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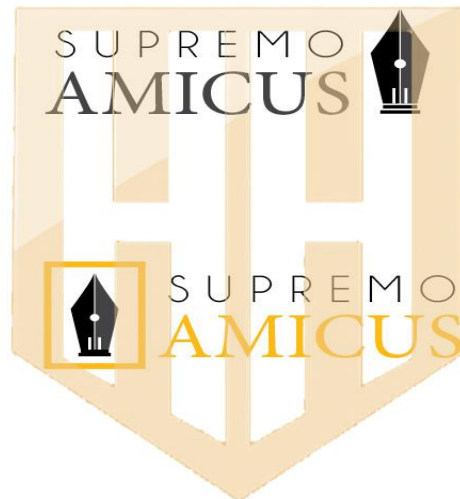


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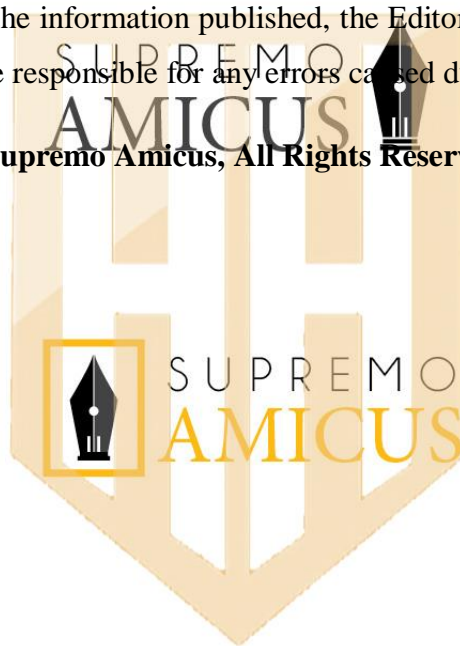
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EDITORIAL

Supremo Amicus is an online peer reviewed international journal on law and science. The journal seeks to provide comprehensive information on different aspects of legal and scientific field. It focuses on the advancement in science and law and the various challenges which are before us in these fields.

The main purpose of the journal is to encourage original research in these fields and to publish outstanding articles. It aims at providing good quality readable material to its readers and to spread knowledge in the area of science and law. The journal welcomes students, research scholars, academicians, and practitioners to present their studies on various topics acknowledged by this journal and also provide them a platform for publication of their works.

With this thought, we bring forth this journal before you.



TEAM

SUPREMO AMICUS



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REVISITING THE RELEVANCE OF BARCELONA TRACTION

By Akanksha Dubey
From OP Jindal Global University

ABSTRACT

The paper begins by briefly examining facts of the case Barcelona Traction. In an obiter dictum, the court in this case identified a new category of international obligations called *erga omnes* - which are obligations owed by the States towards the international community as a whole in the interest of protecting basic values common to all.

Although there was a difference between the ratio and the obiter dicta (*erga omnes*) in this case, this paper seeks to analyse why the concept of *erga omnes* evolved and gives various instances from the judgement itself which try to justify that the international commercial activities of the States are in the interest of the entire international community and therefore are obligations *erga omnes*.

Background

In its judgment in the second phase of the case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)¹, the Court rejected Belgium's claim by fifteen votes to one. The claim, which was brought before the Court on 19th June 1962, arose out of the adjudication in bankruptcy in Spain of Barcelona Traction, a company which was incorporated in Canada. The objective sought by the state of Belgium was reparation for damage alleged to have been sustained by Belgian

nationals, who were shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State.

On behalf of Belgian nationals who had invested in a Canadian corporation, Belgium sued Spain on the premise that Spain was responsible for acts in violation of international law that had caused injury to the Canadian corporation and its Belgian shareholders.

The International Court of Justice held that Belgium had no legal interest in the matter to justify it bringing a claim. Although Belgian shareholders suffered, if a wrong was done to the company, it was only the company's rights that could have been infringed by Spain's actions. It would only be if direct shareholder rights, such as to dividends, were affected, that the state of the shareholders would have an independent right of action. The Court in this case held that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain.

The Court in its judgement held that it was a general rule of international law that when an unlawful act was committed against a company, only the state of incorporation of the company could sue, and because Canada had chosen not to, there was no claim which could be sustained by Belgium.

Further the court held that the idea of a "diplomatic protection" of shareholders was unsound because it would create confusion and insecurity in economic

¹ Barcelona Traction, Light and Power Company, Limited (Belgium v Spain); Second Phase, [1970]

ICJ, ICJ Reports 1970, (ICJ) [1970] ICJ, ICJ Reports 1970 (ICJ).



relations, as shares are 'widely scattered and frequently change hands'.

It was in this case that the court distinguished between two different categories of obligations. One kind was the obligations of a State towards the international community as a whole, which was the concern of all states and for whose protection all states have a 'legal interest'.

These obligations are fundamentally different from those existing vis-a-vis another State. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

²

Such obligations derive, in contemporary international law, from the outlawing acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

Some of the corresponding rights of protection have entered into the body of general international law while others are conferred by international instruments of a universal or quasi-universal character.³

Further, it was stated by the court in this case that the performance of obligations that are the subject of diplomatic protection are not of the same category as obligations *erga omnes* and thus, it cannot be held in the present case that all States have a legal interest in its observance.

This in essence meant that for Belgium to be able to have *jus standi*, it would first have to establish that the losses suffered by the Belgian shareholders in Barcelona Traction were the result of violation of obligations of which the State of Belgium itself was a beneficiary. Therefore, it is existence or inexistence of such a right which is the decisive factor in determining Belgium's capacity or lack thereof to bring about an action against the Spanish State.

The Evolution of *Erga Omnes* and its Necessity in International Commercial Activities:

Although in the instant case it was ruled that the obligations in context of diplomatic protection do not fall within the ambit of *erga omnes* because all States do not have a common interest in its legal observance, however the coming forth of the concept of *erga omnes* itself is a significant step in legal evolution and goes on to show why the evolution of this concept was essential in truly understanding the importance of obligations owed by States towards the treatment of aliens in their international commercial activities.

Justice Riphagen holds in his dissenting opinion, and rightly so, that the distinction drawn by the court between obligations of a *State erga omnes* (i.e; obligations of a State which exist towards certain other States under general international law), and obligations of a State which only exist towards a State with which it has entered into "treaty stipulations" is a problematic classification because it seems impossible hold that the economic interests of a State can be protected through obligations on

² *ibid* [33]

³ *ibid* [34]



other States only by virtue of "treaty stipulations"⁴

The Court's conclusion that such aggrieved shareholders must take recourse to the treaty stipulations is of little value in the face of the apparent need of legal protection of international shareholders since conventional treaties were the means of offering diplomatic protection to shareholders long ago. Today, with the advent of forums like the ICJ, the vacuum for such diplomatic protection must be resolved in accordance with the present day international law rather than by subscribing to treaty stipulations of a century long gone.

The Court in its majority opinion states-

*"When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them."*⁵

However, the Court fails to take into account whether the treatment afforded to Barcelona Traction by the organs of the Spanish State fell within the ambit of Spain's international obligations and thus also fails to appreciate the nature of the rules of customary international law which are applicable in this case, especially the ones concerning the rights and obligations of States in the field known as *"the treatment of aliens"*.

⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain); Second Phase, International Court of Justice (ICJ), 5 February 1970 [1970] International Court of Justice,*

This complete segregation between the rules of customary international law concerning the responsibility for the treatment of aliens, and the rules of municipal law, determines the very content of the rights and obligations of States on the international arena. This requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.

While examining rules of municipal law the Court holds that, under municipal law, the rights of the shareholders are not affected by measures taken against the company and from this it follows that the State of which the shareholders in a company are nationals has also no right that might be injured in the international arena by measures taken by another State against the said company.

The basis of *Jus Standi* of a state depends upon the existence of a connection or a link between the State concerned which has been adversely affected in a particular situation by the conduct of another State. Thus, it is this conduct imputed on States that forms the core of creation of "obligations" and "rights" between states in their mutual relations.

However, the court reasons its verdict on the distinction between "mere interests" and "rights" and it is this reasoning that leads the Court to conclude that it is "mere interest" of the shareholders and not a "right" that has been violated since the

Dissenting Opinion of Justice Riphagen (International Court of Justice).

⁵ *Barcelona Traction (n1)[33]*



alleged acts were directed against the company and not against shareholders. However, in the absence of such protection, the small investors would now be less likely to invest in multinational corporations since this judgement discourages investors from placing capital abroad in a corporation which has a nationality different from his own.

This will not only reduce the investment in multinational corporations but will also inhibit the growth of developing nations where such capital could have been invested.

In reality what this case does concern is rules of customary international law with regards to obligations and rights of the States in their mutual relations and the body of rules of Customary International law tries to protect the interests of the International community in respect of the fundamental freedoms of people as well as that of international commerce. The nature of rights and obligations, is different in international law, because these obligations and rights are consistent with the requirements of the entire international community.

The idea behind the protection of "human rights" in public international law has always been present in international decisions concerning the responsibility of States for the treatment of aliens. Thus, the different methods adopted by the municipal law of different countries are irrelevant to

the attainment of the objectives of the rules of customary international law.⁶ The conclusion of the Court being that Belgium lacks *jus standi* is based solely on the nature and interrelation of the rights of the company and the rights of the shareholders under municipal law.⁷ Therefore, a company's juristic personality is not by any means the only decisive factor concerned with the obligations or the rights of States in the matter of the "treatment of aliens".⁸

Furthermore, it is well established that the conditions under which the international responsibility of a State arises, and the conditions under which another State is entitled to require reparation for an injury caused to it, are completely independent of the content of the municipal law of the States in question.⁹

The judgment even observes that the diplomatic protection of foreigners is closely linked with international commerce¹⁰ and further recognizes that "when a State admits into its territory foreign investments, it assumes obligations concerning the treatment to be afforded them"¹¹ but on the other hand, the Court denies to the State whose nationals have made such investments any protection at the international level apart from "treaty stipulations".¹²

While it is true that when a State admits into its territory foreign investments, it does not thereby become an insurer of that part of another State's wealth which those investments represent"¹³, and that the

⁶ *ibid* [10]

⁷ *ibid* [38]

⁸ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (n1) [55]

⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Dissenting Opinion of

Justice Riphagen (*International Court of Justice*) (n4) [3] 335

¹⁰ *ibid* [37]

¹¹ *ibid* [33]

¹² *ibid* [90]

¹³ *ibid* [86]



infringement of the territorial integrity and political independence of a State cannot be compared with that of an infringement of the fundamental freedoms of a human person, or with that of an injury to international commerce. Nevertheless, from the legal point of view, it is in fact a matter of State interests being protected by the imposition of obligations on other States.¹⁴

The most realistic and practical protection that can be offered to an investor in cases where the host state injures the interest of a foreign investor through wrongful acts directed against corporate personality within the host territory while the nationality of such corporate entity is that of a different third state is through diplomatic protection exercised by his own state's government.

The question whether a state can be allowed to bring about a claim on behalf of its national for an injury suffered to his interest in a corporation of a third state has been answered affirmatively by the American Law institute in the Restatement of Foreign Relations of Law.¹⁵ Section 143 of the same provides that a state would be liable for damages caused to an alien shareholder under three conditions-

- (1) a "significant portion of stock is alien owned",
- (2) the corporation fails to obtain reparation for reasons beyond the control of the shareholders;
- (3) the corporation has not waived or settled

¹⁴ Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Dissenting Opinion of Justice Riphagen (International Court of Justice (n4) [8] 340

its claim.

This rule thus envisages a situation where a shareholder's state would be able to successfully sustain a claim for its national. Such a rule provides an apt mechanism to deal with a situation where the investor/shareholder is allowed to seek redress, thereby providing an escape from the ruling of Barcelona Traction, which foreclosed the opportunity of investors from seeking protection of their national states.

However, the decision reached at by the ICJ in this case is the opposite of such a rule and creates a vacuum leaving the shareholders powerless and remediless in international law having no effective remedy for their injuries.

Further, the Court also looks into special circumstances under which the general rule (i.e.; the State under whose municipal law the company was incorporated would have jurisdiction) might not take effect. In this regard, the court brought up two situations in which a State, other than the one in which the company was incorporated may have jurisdiction.

While these two conditions lead to the non-application of the simple and strict rule, however still the court considered in the first case - "the case of the company having ceased to exist"¹⁶ as being solely within the view of existence under municipal law, failing to take into account the object of the company.

¹⁵ Restatement (Second) of Foreign Relations Law of the United States (1965) Section 173.

¹⁶ *ibid* [64] - [68]



With regards to the second possibility dealt with in the Judgment¹⁷ which was “the lack of capacity of the company's national State to act on its behalf”. Here again, the court concludes that, the creation of a corporate entity by the municipal law of a particular State is the sole relevant consideration without explaining how such a formality can of itself give rise, in international law, to a legally protected interest of that State in the business of the company. By the Court’s ruling that the corporate domicile alone can seek redress, and that in the absence of a rule in international law that confers such a right on the shareholder’s state, if different from the corporation’s state,¹⁸ had the effect that such a ruling left the shareholders who made an investment in a foreign state remediless.

Considering the fact that there has been tremendous growth in the arena of foreign investments in the last century, both nations as well as the investors in such nations have mutually benefitted from such growth and this has also led to an outpace of the flow of capital and has also resulted in increasing the basic standards of living in the developing countries.

States have a real interest in the development of its international commerce, and this international commercial activity of a State affects the economy as a whole. This is also why the State which relies upon such responsibility does not represent the injured person but is representing its own interest in that person's activities in international commerce.

¹⁷ *ibid* [69] - [84]

¹⁸ Preston G Lutz,” Diplomatic Protection of Corporations and Shareholders- Capacity of the Government to Espouse Claims of Shareholders of a Foreign Corporation” 2019

In fact, customary international law protects the interest which a State has in its international commerce because international commerce is of interest to the entire international community.

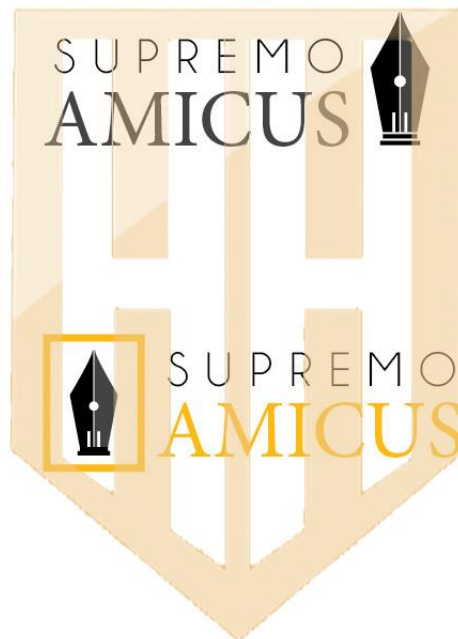
CONCLUSION

Despite there being an absence of cases before the ICJ of proper cases involving *Erga omnes*, the development of the concept itself is a significant step towards its success as it has developed quickly, and has been integrated into other areas of law. One of the most notable of such areas is that of State responsibility. An instance of this can be found in the ILC’s text¹⁹. As per Article 3 of ILC’s text, each State has the right to invoke another State’s responsibility in case in case of breach of an obligation owed towards the international community as a whole, indicating that the essence of the concept of *erga omnes* is that there might arise situations where the rules governing concept of locus stand might have to be looked beyond, in cases where the community interests are at stake. From this it follows that since the interests of the State in its commercial activities are also the interest of the entire international community at large, the States owe duty in the arena of international commercial activity not only to those States with whom such obligations might arise out of “treaty stipulations”, but to the entire international community, thus making such obligations “*erga omnes*”, meaning that all States have a legal interest in the protection of such rights since they have implications on the whole international community.

¹⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, 2001



The concept also has been adopted in areas outside the realm of State responsibility. An apt example of this, can be seen in the extension of the concept of *erga omnes* by Justice Trindade's opinion in the case of *Belgium vs Senegal*²⁰ as being "*a concept that is committed to the prevalence of superior common values*²¹ and requires a wide ranging reinterpretation of traditional common law..." it implied granting immediate protection under more lenient conditions and horizontal application of human rights law.²²



²⁰ *Belgium v Senegal*, Judgment, ICJ GL No 144, ICGJ 437 (ICJ 2012), 20th July 2012, United Nations [UN]; International Court of Justice [ICJ]", International Court of Justice

²¹ *ibid*

²² Christian J. Tams and Antonios Tzanakopoulos, "Barcelona Traction at 40: The ICJ as an Agent of Legal Development", 2019



INFELICITOUS POLICIES LEADING TO THE DETERIORATION OF THE ECONOMY

By Akifa Shahid

From Jamia Milia Islamia

Economic slowdown maybe just a part of growth, for any country, but stagnation or recession is an alarming state, which must not be avoided. A recession is a business cycle contraction, when there is a decline in economic activity, due to a widespread drop in spending there is an adverse demand shock, when the demand shrinks the production slows down and credit tightens, people experience a lower standard of living due to employment uncertainty and investment loss. It is visible that we are in the middle of the crisis right now. The true face of our economy is that we are still strangled in the poverty, corruption and mismanagement of our economy with mismatched economic policies, budgets and acts passed with full majority, which are infructuous in any of the span of time, for the country.

As we are heading towards the future, our goal must be an excellent GDP growth, healthy population with a remarkable employment rate, diminishing instances of crime, keeping health and education as our priorities. This all sounds fascinating, until we face the harsh reality, which is that we have a downtrodden economy, with progressively weakening roots. Vulnerability of the economy is not a sign of development, instead we need to look at

the root causes of the current scenario which are not onerous to perceive. The economic instability, causing stagnation of wages and jobless growth, is only because of the dwindle of demand, not only in the technological sector but agro industries also are being affected very unfavourably. Roughly, 37 million of the population left the agricultural field, in the last 6 years, around 25 million women were out of the workforce. In the Financial Year 2018, the unemployment rate dropped down to 5.3% in Rural areas and 7.8 % in Urban areas²³, resulting in overall dropdown rate of 6.1%.²⁴ The estimated population of our country is close to 1.37 billion, out of which 858 million lives in rural areas and 457 million in urban, facing similar hurdles like unemployment, non-availability of resources and government facilities. Being the tax payers we have the right to receive some basic facilities from the government but unfortunately nothing productive have been done till date, except the promises on which the the population is keeping faith, but we all have to understand that, promises and statements of any quality won't feed us. Comparatively, in 2011-12 there were 472.5 million employed workers in economy whereas the number dropped down to 457 million in 2017-18, a massive decline by 15.5 million, the population is increasing day by day and the jobs are vanishing. A similar estimate of 16 million decline, has been reported by the Labour Bureau's Annual Employment Surveys. India's labour force consists of 45.9 crore workers, out of which 43.3 cr are in the unorganized sector and remaining 2.6 crore (6%) are in the organized sector,²⁵ those

²³ ET Bureau, Is the job scene in India bad? Depends on how you see it, says govt, Economic Times (June 1, 2019, 03:27 PM IST) //economicstimes.indiatimes.com/articleshow/69598640.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

²⁴ Ministry of Programme and Statistics and Implementation, Periodic Labour Force Survey (PLFS) of the National Sample Survey Office (NSSO), (June 26, 2019, 18:01 IST)

²⁵ NSSO, Source Ministry of Labour and Employment, (Aug. 14, 2019).



working in the unorganised sectors are struggling to get job security, living under the fear that on any upcoming day they might lose their job in the name of lay off or something else. This inauspicious dropdown is the sign of in extremis economy.

India has been ranked on 102 out of 117 countries, as a country with ‘serious’ levels of hunger,²⁶ the four parameters for the classification of the same, are undernourishment, child stunting, child wasting and child mortality, but still the renowned ministers of our country are denying the facts, that we are in the middle of the crisis. Either we all are pretending to be blind or else we agree that facts are not facts. Optimism is a great thing, and denial is not the remedy and surely it won't change the current position. There is a need for the application of economical minds, with excellent policies then only we can sail through this swamp of recession. The Ministry of Labour and Employment has stopped carrying out surveys, after the reports of five rounds 2010- 2016 have been carried out. The Centre was asked about truncated unemployment rate, which is at 8.7% for women and 4.3% for men, and what is the remedy for this heavy drop down of the numbers, the Central Government instead of making job opportunities, stopped releasing reports thereafter. Approximately there are 77% of the households which have no fixed salary.²⁷ How an individual is expected to lead a life with uncertain employment, not enough money, because the money he deposited in the bank was taken away by some high profile personality living in abroad, and with undernourished children,

who are expected to get food in the school in the name of mid day meal, but here also they are getting roti to eat with salt or turmeric water. Ironically, the mid day meal is an initiative by the Government to provide adequate nutrition, the meal is no better than the kind of food they are having in their poor homes. We are the Country where the agricultural production is that much high that every year we receive the reports that the grains are being rotten, and our children still die of starvation. Isn't it a mark of shame for us.

The decline in demand is due to the absence of liquidity in the market, the high rate of GST, which is more of a burden to all types of hold-ers whether small or large, after demonetization. In 2016-17, the working age population or job seekers went up to 76%, as usual women continued to leave the workforce. The NSSO, is yet to be released according to Gangwar, but they have not carried out any of it. In earlier, surveys it is much obvious that the female participation in the workforce is declining as maybe because of various social reasons, the situation of the women in rural areas is same as it was in the previous years.²⁸ In Bengaluru, MG (Morris Garages) introduced an initiative named as “Drive Her Back” to enable experienced and qualified women to return to the workplace, women who have previously worked on technical, strategic and commercially-focused projects can apply. The access to networking opportunities and professional development, is being provided. These are the small steps taken up by the people to ensure a balance in participation in the economic development.

²⁶ Global Hunger Index, (oct., 16, 2019).

²⁷ Fifth Annual Employment- Unemployment survey at all India level (Sep. 15, 2016).

²⁸ Somesh Jha, Business Standard, (Jan. 11, 2019).



The Finance Minister, announced the budget this year, which did not include any new economic policy, instead it imposes a hike in tax, overburdening the manufacturing sector, markets, stocks, entrepreneurs and business holders. Even the RBI Governor Shaktikant Das agrees that there is a slowdown in Indian Economy. Slow GDP affects the people in different ways, the overall income may rise, but the annual loss will increase, and it will bring problems like Inflation²⁹, and the Consumer Price Index³⁰ rises to 3.2% in August resulting in the hike of food prices, like the hike in price of onion and tomatoes. EPFO³¹ released the data that there is a total of 26% of the fall in average job creation.³² Our economic disparity is on the peak, 1% of the total population bags about 73% wealth of the country, says Oxfam. Ultimately, creating a wide gap between the poor and the rich, the middle class is facing layoffs and inflation, the poor are dying of starvation, farmers committing suicide because of the incapability of re-payment of loans. Economic crisis is strangling around the throats of 98% of the total population. The kind of situation that we are facing, is not a sign of a developing country, but we are worse than an under developed country. The youth is being misguided, and those who know the true meaning of development, are not allowed to raise voices against the Government and their vague policies, otherwise the charges like Sedition are on the way to get high on the nerves.

As per CMIE³³, India has lost 11 million jobs in 2018, rural areas faced the worst hit. The rate of unemployment has risen to 7.2% from 5.9% in February'18, a compilation of the data shows it. Around 5 million Indian men have lost their jobs since 2016, a study shows. But this all went unnoticed by the people, as they are engaged with something more important than the economy, better food, nourished family, a stable salary, clothing, education and some money in hand to lead a good life.

Icing on the cake, various industries have to layoff, due to the lessening of demand because of the dry market. Employees are being laid off, shifts have been reduced, wages are being cut. Amidst all of this people with jobs are hoping not to get fired. For instance, Zomato fired 541 employees and switched to automation, likewise Uber fired over a third of the Marketing Staff. Parle category Head Mayank told, that due to the hike in prices the demand is getting shorter, as the rate of GST is too high to cope up with, they have to cut short the production and much staff is not needed, so they have to lay off 8,000 to 10,000 of employees. Tech Mahindra sacks nearly 1000 employees, WIPRO fires 600. Automobile sector has a great hit, 3.5 lakhs of people are jobless now, because of the layoffs, John Peter, Chennai's Ambattur, told³⁴ that in the last 5 months, his turnover has dropped by 90% from 8 lakh to just 1 lakh, he cannot even pay the installment of the private loan. Without the liquidity in the market, the

²⁹ The rate at which price increases over time, resulting in a fall in the purchasing value of money.

³⁰ A consumer price index measures changes in the price level of a weighted average market basket of consumer goods and services purchased by households. It is usually calculated and reported by the Bureau of Economic Analysis and Statistics of a Country on a monthly and annual basis.

³¹ Employees' Provident Fund Organization, (Aug, 14, 2019)

<https://yourstory.com/2019/08/independence-day-jobs-india-employment-epfo>

³² Business Today. (Apr. 22, 2019).

³³ Centre for Monitoring Indian Economy.

³⁴ NDTV.



common people are being fired, losing their jobs or are compelled to work at a very low wage rate, with the hike in prices. Economic Times explains that 5 lakhs passengers vehicles and 30 lakh 2 wheelers are unsold, plants are being forced to shut down. These are not the indications of development, in anyway.

In the International Market, a sharp rise in the price of Gold, has weakened the demand. As Import of Gold has come down from 81.71 tonnes to 68.18 tonnes, due to the rise in Import duties from 10% to 12.5%, mentioned in the Union Budget. The liquidity crisis have reached to that extent that no big demands have been registered in the wedding and festive seasons. Surendra Mehta, National Secretary (India Bullion Jewelers Association), observes a 50% fall in demand of Gold this year. A report³⁵ says 5000 millionaires, (High Net Worth Individuals) left India in 2018, or those who are in India are not investing in any business markets. The owner of Bajaj Auto, Rahul Bajaj asked the government "NO investment, NO demand Will growth fall from heavens"³⁶As there is no demand due to the dry market which implies no production and shutting down of industries in the automobile sector. The economic crisis is defended by the Government that India will be a 5 trillion Economy at the end of 2024, which needs a total of 12% GDP growth rate every year, on the contrary it is only 6.8% or 6.5% as per the data given by the Government. But the Former Chief Economic Advisor Arvind Subrahmaniam claims that the real GDP is 4.5%, and the SBI chairman Rajnish Kumar said that it is

visible to all that the demand is slow. In June 2019, the domestic Automobiles sale witnessed a drop of 12.34%, in April 15.93%, figures are clear enough to portrait the condition of devastating state of the Country.

Indian economy is suffering from Global Headwinds and Domestic Policy Issues, like Demonetisation, followed up by the GST, which ate up the liquidity crunch of the bank, stock markets face the loss 12,00,000 cr.³⁷ People are busy in defending the government and its policies, but it is the high time and we all should know that Indian economy resembles a stalling aircraft- losing altitude, red alerts, flashing struggling to stay up³⁸. According to the World Bank report, the position of India has been pushed to 7th spot, IMF cut its projection for India's GDP growth in the current Financial Year by 0.3% to 7% due to the weak demand outlook. The Business Standard Report says the Sensex and Nifty see the worst in the last 17 years, stock markets are going down. India's exports registered a fall of 9.7% to \$125 billion in June as key sectors fare poorly, this is the second fall in the past year.³⁹ Indian rupee slide to 80 per dollar, this is the biggest fall in 6 years.

PSU(Public Sector Undertakings) are the Government Companies which contribute over 20% in the GDP of the country, forms the core wealth of any country, their situation is no better than us. The 11nappropri instead of saving the drowning economy, is selling the PSU's or charging high dividends, from it. CPSEs⁴⁰ today are making losses, like BHEL, CAG report

³⁵ Outlook Web Bureau,(May 12, 2019).

³⁶ Bureau, Economic Times,(sep. 11, 2019)

³⁷ Economic times, (Jul.,22, 2019).

³⁸ ET Bureau, Economic Times(Jul. 30, 2019)

<https://economictimes.indiatimes.com>.

³⁹ 16th July'19.

⁴⁰ Central Public Sector Enterprises, are those companies which are the direct holding of the Central Government.



points out that its turnover declined from 49,510cr to 26,587 cr profits slipped from 7,400 cr to 913 cr. In 2017⁴¹ in one report, the state run oil firms declare 4,570 cr special dividend for the government, so that it can make good fiscal deficit targets.⁴² Another way to drown the reserves of PSU's is 'Disinvestment', the target for disinvestment for FY 20 raised to 1,05,000cr⁴³ in the past of total 26 years, over 2.8 lakh cr, ultimately burdening the masses as there will be nothing left in this country for the poor and the middle class. Likewise, the Government plans to sell Air India other firms by march 2020, with no buyers. But the question is why the 12nappropri is extracting such huge amount from PSU's, tax payers, by super rich entities, as we were told that policies like demonetisation and GST are giving fruits of 15,310.73 billion and much more.⁴⁴ By this kind of extraction the cash reserves of the companies are depleting, stopping the expansion of the companies. These kind of strategies are unfructuous for any of the company whether private or public. Companies like ONGC, are suffering from the erosion of cash reserves down to 58% to 167 cr in 1.5 years. The government is driving this country under a mountain of debt. Like LIC, is being used to fill fiscal gaps, risking the money of millions of Indians., insurance comonies are there to help and provide support to the citizens and not for the 12nappropriate advantages of the Government. We the people of India, are in this situation together, the rich or super rich has nothing to do with the hike in prices of vegetables of CNG or housing Loan interest, or lay offs.

Now our concern must be to improve the situation. The crux is that the economy is at

its worst right now. The only way to survive is to revive the manufacturing sector, by investing in the markets and also in agricultural industries, we need to export more and more, the domestic production needs to buck up, the need to create the capital cities which can attract the Foreign Direct Investments, some special laws to be made which would be really beneficial, unlike GST which is stagnating our growth, and some practical decisions, producing students more employable, with a motive of more advanced skills. All this need to be done if one is really concerned about the economy, which is on its deathbed. Reviving would be a difficult task, but watching it dying is not a good choice. It is the time to save our future, statements and promises will not change anything, it is us who will be affected, by it. So we should be the one's creating opportunities and taking steps forward to survive. As Darwin said "Survival of the fittest," we all need to be fit, in the meaning of the investment, liquidity in the market, cash reserves of the Companies, expansion of the PSU's. This all could be possible, only if we are ready to lead a good life.

⁴¹ Economic times, (mar. 24, 2019, 12:49 AM IST).

⁴² Tapan Sen, General Secretary of the Centre of Indian Trade Unions (CITU)

⁴³ Budget 2019, (Jul. 5, 2019).

⁴⁴ Business standard.



CHILD RIGHTS IN THE ENTERTAINMENT INDUSTRY

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ABSTRACT

The last few years of the twentieth century have seen the sudden boom of economic liberalisation on Indian cinema and Television. The enormous growth of the industry has attracted children to participate and use this platform to showcase their unique artistic talent. With the trend child artists participating in reality shows and on big screen has raised a number of issues. The current paper aims at discussing topic of the child labour Vis-a- Vis child artist, fundamental and other rights violated due to participation of children in audio-visual media and the various other impacts on them. The paper discusses the role of parents and the media houses, outlines the prevalent laws and also suggests certain recommendations to legal framework.

1. INTRODUCTION

The entertainment and media sector is rapidly growing in the country. The various segments such as films, television, advertising, print media and music, among others have experienced phenomenal growth and this trend is expected to continue.⁴⁵ It ranges from taking part in reality shows, serials, drama serials, advertisements to performing as anchors. With the growing number of child artists participating in reality shows and on big screen has raised a number of issues related

⁴⁵ According to a report jointly published by the Federation of Indian Chambers of Commerce and Industry (FICCI) and KPMG, the media and entertainment industry in India is likely to grow 12.5

to their rights, the ethics of using children to boost ratings, the physiological impact on children, the debate of child artist with respect to child labour, the need to frame strict rules and regulations that govern the employment to secure various rights of these children. Hence, there are numerous issues faced by the child participants in growing and varying forms of television media which needs to be fervently acknowledged and addressed taking into consideration their vulnerability because of their tender age.

2. CHILD LABOUR VIS-À-VIS CHILD ARTIST

Art 24. of Indian Constitution states that 'the 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. 'It does not prohibit the working of children in the audio-visual media.

The Child Labour (Prohibition and Regulation) Act, 1986 does not define the term "child labour". The Act does not prohibit the employment of the children in Entertainment Industry. The Part III said Act regulates the working of the children where they are not prohibited from working.

The International Labour Organization defines the term "child labour" is as "the work that deprives children of their childhood, their potential and their dignity and that is harmful to their physical and mental development."

It refers to the work that:

- Is mentally, physically, socially or morally dangerous and harmful to children
- Interferes with their schooling by:

per cent per annum over the next five years and touch US\$ 20.09 billion by 2013—quoted by Brand Equity Foundation, March 2009



- Depriving them of the opportunity to attend school;
- Obliging them to leave school prematurely; or
- Requiring them to attempt to combine school attendance with excessively long and heavy work.⁴⁶

There is excessive interference of busy work schedules in the daily life of child artist which restrains them from the opportunity to attend regular school and also make them work excessively for long hours and heavy works after school. The child actors are often exploited when it comes to the number of hours worked per day causing disturbance in their education. Hence, even though Indian Laws do not categorise child artist as child labour nor prohibit the working of child artist, according to the international definition of “child labour” given by ILO child artists are termed under the definition of child labour.

The ILO in its Article 3 (d) of ILO Convention no. 182 has also defined the work which by its nature or circumstances in which it is carried out is likely to harm the health, safety and morals of the children are said to be the worst form of child labour⁴⁷.

The participation of the children in the adult oriented industry leaves them to get exposed to various unsuitable, anxiety inducing situations. Many of these problems are inherent and generic to the industry but the children of tender age unlike their adult counterparts are exposed to handle excessive emotional and physical stress. Also, at times the children are exploited due to dangerous operational hazards, short changes in the safety provisions and conditions. The glamorous industry is very likely to induce children to compromise their morals. Hence, the excessive and

undesirable physical, mental stress and effect on moral wellbeing of the child, unpredictably suffices the conditions laid down by ILO in its definition of hazardous work.

3. VIOLATION OF FUNDAMENTAL RIGHTS OF CHILDREN

1. RIGHT TO EDUCATION

Article 21A of the Indian Constitution, 1950 provides that Right to Education is a fundamental Right and it makes education mandatory for all children in the age group between 6-14 years. The right to education to be implicit in the right to life because of its inherent fundamental importance⁴⁸The Right to Education Act provides information about when the child is “required to be at school”. Due to the long working hours the children are often deprived to get the basic regular and fundamental education as stated in the Indian Constitution. The children either due to fame, success are possible to quickly neglect their studies as they are made to believe that they can earn from that hobby and talent alone not having to concentrate on their regular studies.

Nirnay started his career with 'Sabse Bada Kalakar'. He and his family moved to Mumbai from their hometown after he was flooded with acting offers. Instead of going to school the five-year-old shoot for 9-10 hours a day and took home tuitions. His mother, Deepali, says, “*I do feel that his childhood is being spent on the sets and shooting for TV shows, but I find him very happy. He is young and not mature enough to choose acting as a career. We ensure that he gets rest at regular intervals.*” Nirnay

⁴⁶ Definition of ILO – <https://www.ilo.org/ipecc/facts/lang--en/index.htm>

⁴⁷ ILO Convention no. 182- <https://www.ilo.org/ipecc/facts/lang--en/index.htm>

⁴⁸ Indian Constitutional Law – Prof MP Jain



stays at Mira Road and travels daily to Naigaon.⁴⁹

Here in this case, the child of 5 years of age is made to compromise the regular school attendance for his TV shootings schedules. The parents may also cite high scores and certificates of academic excellence to argue that their child's education is not being compromised upon.

A popular Marathi film, *Ha Majha Marg Ekla* (1962), debuted one of the most successful child actors Sachin Pilgaonkar. In an interview with him he put forth his opinion about education taking a major backseat when a child enters the film industry, he stated that "*However best you try to talk to the film-maker, if you have to meet a deadline, you have to shoot with them. The attitude is, 'never mind, let him miss school, we'll do something about it. It is very difficult for the child to catch up with the portion he has lost out on.'*"⁵⁰

2. RIGHT TO HEALTH

The excessive working hours can take heavy toll on the health of the children. Also, managing academics with shootings could lead to unnecessary pressure on the child showing extreme repercussions on his/her health. Certain reality shows ask children to do barbaric and inhuman stunts which can source permanent disablement or even death by suicide or mishap if it goes wrong only for the purpose of garnering more views and TRP's. A child may also be unfit if they are exposed to a contagious medical complaint and not ready to perform certain physical tasks. This is violative of

⁴⁹ <https://timesofindia.indiatimes.com/tv/news/hindi/are-tvs-child-actors-being-pushed-into-the-rat-race-early-on-in-their-lives/articleshow/63867618.cms>

⁵⁰ <https://www.cry.org/blog/child-artists-position-indian-film-industry>

Right to Health provided Article 21 of the children.

i. EMOTIONAL AND PHYSIOLOGICAL IMPACT ON THE MINDS OF CHILD ARTISTS

The instance of a young girl who participated in a dance competition on a TV channel was a case in point and widely reported in the media. She was rebuked by the judges of the show during the shooting on 19 May 2009. The teenager was severely affected by the incident, and it was reported that the shock of being publicly chided led to her going into depression and having to be hospitalized.⁵¹

Mentally stable child contestants too are susceptible, especially when the pressures of competition and the public eye to prove successful. They may perhaps get demotivated at the criticism of the media and the public and public failure. Also, the attention garnered at the beginning of their career would put them under the pressure throughout their childhood. You have to be sensitive to them afterwards after they are out or lose. Also, these shows are tremendously competitive for the child participants who at a tender age have to deal with many unbearable emotions like failure, jealousy and rejection. Such extreme emotional state might prompt them to take extreme steps like suicide or running away from their home.

Children may happenstance sudden popularity or also alienation in schools

⁵¹ Guidelines to Regulate Child Participation in TV Serials, Reality Shows and Advertisements- 2010 – 2011



from their peers. Every child will not be able to cope and multitask his school education along with the regressive shooting hours. The success rate of children becoming adult actors and maintain their fame and fortune is very less.

Taking into consideration the vulnerability of children in-depth understanding of the child's emotional capacity and physiological stability is often ignored. Their development which is of the primary consideration would get stagnant at the hands of the extreme competitiveness.

ii. **RIGHT TO PRIVACY**

It cannot be denied that children do not join the entertainment industry out of their own volition. The TV reality shows to garner heavy trps renounce the children's privacy easily and expose their lives, personal details etc. Also, innocent children personally perhaps being unaware of the intensity of the invasion of privacy and the rapid pace of their childhood exposed at the hands of the TV reality shows and enormous audience are ignorant about the violation of their fundamental Right to Privacy

iii. **DIRECTIVE PRINCIPLES OF STATE POLICY**

The Constitutional provisions indicate that the constitution-makers were very anxious to protect and safeguard the interests of the children.

