Child abuse is described as the use of children for the benefit or advantage of another individual, and it often results in the child being handled in a negative, unjust, or cruel manner. Child exploitation, also known as child abuse and neglect, refers to all types of emotional and physical abuse, neglect, sexual abuse, and exploitation that endanger a child's growth, dignity, and health.

It is possible to distinguish between sexual abuse, physical abuse, emotional abuse, inadequate treatment, and other types of child violence. Child exploitation harms a child's physical and mental health, employment opportunities, confidence, and social-emotional growth.

India has 440 million children, accounting for more than 40% of the population. Newborn deaths (those occurring during the first month of life) account for nearly 29 percent of all deaths among children under the age of five in India. Many children have a difficult birth experience and struggle to survive. Many more are harmed by homelessness and have had traumatic childhoods, preventing them from reaching their full potential.

The child will succumb to it, regardless of motive, and it will leave a lasting mark on their actions. It is important to have the requisite knowledge and awareness in parents to take the

necessary steps to reduce the incidence of child exploitation in the Indian community. Childhood development, which takes place between the ages of 5 and 18, is regarded as a critical period of life with long-term implications for health, behaviour, well-being, and learning.

This is a time of great possibilities, but it is also a time when negative forces are very powerful. A child's development is influenced by the amount of inspiration, stimulation, and nutrition he or she receives from his or her family, culture, and care environments.

EXPLOITATION AND CHILD LABOUR

Child labour robs children of their right to go to school and perpetuates poverty generation after generation. India has 10.1 million child labourers, with 4.5 million girls and 5.6 million boys, according to Census 2011 data. Around the world, 152 million children – 64 million girls and 88 million boys – are said to be employed as children, accounting for nearly one out of every ten children.

Despite recent reductions in child labour rates, children are still exposed to some of the most severe forms of child labour, such as bonded labour, child soldiers, and sex trafficking. In India, children work in carpet weaving, brick kilns, domestic service, garment manufacturing, food and refreshment facilities (such as tea stalls), fisheries, agriculture, and mining, among other industries. Other forms of violence, such as the production of child pornography and sexual harassment, can occur both in-person and online, putting children at risk (Bajpai, 2018).

Poverty, social norms that condone child labour, a lack of decent work prospects for adults and youth, migration, and natural disasters all lead to child labour and violence. These factors are both the cause and the effect of social inequity, which is compounded by discrimination. Children belong to schools, not to offices. Child labour is a major barrier to education, affecting both participation and academic performance (Roy, 2015).

Child labour and trafficking continue to be a threat to national economies, with significant short and long-term consequences for children, including a lack of education and a decline in physical and mental health (Deb, 2015).

Human trafficking is linked to child labour, and it almost always results in abuse against children. Trafficked children are exposed to a wide range of forms of violence, including physical, sexual, mental, and emotional abuse. Trafficked children are forced into prostitution, marriage, or adoption; they do free or unpaid labour, are forced to work as house servants or beggars, and maybe recruited into armed groups. As a result of human trafficking, children are vulnerable to, sexual abuse, violence, and HIV infection.

Child labour and other forms of abuse can be avoided by implementing comprehensive policies that strengthen child protection programmes while also addressing poverty and inequity, growing educational access and quality, and mobilizing public support for children's rights.

VIOLENCE AGAINST CHILDREN

Every child has the right to grow up in a healthy, violence-free world. Children's life and well-being, as well as their mental well-being and future opportunities, are all threatened by violence against them. Children's abuse is prevalent and systemic in India, and millions of children face it every day. About half of the world's children have been exposed to severe violence, with 64 percent of those in South Asia (Poreddi, 2016).

A child's right to be safe from injury, exploitation, and abuse is unalienable (Seth, 2015). Despite this, millions of children from all socioeconomic classes, ages, religions, and cultures face everyday violence, exploitation, and harassment. Violence may take many forms, including physical, sexual, and emotional assaults, as well as neglect. It can also be interpersonal, and it can be the product of systems that encourage or facilitate violent actions. Evidence indicates that a child's familiars, such as parents, other family members, caregivers, teachers, employers, law enforcement officials, state and non-state actors, and other children, are often involved in violence, intimidation, and abuse (Cross, 2000).

Violence and abuse can be seen in a variety of settings, including wars and natural disasters, as well as in homes, families, schools, healthcare and justice systems, workplaces, and neighborhoods. Sexual abuse and exploitation, armed violence, trafficking, child labour, gender-based violence, bullying (see UNICEF, Too Often in Silence, 2010), gang violence, female genital mutilation/cutting, child marriage, physically and emotionally abusive child discipline, and other adverse activities are all common occurrences for children (see UNICEF, Too Often in

Silence, 2010). New forms of violence against children, such as cyberbullying and online sexual harassment, are emerging as internet access increases, with devastating and life-altering effects (Dyer, 2010).

Since only a small percentage of acts of aggression, coercion, and abuse are reported and punished, and few offenders are held accountable, statistics on the number of children who have been exposed to violence may downplay the extent of the problem. Aggression, exploitation, and violence have been shown to damage a child's physical and mental health in the short and long term, impairing their ability to learn and socialize, and adversely impacting their transition to adulthood, both of which have long-term consequences (Ackerson, 2009).

It is the duty of governments, politicians, and child-focused organisations like UNICEF to build healthy environments for children and protect survivors of abuse. Governments, communities, local governments, and non-governmental organisations, such as faith-based and community-based organisations, should all work together to ensure that children grow up in a safe and healthy environment. Many positive examples from India and around the world show that the best path to stopping violence is prevention. Promoting personal safety among children, implementing child protection policies in schools, and raising parental awareness are all important steps in preventing child sexual abuse. Since younger children are more vulnerable, specific measures aimed at strengthening families and educational environments and protective positions are needed.

Ending violence against children requires an understanding of the root causes and resolving their interconnectedness (Cookson, 2020). Child welfare programmes aim to mitigate the full range of risk factors that all children and their families face. UNICEF supports the strengthening of all components of child protection structures - human capital, budgets, legislation, standards, governance, supervision, and services - in collaboration with stakeholders such as states, non-governmental organisations, civil society actors, and the private sector.

CHILD MARRIAGE

India has the world's largest number of brides, accounting for one-third of all brides worldwide. Child marriage is a breach of children's rights that exposes them to crime, neglect, and

harassment. Both girls and boys are affected by child marriage, but girls are disproportionately affected (Lal, 2015).

It is described as a girl or boy marrying before they reach the age of eighteen, and it includes both formal and informal unions in which children under the age of eighteen live with a partner as though they were married. When a child marries, his or her childhood is over. It has a negative impact on the rights of children in terms of education, health, and protection. These effects have an effect on the girl's family and culture in addition to the girl herself.

Marrying a young girl increases her chances of dropping out of school, not working, and not contributing to her society. She is more likely to be raped at home and to contract HIV/AIDS. Although she is still a teenager, she is more likely to have children. Complications during pregnancy and childbirth have a greater risk of killing her. According to estimates, at least 1.5 million girls under the age of 18 marry each year in India, making it the world's largest country for child brides, accounting for a third of the total. About 16% of teenage girls between the ages of 15 and 19 are married at this time. The percentage of girls marrying before the age of 18 decreased from 47 percent to 27 percent between 2005-2006 and 2015-2016, but it is still too high (Mahato, 2016).

India's significant success in ending child marriages has contributed to a global decline in the practice's prevalence. Increased maternal literacy, improved access to education for girls, strict legislation, and migration from rural to urban areas could all contribute to the decline. Among the reasons for the transition are increased rates of girls' education, supportive government programmes for teenage girls, and clear public messaging regarding the illegality of child marriage and the damage it causes.

Child marriage is a profoundly ingrained social tradition that represents pervasive patriarchy and gender inequality. It's the product of economic and social forces colliding. Marrying a girl as a child is part of a larger set of social expectations and behaviours that show a lack of respect for girls' human rights in societies where it is accepted. Child marriage has a negative impact on the Indian economy and can result in a poverty cycle that lasts for generations.

Girls and boys who marry as children are more likely to lack the skills, schooling, and job opportunities necessary to raise their families out of poverty and contribute to their country's

social and economic development. Early marriage causes girls to have children at a younger age and have more children later in life, putting financial strain on the family. Girls are thought to have no other choice than to marry because of gender stereotypes that place a lower value on girls than on boys. In preparation for their marriage, they are expected to help with household chores and take on household responsibilities.

Delaying marriage until girls reach legal age, improving their health and nutritional status, assisting them in advancing to secondary school, and assisting them in developing marketable skills are all vital game-changers for teenage girls' empowerment so that they can realize their economic potential and grow into safe, engaged, and motivated adults, according to evidence.

The UNICEF strategy for ending child marriage in India recognises the problem's complexities, as well as the socio-cultural and socioeconomic factors that contribute to the practice. Working with the government, partners, and relevant stakeholders from the national level down to the district level, UNICEF India achieved its "scale-up strategy" to discourage child marriage and increase adolescent empowerment. The most notable change has been from small-scale, largely sector-based approaches to large-scale district models that rely on existing large government programmes for youth empowerment and child marriage reduction (McClendon, 2018).

SCHOOLING AND SOCIAL SYSTEM

India, unlike many other nations, has its system for classifying its people into social groups: the Caste System. The Caste System has five different "classes" into which one may be born; the highest possible rank is that of the Brahmins, also known as Priests. The Kshatriyas, who are India's rulers and warriors, are the next step up. The Vaishyas are farmers, merchants, and artisans. They were also in charge of agricultural treatment and commerce. The labourers, also known as the Shudras, were at the lowest level of the Caste System before the fifth level, the 'Untouchables.' They're the suffocated employees. When one is born into one of these phases or societies, there is no way to adapt. “Caste is probably the most powerful force in Hindu culture, and despite some waning of its former rigidity and power, particularly in cities, it still pervades rural society, preventing its weaker, lower caste members from asserting their constitutional

rights and improving their socioeconomic status," Many of the children who work as children come from the Dalit caste, also known as the Untouchables. (Ram, 2016)

"In India, it has long been believed that some people are born to rule and work with their brains, while the vast majority are born to work with their bodies," Many traditionalists were unconcerned about lower-caste children failing to enroll in school or dropping out, according to UNICEF, if these children end up doing dangerous labour, it is likely to be seen as their fate." (Benoit, 2018) The Dalits' education is not conventional. They aren't supposed to be educated because it will "threaten village hierarchies and power ties." Children from all lower castes, including Dalits, are not allowed to attend school. It may be due to a shortage of schools or that schooling is simply too expensive. There are limited teachers to teach in schools; curriculums and syllabuses are incomplete; instructional approaches are ineffective, and teachers are under-trained. But it's also due to the financial strain that schools place on families.