Art 45: The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years

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

In Unnikrishnan ⁵² the Supreme Court had implied the right to education from the right to life and personal liberty guaranteed by Art 21. As the fundamental Right and Directive Principles are complementary to each other, the contents and parameters of this right are to be deduced in the lights of Art 41, 45.

Article 39(e): The State shall, in particular, direct its policy towards securing 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.

Article 39(D): The State shall, in particular, direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity" and that the childhood and youth are protected against exploitation and against moral and material abandonment.

The State must also take care that the employment of the children in entertainment industry should not be against the directive principles of state policy at any condition.

⁵² J.P Unnikrishnan v. Andhra Pradesh AIR 1993 SC 2178



iv. **OTHER NEGATIVE IMPACTS OF WORKING OF CHILD ARTIST:**

i. **COMMERCIALIZATION OF CHILDHOOD, UNDUE PRESSURE ON CHILDREN & RAT RACE**

The initial innocent childhood days of the children are destroyed by making them work hard. The matter might worsen when a child is star struck, and starts enjoying his fame and stardom. Once the limelight is on the kids, they and their parents will further strive to be in limelight, be part of the rat race and be constantly worrisome about future. Sometimes, in fact, the shows designed specifically for children are also not child-appropriate.⁵³ Since then the innocent children get handcuffed at the concept of continuous rat race, pressure, competition in such cases, not only does the child miss out on his childhood, but also there is the danger that the child in him/her stops existing.

These child artistes are actors of tomorrow and their parents have to understand that there is no point in making them a part of the rat race so early on in their lives.

Sensitizing people about the need to prohibit child actors in reality ("scripted reality") shows, director Sujit Sircar, recently tweeted that there is an urgent need to ban child actors from reality shows. He said that "*it's actually destroying them emotionally & their purity.*"⁵⁴

⁵³ UNDERSTANDING CHILD RIGHTS, NCPCR's Handbook for Media Professionals, , 25-02-2018

⁵⁴<https://twitter.com/shoojitsircar/status/882070022629318656?lang=en>

⁵⁵<https://timesofindia.indiatimes.com/tv/news/hindi/are-tvs-child-actors-being-pushed-into-the-rat->

ii. **GREEDINESS OF PARENTS**

As stated above majorly the children do not join the show business at their own volition. The hopes of achieving stardom as shown by the parents, the children get often swayed with their parent's dream. Parents who could not pursue their Bollywood dreams horde casting directors' offices in the hoping that they can relive their dreams through their children.⁵⁵

The organic wish of the child to participate in such activities may exist or not. They might be are also forced to participate in these reality shows by their parents often neglecting the feelings of these children. The children shift from their home cities to Mumbai- Bollywood and TV base. The possibilities of such children being exploited increases as their parents are likely to be tempted by the spotlight or the possibility of augmenting the family income by pushing them into new assignments. This creates pressure on the child to prove himself. Also, if they are successful, they become a gold mine for their parents and if they be unsuccessful, it leads to depression. Certain disagreements between the members of the family will lead to the increase in the family tensions. Yesteryear actress Daisy Irani, who was Bollywood's popular child artiste in the 1950s and 1960s, stated about how her mother was determined to make her a star.⁵⁶

iii. **TURMOIL CAUSED TO THE CHILDREN AT THE COST OF INCREASING TRP**

[race-early-on-in-their-lives/articleshow/63867618.cms](https://timesofindia.indiatimes.com/tv/news/hindi/are-tvs-child-actors-being-pushed-into-the-rat-early-on-in-their-lives/articleshow/63867618.cms)

⁵⁶<https://timesofindia.indiatimes.com/tv/news/hindi/are-tvs-child-actors-being-pushed-into-the-rat-early-on-in-their-lives/articleshow/63867618.cms>



Even in popular entertainment formats like serials, reality shows, and talent shows children are used more for depicting their cuteness and vulnerabilities, to draw audiences.⁵⁷ Reality shows make participants do many things to increase their TRP's without giving any thought about the rights of the children and emotional turmoil caused to them. TV reality shows often garner attention from the public for being outrageous and arbitrary to good taste and morality. The TV programme has always courted controversies about child participants by pitting children of different age groups and backgrounds against each other for their own personal gain. In current media reality TV Shows characters/people are manipulated into a range of confrontational behaviour for the benefit of media profit.

There is deliberate attempt to create situations order to make things interesting. Thus, conflict, drama, tragedy, sleaze and humour are added as per TRP. Producers may not have screen potential contestants through psychological testing before they were casted. Nevertheless, the several incidents ultimately hamper their mental health.

iv. BAD IMPACT ON VIEWERS AND SOCIETY AT LARGE

*The Social Cognitive Theory*⁵⁸ is developed out of stimulus-response psychology. According to this theory people learn behaviour by observing others performing those behaviours and consequently imitating them. This process takes place when the media actors become the source of observational learning. Taking into

consideration this theory the conclusion can be made regarding the psychological and mental well-being of children and how they are affected physiologically by observing their co-participants and inculcating the negative influence from them. Similar consonance can also draw by the children who are watching this celebrity kids on their TVs of their home.

The parents might force their children to participate into the show business and give attempts to several production houses after seeing another child getting famous through movies, serial or any TV shows.

v. POSSIBLE BENEFITS OF CHILD ARTIST TO PARTICIPANTS, VIEWERS, AND SOCIETY ETC.

1. CHILDREN'S RIGHT OF FREEDOM OF SPEECH AND EXPRESSION

The freedom of speech and expression is a fundamental right as provided in Part III of the constitution

As stated in the case of Maneka Gandhi V Union of India⁵⁹ the right to paint, sing or dance or write poetry or literature is also covered by the term 'speech and expression'.

As provided in the case of Indraprastha People & Anr. V Union of India & others⁶⁰, reality TV is a non-fictional programme, in which the central characters, or subjects are real people which is to say that they are not professional actors and do not have any script".

⁵⁷ UNDERSTANDING CHILD RIGHTS, NCPCR's Handbook for Media Professionals,, 25-02-2018

⁵⁸<http://shodhganga.inflibnet.ac.in/bitstream/10603/124559/1/thesis.pdf>.

⁵⁹ Maneka Gandhi V Union of India AIR 1978 SC 579

⁶⁰ Indraprastha People & Anr. V Union of India & others WP (C) No.1200/2011, (Del. HC)



In the case of Life Insurance Corporation of India v. Professor Manubhai D. Shah⁶¹ the freedom of speech and expression was broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media i.e., periodicals, magazines or journals or through any other communication channel e.g. the radio and the television.

The freedom of expression thus includes the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other media of one's choice. It propagates the expression of one's ideas any visible representation such as through the media, television, cinema etc.

The Fundamental Right of Speech and Expression which are inherent in every human being include children. The acting of children thus also helps the children in propagating their talent through such TV shows or films are able to express themselves through the medium of such shows. This helps the children in gaining a sense of fulfilment.

2. ECONOMIC GROWTH

The Indian Media & Entertainment (M&E) sector has seen a 13% growth in the last year to reach Rs 1.5 trillion⁶². The report mentions that the media and entertainment (M&E) sector thus continues to grow at faster rate than the GDP growth rate, reflecting the growing disposable income led by stable economic growth and changing demographics. The participation of children will help to generate more

revenue. This will in turn act as a huge boost to the Indian economy.

3. PLATFORM FOR SHOWCASING TALENT

The media houses by giving the chance to the children through serials, reality shows are a ray of hope for the ordinary people. It acts as a medium for the children to not only pursue their hobby/passion but it also helps in the overall growth and development of the child actor/participant. They give equal opportunity to the children from the different strata of the society. They also serve many other purposes like give platform to the common people to showcase their talent to a larger audience and not only give them the courage to dream but also the guidance to turn their dreams into reality. Such shows provide them with lifetime opportunity. They help in developing a healthy competitive spirit amongst the participants since their childhood.

Many celebrities like Amir Khan, Sachin Pilgaonkar, Shri Devi, Neetu Singh, Kamal Hassan started their career as child actors.

4. ACKNOWLEDGEMENT OF ACHIEVEMENT/TALENT-

The television becomes a platform to the ordinary children to present their skills and talents. Viewers come to know about them and appreciate their performance, which consequently help them in receiving praise and applaud from the masses. Participants get encouraged and self-satisfied by contributing to the entertainment community. The children by given them the opportunities are able to get their talent acknowledged which in turn provides them with a sense of self-fulfilment.

⁶¹Life Insurance Corporation of India v. Professor Manubhai D. Shah(1992) 3 SCR 595

⁶² *Re-imagining India's M&E sector* | FICCI-EY report 2018



5. START OF THE SUCCESSFUL CAREER:

The TV shows, films, reality shows have given many celebrities the chance to become big stars because of their own talent. Unlike the past they are given a huge platform to reach at the zenith of their careers. For example, Sunidhi Chauhan won the singing reality show “Meri Awaz Suno” and today is a successful singer in Indian film Industry. In today’s competitive world the child participants are able secure their career.

6. AWARDS AND PRIZES-

The money earned through the reality shows which give prize money help the participants in their future endeavours and to secure their future. This is beneficial to the children especially from a weak economic background. The achievements titles and recognition also further boost confidence in the child actors, give them more opportunities’ and establish their roots in the industry

7. SOCIAL ISSUES

One of the most positive effects of the reality TV shows is that they address numerous social issues. They introduce and develop a sense of respect, awareness regarding the ills plaguing in the society. With active inclusion of children on the TV forums the reality shows have made people more aware of what is happening in their vicinity.

vi. LAW RELATING TO THE WORKING OF CHILD ARTISTS THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986.

The Section 3 of the principal Child labour (prohibition and regulation) Act of 1986

prohibited the employment of any children set forth in Part A of the Schedule or in any workshop wherein any of the processes in Part B of the Schedule were carried out. The Schedule did not include employment in the audio-media entertainment industry.

The Part III of the Principal Act regulated the employment of the children where they were not prohibited to work under Sec 3. Hence the employment of the children in the entertainment industry was regulated under Part III

• THE CHILD LABOUR (PROHIBITION AND REGULATION) AMENDMENT ACT, 2016.

The Child Labour (Prohibition and Regulation) Amendment Act, 2016 substituted Section 3 of the Principal Act with new Section 3.

Section 3(2) (b) of the The Child Labour (Prohibition and Regulation) Amendment Act, 2016 states as: Nothing in sub-section (1) shall apply where the child works as an artist in an audio-visual entertainment industry, including advertisement, films, television serials or any such other entertainment or sports activities except the circus, subject to such conditions and safety measures, as may be prescribed:

The Amendment Act, 2016 defined “artist” means a child who performs or practices any work as a hobby or profession directly involving him as an actor, singer, sports person or in such other activity as may be prescribed relating to the entertainment or sports activities falling under clause (b) of sub-section (2) of Section 3. It further stated as ‘Provided that no such work under this clause shall effect the school education of the child.’



Here, the expression “such other activity”⁶³ is defined as:

- (i) Any activity where the child himself is participating in a sports competition or event or training for such sports competition or event;
- (ii) Cinema and documentary shows on television including reality shows, quiz shows, talent shows; radio and any programme in or any other media;
- (iii) Drama serials;
- (iv) Participation as anchor of a show or events; and
- (v) Any other artistic performances which the Central Government permits in individual cases, which shall not include street performance for monetary gain.

• **ESTABLISHMENT OF CHILD AND ADOLESCENT LABOUR REHABILITATION FUND**

The Child Labour (Prohibition and Regulation) Amendment Act, 2016 established a ‘Child and Adolescent Labour Rehabilitation Fund’. It regulates it as follows-

Section 14B (1): The appropriate Government shall constitute a Fund in every district or for two or more districts to be called the Child and Adolescent Labour Rehabilitation Fund to which the amount of the fine realized from the employer of the child and adolescent, within the jurisdiction of such district or districts, shall be credited.

(2) The appropriate Government shall credit an amount of fifteen thousand rupees to the Fund for each child or adolescent for whom the fine amount has been credited under sub-section (1).

(3) The amount credited to the Fund under sub-sections (1) and (2) shall be deposited

in such banks or invested in such manner, as the appropriate Government may decide.

(4) The amount deposited or invested, as the case may be under sub-section (3), and the interest accrued on it, shall be paid to the child or adolescent in whose favour such amount is credited, in such manner as may be prescribed.

Hence, the money earned by any child artist is to be regulated as above.

• **CHILD LABOUR (PROHIBITION AND REGULATION) AMENDMENT RULES, 2017**

The Child Labour (Prohibition and Regulation) Amendment Rules, 2017 states as follows:

Rule 20 Child to work as an artist:

(1) Subject to the provisions of section 3, a child may be allowed to work as an artist subject to the following conditions, namely:

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- (a) NFO child shall be allowed to work for more than five hours in a day, and for not more than three hours without rest;
- (b) any producer of any audio –visual media production or any commercial event involving the participation of a child, shall involve a child in participation only after obtaining the permission from the District Magistrate of the district where the activity is to be performed, and shall furnish to the District Magistrate before starting the activity an undertaking in Form C and the list of child participants, consent of parents or guardian, as the case may be, name of the individual from the production or event who shall be responsible for the safety and security of the child, and ensure that all screening of his films and television programmes shall be made with a disclaimer specifying that if any child has been engaged in the shooting, then, all the

⁶³ Child Labour (Prohibition and Regulation) Amendment Rules, 2017



measures were taken to ensure that there has been no abuse, neglect or exploitation of such child during the entire process of the shooting;

(c) the undertaking referred to in clause (b) shall be valid for six months and shall clearly state the provisions for education, safety, security and reporting of child abuse in consonance with the guidelines and protection policies issued by the Central Government from time to time for such purpose including –

(i) Ensuring facilities for physical and mental health of the child;

(ii) Timely nutritional diet of the child;

(iii) Safe, clean shelter with sufficient provisions for daily necessities; and

(iv) Compliance to all laws applicable for the time being in force for the protection of children, including their right to education, care and protection, and against sexual offences;

(d) appropriate facilities for education of the child to be arranged so as to ensure that there is no discontinuity from his lessons in school and no child shall be allowed to work consecutively for more than twenty-seven days;

(e) one responsible person be appointed for maximum of five children for the production or event, so as to ensure the protection, care and best interest of the child;

(f) at least twenty per cent, of the income earned by the child from the production or event to be directly deposited in a fixed deposit account in a nationalised bank in the name of the child which may be credited to the child on attaining majority; and

(g) no child shall be made to participate in any audio visual and sports activity including informal entertainment activity against his will and consent.

The Child Labour (Prohibition and Regulation) Amendment Rules, 2017

introduced the following rules to regulate the money earned by Child Artist as follows through Child and Adolescent Labour Rehabilitation Fund as follows-

Rule 16A- Payment of amount to child or adolescent from and out of Child and Adolescent Labour Rehabilitation Fund:

(1) The amount credited, deposited or invested, as the case may be, under sub-section (3) of section 14B to the Child and Adolescent Labour Rehabilitation Fund and the interest accrued on it, shall be paid to the child or adolescent in whose favour such amount is credited in the following manner, namely: -

(i) the Inspector or the nodal officer having jurisdiction shall, under his supervision, ensure that an account of such child or adolescent is opened in a nationalised bank and inform the bank in which the amount of the Fund is deposited or, as the case may be, to the officer responsible to invest the amount of the Fund under sub-section (3) of section 14B;

(ii) the interest accrued on the proportionate amount of the Fund in favour of the child or adolescent shall be transferred every six months to the account of the child or adolescent, as the case may be, by the bank or officer responsible to invest the amount under information to the Inspector;

(iii) when the concerned child or adolescent completes the age of eighteen years, then, as soon as may be possible forthwith or within a period of three months, the total amount credited, deposited or invested in favour of the child along with interest accrued thereon remaining in the bank or remaining so invested under sub-section (3) of section 14B, shall be transferred to the said bank account of child or adolescent, as the case may be; and

(iv) the Inspector shall prepare a report of the amount transferred under clause (ii) and



clause (iii) with particulars of the concerned child or adolescent sufficient to identify him and send a copy of the report annually to the Central Government for information.

- 7) Setting up of Regulatory and Monitoring Mechanisms
- 8) Payment for Children
- 9) Anonymity/Confidentiality of Children

- (2) Any amount recovered by way of fine or for composition of offences in pursuance of any order or judgement of a Court in favour of a child or adolescent for the contravention of the provisions of the Act, shall also be deposited in the Fund and shall be spent in accordance with such order or judgement.

ROLE OF GUARDIAN

The parents being the inherent caretaker of the children are endowed with the responsibility to not only take care of their children but give them adequate opportunities of development. It is 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 under 51A(k) of The Fundamental Duties. The glamour industry however sways the parents and causes impediment for the parents to obey their duty.

As a cultural practice the children are always told to obey elders without questioning. Also, the Child artists are often bound to the production houses once the contract is signed/agreed by the parents of the children. The ignorant children are indebted to the management of the production houses and are unable to break away from the contract even if they are discontented with their lives in the media industry. In such cases the feelings of the tender-aged children are often neglected which often results in hurt feelings and damage to the child's personality. Many poor parents are lured into by the production houses by promising high salaries, luxurious lives for them and their children, etc.

The acts of parents thus have major role to play with the participation of children in such shows. The Parents before engaging in nasty contracts should have the in-depth understanding of the concept of the shows and should have honest communications

vii. GUIDELINES ISSUED BY NCPCR (2010-11)

A Working Group was set up under the National Commission for the Protection of Child Rights in January 2008 for the purpose of safeguarding the rights of children participating in Television serials, Advertisements, Reality Shows etc. The Committee under the Chair of Smt. Sandhya Bajaj (Member, NCPCR) including representatives of the Government, broadcasting channels, producers, child psychologists and non-government organizations came up with the information regarding child rights in audio-visual media called as 'Guidelines to Regulate Child Participation in TV Serials, Reality Shows and Advertisements- 2010 – 2011'

The committee concluded that the priority issues that are as under:

- 1) Child protection policy
- 2) Content of Programmes Involving Children
- 3) Defining Age-related Norms for the Participation of Children in TV/Reality Shows
- 4) Child Protection and Supervision
- 5) Convention concerning Minimum Age for Admission to Employment Ensuring the Physical Conditions and Safety of Children
- 6) Terms and Conditions for Parental/Guardian Consent



with the children to avoid repercussions on the minds of children.

ix. LIABILITY OF THE PRODUCTION HOUSE/ MEDIA HOUSES

Along with the need to establish the liability of the parents, it is also the liability of the production houses for the wellbeing of the child artist in need. It is significant that the child artists are not mistreated as commodities to garner higher ratings and should not involve stringent norms regarding the participation of children. The Cine and TV Artistes' Association (CINTAA) the association of media professionals from Television and private channels having association of over 9,000 members have laid down certain the aims and objectives and rules concerning Child artiste.⁶⁴

x. LIMITATIONS OF LEGISLATION AND CURRENT POLICY

The current act does not address the following issues:

- 1) It fails to take into consideration compensation for the psychological damage done to a child due to the deprivation of her basic rights, loss of dignity and freedom arising at any situation.
- 2) Currently, there is no provision for the authority to check nor has a mechanism been devised to ensure that these permitted activities are not hindering the education of children.
- 3) The amendment does not provide for any steps/measures to sensitize the media houses, parents and society to ensure accountability in case there are violations. Nor there is any provision to educate children about their rights who are engaged in the industry.

PROPOSED SOLUTIONS-RECOMMENDATION TO THE LEGAL FRAMEWORK

1. The feelings of the children should be given utmost importance. They should not be forcibly made to enter into avocations against their own will.
2. The government should ask legislature to enforce strict rules for the advantage of the child artistes, but a complete blanket ban on the child artiste in audio-visual media will not serve any purpose. Such a move will also take away extensive and intensive platform for gifted children. However, for the mental and physiological vulnerability of tender aged children, there is a need for special safeguards of them, appropriate legal protection of children is unarguable when they participate in the entertainment industry.
3. There should be employment of the committee to look after their well-being, education and working hours of the children on the sets of the visual industries.
4. The media houses should strike balance between the desires of the viewers, the producers and the children.
5. The broadcasters as their moral duty should take care to ensure the physical and emotional comfort of the children, and maintain the dignity of the children, all in a manner that is suitable under the specific circumstances
6. The current prevailing social norm justifying the working of children under the guise of 'passion or extra-curricular activity is required to change.
7. The counselling of parents, children and employers should be carried out. The parents and media houses should be sensitized and children should be given adequate and enough knowledge about their rights.

⁶⁴ <http://cintaa.net/constitution/>



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8. To raise public interest and far-reaching awareness on this issue, there is a need for an extensive and intensive awareness generation campaigns to be launched over a period of time across various media houses.

xii. **CONCLUSION**

The working of Children in the media industry can be found as a new form of child labour and which continues to grow. The parents must realize the repercussions of the participation of the children is such shows which afflict their physical, mental and moral well-being and thus making them vulnerable in the hands of the competition, commercial activities and the production houses. Their fundamental rights i.e. right to education should not be subjugated at any conditions. They must be in schools so that they can inculcate confidence to take healthy decisions, live in the world as enlightened citizens, explore, discover, question and most importantly acquire knowledge. The children should not be burdened with excessive work and deprived of their normal childhood. The legislature is making continuous efforts to address the issue of child artists being exploited. The question that arises is how promptly and seriously the provisions will be implemented and also what actions will be taken against the exploiters and defaulters.



WIDENING THE PERSPECTIVES OF PATENT LAW IN ARTIFICIAL INTELLIGENCE

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ABSTRACT

Artificial Intelligence (AI) which was once considered fictional has now advanced enough to take over human tasks creating a technological impact on humanity. AI is the cause of sweeping changes in virtually every industry; be it agriculture, healthcare, manufacturing or beyond.

According to WIPO, more than half of all identified AI patents were published in the last five years. The initial purpose of AI was intended to rescue humans from the burden of monotony, extend cost and time effectiveness and provide assistance with enhanced efficiency and output. As it soared to greater heights, the era has almost come where AI is mastering mankind. And it forms the responsibility of the creator of AI, the humans, to ensure protection of AI with regulated patent laws. But as we stand at the crossroads, unable to discriminate between invention and inventor, who gets the patent- the owner, inventor, programmer or the AI itself? And once it is surpassed, will the fundamentals be monopolised by the inventor deterring beginners to flourish.

INTRODUCTION

Natural intelligence displayed by humans is the vital factor in controlling the lives of human beings through inventions and discoveries. However, over the years, we realised the monotony of natural intelligence in repetitive tasks. The purpose

to reduce the burden of mankind and develop a cost effective assistance, has led us to think of an era of machine intelligence better known as Artificial Intelligence (AI). As we embark on our journey towards an 'age of implementation' of Artificial Intelligence, with machines becoming exponentially capable, applications which would revolutionize the ways in which we perform our daily tasks are within the reach of researchers.

Despite the aforesaid pros, AI raises challenges in the human minds. The complex technology which necessitates involvement of expensive machines, restrictions in replicating humans, little improvement with experience, no creativity of its own and potentially affecting different areas of human activity are matters of concern. It also raises questions on privacy, trust and autonomy that may be difficult to deal with. Probably this may be pointing to Narrow Artificial Intelligence with softwares that use technologies like machine learning, data mining and pattern recognitions which makes autonomous decisions.

Contrary to this, is strong artificial intelligence known as 'Artificial General Intelligence' or 'Super-Intelligence' which enables AI systems to successfully perform any intellectual task that could be undertaken by the human brain or the hypothetical ability of a machine to surpass the human brain. Such concepts are not something that the current technology permits but the way to it is not too long.

THE EFFECTS OF ARTIFICIAL INTELLIGENCE WAVE



The impact of AI technologies on humans is likely to be profound. Martin Ford⁶⁵ thinks that with this, many workers need to equip themselves as skilled in different areas while employers and governments will have to find ways to address loss of employment. He predicts that in the next 10 to 20 years, routine and predictable jobs are most vulnerable to automation.

This unveils the truth that AI will change the world, but with frequently asked questions being how and when. Though the term was coined in the 1950s, its power and application geared up only in the last decade. Now the AI algorithms perceive and interpret the world around us. The roots of this change in the last few years emanate from deep learning, an architecture inspired by human brain with neurons and connections. The input involves deep networks to pick up large scale data or observations and recognise incredibly subtle patterns which diverge to outputs with precise decision, be it business, health or legal matters.

While the AI is aimed to do something beneficial, it might develop destructive methods also to achieve the goal. As it progresses in leaps and bounds to surpass vivid waves and reach the destination of super intelligence and beyond, AI might become super human too. It is too early to predict on those lines but it cannot be ruled out.

However, with such a development and advancement in AI technology, the protection and regulated use of inventions are highly important.

ARTIFICIAL INTELLIGENCE UNDER PATENT LAW

Patents are a form of intellectual property rights. Patents are territorial in nature and provide protection in the jurisdiction where an application has been filed and a patent is granted. Patents are generally granted by National Patent Offices – or through regional systems, such as the European Patent Convention (EPC) administered by the European Patent Office (EPO). In many jurisdictions, the Patent Office scrutinises each application to see whether it meets the required criteria:

- (a) the invention falls under a patentable subject matter in the concerned jurisdiction;⁶⁶
- (b) is novel⁶⁷, and should involve an inventive step/ should be non-obvious;
- (c) has a potential industrial application;
- (d) is sufficiently disclosed.

The period for publication of patents is normally 18 months after filing. If the Patent Office decides that the application meets all the patentability criteria, the patent is granted. The term of protection is generally 20 years from the filing date in most jurisdictions.

Once a patent is granted, the claimed invention cannot be used, sold, offered for sale, or imported for the intended purposes, without the consent of the patent holder. The inventor has the right to a patent, which can be assigned to another natural or legal person.

Data sources for analysing AI trends are collected from accessible databases in

⁶⁵ Author of “The Rise of the Robots”

⁶⁶ Discoveries, scientific theories, mathematical methods and computer programs per se are in

general not patentable, whereas software is patentable in some jurisdictions.

⁶⁷ New, not be part of the state of the art



patents. The areas of innovation that inventors focus in AI technologies are revealed through patent applications and are available for public with all useful information, such as the name of the applicant, date of patent application etc. They also include a vast technical description of the invention, including previous technical solutions known as 'state of the art'. Also, AI technologies described in patent applications are disclosed in scientific publications, shared through open source projects or collaboration platforms, or developed in-house and protected by trade secrets. Once published, the information in a patent is available for anyone to read, and analyze for research or academic purposes. Upon expiry of the patent, it becomes part of the public domain.

The above guidelines throw some challenges in deploying AI systems which includes the following:

- (a) Data collection sources, archiving and data availability
- (b) Ensuring protection and privacy of innovations
- (c) Digitisation of processes disclosed ensuring safety
- (d) Deployment of automated vehicles like robots with adequate protection to employment and ensuring safety.

Thus the legal implications of AI patent laws are ambiguous at present and the patent regime is quiet on the matter.

INVENTION AND INVENTOR- MULTIFACETED INTERPRETATIONS

The three relevant sections of the Indian Patent Act, 1970 are being referred to, for analysis.

Section 6 states that "*an application for a patent for any invention can be made only by the true and first 'inventor' of the invention or an assignee.*"

Further, a 'patentee', according to **Section 2(1)(p)**, is a "*person as entered on the patent office register as the grantee or owner of the patent.*" This suggests that an 'inventor' and 'person' must mean a natural person. However, Section 2(1)(s) defines 'person' to "*include the government, a non-natural entity*". Moreover, 'true and first inventor' has an exclusionary definition and there is no mention of a natural person (Section 2(1)(y)).

Section 3 reiterates the list of exclusions as "*mathematical or business method or a computer programme per se or algorithms.*"⁶⁸ Prima facie, this indicates that patents should **not** be awarded to AI based inventions which fall under Computer Related Inventions (CRI), although they are potentially stronger than general software.

The primary requirement for inventorship is "*making a significant contribution to the invention.*"⁶⁹ The initiation of an AI invention involves a person to input seed information⁷⁰, including existing

⁶⁸ specifically Section 3(k) of the Patents Act, 1970

⁶⁹ Netscape Commc'ns Corp. v. ValueClick, Inc., 684 F. Supp. 2d 699, 721 (E.D. Va. 2010), on reconsideration in part, 704 F. Supp. 2d 544 (E.D.

Va. 2010) (citing Pannu v. Iolab Corp., 155 F.3d 1344, 1351 (Fed. Cir. 1998)).

⁷⁰ "Computers require some amount of human input to generate creative output."



technologies (e.g. for neural networks⁷¹), or relevant parameters to be optimized (e.g. for genetic algorithms). Also, the fact that a person finances, owns, or operates AI is not sufficient to qualify him or her as an inventor.⁷² As made clear in the case of *TS Holdings*, financing or initiating the process of invention (e.g. by setting inventors to task) does not satisfy the standard to be named on a patent. Under such circumstances, the person is responsible for the invention, but he has not actually invented a new technology.

A broader search concluded that there are significant differences when it comes to the definitions for ‘inventions’ and ‘inventors’ across the globe, especially in countries like U.S. and the uncertainty in AI patent law is presently global. This may not cause much ambiguity as to who would be considered as the inventor at an early stage which involves human intervention. But when the transition is made from weak to strong AI, the question that needs to be addressed is whether AI technology will be considered an ‘inventor’, when it is a technology and not a human, who creates inventions that are patentable?

So the main issues that stand out on a patent perspective for AI are on its invention, inventor, liability due to ownership and subsequent use of the fundamental technology. The time has come for the authorities to consider how the CRIs pertaining to next generation of AI should be covered under the Patent regime.

A detailed understanding of the above regulations vis-a-vis implementation on

factual inventions indicate that we need distinct and well-marked patent laws for Artificial Intelligence with differentiation before standardisation.

CASE STUDIES

1) DABUS

Stephen Thaler, a pioneering AI researcher based in Missouri has come out with a creation, a Device for Autonomous Bootstrapping of Unified Sentience, (DABUS). Mr Thaler⁷³ taught DABUS to produce ever more complex items using words and images.

DABUS is a type of creativity machine which generates ideas without human intervention. It seeks to develop new ideas using complex interconnected neural networks by varying the connections between networks. In order to predict the consequences of the invention, equally complex neural networks run in the background.

The output generated by the AI forms the basis for two patent applications. The first is for a new type of container based on fractal geometry. The other relates to a flashing light device that can be used to attract attention during search and rescue incidents.

The two AI-designed patent applications were filed by a team headed by Professor Ryan Abbot, Professor of Law and Health Sciences at the University of Surrey. He said that the AI does fulfil the criteria that form the basics of inventorship in these two patents, had it been a natural person. Both

⁷¹ Artificial Neural Networks, a form of AI, mimic brain activity to accelerate technological development

⁷² See *TS Holdings, Inc. v. Schwab*, No. 09-CV-13632, 2011 WL 13205959, at *4 (E.D. Mich. Dec.

16, 2011) (“There is no legal basis for the assertion that financing such reduction to practice equates to invention itself.”).

⁷³ According to the [Financial Times](#)



the UKIPO⁷⁴ and the EPO accept that the inventions made by DABUS are eligible to receive a patent. This means, the light device and the container are considered to be industrially applicable and brand-new inventions.

If so, what is the concern in patenting DABUS?

The scientists believe that Dabus AI deserves legal credit as the inventor of the container that it designed, as well as a lamp that it built to flicker in a pattern that mirrors brain activity. And the legal rights over the creation should go to whoever actually built the algorithm.

A fair distribution of approbation could be as under:

- (a) the AI to be credited on the patent as the inventor,
- (b) the owner of the AI is given ownership of the patent.

Experts think that this is unlikely as the person behind Dabus AI has no legal claim to a patent on the algorithm's inventions.

Stephen Thaler, has filed for patents in the U.K., Europe, and the U.S. arguing that the algorithm deserves proper attribution for designing new products⁷⁵.

The two patents in question will be examined following their formal publication in April and May 2020⁷⁶. Applications for these two machine-created inventions are pending at the UKIPO, as

well as at the EPO and the United States Patent and Trade Mark Office (USPTO).

2) DROPOUT

'Dropout'⁷⁷ is a solution widely used to regularize deep neural network, a powerful machine learning system with larger number of parameters. This is a method popular among data scientists and machine learning engineers for performing model averaging. 'Over-fitting' is a process that occurs in neural networks wherein the model learns the training data too well. As a generalised learning is not achieved, it picks up small details and noise. This results in inaccurate results with new data, due to the fact that the model has 'over-fitted' to the learning dataset and is not able to extend it to more applications.

Dropout works by randomly selecting and removing neurons in a neural network during the training phase. This reduces 'over-fitting' and allows a computationally cheap, yet effective method of regularization.

Google has activated its patent for the application, who acquired the patent rights to the technology in 2016. This activation of patent by Google is a matter of concern for start-ups as well as major organizations because Google now holds the power to enforce the patent on any future competitor. Patenting of fundamental technologies is a bit worrisome at this exact moment. The enforcement of this IP seems to be reserved for future.

CONCLUSION

It is clear by now that AI has advanced towards being a tool used by humans to

⁷⁴ Intellectual Property Office of the United Kingdom

⁷⁵ According to *BBC News*

⁷⁶ Wall Street Journal, 2019, dated 06th October

⁷⁷ Dropout is a solution proposed to this problem by Geoffrey Hinton, Nitish Srivastava and few other students at the University of Toronto in 2012. Geoffrey Hinton is currently an employee at Google.



automate innovation, which has the potential to alter human progress with far-reaching technology.

The above case studies indicate blatant illustrations of the impromptu of international legal systems to accommodate emerging technologies.

In the case of DABUS patent:

Currently, the UK Patents Act of 1977 and the European Patent Convention both say that inventors can only be ‘natural persons’. In the US, the law says inventions must be made by an ‘individual’. There are no comprehensible laws in any countries of the world to specify how cases involving AI inventions should be dealt with.

The patent system should support inventions and innovations **bypassing obstacles**. If we cling on to the outdated IP laws quoting redundant definitions towards leaping innovations, the lack of incentive for inventors would deter the way of remarkable advancement. Unless the **innovations are accredited properly** irrespective of the source of the complexities in the inventorship, as it is now looked upon as by offices, development and progress of humanity will be at stake and the whole intellectual property regime will cease to be of use.

In the case of Dropout,

What does the activation of patent by Google mean for creators of neural networks? What will happen if Google enforces this patent?

Patents on fundamental machine learning techniques are likely to deter development and withhold AI advancement. The extant guidelines granting patent monopoly for a

company for a blanket 20 years does not appear sensible when it is on using well known techniques in a particular domain, even if they were the pioneers in introducing the technique. If granted so, it is limiting further technological advances of other companies who might intend to use that tool in other arenas. Such patents given to machine language techniques used in a particular field might trigger a competition among companies to patent their routine works also. This will restrain and localise inventions thus retarding the growth and usage of technological applications across fields. Start-ups which are likely to use the languages as a first step towards a larger technology may get discouraged and nipped

in the bud. As of now, usage rights and other AI and machine learning properties are not in the bounds of litigation. Still the move to patent fundamental algorithms in neural networks by leading companies is definitely a matter of concern for those who fear that companies claiming control over the technology might one day lead to monopolisation. We hope to trust Google that they will not sue anyone with the patent and hope that it is a mere check against patent trolls.

Global IP laws on AI must catch up with the rapidly changing pace of technological advancement keeping in mind:

- (a) the clear distinction between inventor and invention
- (b) the recognition of creations and inventions by AI without overlooking the involvement of a human agency or manufacturer, to fix the liability at any stage
- (c) the appropriate period of monopoly granted to any patent without restricting the use of abstracts or fundamentals for impending inventions



(d) a necessary AI Data Protection Act, foreseeing the fast approaching era where machines overtake humans.

The evolution of a well crafted patent law for AI will help in flourishing inventions towards advancement.

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MOVING AWAY FROM TRADITIONAL HOMOGENOUS FAMILIES: A CASE FOR SAME-SEX MARRIAGES IN INDIA

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ABSTRACT

In a country like India wherein equality serves as the base on which our Constitution is built on, the law has long discriminated homosexuality and until recently sodomy was considered as a penal offence. The celebrated judgment passed by the Supreme Court on 6th September 2018 came as a relief to the LGBTQI+ community but although homosexuality was decriminalized, the law still remains silent on same-sex marriages in India. The Indian societal structure where homosexuality itself is a taboo, same-sex marriage is unthinkable and the society has a huge aversion to it. The so-called liberal Indian society defies the fact that marriage can be a union between two consenting adults without taking into consideration the gender of the individual. The basic definition of marriage itself restricts the union to opposite-sex partners. However, with the shift in the legal scenario, the acceptance of homosexuality as a sexual orientation and not a disease has occurred but the legal recognition to the institution of homosexual marriage is yet not taken up. Different nations worldwide legalise same-sex marriages and both same-sex couples and heterosexual couples are treated equally in the eyes of law, however, the Indian laws have remained silent on this subject. Through this paper, the researchers will conduct a comparative study regarding the position of India and other nations with respect to same-sex marriage. With the increase in acceptance of live-in

relationships in the society and the legal recognition it gets, the paper will look into the scope of substituting same-sex marriage with live-in relationships or civil unions which is used as an alternative in different nations. The scope of amendments in the personal laws of the country will as well be discussed in this paper.

Keywords: homosexuality, aversion, legal recognition, marriage, civil-unions, live-in relationships, substitute, comparative study.

CHAPTER-I **OVERVIEW**

1.1 INTRODUCTION

In the Indian society, marriage has a very restricted construction. It is defined as a union between two individuals of opposite sexes. This leaves a lacuna wherein same-sex relationships has no place in the societal definition of marriage. Not only the society but also the legal system in India fails to identify any such thing as same-sex marriage, there exists no provision in the law that recognises the union of same-sex couples and neither any right nor any remedy is provided if such a union collapses. In Hindu law marriage is treated as a sacrament between individuals of opposite sexes, section 5 of the act which provides for the essentials for a Hindu Marriage fails to bring into its purview the institution of same-sex relationships. Although there is no explicit mention of two definite sexes in the section, the act when read as a whole very clearly brings out the essence of section 5 leaving no room for further interpretation. As the law does not recognise marriage itself, there exists no potential safe-guard for divorce and forecasts huge discrimination between heterosexual and homosexual couples. Different nations across the world recognise same-sex marriage or at least



gives rights to the same-sex couple to have a civil-union and provides certain legal safeguard to such union. However, India neither legally nor socially accepts same-sex marriage. The decriminalisation of homosexuality has resulted in a lot of people coming out and a dire need for legal acceptance of same-sex relationships has come to surface. The legislation of laws that not only allows homosexual couple to stay in live-in relationship but also allows them to marry or have civil unions has arisen.