Most Dalit families can't afford to send their children to school because they live on less than $1 a day. (Aiyar, 2016) Another explanation why parents do not send their children to school is that they do not believe in education. Some people believe that "children should study to learn skills useful in the job market, rather than taking advantage of a formal education," since they don't know any better. Their practices and traditions have been passed down over the generations. As said by former President Smt. Pratibha Devisingh Patil. "I am deeply committed to the cause of education and would like to see every person, man and woman, boy and girl, touched by the light of modern education,"

POVERTY

According to a report by a government committee in India, nearly 38% of the Indian population is in poor health. It is widely acknowledged that India has the world's largest population of poor people. Many poor people in India live on less than $0.20 or $0.40 a day. (Patel V. P., 2015) Poverty in rural areas that has an effect on the rural economy, community, and political system is referred to as rural poverty. Child labour and exploitation are inextricably related to poverty in rural areas. Overall, hardship forces parents and guardians to make their children work hard. Glass, locks, traditional crafts, pottery, and clothing all have one thing in common: they're all

risky, unsafe, and life-threatening occupations. Children who work in India provide a means of income for their families. According to a study, children account for between 34 percent and 37 percent of total household income. (Swaminathan, 2019) Employers are more likely to recruit children than adults, which is why parents put their children to such hard labour. Since children are less expensive than adults, this is the truth. Adults are more likely to demand a higher wage than adolescents. Another theory is those children's hands are smaller, allowing them to handle machinery more quickly and easily switch between machines in factories.

PROSTITUTION

Prostitution is a form of child labour, and there are various forms of prostitution in India. One of these is traditional and religious trafficking, where "thousands of girls are reported through sexual slavery in rural India in the name of tradition and religious practices" (Chopra, 2015). In certain parts of Indian culture, child trafficking is socially appropriate. They are said to be 'given to the Gods, who then transform them into religious prostitutes. The spread of HIV/AIDS is a major factor in child prostitution in India. To help eradicate child trafficking and stem the spread of HIV, committees have been created. A sprawling red-light district in Kolkata known as the Sonagachi, which translates to "Golden Tree," was known for its concubines between the 1700s and 1800s, and is now home to "hundreds of multistory brothels built along narrow alleys, housing more than 6,000 prostitutes." Children who work in these brothels unwittingly participate in the prostitution industry. In these brothels, the girls are raised as prostitutes, while the boys work as servants doing laundry and cooking. "Many more women and girls are brought into brothels each year.

PROTECTION OF CHILDREN FROM ABUSE, EXPLOITATION, AND VIOLENCE IN INDIA

In India, where a wide range of laws exists to protect children, child protection is being increasingly recognised as a critical component of social development. Enforcing the laws is difficult due to a shortage of human resources on the ground and high-quality prevention and

rehabilitation programmes. As a result, millions of children are at risk of being bullied, exploited, or harmed (Reed, 2019).

Home, school, child care facilities, the workplace, and the community are all places where violence can be found. Abuse is often perpetrated by someone who knows the child. Violence against children is common in India, and it is a harsh reality for millions of children from all socioeconomic backgrounds. Girls and boys in India face issues such as early marriage, domestic abuse, sexual assault, and violence at home and school, as well as trafficking, online violence, child labour, and bullying. Crime, bullying, and abuse of some kind have a long-term impact on children's lives (Patel R. G., 2021).

India is becoming more aware of violence against children, especially sexual abuse, despite a lack of precise data on violence, harassment, and exploitation. A variety of cases that could have previously gone unnoticed are now being discovered.

RIGHTS OF CHILDREN IN INDIA

The Indian Constitution and international legal instruments that we have ratified by constitutional reform grant citizenship to all citizens under the age of 18. Children are guaranteed certain rights in the Indian constitution, which are expressly stated to protect them. Child rights go beyond human rights and ensure that people are treated equally and respectfully around the world, as well as to promote their welfare (De, 2020).

Rights of children in India comprise of:

1. All children aged 6 to 14 have the right to a free and compulsory elementary education (Article 21 A).

2. Up to the age of 14, you have the right to be shielded from any dangerous behaviour (Article 24).

3. The right to be free from violence and being coerced into jobs that are inappropriate for one's age or strength due to financial constraints (Article 39).

4. The right to equal and dignified opportunities and services for children and young people to develop in a healthy and dignified manner, as well as the assurance of security from violence and moral and material abandonment (Article 39F).

5. Equality rights (Article 14).

6. Anti-discrimination right (Article 15).

7. The right to personal liberty and due process (Article 21).

8. The right to be free of slavery and being forced to work as a slave (Article 23).

9. The right of poorer people to be shielded from social injustice and other types of oppression (Article 46).

INDIA'S LEGAL FRAMEWORK FOR PROTECTING CHILDREN'S RIGHTS

With the passage of new legislation and amendments to existing laws, India's legal structure for child rights is being improved.

Legislations contain the following:

1. The Food Security Act 2013,

2. The POCSO Act, 2012,

3. The Free and Compulsory Education Act 2009,

4. The Prohibition of Child Marriage Act 2006,

5. The Commissions for the Protection of Children's Rights Act 2006,

6. The Juvenile Justice Act (Care and Safety of Children) Act 2006,

7. The Child Labour Act (Prohibition & Regulation), 2008

Key federal legislation was the Juvenile Justice (Care and Protection) Act of 2000. (Amended 2006). It developed a system for children's care and protection, as well as children in legal trouble. This legislation is currently being revised for substantive changes, and a new law could be enacted to replace it.

The government has delegated primary responsibility for child rights and development to the Ministry of Women and Child Development (MWCD). Maltreatment of children is a global problem, but it is more difficult to quantify and solve in developing countries like India, which has one-fifth of the world's total child population. Children are the most important human resource in the world, and their well-being is a gauge of the country's social development. India's children are still subjected to child exploitation and violence, despite the minimal steps taken to prevent it.

CONCLUSION

Child labour is a major issue in India due to extreme poverty, the social climate, and an increasing population. Accepting child labour on moral grounds due to poverty, population growth, and the socioeconomic system, on the other hand, is not only irrational but also immoral. This major problem has so many causes that resolving it would be impossible, as it would necessitate significant changes in Indian society's foundations today (including the social system). Despite the fact that school is compulsory in India, many children do not attend schools. The school system for children from lower castes notes, "People from the lower castes are often deprived of the most basic facilities and opportunities." Despite the fact that child labour provides a family with the necessary funds to survive, it is not without its drawbacks.

Teachers and other educators will serve as frontline protectors for children, alerting other stakeholders such as social workers to situations in which children display signs of distress or say they work long hours. To get children out of the workforce and enroll in school, broader policy reforms are needed, allowing families to choose education over exploitative labour.

It is inhuman to force children to work at such a young age, and we must all take responsibility for helping to eliminate this heinous practice in the Western business environment. The social obligation of businesses ensures that they seek out and promote the rights enshrined in the Universal Declaration of Human Rights of the United Nations. Violations of human rights are not accepted. They continue to reject forced labour and other forms of enslavement. Companies that support social responsibility invest in programmes that seek to eradicate child labour in the best interests of the child. Consumer influence is highly powerful these days, and it can have a huge impact, as we've seen in cases where companies were found exploiting child labour to increase income. This is also true in the area of fair trade, which means that products are sold at reasonable rates and reduces the need for children to work in order to sustain a family. As a result, customers must be mindful of the causes of child labour and be able to pay a marginally higher price for products. In contrast to the suffering of children who are made to work hard physically and psychologically from an early age, this is a small effort. As Mohandas Gandhi once said, “I have also seen children successfully surmounting the effects of an evil inheritance. That is due to purity being an inherent attribute of the soul.”

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Organized Crime in India: Problems and Perspectives*

Abstract

Everyone is born as a normal person but a negative social environment turns them into criminals. In India crime is a common rising issue. The crime rate rose steadily from 2017 to 2020: it was 237.9 cases per one lakh population in 2017, and then rose to 500.7 in 2020. The organized crime rate increased in India due to rapid civilization and a rise in the cost of living. Mainly crime active in criminal networks, it's well organized, focuses exclusively on planned, rational acts that reflect the effort of groups of individuals. The important organized crime activity was the supply of drugs and services, which was intensely involved in the legal business and in political parties. No methodical study of organized crime in India from either sociology of crime science. There was no solid data regarding organized gangsters, but the article tries to give an abstract portrait of some of the vital gangs in metro cities. Major Organized crime in India is racketeering, corruption, internet fraud, armed robbery, counterfeiting, drug abuse, illegal immigration, money laundering, extortion, loan sharking, contract killing, terrorism, smuggling, prostitution, kidnapping for ransom, bootlegging, arms trafficking, gambling, bribery, skimming, murder, and forgery. The article included case studies of Illegal Immigration and a case involved in the financing of organized crime. Officials facing several problems to control organized crime such as political vacuums, lack of coordination, difficulties in obtaining proof, legal gaps, laggard trials, and fewer conviction rates, shortage of resources and training. The article includes techniques to reduce organized crime such as reinforcing criminal laws, enhancing local and international relationships and making esoteric units, political allegiance, public alertness, and enlarging the role of the electronic media. This article also analyses the origin, development, news reports, causes and preventive measures of organized crime.

Keywords: organized crime, politics, negative, social, human rights, law and order, security, threat, electronic media, India

* Written By:Martha Junior

Introduction

Organized crime is a threat to the integrity of the country. Dirty politics is the origin of all organized crimes. It develops under the shadow of the Mafia. It is a local, national, or group of highly concentrated companies run by criminals. This can be done for the partners of an organized crime company or for such companies. It aims to gain special benefits or to gain unnecessary financial or other benefits for oneself or any other person or to encourage apostasy. Politically motivated terrorist groups are commonly involved in these types of criminal activities. Organized crime can be given as people who have worked together for an extended period of time to plan, coordinate and conduct a serious crime. These people are, more often than not, motivated to commit these serious crimes by the potential of financial gain, and always changing and flexible.

Organized Crime in India

Some major organized crimes in India and their news reports are discussed below.

Terrorism

The link between terrorism and organized crime is widespread and widespread, posing a serious threat not only to national peace and security but also to international unity. Organized criminal groups and extremists want to make the most of and regularly exploit new casualties and scams. Regardless of planning or principle, their connections take advantage of immediate opportunities, based on shared territory or other reciprocal interests in which terrorists benefit from organized crime, as well as trafficking in individuals and immigration smuggling; Smuggling of drugs, firearms, cultural property and other items; Kidnapping for ransom; Robbery; Other illegal activities. It is clear that extremists are abstractly involved in organized criminal activities, while organized criminal groups are involved in pushing terrorists across the border.

Shocking news from Punjab - Hizbul narco terror case: Jaswant Singh from Gurdaspur, Jassa, and Gorsant Singh alias Gora from Tarn Taran in Punjab was also involved in the collection, distribution, and sale of heroin smuggled from Pakistan. Hizbul was created to further improve the activities of the Mujahideen. This led to the breakdown of a major narco-terror module involved in the smuggling and sale of heroin in India, and to hawala-based Pakistan

and narcotics via hawala to Jammu and Kashmir-based HM militants on the instructions of Pakistan-based HM militants.[1]

Internet fraud

Computer and the internet opened new doors to fraudsters. They send fraudulent emails to banks and draw lakhs into their accounts. Email spam is one of the most common and easy forms of online fraud detection.

Drug abuse

Possession, manufacture, and distribution of drugs (morphine, cocaine, heroin, and amphetamines) classified as potentially drug-related drug abuse. Drug trafficking and drug production are often controlled by drug cartels, organized crime, and gangs.

Illegal Immigration

Well-organized crime Illegal Immigration in God's own country Kerala

Munambam Illegal Immigration Case On the morning of January 12, 2018, about 243 Sri Lankan Tamils from Madangir Colony, Delhi, set sail from the shores of Munambam in the fishing boat 'Dhaya Mata-2'. The Kerala High Court observed that the allegations in the Munambam human trafficking case could not be taken lightly as they affected the sovereignty and security of the country. The trial court rejected the bail pleas of the accused, Delhi Ravi and Anil Kumar of Venkanur. Observed by Sudhindra Kumar.[2]

Money laundering

Organized groups get financial help from money laundering criminals. Terrific news reports from Rajdhani of India - On 17 Jan 2021, at New Delhi: The Enforcement Directorate has arrested two Chinese nationals Charlie Peng alias Luo Sang (42) and Carter Lee in connection with its money laundering probe linked to an alleged hawala racket worth an estimated ₹1,000 crore.[3]

Contract killing

Terrific news report from Odisha: A 58-year-old woman was arrested in Odisha's Balasore district in connection with the killing of her daughter, Sukuri Giri allegedly hired Pramod Jena (32) and two others to get her daughter killed for ₹ 50,000. Pramod Jena was also arrested,

1**https://indianexpress.com/article/cities/chandigarh/nia-files-chargesheet-against-2-accused-in-narco-terror-case-7134796/**

2**https://www.newindianexpress.com/states/kerala/2019/mar/26/munambam-human-trafficking-case- cannot-be-viewed-lightly-observes-high-court-1955830.html**

3**https://www.livemint.com/news/india/money-laundering-ed-arrests-2-chinese-nationals-in-a-probe-linked-to-alleged-hawala-racket-worth-1-000-cr-11610881824876.html**

police official Pravash Pal said that the preliminary investigation has suggested that Shibani Nayak (36), the daughter of Sukiri Giri, was involved in the illicit liquor trade because of which their relationship began to turn sour. As Giri's efforts to dissuade her daughter from the illegal liquor trade failed to yield any result, she contacted Pramod Jena to get her daughter eliminated, and a deal was finalized for ₹ 50,000, She had given an advance of ₹ 8,000 to the contract-killer. This news report shows that it common in India and anybody can easily be attacked by contract killers.[4]

Smuggling

Gold smuggling news from New Delhi:-The Directorate of Revenue Intelligence (DRI) has stopped eight passengers of the Dibrugarh-New Delhi Rajdhani Express at the New Delhi railway station. 504 gold bars seized from abroad. Weight 83.621 kg. Smuggling is the illegal transfer of goods, materials, information, or people from a home, building, jail, or international border in violation of applicable laws or other regulations. Air, land, and rail were used to smuggle gold locally. The eight carriers mentioned above were arrested under the Customs Act 1962 and remanded in judicial custody. Gold smuggling is common in Kerala.[5]

Prostitution

Organized crime of prostitution – At Pune Deshpande was arrested in July 2016 after carrying out a sex racket in Bhusari Colony, a residential area in Kothrud. Deshpande's aide was arrested and three girls were rescued from the area. A Pune special court has ruled that running a brothel or prostitution business and buying girls for explicit purposes is part of a "continuing illegal activity" that is at the heart of organized crime, either as an individual or as a member of an organized crime group.[6]

Kidnapping for ransom

The money is the primary purpose of the ransom (usually a lump sum) law for the release of a hostage and the enrichment of criminals. Shocking News Reports from Bihar -15-year-old boy Satyam Kumar, son of a doctor, Sashibhusan Prasad Gupta, kidnapped. The kidnappers had demanded a ransom of ₹ 50 lakh from his family for his safe release. Police had launched an operation to rescue him but the boy was killed. His body has been recovered. In another

4**https://www.ndtv.com/cities/balasore-odisha-woman-paid-rs-50-000-to-get-daughter-killed-arrested-odisha-police-2353926**

5 **https://www.thehindubusinessline.com/news/gold-smugglers-gang- busted/article32475006.ece**

6**http://timesofindia.indiatimes.com/articleshow/59307919.cmsutm_source=contentofinterest&utm_medium=text&utmcampaign=cppst**

similar case, Jaivardhan Kumar, branch manager of Bihar Kshetriya Gramin Bank was abducted in Sheikhpura district when he was returning home. The kidnappers have reportedly demanded a ransom from the bank official's family. These reports clearly show that the act of ransom, taking and carrying away a person by force, is an organized crime, but the police officers are helpless to provide rescue to people.[7]

Bootlegging

Selling rum or smuggling is an illegal alcohol smuggling business, and such transportation is prohibited by law. The term rum exploitation is used for smuggling without a prescription. Smuggling applies to smuggling abroad. On 7th July 2009, ten people died in Behrampura after drinking spurious liquor. The liquor was brewed in the house of Arvind Solanki, who also died after consuming the liquor. The death toll rose to 43 the next day and crossed 120 by 12 July. two hundred seventy-six people were admitted to various hospitals with nearly 100 of them in intensive care units. more than 1,000 liters of hooch containing methanol was brought to Ahmedabad from mahemdavad.[8]

Arms trafficking

Arms smuggling or arms smuggling is the smuggling of small arms and ammunition that are part of a number of illegal activities involving international criminal organizations. Police arrested four arms dealers. Both the raids indicate an increase in the illegal arms trade-in Bihar. According to state police records, up to 1,767 illegally manufactured firearms were seized in the first six months of this year. This is in addition to the 19 standard firearms recovered from the criminals.

Gambling

The main purpose of commodity money, goods, money, or something of value on an event with an unstable tree (known as the "stock") is also known as betting.

Bribery

Organized criminal groups use bribes to protect their illegal activities. For example, members of organized criminal groups may receive illegal benefits or pay judges, jurors, police, or other public officials in exchange for other means.

Skimming (Financing of organized crime)

7**https://widgets.hindustantimes.com/india-news/doctor-s-son-abducted-in-bihar-found-murdered/story-jTxnHpSyz2GxP9BdI7VJ0H.html**

8**https://web.archive.org/web/20131029201448/http://articles.timesofindia.indiatimes.com/2009-07-08/ahmedabad/28184749_1_spurious-liquor-brew-kantodiavaas**

Skimming in casinos is linked to funding organized crime. In addition to skimming, there can be direct theft of money; In addition to concealing this from tax authorities, the offender also conceals what he is taking from an employer, business partners, or shareholders.

Murder

On May 4, 2012, T P Chandrasekharan founder of Revolutionary Marxist Party in Kerala was brutally hacked to death by a group in Onchiyam in Kozhikode district. Political violence leads to T.P. He had 51 wounds on his body. In 2014, Kerala court sentenced 11 including three CPI (M) members to life imprisonment. Murder is defined under Section 300 of the Indian Penal Code. But who will control these types of organized murder? I think its side effects of violent politics.[9]

Forgery

White-Collar Crime - Forgery, however, punishments can have serious consequences for the convicted person. This offense is a distraction from this condition, which can lead to serious misconduct or infractions.

Problems to control organized crime:

Political vacuums

Politics and Mafia are two sides on the same coin; either they make war or they reach an agreement. So it is clear that most of the political leaders, with the power to suppress the evidence, result in the criminals getting freedom. Corrupted leaders give back support to criminals in organized crimes

Lack of coordination

Most of the officials work as agents of political leaders, so the information always passes to criminals easily, then escapes is also easy for them. Lack of coordination between Govt officials, helps the criminals change their location at the time of the arrest. Some officials also help the criminals in their illegal activities

Difficulties in obtaining proof

It is usually difficult to convict organized crime leaders because they pay off a lot of enforcement officers to turn away from their operation. Evidence is the main thing used to establish proof that a crime was committed or that a particular person committed that crime.

9**https://www.thehindu.com/news/national/kerala/12-held-guilty-of-tp-chandrasekharan-murder/article5605223.ece**

Without evidence, crime will not prove.

Legal gaps

In some organized crimes law has no answer because of certain issues; legal gaps should be seen as a complete absence of a legal rule.

The laggard trials and fewer conviction rates

It is common in courts. Laggard trials are truly beneficial for criminals; most of them escape from India after taking bail. Because of less conviction rates, most of the cases dropped in halfway and criminals will get benefits.

Shortage of resources and training

A criminal getting better training than officials of Govt. Govt. has to take immediate action to fulfill the shortage of resources and training. Without adequate resources, they can't control the crimes.

Ways to reduce organized crime

- Reinforced criminal laws
- Enhancing local and international relations and making esoteric units
- Political allegiance
- Public alertness
- Enlarging the role of the electronic media
- India needs only good (means who work for people) human beings in politics, then only we can change the negative environment to positive.