1.2 RATIONALE

Sodomy has been criminalised in India for a long time but recently by a celebrated judgment of the Supreme Court it was decriminalised. This although served as a start for India to undo its past mistakes, this same-sex relationship is still not legally recognised i.e. it is not a crime under the Indian Penal Law to have consensual sexual intercourse with same-sex individual, this relationship has no legal recognition, neither any provision regarding the safeguards of aggrieved party is provided because same-sex relationship does not find a place in Hindu Marriage Act for a result of which there is no provision for divorce. This paper will deal with legal recognition of same-sex marriage and divorce and other alternatives to this union.

1.3 PRESENT LEGAL SCENARIO

The decriminalisation of homosexuality creates a dire need for giving same-sex couples legal recognition of their relationship and the safeguard for the collapse of such union. Countries like USA, UK as well as third world countries like

South Africa has recognised same-sex marriage as well as divorce but India remains far behind. Therefore a dire need has arisen to re-consider the definition of marriage and bring same-sex marriage within the ambit of section 5 of Hindu Marriage Act 1955 and also allow the option for divorce under section 13 of the act.

1.4 LITERATURE REVIEW

Many sociologists classically define marriage as a union between a man and a woman, George Andrew Lundberg defines marriage as “rules and regulations that define the rights, duties and privileges of husband and wife with respect to each other.”⁷⁸ Westermack opines that marriage is “the more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring.”⁷⁹ However, the concept of marriage has evolved over time and in some countries across the world marriage now includes a union of two individuals irrespective of sex. In the Indian context, however, the traditional definition of marriage is still observed. According to Hindu Law, marriage is considered to be a sacrament or ‘samaskara’ and is considered to be the last of the 10 sacraments that are enjoyed by the Hindus⁸⁰. Although the Hindu Marriage Act, 1955 does not explicitly mention marriage to be a union between a male and a female, section 5⁸¹ of the act that deals with the essentials for marriage implicitly indicates that union between opposite sexes only constitutes a valid marriage. Section 5(iii) reads that “the bridegroom has completed the age

⁷⁸ George A. Lundberg and others, *Sociology* (3rd edn, Harper and Row publishers).

⁷⁹ C.N. Shankar Rao, *Sociology, Principles of Sociology with an*

Introduction to Social Thought p.327 (6th ed. 2007).

⁸⁰ Sir Dinshaw Fardunji Mulla, *Hindu Law* 812 (22nd edn, Lexis Nexis, 2016).

⁸¹ The Hind Marriage Act 1955, s.5.



of⁴ [twenty-one years] and the bride, the age of⁵ [eighteen years] at the time of the marriage”. This section, however, nowhere provides the definition of bride and bridegroom but as every act should be interpreted as a whole and not by a part of it, section 13 (2) (iv) provides “that **her** marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.” Thus, the gender of the bride can be clearly understood leaving no space for interpretation.⁸² Homosexuality has long since been a crime in India until recently when it was declared legal⁸³ by the supreme judicial authority in India. Although this shows a huge shift in the legal scenario of the country, it is still a taboo in society. In such a social context the Supreme Court has also preferred to remain silent in the case of same-sex marriage. The judgment delivered on 6th of September, 2018 has nowhere discussed the concept of same-sex marriage. In a poll conducted in India in January 2019 on whether same-sex marriage should be allowed in India, 62% opined that same-sex marriage should not be allowed.⁸⁴

Many countries across the world allow same-sex marriage and various other

alternatives like civil-unions, registered-partnerships, etc. India has failed to recognise any such thing. According to Austin O’Malley “The three most important events of human life are equally devoid of reason: birth, marriage and death.”⁸⁵ Right to marry is a fundamental right under the Constitution of India, Article 21 although does not explicitly mention right to marry, the Supreme Court in a case⁸⁶ stated that “This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes.” However, the Hindu Marriage Act, 1955 does not recognise this right with regard to the LGBTQI+ community and there is no such provision in the law that protects or allows same-sex marriage.

In the USA, *Baehr v Lewin*(1993)⁸⁷, the court first recognised gay rights. In *Lawrence v Texas* (2003)⁸⁸ the US Supreme Court struck down the law that criminalised sodomy. Following which in the case of *Goodridge v Department of Public Health* (2003)⁸⁹ in Massachusetts and in the case of *Halpern*⁹⁰ the court ruled in the favour of same-sex marriage. Some countries in the USA recognises same-sex marriages and civil unions while others don’t, this creates a problem in cases of divorce. In the case of *Boddie v. Connecticut*⁹¹, i.e. an opposite-sex divorce

⁸² Rohit chabra, ‘Legality of Same Sex Marriages Under The Hindu Marriage Act, 1955’ (2017) JURIP 1 < <http://jurip.org/wp-content/uploads/2017/05/Ronak-Chhabria.pdf>> accessed on 15 September 2019.

⁸³ Navtej Singh Johar v Union of India, WP (Crl.) No 76/2016, order dated 12-07-2018.

⁸⁴ Nishtha Gupta, ‘Where is the love: 62 per cent Indians say same-sex marriages not accepted, finds Mood of the Nation poll’ India Today (New Delhi, 31st January 2019) < <https://www.indiatoday.in/magazine/web-exclusive/story/20190204-motn-same-sex->

marriage-lgbt-rights-section-377-india-1439545-2019-01-25> accessed on 15 September 2019.

⁸⁵ Anisa Shaikh, ‘Right to Marry under Right to Life: Panoramic View’ (2012) SSRN <<http://dx.doi.org/10.2139/ssrn.2713789>> accessed on 15 September 2019.

⁸⁶ *Lata Singh v. State of Uttar Pradesh* AIR 2006 SC 2522.

⁸⁷ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁸⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸⁹ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

⁹⁰ *Halpern v Canada* (AG), [2003] O.J. No. 2268.

⁹¹ *Boddie v. Connecticut*, 401 U.S. 371 (1971).



case the US Supreme Court held that only through divorce couples can "mutually liberate themselves from the constraints ... that go with marriage." However, due to the non-concurrences of laws in different states, it becomes very difficult for same-sex couples to opt for divorce. In a research paper titled "No Exit: The Problem of Same-Sex Divorce"⁹² Elisabeth Oppenheimer explains the problem through an illustration, she states "Suppose a same-sex couple marries in Massachusetts, which recognizes gay marriage, then moves to Pennsylvania, which does not. The relationship ends. Where can the couple divorce? The surprising answer is nowhere. Pennsylvania courts will not divorce them because Pennsylvania does not recognize their same-sex marriage. Massachusetts courts will not divorce them because Massachusetts-like every other state-only grants divorces to current residents, even though it will marry non-residents".

The UK used to recognise civil partnership and not marriage as an option for same-sex couples. The Civil Partnership Act came into force in Britain in 2005 following which in a case a High Court to state that to rule a marriage as partnership "fail to recognise physical reality"⁹³. However, in 2013 in England and Wales same-sex marriage was made available to such couples and also the civil partnership option was kept open. In a recent judgment⁹⁴ by the UK Supreme Court, it was held that civil partnership should also be extended to

heterosexual couples as it violated the European Federation of Human Rights. However, same-sex marriage in other jurisdictions is yet not recognised. The problem of divorce for same-sex couples exists in the UK as the USA due to the variety of law in different states, however, in UK residence is also taken into consideration while allowing divorce as opposed to the USA where the only domicile is considered.⁹⁵

Despite the changing legal and social scenario across the world, India lags behind in recognising same-sex marriage and its high time that India gives the LGBTQI+ community the right to marriage as guaranteed by the Constitution and bring it under the ambit of section 5 and also allow same-sex couples the right to divorce under section 13 of the Hindu Marriage Act, 1955 or provide some other alternative.

1.5 HYPOTHESIS

Although there is no special provision for civil unions, section 5 and 13 of Hindu Marriage Act, 1955 is such that it can accommodate same-sex marriage and divorce within the ambit.

1.6 RESEARCH QUESTION

Is there any such provision in the Hindu Marriage Act, 1955 that can bring same-sex marriage and divorce within its ambit?

1.7 OBJECTIVES

Development (in substitution for the Home Secretary and the Education Secretary) (Respondent) [2018] UKSC 32.

⁹⁵ Barry Crown, 'Civil Partnership In The U.K Some International Problems' (2014) 8 New York Law School Law Review 697 <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/01/NYLS_Law_Review_Volume-48.Issue-4.Crown-article.pdf>

accessed on 16 September 2019.

⁹² Elisabeth Oppenheimer, 'No Exit: The Problem of Same-Sex Divorce' (2011) 90 N.C. L. Rev.73 <<http://scholarship.law.unc.edu/nclr/vol90/iss1/3>> accessed on 16 September 2019.

⁹³ Jowett, A. & Peel, E., "Seismic Cultural Change?": British media representations of same-sex 'marriage' (2011) Women's Studies International Forum, 33(3) 206.

⁹⁴ R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International



This paper will mainly deal with comparative study regarding the position of India and other nations with respect to same-sex marriage and divorce laws. Also, the paper will look into the scope of substituting same-sex marriage with live-in relationships or civil unions which is used as an alternative in different nations. The liberty of amendments in the personal laws and the need for legally recognising same-sex marriage and ending the age-old disparity between heterosexual and homosexual couples will be looked into in the paper.

1.8 METHODOLOGY

The doctrinal research method is used in this research paper thus secondary data is mainly relied on and critically analysed. The top-down method of research is applied in this study wherein the end the hypothesis is verified and either validated or refuted.

Chapter-II

SAME-SEX MARRIAGE A COMPARATIVE STUDY

The Hindu Marriage Act, 1955 states all the conditions necessary for a marriage to be a valid marriage according to the Hindu Marriage Act. Section 5 of the Hindu Marriage Act states that, “a marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-

- (i) Neither part has a spouse living at the time of the marriage;
- (ii) At the time of the marriage, neither party,
 - (a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) Though capable of giving valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children; or

(c) Has been a subject to recurrent attacks of insanity [(***);]

(iii) The bridegroom has completed the age of twenty-one years and the bride age of eighteen years at the time of the marriage;

(iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the

two;

The parties are not sapindas of each other unless the custom or usage governing each of them permits of a marriage between the two.⁹⁶

Though the essentials laid down in the Hindu Marriage Act does not specify any gender-based distinction, that will deem a marriage to be valid or void, but the term bride groom and bride seem to implicate to the terms male and female respectively. Though the section or the act does not explicitly define marriage as a union between man and woman, the laws have heteronormative underpinning, which does not recognise the union of two men or women as a valid marriage⁹⁷. This sort of differential behaviour has caused a lot of disturbance in the society. There has been many same sex marriage and suicide cases that has caught media’s attention. In the year 1980, two women Lalitha and Mallika attempted suicide, the same year two women in Gujarat namely Jyotsna and Jayashree attempted suicide by jumping in

⁹⁶ Hindu Marriage Act 1955, s 9.

⁹⁷ Ruth Vanita “Wedding of Two Souls’: Same-Sex Marriage and Hindu Traditions” (2004) 20 Journal

of Feminist Studies in Religion 119 <www.jstor.org/stable/25002506> accessed on 20 September 2019.



front of the train⁹⁸. These suicides caught the attention of media and people alike of the much-shunned issue in India. Over the years the issue has evolved and the Indian judiciary and government have tried to resolve the issue keeping in mind the public interest and peace in the society is not disturbed. But it was not until 2018 that the rights of the LGBT community were recognised by the state and the judiciary.

The decriminalisation of section 377 of the Indian penal code in the landmark judgement of *Navtej Singh Johar v Union Of India*⁹⁹, endowed upon the LGBT community with a whole new set of rights and gave them equality as promised in the constitution under article 15¹⁰⁰. Though section 377 was decriminalized the union of two men or women did not get any validation under the Hindu Marriage Act. In the Indian society according to the law, a sexual relationship between two consenting individuals, both homosexual and heterosexual is legal, but only the heterosexual relationship can be legitimately be married and have all the legal duties and rights bestowed upon them. Whereas the homosexual couple fail to befall in the category of the legitimised married couple and do not share any legal marital rights and duties as laid down in the Hindu Marriage Act of 1955.

Contrasting to this concept that is followed in India, other countries like USA and UK have legalised same sex marriage. They

have given equal rights to both heterosexual and homosexual couples.

2.1 USA: The recognition of homosexual couples began in the USA in different parts in different times¹⁰¹, the campaigning and protest started nearly around 1970s, the people of USA wanted their civil rights to percolate down to each and every individual irrespective of their sexual orientation. The first case ever filed in the Supreme Court of USA was in the year 1972, where the bench laid down that “loving does indicate that not all restrictions upon the right to marry are beyond the reach of the fourteen amendment. But in common sense, there is a clear distinction between a marital restriction merely based race and one based upon the fundamental difference in sex¹⁰².”

This decision was challenged in the Supreme Court of US a number of times, where the same style and genre of judgement was upheld by the US Supreme Court¹⁰³. After many attempts of the Supreme Court to curb such an uprising the state Supreme Courts started making legislations against the homosexual union. The first legislation made by the state in the against a homosexual union was in the year 1993 with the enactment of DOMA (Defence of marriage act) in 1996, the Supreme Court of Hawaii laid down that, “that it was unconstitutional under the state constitution for the state to abridge marriage on the basis of sex¹⁰⁴.” The same judgement was given by the Massachusetts

⁹⁸ R. Vanita, *Love rites: Same sex marriage in India and the West* (1st edn, Macmillian, 2005) 48.

⁹⁹ Id 6.

¹⁰⁰ Constitution Of India (One Hundred And Third Amendment,) 1950, a.15.

¹⁰¹ Lynn D Wardle, “Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage”(1998) 39 S Tex L Rev 735.

<https://heinonline.org/HOL/Page?collection=sccjournals&handle=hein.journals/stexlr39&id=746&men_tab=srchresults> accessed on 21 September 2019.

¹⁰² Baker v Nelson, 191 N.W 2d 185(1971).

¹⁰³ Williams, R., “Same-Sex Marriage and Equality. Ethical Theory and Moral Practice” (2011) 14(5) Springer 589

<<http://www.jstor.org/stable/41472625>> accessed on 21 September 2019.

¹⁰⁴ Baehr v Mike, 852. P2d 74(1993).



Supreme Court, in the case *Goodridge v Department of Public Health*¹⁰⁵. It was not until the year 2015 that the homosexual union was recognised in USA in all its states and territories and the US Supreme Court passing the judgement on the same binding on all the states that were part of USA. Although, since the year 2004, that the states started making legislations and laws relating to homosexual marriage, before the US Supreme Court passed a judgement to create a uniform civil right for marriage there were thirty-eight states, one district and one district that had passed laws in favour of homosexual marriage¹⁰⁶. The judgement of *Baker v Nelson* was overruled by the US Supreme Court listed four reasons to accept such a union they were, "First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals," a principle applying equally to same-sex couples. Third, the fundamental right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; as same-sex couples have children and families, they are deserving of this safeguard—though the right to marry in the United States has never been conditioned on procreation. Fourth, and lastly, "marriage is a keystone of our social order," and "there is no difference between same- and opposite-sex couples with respect to this principle"; consequently, preventing same-sex couples from

marrying puts them at odds with society, denies them countless benefits of marriage, and introduces instability into their relationships for no justifiable reason.¹⁰⁷ this judgement turned the meaning of the term marriage in the USA and gave the union of homosexual and heterosexual the same validation and legitimacy. There are yet a few challenges that need to be looked into, the federal system of government traditionally did not make laws regarding the civil matters of marriage that would be in all states, the states had the power to make their own marriage civil laws. The marriage that was accepted by any one of the states was accepted by the federal government even though it was not recognised by other states of USA¹⁰⁸. After the judgement of *Obergefell v Hodges* all the 50 states had to legalise homosexual marriage, and thus it reversed the position of the authorities in cases of recognising homosexual marriage. The Supreme Court of US laid down that, "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest

¹⁰⁵ *Goodridge v Department of public health*, N.E.2d 941(2003).

¹⁰⁶ Chamie, Joseph, and Barry Mirkin. "Same-Sex Marriage: A New Social Phenomenon" (2011) 37 *Population and Development Review* 529 <www.jstor.org/stable/23036054> accessed on 21 September 2019 .

¹⁰⁷ *Obergefell v Hodges*, 2015 BL 204553.

¹⁰⁸ Dinno, Alexis. "Comment on 'The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence From the Netherlands'" (2014) 51 *Demography* 2343 <www.jstor.org/stable/43697509> accessed on 21 September 2019.



institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right¹⁰⁹.” Thus, with evolution of time USA mixed the old traditions with the modern ones to create a society that is fair to all and gives every individual equal right in civil marriage cases irrespective of the sexual orientation of the people.

2.2 **UK:** United Kingdom legalised same sex marriage in the year 2005 and was amongst one of the pioneers to legalise same sex marriage. The first homosexual marriage in UK took place in the year 1860, when Arabella Hunt married James Howard, their marriage was annulled on the basis that two women with perfectly womanly parts cannot marry each other¹¹⁰. A same judgement was given in 1866, it was stated that, “Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others¹¹¹.” This was followed by a number of cases with the same decision that disregarded the marital union of two homosexuals, on the basis that Christianity did not permit them to have a matrimonial alliance between two male or two females. It only considered the matrimonial alliance between a man and a woman. It was only in the year 2003, Celia Kitzinger and Sue Wilkison, were legally married¹¹². Their marriage was not recognised a marriage under British law rather it was converted into civil partnership. The judgement was passed in the year 2006, where the high court stated

that, “Abiding single sex relationships are in no way inferior, nor does English law suggest that they are by according them recognition under the name of civil partnership¹¹³.” According to the new act passed to legitimise the union of homosexual couples, the civil partnership is a different union and doesn’t bring along the rights and duties that are brought upon a couple under civil marriage. The concept of civil partnership can only take in the permitted premises of the United Kingdom. The first civil partnership took place on 5th December 2005 between Mathew Roche and Christopher Camp, the venue of this historic event was at St Barnabas Hospice, Worthing, West Sussex¹¹⁴. According to this law the civil partnership thus formed will have the same rights as a married couple and will be entitled to the same property rights as the married couple, they will have the same exemptions as that of the married couple for example the exemption on inheritance tax, social security and pension benefits. In the year 2013, the marriage act of 2013 was passed which legalised same sex marriage in England and Wales, and also granted the ability to the civil partnership to convert into marriage. This was though reviewed again in the year 2018 and the government passed a legislation stating that civil partnership will be allowed throughout the United Kingdom, and the homosexual matrimonial alliance would have an option to either form a civil partnership or a marriage. A civil partnership is formed once both individuals

¹⁰⁹ Id 12.

¹¹⁰ Willetts, Marion C. “Registered Domestic Partnerships, Same-Sex Marriage, and the Pursuit of Equality in California” (2011) 60 Family Relations 135 <www.jstor.org/stable/41236754> accessed on 21 September 2019.

¹¹¹ Hyde v Hyde , (L.R.)1 P.&D. 130

¹¹² Bernstein, Mary. “Same-Sex Marriage And The Future Of The Lgbt Movement: SWS Presidential Address” (2015) 29 Gender and Society 321

<www.jstor.org/stable/43669974> accessed on 22 September 2019 .

¹¹³ Wilkinson v. Kitzinger and Others, (2006) EWHC 2022(Fam).

¹¹⁴ ‘First civil union in united kingdom’ *BBC news* (6 Dec 2005) <http://news.bbc.co.uk/2/hi/uk_news/england/south_ern_counties/4505010.stm> accessed on 21 September 2019.



have signed the civil partnership document in the presence of a registrar and two witness¹¹⁵. Thus, with progression of time the ideologies based on homosexual matrimonial alliance evolved in the United Kingdom, from annulling the homosexual union to giving them right as civil partnership, and then giving the couple the freedom of choice to choose between legitimisation of union as a matrimonial alliance or a civil partnership.

India, as country should now consider the concept of homosexual marriage and include them in the personal laws, or specific marriage laws if not the inclusion of the homosexual marriage in the personal laws to avoid disturbance of public harmony at large. It should set specific provisions or provide the provisions of civil partnership to legitimise the union of a homosexual couple.

CHAPTER-III

DIVORCE IN RESPECT OF SAME-SEX MARRIAGE OR CIVIL UNION- A COMPARATIVE ANALYSIS

Divorce can be defined as a derivative benefit of marriage which can be opted in case of the collapse of a legal union. It provides a way for the spouses to end the institution in a dignified manner and liberates individual from such a union. Recognising divorce is as essential as recognising marriage itself, identifying an institution as a legal union without this derivative benefit leaves spouse devoid of legal safeguards. In this part, a comparative study is done with respect to divorce from the standpoint of India, USA and UK with regards to same-sex marriages.

3.1 USA: Same-sex marriage was only recently legalised in the States and in some parts of it same-sex marriage is still not allowed this creates a problem in cases of divorce. In the case of *Boddie v. Connecticut*¹¹⁶, i.e. an opposite-sex divorce case the US Supreme Court held that only through divorce couples can "mutually liberate themselves from the constraints ... that go with marriage." However, due to the non-concurrences of laws in different states, it becomes very difficult for same-sex couples to opt for divorce. In a research paper titled "No Exit: The Problem of Same-Sex Divorce"¹¹⁷ Elisabeth Oppenheimer explains the problem through an illustration, she states "Suppose a same-sex couple marries in Massachusetts, which recognizes gay marriage, then moves to Pennsylvania, which does not. The relationship ends. Where can the couple divorce? The surprising answer is nowhere. Pennsylvania courts will not divorce them because Pennsylvania does not recognize their same-sex marriage. Massachusetts courts will not divorce them because Massachusetts-like every other state-only grants divorces to current residents, even though it will marry non-residents". Judges while dealing with cases of divorce in such circumstances use two approaches one is equity and the other is originalism. In a case wherein a gay couple travelled from Texas to Vermont to get their union registered under civil-partnership, but after a year when they wanted a divorce the Vermont law's domicile requirement came as a barrier, post this they filed a divorce in Texas wherein the District judge allowed, however, the attorney general of Texas told the judge that 'a divorce can't be granted where there existed no marriage at the first

¹¹⁵ 'Registering civil partnership in Scotland' (4 June 2019) *Wayback machine* <<https://www.nrscotland.gov.uk/regscot/registering>

<[-a-civil-partnership-in-scotland.html](#)> accessed on 22 September 2019.

¹¹⁶ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

¹¹⁷ Id 15.



place'¹¹⁸ following which the judgment was overturned. In the case of *re KJB v JSP*¹¹⁹ a lesbian couple who was not a resident of Vermont but Illowa filed a suit for divorce in Vermont. The court although lacked jurisdiction, the divorce was granted, although he received a lot of criticism he was of the opinion that "[T]his [is] a dispute between parties that in some way I'm going to have to solve." In these cases the court took an equity approach whereas in cases like *Chambers v Ormiston*¹²⁰ following the same problem of domicile requirement and disqualifying the divorce petition through the originalistic intent, the court was of the view that "sometimes our decisions result in palpable hardship to the persons affected by them," but also was of the opinion that the legislature should legislate laws on such matter and not the judiciary.

3.2 UK: The UK used to recognise civil partnership and not marriage as an option for same-sex couples. The Civil Partnership Act came into force in Britain in 2005 following which in a case a High Court to state that to rule a marriage as partnership "fail to recognise physical reality"¹²¹. However, in 2013 in England and Wales same-sex marriage was made available to such couples and also the civil partnership option was kept open. In a recent judgment¹²² by the UK Supreme Court, it was held that civil partnership should also be extended to heterosexual couples as it violated the European Federation of Human Rights. However, same-sex marriage in other jurisdictions is yet not recognised.

The problem of divorce for same-sex couples exists in the UK as the USA due to the variety of law in different states, however, in UK residence is also taken into consideration while allowing divorce as opposed to the USA where only domicile is considered.

The problem with divorce even in the UK is due to multiple jurisdictions and a variety of laws concerning it. However, English courts have jurisdiction to deal with any case of divorce considering that the union is registered under English civil-partnership act.

In India, however, the Hindu Marriage Act does not recognise same-sex marriage and subsequently no divorce clause exists that allows same-sex divorce, Section 13 (1) of the act that deals with condition relating to divorce reads "Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the *husband or the wife*, be dissolved by a decree of divorce on the ground that the other party....." ruling out any scope of interpreting it otherwise and largely excluding same-sex divorce cases. Even if considering that a totally different position is made available to same-sex couples, i.e. of civil-unions, it is mandatory that the collapse of such should also be brought under the clause of divorce giving same-sex couples a legally recognised institutionalised relationship and a dignified way of leaving such a union in case of its collapse. India will not have a

¹¹⁸ Fred A. Bernstein, 'Gay Unions were only Half the Battle' *The New York Times* (3rd April 2003).

¹¹⁹ *Id* 15.

¹²⁰ *Chambers v. Ormiston*, 935 A.2d 956 (2007).

¹²¹ Jowett, A. & Peel, E., "'Seismic Cultural Change?': British media representations of same-sex 'marriage'" (2011) *Women's Studies International Forum*, 33(3) 206.

¹²² *R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) (Respondent)* [2018] UKSC 32.



problem of multiple jurisdiction or inconsistency in law if the Hindu Marriage Act is amended as every person who is a Hindu and who married according to section 5 of the act will have access to divorce and can contest in a court of appropriate jurisdiction.

However, in a study, it was found that there exist higher chances of divorce in case of same-sex relationships due to the lack of normative pressure and a lesser institutionalised form of the relationship.¹²³ This makes it very important to amend section 13 along with section 5 to bring into its purview same-sex marriage and divorce.

CHAPTER-IV

CONCLUSION RECOMMENDATIONS

CONCLUSION:

In the summary, provisions in the Hindu Marriage Act, 1955 for providing legitimacy to the same sex marriage after the landmark judgement of, U P decriminalisation of section 377 is looked into. The first part of the paper gives an overview of the research paper, hypothesis, research methodology, literature review and the objective that are being addressed by the paper.

The first part of the second chapter deals with the provisions of a valid Hindu marriage under the Hindu Marriage Act. Even though there has been no mention of the union of a heterosexual couple, the heterosexual underpinning indicates only

the union of a man and woman can be claimed to be a valid marriage. Comparison is drawn from two of the major countries namely, United States of America and United Kingdom and how the evolution of same sex marriage took place in these countries and how they legitimised same sex marriage. Though the same sex marriage is not a legitimised concept in our country but the government and the citizens are progressing towards, it was not until the recent time that in Gurgaon a homosexual couple got recognised as a married couple and the courts ruled in their favour¹²⁴.

The second part of the chapter deals with divorce and other remedies available to a homosexual couple in India with comparison to USA and UK. It is seen that the occurrence of divorce in homosexual couples are more compared to heterosexual couples due to the lack of normative pressure and lesser form of institutionalised relationship. Both in US and UK there exists a problem with domicile and residence when treating same-sex divorce cases due to it not being legally accepted in most of the country. If section 13 of Hindu Marriage Act is amended then this problem will not arise as any individual who is a Hindu and has registered their marriage under the said act can contest for divorce in any court of appropriate jurisdiction.

All the above instances portray that there should be provisions made in The Hindu Marriage Act for the incorporation of the matrimonial alliance of the homosexuals. The instances drawn from the comparison from USA and UK depicts ways in which same sex marriage can be incorporated in

¹²³ Gunnar Anderson and others, 'The Demographics of Same-sex marriage in Norway and Sweden' (2006) 43 *Demography* 79 <<https://www.jstor.org/stable/413723>> accessed on 18th September 2019.

¹²⁴ Dipak Kumar Dash & Sanjay Yadav, 'Gurgaon court recognises lesbian marriage' *Times of India*

(29 July 2011) <<https://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms>>, accessed on 22 September 2019.



the Hindu Marriage Act in section 5 and section 13. This with all the above instances refutes the hypothesis- *Although there is no special provision for civil unions, section 5 and 13 of Hindu Marriage Act, 1955 is such that it can accommodate same-sex marriage and divorce within the ambit.*

RECOMMENDATIONS:

1. The underpinning heterosexual concept of section 5 of the Hindu Marriage Act should be transposed off with. This gives a whole meaning to essentials for a valid Hindu marriage and makes it more holistic and broadened such as to include every matrimonial alliance irrespective of their sexual orientation.
2. New provision should be made in the Hindu Marriage Act with consideration to the removal of gender-based legitimisation of the Hindu marriage and homosexual marriage should be recognised under section 5 of the Hindu Marriage Act.
3. The proposal made in the law commission report 2018, with respect to reformation of family law must be taken into consideration and laws must be passed with regard to. The law commission report proposed that there should be uniform civil code for marriage that allows the marriage of homosexuals¹²⁵.
4. Section 13 of the act should also be amended to bring into its ambit same-sex divorce. Recognising divorce is as essential as recognising marriage itself, identifying an institution as a legal union without this derivative benefit leaves spouse devoid of legal safeguards.

¹²⁵Reform on Family Law Law commission report consultation paper,2018
<http://www.lawcommissionofindia.nic.in/reports/>

[CPonReformFamilyLaw.pdf](#) > accessed on 22 September 2019.



REPORT ON AMENDMENT OF THE NAME CLAUSE- LAW AND PROCEDURE WITH REFERENCE TO CASE LAWS

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CHAPTER -1

❖ INTRODUCTION

A business that is a legal entity must have its own name in order to create its separate identity. The company's name is a sign of the company's autonomous existence. The company's first clause in the Association Memorandum says the name a firm is known by. The business may adopt any appropriate name as long as it is not unwanted.

After incorporation, the Company may alter its name by following:

- (a) Name conversion from private to public, or
- (b) Name conversion from public to private, or
- (c) Name change from ABC restricted to XYZ limited.

Change in the Company's Name Clause includes altering the Company's Memorandum of Association ('Memorandum'). Section 13 of the Companies Act 2013 regulates the modification process for all businesses in the Association Memorandum. By adopting a special resolution, all parts of the Memorandum except the Capital clause may be modified by following the provisions of Section 13 of the Companies Act, 2013.

A name change pursuant to section 21 does not influence the company's rights and responsibilities or make defective any legal proceedings by or against the firm and any legal proceedings that could have been continued or initiated by its former name or against the business, may be continued by or against the company by its new name. The business that has altered its name would have the right to ask the businesses in which it holds stocks to replace its ancient certificates with fresh ones.

Section 13 of the Companies Act, 2013 deals with a name change that states that the company's name can be altered by a special resolution and the Central Government's consent. Central government approval is not needed if the change involves adding / removing the phrases "private" to the title.

❖ OBJECTIVE

A business is a legal entity. So, in order to define its identity, it must have a name. Name Clause in the Association Memorandum provides protection in the same or tightly similar name against subsequent company registration. It secures a de facto corporate trading monopoly under a specific name for the business. Each business must have its name etched on its seal along with the address of its registered office and have it mentioned on all official documents and publications.

❖ RESEARCH METHODOLOGY

To answer the research questions, conceptual method will be the most appropriate method. In order to achieve this doctrinal research will be carried out.



❖ **RESEARCH QUESTION**

1. How to amend name clause?
2. Comparative analysis between companies act 1956 and companies act 2013 with respect to change of name of a company

CHAPTER-2

❖ **HOW TO AMEND NAME CLAUSE?**

1. **Passing board resolution When partners are mutually agreed**

A board meeting should be called upon to pass a resolution to modify the name of the business when partners are mutually agreed. The board of directors will discuss and approve the name change at the meeting, authorizing the company's director or CS to check the availability of name with MCA, and calling for a special resolution to be passed by the Extra-Ordinary General Meeting.

2. **Checking name availability**

The approved director or secretary of the business will apply to MCA in the form INC-1 to check the accessibility of the name and approve the name. This method is the same as the method taken at the moment of approval of the original name.

RoC is going to send a letter saying that the name suggested is accessible. Please note that this will not be the business name's final approval, it is only a RoC confirmation that the suggested name is accessible.

The suggested name should not be comparable to another current name of the business and should not include the term "state." In this scenario there are also other circumstances that exist at the moment of the original authorization of the name.

3. **Passing Special Resolution**

Once the name is approved by MCA, the company should call for an extraordinary general meeting. A special resolution will be passed for changing name and make the change in Memorandum of Association and Articles of Association.

4. **Applying to Registrar**

A special resolution will be filed with RoC within 30 days of passing the resolution. With it, Form MGT-14 will also be filed which contains the details about special resolution. Following documents are submitted with MGT-14:

- Certified copy of Special Resolution,
- Notice of EGM,
- Explanatory statement to EGM,
- Altered Memorandum of Association,
- Altered Articles of Association

5. **Issuance of certificate of incorporation**

If the Registrar of Companies is okay with the documents, it will issue a new certificate of incorporation.

Company's name change process isn't completed until the new certificate for incorporation is issued by the RoC.

6. **Incorporating company name in MoA and AoA**

Once the new certificate of incorporation is received from RoC, the company name must be incorporated in all the copies of MOA and AOA.

Sub Section- 2 of Section 4 of the Companies Act, 2013 provides that no company shall be registered by name which:

- Is identical with or too close to the name of an current business registered under this Act or any prior business legislation,



- constitutes, for the time being, an offense under any legislation,
- is undesirable in the Central Government's view.
- Sub-Section-3 without prejudice (Effect) to the provisions of sub-Section (2) a company shall not be registered with a name containing any such word or expression unless previous approval has been obtained from the Central Government.

any word or expression likely to give the impression that the company is in any way related or patronized by the Central Government, any State Government or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force ; or

- any word or expression as may be prescribed

Alteration of Name shall not allow to following Companies:

The change of name shall not be allowed to a company:

- which has not filed annual returns or financial statements pending for filing with the Registrar or
- which has failed to pay or repay matured deposits or debentures or interest and are still pending.

❖ **COMPARATIVE ANALYSIS BETWEEN COMPANIES ACT 1956 AND COMPANIES ACT 2013 WITH RESPECT TO CHANGE OF NAME OF A COMPANY**

The provisions of the 1956 Companies Act differ in a few ways from the 2013

Companies Act. Change in the name of a business under the Companies Act, 1956 is regulated by Sections 20 and 21 of the aforementioned Act, which is as follows : Companies not to be enrolled with undesirable names. No corporation shall be recorded by a name that is undesirable in the view of the Central Government.

Without prejudice to the generality of the foregoing power, a name which is identical with, or too nearly resembles,-

- (i) The name by which a company in existence has been previously registered thereon, or
- (ii) A trademark, or a registered trademark which is subject of an application for registration, of any other person under the Trade Marks Act, 1999, may be presume to be undesirable by the Central Government within the meaning of sub-section (1).

The Central Government may, before deeming a name as undesirable under clause (ii) of sub-section (2), consult the Registrar of Trade Marks.”

A company may, by special resolution and with the approval of the Central Government signified in writing, change its name.

Provided that no such approval is required if the only change in a company's name is the addition thereof or, as the case may be, the deletion thereof of the word "private" a consequence of the conversion of a public company into a private company in accordance with the provisions of this Act or of a private company into a public company.

While Section 20 does not specifically govern the procedure and elements of a company's name change law, it is nonetheless essential because it sets out circumstances that must be met, which regulate the kinds of names that can be provided to a firm.

Thus, as evident from the Section, a change in the name of a company under Section 21



and of the Companies Act, 1956 is possible by two means;

1. By government's unique resolutions and permission: a company's name may be altered at any moment by passing a special resolution at a company's general meeting and with the central government's written consent. Such consent is not needed, however, if the name change includes adding or removing the term "private."
2. By rectifying omission in name: If a business has registered its name by a error that is the same or comparable to an current business name, the business may alter its name by passing an ordinary resolution and obtaining written approval from the central government.

In such a case, the central government in one year of the first registration or registration under a changed name can direct the company to change its name. In such a situation, the company must alter its name by passing an ordinary resolution in three months from the date of such direction.

The change of the name of the company doesn't result in a change in the power and of the same. As a result of this change, the name legal affairs of the company are not affected. However, after the new name is registered, the legal affairs cannot be continued with the old name.¹²⁶

Due to the spontaneous changes in the economic and financial atmosphere both nationally and globally, the Companies Act, 1956 was under review for a while. Consequently, the Companies Act 2013 was implemented as a consequence of these modifications in the global setting. The objective behind the 2013 Act is less public endorsement and enhanced self-direction in

combination with an emphasis on the scheme of corporate majority rules. The 2013 Act delinks the procedural angles from substantive law and provides more adaptability to enable the evolving financial and specialized situation to be adjusted. Under this Act, the Central Government is enabled to monitor growth, funding and work and winding up of organizations. It contains the component in regards to hierarchical, budgetary and administrative and all the significant parts of an organization.

The Companies Act, 2013 was approved on 29 August 2013 by the President of India and published on 30 August 2013 in the Official Gazette. Under the Companies Act 2013, the alteration of the memorandum as a result of a change in the company's name is governed by Section 13(2) and (3) read in accordance with Section 4(2) and (3) of the aforementioned Act, which reads as follows; any change in the company's name is subject to the provisions of Section 4 of paragraphs (2) and (3) and has no effect except with the approval of the Central Act. When a change in a company's name is produced in sub-section (2) the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.

And Section 4 (2) and (3) are as follows;

- The name stated in the memorandum shall not include following :-
 - (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law.

¹²⁶ Malhati Tea Syndicate v. Revenue Officer



(b) such that its use by the company
 (i) it will constitute an offence under any law for the time being in force; or
 (ii) it is undesirable in the opinion of the Central Government.

- Without prejudice to the provisions of sub-section (2), a company shall not be registered with a name which contains

(a) Any word or expression likely to give the impression that the company is in any way related to, or patronized by, the Central Government, any State Government or any local authority corporation or body constituted by the Central Government or any State Government under any law for the time being in force ; or

(b) Such word or expression as may be prescribed, unless such word or expression is prescribed by that law ;

In a basic reading of Sections 13 (2) and (3) read with Section 4 (2) and (3), it is obvious to notice that, with respect to change of name of a company, Section 13 (2) and (3) establishes the consequence of name change of a company while Section 4 (2) and (3) lays down the criteria to keep in mind while naming or re-naming a company.