Conclusion

All organized crimes are interrelated. Politics and Mafia are two sides on the same coin; either they make war or they reach an agreement. The smuggling syndicate recruited poor and needy individuals from various parts of the country to act as carriers of smuggled gold by luring them with the prospect of quick and easy money. It is usually difficult to convict organized crime leaders because they pay off a lot of enforcement officers to turn away from their operation. Organized crimes are side effects of violent politics. Not make any new laws, we need only good (means who work for people) human beings in politics, then only we can change the negative environment to positive, then criminals will get a short break and common people can live with peace.

CONSTITUTIONAL STATUS OF CHILDREN IN INDIA*

ABSTRACT

Constitutional status of children refers to the situation of the children's problems and scenarios in front of the country and with problems it also describes the reforms which are taken by the Government of the Country.

Children are the most valued assets they need to be protected and nurtured them physically, mentally and emotionally and to Provide them a happy and safe environment

This article gives adequate information about the child, its age, and its rights which are introduced by the Constitution makers of India. Here, we also mentioned the estimated figures of the child population in comparison with the total population of India.

Further, it has mentioned the special Constitutional rights given for children to make a healthy environment of the country. There are various parts in which some Articles are given for the well-being of children, i.e., Fundamental rights (Part III), Directive Principles (Part IV), Fundamental Duties (Part VI A). In case of the violation of these provisions, Various Judicial actions are given. Children abusing is also a problem in one of the other major problems which India is facing today, but our Constitution makers are well aware of the fact that the country is in the hands of future children. For this the constitution has made some rights, provisions and acts and also punishments, which had implied for halting the problem of child abuse and also helps in their development. i.e. education, nutrition, protection.Government of the country is now updating their ways and applying modern techniques for the well being of the children like they introduced "SARVA SIKSHA ABHIYAN" i.e. education for all, this act helps children to get free and compulsory education between the ages of 7 to 14 years. Prohibition of child marriage 2006 which ensures that marriage of children in their tender age is a punishable legal offence.

Finally, we concluded our article for a better system in India after looking at various schemes, provisions, etc in the Indian Constitution. Keywords:- Children, Child Rights, Constitutional

*Written by: Sakshi Agarwal

Rights for Children, Child protection act, Problems faces by Children, Condition of a child in India, Provisions for Children, Safeguards of a Child.

INTRODUCTION

"Children do not constitute anyone's property: they are neither the property of their parents nor even the society. They belong only to their own freedom."

In India, there are 472 million children under the minor category, i.e. below 18 years of age, representing 39% of the country's total population. From the total population of children, 73% are living in rural areas, unable to access fundamental needs such as nutrition, healthcare, education, and protection, which results in a negative impact on children accessing fundamental rights.

The Indian constitution concurs with the rights of children as residents of the country, and with regards to their extraordinary status, the State has even ordered exceptional laws. Some specific provisions are necessarily entitled to children in India. The proper execution of these laws can lead to their better understanding. The Constitution, enacted in 1950, passed some special provisions for Children which were taken from UN conventions which are included in Fundamental Rights, Part III and Directive Principles of State Policy, Part IV of the Indian Constitution.

Children are the future preserver of sovereignty, rule of law, i.e., justice, liberty equality, fraternity, and international peace and security. They were the recipient of welfare measures. It was in the 20th century that the concept of children's rights emerged. Technically, it is a replacement of welfare with rights. In India, the protection of children's rights is the priority of the Indian Government for the welfare of the state and its future, as Children are the shoulders of the nation, for this certain provisions are given in our Indian Constitution with the aim of welfare and dealt with the lives of children. They were concerned about making provisions for the protection of children. By protection, they meant that protection of their status, body, mind, rights, dignity, etc. To reinforce the arrangements in the constitution, many legislations, policies, schemes, etc were introduced.

Who is Child?

According to **UNCRC**[1]- A Child is any person who has not completed eighteen (18) years of age. The person who is below 18 years is termed as **Minor**. This definition of a 'Child' is universally accepted.

In India, there is always a distinct legal entity of minor persons, That is strict for all to follow the eligibility to get the right to vote, driving license, or enter into any legal contracts by their own will, this can only be done when they attain the age of 18 years. According to the Indian Constitution, Different Acts gives the different eligibility criteria for the age of a "**Child**", according to the **India and Child Labor(Prohibition and Regulation) Act, 1986** the age must be below 14 years. Likewise, In **Juvenile Justice Act**, 1986, defines the age of a girl is below 18 years and as the boy is 16 years.

Key points:-

- Child, "All persons under the age of 18 years".
- Children make unforgettable memories during childhood.
- Children get distinct experiences during childhood.
- Childhood is the tender stage through which every human being passes.
- Being a tender child needs to be protected from abuse and exploitation.

What are Child Rights?

Child Rights are specialized human rights that are applied to all children below 18 years of age.The United Nations defined its Charter of Child Rights in 1989.It specifies that every child has that the right to:-

Survival - Life, Health, Name, Nutrition, and Nationality.

1United Nations Convention on the Rights of the Child (CRC), (1989).

Development, i.e., Education, Leisure, Care, Recreation.

Protection from Exploitation, abuse, neglect.

Participation, i.e., Expression, Information, Thought, and Religion.

Human rights instruments specific to the right of the child: The declaration of the rights of 1924, adopted by the fifth assembly of the League of Nations, can be seen as the first international instruments dealing with children's rights.

Who Created the Child's Rights?

The world's very first declaration on child rights was written by "Save the Children" founder, **Eglantyne Jebb.** The United Nations adopted these Rights. She contributed to various NGOs, volunteered for a small children's relief center, etc.

Why do Children need special attention?

- Children are most sensitive at their primary age. For this they need experiences and relationships that show them their special value for pleasure. Children are more vulnerable than adults because of the lack of understanding due to which they easily get affected than any other age group. A child's feeling of security and safety comes from responsive interactions with parents, guardians, caretakers, etc.

The drafting committee of the constitution was well aware of the fact that children are the promises of the nation, and the future of India is dependent on them, due to which the Constitution makers were more concerned for the safety of the Children for that they made some provisions for the protection of the children. By the term protection, they meant the protection of the mind, body, dignity, rights, etc. As minors, by law do not have rights to take any legal decisions by their own, Instead these decisions are made by their caretakers.

INTERPRETATION OF ARTICLES

CONSTITUTIONAL PROVISIONS WHICH PROTECT THE RIGHTS OF CHILDREN IN INDIA

The Constitution defines the rights and protection of children through its various provisions. Children on the account of their Sensitive and immature age need special care and protection. They have specific rights and legal beliefs that are recognized across the globe. The constitution included many articles dealing with education, development, prohibition of child labour, non-discrimination, etc for Children.

Some of the legal provisions are-

FUNDAMENTAL RIGHTS

- Article 14- Right to Equality.
- Article 21A- Right to Education.
- Article 24- Prohibition of Employment of Children in Factories.

DIRECTIVE PRINCIPLES OF STATE POLICY

- Article 39- Certain Principles of the policy to be followed by the state.
- Article 45- Provision for early childhood care and education to children below the age of six years.

FUNDAMENTAL DUTIES

- Article 51A (k).

FUNDAMENTAL RIGHTS

Article 14- Right to Equality

According to this article, *"the State shall not deny to any person the equality before the law or the equal protection of laws within the territory of India"*.

This Article guarantees equality to all persons, including citizens, corporations, and foreigners. Citizens of India including children must be treated equally before the law and must be given equal protection by law without any discrimination or arbitrariness.

EQUALITY- A DYNAMIC CONCEPT-

In E.P. Royappa v. State of Tamil Nadu,[2] Justice Bhagwati, delivering the judgement on behalf of himself, Chandrachud and Krishna Iyer, JJ. observed:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within the traditional and doctrinaire limits. From the positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies… Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."

Child rights go beyond just human rights, which exist to ensure fair and proper treatment of people across the world and promote their well-being. This right which is given in Indian Constitution shall protect all the rights of the children of India, through which their dignity and integrity as a child remains safe from exploitation. In Indian society, due to the vulnerability of children, they have more chances to be treated unequally. Article 15(3) of Indian Constitution prohibits the Discrimination.

ARTICLE 15(3)- *Nothing in this article shall prevent the State from making any special provision for women and children* and does not require that absolutely identical treatment as those enjoyed by males in similar matters must be afforded to them.[3]

ARTICLE 21A- RIGHT TO EDUCATION-

"We are committed to ensuring that all children, irrespective of gender and social category, have access to education. An education that enables them to acquire the skill, knowledge, values, and attitudes necessary to become responsible and active citizens of India".

(-Former P.M., Dr. Manmohan Singh)

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2 AIR 1974 SC 555.

3 Anjali Roy v. State of West Bengal, AIR 1952 Cal. 825.

This article states that "*The State shall provide free and compulsory education to all the children of the age of six (6) to fourteen(14) years in such manner as the State may, by law, determine"*

The Right to Education, initially was included in the Directive Principle under Article 45 and not in fundamental rights of the Indian Constitution. This provision for Children under the age of 14 years is required for free and compulsory education, for the betterment of their livelihood. The Constitutional (86th Amendment) Act, 2002, is made with regards to the protection of citizen's right to education, as well as the state is aware of the challenges in regard to Education in India. This amendment introduced three provisions in the Indian Constitution for children between ages 6 to 14 years to encourage the people for free and compulsory education as a Fundamental Right.

These provisions are as follows:-

- Article 21A in part III of Fundamental Rights
- Article 45 in Part IV of Directive Principles
- Article 51A(k) of Fundamental Duties

If a child between the age group of 6-14 years is not provided free and compulsory education then he/she can move to court under this Article, i.e., Article 21(A). These articles ensure that every child must enjoy their educational rights and are not deprived of his/her basic education.

Judicial Initiative for Right to Education for children-

Article 21A makes it mandatory for the government to enact Central legislation to give effect to the constitutional amendment. The legislation will create a structure by which a citizen who is distressed that the right to education has not been fulfilled should be able to get relief by filing writ petitions in the High Courts and the Supreme Court. The Act contains seven chapters spread over 38 Sections. It provides the responsibilities of the Central and State Government, teachers, parents, and community members in ensuring that all children of the age of 6 and 14 years receive free and compulsory elementary education.

ARTICLE 24- PROHIBITION OF EMPLOYMENT OF CHILDREN IN FACTORIES, ETC. - This Article states that "*No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment*". This Article prohibits the children under the age of 14 years to get employed in factories and hazardous employment. **Hazardous** child labour means the **work** in dangerous or unhealthy conditions for children, which could result in loss of life of a tender child or provides injury or made ill as an outcome of the poor safety in their working arrangements. It could result in a permanent disability, ill health and psychological damage. However, the employment of children in non-hazardous work is allowed with certain obligations, i.e. Owners have to bear the educational expenses till the age of 14 years of the working child. This provision mainly deals with the welfare of the public health and safety of life of children.

In *People's Union for Democratic Rights v. Union of India*[4],

> "It was contended that the Employment of Children Act, 1938 was not applicable in case of employment of children in the construction work of Asiad Projects in Delhi since construction industry was not a process specified in the schedule to the Children Act. The Court rejected this contention and held that the construction work is hazardous employment and therefore under Art. 24 No child below the age of 14 years can be employed in the construction work even if the construction industry is not specified in the schedule to the Employment of Children Act, 1938. Expressing concern about the 'sad and deplorable omission', Bhagwati, J., advised the State Government to take immediate steps for inclusion of construction work in the schedule to the Act, and to ensure that the constitutional mandate of Article 24 is not violated in any part of the country. In *Labours Working on Salal Hydro Project v. State of Jammu and Kashmir*[5], the Court has reiterated the principle that the construction work is hazardous employment and children below 14 cannot be employed in this work".

4*AIR 1982 SC 1473.*

5AIR 1984 SC 177.

There are some Acts which are given after the pursuance of the above duty for the benefits of the Children like:-

1. **The Employment of Children Act, 1938**,- Prohibits children under age of the 14 years to get employment in railways and other means of transport.
2. **The Child Labour (Prohibition and Regulation) Act, 1986**,- In this act it described where and how children could be employed and were forbidden.
3. **The Factories Act, 1948,-** This was the first act that was passed after the independence of the Nation with the aim to restrict the employment of children by setting the minimum age limit, i.e., 14 years.
4. **The Mines Act, 1952,-** This Act prohibits the employment of people under the age of 18 years in mines.

In case of the violation of this Article, an individual can move to the Judiciary- Supreme Court to file the Petition against the person. This can be done by Article 32 of the Indian Constitution, which gives the Remedies for enforcement of rights conferred by Part III, i.e. Fundamental Rights.

DIRECTIVE PRINCIPLES OF STATE POLICY

- **Article 39- Certain Principles of the policy to be followed by the state.**

Article 39(e) states-

"that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength". This article gives the responsibility to the State to ensure that no child is engaged in any physical or mental abuse or work…

Employment of Children.- Clause (f) was modified by the Constitution (42nd Amendment) Act, 1976 with a view to emphasise the constructive role of the State with regard to children. Article 39(f) states that,

"Children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment".

This provision talks about the opportunities and facilities to evaluate for the children of India to grow with safe explosion with the protection of their dignity.

In M. C. Mehta v. State of Tamil Nadu[6], it has been held in view of Art. 39 the employment of children within the match factories directly connected with the manufacturing process of matches and fireworks cannot be allowed as it is hazardous. Children can, however, be employed in the process of packing but it should be done in an area away from the place of manufacturing to avoid exposure to accidents.

FUNDAMENTAL DUTIES- Fundamental duties refer to the basic obligations of a citizen of India. It is defined as the moral obligation of all citizens to help promote a spirit of patriotism and to uphold the unity of India. These are Non-Justiciable.

Article 51A(k)- It shall be the duty of every Citizen of India- *"who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years"*. This provision strictly mentions that it is the duty of the parents to provide education for their Children under the age of 14 years for their bright future and development of the Country.

This Provision of Fundamental Duties was inserted by the 86th amendment act, 2002. At the time of this Amendment Act, a committee named **Sardar Swaran Singh Committee** imposed **Education for all movement.**

Besides these provisions mentioned above they also have rights as equal citizens of India, just as any other adult male or female.

PROBLEMS FACED BY CHILDREN IN INDIA

Children in India go through the following problems for which various legal provisions have come about:-

6 1990 SCR Supl. (2) 518.

Child Abuse:- Children were subjected to exploitation in case of Child abuse, is when his/her parent, whether through action or failing to act, causes injury or harm a child. Due to this, the need for provincial legislation was realised.

Child Soldier:- According to the capacity of the Children of minor's age, under the age of 18 years, boys and girls are recruited by various Military Corps and Armed Forces, used as a fighter, cooks, porters, messengers, spies, or for sexual purposes.[7]

Child Labour:-

Child labour refers to the exploitation of children through employing them by forcing into work that deprives them of their childhood, potential and their dignity, interferes with their ability to attend regular school, at their tender age. The main causes of Child Labour are Poverty, Lack of decent work opportunities for adults and adolescents, high migration, emergencies and so on...

UNICEF estimates India with such a high population has a high rate of child labourers. India, after its independence from the colonial rule, had passed many constitutional protections and laws on child labour.

Like the Child Labour (Prohibition and Regulation) Act, 1986. The main object of this act, is to address the concern over the employment of children in hazardous industries specially below the age of 14 years.

Child Trafficking:-Child Trafficking can be defined as any minor Who is illegally recruited, transported, harbored or received by threats, force, and coercion and without his/her consent and are exploited, either within or outside a country. These victims are mainly used for drug trafficking purposes.

CHILD PROTECTION LAWS AND ACTS IN INDIA

There are many Acts and laws which bind the Government to protect the Child from the outer or inner torture. Some of them are as follows:-

7State of Tamil Nadu v. Union of India.

INDIAN PENAL CODE, 1860 (IPC)

Section 82 states that, *"Act of a child under seven years of age.—Nothing is an offence which is done by a child under seven years of age"*.

This Article states that, any offence which is done by an immature child who is below 7 years of age gets complete immunity from any kind of Criminal Liability as he is not mature enough to understand between what is right and what is wrong.

Section 83 states that, *"Act of a child above seven and under twelve of immature understanding — Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion"*.

Section 305 states that, *"Abetment of suicide of child or insane person.—If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine"*.

Section 315 states that, *"Act done with intent to prevent child being born alive or to cause it to die after birth"*. —If any person tries to harm or kills a child before or after its birth, and this action is not done in a good faith for the protection of its mother's life, he/she would be punished withimprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Section 316 states that**,** *"Causing death of a quick unborn child by act amounting to culpable homicide"*.—If such an act is done by any person then shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 317 states that,if any parent or a person who cares for a child below 12 years of age leaves it with the intention of abandonment, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Section 369 states that- ***"****Kidnapping or abducting child under ten years with intent to steal from its person"*- This section states that if any person kidnaps or abducts a child under the age of 10 years with a false intention shall be punished with imprisonment upto seven years, and shall also be liable to fine.

Section 366A states that- ***"****Procuration of minor girl"*- If any person induces to force or seduce to illicit intercourse to any minor girl by any means then that person shall be punished with imprisonment upto ten years, and shall also be liable to fine.

Section 372 and **Section 373,** States the punishment for **buying** and **selling** of a minor child, used for the purpose of prostitution or illicit intercourse with any person or for any unlawful purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

PROHIBITION OF CHILD MARRIAGE ACT, 2006

The Indian Government introduced the act for the prohibition of a marriage of a child, named as **The Prohibition of Child Marriage Act, 2006,** that came enforce on 1st of November, 2007. This act came after the repetition of the Child Marriage Restraint Act. This act aims the elimination of the Child Marriage from the Society. According to this act, the age for marriage, girl must attain 18 years or more and in case of a boy, he must attain his 21 years or above.

JUVENILE JUSTICE ACT 2015:-

The Juvenile Justice Act (JJ Act), brought up for protection of the Child Rights. It was repealed earlier, Juvenile Justice Act of 1986. This act was amended 2 times, in 2006 and in 2010. The JJ act provides a special protection for the development of the children.This is the act which was passed specially to tackle the offences against the children or the offences which were not covered under any other law. This act includes the sale and procurement of a child for any

unlawful activity like illegal adoption, corporal punishment in child care institutions, giving children intoxicating liquor or narcotic drug or psychotropic substance, etc. Further, this act prescribed the punishment for various offences against the children. Such punishment differs according to the level of the offence done against any child. For the effective implementation of these provisions, JJ Model Rules, 2016 provides for child friendly procedures for reporting, recording and trial.

THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT 1986

The Child Labour (PROHIBITION AND REGULATION) ACT 1986, prohibits the engagement of children who has not completed 14th year of his age, in the employment of any hazardous activity for a child, that can harm the child mentally or physically, or get lifelong injury. The person commits this offence, shall get imprisonment of 3-12 months or have to pay fine of Rs. 10,000-20,000 or both.

CHILDLINE

CHILDLINE 1908 is the toll free number that is provided for the children for taking any kind of help in need or at the time of emergency. The digits spell out the hope for millions of children all over the Nation. This emergency number can be dialed 24X7.

THE MINISTRY OF WOMEN AND CHILD DEVELOPMENT

The Ministry of Women and Child Development is a Governmental branch, is an apex body, administers the rules and regulations and all the laws related to women and children's development in the Country. The Ministry has implemented various schemes for the upliftment of the Children. Some of the successful Institutions are listed below:-

- National Institute of Public Cooperation and Child Development (NIPCCD)
- National Commission for Women (NCW)
- National Commission for Protection of Child Rights (NCPCR)
- Central Adoption Resource Agency (CARA)
- Central Social Welfare Board (CSWB)
- RashtriyaMahilaKosh (RMK)

CONCLUSION

Pursuance of the Study about the **CONSTITUTIONAL STATUS OF CHILDREN IN INDIA**, there is still a scarcity of resources and reforms which may improve children's living standard and their rate of survival, as Government of India has made many reforms for children in respect of their living, development, and survival. UNCRC gives a complete definition of Child Rights for the upliftment of their living standards, and laying aside their race, colour, gender, language, religion, sex, opinions, origin, wealth, birth status, etc. In India, we adopt the reformative philosophy, which seeks to help offenders become better people. All of these reform attempts proved to be ineffective, and instead posed a challenge. All the Children of India deserve equality as the other members of the Country. They are entitled to enjoy all the Rights, no matter what race, colour, religion, language, ethnicity, gender, or abilities define them. The Government has Started many initiatives Like, Prohibition of child labour in factories, mines etc, Prohibition of child marriage, Education sponsorship proggrammes, Mid- Day meals in the school, Setting up Courtyard Shelters "Aaganwadi" for the rural and backward areas of the Country for children education and nutrition and vaccination proggramme from the side for children after birth which protect from the different diseases. As in the developing Country like India, they get lots of rights, still thwarted to enjoy all their rights. In spite of all these programmes there is still a scarcity which is in existence and many challenges which are to be faced both current situations in future also. In Crime scenarios there are many conditions or cases in which justice to children are not delivered like child marriage and child marriage are still practiced. For the Procurement of Child rights Government should take strong measures and Endeavour the implementation of these measures from the grass root levels.