Comparing the clauses relating to a business name change in the 1956 and 2013 Act, Section 20(2)(ii) of the 1956 Act restricts a individual from naming any other individual under the Trade Marks Act, 1999, a firm that violates a registered trademark or a trademark that is the topic of a registration request. This specific provision in the Companies Act 1956 is not included in the Companies Act 2013 and the Companies Act 2013, which governs the requirements for a business name in a distinct way by delegating authority to the central government to notify the general

public by regulations that set out the requirements or the same.

One such example is the 2014 Companies (Incorporation) Rules, under which Rule 8 and Rule 9, respectively, discuss unwanted names and name reservations. Rule 8 goes on to cover comprehensively what can be covered under the garb of undesirable (which also includes identical) names such as, the plural version of words, type and case of letters (including punctuation), misspelt words, either intentionally or unintentionally conflicting with another company's properly spelt name. The trademark infringement component pursuant to Section 20(2)(ii) of the Companies Act 1956 was included in Rule 8(2)(ii) of the Companies (Incorporation) Rules 2014.

With respect to reservation of a name, the Companies Act 2013 under Section 16 incorporates Section 22 of the Companies Act 1956, with certain observed changes such as the change in time period within which the company has to comply with the direction of the Central government to change its name from 3 months to 6 months.

CHAPTER-3 (CASE LAWS)

➤ **Ashbury Railway Carriage and Iron Co v Riche**

A memorandum of association containing the purpose for which it is incorporated is no longer a requirement for the establishment of companies incorporated under the Companies Act 2006. However, a memorandum of association obviously specifying the purpose for which it was established was needed for businesses restricted by shares incorporated under the Companies Act 1985. Such item may not be illegitimate or may be quashed from its registration. The legal aim for which a



corporation can be established is unlimited, and businesses can do most of the stuff necessary to accomplish this objective. The objects of Ashbury Railway Carriage and Iron Co Ltd were to manufacture or sell or lend on hire, railway wagons and wagons, and all sorts of railway plants, fittings, equipment and rolling stock; to carry on the company of mechanical engineers and general contractors; to buy and sell such products as merchants, timber, coal, metals or other materials; and to buy and sell such products on commission As it was not included in the objects clause in its memorandum, the House of Lords regarded the agreement to be beyond or outside the company's powers It was held that the company was in breach of its constitution by entering into the transaction because it had no 'competence' or 'power' to enter into the contract and therefore had no legal effect on the transaction. This meant that Richie's claim against the business for violation of contract failed, as there was no agreement to be implemented. However, until the House of Lords dealt with this problem in Ashbury Railway Carriage and Iron Co, the situation of a business performing a legitimate activity outside the scope of its objects clause was uncertain.¹²⁷

➤ **Cotman v Brougham**

The attention shifted to the drafting of the object clauses in company constitutions in order to further restrict the effect of the rules. In Cotman v Brougham Lord Parker indicated the object clauses directed at defending the company's shareholders and individuals, although both had very distinct interests in how broad the clause should be. Shareholder protection was best achieved by narrowly drafting the clause on objects, limiting the purposes for which the capital

they invest in the company could be used. And protection of those who deal with the company would be achieved through the extensive drafting of the objects clause, so a particular transaction was less likely to be outside the company's objects. Clauses which were so wide to include every eventuality were called 'Cotman v Broughman' clauses.¹²⁸

➤ **Bell Houses Ltd. v City Wall Properties Ltd**

Later, more instruments were used to prevent the effect of the rule of ultra vires. In Bell Houses Ltd. v City Wall Properties Ltd., the object clause contained the object: 'to carry on any trade or business whatsoever which, in the view of the board of directors, may be beneficially carried on by the company in connection with or as ancillary to any of the above-mentioned business or the company's overall business.' The claimant charged a fee for a non-object transaction. The defendant refused to pay the claimant company on the grounds that the transaction was ultra vires. The Court of Appeal held that the transaction was intra vires the company, as falling within the objects. 'Bell Houses' clauses were born.¹²⁹

❖ **Conclusion**

A corporation is a legal entity. So, it must have a name to define its identity. The Association Memorandum Name Clause offers protection against subsequent company registration in the same or tightly similar name. It secures a de facto business trading monopoly for the business under a specific name. Each company must have its name engraved on its seal along with its

¹²⁷ Ashbury Railway Carriage and Iron Co v Riche (1875) LR 7 HL 653

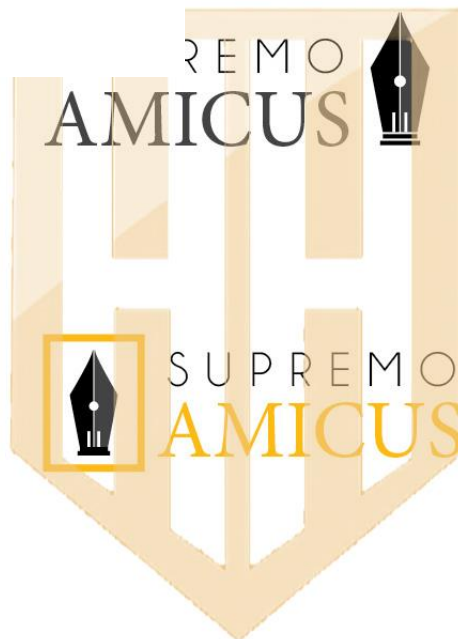
¹²⁸ Cotman v Broughman

¹²⁹ In Bell Houses Ltd. v City Wall Properties Ltd



registered office address and all official records and publications referred to it.

Drawing a parallel between the Companies Act 1956 and Companies Act 2013, it can be concluded that the Companies Act 2013, unlike Companies Act 1956 divides the procedure into two parts by prescribing guidelines to be followed while renaming a company separately in Section 4 (2) (3) of the Act and the Companies (Incorporation) Rules 2014, while the Companies Act 1956 laid down how the change has to be done with respect to procedures to be complied with.





JUVENILE DELINQUENCY: RETRIBUTION OR REFORMATION?

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Abstract

The youth forms one of the most important backbones of a nation. Their personalities are the reflection of a nation's past, present and future. However, it is deeply saddening that the crime rate amongst juveniles is on a rise. The rate has increased across the globe and has a major percentage in India as well. The reasons can be numerous social background, poverty, lack of moral values, ineffectiveness of the education system, etc. What is even more worrisome is the way they are tried in the court of law. Since the person committing the crime is a juvenile, the scope of reformation broadens. However, with juveniles indulging in serious offences like terrorism, rape murder etc., the scope and equity of such a decision becomes highly questionable. Further, with remand homes serving as a ground for physical and mental exploitation, their credibility comes under the scanner. Our research aims at analysing the causes of juvenile crimes and gives a scrutiny of the Juvenile Justice Act, 2015 which is the principle legislation dealing with this subject. The research paper would also give an overview of the conditions of remand homes and prisons; and analyse whether such institutions would actually "reform" the future of the country. The paper would also give probable solutions to these problems and suggest reforms in the legal system. Lastly, we would analyse the approach and

legislation of various countries and give a comparative analysis with India.

Introduction

Nelson Mandela once said that *"There can be no keener revelation of a society's soul than the way in which it treats its children."* This holds the core for juvenile justice system across the world. Certain landmark cases have stated children as *"a supremely important national asset¹³⁰"* and *"the greatest gift of humanity¹³¹"*. Thus it is an accepted fact that the youth holds the key to our globe's future. However, with the present situation of juvenile crime across the world, the future of the globe seems bleak. As per *"Statistical Year Book India 2017"* released by Ministry of Statistics & Programme Implementation, the involvement of juveniles in heinous crimes such as Rape, Murder, Dacoity, etc. has increased since 2001. The report states that the juveniles convicted of crimes like rape, kidnapping and abduction has increased from 399 in 2001 to 1688 in 2015. The increase in juveniles convicted of dacoity from 122 to 1630 is heart-breaking. The increase in delinquents involved in rioting from 3196 to 6046. With such numbers, the law-makers as well as the citizens need to ponder over their moral compass. Before addressing the various issues pertaining to juvenile justice it would be prudent to consider what exactly constitutes a juvenile in India.

Concept of Juvenile Delinquency

The word juvenile originates from *"juvenis"*, (in Latin) i.e young. In general a juvenile is a child who has been alleged to have contravened some law which declares his/her acts as an offence. According to

¹³⁰ Laxmikant Pandey vs. Union of India, 1984(2) SC 244, 249

¹³¹ Bandhua Mukti Morcha vs. Union of India (1997) 10 SC 551-553



Section 2 (35) of the Juvenile Justice (Care and Protection of Children) Act, 2015 juvenile means, “a child below the age of 18 years”. As far as delinquency is concerned it usually refers to a person who shows illegal behaviour and has deviated from course of normal social life. Etymologically, the term delinquency has been derived from the Latin word “delinquer” meaning “to omit”. The Roman used the term to refer to the failure of a person in case of performing the assigned duty or task. It was in 1484 when William Coxtan used the term “delinquent” to describe a person found guilty of customary offence. The word also found place in the famous Shakespearean play “Macbeth” in the year 1605. Thus while juvenile would refer to the age of the person accused, delinquency would pertain to the deviant behaviour of the person accused. Though the term “juvenile delinquency” is a fairly recent invention, the concept dates ages back. Socrates (470–399 BCE) has voiced the condition of the present youth through his ancient language- “The children now love luxury. They have bad manners, contempt for authority, they show disrespect for adults and love to talk rather than work or exercise. They no longer rise when adults enter the room. They contradict their parents, chatter in front of company, gobble down food at the table, and intimidate teachers.” Let’s fast forward the situation to today and focus particularly on India. The situation perhaps seems worse if not the same. Before we chalk out the solution, it would be better to understand the basis of the problem.

Reasons

A child when born is a blank slate. It would speak whatever you write and particularly do whatever he/ she sees around them. Abraham Lincoln has said: “A child is a person who is going to carry on what you

have started. He is going to sit where you are sitting, and when you are gone, attend to those things you think are important. You may adopt all the policies you please, but how they are carried out depends on him. He is going to move in and take over your churches, schools, universities and corporations. The fate of humanity is in his hands”. But is it actually in safe hands? A nation that prides itself to be the largest democracy of the world, nation which was once called the golden bird, a nation that was the “hub” of world education with universities like Nalanda and Taxila is unable to raise its youth in a healthy and secure environment. Ours is the very nation wherein a 23 year old youth- Bhagat Singh faced death in its very eyes. And ours is the very nation where teenagers were turned into revolutionaries in the Chittagong uprising. Ours is also a nation where a juvenile was involved in brutally raping a woman in a moving bus. This raises a serious question on our progress a “modern” country.

A criminal is not a born criminal, there is a journey that he/ she completes before reaching such a stage. We as stakeholders of law come at a much later stage. According to various sociologists and psychologists the social as well as the emotional environment around a child play a crucial role in its development. A discrepancy in their upbringing would take years of correction. Therefore the causes of juvenile delinquency need to be seen in their socio-emotional environment. As already mentioned juvenile is a person below 18 years of age but has been charged with an offence usually committed by adults. So it is quite clear that juvenile delinquency is also a part of all those behavioural change that occurs in a person’s life while passing the stormy phase of adolescence, though it is not found



in every adolescent¹³². The proportion of delinquency would vary from one individual to another. Psychologists usually refer to adolescents as a turbulent phase wherein one passes through rapid revolutionary changes in one's physical, mental, moral, and spiritual, sex and social outlook. They become emotionally unstable and frequent mood change is observed. It is the period of anxieties, worries, conflicts and complexities¹³³. Change is the most constant phenomena, but what makes this change so cataclysmic in case of certain children. Psychologists across the world have tried to figure out these phenomena and therefore it has led the formation of various schools. Firstly we have the biological and psychological school in criminology which lays emphasis on the interrelatedness between the delinquent's physical constitution, biological factors and psychological personality traits. The school states that the resultant deviation in the behaviour is due to one's nervous system, endocrine system and physical constitution. In addition, the "biological" school in criminology ascribes considerable importance to genetic inheritance of criminal disposition as well as to a genetic anomaly in human chromosomes¹³⁴. The proponents of this approach were Lombroso, Garofalo, Tappan, Kretschmer and Sheldon. Lombroso once posed a question- "How can an unhappy child protect himself/herself from the evil which is displayed in the brightest colours or, even worse, which is imposed by parental authority or bad example given by a parent

or another person responsible for the child's upbringing?" therefore are merely punishing a delinquent of being "unhappy". So are we merely punishing delinquents for having a physiological imbalance? Such is not the case. The biological school is therefore criticised in this regard. An over-emphasis on hormonal imbalance would be unnecessary. It would be prudent to club them with psychological factors which are influenced by the emotional, social and financial environment in which one is raised. The criminologists belonging to the psychological school in criminology agree that the child who experiences any sort of abuse or neglect, or any other form of child-threatening behaviour, may consequently exhibit pathological disobedience¹³⁵. Disobedience, which is quite common among adolescents, is a constant transfer of unfulfilled childhood desires into aggressive behaviour. Further, immoral acts of the parents too jeopardise with the psychic of the child. Lombroso, noticed that a number of criminal offenders were either born out of wedlock by "sinful" parents or were orphans. Further it has been found that children usually imitate the immoral activities of the parents. This has been proved by Albert Bandura through his classical Bobo Doll studies. In this experiment children witnessed adults play with a rubber, inflated toy. The adults either behaved aggressively towards the doll, such as hitting it with a hammer, or kicking it, or interacted peacefully with the doll¹³⁶. The crux of Bandura's social learning theory is that children (and adults new to situations)

¹³² Dr. Tomba Chingtham, Causes of Juvenile Delinquency in the Higher Secondary School Students, IOSR Journal of Research & Method in Education (IOSR-JRME) , 20, 20 (2015)

¹³³ Supra

¹³⁴ Miomira Kostić, Biological And Psychological Theories On Juvenile Delinquency, Law and Politics (Facta Universitatis) ,1, 3 (2013)

¹³⁵ Supra

¹³⁶ Nathan A Heflick, Children Learn Aggression From Parents, Raising more peaceful children, (October, 1st 2019, 03:31PM) <https://www.psychologytoday.com/us/blog/the-big-questions/201111/children-learn-aggression-parents>



learn from others in the environment how to behave¹³⁷. Thus we can safely conclude that violent and abusive childhood; unhealthy parenting; bad company play a key role in developing delinquents.

However apart from psychological and physiological factors, several social factors too play a major role. The most commonly held cause for delinquency has been held to be homelessness and poverty. However, urban towns offer a very contrary picture. An analysis of the family background of juveniles arrested in 2016 shows that 38,061 or 86% of the 44,171 minors apprehended lived with their parents; while another 4,550 (10.3%) lived with guardians. Only 1,560 of them were homeless. Child Rights Trust director Nagasimha G Rao stated that "The social environment is changing constantly. The way children spend time in schools is changing, with less friendship and more competition; parents have less time to give their children and we see a lot of cases where children come from families that have no financial problems, which indicates that the problem is something else." It is here that social institutions such as schools come forward. After one's parents, a child spends most of the time in school. According to Pathak, "School is usually thought as a constructive agency but when it fails to perform its designated functions, it may become by virtue of its negligence, a main contributor to delinquency."¹³⁸ Schools now days have become a ground for drug abuse and criminal activities. Further the education system being increasingly job oriented rather than being knowledge oriented fails to provide any morals to the students. This therefore leads to activities like drug abuse, peer pressure

and sexual abuse. The last nail in the coffin is inserted by the media. Media particularly movies are a source of great influence upon the youth. However the increase in the objectification of women in films leaves no room for a substance based media. Another pillar of the media is the newspaper. The constant emphasis on sexual violence, dacoity, robbery, theft, murder etc puts a negative influence on the youth. Jerome Motto, says that "newspaper is one of the factors in encouraging suicide". He relied on his research result, "that suicide rate in the Detroit area dropped by 20% during the ten months strike when newspapers were not available". Lastly easy access to pornography influences the youth to indulge in sexual crimes.

Legal Aspect

The primary legislation dealing with juvenile justice is Juvenile Justice (Care & Protection) Act 2015. The act was introduced in 2000. India redesign there court system and formed a new act. The old law which governed the minor delinquents was known as Juvenile Justice Act 1986 and was in conformity with the UN. This was however replaced by the act introduced in 2000. This law was later amended in 2006 and new ideas of vocational programs and apprenticeships were introduced. From then onwards volunteer organizations have been allowed to work with the offender and to provide them work opportunity, job experience and education. The act was again amended in 2015, now it allows children between the age of 16-18 to be tried as adults if accused of some serious crime like murder and rape. Age of offender in this regard has always been a major point of debate. Under section 82 of Indian Penal Code children up to 7 years of age are

¹³⁷ Supra

¹³⁸ Shipra Lavania, 'Juvenile Delinquency' 1517 (1983)



considered to be *dole incapax*. This means that children below a certain age are incapable of determining their intent and consequences of the crime committed. Thus immunity is granted on the grounds that they lack the requisite *mens rea*. The 2015 act has however changed the age cap. Now a new bracket has been introduced i.e a person between the age of 16-18 can be tried as an adult in case of heinous crimes. The act further makes a demarcation between children in need of care and protection and children in conflict with law. While the former includes children who are in adverse conditions, requiring state support to become responsible citizens, the later are those children who have committed crimes. This can become more clear through Maneka Gandhi's statement while debating this act in the parliament- In one case, there is a child whose drunken father beats his mother everyday and inflicts pain on him and his siblings by stubbing cigarettes on their body. One day the child hits back at the father which leads to his death. In another case, few boys of 16 years of age drug a seven-year-old girl and kidnap her. She is kept in a field for three days and is repeatedly raped by these young boys. While in the previous laws, the perpetrators would be left in both the cases by virtue of being "juvenile", in the present scenario the later would be held guilty and tried as an adult. Thus, the intent the acts of the accused have been given prime importance. However our question pertains to the fact whether intent can be judged on the basis of age? What would happen to an accused, who is below the age of 16 years? Assuming 3, 15 year old boys have been

charged of rape¹³⁹. What would be the possible recourse in that case? As per the provisions of the present law they would be sent to a reform home. Therefore, the entire purpose of reprimanding those in "conflict with law" is defeated. With the advancement in technology and easy access to information, the youth of today is more aware about the various aspects of their personality. This includes ones sexual urges. Hence juveniles in case of rape cannot be tried through a hard fast rule of age. In case of offences like theft and counterfeiting the prime motive might be to make money. However the nature of sexual offences is completely different.

Another aspect of this act is the observation homes. Section 39 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 states "*For children in conflict with law the process of rehabilitation and social integration shall be undertaken in the observation homes, if the child is not released on bail or in special homes or place of safety or fit facility or with a fit person, if placed there by the order of the Board.*" Further section 39(3) of the Acts states that, "*The children in need of care and protection who are not placed in families for any reason may be placed in an institution registered for such children under this Act or with a fit person or a fit facility, on a temporary or long-term basis, and the process of rehabilitation and social integration shall be undertaken wherever the child is so placed.*"

However whether these observation homes actually act as reformative agents is a big

¹³⁹ Unknown, India schoolboys arrested for gang-raping classmate (October, 2nd 2019, 10:00AM) <https://www.bbc.com/news/world-asia-india-34941639>



question. Several cases of sexual assaults have been reported. For instance during individual counselling sessions at DSCH (David Sassoon Children's Home), it was noticed that lots of children had been groomed into the sexual abuse process, and many didn't realise they had been victims of the same. With time it was seen that many juveniles had themselves become perpetrators and the authorities even after being aware of such happenings had turned a blind eye. Another issue pertaining to these homes is that in practice children accused of heinous crimes and those accused of serious or petty crimes are made to stay together. The treatment towards both these categories is different. While a child in need of care or protection would be treated with love and affection; a child in conflict with law would be treated more harshly. Thus, preferential treatment towards the former would lead to frustration in the mind of the latter. Further it has been found that more than 15 children are meant to stay together in one room due to lack of infrastructure. This leads to health issues and violent behaviour. What we fail to understand is that these children often come from financially vulnerable backgrounds. Keeping them in such dilapidated conditions would just reinforce negative behaviour. Lastly these homes lack proper administration in terms of the children's daily routine. It has been observed that most children lack a proper daily routine due to which they are sitting idle most of times. Thus the noble intent behind setting up observation homes has been seriously jeopardised by lacklustre enforcement.

Retribution or Reformation?

The entire nation was in shock after the horrific Nirbhaya incident and equally shocking was the involvement of a 17 year old. The incident triggered a debate

surrounding the need to alter the juvenile justice system and reduce the age limit of a juvenile offender to be tried as an adult from 18. Prior to this even if the juvenile had committed a heinous offence, he/she cannot be tried like a hardened criminal. In response to this lacuna, the government passed the Juvenile Justice Bill (Care and Protection of Children) 2015 and thereby allowing the minors in the age groups of 16-18 to be tried as adult in case they commit heinous crimes. Punitive action on the part of the courts usually serves four purposes. They form the 4 theories of punishment. First theory of punishment is the deterrent theory. This tends to protect the entire society from following the footsteps of criminal. Giving punishment for a crime leads to negative conditioning of the people. They form a clear opinion about what is wrong and what is right. Thus the purpose of the deterrent theory is to show the futility of crimes in the society. Secondly, we have the retributive theory. This serves the vindictive side of the society. Any person wronged would want the offender to be punished. Therefore the entire purpose of retribution is to punish the offender and make him pay for his follies. The third theory of punishment is preventive theory. Herein the punishment is given in order to prevent the further commission of the crime by the criminal itself. Lastly and perhaps the essence of juvenile justice is the reformatory theory. Herein the offender is punished with an attempt to re-educate the criminal. Our juvenile justice system is based on the reformatory theory. It is believed that since the person committing the crime is below the age of 18 years, there is a scope for re-altering the discrepancy of the mind. However, with the recent amendment, the system would now be able to successfully balance the reformatory approach with the other approaches of punishment. The youth



of today live in an extremely globalised era wherein the acts of one can be easily imitated by the other. Thus in order to deter the rest of the youth it is important to punish the perpetrators irrespective of age especially in sexual offences. Further, the amendment needs to be credited for introducing a victim centric approach in the juvenile system whereby the interest of the victim as well as the society at large has been taken into consideration.

Juvenile Justice in USA and Pakistan¹⁴⁰

In present era, a movement for the special treatment of juvenile offender has started. There are many different legislation which are framed by the countries related to juvenile delinquency. Juvenile justice is a major concern across the globe, therefore what steps should be taken against a minor who has committed a criminal offence and what law to be made to reduce juvenile delinquency is a major task for law makers. So, different countries have different laws for juvenile justice. Juvenile justice encompasses various aspects such as to ensure the safety, condition, treatment and proper care of a juvenile who is in the custody for committing the delinquent act. Juvenile age range varies from country to country as no universal standards are followed. United Nation made many efforts to unify the juvenile justice among the countries but despites many attempt the failed.

Juvenile justice law in Pakistan: In Pakistan, Juvenile Justice System Ordinance was introduced in 2000. The act was made to protect the ill-treatment towards juvenile offenders.

As per the Pakistan Penal Code criminal responsibility for most of the offence is at 7 and section 83 lays down that any child between the age of 7 and 12 are consider to be doli incapax. In contrast to India any child arrested or detained who is below the age of fifteen and the offence is punishable with imprisonment of less the ten year shall be treated as if he was accused of the commission of a bailable offence. Further if a child is fifteen year and above is arrested ,the court may refuse to grant bail if there are reasonable ground to believe that such child was involved in heinous ,gruesome offence or offence shocking to public and any time before offender convicted of an offence punishable with death or life imprisonment.

Juvenile Justice in United States: The laws of US carry a glimpse of the Common Law system of UK by virtue of being a colony of Britain before independence. In 1825 New York House of Refuges were formed by the United States for the prevention of juvenile delinquency. It was the first juvenile center in North America. This program expanded to various cities in US and in 1899 their first juvenile court took place 1899 in Cook County, Illinois. Guidelines were provided to the judges about the law but in due course of time exceptions were made, rules were broken and juvenile justice took a more flexible approach. Juvenile centers in America were criticized as they were not providing proper facilities and education and not taking proper measures to control the juvenile delinquency. Juveniles thus after completing their sentences would take to crimes again. The history of juvenile crime policy over the course of the twentieth

¹⁴⁰ The reason behind taking Pakistan and United States was that Pakistan, like India is a developing country, while US is a developed nation.



century is a narrative about the transformation of the law's conception of young offenders. At the dawn of the juvenile court era in the late 19th century, most youths were tried and punished as adults. Judge Julian Mack famously proposed in a Harvard Law Review article that a juvenile offender should be treated "as a wise and merciful father handles his own child." Like the other progressive reformers who worked to establish the juvenile court, Judge Mack viewed youths involved in crime first and foremost as children; indeed, by his account, they were no different from children who were subject to parental abuse and neglect.¹⁴¹ Presently, in United States, slogan "adult crime adult time" is being adopted. With regards to age presently, in 38 states of US, upper age of juveniles is seventeen years while in other three states it is fifteen years. In heinous crimes even life imprisonment can be granted to child aged twelve years which is considered to be the maximum punishment¹⁴². Potential Juveniles who can commit serious offences are detained in a secured and sound environment and are further made to participate rehabilitative programs. Additionally rigorous punishments relating to drugs and gang related offences, stringent treatment such as boot camps and blended sentence have also been introduced to put them right¹⁴³. As far as the jurisdiction part is concerned if a child usually 13 or 15 commits a grave and grim crime then their case is automatically shifted to adult court. Jurisdiction of juvenile courts is automatically waived in such cases¹⁴⁴.

Suggestions

Observation homes are a combination of a preventive and reformatory approach. However with the present condition they tend to defy both. What is required is a proper administration of these homes. For this we recommend that the government should conduct regular inspections. Further the authorities rather than being government employees consist of professional psychologists. Instead of employing psychologist for counselling only, they should be involved in the administration of these homes as well. There should be regular medical check-ups in these homes considering the poor sanitation conditions.

Violence against children endangers their fundamental human rights. It is therefore imperative to convince individuals and institutions to commit the time, money, expertise and other resources needed to address this global problem. A number of United Nations instrument reflects a preference for social rather than judicial approaches to controlling Juvenile Delinquency. The Riyadh Guidelines assert that the prevention of Juvenile Delinquency is an essential part of overall crime prevention in Society, and the United Nation Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) recommend instituting positive measures to strengthen a juvenile's overall well being and reduce the need for State intervention. Prevention requires individual, group and organizational efforts

¹⁴¹Manmeet Singh, Juvenile Delinquency in India, U.K. and U.S.A (October , 2nd 2019, 05:10 PM) <http://www.legalservicesindia.com/article/2006/Juvenile-Delinquency-in-India,-U.K.-and-U.S.A.html>

¹⁴² Dr. Shivani Goswami & Dr. Neelu Mehra, Juvenile Justice Systems in United States and India:

Modern Scenario and Much Needed Modifications, Journal of Law and Criminal Justice, 251, 254 (2014)

¹⁴³ Supra

¹⁴⁴ Supra



aimed at keeping adolescents from breaking the law. Thus keeping this in mind Government and Social organizations in India should work hand in hand to spread awareness about delinquent behavior. The awareness should not be restricted to educational institutions only but to places like slums, brothels etc. Furthermore countries across the world use various methods of discouraging delinquent and criminal behavior. While some focus on punitive prevention intended to instill fear in potential offenders by making sure they understand the possibility of severe punishment, or action that may be taken to prevent recurrent crime, which includes explaining the negative aspects of an offence to a delinquent and attempting to reconcile offenders and their victims¹⁴⁵.

As per the Riyadh Guidelines, "A wide range of recreational facilities and services of particular interest to young persons should be established and made easily accessible to them." For instance in a number of towns in the United States the establishment of basketball programs for adolescents led to a decrease in the crime rate by 60%. Keeping this in mind regular vocational activities should be organized by correction homes by the India Government. Though certain homes do offer vocational and educational purposes, they are highly unorganized and lack regularity. Also programs for preventing gang delinquency should endeavor to integrate children and youth into organized group activities. This

can be achieved through social service agencies or organizations such as the YMCA, YWCA, Girl Guides and Boy Scouts, as well as independent activities also serve this purpose¹⁴⁶.

Thus we can conclude that, a law would not be sufficient to prevent delinquent behaviour. A collective effort by the society and government together needs to be taken in order to safeguard the future of our nation.

¹⁴⁵ Ebere Sunday Chisom, Knowledge And Awareness Of Juvenile Delinquency Services By The Residence Of Nsukka Local Government Area (October, 2nd 2019, 4:30 PM) https://www.researchgate.net/publication/306281208_KNOWLEDGE_AND_AWARENESS_OF_JUVENILE_DELIQUENCY_SERVICES_BY_THE_RESIDENCE_OF_NSUKKA_LOCAL_GOVERNMENT_AREA

¹⁴⁶ United Nations. Dept. of Economic and Social Affairs, World Youth Report, 2003: The Global Situation of Young People (2003)



REBUS SIC STANTIBUS: A CRITICAL ANALYSIS

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Introduction to the Concept

International Law is based on a number of sources. One amongst them is treaties. One of the most authentic sources of Public International Law, the treaties constitute an essential factors in making the International Law, a proper and binding law. One of the provisions in the Vienna Convention on Law Of Treaties which gives a binding effect to the treaties is Article 26 which states that, “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” The article is embodied in the maxim of “Pacta Sunt Servanda”. Generally, treaty will prevail if the circumstances around it are relatively stable and do not go through significant change in accordance with what is promised. The parties of the treaty in this condition, do not automatically have reasons to get away unilaterally from the agreement. The breach of a treaty as per this doctrine will have legal implications. However, certain exceptional situations may arise which may leave the continuation of treaties redundant for the signatory state/states. Contemplating such a situation, the International Law makers incorporated the doctrine of Rebus Sic Stantibus. The concept of *rebus sic stantibus* (Latin: “things standing thus”) stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question. An obvious example would be one in which a relevant island has become submerged. Being an exception to the principle of pacta sunt servanda, the doctrine was previously

known as *clausula* due to its express assertion in many treaties.

The central figure in the formulation of *rebus sic stantibus* was the Italian jurist Scipione Gentili (1563–1616), who is attributed for coining the maxim *omnis conventio intelligitur rebus sic stantibus* ('every convention is understood with circumstances as they stand'). Another major contributor was the Swiss legal expert Emer de Vattel who advanced the view that 'everybody bound himself for the future only on the stipulation of the presence of the actual conditions' and so 'with a change of the condition also the relations originating from the situation would undergo a change'. A major shift occurred during the 19th century, wherein the civil law came to reject the doctrine of *clausula rebus sic stantibus*, but Vattel's thinking continued to influence international law, not least because it helped reconcile 'the antagonism between the static nature of the law and the dynamism of international life'. In the 19th century the clause passed through a period of remarkable influence which culminated in the Italian and German interpretations of the doctrine. These countries availed themselves of the tempting possibilities of a not too scrupulous application of the clause on their way to national unity, thus enabling themselves to excuse acts the legality of which would otherwise have been doubtful. However, the doctrine suffered a serious hitch with the rise of the positivist school of law.

PRESENT CONTEXT

This maxim is embodied Under Article -62 of the Vienna Convention on Law Of Treaties and states

“1) A fundamental change of circumstance which has occurred with regard to those existing at the time of the conclusion of a



treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless :

*a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and
b) The effect of the change is radically to transform the extent of the obligation still to be performed under the treaty”*

2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

*(a) If the treaty establishes a boundary; or
(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.*

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Let us now analyse the provision. It would be prudent to analyse the term “fundamental change in circumstances”. This term forms the very essence of the principle. This scope this term even though not directly was examined in the landmark case of *Gabčíkovo–Nagymaros Project case*¹⁴⁷, where the International Court concluded that:

“The changed circumstances advanced by Hungary are, in the Court’s view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental

change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances should be applied only in exceptional cases.”

To understand the aforesaid provision better, it would be prudent to relate it with the Law of Contracts. In *Trans World Airlines, Inc. v. Franklin Mint Corp*¹⁴⁸, Madam Justice Sandra Day O'Connor of the Supreme Court of United States wrote¹⁴⁹:
“A treaty is in the nature of a contract between nations. The doctrine of *rebus sic stantibus* does recognize that a nation that is party to a treaty might conceivably invoke changed circumstances as an excuse for terminating its obligations under the treaty.”

The above provision contemplates situations which would leave the performance of the obligations under treaties impossible. Similarly in the law of Contracts, the concept of frustration is incorporated, which gives a right to a party to terminate a contract if vital change has occurred in circumstances under which the contract was entered into. The doctrine of frustration is recognised under the Indian Contract Act, 1872 under Section 56 which states the following:

“Contract to do act afterwards becoming impossible or unlawful: A contract to do an

¹⁴⁷ *Gabčíkovo–Nagymaros Project, Hungary v Slovakia* [1997] ICJ Rep 7

¹⁴⁸ 466 [US](#) 243 (1984)

¹⁴⁹ *Rebus Sic Stantibus* Definition available at <http://www.duhaime.org/LegalDictionary/R/RebusSicStantibus.aspx> (Visited on 15th October 2019)



act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

For instance, A contract to act at a theatre for six months in a consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void. Coming back to the context of Public International Law, for instance State A and State B have entered into a treaty to make investments in each others trade. Later on the financial stability of the State A is jeopardised due to various reasons. The performance of treaty obligations on the part of State A would become impossible and hence the state would have the right to withdraw from the treaty.

The question now arises as to the effect of the termination of the treaty under this doctrine. As discussed above, this doctrine gives a right to the party/parties to withdraw from the treaty in case of changed circumstances. If interested parties in a treaty have similar perception that an underlying change has occurred and made it impossible to embody the treaty, consequently both parties can dispose the issue in an amicable manner¹⁵⁰. If the parties fail to reach on a similar consensus legal dispute will be inevitable. Disputes are a regular part of any legal system. If a dispute happens in the milieu of national law, the settlement is enforceable in two ways. First, legislative body may enact legislation or in other form of regulation that formulate fundamental change of circumstances with distinct limitations¹⁵¹. Disputing parties

may refer to those regulations as a legal basis for dispute settlement. Second, if a dispute cannot be settled, the Judge of the Court will release a binding decision for both disputing parties as a dispute resolution¹⁵². In the milieu of international law, the circumstances are different. International community does not have a Central Government or a Legislative Body who may enact regulation that is generally accepted or a Court that requires State as international law actor to abide by the Jurisdiction of the Court¹⁵³. Dispute settlement from a treaty is fully delegated to the State parties of the treaty.

The effects of the termination of treaty are further contemplated under Article 70 of the Vienna Convention provides that:

“1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.”

Further Article 72 provides that:

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

¹⁵⁰ D. Sidik Suraputra, “Doctrine Of Rebus Sic Stantibus And Law Of International Treaty” Jurnal Hukum Internasional 462(2014)

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Ibid



(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

WHETHER THIS DOCTRINE IS USEFUL TODAY OR NOT?

Such a question is difficult to answer and depends largely on the conduct of the states. Nations dissatisfied with the status quo continue to regard it as a welcome device for escaping from burdensome treaties, while others fear it as a threat to stability and to their interests. Notwithstanding the fact that the fundamental change of circumstances principle is yet to be discussed in a case and International Court of Justice is yet to take a stand, it needs to be cognized by the interested parties. However the usefulness of the doctrine has been analysed in the past by many jurists. Legal experts like Oppenheim and classical scholars like Fauchille and Bonfils believed that every international accord like every contract includes an implied condition, according to which, it is permanently presumed that in an international agreement as long as everything is in its normal state, the agreement is valid and enforceable. On the other hand jurists like Lord Me Nair, Anzilotti and Burkardt hold a different opinion and discuss the aspect of will in the doctrine. According to Anzilotti an

agreement is the product of exercising rights and performing obligations according to the wills of the parties to the contract. In the other words, it is the opinion of the parties according to their will, that they have undertaken and fixed the limits which they wanted. Thus, with the passage of time, the core circumstances under which the parties exercised their will and entered into the treaty are bound to change. Such a shift in the fundamental circumstances gives both the parties the right to withdraw from the treaty. Such explanations seem to hold validity in the present context as well. In a time where states are becoming increasing conscious about their own growth, the invocation of the doctrine of *rebus sic stantibus* becomes valid. However this doctrine does not come without its own limitations. There are jurists who have propounded against the use of this doctrine. Hans Kelson has negated the doctrine absolutely. As a jurist he held great respect for the doctrine of *Pacta Sunt Servanda* and hence advocated that the clause of "Rebus" or the "Rule of Changed Circumstance" is harmful for the ultimate goal of international law which is the continuation of the judicial stability or equilibrium of the laws. In his 1929 treatise on international law, Henry Wheaton noted that there were several ways in which a state claim to be free of treaty obligations¹⁵⁴. Many treaties contain opt-out mechanisms.

But as to *rebus sic stantibus*, treaties:

"... are liable to dissolution on demand of one of the parties on a vital change of circumstances, on the principle *conventio omnis intelligitur rebus sic stantibus*.

"It is clear that (*rebus sic stantibus*) is a very dangerous factor and that it cannot be

¹⁵⁴ Rebus Sic Stantibus Definition available at <http://www.duhaime.org/LegalDictionary/R/RebusSicStantibus.aspx> (Visited on 15th October 2019)



misused but, on the other hand, the principle that no treaty can be broken is equally dangerous. It is fair to say that each state contracts in the belief that it is not endangering its national life and development, and if a treaty in fact proves to threaten these essentials, it can insist on revision or cancellation. Yet there must be grave cause; mere loss or inconvenience is not enough...." This doctrine was widely used from the period towards 1914, to escape from burdensome treaties, and it continued to the period between the First and the Second World War. Rebus Sic Stantibus principle has been applied by Austria – Hungary in 1908 as a justification for annexation of Bosnia and Herzegovina based on the Treaty of Berlin 1878 and the Convention of Constantinople which granted rights to Austria – Hungary to occupy or run the government. Also on the basis of this principle, Switzerland laid claim to plea for the 1909 treaty with Germany and Italy in regards to the rail road of Saint Gothard and in respect of this, Germany had granted its approval. The application of Rebus Sic Stantibus principle by States in the European region continued after the First World War ended. The application of the Rebus Sic Stantibus doctrine came to an end in April 1924. Russian government, at that time, was at the opinion of that the treaty between Russia and other European powers, despite it needed to be ceased to be current, were not automatically expired although since the signing of the treaty there was a variance in international situation and affected the continuity of the validity of the treaty. Before judgment was taken to terminate the treaty, the validity of those treaties had to be seen, in the first instance, from the Rebus Sic Stantibus point of view. The rapidly ongoing change of circumstances in

international community may induce the possibility of demand from interested party to amend provision laid down in a treaty, even to terminate the validity of a treaty which is attributed to the conditions in the treaty that have prevailed for long are no longer suitable for the current condition, therefore such treaty is no longer operational. However, till date the ICJ is yet to formulate a concrete stand pertaining to the doctrine which the Permanent Court of International Justice refused to take in the case of *Free Zones of Upper Savoy and the District of Gex, France v Switzerland*¹⁵⁵.

In conclusion, the researchers are of the opinion that though the doctrine of rebus sic stantibus comes with its own limitations, its usage is but inevitable in the present context. The researchers are of the opinion that signatory states of the Vienna Convention on the Law of Treaties need to take an initiative and approach the International Court of Justice to take a concrete stand on the issue.

¹⁵⁵ 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19)



EMERGENCE OF UNCLOS III : THE FALKLAND ISLANDS DISPUTE

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ABSTRACT

The United Nations convention on law of Sea was introduced with the induction of maritime laws for the accession of countries over the water bodies. The waters have always been mired with disputes and have been witness to power wars based on navel strengths of competing nations. The question remains on how successful the charter has been in retaining harmony and dignity among the countries. The paper takes a peek into the history of the dispute of Falkland Islands and presents the status quo. It also focuses on the inception of the Convention on the law of the Sea and also shows the importance of the Convention in relation to the dispute between the two countries. Further, it also provides insights on the loopholes in the convention, its implementation and importance.

1.INTRODUCTION

1.1-History of Falkland Islands

The Falkland islands have always garnered attention for being a nodal centre of dispute and associated with pride for the United Kingdom and the Argentine Republic.¹⁵⁶ France was the first country to establish de facto control in the Falkland Islands, with the foundation of Port Saint Louis in East Falkland by French explorer Louis Antoine de Bougainville in 1764. The French colony

consisted of a small fort and some settlements with an initial population of around 250 people. The Islands were named after the Breton port of St. Malo as the *Îles Malouines*, which remains the French name for the islands. In 1766, France agreed to leave the islands to Spain, with Spain reimbursing de Bougainville and the St. Malo Company for the cost of the settlement. France insisted that Spain maintain the colony in Port Louis to prevent Britain from claiming the title to the Islands, and Spain agreed.¹⁵⁷

After the agreement, Spain took over the control of the islands claiming it to be a part of Treaty of Utrecht wherein with the colonisation provided for the benefit of the failure of the French king Louis XIV's nephew Philippe of Orleans.¹⁵⁸ With the take-over by the Spanish monarch, the decision was made to change the name of Port Saint Louis to Port Soledad in 1767.¹⁵⁹ After the annexation, a Spanish expedition expelled the British colony at Port Egmont, and Spain took de facto control of the Islands. Spain and Great Britain came close to a war over the issue but instead, concluded a treaty on 22nd January 1771, allowing the British to return to Port Egmont with neither side relinquishing sovereignty claims.¹⁶⁰ However, after a while, the British again left Port Egmont in the year 1774, leaving behind a flag to mark it as a British land. Subsequently, the freedom of Argentina from the Spanish Colonialism marked the birth of a triangular dispute in the Falkland island dispute.

¹⁵⁶ Calvert, Peter (July 1983). "[Sovereignty and the Falklands crisis](#)". *International Affairs*. Chatham House RIIA. **59** (3): 406. [ISSN 0020-5850](#)

¹⁵⁷ Laver, Roberto C. [The Falklands/Malvinas Case Breaking The Deadlock in the Anglo-Argentine Sovereignty Dispute, Developments in International Law, V. 40 \(Book 40\)](#)

¹⁵⁸ *Queen Anne: The Politics of Passion*. Harper Press. p. 470. [ISBN 978-0007203765](#).

¹⁵⁹ Utrecht charter Article XX.

¹⁶⁰ Harris, Chris (27 May 2002). "[Declarations signed by Masserano and Rochford January 22nd 1771](#)". *The history of the Falkland Islands*. Archived from [the original](#)



The Argentine Republic in 1824 granted permission to a Buenos Aires based businessman to trade on a piece of land on the East Falkland island.¹⁶¹ Subsequently, the ship had to return following failure of measures to establish trade. Similarly, after the sanction from the British Government, the Argentine Government again tried to create an establishment. However, lack of proper availability of resources created a vacuum resulting in the withdrawal of the troops and the civilians. The 1850 Convention of Settlement, otherwise known as the Arana-Southern Treaty, which did not mention the islands, agreed to restore "perfect relations of friendship" between the two countries.

There were no further protests until 1885, when Argentina included the Falkland Islands in an officially sponsored map.¹⁶² This resulted in a tense region witnessing protests and flexing of muscles by both sides. However, with the onset of the World War II, the British commenced on a journey to lose out on the colonies in Asia, Africa and Europe. At this juncture, the Argentine Republic sought the opportunity to gain control under the banner of the ruler Juan Paron by claiming its stake on the Falkland Islands at the United Nations. Following the claim, the United Kingdom decided to ask the Republic of Argentina to take up the matter in International Court of Justice which was eventually rejected by the former.

In 1965, the United Nations passed a resolution calling on the UK and Argentina to proceed with negotiations on

seeking a peaceful solution to the big sovereignty question which would be "bearing in mind the provisions and objectives of the Charter of the United Nations and of General Assembly resolution 1514 (XV) and the interests of the population of the Falkland Islands (Malvinas)."¹⁶³ After the two nations signed the Communications Agreement of 1971,^[49] whereby external communications would be provided to the Falkland Islands by Argentina, the Argentine Air Force broke the islands' airways isolation by opening an air route with an amphibious flight from Comodoro Rivadavia with Grumman HU-16B Albatross aircraft operated by LADE, Argentina's military airline.

In 1972, after an Argentine request, the United Kingdom agreed to allow Argentina to construct a temporary air strip near Stanley. On 15th November 1972, a temporary runway was inaugurated with the first arrival of a Fokker F-27; subsequent flights arrived twice weekly. Flight services improved in 1978 with the arrival of Fokker F-28 jets, after the completion of a permanent runway funded by the British Government. This service, the only air connection to the islands, was maintained until the 1982 war.¹⁶⁴

1.2-The War of 1982

In the period leading up to the war—and, in particular, following the transfer of power between the military dictators General Jorge Rafael Videla and General Roberto Eduardo Viola late in March 1981—Argentina had been in the midst of devastating economic stagnation

¹⁶¹ Jorge Pacheco, Buenos Aires, 1823

¹⁶² Charter Article 3, 1850.

¹⁶³ ["UN 2065 \(XX\). Question of the Falkland Islands \(Malvinas\)". Resolutions adopted on the reports of the Fourth Committee.](#) United Nations. 16 December 1965.

¹⁶⁴ [H.Cámara de Diputados de la Nación Archived](#) 29 November 2012 at [Archive.today](#). Ciudad Autónoma de Buenos Aires. 25 August 2006



and large-scale civil unrest against the military *junta* that had been governing the country since 1976.¹⁶⁵ Later on in December 1981, there was a further change in the Argentine military regime, with the takeover by a new *junta* headed by General Leopoldo Galtieri (acting president), Air Brigadier Basilio Lami Dozo and Admiral Jorge Anaya. Anaya was the main architect and supporter of a military solution for the long-standing claim over the islands,^[13] calculating that the United Kingdom would never respond militarily.

In December 1981, a new military junta led by General Leopoldo Galtieri determined that the islands should be retaken by the 150th anniversary of this event, if necessary, by force. Though the British government had shown little interest in the islands, it stood by a commitment to the islanders, made first in 1968, that gave them the final say over whether sovereignty should be transferred to Argentina.¹⁶⁶ The island of South Georgia, uninhabited other than by the British Antarctic Survey, was administratively linked to the Falklands and also claimed by Argentina, although its constitutional history was quite different. An Argentine scrap metal merchant had a legitimate contract to clear up an old whaling station.¹⁶⁷ His men were taken to the island by the Argentine Navy avoiding any formalities that would have acknowledged Britain's sovereignty. Their aim was to establish a long-term presence as a means of asserting Argentina's sovereignty. This incident triggered a full-blown crisis. The junta was convinced that the British would use the crisis to reinforce their naval presence in the South Atlantic,

thwarting any later attempts to take the Falklands. They decided to implement their occupation plans at once.

On 2nd April, the Falklands was seized followed by South Georgia a few days later, after spirited resistance from the small Royal Marines garrison. A plea by US President Reagan to General Galtieri not to go ahead was ignored. This was a critical moment for British Prime Minister Margaret Thatcher. She had gained a reputation for being tough yet was about to preside over the loss of sovereign territory. The Royal Navy came to her rescue. The First Sea Lord, Sir Henry Leach, insisted it would be possible to send a task force to retrieve the islands and that it could leave in a few days. The fact that this proved to be the case was testament to an extraordinary effort by the armed forces to pull together people and equipment at great speed and equal measure. It also reflected poor Argentine timing, because they had picked a moment before British naval cuts agreed in 1981 had taken effect, and when one chunk of the fleet was gathered close to Gibraltar for exercises while the rest was back at port.

The fact that the Prime Minister could announce that a task force was sailing meant that political attention soon moved on from the humiliation of being caught (helped by the resignation of foreign secretary Lord Carrington) and on to the campaign. The initial assumption was that sending a task force would create conditions for a diplomatic settlement. The US Secretary of State Alexander Haig shuttled between London and Buenos Aires trying to strike a deal. Later, even after serious fighting had begun, the UN

¹⁶⁵ Boughton, James M. (2001). ["Silent Revolution: The IMF 1979–1989"](#) (PDF). IMF. pp. 328–329. Retrieved 28 June 2019.

¹⁶⁶ <https://www.historyextra.com/period/20th-century/falklands-war-history-facts-what-happened/>

¹⁶⁷ General Jaltu's diary of impugny p.209



Secretary General Javier Perez de Cuellar also tried. The British agreed to substantial concessions, including a measure of Argentine influence over an interim administration while talks over the long-term future of the islands went ahead. The junta, however, could not bring itself in the end to concede that the talks might not end with a transfer of sovereignty.

Diplomatic activity filled the weeks as the British task force sailed down south. Meanwhile, the Argentine navy sought to catch the British fleet in a pincer movement. Woodward's hope had been that a British submarine would be able to attack the sole Argentine aircraft carrier but it had not been found. Meanwhile, the old Argentine cruiser; the General Belgrano, had been found by a submarine, HMS Conqueror. As this was outside the "exclusion zone" around the Falklands, within which the British had warned that any Argentine vessel could be sunk, a change in the rules of engagement was needed to permit an attack. This was agreed and the Belgrano was torpedoed by Conqueror on 2nd May even though the Argentine pincer movement had by then been called off and the cruiser had turned away. This, and the loss of 323 lives in the attack led to a controversy later, including erroneous claims that the torpedo strike was really about scuppering a new peace initiative. The military effect was exactly as intended, as the Argentine navy never again ventured out. Argentina gained revenge on 4th May when the Super-Etendard aircraft executed an Exocet missile attack on HMS Sheffield.

The next most deadly bout of fighting came on 21st May when 5 Commando Brigade

landed at Port San Carlos. The initial landing was unopposed, but soon waves of Argentine aircraft came in. Over the next few days, the ships of the task force took a battering, with four of them sunk and others damaged. By the end of the month, many men and equipments were ashore and the fight switched from being a water borne one to one on the land. The first battle for Darwin and Goose Green settlements was extremely hard fought and led to the death of the commanding officer of 2 Para, Colonel "H" Jones.¹⁶⁸ The British launched their final push in a series of short but intense battles until the collapse of the Argentinian will. On 14th June 1982, the Argentine garrison surrendered.

The war cost the lives of around 650 Argentinian and 253 British folks and did not settle the dispute: Argentina still lays its claim over the Falklands. Had the Falklands been left to fend for themselves in 1982, the de-population would have eventually made the place unviable. Instead the victory led to firmer British commitment, resulting in a more prosperous and secure Falkland than ever before.

2. THE UN CONVENTIONS ON THE LAW OF THE SEA

2.1- History

The oceans had long been subject to the freedom-of-the-seas doctrine; a principle put forth in the seventeenth century to essentially limit the national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all and belonging to none. While this situation prevailed till the twentieth century, there was an impetus to extend national claims over offshore resources by

¹⁶⁸ The night of Falkland massacre, 1982. R Jones, 1988. P. 104



the mid-century. There was growing concern over the toll taken on coastal fish stocks by long-distance fishing fleets and the threat from pollution and wastes from transport ships and oil tankers carrying noxious cargoes that plied sea routes across the globe. The hazard of pollution was ever present, threatening coastal resorts and all forms of ocean life. The navies of the maritime powers were competing to maintain their presence across the globe on the surface waters and even under the sea. The onset of sea trade further increased the use of waters which began to be prioritised over land. With the waters becoming nodal power centres, the need to facilitate the ongoing power tussle became even more vigorous. The countries subsequently decided to use the waters for their tactical purposes and annexed over various other sovereign states.

The sea also became a battleground resulting in misuse of nature and thereby creating disharmony amongst the nations. A tangle of claims, widespread pollution, competing demands for lucrative fish stocks in coastal waters and adjacent seas, growing tension between coastal nations over rights to these resources and those of distant-water fishermen, the prospects of a rich harvest of resources on the sea floor, the increased presence of maritime powers and the pressures of long-distance navigation and a seemingly outdated, if not inherently conflicting, freedom-of-the-seas doctrine - all these were threatening to transform the oceans into another arena for conflict and instability.¹⁶⁹

Due to such benefits of the waters, various countries started indulging in creation of

such rifts. In 1945, President Harry S Truman, responding in part to pressure from domestic oil interests, unilaterally extended United States jurisdiction over all the natural resources on that nation's continental shelf- oil, gas, minerals, among others. This was the first major challenge to the freedom-of-the-seas doctrine. Other nations followed suit soon. In October 1946, Argentina claimed its shelf and the epicontinental sea above it. Following which, Chile and Peru in 1947 and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas. The failure to adhere to the motions and boundaries in furtherance increased the possibility of successfully waging war through waters instead of land which was evidential during the times of Cuban missile crisis that eventually would have led to another world war if not controlled at that point of time.¹⁷⁰

On 1st November 1967, Malta's Ambassador to the United Nations, Arvid Pardo, asked the nations of the world to look around them and open their eyes to a looming conflict that could devastate oceans, the lifeline of man's very survival. In a speech at the United Nations General Assembly, he spoke of the Superpower rivalry that was spreading to the oceans, of the pollution that was poisoning the seas, of the conflicting legal claims and their implications for a stable order and of the rich potential that lay on the seabed. Pardo ended with a call for "an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction". He had added, "it is

¹⁶⁹https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective

¹⁷⁰ Cuban missile crisis



the only alternative by which we can hope to avoid the escalating tensions that will be inevitable if the present situation is allowed to continue".¹⁷¹ Subsequently, in total, three conventions were held in due course of time which consequentially resulted in drafting and then passing of a resolution on the charter of laws related to the sea.

2.3- The Convention

Navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and a more unique feature of a binding procedure for settlement of disputes between States - these are among the important features of the treaty. In short, the Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring about a stable order to mankind's very source of life.

"Possibly the most significant legal instrument of this century" is how the United Nations Secretary-General described the treaty after its signing. The Convention was adopted as a "Package deal", to be accepted as a whole in all its parts without reservation on any aspect. The signature of the Convention by Governments carries the undertaking not to take any action that might defeat its objects and purposes. Ratification of, or accession to the Convention expresses the consent of a State to be bound by its provisions. The Convention came into force on 16th

November 1994, one year after Guyana became the 60th State to adhere to it.

Across the globe, Governments have taken steps to bring their extended areas of adjacent ocean within their jurisdiction. They are taking steps to exercise their rights over neighbouring seas, to assess the resources of their waters and on the floor of the continental shelf. The practice of States has in nearly all respects been carried out in a manner consistent with the Convention, particularly after its entry into force and its rapid acceptance by the international community as the basis for all actions dealing with the oceans and the law of the sea.

The definition of the territorial sea has brought relief from conflicting claims. Navigation through the territorial sea and narrow straits is now based on legal principles. Coastal States are already reaping the benefits of provisions giving them extensive economic rights over a 200-mile wide zone along their shores. The right of landlocked countries of access to and from the sea is now stipulated unequivocally. The right to conduct marine scientific research is now based on accepted principles and cannot be unreasonably denied. The International Seabed Authority, which organizes and controls activities in the deep seabed beyond national jurisdiction with a view to administer its resources is already established and functioning and so is the International Tribunal for the Law of the Sea, which has competence to settle ocean related disputes arising from the application or interpretation of the Convention.

¹⁷¹https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective



Wider understanding of the Convention will bring wider application. Stability promises order and harmonious development. However, Part XI, which deals with mining of minerals lying on the deep ocean floor outside of nationally regulated ocean areas, in what is commonly known as the international seabed area, had raised many concerns especially from industrialized States. The Secretary General, in an attempt to achieve universal participation in the Convention, initiated a series of informal consultations among States in order to resolve those areas of concern. The consultations successfully achieved in July 1998, an Agreement Related to the Implementation of Part XI of the Convention. The Agreement, which is part of the Convention, is now deemed to have paved the way for all States to become parties to the Convention.

3. IMPORTANCE OF THE CONVENTION TO THE DISPUTE

The Convention has codified and defined the various aspects and sub-sections of the varied laws. The Falkland island has earned a specific geographical tag for its supply of rare breed fish which is a big boon. This can boost the economy of both the countries in dispute. The island is also strategically located in terms of political warfare with its connection to the south of America and Western Africa, which in turn is advantageous for economical trade.

3.1- Judgement by the United Nations

The UN Commission on the limits of the continental shelf life sided with Argentina, ratifying the country's 2009 report fixing the limit of its territory at 200 to 350 miles

from its coast.¹⁷² The Argentine foreign ministry said its waters had increased by 1.7 million square km (0.66 million square miles) and the decision will be the key in its dispute with Britain over the islands. With the coming in of the amendment, the decision was made by the Argentine Government to further increase the territorial terrain and thereby the economic benefits. With the oil industries coming up and millions of dollars being invested into the island, the territorial control will rapidly help Argentina in increasing the economic strength. However, many islanders remain concerned about Argentina's claim as well as the potential for problems from rapid changes ushered in by the new industry. This decision has also subsequently resulted in a diplomatic comment by the British Government wherein it stated that the Sovereignty of the Falkland island must be retained and the people cannot be impounded with the Argentine laws unless consented by the people themselves. The dispute per se is still intact and the war of words have been sufficient enough. Subsequently though, the war has not got any colder.

4. IMPLEMENTATION AND LOOPHOLES OF THE CONVENTION

The Conventions on Law of Seas that was signed in 1982 and came into effect in 1994 was successfully signed by 157 countries as parties to the third Convention. The clarity in terms of specifying the borders and places meant for economical purposes has successfully been able to work on paper and has also benefitted countries in terms of providing peace and a defined border which was previously a stress inducer amongst the nations and resulted in cross border disputes on water. Furthermore, the nations

¹⁷²<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.html>



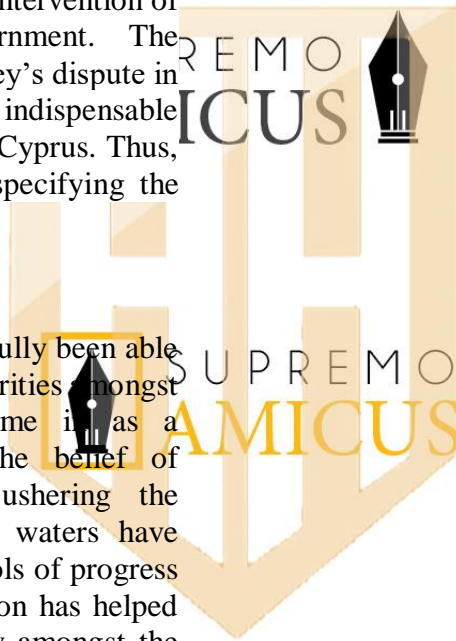
could freely indulge in financial trade on the waters, thus helping them attain economic independence.

the islands, instead of the spotlight being on the pride of the nations in conflict.

However, the Convention was not completely successful in terms of implementation of the rules and regulations which led to a paradoxical paradise for a few countries. While the Convention systematically officiated the boundaries, it however failed to mention the semi-boundaries wherein the borders were shared with common water bodies. The South China Sea dispute epitomises the conflict and so does the Japan and Laos rift, which subsequently resulted in the intervention of the United States Government. The Mediterranean crisis of Turkey's dispute in furtherance caused the indispensable dispute with Azerbaijan and Cyprus. Thus, the Convention did fail in specifying the semi-border dispute.

5. CONCLUSION

The Convention has successfully been able to reduce the increasing disparities amongst the countries and has come in as a revolutionary ideal with the belief of creating an environment ushering the betterment of nations. The waters have successfully been used as tools of progress by nations and the Convention has helped retain peace and sovereignty amongst the countries. The Falkland Island war cannot be taken off the charts completely as the dispute still exists in various parts of the world. However, the Convention has definitely helped set limits that have in turn aided the Court to identify and distinguish on certain key matters. Thus, the dispute needs to be handled carefully and understood in accordance to the choice of the people; as the need of the hour is to usher in peace and harmony around the world as well as for the people residing in





**INTERPRETING
STATUTORY LICENSING UNDER
SECTION 31D OF THE COPYRIGHT
ACT**

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Abstract

The present research article involves a substantial question of law of wide-ranging importance pertaining to the interpretation of Section 31D of the Copyright Act, 1957 as amended by the Copyright Amendment Act, 2012. The question of law arising for interpretation maybe stated as under:

- (a) Whether Internet broadcasting is covered under the purview of Section 31D of the Copyright Act, 1957?
- (b) Whether the Government can exercise its powers to come up with an Office Memorandum that goes beyond the statutory law?

The Government of India through the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, vide an Office Memorandum dated 5th September 2016 ('the Memorandum'), issued under the Act, had sought to state that the provisions of Section 31D of the Copyright Act are not just restricted to radio and television broadcasting but cover even internet transmissions. The present article discusses in detail the contents of the said Office Memorandum, F.NO. 14-35/2015-CRB/LU (IPRVII), dated 5th September 2016 issued under the Act, as being

contrary to the Act and ultra-vires Section 31D.

Introduction

The object of the Copyright Act, 1957 ('the Act'), enacted on 04.06.1957,¹⁷³ is to encourage authors, composers, artists and designers to create original works by rewarding them with the exclusive right for a limited period to exploit the work for monetary gain. It protects the writer or creator of the original work from the unauthorized reproduction or exploitation of his materials. Copyright subsists only in the material form in which the ideas are expressed. Furthermore, the Copyright Amendment Act, 2012 ('the Amended Act')¹⁷⁴ inserted section 31D by which broadcasting organizations desirous of communicating any work to the public by way of a broadcast or by way of a public performance of a literary or musical work and sound recording which has been already published may do so, subject to the compliance requirements under the Section. The amended section authorizes the Copyright Board to grant licenses to communicate to the public by way of a broadcast or performance of a literary or musical work and sound recording, which has already been published after paying Royalty fixed by the Board.

Power of the Government

The point of discussion of this part of the article is whether the Government had power, competency or jurisdiction to formulate any rules under the provisions of the Copyright Act, 1957 read with the Copyright Rules, 2013 ('the Rules')¹⁷⁵ and whether the provisions of the Memorandum are vague and arbitrary and fail to disclose

¹⁷³ The Copyright Act, 1957, accessed through Manupatra.

¹⁷⁴ The Copyright Amendment Act, 2012, accessed through Manupatra

¹⁷⁵ The Copyright Rules, 2013, accessed through Manupatra



any objective criteria for including internet transmissions, as opposed to communication to the public by “broadcasting”, both under the purview of Section 31D.

Vide Section 2(ff)¹⁷⁶, the Act gives out the definition of “communication to public” as hereunder:

“(ff) “communication to the public” means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Explanation.-For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public”

The drafters of the Copyright Act contemplated the impact of new technologies to broadcasting organizations and the concept of broadcasting. They carefully updated the concept and decided against including internet transmissions within the definition. It can be thus argued that Section 31-D(3), the Copyright rules, 2013 and the legislative history preceding the passage of the Copyright Act 2012 clearly support the contention that the exercise of a section 31-D license is

restricted to television and radio broadcasting and not internet streaming.

Under Rule 31 of the Copyright Rules, 2013¹⁷⁷ the Copyright Board is obligated to commence the process of fixation of royalty, either *suomotu* or on receipt of a request from “*any interested person*” (not just a broadcaster). This clearly indicates that on an application being made by any interested person or even *suomotu*, the Appellate Board may fix an industry wise royalty and this royalty, can then be used as the basis for individual broadcasting organizations, giving their respective notices under Section 31-D and Rule 29.

The Office Memorandum dated September 5, 2016.

The office memorandum dated September 5, 2016 (F-No 14-35/2015-CRB/LU (IPR VII) issued by the Department of Industrial Policy and Promotion (DIPP), noted that the provision under Section 31D covered ‘*internet broadcasts*’ as well.¹⁷⁸ The Department has sought to interpret Section 31D of the Act with respect to Section 2(ff) as stated above, in order to bring internet transmission under the purview of Statutory Licensing u/s 31D. By way of such an office memorandum, the Department has come out with a complete vague and arbitrary interpretation of the said section that directly goes beyond the scope of the statute in place and the rules therein.

The Copyright Act, 1957 was legislated upon by the Parliament of India and brought into force well accepted legal tenets. Under the constitutional scheme, it is the courts of law that are tasked with the

¹⁷⁶ Supra Note 1

¹⁷⁷ Supra Note 3

¹⁷⁸ Ministry of Commerce and Industry, Government of India, Office Memorandum,

https://dipp.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf, accessed on 10th of October



primary duty of interpreting the statutory enactment. That the government agencies may also interpret the various provisions provided that the statute itself provides some scope for them to do so.

Although, such an initiative and interpretation might be necessary to offer guidance to copyright stakeholders, it still might be wrong at law and desolately fall outside the constitutional competence of the Department to issue such a memorandum. Section 31-D clearly does not contemplate a fixation of rates for subjects other than television and/or radio broadcasting. Any doubts *qua* this position are dispelled by the Statement of Objects and Reasons and the 227th Rajya Sabha Parliamentary Standing Committee Report that deliberated on the Copyright Bill, 2010.¹⁷⁹ The legislative decision to not provide for a statutory license in respect of internet streaming is thus a conscious choice. The Rules merely effect this decision and only prescribe the procedure for determining royalty in respect of television broadcasting and radio broadcasting.

It is an established law that using any such Office Memorandum that overrides the Parent Law is unjustified and tantamount to violating the Law and encouraging further violations. In fact, regularizing such complete violations of the Laws of the Land by issuing Office Memorandums only encourages more violations of the Copyright Act, 1957 and the subsequent Copyright Rules, 2013. Any such regularisation and weak action directly demeans Copyright governance of the country and the Ministry of Commerce and Industry itself.

The issue here is not whether or not the interpretation put forth by the Government/Department vide the Office Memorandum is the correct one, but whether or not the Government/Department is constitutionally competent to issue such an interpretation in the first place. Section 31D of the Act does not empower the Government/Department to frame rules with relation to matters arising out of issuance of Statutory licenses under it. It is pertinent to mention that the Department of Industrial Policy and Promotion has nothing to do with section 31D of the Copyright Act or the issuance of statutory licenses under it. That power vests with the Appellate Board, which is an independent tribunal and not an agency of the Government/Department.

The provisions of the Act do not empower the Department to formulate rules and regulations with respect to statutory licenses under section 31D of the Act. As per Section 78 (2) (b) and Section 78 (2) (CD), the Central Government can make rules to provide for '*the form of complaints and applications to be made, and the licenses to be granted*' and '*the manner in which prior notice may be given by a broadcasting organization under sub-section (2) of Section 31D*', respectively. Thus, the Copyright Act solely empowers the Appellate Board, which is an independent tribunal, under Section 12 with regulation of its own procedure with respect to the provisions of the Act including fixing of places and times of its sittings.

Observations

¹⁷⁹ Parliament of India, 227th Parliamentary Report, <http://164.100.47.5/newcommittee/reports/English>

Committees/Committee%20on%20HRD/227.pdf, accessed on 12th October 2019



The Office Memorandum of 5th September 2016 is contrary to the statute.

The Memorandum dated 5th September 2016 issued by the Department of Industrial Policy and Promotion is misplaced. This Memorandum is clearly contrary to Section 31-D, Rules 29, 30 and 31 and the legislative history preceding its enactment. Executive instructions cannot prevail or override substantive provisions of the statute or Rules that have been framed pursuant to a rule making power granted under the statute.

Further, through a catena of judgements it is an established law¹⁸⁰ that using any such Office Memorandum that over rides the Parent Law is unjustified and tantamount to violating the Law and encouraging further violations. *In fact, regularizing such complete violations of the Laws of the Land by issuing Office Memorandums only encourages more violations of the Copyright Act, 1957 and the subsequent Copyright Rules, 2013. Any such regularisation and weak action directly demeans Copyright governance of the country and the Ministry of Commerce and Industry itself.*

It can be thus inferred that the Government/Department vide the Office Memorandum permits “*what is prohibited to be done*” and will not stand legal sanctity. **It is thus clear that such a wide interpretation bringing internet broadcasting under the purview of the provisions of Section 31D using the Office Memorandum has no legal sanctity/support and should be subjected to rigorous tests.**

The Office Memorandum is vague and arbitrary.

As per settled principles of jurisprudence, if there is a conflict between a norm in a higher layer of the hierarchy and a norm in a lower level of the hierarchy, then the norm in the higher layer prevails, and the norm in the lower layer becomes ultra vires. A statutory law either made by the Parliament or by the State legislature necessarily prevails over rules and regulation and in effect, the Memorandum is falling in the ambit to be held ultra vires.

At the outset the act does not permit the Department to regulate any matter with respect to internet broadcasting under Section 31D of the Act and the subsequent Copyright Rules 2013. An Office Memorandum cannot go beyond the scope of authority conferred by the parent or enabling statute and that the Memorandum does surpass this authority and goes beyond the scope of the Act. In view of the foregoing, the Department has no power to frame rules and regulations with respect to statutory licensing under the Copyright Act and thus the Memorandum is non-est.

It can be now stated that the Office Regulation is completely vague in so far as it goes beyond the statute and states that “*internet broadcast*” comes under the relevant provisions of the Act. The Department/Government has evasively come out with the Office Memorandum, which leads to the possibility of unbridled discretion being exercised by the Government, and the possibility of unequal treatment, which thereby offends Article 14 of the Constitution.

¹⁸⁰ *State of Haryana vs Mahender Singh & Ors* (2007) 13 SCC 606



Conclusion

The Office Memorandum in so far as it mandates empowers the Department/Government to frame rules with relation to matters arising out of issuance of Statutory licenses under it and thus asserts that “*internet broadcasts*” be included under the purview of Section 31D of the Copyright Act, is definitely on the lines of being termed as ultra vires. A statutory law either made by the Parliament or by the State legislature necessarily prevails over rules and regulation and in effect, the Office Memorandum must necessarily be held to be ultra vires.

The Government/Department came out with the aforementioned Office Memorandum and that a Regulation/Circular/Memorandum cannot go beyond the scope of authority conferred by the parent or enabling statute and that the Office Memorandum cannot go beyond the scope of the Copyright Act.

Rule 29 of the Rules, which provides for the particulars of the notice required under Section 31-D, also only contemplates the furnishing of details for radio and/or television broadcasting. Clearly, the notice requirements of Rule 29 are only in respect of radio broadcasts, television broadcast and performance. Now, “Performance” is defined under section 2 (q) of the Copyright Act to mean, “*in relation to performer’s right, means any visual or acoustic presentation made live by one or more performers;*”. The Internet broadcasting activity is therefore clearly not a ‘performance’. The fact that this rule only enables the issuance of notice for these three categories buttresses the submission that a Section 31-D licence does not cover the internet streaming activities.



SHORTCOMINGS OF KARNATAKA LAND REFORMS ACT

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INTRODUCTION

IN A COUNTRY LIKE OURS, WHICH HAS ACCEPTED AND ADOPTED THE CONCEPT OF WELFARE STATE, LAW NECESSARILY BECOMES A DYNAMIC INSTRUMENT OF SOCIAL ENGINEERING. AGRARIAN REFORMS BY WAY OF SUITABLE LEGISLATION HAVE BEEN COMMENCED SINCE LONG IN VARIOUS STATES, AND OUR OWN STATE BROUGHT ABOUT CONSOLIDATION OF LAND REFORMS ACT PREVALENT IN DIFFERENT AREAS, WHICH FORMED PARTS OF INTEGRATED KARNATAKA STATE, AND PASSED THE KARNATAKA LAND REFORMS ACT IN 1961 (ACT 10 OF 1962).

Land Reform in the southern Indian state of Karnataka is characterized by both bright spots and serious areas of concern. The state has been in the forefront of modernizing land governance by using information technology for the past few decades, and it also has a record of having implemented one of the most progressive land reforms laws in India.¹⁸¹ In Karnataka, about 53.41 percent of the total land available within the State which forms the “net sown area” and the rights OVER the agricultural land is subjected to restrictions under various provisions of the Karnataka Land Reforms Act, 1961 and successive amendments to it over the years have aimed at bringing about revolutionary changes.

THE OBJECT IS THUS THE CREATION OF EGALITARIAN SOCIETY TO PROVIDE EQUALITY OF STATUS AND OPPORTUNITY AND TO BRING ABOUT ECONOMIC SECURITY AND STABILITY TO THE EXTENT POSSIBLE, WITHIN THE FRAME WORK OF LAW, IN THE FIELD OF AGRICULTURE AND DISTRIBUTION OF LAND AVAILABLE.

THE PAPER MAKES AN EFFORT TO question the constitutional validity of Section 79- A, 79-B, 79-C and Section 80 of the Karnataka Land Reforms Act, 1961 on the ground that it violates the basic structure of the fundamental rights of the citizens. The above provisions place an embargo on sale of agricultural land to a non-agriculturist and provides for restrictions on transfers and holdings of agricultural land based on the income from non-agricultural sources over and above existing provisions under the same Act which provides for acquisition of surplus land by the State through executive action.

THE PAPER IN ITS INITIAL PART MAKES AN EFFORT TO TRACE OUT THE HISTORICAL DEVELOPMENT TO THE CONSTITUTION THROUGH AMENDMENTS AND VARIOUS ENACTMENTS GIVEN LIFE TO BY LEGISLATIVE ASSEMBLIES ACROSS THE COUNTY IN REALISING AND ACHIEVING REFORMS IN THE PASTURES OF AGRICULTURE, STAYING TRUE TO ITS OBJECTIVE WHICH IT WAS SET-OUT TO ACHIEVE.

HISTORICAL BACKGROUND

1. PRE- CONSTITUTIONAL ERA

¹⁸¹ LAND GOVERNANCE ASSESSMENT FRAMEWORK (LGAF), KARNATAKA- State Report 2014



LONG BEFORE independence, the political leadership of India had committed itself to create a more just and egalitarian society for the country. To these men the creation of such a society required a more equitable distribution of wealth and other means of livelihood. The discussion in the Constituent Assembly concerning property rights and the compulsory acquisition of the land generated even more heated debate than the extended debates on “due process” clause. This is quite understandable in the view of the fact that this would have far reaching consequences considering its brawny effects on private land holding across the length and breadth of the nation. Decision as to what degree the property rights would receive constitutional protection would have great bearing on a whole host of other consideration, the most notably of which were land reforms and improving the grim lot of the Indian peasantry. The question as to social, political and economical implications in the very same order startled in the minds of the members of the Constituent Assembly. While there was a general consensus among the members on land reforms and to improve the social and economic status of the peasantry, many complex questions were raised and opinion of the Constituent Assembly was sharply divided, especially over the question of compensation for the land acquired by the Government. The end result was a balancing act on part of the State to reconcile claims of compensation on acquisition of the private property and the duty of the state to acquire private property for public purpose. In the account,

only the highlight of the debate can be touched upon.¹⁸²

Jawaharlal Nehru and the leadership of the Indian National Congress had agreed that the only solution to the zamindari problem could be its abolition and the distribution of their land holdings among the tenant-farmers. Speaking in 1928 to the Annual Session of the United Congress Committee, Nehru declared:

“To our misfortune we have zamindars everywhere, and like blight they have prevented all healthy growth.... We must, therefore, face this problem of landlords, and if we face it what can we do to abolish it? There is no halfway house. It is a feudal relic of the past utterly out of keeping with the modern conditions. The abolition of landlordism must, therefore, occupy a prominent place in our programme.”¹⁸³

2. POST-CONSTITUTIONAL ERA

The ideas of socio-economic justice and equality, which were nurtured by the radicals in the pre-independence days also found their way into the Constitution of India. The chapter on directive principles of state policy, which significantly carries no sanctions, enjoins certain duties upon the states. Article 38, for example, requires the state to secure and protect "as effectively as it may, a social order in which justice, social, economic and political" would

¹⁸² H.C.L Merliat: “Compensation for the Taking of Property: A Historical Footnote on Bela Banerjee’s Case,” *Journal of India Law Institute*, I (1958-1959), pp. 375-397. and “The Indian Constitution: Property Rights and Social Reform,” *Ohio State Law Journal*, XXI (1960), pp. 616-642.

¹⁸³ Quoted in Frank J. Moore and Constance A. Freydid, *Land Tenure Legislation in Uttar Pradesh* (Berkeley: Modern India Project Institute of East Asiatic Studies, University of California, 1955), p.3.



permeate the nation's life. Article 39 is somewhat more specific. It directs the state to distribute ownership and control of the material sources of the community for the sake of the good of society. Thus, although agrarian reform is not specifically mentioned in the Constitution, its introduction would, quite clearly, be well within the scope of the directive principles.

*“The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions.”*¹⁸⁴, were the words of the members of the Constituent Assembly which inspired the Parliament to bring immediate changes to the Constitution with introduction of Art.31-A, Art.31-B and Art.31-C by an amendment¹⁸⁵ with a view to facilitate agrarian reforms and abolish zamindari holdings. Insertion of such provisions rendered Art 31 futile¹⁸⁶ as insertion of Art.300 A¹⁸⁷ which was equivalent of the former Art.31 (1). The provisions under the umbrella of the Constitution providing for acquisition of estates, etc.; validation of certain Acts and Regulations and laws giving effect to certain directive principles were inserted to bring about never seen revolutionary changes to agrarian reforms and securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular.

¹⁸⁴ Constituent Assembly Debates, 1948, Vol. VII, 38.