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CASE COMMENT ON THE SUPREME COURT JUDGEMENT OF JARNAIL SINGH VS LACHHMI NARAIN GUPTA*

INTRODUCTION

Reservation has always been a controversial and a highly debatable issue in India. The main motto behind the reservation was the empowerment of the weaker sections of the society. Reservation refers to the process and practice of reserving a certain percentage of seats in the government institutions for the people belonging to underrepresented sections of the society.

The basic idea to put reservation on work was only for 10 years to facilitate the development of the underprivileged sections. The reservation system is the solution to the age-old caste system of India.

This case is also known as the 'Reservation in Promotion Case'. It was decided by a constitutional bench comprising of the then Chief Justice of India Dipak Misra, Justice Kurian Joseph, , Justice SK Kaul, Justice Indu Malhotra and Justice RF Nariman. It was formed to review the constitutional validity of the judgment given in M. Nagaraj V. Union of India given in 2006. The bench was supposed to check its validity with reference to Article 16(4) of the Constitution, which talks about providing reservations in government jobs to those belonging to the backward communities of the Scheduled Caste and Scheduled Tribe communities. In the M. Nagaraj case, it was held that to provide reservations, the state needs to collect quantifiable data regarding the backwardness of the community. It implied that the states need to prove the backwardness of a community before providing reservations in promotions. Moreover, the state needed to prove that the reservation would increase administrative efficiency too.

* Written By: Yash Krishna Pandey

Many states detested this move as it made it harder for them to provide reservations in promotions. It was also contrary to the judgment given in Indra Sawhney versus Union of India in 1992. The petitioner believed that a seven-judge bench needs to review the judgment and make necessary changes so that the verdict is constitutionally valid. However, the matter was reviewed by a five-judge bench instead. The exclusion of creamy layer from reservations was also tackled in this judgment. After the petition in 2011, the judgment was given on 26 September 2018.

FACTS AND ISSUES OF THE CASE

1. An excursion seat of Justice Adarsh Kumar Goel and Justice Ashok Bhushan was hearing an SLP favored by the Center against the August-2017 judgment of the Delhi High Court subduing the DoPT Office Memorandum (OM) dated August 13, 1997, which accommodated the continuation of reservation in advancements inconclusively.

    1. The high court had passed the decision in the light of the summit court constitution seat judgment in M Nagaraj (2006).

    2. On May 17, a seat of Justice Kurian Joseph and Justice Mohan M Shantanagoudar, hearing an SLP against the 2011 judgment of the Punjab and Haryana High Court subduing a comparable OM incompatibility of M Nagaraj, had coordinated “that the pendency of this Special Leave Petition will not disrupt the general flow of Union of India making strides with the end goal of advancement from ‘held to saved’ and ‘open to open’ and in the matter of advancement on merits.”

    3. The Constitution seat of the Supreme Court, on 26 September 2018 conveyed a judgment created by Justice Rohinton Nariman, that booking in advancements doesn’t require the state to gather quantifiable information on the backwardness of the Scheduled Castes and the Scheduled Tribes yet makes the “smooth layer” in either bunch ineligible for the advantages.

The main issues presented before the Honorable Court were as follows-

1. Regardless of whether M. Nagaraj v. Association of India (Nagaraj) required reexamination?

2. Nagaraj decision had held that before the Scheduled Caste and Scheduled Tribe competitors can be advanced, the states needed to demonstrate by “quantifiable information” that they were to be sure “in reverse”

3. Regardless of whether the ‘rich layer’ among SC/STs ought to be banned from acquiring advancements through reservations?

PETITIONER’S ARGUMENT

Those who have defended Nagaraj have stated that the Nagaraj case refers to backwardness, for reservations, it means backwardness in terms of job posts and hence is not directly related to the caste of an individual. It does not pertain to the Scheduled Caste and Scheduled Tribes in that sense. The need for the states to show quantifiable data for reservations in promotions is hence justified. They also argued, relying upon Keshav Mills Co. Ltd v. Commissioner of Income-Tax, Bombay North, that a Constitution Bench judgment which has stood the test of time, ought not to be revisited, and if the parameters of Keshav Mills are to be applied, Nagaraj ought not to be revisited. Those who are in favor of inclusion of creamy layer in reservations in promotion argue that inequality only exists at entry levels. After a certain post or authority at a job, the difference between those belonging to the creamy layer and non-creamy layer vanishes. Hence those belonging to the creamy layer should not be excluded from the ambit of reservations. Proponents of this argument believed that the truly backward would still have a chance to flourish.

RESPONDENT’S ARGUMENT

The learned Attorney General for India, Shri K.K. Venugopal, led the charge for reconsideration of Nagaraj. According to the Attorney General, the Nagaraj case needs to be reviewed on mainly two points. Firstly, the Nagaraj case judgment has not correctly applied the creamy layer concept. The creamy layer concept was not introduced in the case of Indra Sawhney versus Union of India. The second point raised by the Attorney General was that the M. Nagaraj versus Union of India required quantifiable data collected by the state to provide reservations. This was

contrary to the verdict given in Indra Sawhney versus Union of India. Moreover, there was no need to collect data to prove backwardness as those belonging to the Scheduled Caste and Scheduled tribes are among those communities which are socially and economically backward. They are already a part of the Presidential List under articles 341 and 342 of the constitution of India and hence verifying their backwardness would be redundant and unnecessary.

JUDGEMENT

1. The court concluded that the judgment in the Nagraj case does not need to be referred to a seven-Judge bench.

2. Along with this, the provision that the State must collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes is contrary to the nine-Judge Bench in Indra Sawhney case making this provision invalid.

3. It was also seen in the Indra Sawhney Case that any discussion on the ‘creamy layer’ has no relevance in the context of Scheduled castes and Scheduled tribes.

4. Further, the Supreme Court confirmed the Application of creamy layer to promotions for Scheduled castes and Scheduled tribes as held in the Nagraj Judgement. It had resulted in thousands of employees being denied their due promotions.

5. The court viewed the principle of the creamy layer as a principle of identification and not of equality.

JUDGEMENT ANALYSIS

The judgment of the Supreme Court in this which certified the utilization of rich layer to headways for SC/ST government laborers as held in M. Nagaraj versus Union of India showed the little cognizance of standing partition in foundations. While on one hand, the judgment held Articles 16(4A) and 16(4B) to be considerable, which considers reservations in headways, on the other, it satisfactorily killed this benefit by applying the smooth layer impediment. On the off chance that the current smooth layer top of Rs 8 lakh for each annum were to be applied, in any event, 'Social occasion D' SC/ST laborers would be restricted from reservations. Like a deft

performer, the court has played out a talented double dealing on the booking in progressions – left behind it by one hand and taken it by another hand.

CONCLUSION

India has a disputable history in caste-related matters. It has foundationally minimized certain segments of the social orders while giving advantages to another based on birth. With the end goal of advancing socially and monetarily in reverse networks, reservations have an advantage for society. They elevate the individuals who have been pushed down for ages. They give them instructive and efficient upliftment and generally significant, social eminence. The judgment besides, avoided those having a place with the smooth layer which is another productive expansion to the booking models. It assists with elevating those out of luck and prohibits the individuals who are grounded. The move by the Supreme Court is an exceptionally liked one.

In Jarnail Singh, the Constitution seat of five appointed authorities was called upon to choose whether Nagraj should be alluded to a seat of seven adjudicators to settle on its accuracy. The Court as opposed to alluding the make a difference to a bigger seat, willingly volunteered to strike down one of the conditions set somewhere around an organize seat in Nagraj. It is deferentially presented that the five-judge seat in Jarnail Singh did not have the imperative ward to refute one of the conditions set somewhere around a organize seat in Nagraj. The Court, in this way, blundered when it declined to allude Nagraj to a seat of seven appointed authorities for reevaluation.

The decision that the Courts can bar smooth layer from SC/STs while applying the rule of uniformity needs adequate clearness. The choice by the Constitution Bench in Jarnail Singh should unmistakably lay down the law and shut down the loss of motion in administration. Notwithstanding, it has fizzled on both these considers it disturbs the equivocalness and disarray previously encompassing the question of reservation in advancements. Thus, the privileges of thousands of SC/ST representatives are kept in suppression as the law on reservation in advancements is as yet disrupted. It should be noticed that the issue of reevaluation of Nagraj has

overall political results. The discussion on reservations has continuously established a politically charged climate coming about into a conflict between the Supreme Court and the Parliament.

The choice of Nagraj and ensuing cases that deciphered Nagraj were not invited by the State as they oppressed the approach choices of the State to severe legal examination. The Court's accentuation on assortment of quantifiable information to fulfill states of Nagraj has made challenges for the State. In this manner, to invalidate the choice of Nagraj, the Parliament acquainted a bill with alter Article 16(4A).

Such a move would again bring about testing the amended Article 16(4A) on the ground of repeal of the essential design of the Constitution. In this way, the arrangement isn't to alter Article 16(4A) however for the Supreme Court to reevaluate Nagraj and definitively indicate the conditions on which the State can give reservation in advancements. The Court should obviously set out the unit of assurance of deficient portrayal of SC/STs in the administrations and the idea of quantifiable information. The Court should decipher Article 16(4A) as meeting power combined with obligation on the State to gather quantifiable information, so the arrangement isn't delivered slothful. At last, the Court should end the equivocalness on the issue of the utilization of rich layer to SC/STs. The court is needed to resolve these huge inquiries that were left unanswered in Nagraj, and which are additionally jumbled in Jarnail Singh. At the same time, the Court should recognize that there are clashing asserts in question that should be adjusted against one another.

DUTY OF CARE: ITS IMPLICATION ON MEDICAL PROFESSION*

ABSTRACT

A patient approaches a doctor with a faith that the doctor will treat him with all the knowledge and skill that he possesses. Also, as the world is changing at a rapid due to the technological advancement which has its effect on every field and medicine is not immune to its affect. Medical science is also witnessing the increase of technological intervention, which puts extra responsibilities on the professionals. The relationship between the patient and the medical professional is that of contractual nature retaining the elements of torts. A doctor owns a duty to his patient and breach of any of these duties gives the right to action to the patient against the doctor. It is no doubt that a slightest mistake or negligent act by the doctor could cost the life of the patient which alludes to the kind of trust the patient is entrusting on the doctor.so it is the duty of the doctor to obtain prior consent from the patient before carrying out any diagnostic and therapeutic management. The services provided by the medical professional has been brought under the purview of consumer protection act, 1986 thereby broadening the definition of service under the act and a patient can seek redressal of grievances from the consumer court.

What is a 'Duty of Care'?[1]

Duty of care is one of the essential elements of torts. While there are many instances where a person can be careless and his careless can cause damage to the individual, but unless the person owes a duty of care he will not to liable for his carelessness. This is the major point – unless the person owes a duty of care the person will not be liable for his carelessness thereby damaging the other person. At first instances, the word 'duty of care' may seem alien to a layman, it can be understood as a responsibility which obligate us to be careful with actions and not to cause any harm due to one's own carelessness. For example: a diamantaire owes a duty of care to his customers with regards to ensuring the quality of the diamond. He is

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1. Pandit, M. S., & Pandit, S. (2009). Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense - A legal perspective. Indian journal of urology : IJU : journal of the Urological Society of India, 25(3), 372–378. https://doi.org/10.4103/0970-1591.56206

obligated to not sale low quality diamond to his customers. In other words, he owes a duty of care in ensuring the quality of diamond.

The principle of duty of care is used by the courts of law to decide the cases of carelessness thereby causing breach of the people's rights- essentially it a way through courts decide and are able to distinguish legally significant case from the unsignificant which merit the court attention.

The Development of the Duty of Care

The principle 'duty of care' found its origination in the case of Donoghue v Stevenson [1932] AC 562. Although as we move forward, we will encounter various modern test of 'duty of care', Donoghue v Stevenson provides theoretical basis for the duty of care as well as for modern negligence which shows the importance of the case.

The concept of 'duty of care' did not exist in a notable form under the English law before this case, which allude us that unless the plaintiff had a contract with the defendant, plaintiff had no means of bringing up a case against the defendant for his carelessness. This led to a considerable injustice to the plaintiff where they suffered due to clear instances of negligence. An example of this instances can be seen in Winterbottom v Wright (1842) 10 M&W 109. The facts of the case are as follows:

"The defendant (Wright) was contracted by the UK's Postmaster-General to maintain a horse-drawn mail coach in a safe state. The plaintiff (Winterbottom) was also contracted by the Postmaster-General to drive the coach between destinations but was injured when the coach collapsed due to disrepair. Although it was clear that Wright had acted negligently, the courts held that Winterbottom could not sue Wright, because a contract did not exist between the two. In essence, the contract concept of privity prevented legal action"

It is not difficult to point out the fallacy that is evident in the above decision. For example: if a third person buys a cola and the person who consumed the cola and found the remains of rodents inside the tumbler then he was not be able to sue the manufacturer due to lack of contract between the defendant and the plaintiff. Similarly, the road users do not have contract with each other and so they don't have any contract with each other and they will not be held liable for their carelessness while driving on the road. This is evidently problematic and concerning. The consumer of soda would want the soda manufacturer to ensure the

quality and hygiene of the product and so will the beneficiary of the road would expect the person driving on the road to drive safely and responsibly.

This problematic nature led to the establishment of the concept of ‘duty of care’ in Donoghue v Stevenson. It is important to note that the concept of duty of care was not specifically created in Donoghue, instead, it was restricted to a few, highly specific situations which shows that the concept of duty of care was not ‘invented’ or created by the courts instead they greatly widen the ambit of the concept of duty of care.

Case in focus: Donoghue v Stevenson [2]

The case itself involved a relatively simple (and now famous) set of facts. The plaintiff (Mrs. Donoghue) visited a café in August of 1928 with a friend. The friend purchased an opaque bottle of ginger beer for Mrs. Donoghue and decanted most of it into a glass tumbler for her to drink. After Mrs. Donoghue had consumed the glass of ginger beer, her friend poured the remainder of the bottle into the glass, which to both Mrs. Donoghue and her friend’s surprise, contained a partially decomposed snail. As a consequence, the plaintiff suffered from ‘shock and illnesses, and subsequently brought a case against the manufacturer of the ginger beer (Stevenson) for £500, asserting that it had failed in its duty to prevent foreign objects from making their way into its products. Following Winterbottom, the case was rejected in both of the lower courts, before being appealed to the House of Lords where it was successful, and Donoghue was awarded damages.

In this regard, the reasoning of Lord Atkin is important. Atkin held that general duty of care could be said to exist between two parties under neighbor principle’ described in the below key quote.

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.”

- Lord Atkin, Donoghue v Stevenson, at 44

2 [1932] AC 562

The whole reasoning of Lord Atkin contend that the Stevenson should have taken reasonable care to avoid snails or similar from getting into its product, because it could be easily foreseen that such contamination would have an adverse effect on the health of the person consuming them. Also, Atkin was of the belief that ignoring the neighbor principle would be unjust as it would give a freehand to the manufacturers to intentionally send faulty products and then get away with their liability as there was no contract between the party consuming the product and the manufacturer.

However, description of the Atkin's neighbor principle is very broad in scope and is inclusive of wide range of situations. As a result, a number of cases sought to limit the applicability of neighbor principle to physical harm or damage to property（Old Gate Estates Ltd v Toplis & Harding & Russell [3]

With these restrictions on, the law once again returned towards with its universal applicability with Annes v Merton London Borough[4], establishing two – part test similar to one employed in Donoghue. The first part of the Annes test essentially show the neighbor principle- a duty is said to exist where it is foreseeable that a harm can be caused due to the negligent act. The second part, however includes the caveat that the defence can argue against the existence of duty with reasons. It is important to note that the Annes test has been rejected in England. However, it is still in use in a number of commonwealth countries.

The Annes test was rejected once again in favor of test laid down in Caparo Industries v Dickman[5], which is currently applicable to determine/establish the duty of care.

The current Law: Caparo test

Caparo test is the current applicable test which is used to establish the duty of care and therefore, it is important that we have a in-depth knowledge of the test. However, it is to be noted that the test can be applied only in cases where the duty is not pre-defined. The Caparo test is made up of three stages: - foreseeability, proximity and fairness. The first stage deals with the foreseeability of the harm which can be caused by the defendant's careless act. The second stage deals with proximity between the plaintiff and the defendant. Here proximity

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3 [1939] 3 All ER 209).

4 [1978] AC 728

5 [1990] 2 AC 605 test

does not mean that they should be physically proximate, rather it means that there must be a connection between the two. The third stage deals with establishing that whether it would be fair, just and reasonable for the courts to held that the defendant owed a duty of care and make him compensate for the harm.

At last, when all these stages have been passed, then it can be said that the case has satisfied the Caparo test and thus a duty of care can be said to exist.

After discussing at length about what is duty of care now, we will narrow down our research to duty of care associated with medical fraternity.

The medical profession is considered to be the job of God because it helps in preserving life. A patient approaches the doctor or hospital based on his reputation which shows the expectation of the patient from the medical fraternity. Expectations are two-pronged: medical profession will provide the treatment to the best of their knowledge and skill and secondly, they will not do anything which could cause harm to their patients. Therefore, it is expected that the doctor would carry out necessary tests and seek report from the patient before proceeding further with the treatment. Furthermore, unless it is an emergency, the doctors are also expected to get an informed consent from the patient before proceeding with any major treatment. Thus, a patient right to receive medical attention is essentially a civil right. The relation takes the form of civil right because of the informed consent and payment for the services provided by the medical professionals.

In the case Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr.,[6] and A.S.Mittal v. State of U.P.[7]. The honorable court laid down certain duties which the doctor has to assure when a patient comes for consultation. The duties are as follows:

- Duty of care in deciding whether to take up the case
- Duty of care in deciding type of treatment to be administer
- Duty of care in administration of the treatment

A breach of anyone of the above duty could result in establishing the negligence on the part of the medical professional and the plaintiff would be able to bring in cause of action against the negligent professional. In the instant case, the honorable court observed that negligence has many manifestation- it may be active negligence, concurrent negligence,

6 AIR 1969 SC 128

7 AIR 1989 SC 1570

gross negligence etc. Black's Law Dictionary defines negligence per se as “conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid Municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.” The honorable apex court in the case Poonam Verma vs. Ashwin Patel and Ors[8], held that where a person does not possess the knowledge of the system of medicine but practices in that system is a quack. Where it is evident that the person is guilty of negligence per se, no further proof is needed.

Example of medical negligence:

- Improper administration of medicines
- Performing the wrong or inappropriate type of surgery
- Not giving proper medical advice
- Leaving any alien object inside the body of the patient such as cotton swab, bandage etc. after the surgery
- Practicing medicine without the knowledge and skill of the profession.

What does not come under medical negligence?

A doctor is liable for the harm which has been caused due to his negligence. However, the doctor can take the defence that he has not breached the duty of care

The error of judgement can be of two types:

- Error of judgement: In this case, it has been held that the doctor cannot be held liable for medical negligence merely because of his erroneous decision which caused harm to the plaintiff.
- Error of judgement due to negligence: In this case, it has been held that the doctor is liable for medical negligence because of the breach of duty care entrusted upon him by his profession.

8 AIR (1996) 4 SCC 322

Types of medical negligence

Medical negligence can occur in different ways. It occurs when a medical professional deviate from the standard care which is expected in his profession. So, we can say that any kind of deviation from the accepted standard of medication and care is considered to be medical negligence and if the negligence cause harm to the patient, then the doctor or medical profession will be liable for the damage caused due to his negligence.