¹⁸⁵ Ins. By the Constitution (First Amendment) Act, 1951, s.4 (with retrospective effect)

¹⁸⁶ Art. 31. [Compulsory Acquisition of Property.] Rep. by the Constitution (Forty- fourth Amendment) Act, 1978, s.6 (w.e.f. 20-06-1979)

THE SUPREME COURT AND PROPERTY RIGHTS

By the late 1950 much of the legislation had been enacted by the State Legislature, had received the Presidential assent, and implementation process began. Although there was no uniform pattern to these land-reforms enactments, the formula established by the legislature for determining the amount of compensation varied from state to state and from enactments to enactments. No had the President given his assent to these legislations, the High Court of the States were filled with petitions under Art.226 questioning the amount of compensation receivable by the zamindars and immediate relief prayed was for delay in implementation of the legislations. In the State of Uttar Pradesh alone, “about 7000” petitions had been filed by February 1951.¹⁸⁸ Much water has flown through the rivers of India since the Supreme Court, by three to two majority, declared unconstitutional two provisions of Bihar Land Reforms Act in its judgment handed down in the case of The State of Bihar v. Maharajadhiraja Sri Kameshwar Singh of Darbhanga and Others¹⁸⁹. Subsequently, validity of Madhya Pradesh¹⁹⁰, Uttar Pradesh¹⁹¹ and several other zamindari abolition enactments arose before the Apex Court. The decision of the Supreme Court of course, was binding upon the High Courts, and the result was that several of the High Court’s

¹⁸⁷ Ins. By the Constitution (Forty- fourth Amendment) Act, 1951

¹⁸⁸ National Herald (Lucknow), February 7, 1951.

¹⁸⁹ AIR 1952 SC 252

¹⁹⁰ Vishweshwar Rao v. The State of Madhya Pradesh, (1952) S.C.R 1020.

¹⁹¹ Raja Suriya Pal Singh v. The State of Uttar Pradesh and Another, (1952) S.C.R 1056.



began questioning the validity of the enactments. Seeing its land-reform programme threatened by judicial decisions while accentuating the loopholes existing in the Constitution and amendments that followed up post its existence, the Government introduced in the Parliament yet another constitutional amendment (Seventeenth Amendment) designed to settle once and for all, questions posed over the validity of these measures. The then Law Minister, Mr A.K Sen cleared general sense of misconception in the air that, the amendment aimed at casting away all the impediments, technical and legal, in our way to achieve noble purpose of ensuring minimum land to everyone¹⁹² and clarified that it was in no way out of any disrespect to the judiciary¹⁹³ but to remove fetters in the way of introducing land reforms.¹⁹⁴ Significantly, however, this amendment does add to Art.31-A the proviso that when the State acquires any land which is within the ceiling limit and under personal cultivation of the property owner, then the law must provide for payment of compensation "at a rate which shall not be less than the market value thereof".¹⁹⁵ However, it was unclear whether the Courts had any jurisdiction to make certain that property owners would receive full compensation, for this new proviso is a part of At.31-A which imposes severe limitations on the scope of judicial review.

KARNATAKA LAND REFORMS

The Mysore Land Reforms Act, 1961 to enact uniform law relating to land reforms

in the State of Karnataka relating to agrarian relations, conferment ownership on tenants and ceiling on land holdings etc., which Act is renamed as Karnataka Land Reforms Act, 1961 in view of renaming of the State. The Act No.10 of 1962 received the assent of the President on 05.03.1962 Constitution (17th Amendment) Act.1964 inserting Act No.10 of 1962 in the 9th Schedule of the Constitution of India at Sl.No.51. Hence, Act No.10 of 1962 received the protection of being challenged as violative of any of the provisions of the Part-III of the Constitution. Amendment of Karnataka Land Reforms Act, 1961 subsequently amended to introduce the prohibitions on holding or transfers and dealings in holdings of agricultural lands in the State of Karnataka Land Reforms (Amendment) Act, 1973 which is referred as Act No.1 of 1974. The provisions Section 79A, 79B, 79C and 80 are the focus of this paper which provides for an absolute embargo on any person or joint family, as the case may be from holding or transferring agriculture lands. It is also pertinent to note that Karnataka is the only state to impose restrictions on parameters of income in addition to holdings of surplus land in the hands of land owners/landlords. In view of the embargo imposed under Section 79-B of the Karnataka Land Reforms Act, 1961, based on the income criteria, a person cannot transfer/make over her land holdings to her own daughters and Petitioners 2 to 4 cannot hold any agricultural lands in the State of Karnataka for reason of their family income exceeding 25 lakhs from sources other than agriculture for a period of 5 consecutive years preceding the said date. Hence, the paper is

¹⁹² *The Hindu*, June 2, 1964, p.7

¹⁹³ *The Hindustan Times*, June 2, 1964, p.6

¹⁹⁴ *The Hindustan Times*, June 3, 1964, p.12

¹⁹⁵ Land ceilings differ from State to State, taking into account such factors as the traditional land

systems, degree of arability of land, and size of families : *M/s Nambudari Seeds v. Asst. Commissioner of Income Tax* (decided on 14th July 2014)



challenging the restrictive provisions of Section 79- A, 79-B, 79-C and Section 80 of the Karnataka Land Reforms Act, 1961 on the ground of being violative of Art. 14, 19 and 21 of the Constitution of India.

Act No.1 of 1974 inserted in the 9th schedule of Constitution of India (39th amendment) Act, 1974 which received the assent of the President on 10th August 1975. Thus Act No.1 of 1974 received the protection of Art.31B of the Constitution of India.

The validity of some of the clauses in Section 2A and Section 5, 7, 8, 14, 15, 41, 42, 44, 45, 47, 57, 59, 63, 66, 66A, 67, 72, 77, 78, 79A, 79C, 81, 91, 104, 106, 127A and Schedule I of the Act as amended by Act of 1 of 1974 of the Karnataka Land Reforms Act, 1961, on the ground that they were violative of Art. 14, 19 & 31 of the Constitution of India.

Act in question is protected under the umbrella of 9th Schedule to the Constitution of India having regard to the fact that the law placed in the 9th schedule cannot be deemed to be void in view of Article 31B. Hence, the Hon'ble Court was upheld the validity of the said Sections.

13 member Bench of Hon'ble Supreme Court had occasion to deal with Art 31B of the Constitution of India wherein it considered the validity of the Constitution (Twenty fourth Amendment) Act 1971, and Constitution (Twenty fifth Amendment) Act 1972, Constitution (Twenty Ninth Amendment) Act 1972, in his holiness *Kesavanada Bharathi Sripadagavaru & Others v. State Of Kerala & Another* (AIR 1993 SC 1461), wherein the Kerala Land Reforms (Amendment) Act, 1969 (Kerala

Act No.25 of 1971) came to be inserted in the Ninth Schedule of the Constitution of seek protection under Art.31B from being challenged on the ground of violation of any of the provisions of Part III of the Constitution. The Hon'ble Apex Court by its Judgment dated 24th April 1973 held as follows:-

*“486. I have held that Art.369 does not enable parliament to abrogate or take away fundamental rights. If this is so, it does not enable parliament to do this by any means, including the device of Art.31B and the Ninth Schedule. **This device of Art.31B and the Ninth Schedule is bad in so far as it protects statutes even if they take away fundamental rights.** Therefore, it is necessary to declare that the Twenty Ninth Amendment is ineffective to protect the impugned Acts if they take away fundamental rights”*

Subsequent judgment of the Constitution Benches of the Hon'ble Supreme Court in *Vaman Rao v. Union Of India*¹⁹⁶ and *Bheem Singhji v. Union Of India*¹⁹⁷ held that *“mere abridgment that is to say curtailment, and not necessarily abrogation, that is to say total deprivation, is enough to produce the consequence provided for by Art. 13(2). It was also of the opinion that every case in which the protection of fundamental rights is withdrawn, will not necessarily result in damaging or destroying the basic structure of the Constitution, and the question as to whether the basic structure is damaged or destroyed in any given case, would depend upon which particular Article of part-III is in issue, and whether what is withdrawn is quintessential to the basic structure of the Constitution.”*

¹⁹⁶ 1981 (2) SCC 362.

¹⁹⁷ 1981 (1) SCC 166



The 5 member bench of the Hon'ble Supreme Court in the matter of **I.R.Coelho v. State Of Tamil Nadu**¹⁹⁸ has referred the matter to 9 judges bench so as to consider whether the validity of a Constitutional amendment made on or after 24.04.1973 effecting inclusion in the 9th Schedule. Whether validity of a Constitutional amendment made on or after 24.04.1973 effecting inclusion in the ninth schedule of an Act or regulation which, or a part of which, is or has been found by the Supreme Court to be violative of one or more of the fundamental rights under Arts. 14, 19 and 31 is open to challenge or whether only validity of such a constitutional amendment to the ninth schedule which damages or destroys the basic structure of the constitution can be challenged before the Court

	compensation at a rate which shall not be less than the market value.
24/04/1973	The Constitution Bench of the Hon'ble Supreme Court in Keshavananda Bharati's case AIR 1973 SC 1461 <i>inter alia</i> held that that Parliament had no power to amend the basic structure of the Constitution. Therefore, as held subsequently in <i>I.R. Coelho's case</i> that after 24/04/1973, the laws included in the 9 th Schedule would not have absolute immunity and thus validity of such laws may be challenged on the touchstone of basic structure as reflected in Article 21 read with Article 14, 15 and 19 and the principles underlying in those articles.
01/03/1974	Karnataka Act No. 1 of 1974 came into force which was inserted in the 9 th Schedule and Constitution (39 th Amendment) Act, 1975 which <i>inter alia</i> inserted Sections 79-A, B and C of the Karnataka Land Reforms Act, 1961.
20/06/1979	Constitution (44 th Amendment) Act, 1978 came into force, which <i>inter alia</i> (i) Repealed A.19(1)(f) -Fundamental right to property;

LIST OF DATES

18/06/1951	Constitution (1 st Amendment) Act, 1951 came into force, which: (i) Inserted A.31-A, 31-B and 31-C of the Constitution; (ii) Inserted 9th Schedule into the Constitution.
15/03/1962	Karnataka Act No. 10 of 1962 (i.e., the Karnataka Land Reforms Act, 1961) came into force.
20/06/1964	Constitution (17 th Amendment) Act, 1964 came into force, which: (i) Inserted Second Proviso to A.31-A which provides that wherever Government acquires property, it should provide for payment of

¹⁹⁸ 1999 (7) SCC 580.



	(ii) Repealed A.31- Compulsory acquisition of property. In this case, (iii) Inserted A.300A- Persons not to be deprived of property save by authority of law.
13/11/1980	The Constitution Bench of the Hon'ble Supreme Court in <i>Waman Rao v. Union of India AIR 1981 SC 271</i> held that deletion of Article 19(1)(f) and 31(2) by the Constitution (44 th Amendment) Act, 1978 is not retrospective. As such, the validity of any law made prior to 20/06/1979 shall be open to challenge on the ground of contravention of those Articles.
11/01/2007	The Constitution Bench of the Hon'ble Supreme Court in <i>I.R. Coelho v. State of Tamil Nadu AIR 2007 SC 861</i> <i>inter alia</i> held that the power to grant absolute immunity at will is not compatible with basic structure doctrine and after 24/04/1973, the laws included in the 9 th Schedule would not have absolute immunity and thus validity of such could be challenged on the touchstone of basic structure as reflected in Article 21 read with Article 14, 15 and 19 and the principles underlying in those articles.

AMENDMENT TO KARNATAKA LAND REFORMS ACT, 1961 WITH RELEVANT AMENDMENTS TO THE IMPUGNED PROVISIONS

A total of 43 amendments have been carried out to the Karnataka Land Reforms Act, 1961 starting with the 1st Amendment in 1965 until the most recent 43rd Amendment in 2017.

Insofar as the impugned provisions are concerned, a total of only 6 of these amendments are relevant, i.e., (a) 9th Amendment (1974), (b) 18th Amendment (1979), (c) 20th Amendment (1982), (d) 25th Amendment (1991), (e) 28th Amendment (1996) and (f) 42nd Amendment (2015).

Out of the above 6 amendments, the last 3 amendments deal exclusively with the increase in non-agricultural income limits, i.e., (a) 25th Amendment (1991), (b) 28th Amendment (1996) and (c) 42nd Amendment (2015), wherein the limit was raised from the original Rs. 12,000/- (1974-9th Amendment) to Rs. 50,000/- (1991-25th Amendment) to Rs. 2,00,000/- (1995-28th Amendment) to Rs. 25,00,000/- (42nd Amendment). Pertinently, while the practical situation as to agrarian reforms has evolved dynamically from 1974 onwards, the law whilst being stagnant, only the portion as to the exclusionary limit has been modified, albeit neither reasonably nor in a rational and prudent matter.

Sl. No.	Karnat aka Act No.	Effective Date	Description
1	10 of 1962	15/03/1962	Karnataka (Mysore) Land



			Reforms Act, 1961 originally enacted				
2	14 of 1965	29/07/1965	1 st Amendment				section (1).
3	38 of 1966	29/09/1966	2 nd Amendment				➤ Section 80(b)(iii) which originally read ‘who is not an agricultural labourer’,
4	1 of 1967	02/02/1967	3 rd Amendment				substituted with: “(iii) who is not an agricultural labourer;
5	5 of 1967	01/02/1967	4 th Amendment				or
6	11 of 1968	28/03/1968	5 th Amendment				(iv) who is disentitled under Section 79-A or 79-B to acquire or hold any land.”
7	6 of 1970	15/01/1970	6 th Amendment				➤ Section 80: in the proviso, for the words “to enable persons”, substitute the words figures and
8	4 of 1972	11/05/1972	7 th Amendment				
9	2 of 1973	15/02/1973	8 th Amendment				
10	1 of 1974	01/03/1974	9 th Amendment ➤ Inserted the word “ <i>holding or</i> ” after “restrictions on” in heading of Chapter-V. ➤ Inserted Sections 79-A, 79-B and 79-C. ➤ Section 80 renumbered to sub-				



			letters “ <i>to enable a person disentitled to acquire or hold land under Section 79-A or Section 79-B</i> ”.	17	12 of 1977	01/03/1974 ¹⁹⁹ 31/12/1976 ²⁰⁰ 04/05/1977 ²⁰¹	16 th Amendment
				18	23 of 1977	01/03/1974	17 th Amendment
			Section 80: Inserted sub-section (2) “ <i>Nothing in sub-section (1) shall apply to lands granted under Section 77</i> ”.	19	1 of 1979	01/03/1974 ²⁰² 01/01/1979 ²⁰³	18 th Amendment Section 79-A(6): Substituted the words “ <i>no amount</i> ” in place of “ <i>only fifty per cent of such amount</i> ”.
				20	2 of 1980	17/12/1979	19 th Amendment
				21	3 of 1982	01/03/1974 ²⁰⁴ 01/01/1979 ²⁰⁵	20 th Amendment Section 80(1): Substituted the words “ <i>lawful</i> ” in place of “ <i>valid</i> ”.
11	26 of 1974	01/03/1974	10 th Amendment			25/11/1980 ²⁰⁶	
12	31 of 1974	03/08/1974	11 th Amendment			06/03/1982 ²⁰⁷	
13	18 of 1976	11/09/1975	12 th Amendment				
14	27 of 1976	16/12/1975	13 th Amendment	22	1 of 1983	19/10/1982	21 st Amendment
15	44 of 1976	02/06/1976	14 th Amendment	23	35 of 1985	27/09/1985	22 nd Amendment
16	67 of 1976	13/06/1976	15 th Amendment	24	19 of 1986	06/12/1985	23 rd Amendment

¹⁹⁹ All sections except Section 1, 2 and 11

²⁰⁰ Section 2

²⁰¹ Section 1 and 11

²⁰² All other provisions except Sections 1,3,10,12, 13(1), 15, 16(1), 16(3), 17, 18, 19, 24, 25, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 43

²⁰³ Sections 1,3,10,12, 13(1), 15, 16(1), 16(3), 17, 18, 19, 24, 25, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 43

²⁰⁴ Sections 3,7,15,16 and 20

²⁰⁵ Sections 4, 6(1), 8, 9, 10, 12, 19 and 21

²⁰⁶ Sections 1, 6(2), 11, 13, 14, 17, 18 and 22

²⁰⁷ Sections 2 and 5



25	18 of 1990	08/10/1990	24 th Amendment	39	17 of 2007	05/01/2007	38 th Amendment
26	1 of 1991	05/02/1991	25 th Amendment Section 79-A(1) and (2): Substituted “ <i>fifty thousand</i> ” in place of “ <i>twelve thousand</i> ”	40	35 of 2010	29/07/2007	39 th Amendment
27	31 of 1991	13/11/1991	26 th Amendment	41	27 of 2014	28/08/2014	40 th Amendment
28	9 of 1992	21/04/1992	27 th Amendment	42	2 of 2015	08/01/2015	41 st Amendment
29	31 of 1995	20/10/1995	28 th Amendment Section 79-A(1) and (2): Substituted “ <i>two lakhs</i> ” in place of “ <i>fifty thousand</i> ”	43	33 of 2015	12/08/2015	42 nd Amendment ➤ Section 79-A(1) and (2): Substituted “ <i>twenty five lakhs</i> ” in place of “ <i>two lakhs</i> ” ➤ Section 80: Proviso Substituted “Deputy Commissioner” in place of “Assistant Commissioner”
30	8 of 1996	20/10/1995	29 th Amendment	44	43 of 2017	28/10/2017	43 rd Amendment
31	23 of 1998	01/11/1998	30 th Amendment				
32	34 of 1998	15/02/1999	31 st Amendment				
33	22 of 2001	27/08/2001	32 nd Amendment				
34	20 of 2003	23/04/2003	33 rd Amendment				
35	34 of 2003	20/08/2003	34 th Amendment				
36	18 of 2004	10/03/2004	35 th Amendment				
37	7 of 2005	19/03/2005	36 th Amendment				
38	17 of 2005	28/05/2005	37 th Amendment				

STATEMENTS OF OBJECTS AND REASONS FOR THE KARNATAKA LAND REFORMS ACT, 1961 AND AMENDMENTS TO THE IMPUGNED PROVISIONS

Karnataka Act No. 10 of 1962 (Karnataka Land Reforms Act, 1961) as originally enacted

An act to enact uniform law relating to land reforms in the State of Karnataka.



Whereas it is expedient to enact a uniform law in the State of Karnataka relating to agrarian relations, conferment of ownership on tenants, ceiling on land holdings and for certain other matters hereinafter appearing”

**Karnataka Act No. 1 of 1974
(Amendment inserting the impugned provisions)**

Relevant portion:

“...While applying the ceiling and determining the surplus land for a family, the lands held by the individual members will be added together. Where lands are held separately by the husband and wife of a family, the surplus to be surrendered shall be on pro rata basis from the holding of each member of the family.

Ceiling will not apply to the lands held by co-operative farming societies but the extent held by each person in such society and also in firms, associations and private trusts shall be deemed to be his personal holding for applying the ceiling.

Persons having assured income of not less than Rs. 12,000 per annum from non-agricultural source are not permitted to hold agricultural lands. Persons who are not cultivating personally are also not permitted to hold agricultural lands

The term “to cultivate personally” is redefined so as to require residence within 16 kilometers from the limits of the village in which the land is situated...”(emphasis supplied)

**Karnataka Act No. 1 of 1979
(Amendment of Section 79-A(6) wherein ‘no amount’ was substituted in place of ‘fifty percent’ as regards compensation)**

“Amendments proposed in the Bill are mainly to give effect to the suggestions made by the Government of India while assenting to the Act I of 1974 and to remove certain difficulties felt in the implementation of the Act. Some of the important amendments proposed are.—

*(1) cocoa is being made a plantation crop;
(2) persons cultivating lands on the strength of leases created upto 1st March 1974 contrary to the provisions of section 5 are proposed to be declared as “tenant”;
(3) certain dependents of soldiers who have died while in service are proposed to be permitted to alienate the land resumed from their tenants;*

(4) provision is being made to grant agricultural labourers ownership of their dwelling houses;

(5) members of the Tribunal who continuously absent themselves for more than three consecutive meetings of the Tribunal are proposed to be removed and the Deputy Commissioners are being empowered to transfer cases from one Tribunal to another wherever necessary;

(6) the High Court has recently struck down the registration of tenants as occupants who filed their applications after 31-12-1974 without showing sufficient cause for the delay. It is proposed to validate all such applications. Time to file declarations is being extended upto the expiry of three months from the date of commencement of this Act;

(7) it is proposed to provide for the payment of compensation in a lumpsum to landlords whose annual income is not more than Rs. 2,400 and to give option to widows to receive the compensation amount either in lumpsum or in the form of annuity. In the case of religious and charitable institution, in lieu of annuity it is proposed to give every year the interest that would accrue had the amount payable been deposited in fixed



deposit in a Scheduled Bank for a period not less than 61 months;

(8) as desired by the Reserve Bank of India it is proposed to give compensation in the form of non-negotiable bonds to landlords;

(9) it is proposed to empower the deputy commissioner or some other officer authorised by the Government to distribute surplus lands;

(10) the Tribunal is being empowered to reopen any orders passed under section 67 of the Tribunal is satisfied that the said order has been obtained by fraud, misrepresentation or suppression of facts or by furnishing false, incorrect or incomplete declarations;

(11) the provisions of the Act are being made applicable to all tenants and landlords holding lands in inams or other alienated lands;

(12) according to the existing Schedule I the government has to issue a notification specifying the nature of irrigation facilities from government canals and from government tanks in respect of all lands for the purpose of classification of lands. It is proposed to remove the necessity of issuance of notification by the Government consequential and minor amendments.

Opportunity is taken to make some other consequential and minor amendments.

Hence this bill.”

**Karnataka Act No. 1 of 1991
(Amendment of Section 79A(1)
increasing non-agricultural income limit
from Rs.12,000/- to Rs. 50,000/-)**

The Government having considered several representations to amend the Karnataka Land Reforms Act, 1961, has considered it necessary to amend certain provisions of the said Act. Salient features of the Bill are as follows:—

“...

7) The limit of rupees 12,000 on the income accruing from sources other than agriculture is proposed to be enhanced to rupees 50,000 to make persons having such income eligible to acquire agricultural land.

8) The period fixed for filing application to the High Court consequent to the abolition of appellate authorities is extended from 90 days to 120 days. Opportunity is also taken to make some incidental and consequential amendments.

Hence the Bill.” (emphasis supplied)

**Karnataka Act No. 31 of 1995
(Amendment of Section 79A(1)
increasing non-agricultural income limit
from Rs.50,000/- to Rs. 2,00,000/-)**

“Certain difficulties have been experienced in recent years in the working of the Land Reforms Act in the State, in as much as Restrictions imposed on acquisition of agricultural land for certain purposes have come in the way of achieving development in certain sectors of economy, especially the Agro-Industrial Sector where the State holds considerable potential for advancement. Industries and other economic sectors where speedy execution is necessary, are found resorting to various indirect methods of obtaining lands for their requirement, which often tend to defeat the very purpose of the Land Reforms Law. In the new environment of economic liberalisation sweeping the country, it is felt necessary to enable the industries based on aquaculture, floriculture, horticulture and also the housing industry which hold high potential for drawing outside investment in the State, to obtain lands required for their establishment and expansion, easily.



The amendments proposed in this Bill are formulated with a view to addressing these issues which have roused persistent demand for public regulation, and to achieve overall development of the State by giving impetus to its economic growth and to that end to remove the lacunae in the existing law.

Opportunity is also taken to make some other consequential and incidental changes.

Hence the Bill.”

Karnataka Act No. 33 of 2015 (Amendment of Section 79A(1) increasing non-agricultural income limit from Rs.2,00,000/- to Rs. 25,00,000/-)

It is considered necessary to amend the Karnataka Land Reforms Act, 1961 (Karnataka Act 10 of 1962), for the following reasons, namely:-

(1)to enhance the annual income limit from two lakh to twenty-five lakhs from sources other than agricultural lands to acquire any land taking into consideration the revision of rupee value since 1995;

(2)to empower Deputy Commissioner instead of Assistant Commissioner to grant permission for non-agriculturist to purchase agriculture land under section 80 to take more caution while granting such permissions;

(3)to enhance the power of the Government and the Deputy Commissioner excisable on behalf of the Government to grant the land in any area to exempt from the provisions of section 63, 79A, 79B of the Act.

Hence, the Bill.” (emphasis supplied)

TIME PERIODS AND GAP IN INCREASE IN NON-AGRICULTURAL INCOME CAP

Act No. 10 of 1962 w.e.f. 15/03/1962: Rs. 0 (since S.79-A was not present in the original enactment)

Time Gap: 12 years



Act No. 1 of 1974 w.e.f 01/03/1974: **Rs. 12,000/-**

Time Gap: 17 years



Act No. 1 of 1991 w.e.f. 05/02/1991: **Rs. 50,000/-**

Time Gap: 4 years



Act No. 31 of 1995 w.e.f 20/10/1995- **Rs. 2,00,000/-**

Time Gap: 20 years



Act No. 33 of 2015 w.e.f. 12/08/2015- **Rs. 25,00,000/-**

With respect to the above, it is also pertinent to note the following:

Average income of an Indian citizen in 1974, per World Bank data was Rs. 12,240/- (US\$ 140 @ 1 USD = 72 INR). This means that the limit of Rs. 12,000/- as set in 1974 excluded a considerably large Indian populace from their right to purchase agricultural property in Karnataka, despite at that time, the right to property was a fundamental right under Article 19(6) before being repealed in 1979 through the Constitution (44th Amendment) Act.



Per Income Tax department's data,

- In **AY 2012-13 (FY 2011-12)**, there were a total of 3,12,88,559 (3.12 crore) taxpayers, of which 1,91,51,275 (1.91 crore) taxpayers filed ITRs of gross income over INR 2 lakhs per annum, which means as per the then existing slab of INR 2 lakhs of non-agricultural income, about **61.2% of Indian populace were excluded from purchasing or holding agricultural property in Karnataka.**
- In **AY 2013-14 (FY 2012-13)**, there were a total of 3,60,75,691 (3.60 crore) taxpayers, of which 2,61,85,891 (2.61 crore) taxpayers filed ITRs of gross income over INR 2 lakhs per annum, which means as per the then existing slab of INR 2 lakhs of non-agricultural income, about **72% of Indian populace were excluded from purchasing or holding agricultural property in Karnataka.**
- In **AY 2014-15 (FY 2013-14)**, there were a total of 3,91,28,247 (3.91 crore) taxpayers, of which 3,21,68,851 (3.21 crore) taxpayers filed ITRs of gross income over INR 2 lakhs per annum, which means as per the then existing slab of INR 2 lakhs of non-agricultural income, about **82.21% of Indian populace were excluded from purchasing or holding agricultural property in Karnataka.**
- In **AY 2015-16 (FY 2014-15)**, there were a total of 4,35,99,192 (4.35 crore) taxpayers, of which 3,81,49,761 (3.81 crore) taxpayers filed ITRs of gross income over INR 2 lakhs per annum, which means as per the then existing slab of INR 2 lakhs of non-agricultural income, about **87.50% of Indian**

populace were excluded from purchasing or holding agricultural property in Karnataka.

The inflation rate in India between 1995 and 2015 was 303.88%, which translates into a total increase of INR 303.88. This means that **100 rupees in 1995 are equivalent to 403.88 rupees in 2015.** In other words, the purchasing power of INR 100 in 1995 equals INR 403.88 in 2015. The average annual inflation rate between these periods was 7.23%.

However, the % increase in the non-agricultural income limit in 1995 which was 2,00,000/- and in 2015 when it was increased to 25,00,000/- has no co-relation to the rupee value, as may be evidenced by the fact above that 2,00,000 in 1995 would be equivalent to 8,07,760 in 2015. However, there was an arbitrary increase of more than 1150% which is unreasonable and has no basis.

CONSTITUTIONAL VALIDITY OF THE IMPUGNED PROVISIONS

The paper analyses the constitutional validity of Section 79-A, 79-B, 79-C and Section 80 of the Karnataka Land Reforms Act, 1961 (hereafter, "**Impugned provisions**"). The paper also wishes to highlight the fact that a lot of water has flown through since its inception and such provisions will only hamper the land reforms than facilitating it in the near future.

VIOLATION OF "ARTICLE 14" BY THE IMPUGNED PROVISIONS

Manifest arbitrariness', i.e., when legislation is not fair, not reasonable, discriminatory, not transparent, capricious,



biased, with favoritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment can be sole ground for striking down legislation as being violative of Article 14²⁰⁸. Positively speaking, the law must conform to norms which are rational, informed with reason and guided by public interest, etc.

The impugned sections being prohibitory making an unnecessary classification of a section of society benefitting one section and depriving other section, is totally unconstitutional, as it runs against the scheme of the Constitution which is “equality” and that too in a “Democratic Republic.” The impugned provisions of the Act indirectly taking away the property of a person without specifying the purpose for which the land is to be used is not a measure for agrarian reform. Hence the same affects the basic principles of the Rule of Law.²⁰⁹ The legislations should not termed ‘arbitrary’ in the eyes of the judiciary be while trying to bring a sense of equality, which in its fundamentals is antithetic to arbitrariness, for equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.²¹⁰

a. Classification not found on intelligible differentia

Scheme of impugned provisions running parallel depriving the following classes of persons from holding or acquiring (even through inheritance) agricultural property: (a) person or family having non-agricultural

income over a certain limit (79A); (b) person not cultivating land personally(79B); (c) any company, educational institution, trust etc.; and (d) non-agriculturists (80).

As a corollary, this would mean even the following classes of persons are not entitled to hold or acquire agricultural land: (a) person who may be an agriculturist, but by virtue of his family member earning from non-agricultural sources, tipping over the stipulated income limit; (b) a person whose immediate predecessor may be an agriculturist cultivating land personally, but him earning from non-agricultural sources over stipulated limit disentitling him to his succession rights; (b) agriculturist who may be cultivating land personally, but has income from non-agricultural sources over the stipulated income limit; (c) a company which may be into agri-based products; (d) an educational institution which may be into agricultural research.

The differentiation sought to be made seems to be, for instance:

a)	Agriculturist without non-agricultural income >Rs. 25 lakh	vis-à-vis	Agriculturist with non-agricultural income >Rs. 25 lakh.
b)	Non-agriculturist without any source of livelihood	vis-à-vis	Non-agriculturist with non-agricultural income >Rs. 25 lakh.
c)	Agriculturist with any	vis-à-vis	Non-Agriculturist

²⁰⁸ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, para 95

²⁰⁹ *The Godavari Sugar Mills Ltd. v. S.B. Kamble and Others*, 1975(1) SCC 696

²¹⁰ *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165 : AIR 1974 SC 555



	income without any limit.		with income <Rs. 25 lakhs.
d)	Owner of agricultural land <Rs. 25 lakhs non-agricultural income.	vis-à-vis	Owner of agricultural land, <Rs.25 lakhs non-agricultural income from non-agricultural sources, but member of a family has non-agricultural income >Rs. 25 lakhs

a. **No rational nexus between the provisions and objects sought to be achieved by the legislation**

The Statement of Objects and Reasons of Karnataka Act No. 1 of 1974 seems to have no rational nexus with the very object of “agrarian reforms”. Impugned provisions vis-à-vis S.109 of the same Act provides for excessive delegation, and once again defeats the agrarian reform by giving powers to the District Collector to exempt certain lands from being acquired by the Government. The court should closely study to see if the legislature merely wears the mask of agrarian reform or it is in reality such. A label cannot salvage a statue from the constitutional limitations if the agrarian reform envisaged by it is “a teasing illusion or promise of unreality.”²¹¹

On basis of above, the excessively restrictive provisions permit only an agriculturist, who is personally cultivating the agricultural land, and who along with his family has no non-agricultural income over 25 lakhs to acquire or hold agricultural land. Even the sub-registrar/guidance value of agricultural land in and around Bangalore is valued at approximately Rs. 3 crore per acre, which means it becomes highly unaffordable for a person permitted by the impugned provisions to acquire agricultural land. The delineation of class in the Impugned Provisions is therefore, irrational, capricious and completely devoid of any reasoning.

The impugned provisions effectively create two classes of property: (a) agricultural property which can be converted and sold (Refer S.95 of Karnataka Land Revenue Act, 1964-non-obstante clause) and (b) agricultural property which cannot be sold on account of being unconverted. Therefore, whilst selling agricultural property for agricultural purposes only in certain cases is invalid, converting the agricultural property and thereafter selling it is permissible. The very object of “agrarian reforms” is defeated. In the name of agrarian reform, agrarian regression being perpetuated.

VIOLATION OF ARTICLE 19(1)(F) AND 19(1)(G)

²¹¹ *State of Kerala v. Gwalior Rayon Silk Manufacturing Co. Ltd*, AIR 1973 SC 2734, also *Godavari Sugar Mills Ltd. v. S.B. Kamble* (AIR 1975 SC 1193), *VajraveluMudaliar v. Sp. Dy. Collector* (AIR 1965 SC 1017), *Balmadies*

*Plantations Ltd. v. State of Tamil Nadu*1972(2) SCC 133.



The deletion of the right to property from the array of fundamental rights will not deprive the person of protection under Part III of the Constitution which were available prior to the coming into force of the 44th Amendment, since the impugned Acts were passed before June 20, 1979 on which date Article 19(1)(f) was deleted. It is therefore pertinent to note that any acquisition of land under the impugned provisions can still be challenged before the court of law after the decisions of the Apex Court in I.R Coelho Case which made the Ninth Schedule of the Constitution amenable to challenge for violating of provisions under Part III of the Constitution.

Right to practice an occupation/profession/avocation under 19(1)(g) restricted by virtue of impugned provision: (a) an agriculturist personally cultivating the land having non-agricultural income over limit (for instance, owing to an acquisition, lost land, and invested in commercial venture) is prevented from holding agricultural land and also from acquiring further agricultural land, thus preventing him from his original occupation; (b) a non-agriculturist within income limit who intends to take up agriculture as an additional occupation has to seek permission to even take up agriculture- for exercising fundamental right, he has to seek state sanction; (c) an agriculturist personally cultivating the land having non-agricultural income within the limit is prevented from holding/acquiring agricultural land merely because his spouse/unmarried daughter has non-agricultural income over the stipulated limit.

Courts are increasingly receptive to economic arguments while deciding these issues. In such an environment it becomes the bounden duty of the Court to have the economic analysis and economic impact of its decisions. We may hasten to add that it is by no means suggested that while taking into account these considerations specific provisions of law are to be ignored. First duty of the Court is to decide the case by applying the statutory provisions. However, on the application of law and while interpreting a particular provision, economic impact/effect of a decision, wherever warranted, has to be kept in mind.

Likewise in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of a particular view which subserves the economic interest of the nation.²¹² Conversely, the Court needs to avoid that particular outcome which has a potential to create an adverse affect on employment, growth of infrastructure or economy or the revenue of the State. It is imperative to understand that, now if the impugned provisions are done away with the agricultural lands will be free from unnecessary Governmental control. There is more interest from high-earning population to own a land to cultivate on land near their place of work and with such embargo being placed on non-agriculturists with income of Rs.25,00,000/- or more from buying agricultural land. A person who is holding a fallow land, unable to cultivate will now find it difficult to sell his land and the situation is worsened when the population with purchasing power to buy such land is barred from buying agricultural lands hampering the revenue

²¹² *Shivashakti Sugars Limited vs. Shree Renuka Sugar Limited and Ors.* (09.05.2017 - SC) : MANU/SC/0647/2017



and development of the State as the land will remain unfit for cultivation and not being available for developmental activities and situation of limbo to a farmer holding such pieces of fallow/unfit land.

VIOLETION OF ARTICLE 21

Article 21 of the Constitution of India, 1950 provides that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” ‘Life’ in Article 21 of the Constitution is not merely the physical act of breathing. It does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to live with human dignity, right to livelihood, right to health, right to pollution free air, etc.

The living tree doctrine adopted by the Supreme Court in plethora of cases has now extended the scope of A.21 to include Right to property, a fundamental human right under Article 300-A²¹³: The impugned provisions take away the liberty of an agriculturist to deal with his own agricultural property which in-turn would affect his Right over his property and with such interpretations it can only be said Fundamental Rights of agriculturists are being hampered by such impugned provisions.

The impugned provisions also interfere with the right to inheritance which is a sacred right, and a vital part of the right to life. There is deprivation of livelihood by not affording compensation and taking away agricultural land merely because of

certain factors in the impugned provisions. For protection of 31-A, compensation at market value is a must.²¹⁴ If the compensation is illusory or the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the Legislature committed or a fraud on power and, therefore, the law is bad.

VIOLETION OF ‘FEDERALISM’ I.E., ARTICLE 251 AND 254 OF CONSTITUTION

Federalism is part of the basic structure of the Constitution. The Seventh Schedule to the Constitution of India defines and specifies allocation of powers and functions between Union & States. It contains three lists; i.e. Union List (“List I”), State List (“List II”) and Concurrent List (“List III”) which forms the foundations for upholding federalistic feature of the Indian Constitution.

Impugned provisions fall under List III Entry 42 of VII Schedule since acquisition and requisition of land are covered in the impugned provisions. Section 79A falls under List III Entry 5 since inheritance is an important subject covered by that provision.

Impugned provisions under Karnataka Act No. 1 of 1974 are completely contradictory to Central Act No. 39 of 2005 [Hindu Succession (Amendment) Act, 2005, specifically S.6] insofar as treatment of female issues as coparceners and their right of inheritance when it comes to agricultural

²¹³ See *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Cock and Chem. Ltd. and Ors.* (MANU/SC/7706/2007); *Tukaram Kana Joshi and Ors. v. MIDC and Ors.* (MANU/SC/0933/2012)

²¹⁴ See *K.T. Plantation Case*, (2011) 9 SCC 1; *P. Vajravelu Mudaliar v. Special Deputy Collector*, AIR 1965 SC 1107; *State of Gujrat v. Shantilal Mangaldas*, AIR 1969 SC 634



lands. As such, impugned provisions are in violation of Article 254 and therefore void by operation of Article 254(2). Since impugned provisions are repugnant to Central Act (Hindu Succession Act), they deserve to be struck down as being void.²¹⁵

CONCLUSION

In light of the above, it is imperative to look at the present effect and the potential/future effects that the impugned provisions have and shall continue to have from the perspective of the State's economy. Whilst the general trend is increasingly for high level executives in various professions to purchase land and cultivate it outside, the draconian impugned provisions prevent them from acquiring any agricultural land and therefore, rather than increasing and reforming agricultural sector. On the other hand, it is also imperative to look at the compensation being offered for those holders who lose lands as a consequence which is not at market value which once again lends credence to the contention that the impugned provisions suffer from arbitrariness and therefore are amenable to be struck down.

²¹⁵ *State of Kerala v. Mar AppraemKuri Company Ltd.* MANU/SC/0455/2012



ELECTION COMMISSION AS A 'WATCHDOG OF FREE AND FAIR ELECTION

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Abstract

The constitution has declared India as a 'Democracy where only citizen can elect the government. Democracy will be futile without active participation of its citizens. Free and Fair elections are the chief essence of democracy. However election could be very notorious as it witness power drifts and clashed for the seat which could kill the essence of the fairness and freeness of election therefore an watch dog is required to check this menace so that every citizen could get its right.

Thus to ensure a free and fair election, an autonomous body was created to meet the need of time. This is a body autonomous in character and insulated from political pressures and executive influence. However organizing election is not easy, it faces huge challenges.

Targeting the aforesaid situation the research has been made on doctrinal model of research relying on secondary sources. It aims to determine the role of election in democracy and the structure of election commission and its constitutionality. It further determines the problem election commission face and constitutional validity of the remedies it takes. Thus research determines how election commission is a guardian to free and fair election in India.

INTRODUCTION

Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education.

Franklin D. Roosevelt

Democracy is a "GOVERNMENT OF THE PEOPLE "BY THE PEOPLE AND FOR THE PEOPLE". Democracy can only works when all its citizen take active part in the selection of the governments. This had been the prime dream of the framers of the constitution whom realized that the fate of nation will only thrive when the people will choose their rules according to the will.

Elections are key way for citizens in a democracy to communicate with representatives. Different rules about elections and concentration of assembly power can create either majoritarian or proportional systems of democracy. They realized that giving of power in a single hand for a long time will result in a dictatorial system that was the reason that several attempt were made by them in so that free and fair election could take place in the country. It was held that "One of the most important features of the democratic polity is elections at regular intervals. Elections constitute the signpost of the democracy; these are medium through which the attitudes, values and beliefs of the people towards their political environment are reflected. Elections are the central democratic procedure for selecting and controlling leaders. Elections grant people a government and the government has constitutional right to govern those who elect it. Elections symbolize the sovereignty of the people and provide legitimacy to the authority of the government. Thus, free & fair elections are indispensable for the success of the democracy²¹⁶.

²¹⁶ Indira Nehru Gandhi V/s. Raj Narayan



Thus in order to ensure free & fair elections the Constitution establishes the Election Commission. In 1950, the Election Commission has established in India. This is a body autonomous in character and insulated from political pressures and executive influence. Care has been taken to ensure that the Election Commission work as an independent body free from external pressures from the party in power or executive of the day²¹⁷. It is duty of the Election Commission to carry free & fair elections to the various legislative bodies in the country and guarantee the growth of democracy. There are mixed populated states. There are native people as well as others who are racially, linguistically and culturally different but to supervise, organize and conduct election the Commission is setup for All – India Level²¹⁸.

Election and democracy

Elections and democracy are like two wheels of a chariot. If one removes a wheel the whole vehicle would be rendered immobile. Elections are a kind of political necessity which forms the heart of Indian Democratic order. A Democratic rule cannot be imagined without free and fair elections. Elections provide legitimacy to a person representing a particular area of population. In countries with biased election process, political leadership lacks legitimacy; it would be a source of

instability in political order and ultimately leads to turmoil²¹⁹

India being an Electoral Democracy is "a system for arriving at political decisions in which individuals acquire power by a competitive struggle for the people's vote", or more simply, "a regime in which governmental offices are filled as a consequence of contested elections"²²⁰. Basically an electoral democracy is one in which the representatives of people are elected by the process of elections. Electoral Democracy should be Liberal Democracy. For it to be a Liberal democracy, in which all including the poor and ethnic and regional minorities, are able to effectively compete in elections with non-trivial chances of getting elected, following conditions are to be met. These conditions are: the rule of law, an independent judiciary, constitutional constraints on executive power, strong fundamental freedoms entrenched as basic rights, including equality before the law, and freedoms of belief, faith, assembly, movement, residence, association, occupation, speech, publication, opinion, demonstration and petition, and including rights for religious, racial, ethnic, linguistic, cultural and other minorities, and civic pluralism including the presence of independent media²²¹. Without these enabling conditions, legal and social, in place, elections can be manipulated²²². Free and fair elections are the part of democratic

²¹⁷ indian Constitutional Law" target=_blank>Constitutional Law, Prof. M. P. Jain, 5th Edition, 2009, Pg. 806

²¹⁸ <http://legalservicesindia.com/article/article/role-of-election-commission-108-1.html>

²¹⁹ See Elections and Democracy by Ronald Meinardus

²²⁰ See Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, New York: Harper, 1947; Adam

Przeworski, Michael Alvarez, Jose Cheibub and Fernando Limongi, "What Makes Democracy Endure?",

Journal of Democracy, 7, No. 1 (1996)

²²¹ See Larry Diamond, *Developing Democracy: Toward Consolidation*, Baltimore: Johns Hopkins University Press, 1999, pp. 8-13.

²²² See GLOBAL DIMENSIONS OF ELECTORAL DEMOCRACY



structure.²²³ All the seven Judges in the Fundamental Right Case²²⁴ agreed that democratic set up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives, it further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice²²⁵. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion²²⁶.

Election supports the idea of Constitutionalism. Constitutionalism is the concept of *limited government*²²⁷. The most important function of a written constitution is that of, controlling the organs of Government.²²⁸ Constitutionalism is the idea that the government should be legally limited in its powers, and that its authority depends on its observing these limitations²²⁹. According F.A.Hayek “constitutionalism means that all power

rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey”²³⁰ Constitutionalism is antithetic to arbitrariness²³¹ and if there are prejudice and unfair elections then the governments formed by such elections would exercise arbitrary powers, which would be against the concept of constitutionalism. The basic difference between the ‘Constitutionalism’ and ‘Constitution’ is that, Constitution ought not merely to confer power on the various organs of the government but also seeks to restrain those powers, which is called Constitutionalism²³². Fundamental Rights are an important principle for promotion of the principle of Constitutionalism²³³. The people delegated their powers and freedoms to the legislative, executive and judicial organs of the State while reserving some powers and freedoms to themselves, the fundamental rights which they made paramount by providing that the State shall not make any law which takes away or abridges the rights conferred by that Part²³⁴. Like

²²³ See Smt. Indira Nehru Gandhi v. Shri Raj Narain And Anr., AIR1975 SC 2299

²²⁴ See Kesvananda Bharti v. State of Kerala, AIR 1973 SC 1461

²²⁵ *Ibid*

²²⁶ *Ibid*

²²⁷ See Russell Hardin, “Constitutionalism”. (Barry R. Weingest and Donald A. Wittman, “The Oxford Handbook of Political Economy”, Oxford University Press, London, p. 289.)

²²⁸ See Meaning of western constitutionalism, by Prof. Faizan Mustafa reading material first edition

²²⁹ *Ibid*

²³⁰ See F. Hayek, the constitution of liberty, Chicago: university Press, 1960 pg. 181

²³¹ See Giovanni Sartori, “Constitutionalism: A Preliminary Discussion”, (1962) 56 Am. Pol. SC Rev. 853.

²³² See M. P. Jain, Indian Constitutional Law, 5th edition, rep. 2006, Wadhwa Publications, Nagpur, pg. 6.

²³³ See M. P. Jain, Indian Constitutional Law, 5th edition, rep. 2006, Wadhwa Publications, Nagpur, pg. 6.

²³⁴ See A.K.Gopalan v. The State of Madras, AIR 1950 SC 27, H. M. Seervai, “Constitutional Law of India: A Critical Commentry”, vol. 1, 4th Edi.,



Fundamental rights, elections also form a tool of limiting the power of the executive and legislature. Constitution of India provides for regular elections for Parliament and State Assemblies, and Election Commission are set up for the superintendence, direction, and control of election. When you are having the limitation on time period to control over the nation, you are basically trying to curb down the power of the governance, which the Constitution has limited to five years for a government, before holding the next elections²³⁵. Thus in this manner we are able exercise control over the government automatically with the help of Constitution; so also for further check and control on the government, we have Judiciary. Judiciary looks down into the control of the ruling party over the nation and holds it down if needed.

Constitutional Standing of Election Commission

Democracy shall only sustain by free and fair elections.²³⁶ Only free and fair elections to the various legislative bodies in the countries can guarantee the growth of democratic polity.. India is characterized by the largest democracy of the world²³⁷. At a general elections millions of people are going to the polling booth for the selection of the policy makers who can curve the fate of their sustainable future of India. The preamble of the Indian constitution declares India as a Democratic Republic thereby free and fair election is the biggest requirement of the nation. Free and fair election has been

held as the basic structure of the constitution of the nation²³⁸

Thereby in order to have a free and fair elections the framers of the constitution created an impartial body which has a sole purpose of conduction free and fair elections in the country.²³⁹The constitution established an autonomous body character and insulated from the political pressure or of the executives influence. All reasonable care were taken in creating this body as an independent agency whicg shall be free from all pressures of political party in power and the executives of the day²⁴⁰.

The importance of Election Commission can be observed from the fact that it is placed in a separate part i.e. Part XV of the Constitution of India, after the Union and the State which shows that election commission works as an independent body irrespective of the federal set up. Part XV of the Constitution is really a code for itself providing the entire ground work for enacting appropriate laws and setting up machinery for the conduct of elections²⁴¹. The Committee of the Constituent Assembly on fundamental rights had recommended that the independence of election should be regarded as a fundamental right of every citizen²⁴². The Assembly agreed with the view if the Committee that the question of fair election was a matter of great importance but it was not in favor of embodying a right to that effect in the chapter on the fundamental rights²⁴³. In pursuance of the decision of the Assembly, the Drafting Committee removed the matter from the category of

Universal Law Publishing Co. Pvt. Ltd., Delhi, p. 369, para 7.40.

²³⁵ See The Constitution of India, Article 81, 117

²³⁶ S.R. Bansali "The constitution of India" India publication house, ed 1, Volume 2 pg 10708

²³⁷ facts

²³⁸ Keshavand bharti v union of india

²³⁹ J.N pandey

²⁴⁰ Mp Jain

²⁴¹ See N.P.Ponnuswami v. Returning Officer, AIR 1952 SC 64

²⁴² See V.N.Shukla, Constitution of India, 11th edition, rep. 2008, Eastern Book Company.

²⁴³ *Ibid*



fundamental rights and put it into a separate part, which finally became Part XV of the Constitution²⁴⁴.

The commission was vested with all the powers where elections were concerned. The commission was set up under Art 324 (1). It had been an all India body having a jurisdiction over the election of Lok Sabha Rajya Sabha, State legislatures, Office of president and vice president.²⁴⁵ The reason for having an all India body for the supervise and conduct elections. Rather than the separate body to organize elections of the states. The entire election machinery of state and central has thus been placed under the hand of centralized body which alone is entitled to issue the directions and frames the policies of the conducting a free and fair election in the country. The election Commission shall be independent of executive control inasmuch as the members of the election commission shall not be removed by the president except in recommendation of the election commissioner²⁴⁶

The word “superintendence directions and control empowers the election commission to act in contingencies not provided for by law²⁴⁷ and to pass the orders for conduct of election. It has to direct special revision of the electoral role for any constituency. The word superintendence, directions and control are enough to include all the powers which are required to conduct smooth election so that will of the people could be expressed²⁴⁸ It had been held that “The Constitution has taken care of leaving the residuary power by the commission in its

own right as a creature of the constitution in the infinite variety of the situation that may emerge from time to time in the large democracy as every contingency could not be foreseen or anticipated by laws, and commission can fulfil such vacuum created²⁴⁹ The courts have also held that the power exercise by the commission shall not be exercised mindlessly nor mala fide nor arbitrarily nor partially but keeping in the guideline of the rule of law and not stultifying the presidential notification nor exercising legislations²⁵⁰

Election commission is primarily an administrative body but also exercise certain adjudicatory function also. It has a power under Art 324 dealing with the relevant provisions of Election symbols, adjudicate dispute regarding the recognition of the political parties or rival claims to a particular symbols for the purpose of election²⁵¹. In such case the commission is empowered to act as a judicial body when such disputes arises²⁵²

Parliament is empowered to make laws but it is the sole duty of the commission to conduct those elections. And even as a matter of law plenary power cannot be taken away by the parliament of the commission by even laws framed by the parliament²⁵³, if parliament makes any law which is of such contravention in nature then it would be repugnant to Art 324. It shall be noted that fixing the dates of election either to the house of the people or the legislative assembly is the exclusive domain of the election commission

²⁴⁴ *Ibid*

²⁴⁵ Dr Ambedhkar Speech VII CAD 905-7

²⁴⁶ Dd basu pg 10809

²⁴⁷ Kanhiya V trivadi AIR 1986 SC 111

²⁴⁸ Election Commissioner of India v Ashok Kumar Air 2000 Sc 2979

²⁴⁹ Union of India v Association for the democratic Reform AIR 2002 SC 2112

²⁵⁰ Digvijay Mote v Union of India 1993 Scc 3127

²⁵¹ Yusuf Salim V Shiv Kumar Air 1974 SC 1218

²⁵² Shillong v Sangama AIR 1977 SC 2155

²⁵³ DD Basu pg 10711



especially when power is not subject to any law made by parliament.²⁵⁴

Under 324 the commission has the power to issue the directions requiring the political parties to submit to the election commission for the scrutiny of details of expenditure incurred by them or their authorized agent by parties in connection with the election of their candidates. It shall be noted that constitution has prepared itself to face any surprise problem and operate well in areas unoccupied by legislation. It was held by court the purity of election is fundamental to democracy and thereby the election commission has full authority to question about the expenditure done by the parties to curb the money power²⁵⁵

This empowerment to the powers of commission has resulted in the new controversy where right to privacy was hunting its existence for the candidates contesting election however courts came to the rescue and state that it's the right of every citizen under Art 19 (1)(a) for every citizen to know about the people for whom they are voting to. The supreme court said that Election Commission can issue direction calling for the information from the candidates²⁵⁶

The election commission can order re poll for the whole constituency if it deems fit in the bona fide spirit that the purpose of election has not been achieved. It was held that this Article has to be read in the light of the constitution scheme and the Representation of the peoples act of 1950 and 1951. It was observed that the Art 324

its wide enough to supplement the power under the Acts. But before directing re poll principles of natural justice must be followed²⁵⁷.

No court would extend its jurisdiction in issuing the direction to the election commission for the conduct of the particular polls on particular dates of independently of the perception of the commission as to their feasibility and practicability consistent with what may be needed to ensure purity of the electoral process.

Jurisdiction of courts

The election commission is the tribunal within the meaning of Art 136 (1) inasmuch as the commission has been created by the constitution and vested with the power some of which are adjudicatory. Hence order of the commission are subject to appeal by S.L.P of supreme court by Art 136.. An order of commission can be challenged under Art 32 if it include question of constitution validity. It could also be challenged on the ground of ultra vires in election petition before the high court under s 116A of Representation of People Act 1951²⁵⁸. There were that consent were laid in absence of any period of limitation for holding election in the said constituency in Constitution or in R.P Act and giving powers to the commission in this context will be end of the democracy however Supreme court held that it would be doing each and every thing in protecting the democracy which is the basic structure of the constitution²⁵⁹.

Structure of the Commission

²⁵⁴ Special Reference No 1 of 2000

²⁵⁵ Union of India v Ass for democracy reform AIR 2002 SC 2112

²⁵⁶ A registered society v union of Inda AIR 1996 SC 3081

²⁵⁷ Mohinder Singh Gill v CEC Air 1978 SC 851

²⁵⁸ Election commission v state of Haryana AIR 1984 Sc 1406

²⁵⁹



Elections are an important part of democratic government²⁶⁰. Elections and democracy are like two wheels of a chariot. If one removes a wheel the whole vehicle would be rendered immobile. Elections are a kind of political necessity which forms the heart of Indian Democratic order²⁶¹ Thus, to make sure that elections are free and fair, the Constitution of India (Article 324) provides for an Election Commission.

It consists of a Chief Election Commissioner and some other members (at present, there are two other members). They are appointed by the President of India. Their terms and conditions of service are determined by the Parliament. The normal tenure of the Election Commissioners is 6 years. However, they can be removed from office by the same procedure by which a judge of the Supreme Court can be removed.

The commission consists of a Chief Election Commissioner and other Election Commissioners, appointed by the president and may fix the number as per the time by Art 321 (2).²⁶² The Chief Election Commissioner act as a chairman of the commission of any other Election commissioner has been appointed by the president. It shall be clear that the appointment is not given extremely in hand of central executive however prescribe that president shall consider with the CEC for appointment of the EC²⁶³. The regional commissioners are appointed by the president in consensus with the CEC as per requirement of the state and the constituencies.

An Obligation was been made on the state and central government that at time of requirement of the state or election commission the government has to arrange the employees for the commission for smooth functioning of the commission. By Art 324 (6)²⁶⁴ However the staff so mentioned here includes only those who comes under the disciplinary control of the government. It means that a employee of statutory body cannot be asked to be placed for election purposes²⁶⁵

The Constitution does not prescribe any qualifications, academic or otherwise, for appointment to these offices. However, by convention, only senior civil servants, either serving or retired, of the rank of the cabinet secretary or secretary to the Government of India or of an equivalent rank have been appointed as the Chief Election Commissioner and election commissioners so far. In *Bhagwati Prashad Dixit Ghorewala v. Rajiv Gandhi*²⁶⁶[6], it was contended that as the Chief Election Commissioner is placed at par with a judge of the Supreme Court in the matter of his removability from office under the Constitution, for his appointment also he should possess qualifications similar to that of a judge of the Supreme Court. However, the Supreme Court rejected that contention.

The Chief Election Commissioner may be removed from his office in like manner and on the like grounds as a judge of the Supreme Court. It means the Chief Election Commissioner may be removed from office by Parliament by passing a resolution to that effect, passed by special majority on

²⁶⁰ Srishukal

²⁶¹ Akash Johri

²⁶² M. P. Jain

²⁶³ *ibid*

²⁶⁴ *CEC v State of West Bengal* 1961 SCC 342

²⁶⁵ *Election Commission v State Bank of India* AIR 1995 SC 1078

²⁶⁶ *V S Rama Devi and S K Mendiratta*, *Election Laws, Practice and Procedure*, (Nagpur: Lexis Nexis Butterworths) 2006 P 187.



the ground of proved misbehavior or incapacity. The Election Commission shall consist of a chief Election Commissioner and such other Commissioners as the President may, from time to time, fix. Other Election Commissioner may be removed by the President on the recommendation of the Chief Election Commissioner. Salary of chief election commissioner is same as justice of Supreme Court of India. All three commissioners have same right of taking a decision. Tenure of commissioners is 6 years or up to age of 65, whichever is earlier. The Election Commission of India has completed more than 300 elections. The Chief Election Commissioner can be removed from office only on the like manner and on like grounds as a judge of Supreme Court²⁶⁷.

Until October 1989, there was just one Chief Election Commissioner²⁶⁸. In 1989 the central government changed the structure and appointed two other commissioners by Art 321(2). The underlying purpose of the move seems to be to curb the ultimate power of the CEC who single handedly exercise the power. In 1989, two Election Commissioners were appointed, but were removed again in January 1990. In 1991, however, the Parliament of India passed a law providing for the appointment of two Election Commissioners. This law was amended and renamed in 1993 as the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Act 1993. As of Tuesday, 21 April 2009, the CEC is Navin Chawla. The two Election Commissioners are S.Y. Quraishi and former Power Secretary V.S. Sampath . The Apex Court held that “ *when*

an institution like the election commission is entrusted with vital function an is armed with exclusive and uncontrolled power to exercise them. It is both necessary and desirable that such power shall not be enjoyed by one individual however wise it may be ²⁶⁹ thereby the court held that the 1980 notifications are valid Art 324 (2) leaves to appoint the such number and appoint the election commissioner as he may in time determine. *The power to create a post is unfettered so is the power to reduce or abolish them* “

In 1993 the central government decided to convert the commission into a multi member body. According to the two notifications were issued 1/10/93. According to the one EC was fixed at two. According to the second the remaining were appointed as two. Thereby the T. N. Seshan challenged the notification and the two appointments mentioned in the act of 1993. In T. N. Sheshan v Union of India ²⁷⁰ the supreme court rejected the argument and upheld the appointment of E.C as well as the provisions of the act . By further order dated 15 December 1993, the matter was referred to a Constitution Bench, as it involved interpretation of art 324. The Constitution Bench of the Supreme Court (AM Ahmadi CJI, JS Verma, NP Singh, SP Bharucha and MK Mukherjee however, dismissed all the above petitions by a unanimous decision²⁷¹ on July 14 1995, disagreeing with some of the observations of the division bench in Dhanao's case²⁷².

The Supreme Court, dismissing the above petitions, held that the scheme of art 324 is that the Election Commission can either be a single member body or a multi—member

²⁶⁷ *ibid*

²⁶⁸ Legal India,
<http://legalservicesindia.com/article/article/election-commission-of-india-246-1.html>

²⁶⁹ S.S Dhanao v Union of India AIR 1991 SC 1745
²⁷⁰ (1995) 4 SCC 611

²⁷¹ *Ibid*

²⁷² *ibid*



body, if the President considers it necessary to appoint one or more election commissioners. The argument that a multi-member Election Commission would be unworkable and should not, therefore, be appointed could not be accepted as that would tantamount to destroying or nullifying ell (2) and (3) of art 324. By art 324(1), the Constitution makers entrusted the task of conducting elections in the country to the Election Commission and not to an individual. The Commission discharges a public function.

The election commissioners form part of the Commission and, therefore, they must have a say in decision making. If the Chief Election Commissioner is considered to be superior in the sense that his word is final, he would render the election commissioners non—functional or ornamental. Such an intention is difficult to cull out from art 324 and it is not possible to accept the argument that the function of the election commissioners is only to tender advice to the Chief Election Commissioner. The Chief Election Commissioner does not enjoy a status superior to election commissioners, only because the first proviso to cl (5) of Art 324 lays down that conditions of service of the Chief Election Commissioner cannot be varied to his disadvantage after his appointment and because such protection is not extended to the election commissioners.

Thus now Election Commission is now a multi member body havin one ECE and two CE. It is now assumed that multi member CEC is order of the day and their appointment and removal has been that of the judge of supreme court. However the order made by the court was well explained

that “*only because the procedure and ground of CEC are same of a supreme court Judge they cannot be assumed the said status*”²⁷³.

OBSTACTCLES FACED BY ELECTION COMMISSION

A Democratic rule cannot be imagined without free and fair elections. Elections provide legitimacy to a person representing a particular area of population. In countries with biased election process, political leadership lacks legitimacy; it would be a source of instability in political order and ultimately leads to turmoil²⁷⁴. Elections are of vital importance in representative democracy whose process should recognize the people's will and sovereignty. It is on this premise that the Election Commission was established under Article 324 of the Constitution of the of India , and mandated to organize, conduct and supervise regular, free and fair elections

James Nits in his book, "Management Dimension of Free and Fair Elections" shades more light on what constitutes a free and fair election: “*to determine whether an election has been free and fair, the election must be conducted under conditions that enable the voter to cast his or her vote as he or she wishes purely on his or her own accord. The conditions must be such as the voter is able to cast his or her vote for whoever candidate he or she wishes to vote for. There must be no obstruction, harassment, hindrance, threats or intimidation. There must be no bribery to induce the voter to vote in one way or another. There must be no conditions creating fear in the minds of the voters for prosecution or*

²⁷³ Supra 36

²⁷⁴ See Elections and Democracy by Ronald Meinardus



*victimization after the elections have taken place*²⁷⁵.

It shall also be observed that to conducting free and fair election is a matter of several obsectcle depending of the nature of are concerned and the commission faces several problems in the conducting of the election. S.Y Qurasi (the CEC) said that “ *Conducting election depend upon the nature of the society of the area and the social forces acting in those constituencies. To conduct the election in a rural area of bihar or underdeveloped area of Jharkhand require huge awareness whereas conducting election in area of terror require physical security of the voter*”²⁷⁶. Thus the problem faced by the commission is very area specific and requires huge efforts by the commission as well as support of the government

All aspects in the electoral process have to receive due attention from all stakeholders, as this will enlist the spirit of fairness in the running of electoral activities. The electoral process itself must, in its design and implementation, reflect best practice principles, which are accepted by all the relevant stakeholder engaged in the electoral process. The definition thereof however, varies from country to country, although the basic concerns for the management, conduct and supervision can be developed by individual countries.

In the execution of its functions, the Commission has been faced with the following challenges:- late enactment of laws, qualification of candidates, campaigns characterized by election violence, voter fatigue, putting in place a

credible voters’ register, to mention, but a few.

Qualification of Candidates and Voters

The issue of equivalence to determine a candidate's qualification is still susceptible to misinterpretation coupled with the problem of forgery by some persons in order to qualify. The electoral laws pertaining to eligibility of voters and candidates for particular elections are paramount. These have to be communicated to the voters and candidates in order not to create mishaps over which group of persons are being favored for whichever elections.

Requirements for candidates to contest during elections for some offices have frequently raised concern from opponents – leading to court cases. A few by-elections have already been conducted as a result of this. It is the prime duty of election commission to check that whether a contesting person is eligible for contesting the election or not. All rights in concern of elections have been given to the member In case of **Kapil Muni Karwariya vs Chandra Narain Tripathi**²⁷⁷ it was held that “ *the question to determine that whether an appeal is maintainable before the court on election commission in case of rejection of a candidate for contesting election depend upon the eligibility of the candidate to contest the election. The tribunal can reject any person if the person does not fulfill the requirement to contest the said election*”. Thus onus to verify the eligibility lie with the commission. In case of **Birad Mal Singhvi vs Anand Purohit**²⁷⁸ it was held that “ *candidate who is below the eligible is can be*

²⁷⁵ James Nits in his book, "Management Dimension of Free and Fair Elections

²⁷⁶ toi

²⁷⁷ CIVIL APPEAL NO.2122 OF 2012(Arising out of SLP(C)No.16734 of 2011)

²⁷⁸ AIR 1796, 1988 SCR Supl. (2) 1



disqualified by the election commission as he was not fulfilling the eligibility of age
“

Election Violence

The Electoral Commission draws guidelines for campaigns for candidates. These guidelines are derived from provisions of the laws governing the conduct of elections during campaigns. The Commission does this in anticipation that candidates shall be free to expound on their programs and campaign manifestos in an orderly manner. Likewise, the behavior of voters/supporters of candidates should demonstrate restraint from intimidation and violence.

However the phenomenon of violence is taking root and is becoming a serious challenge in our electoral process. Some candidates now use it as a method of campaign causing fear and intimidation among the electorates. The causes are rivalry among candidates, ignorance and lack of democratic culture, monetization elections and bribing of voters, partisan politics and campaigns, greed for power coupled with fear to lose elections on polling day, weak electoral laws to effectively curb violence and affinity to rig.

THE six-phase, 19-day panchayat elections held in caste-ridden Bihar in April were swathed in blood. At least 100 people were killed and thousands injured in the turf war between the old masters from the upper castes and the newly empowered Dalits. There were 1,30,563 candidates for mukhia (panchayat head), 2,28,995 for seats in the panchayat committee and over four lakhs for membership in the district councils. The

elections, in 8,452 panchayats in 29 districts, were held after 3 years²⁷⁹. Thereby such trouble are resolved by the election commission. The similar line of problems were face many times in Jammu and Kashmir and now in the naxal areas²⁸⁰

1.3(d) Voter Fatigue

It has been noted that frequent elections may be good for the people to choose representatives but it also causes voter fatigue thereby furthering voter apathy. The challenge thereby is what should be done with the population to ensure that they sustain consistent participation in the electoral process. The possibility of combining elections which do not have many variations like the Presidential and Parliamentary elections (with the exception of election for Special Interest Groups to Parliament) could be explored. It's a duty of parliament to decide the time for conducting election however the actual problem face by the commission is that the often election lead to fatigue in voters. The national statistical bureau shows that there had been a decline of 8 % voting in general election in 1998 general election in urban areas²⁸¹. Thus it is one of the prime difficulties faced by the voter to recreated the interest by massive awareness.

Putting in Place a Credible Voters' Register

Availability of a credible Register on polling day before casting a vote underscores the significance of the register in elections. Thus, the following activities that have to be carried out prior to production of the polling day register should be given special attention:

- (i) Registration of eligible voters

²⁷⁹

<http://www.frontlineonnet.com/fl1810/18100380.htm>

²⁸⁰ *ibid*

²⁸¹ source



- (ii) Compilation/processing of the register,
- (iii) Display of the register
- (iv) Production/availability of the polling-day register

Consequently the Electoral Commission, under the Photographic Voter Registration Identification System (PVRIS) Project, carried out fresh registration of voters nationwide in a bid to improve the quality of the old register by adding pictures of the voters biodata as well in the register database.

Already about 8.2 Million voters are registered under the project and close to 2 Million voter cards bearing photographs have been produced. Similarly several elections and by-elections have been conducted using the photo bearing registers.

Voters' Register.

Independent Election Monitoring and observing of elections by the Commission is a challenge in that most often a time, it becomes expensive to involve Commission staff to overseeing or presiding over some of the electoral process. However, with resources available, this is important because it ensures transparency in the electoral process. While the supervision of elections is primarily the responsibility of the Commission, due credence is attached to ratification of the entire process by independent observers. Thus, the scope of monitoring or observing the electoral process should transcend both preparatory and polling day activities of an election by not restricting it to polling day activities alone.

1.3(I) Inadequate Training

In line with the foregoing, and in relation to our election officials, adherence to

voting procedures and regulations is as important as material preparation for elections. Well-trained personnel at all levels of the electoral structure contribute significantly to the conduct of elections and in keeping with accepted international standards for open and transparent participatory elections.

Verbatim reading of the electoral laws does not constitute training. To be effective, a training program should be participatory. Trainees need to leave the training with some kind of memory aid, copies of legal documents governing the elections, regulations, guidelines, related posters/pictorial demonstrations or election officials manual to be the best option and serves as a reference document for trainers and practitioners.

There is need for election officials, especially the core group of trainers to be experienced and mature persons of good character and integrity, for example professionals, Head-teachers, magistrates and bureaucrats. In Eritrea and Ghana, for example, retired professionals are recruited as election officials.

Training should not be considered a luxury but an integral part of election preparation and this can only be achieved if there is adequate funding. The Commission is also called upon to fill up existing vacancies in its structure so as to have an efficient human resource to competently handle it programs.

Election Commission the watch dog of free and fair election

Election commission is one of those constitutional body which is not only vested with the duty of conducting election but



serves a very important purpose of conducting a free and fair election. *It is the right to be governed by good legislature which is consequently made by good legislators.*” Legislators are elected through the process of election. Elections help us to know the real representative of the citizen. Now a day’s election in India is known for its muscle and money power on one hand and use of caste and religious sentiments of electorates on the other hand. Government today is not taking the necessary step to curtail due to political pressure, in spite of commissions, committee reports and judicial interferences. Therefore there is an urgent need for strengthening election commission and subsequent judicial intervention, which is required for the better administration of elections. The concerned paper would be analysing that how within the contours of constitution electoral reforms can be made. Thereby election commission itself take several measures to restrict the misuse of power during election period.

The following are few steps taken by the commission in controlling the function of biased elections .

1. Choice of symbols by candidates:- a controversy put aside

It has been a prime function of election commission to allot symbols to the parties. The chief purpose of this is to achieve the proper voting by even those who are not able to read or right.

In the case of Samyukta Socialist Party vs Election Commission Of India & Anr on 30 September, 1966²⁸² Rule 5(1) The Election Commission shall, by notification in the Gazette of India and in the Official

Gazette of each State, publish a list of symbols and may in like manner amend such list.”

Under the power conferred under the existing Rule 5(1) the Election Commission has prepared a list of free and reserved symbols and has notified them from time to time together with the restrictions to which their use is subject. The reserved symbol is indicated in the various notifications either by putting it against the name of the particular Political Party or by showing the name of the Political Party in brackets opposite it.

It is said that by changing rule 5(1) and dropping the last 8: words from that rule the Election Commission has denied to itself the power to amend the list of symbols. This is not correct.. Before a candidate can choose a symbol it must be free. Before a reserved symbol can be chosen the candidate must be accredited to the party whose symbol it is and it must be shown by the Election Commission in its, notification as the symbol of that party. Obviously, therefore, if circumstances change the notification must follow suit. Parties may come into existence and parties may go out of existence; parties may unite or parties may separate. This will require amendment of the notification. Just as the Election Commission allotted the 'Hut' as a symbol by a change of notification to the Samyukta Socialist Party, it can allot it to another party if circumstances made that course obligatory and just. In *Sadiq Ali vs. Election Commissioner*²⁸³ the Supreme Court upheld the validity of the order which was passed under Symbols Order, 1968. Rule 5(1) of the rules made by the Central government under the representation of the People Act, 1951 empowers the election

²⁸² 1967 SCR (1) 643

²⁸³ AIR 2002 SC 2112



commission to specify the symbols which candidates for election may specify. The Election Commission has issued the Symbols order, 1968 under Article 324 read with these rules. The validity of this order has been challenged from time to time on the ground that the order being legislative in character is ultra vires the commission because the commission has executive, but not legislative power under Article 324.

2. Criminalization of Politics

Even after the 60's years of India's sovereignty, the blessings of independence have reached only to the creamy layer of the society, thus creating India the island of few ultra rich people encircled by vast sea of entirely poor. The criminalization of politics has spread its roots from legislature to executive and from executive to judiciary. In Indian parliament, around 20% of the members of the current Lok Sabha have criminal cases pending against them. The charges of these cases are of very serious crimes like rape, kidnapping, murder, robbery etc²⁸⁴.

Election Commission of India has recently in May 2009, conducted general elections for 15th Lok Sabha at 543 constituencies all over India. Let us have a look at the status of criminalization data in Indian politics.

2004	2009	Increase	% Increase
MPs with criminal records	128	150	22 17.2%
Total Criminal cases on MPs	429	412	-17 -4%
MPs with serious criminal records	55		72 17 30.9%

Since last 15 years, not a single election has conducted peacefully without use of money

or muscle power and domestic violence. Sometimes rival candidates got killed in a bid to have the elections cancelled. All these acts of lawlessness and violence have become possible because of the growing links between many politicians and criminal/anti-social elements. Some of the Bigwigs in this field who have left a mark at being people who have committed heinous crime and acted as leader's are:

Mohammad Sahabuddin was elected to four successive terms in the Indian Parliament from 1996-2008 from Siwan constituency Bihar on RJD ticket. In 1996, Sahabuddin was named as a Minister of State for the Home Ministry in the H.D. Deve Gowda government. He is currently serving a life sentence for kidnapping with intent to murder and as many as 34 cases of serious crime are pending against him.

Mukhtar Ansari is commonly referred to as "the Sahabuddin of UP", is an Indian politician from Maunath Bhanjan or Mau in Eastern Uttar Pradesh. Most recently he won the Mau seat in the Uttar Pradesh Elections, 2007 as an Independent while lodged initially at Ghazipur jail.

Atiq Ahmad he was a member of the 14th Lok Sabha from the Phulpur Lok Sabha Constituency in Uttar Pradesh. He is currently in prison facing trial in 35 criminal cases including several cases of murder. In the Indian general elections, 2009, Atiq Ahmad was allowed to run for election since he is yet to be convicted in any case.

Criminalization of politics in India has attained a stage, where it needs serious attention from the citizens, government and political parties as there was a steady

²⁸⁴ <http://www.weeklyblitz.net/2213/increasing-criminalization-of-politics-in-india>



decline in values of all sections of our society. Criminalization of politics has led to immense pressure on functioning of political institution. The worst part of picture is that “criminal record” becomes an essential qualification for entry into politics. In India Politics is not a social service anymore, instead it emerged as a lucrative profession or business.

Eligibility of candidates with criminal cases pending against them

Recommendations

The Election Commission proposed in its 2004 report that Section 8 of the Representation of the People Act, 1951 should be amended to disqualify candidates accused of an offence punishable by imprisonment of 5 years or more even when trial is pending, given that the Court has framed charges against the person. In the report the Commission addresses the possibility that such a provision could be misused in the form of motivated cases by the ruling party. To prevent such misuse, the Commission suggested a compromise whereas only cases filed prior to six months before an election would lead to disqualification of a candidate. In addition, the Commission proposed that Candidates found guilty by a Commission of Enquiry should stand disqualified. In 1997, the Election Commission issued an order requiring candidates to submit affidavits about their convictions for any of the above criminal offences. However there was no provision in the election law to make this information available to the voter. The Law Commission gave voice to the growing feeling among voters that it was not enough to disqualify criminals found guilty by a court.

3. Right to Know About Candidates.

In order to make democracy healthy & unpolluted, citizens have right to know about Candidates to whom they prefer as their Representative. To stop criminalization and in the public interest the past of candidate should not kept in dark. In the case of Union of India V/s Association for Democratic Reforms²⁸⁵.

Supreme Court agreed with Delhi High Court and in judgment directed the Election Commission to take necessary information on affidavit from candidates as it is part of his nomination paper. Election Commission must take such information which is mandatory including;

- a) His/her criminal antecedents, whether convicted or acquitted? Whether punishable with imprisonment or fine?
- b) Prior to 6 months of filing nomination paper he is an accused of any offence punishable with imprisonment of 2 years? Whether Court has taken its cognizance, if so details thereof.
- c) The assets (movable, immovable, bank balance) of a candidate and his or her spouse and dependants.
- d) Liabilities, if any, particularly over dues of any public financial institutions or government.
- e) Educational qualification of the candidate.

However, failing to furnish required information on nomination papers shall be liable to reject nomination papers by the Returning Officer. Furnishing wrong and incomplete information also liable for penal action. This information is available to the general public, and to the print and electronic media, free of cost.

²⁸⁵ Add the citation



There should be provision compelling winning candidates periodically to report his work to constituency and measures taken by him for people grievances as remedy. This sense of accountability must be given legal shape and punishment for default. There are other important innovations to make specially elections clean, candidate competent and incorruptible. Invigilation is important from the beginning to the end of the election process. In *Common Cause- A Registered Society vs. Union of India*[1] the question about the election expenses incurred by the political parties, it was argued that elections in India are fought with money power and so the people should not be misled by the money incurred by the political parties and the candidates in election. The Court ruled that purity of election is fundamental to democracy and the commission can ask the candidates about the expenditure incurred by the candidates and by a political party for this purpose. In a democracy where rule of law prevails this type of naked display of black money cannot be permitted. Thus, the commission has power to issue directions requiring the political parties to submit to the election commission for its scrutiny, the details of the expenditure incurred.