Some of the common categories of medical negligence are as follows:

Wrong diagnosis: When a patient goes to the hospital/clinic etc. the first step will be diagnosis of the illness. Diagnosis is of utmost importance because it helps in diagnosis of the disease which in turn, will help in the treatment of the disease. However, if the patient is not treated properly due to ill diagnose of the disease and due to which if he suffers any damage then the medical professional will be held liable for his negligence.

Delay diagnosis: A delayed diagnosis is treated as medical negligence if another doctor would have treated the same disease in a timely fashion. A delay in diagnosis can cause irreparable loss to the patient or can even be fatal. Delay in diagnosis will reduce the chances of the patient being recovered.

Error in surgery: Surgical operations require expertise with the skill of surgery and it should be done with utmost care and caution because the slightest mistakes can cost life of the patient.

Unnecessary surgery: Unnecessary surgery is by and large**,** associated with mis diagnosis of patient symptoms or medical decision without due considerations of the risks associated with operation**.**

Error in the administration of anesthesia: Anesthesia is a risky part of the operation and requires expertise for its administration. Prior to the administration of anesthesia, the doctor has to review patient’s medical history, conditions, medication etc. to decide its requirement.

Long-term negligent treatment: Medical negligence can also occur in subtle ways over a course of time. Usually, in this case the doctor is negligent in not following up the treatment or his failure to monitor the effects of the treatment.

Essentials of medical negligence

The word medical negligence consists of two words “medical and negligence”. The word negligence means failure to provide reasonable care and the word medical denotes the profession which is associated with medicine. So, medical negligence is the failure to provide reasonable care while administering the medicine.

Essentials for right of action in medical negligence:

- Duty of care
- Breach of duty of care
- Plaintiff suffered a damage

Duty of care owed by the doctor to his patients:

A duty of care in medical negligence is an obligation of one party i.e., doctor to ensure reasonable care while operating or attending the other party i.e., patient.

- It is the duty of doctor to decide whether he should take the case or not.
- It is the duty of the doctor to decide what type of treatment to be administer to the patient
- It is the duty of the doctor to decide what treatment to give

If the doctor fails in performing the aforementioned duties, then it will result in breach of duty and gives a right to action to the patient. Breach of duty is caused by the doctor when he did not take the reasonable care which a man with his skill would have taken.

In **Kusum Sharma v. Batra Hospital**[9], “it was held by the Supreme Court that a doctor often adopts a procedure which involves a higher element of risk, but in doing so he honestly believes that it will provide greater chances of success for the patient. If a doctor has taken a higher risk to redeem the patient out of his/her suffering and it did not yield the desired result, this may not amount to medical negligence”.

In **Jasbir Kaur v. State of Punjab**[10], the fact of the case is “a newly born child was found missing from the bed in a hospital. The child was found bleeding and near the wash-basin of the bathroom. The hospital authorities argued that the child had been taken away by a cat which caused the damage to him. The court held that the hospital authorities were negligent

9 CIVIL APPEAL NO. 1385 OF 2001

10 1995 ACJ 1048, AIR 1995 P H 278 (1995)110 PLR 343

and had not taken due care and precaution. Thus, awarded the compensation amounting to Rs. 1 lakh".

Standard of care

The standard of care specifies the appropriate treatment and medication procedure as per the requirement in the case. If the doctor fails to provide the standard of care which is expected in the instant case, then he will be liable for medical negligence. The care should not be of highest or lowest degree but of the degree which is required in a particular case.

Here the degree of care means the level of care an ordinary health profession, with same training and experience, would have provided in the similar circumstances. This is the most critical question in deciding the liability of the medical profession and if the answer to the question is "NO" then the patient can sue the medical professional for his negligence.

In the case of **Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Anr**[11], the honorable apex court held that doctor owed certain duties and if he errs in his duties due to his negligent behavior then he will be liable for the harm thus caused.

Burden of proof

The burden of proof usually lies with the complainant. The law requires a higher standard of evidence to support an allegation of negligence against the doctor. In case of medical negligence, the patient must establish the claim against doctor to succeed.

In the case of **Calcutta Medical Research Institute vs Bimalesh Chatterjee**[12], it was held the onus of proving the negligence and deficiency of services, is clearly on the complainant.

Proof of negligence

It has been held in various judgements that to charge the doctor for medical negligence, the burden of proof resides on the complainant. The guilt of negligence can be proved only if the act of the doctor falls below the standard which is expected from him.

When does the liability arise

11 1969AIR 128, 1969 SCR (1) 206

12 LAWS (NCD)- 1998-12-11

By and large, liability arise when the patient suffers injury due to failure of the doctor to provide reasonable care to his patient. Hence, the patient must establish that doctor owed a duty of care to him which the doctor was liable to provide and the next step is to prove the breach of duty by the doctor

In general, liability arises only when the complainant is willing to discharge the burden on him of proving the negligence. However, in some cases where the negligence is evident, the principle of “res ipsa loquitor” is being applied which means that the thing speaks of itself. Mostly the doctor is liable for his act of negligence. However, in some cases he can also be held liable for the negligence of others. For example: when a junior doctor, acting under the supervision of a senior doctor commits a negligent act then the senior doctor will be held vicariously liable.

Res ipsa loquitor

The meaning of the above Latin maxim is “the thing speaks for itself”

In medical practice, it refers to the gross negligence by the doctor, which has caused damage to the patient. The act was so far below the standard that it can be easily noticed.

The doctrine takes into consideration following things:

- Nature of injury which shows the degree of negligence
- No involvement of patient in the injury in any way possible
- Injury happened under the circumstances when the patient was under the supervision of the doctor

By applying this maxim, the negligence of the doctor can be proved. The doctor has to rebut the accusation and if fails to prove the accusation wrong then he will be held liable for negligence and will have to compensate for the loss.

Some example of Res ipsa loquitor

- Leaving some object inside the body of the patient
- If the wrong patient is operated
- If the wrong part of the patient gets operated

Coverage of doctors and hospital under CPA Act, 1986

The honorable apex court in the case of **Indian Medical Association vs. V.P. Shantha**[13], held that all the medical professional and services come under the purview of CPA Act 1986. Even the medical services provided free of cost will come under the act which shows the scope of this judgement.

In this case the court discussed whether the services provided by hospital and doctor come under the purview of section 2(1) (O) of the consumer protection act.

Section 2(1)(o) of the Consumer Protection Act defines the 'deficiency of service' which means any fault, imperfection, etc. in the quality or manner of performance that is required to be maintained by or under any law or it has been undertaken to be performed by a person in pursuance of a contract or otherwise[14].

Provisions[15]

According to **Section 304-A of the Indian Penal Code, 1860**, "if a person commits a rash or negligent act which amounts to culpable homicide then the person will be punished with imprisonment for a term which may extend to two years or with fine or both".

According to **Section 337 of the Indian Penal Code, 1860**," if a person commits a rash or negligent act due to which human life or personal safety of others gets threatened. The person will be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or both".

According to **Section 338 of the Indian Penal Code, 1860**, "if a person commits a rash or negligent act due to which human life or personal safety of others gets threatened. The person will be punished with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or both".

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13 1996 AIR 550, 1995 SCC (6) 665

14 Bare act of consumer protection act, 1986

15 Indian penal code, 1860

Defence[16]

Section 80 of the Indian Penal code says that anything which happens as a result of an accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution is not an offense.

- **Section 81 of the Indian Penal Code, 1860**, states that if anything is done merely by the reason that it is likely to cause harm but if the same is done without any intention to cause harm and in good faith in order to avoid other damages to a person or his property is not an offense.
- **Section 88 of the Indian Penal Code, 1860**, says that no one can be made an accused of any offense if he performs an act in good faith for the good of other people and does not intend to cause harm even if there is a risk involved and the patient has given the consent explicitly or implicitly.

Supreme Court Judgments on Medical Negligence

Below are few of the landmark judgement of supreme court on medical negligence:

- In the case of **Dr. Kunal Saha Represented by Sri … vs Dr. Sukumar Mukherjee and Ors**[17], which is popularly known as **Anuradha Saha case**. The fact of the case is that the wife of the plaintiff was suffering from drug allergy and doctor negligently administered wrong medicine to the patient which led to the death of the patient. It is the case where the honorable apex court had provided the highest compensation to date.
- In the case of **V. Kishan Rao Vs Nikhil Super Specialty Hospital**[18], there was a lady who was to undergo the treatment for malarial fever, was treated differently. An officer in the malarial department sued the hospital authorities for negligently handling the case. His wife was treated for typhoid fever instead of malarial fever.

16 Indian penal code, 1860

17 Petition no. 240 of 1999

18 Civil appeal no. 2461 of 2010

The husband was compensated for the negligent act of the authorities. In this case, the principle of **Res ipsa loquitor** was applied.

- In **Jacob Mathew .V. State of Punjab**[19]**,** the honorable apex court held that in some cases the doctor are bound to make difficult choices. Sometimes situations make them go for decision involving greater risks because of higher chances of success and sometimes they have to go for such situations in which there is less risk and high chances of failure. So, at the end, it depends upon the fact and circumstances involved in the case.
- In the case of **Juggan Khan v. State of Madhya Pradesh**[20]**,** the appellant was a homeopathic practitioner. After seeing an advertisement, a women went to the doctor for treatment of guinea worms. After taking the medicine prescribed by him, she started feeling restless and even after the administration of antidotes, she succumbed to the effects of the poisonous medicine. The court held that it was a negligent act to prescribe poisonous medicine to the women without proper checking and knowledge of the same.

19 Appeal no. 144-145 of 2004

20 1965 AIR 831

CONCLUSION

Though doctors are seen as God and the patients hold immense faith in the treatment provided by them and believe that they will retain their per-pathos state after the treatment gets over. But sometimes, even the doctors make mistake whose cost has to bear by the patients. Sometimes, the costs are so high that the slightest mistake of the doctor has to be paid by the patient in the form of their life.

The manufacturing of equipment and medical tools should be made with due care and caution and it could lead to injury to the patients and could even cost their life. The government should make provisions which can keep a check on the quality of the equipment being made and could punish the manufacturer for their negligence, imposing duty of care which they must ensure.

People are losing faith in medical profession due to some serious negligence in the past few years which alludes lack of duty of care on the part of medical profession. With technological intervention in medical field, duty of care on the part of the medical professional will also increase. Medical professionals need to do some introspection and analysis of their negligent behavior and try to regain and retain the trust of their patient the medical ethics need to be reformed and developed so as to serve with complete justice.