In *Union of India vs. Association for Democratic Reforms*[2] the Supreme Court directed the Election Commission to issue certain directions to candidates to file an affidavit detailing information about themselves under certain specific heads. This was done to stop criminalization of politics. People have a right to know about the candidate for whom they are being urged to vote. The Right to know flows from 19(1)(a). When law is silent Article

324 is a reservoir of power to act for the purpose of having free and fair elections. Article 324 is geared to the accomplishment of free and fair elections expeditiously. However the commission needs to exercise its power with fairness and not arbitrarily. The Court has observed that no body will deny that the election commissioner in our democratic scheme is a central figure and a high functionary. The election commission has to exercise its power in accordance with the existing law and not in derogation thereof. There are the Courts to strike down any misuse of power by the Commission.

4. Restriction of timing for canvassing

The commission has issued an order limiting the hours for use of loud speakers for election purposes only between 8 AM to 7 PM in evening. Beside this canvassing was restricted to two days before the polls. The order was made to avoid noise pollution and disturbance of peace and general public at large. There had been several writ petitions filed in this context. The high court expressly declared this power not included in art 324. However the supreme court gave its sanction as soon as this reached the house of law at apex court.
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WHAT COULD BE THE EXTENT OF JUDICIAL INTERVENTION?

In order to save its people from the curse of bad legislature, Constitution provides for a strong and distinct Election Commission and an independent Judiciary. Judiciary in India enjoys a very distinct position as it is the guardian and custodian of the Constitution. Indian Judiciary is “truly the only defensive armor of the country for its Constitution and laws”.

²⁸⁶ *ECI v All India Anna Dravida Maneta Kazangam* 1994 2 SCC 689



Corruption today is not only affecting the social life of the country but also rights of the people whose representatives today are making laws. The Law Commission in its 170th Report has recommended various changes in the Representative of the Peoples Act, 1951 and Rules 1961. Many Election Commission Reports have suggested various changes in the above mentioned laws. But, Parliament would not be able to take harsh steps as it directly affects the members of Parliament. Therefore there is a need of strengthening Election Commission and intervention of Judiciary for having a free and fair election. The Supreme Court of India may lay down guidelines in these regards under article 142 of the Constitution as done in the *Vishaka case*²⁸⁷ till a suitable legislation is enacted. As stated by the Supreme Court in *Vineet Narain case*²⁸⁸ “In exercise of the power of the Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number cases and a brief reference to a few of them is sufficient. In *Erac Sam Kanga v. Union of India*²⁸⁹, the Constitutional Bench laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey v. Union of India*²⁹⁰ (In re: Foreign Adoption), guidelines for adoption of minor children by foreigners were laid down. Similarly in the cases of *State of West Bengal v. Sampat Lal*²⁹¹, *Union Carbide Corporation v. Union of India*²⁹², *Dinesh Trivedi (MP) v. Union of India* etc. guidelines were laid down having the effect of laws, requiring rigid compliance.” Recently in the *Vishaka case*²⁹³ guidelines have been laid down for

observation in workplaces relating to sexual harassment of working women. In this case Supreme Court said that “The obligation of this court under Article 32 of the Constitution of India for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing statement of Principles of the Independence of the judiciary in the LAWEASIA region. These principles were accepted by the Chief Justice of Asia and the Pacific at the Beijing in 1995 (As amended at Manila, 28th August 1997) as those representing the minimum standard necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objective of the judiciary mentioned in the Beijing Statement is: Objectives of the Judiciary

- The objective and functions of the judiciary include the following:-
 1. To ensure that all persons are able to live securely under the rule of law.
 2. To promote within the proper limits of the judicial functions, the observance and the attainment of human rights, and
 3. Administer the law impartially among person and between persons and the state”

It is pointed out in *Vishaka* that it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its Constitutional obligation under the

²⁸⁷ See *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241

²⁸⁸ See *Vineet Narain*, (1998) 1 SCC 226

²⁸⁹ See *Erac Sam Kanga v. Union of India*, WP No. 2632 of 1978 decided on 20.3.1979

²⁹⁰ See *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244

²⁹¹ See *State of West Bengal v. Sampat Lal*, (1985) 1 SCC 317

²⁹² See *Union Carbide Corporation v. Union of India*, (1991) 4 SCC 584

²⁹³ See *Supra*, 23



aforesaid provision to provide a solution till such time as the legislature acts to perform its role by enacting proper legislature to cover the field.

On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature step into substitute then by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under article 141 and, by virtue of Article 144, it is the duties of all authorities, civil and judicial, in the territory of India to act in aid of this court.

Conclusion

Election commission is a statutory authority created for proper functioning of the election in India.

It serves a purpose not only as that of a body conducting election but a body which can be the wheel of democracy in India. It makes all the attempt to have a smooth functioning of the elction in the country

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**WOMEN AND EMPLOYMENT
(WITH SPECIAL REFERENCE TO
THE SEXUAL HARASSMENT OF
WOMEN AT WORKPLACE)**

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Abstract

Employment and human beings share an extremely important relationship with each other and this relationship has several perspectives to be considered- economic, social, political, etc. India is the country following the tradition of “Yatra Narayastu Pujyante Ramante Tatra Devata” (Where women are honoured, divinity blooms there).

In this research paper, the author is very much keen to evaluate the nexus between women and employment. Women are most important part of human society but since time immemorial, they are vulnerable to discrimination of one sort or the other when it comes to employment. Low pay, unequal promotion prospects, job segregation, restrictions after marriage, training and education, sexual harassment are few types of discrimination.

The author puts a special emphasis on the problems of sexual harassment at workplace which a women undergoes during her due course of employment. Comment has been made on the case of *Vishakha v State of Rajasthan*. There are many provisions in the Indian Penal Code, 1860; *Young Persons Harmful Publications*

Act, 1956; the Indecent Representation of Women (Prohibition) Act, 1986; Factories Act, 1948; Maternity Benefit Act, 1961; Equal Remuneration Act; etc. are few legislations which deal with the problem of sexual harassment directly or indirectly. But the major focus is on the Sexual Harassment of women at Work Place (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) - its origin, its applicability, important definitions, redressal mechanisms and other concepts. The author has also made an attempt in order to analyse the POSH Act and also given few suggestions in order to enhance the Act.

Women and Employment

(With special reference to The Sexual Harassment of Women at Workplace)

1. Introduction

A social problem mean a social question or difficulty which requires a solution. According to Fuller and Myers, “social problems are behaviour patterns or conditions that are considered objectionable or undesirable by many members of society. These members recognize that corrective policies, programmes and services are necessary to cope with and reduce the scope of problem.”²⁹⁴ In a nutshell, a social problem is a question which is objectionable and undesirable to majority and can be solved by collective action towards improvement.

These social problems are universal in nature. No single society can exist without

²⁹⁴ Benedick Freeman, 1941 Fuller Myers *The Natural History of Social Problems*, <https://www.scribd.com/document/397270852/1941-Fuller-Myers-The-Natural-History-of-Social-Problems> (Last visited 23/10/2019)



social problem. A society whether advanced or backward, small or large, traditional or modern face some or the other social problem. When a problem is faced by an individual, it is termed as a personal problem. But when a larger section of people are affected (negatively) due to certain issue, we term it as a social problem. So it is very important to understand that social problems differ largely from personal problems. These problems are relative and inconsistent in nature. They change from time to time and place to place. A question can be considered to be a social problem only if people sanction it to be so. It needs to be highlighted that social problems are interrelated to each other. For instance, problems like over-population, unemployment, poverty, crime, begging, prostitution, etc. are interrelated.

Theoretically, it is considered that all humans are equal. But in practice it is found that there are various types of inequalities. Discrimination is made on the basis of gender in all societies. It is called gender inequality or male-female inequality. Problems related to women in India can be broadly classified into four main headings.

They are:

- A. Problem of gender inequality
- B. Problem of dowry
- C. Problem of domestic violence
- D. Women and employment related problems

This paper is going to deal with problems about women and employment, especially with sexual harassment they go through during their due course of employment.

²⁹⁵ Universal Declaration of Human Rights (UDHR), G.A. Res 217 (III) art. 7, U.N. Doc, A/810 (Dec 10, 1948).

²⁹⁶ *Circle of Prevention, Economic Independence for Women: Leaving or Living in Abusive*

Since the very beginning of human civilization, right to work, earn livelihood has been universally considered as a fundamental right of each and every individual. The Universal Declaration of human rights has explicitly provided that **all are equal before law and shall face no discrimination in equal protection by the law**²⁹⁵. Even then discrimination against women at workplace is not an unusual phenomenon.

'Economic Independence refers to a condition where individual women and men have their own access to the full range of economic opportunities and resources in order that they can shape their lives and meet their own needs and those of their dependents. It recognizes women as economic players who contribute to the economic activity and should be able to benefit from it with equal basis with men. Women need to be valued and recognized for the contribution they make to their children, home, community and economy. Women need economic resources for making choices for themselves and their children.²⁹⁶ For achieving this economic independence for all the sexes, it is very important to have a holistic development of all the genders, especially in the field of employment.

2. Discrimination at Work Place

Women form a considerable part in workforce in India. Majority of rural female workers are employed in agriculture as labourers and cultivators. In urban areas, women are primarily employed in unorganized sectors such as household

Relationships, Discussion Paper (2002), <https://www.gov.nl.ca/vpi/files/economicindependence.pdf> (Last visited 23/10/2019)



industries, petty trades and services, buildings and constructions, etc. In many regions, women have been working in formal and non-formal sectors. Due to pathetic economic conditions and a lack of bargaining power, there is an existence of gender inequality which in turn leads to acceptance of low pay and worst working conditions by women labourers. Thus, women turn out to be preferred workers. On the contrary, when women became aware of and initiated demanding their rights, there was a massive increase of women entering the organized and formal workforce, willingly. Some have been successful in proving their propensity leading to improved pay and working conditions.²⁹⁷ The most unfortunate phenomenon here is that the contribution of women towards work and economy is almost always considered to be subordinate, underestimated resulting in deprivation of several opportunities which a woman can receive in her due course of employment.

Discrimination can take place in several ways in the course of her employment. Some of the discriminatory practices at the place of work are listed as follows:

- i. **Low Pay**- There has been a delusion that many women have started taking part in paid employment in the recent years, in fact a significant number of females are a part of paid work force since a long time. It is still a known fact that even if men and women are engaged in identical work, women are paid less. In other words, there is a clear cut absence of the concept of equal pay for equal work.
- ii. **Unequal Promotion Probabilities**- Women are subjected to their job prospects by not promoting them to the position they deserve. Men are often

given preferential treatment. Woman with same or even better qualifications than male counterparts miss her opportunity to be promoted only on the basis of she being a woman. There are several reasons for this; prominent being patriarchy which is prevalent home and even the workplace. Men expects women to always be in a subordinate or inferior position than them. This is a great barrier in the way of personality development and overall progress of a female.

- iii. **Job Segregation**- Polarization in paid female workforce is clearly evident due to the pattern of job segregation. Women are unrepresented in the construction industries, forming just over 10 per cent employees and 20 per cent in energy generation and water supply. A clear preferential treatment is given to men in engineering and manufacturing sectors. Job segregation is notable in part time workers. The pay and status of women part timers is way distinct than male counterparts. In particular, women part time workers have through jobs having a low pay and lower status especially in personal services and sales occupations, which are not even particular.²⁹⁸

- iv. **Restricted relationship between Marriage and Employment**- It is stereotypically believed that marriage lead to obligations and difficulties which in turn hinders efficiency of the worker due to which many institutes refuse to employ married women as their employees. There is no dearth of cases wherein the women employee was fired because of her pregnancy. In India, several establishments have accepted the 'Maternity Services Act' in their own service policies. In the landmark

²⁹⁷ Women and Economy, Beijing Platform for Action, para151.

²⁹⁸ Sandra Fredman, *Women and Law* (Claredon Press 1997).



judgement of *Air India V Nargeez Mirza*²⁹⁹ it was seen that this institution had made pregnancy a bar to work an airhostess. The Hon'ble Supreme Court found this provision to be most arbitrary and unreasonable as it the corporation has adopted an unreasonably subjective approach regarding woman's capacity to work after her pregnancy. A law about maternity benefit was enacted to provide support to a women in her productive and reproductive roles which will effectively stand against discrimination because of biological role she is ought to play. But these positive intentions backfired as the employers were not willing to hire a married women in order to avoid the maternity benefits which are needed to be given by them.³⁰⁰

v. **Training and Education-** Increased access to education for women is directly proportionate to improvement in quality of women employment. Irrespective of development in science and technology, it is observed that women are deprived of proper education and skill development training. Most of them are unable to compete with the sophisticated job culture. In fact, at many instances, they do not fulfil the eligibility criteria to apply for the job.

vi. **Sexual Harassment at Work Place-** Sexual harassment at workplace is a tremendous infringement on not only fundamental rights of women but also their human rights as this is clear violation of their sense of dignity and to earn their livelihood with dignity. In fact this is an unlawful intrusion on the right

to privacy of women and also adversely affect sanctity of a woman. In India, apart from the reported cases, there is even more number of unreported cases of sexual harassment as. The main reason behind this sexual harassment is to show a subordinate position to women. By deliberately targeting the sexuality of women, their working capacity and abilities are belittled.

3. Sexual Harassment at Work Place

A female government officer, Bhanwari Devi³⁰¹, was gang raped by five men as an act of revenge merely because she tried to refrain them to marry off a girl in their family who was not even a year old. This saddening incident took place in Rajasthan in 1992. This evil of sexual harassment of women which can be considered as a reason for discrimination at work place has really threatening effects on the Indian society. Undoubtedly, this demon prevailed in the Indian society. But the aforesaid case was an eye-opener for everyone. In this case, several women's organisations filed petitions in the Hon'ble Supreme Court as they were unable to get justice in the lower judicial levels. In the end, the petition was filed as *VISHAKHA* and in 1997 after a brief period of five years, the Hon'ble Supreme Court of India gave a landmark judgement, empowering the rights of women at workplace by issuing guidelines, popularly known as *VISHAKHA Guidelines*.³⁰²

²⁹⁹ *Air India V Nargeez Mirza*, (1981) 4 SCC 335 (India).

³⁰⁰ Amita Dhar & Archana Prashar, *Endangering Law Essays In Honour Of Latika Sarkar* (1997).

³⁰¹ *Vishakha v State of Rajasthan AIR 1997 SC 3011* (India).

³⁰² Sanghamitra Muzamdar, *What are Vishaka guidelines? Know what constitutes sexual harassment at workplace* (2018), <https://www.thestatesman.com/supplements/law/vishaka-guidelines-know-what-constitutes-sexual-harassment-at-workplace-1502694883.html> . (Last Visited 25/10/2019).



It is quite evident from the National Crime Records Bureau (NCRB) statistics that the number of reports about sexual harassment have declined considerably in the recent years³⁰³ also there is no dearth of unreported cases. For instances, in the year 2017-17, 88 cases were filed in Infosys, 116 complaints were raised in Wipro, 65 in TCS, Tata Steel recorded 26 complaints and the list goes on and on.³⁰⁴ A study by Oxfam India and Social and rural research institute (in the year 2012) showed that 17 per cent of the working women had to suffer from sexual harassment at their work place. This was conducted in the cities of Mumbai, Delhi, Bangalore, Chennai, Kolkata, Ahmedabad, Lucknow and Durgapur. It revealed that the three main sectors which were most vulnerable to sexual harassment were labourers (29%), domestic workers (23%) and small scale units (16%).³⁰⁵

4. Criminal Provisions for Combating Sexual Harassment at Work Place

In the Indian Penal Code (IPC), there are no explicit provisions dealing with sexual harassment at workplace. But there is no dearth of provisions which cover sexual harassment and prescribe punishments for such acts. Section 354A of Indian Penal Code has defined sexual harassment and also prescribed punishment for the same. According to sub clause 1 of section 354 IPC,

A man committing any of these following offenses amount to sexual harassment:

1. *physical contact and advances involving unwelcome and explicit sexual overtures; or*
2. *a demand or request for sexual favours; or*
3. *showing pornography against the will of a woman; or*
4. *making sexually coloured remarks, shall be guilty of the offence of sexual harassment. (emphasis supplied)*

Also, this section talks about punishment for the offences mentioned above. Section 509 of the IPC prescribes imprisonment which may extend to one year, fine or both for words, gesture or an act intended to insult the modesty of a woman³⁰⁶. Also, section 54 of the IPC gives a punishment of imprisonment anywhere between one to five years also there is liability of fine for assault or criminal force with intent to outrage her modesty.³⁰⁷

Apart from that, various social legislations such as Young Persons Harmful Publications Act, 1956; the Indecent Representation of Women (Prohibition) Act, 1986; Section 67 of Information Technology Act, 2000 which gives punishment to people who publish child pornography on internet etc. are to a some extent addressing the issue of sexual harassment. Besides among labour legislations which are directly or indirectly related to sexual harassment of women are Factories Act, 1948; Maternity Benefit Act, 1961; Equal Remuneration Act, 1976 etc.

³⁰³ National Crime Records Bureau (NCRB), Crimes Against Women, Available at 2.

³⁰⁴ Press Trust of India, *Sexual harassment at corporate offices: Rise in number of complaints in 2016-2017* (In the Hindustan Times on August 6, 2017), [https://www.hindustantimes.com/india-news/sexual-harassment-at-workplace-data-disclosed-by-corporate-offices/story-](https://www.hindustantimes.com/india-news/sexual-harassment-at-workplace-data-disclosed-by-corporate-offices/story-8cmVxn8tKia3lI6oqqYt9K.html)

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³⁰⁵ Rashi Aditi Ghosh, *Sexual Harassment of women not down despite laws to protect them*, https://zeenews.india.com/exclusive/sexual-harassment-of-women-not-down-despite-laws-to-protect-them_6270.html (Last visited 25/10/2019).

³⁰⁶ Section 509 of Indian Penal Code, 1860.

³⁰⁷ Section 354 of Indian Penal Code, 1860.



5. Sexual Harassment of women at Work Place (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act)

5.1 How did the above mentioned act come into existence?

In the year 1980, India signed The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). Thus India came in an obligation to ensure protection of women, especially against sexual harassment. The Vishakha Case³⁰⁸ and the Apparel Export Promotion Council v A. K. Chopra³⁰⁹ were the major cases which drew everyone's attention towards the issue of sexual harassment. National Commission for Women took efforts to draft the first bill for protection of women from sexual harassment at workplace. But this underwent several changes. The bill which was introduced in 2010 was sent to Standing Committee of Human Resources Development which recommended several changes in the bill. This bill was passed in the Lower House of the Parliament in September 2012. It was passed by the Upper House of Parliament unanimously in February 2013. Thus, on February 27, 2013, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 became an 'Act'. It is also to be noted that before these developments, Indian Criminal Law

witnessed an extremely significant step- 'Criminal Law Amendment Ordinance, 2013'³¹⁰ which was mainly caused due to the infamous 'Nirbhaya' Delhi gang rape case. Justice Verma Committee³¹¹ was constituted for revisiting and making recommendations on the criminal laws of India. Some of these recommendations pertaining to sexual harassment are included in the POSH Act.

5.2 Key features of the Sexual Harassment of women at Work Place (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act.)

A. Applicability:

This Act is applicable to each and every place or institution which falls under the purview of 'Workplace' as per the aforesaid act. According to POSH Act, a 'Workplace' includes³¹²

- (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;
- (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust,

³⁰⁸ Vishakha v State of Rajasthan, AIR 1997 SC 3011 (India).

³⁰⁹ Apparel Export Promotion Council v A. K. Chopra, AIR 1999 SC 625 (India).

³¹⁰ The Criminal Law (Amendment) Ordinance, 2013, Found on <http://www.manupatra.com/manufeed/contents/PDF/634953350808963007.pdf> (Last visited on 28/10/2019).

³¹¹ Report of Committee on Amendments to Criminal Law, 23 January, 2013, Found on <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (Last visited on 28/10/2019).

³¹² The Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act 2013, Section 2 (o).



non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;

(vi) a dwelling place or a house.

Hence the act is applicable in all the organized and unorganized sectors. Hence it can be concluded that there is a wide applicability of the said act.

(emphasis supplied)

B. Sexual Harassment³¹³:

It is very important to understand the exact meaning of the term 'sexual harassment' according to this act. As per clause (v), Section 2 (n) of this act, sexual harassment means any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Also the act mentions in a neat way what can we term as sexual harassment.

These are as follows:

- i. *Physical contact or advance*
- ii. *A demand or request for sexual favours;*
- iii. *Making sexually coloured remarks;*
- iv. *Showing pornography; and*
- v. *Any other physical, verbal or non-verbal conduct of a sexual nature.*

Apart from the above, some other examples of sexual harassment are:

- *unwelcome touching, hugging or kissing;*

- *staring or leering;*
- *suggestive comments or jokes;*
- *unwanted or persistent requests to go out;*
- *Intrusive questions about another person's private life or body;*
- *deliberately brushing up against someone;*
- *insults or taunts of a sexual nature;*
- *sexually explicit pictures, posters, screensavers, emails, twitters, SMS or instant, messages, etc.;*
- *accessing explicit internet sites;*
- *inappropriate advances social networking sites; and*
- *behaviour which would also be an offence under the criminal law, such as physical assault, indecent exposure, sexual assault, stalking and obscene communications.*

(emphasis supplied)

C. Aggrieved Woman³¹⁴:

Aggrieved woman can be a woman who alleges to have been subjected to sexual harassment irrespective of her age or whether she being employed or not. Since it is clear that there is no linkage between woman and she being employed, it can be deduced that any woman can file a complaint in relation to any workplace. For instance, the customer gets sexually harassed by the employee, the customer can file a complaint with the Internal Complaints Committee of that workplace regarding that specific employee.

D. Internal Complaints Committee³¹⁵:

To hear and redress the grievances pertaining to sexual offences, an Internal Complaints Committee is to be established

³¹³ The Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act 2013, Section 2 (n).

³¹⁴ The Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act 2013, Section 2 (a).

³¹⁵ The Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act 2013, Section 4.



at each and every branch of the company by the employer employing more than 10 employees. This committee is to be presided by the senior most female officer. The committee should also consist of minimum two Members amongst the employees. One member should be a member of an NGO or any other institution dealing with similar issues (This member shall be paid). The tenure of the office of this committee shall not be more than three years. Also there are provisions for removing the presiding officer.

E. Redressal Procedure:

‘Conciliation’ is the initial procedure to be followed by both the parties- aggrieved and accused. If it is not possible, a written complaint has to be filed with the Internal Complaints Authority. A copy of the complaint should also be served to the accused Enquiry is to be conducted and completed within 90 days of the complaint. In this entire procedure, the identity of the woman should not be revealed i.e. it should be kept anonymous. If requested by the aggrieved woman, she can be transferred or an additional leave of three months can be given to her.

F. Penalty:

Once the accused is proved to be guilty, following penalties/ punishments can be possibly imposed-

- i) *Punishment prescribed under the service rules of the organization;*

- ii) *Disciplinary actions such as written apology, warning, withholding the pay, reprimand, termination, etc.; and*
- iii) *Deduction of the compensation to be paid to the aggrieved woman from the compensation of the accused.*
(emphasis supplied)

5.3 Analysis of the Sexual Harassment of women at Work Place (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act)

Irrespective of POSH Act being in force for more than half a decade, the incidents of sexual harassment has not gone down. Instead there is a rise of 14 per cent in the complaints of sexual harassment³¹⁶. So two things can be deduced here:

- a) That there something missing with the act itself; and
- b) That the implementation of the Act and its compliance are unable to fetch up to the mark results.³¹⁷

Prima facie it is clear that the act is very well worded and covers almost all the aspects related to sexual harassment. But the issue which is evident here is that the Act is not at all gender neutral. But the major flaw arises when it comes to effective execution and compliance of the POSH Act. In many unorganized workplaces Internal Complaints Committee is absent. In fact many organized workplace also do not have an Internal Complaints Committee in place. Also there is a clear cut lack of awareness amongst the employees that they

³¹⁶ Rica Bhattacharya, *India Inc. reports 14% rise in sexual harassment complaints in FY 19*, <https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-reports-14-rise-in-sexual-harassment-complaints-in->

[fy19/articleshow/71288712.cms?from=mdr](https://www.supremoamicus.org/fy19/articleshow/71288712.cms?from=mdr) (Last visited 28/10/2019).

³¹⁷ Bhumesh Verma, *Decoding POSH: Analysis of India's Regime against Sexual Harassment*, (2018) PL (CL) Dec 89.



have all the rights to file a complaint under the POSH Act.

Also, 'sexual harassment' being a subjective concept, male and female employees are both unable to understand what constitutes sexual harassment exactly. What one thinks of a casual behaviour can be perceived as sexual harassment by another. There should be a strict compliance regime. There should be timely audits and review of all complaints periodically. Awareness programmes regarding sexual harassment should also be conducted. The penalties and punishment should be made more stringent.

6. Conclusion

The Indian Constitution is enacted in a way to create a society without any kind of gender or class discrimination and create an environment wherein equal opportunities and avenues of individual development are available for every person irrespective of his/her gender, caste, religion, race, place of birth, etc. as the framers of the Constitution believe that individual progress is progress of nation as a whole. There is no dearth of laws, statutes, authorities dealing with gender discrimination, directly or indirectly. Problems pertaining to women in the due course of her employment are handled in all such acts and laws.

One such act is the POSH Act. It is a strong worded act with lack of effective application and compliance. The major reason for this meek success is lack of awareness. Also Internal Complaints Committee should be given more authority. At the same time it is essential to understand that the above mentioned Act is an extremely strong tool in the hands of women. Thus it should be judiciously in order to maintain the sanctity of the

impugned act. One of the lacuna in this Act is it being thoroughly gender biased. Just as women, problems pertaining to men should also be given due consideration. Sensitization regarding this issue of sexual harassment is very much necessary. Necessary steps need to be undertaken by employer as well as employee. There should be quick decision making and equal active participation on part of each and every employee, employer in order to curb this cancer of sexual harassment. Economically independent woman is an asset of the nation. Curbing discrimination, sexual harassment, etc. are steps in order to strengthen women and make them independent economically.

Legislations like these are necessary for empowerment of women leading to betterment of entire society. It is imperative that these pieces of legislations do not merely adorn paper but become a real weapon to curb sexual harassment in the country. Swami Vivekanand once said,

“The best thermometer to the progress of a nation is its treatment to women.”



A FICTITIOUS MILIEU: THE LEGISLATURE, JUDICIARY & THE INDIAN CONSTITUTION WITH A CODIFIED THE BASIC STRUCTURE

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Introduction

The most wonderful conundrum a Constitutional Law scholar would ever come across is the question: what if we have a codified basic structure doctrine? However, it is insuperable to answer such chimeric enigma through a single line exhaustive sequitur. This paper editorialize the idea that the codification of the basic structure doctrine (hereinafter referred as the 'doctrine') may lead to a double-edged sword consequence. In one hand, Codification may trammel the aborning grounds for judicial overreach but; on the other side it may also act as the cul-de-sacs for the legislature to circumvent the doctrine and annihilate the basic structure of the Constitution, since a codified doctrine will cease to persevere as an undefined gamut. However, a deep cogitation would coax one to reckon that the entire narrative set regarding the unbridled power the doctrine delves on the judiciary by virtue of which it encroaches upon the law-making power of the *populus electus*, should be looked from a different standpoint, which if done would lead to the sequitur whether the codification is desirable or not. Nevertheless, at the end, an undefined doctrine susceptible to kaleidoscopic interpretation versus a defined version of it providing grounds for flimflaming the doctrine, both are radical

evils and thus it is an arduous endeavour to espouse the lesser one.

A Codified Basic Structure Doctrine

At this incipient juncture, firstly it is ineluctable to catechize the scenario where the basic structure of the Constitution is a codified one along with understanding how such codification will be undertaken. Convincingly, the most probable path which would be adopted to effectuate codification is a Constitutional amendment under Article 368 of the Constitution³¹⁸ thus would be under basic structure scrutiny; but, even if such codification is conducted without any Constitutional amendment still it has meagre chances of survival since the judiciary would strike it down at the first glimpse, by exercising the power of 'judicial review' which itself stands as the basic structure.³¹⁹

However, to extrapolate the nuances, it becomes imperative to point out the flaws in the perspective through which the doctrine is perceived. The doctrine is seen as some impediment restraining the law making powers of the legislatures. But, one of the majority judges in *Keshavnanda Bharti*³²⁰, Justice Palekar himself asserted that the Parliament has an 'indefinite' power to amend.³²¹ However, this power to amend gets startlingly effected when the doctrine gets codified. It needs to be understood that, the doctrine does not create an *ad infinitum* space for the judiciary rather it fosters a leeway for the legislatures itself. It is established by the fact that if, in future, the Parliamentary form of government which is efficacious today turns anachronistic and unworkable where a Presidential form of government would be

³¹⁸ The Constitution of India, 1950, Art. 368

³¹⁹ *Minerva Mills Ltd. & Ors vs Union Of India & Ors* citation, AIR 1980 SC 1789

³²⁰ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

³²¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 1120, (as per Palekar J.)



the need of the hour, then a rigid codified basic structure doctrine may not prescribe for such shift even if the new form of government encase all the basic features such as democracy, the supremacy of the Constitution, independence of judiciary etc. The most cogent reason for the codified one not to embrace such shift is the fact that the codification if endeavoured would be done by present Parliamentary form of government and thus they would be the last one to codify the basic structure in such a way which would be susceptible to such change. However, within the same framework, an un-codified doctrine provides enough amplitude for such change which needs to be adopted with the passage of time keeping a single check that the basic features perseveres in the new form too. Hence, the legislatures with an undefined and un-codified basic structure turn to be in a more commodious state than with a codified one, as the former gives them the plenary power of interpreting and formulating any law barring the fact that it does not violates the basic structure of the Constitution.³²² Thus it is established that the undefined doctrine no way binds the legislature's power of law making but just to upheld the checks and balances notion of our Constitution the judiciary is delved with the task of ensuring that the laws and amendments does not destroy the foundation or the basic structure of the Constitution.

Moreover, the rhetoric that the basic structure of the Constitution is stalemated and immune to change is suffering from an

ample amount of fallacy too. The verdict of *Keshavnanda Bharti*³²³ never contemplated an exhaustive list citing all the ingredients that consists the basic structure since an element which *ad tempus* does not make the basic structure may in future it be the need of the hour to accrue the same element the tag of the basic structure.³²⁴ The same is pertinent from the fact that the draftsmen of our Constitution never contemplated that 60 years down the line privacy of an individual may be of utmost importance but since the basic structure was not a codified one with no exhaustive list thus when circumstances entailed, the right to privacy was considered as the part of the basic structure of the Constitution.³²⁵ Hence a codified basic structure with an exhaustive list would destroy the ground required for the Constitution to rejigger itself over the changed time and circumstances.

Catechizing the *status quo*

Let us now delve *in praesenti* where the doctrine is undefined. But, before investigating into this we must succinctly look at the political imbroglio which resulted into the formulation of the basic structure doctrine. In 1973, Mrs Gandhi's hegemony was turning megalomaniac and it was such that the two *ad hoc* judges in *Kesavananda Bharati*³²⁶ were handpicked as deemed to be pro-government since back then no collegium system persisted. Thus the doctrine was the need of the hour to stop Mrs Gandhi's rampant voyage which if at that point of time left to perdure could overthrow the institution of the judiciary itself and such foreboding is not void of

³²² Gautam Bhatia, *Basic Structure – V: Why are the Basic Features Abstract and Illustrative?*, Feb 17, 2014, available at <https://indconlawphil.wordpress.com/2013/11/12/basic-structure-v-why-are-the-basic-features-abstract-and-illustrative/> (Last Visited on October 18, 2019)

³²³ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

³²⁴ Bhatia, *supra* note 4

³²⁵ *Justice K.S Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*, (2018) 1 SCC 809

³²⁶ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225



evidence since the very next day of pronouncement of the judgment, 3 senior-most judges of the SC were superseded and Hon'ble A.N Ray J. was appointed the CJI.³²⁷ Along with that Mrs Gandhi kept no stone unturned to overrule *Kesavananda Bharati*³²⁸ through *Minerva Mills v. Union of India*³²⁹ but it was an otiose venture on her part due to some changes in political climate. Hence, it must be understood that the doctrine was born as a result of a tug-war between the legislature and the judiciary.

Professor Conrad's daunting didactic speech

The 'unbridled' power which was accrued to the judiciary by formulating the doctrine of basic structure was thus *sine qua non* during that political imbroglio. However, it can never be concluded that culmination of Mrs Gandhi's regime has made the doctrine supererogatory since what Professor Dietrich Conrad was daunting way back in 1965 while delivering a lecture at Banaras Hindu University was the fact that with no checks if amending power of the Parliament is considered to be unlimited and unfettered, whether it would even be legit that it amends Article 1 and divides the nation? Or if the whole Constitution is repealed and Moghul rule re-introduced?³³⁰

Such a scenario may seem outlandish today but the only reason for its improbability is due to the fact that we have the 'basic structure' doctrine bulwarking the Constitution.

Moreover, Prof. Dietrich Conrad and other Constitutions such as that of Germany evidence the fact that there are certain 'implied limitation of the Amending power'.³³¹ Accordingly, the majority in *Keshavnanda Bharti*³³² too agreed to the fact that the amending power under Article 368³³³ is subject to some implied and inherent limitations³³⁴ along with the fact that the word 'amendment' itself purports the limitation,³³⁵ which many scholars perceive as 'a limiting ingredient to the power of legislature'. However, rather than limiting the power, it facilitates the legislatures to freely amend the Constitution including the fundamental rights but only puts a check of the basic structure which is established by the fact that the basic structure is not any particular 'Article' or 'clause' in the Constitution which the judiciary is averting to amend rather it is a doctrine, thus the word 'limitation' can only be used when the judiciary is precluding the legislature to amend a specific clause or article of the Constitution but when such bar is absent, as it is in the case of the basic structure

³²⁷ The Economic Times, *Two hours given to Justice A N Ray to decide on CJI post?*, July 16, 2018, available at <https://economictimes.indiatimes.com/news/politics-and-nation/two-hours-given-to-justice-a-n-ray-to-decide-on-cji-post/articleshow/65007659.cms> , (Last Visited on October 18, 2019)

³²⁸ *Ibid.*

³²⁹ *Minerva Mills v. Union of India*, AIR 1980 SC 1789

³³⁰ A. G. Noorani , *Behind the 'basic structure' doctrine*, May 11, 2001, available at <https://frontline.thehindu.com/static/html/fl1809/18090950.htm> (Last Visited on October 18, 2019)

³³¹ Article 79(3), Basic Law of the Federal Republic of Germany, 1949 (Germany) ; A. G. Noorani , *Behind the 'basic structure' doctrine*, May 11, 2001, available

at <https://frontline.thehindu.com/static/html/fl1809/18090950.htm> (Last Visited on October 18, 2019)

³³² *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

³³³ The Constitution of India, 1950, Art. 368

³³⁴ MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA, 1088 (13th ed., 2017)

³³⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 499, (as per J.M. Shelat J. and A. N. Grover J.)



doctrine, it cannot be termed as a limiting agent encroaching on the law making powers of the legislatures. Furthermore, the contention that judiciary attributed some 'Article' of the Constitution the status of the basic structure cannot be accepted as to limit legislatures since only those amendments which if passed would put the Constitution itself at peril are struck down. Moreover, the argument that the 'basic structure' doctrine has no basis within the Constitution itself is suffering from an ample amount of fallacy, since the power to amend comes with 'implied limitations' and this doctrine of basic structure falls within the connotation of this implied limitation's foursquare.

Judiciary: Faith Fetters & Flaws

Regarding the fact that such wide powers delved on the judiciary is susceptible to abuse, the words of former CJI Hon'ble Justice Bhuvneshwar Prasad in one of his most reasoned verdict where he elucidated the thought that "The fact that a power is capable of being abused has never been in law a reason for denying its existence"³³⁶ seems to be applicative. Furthermore, the judge's oath reading as 'bear true faith and allegiance to the Constitution of India as by law established... and that I will uphold the Constitution and the laws'³³⁷ precludes them to abuse the power delved on them and makes them to upheld the basic structure in its true essence. There may be decisions such as *Indra Shawhney v. Union of India*³³⁸ or *S.R. Bommai v. Union of*

*India*³³⁹ where ordinary legislations were struck down taking the shield of the basic structure doctrine but even such decisions cannot be a cogent ground to codify the doctrine since it was done in pursuance of 'power to do complete justice under Article 142 of the Constitution' which itself is the part of the basic structure as held in *Union Carbide Corporation v. Union of India*³⁴⁰. However, in *Kuldip Nayar v. Union of India*³⁴¹ and *Ashoka Kumar Thakur v. Union of India*³⁴² the previous position set by *Indira Nehru Gandhi v. Raj Narain*³⁴³ was reiterated by the Constitutional bench that the doctrine of basic structure can only be used to scrutinize Constitutional amendments.

Conceding to all such facts above regarding oaths and pledges that judges take, it is also a bitter truth that the judiciary exercising the doctrine of basic structure circumvented all such fetters and gradually tilted the points of checks and balances in the Constitution in such a way that made the judiciary least susceptible to scrutiny. Usually, the judiciary is said to be under the checks of the executive mainly vide provision such as Article 124³⁴⁴ where the President appoints the judges of the Supreme Court and reserves the authority to remove such judges. However, a panoramic review would reflect that the President is just left as a nominal piece in appointment of judges of the Supreme Court. This position was brought about by using the doctrine of basic structure in a very specious manner which is discovered

³³⁶ *State of West Bengal v. Union of India*, (1964) 1 SCR 371, ¶36 (as per Bhuvneshwar Prasad CJ.).

³³⁷ The Constitution of India, 1950, Schedule III, Part B, Item 4, 7.

³³⁸ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

³³⁹ *S. R. Bommai v. Union of India*, (1994) 2 SCR 644

³⁴⁰ *Union Carbide Corporation v. Union Of India and Ors.*, (1989) 3 SCC 38

³⁴¹ *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1

³⁴² *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1

³⁴³ *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp SCC 1

³⁴⁴ The Constitution of India, 1950, Art. 124



by reading the dissenting judgement of Hon'ble Justice Jasti Chelameswar in the case of Supreme Court Advocates-on-Record Assn v. Union of India³⁴⁵ where he vehemently articulated the notion that the primacy to the opinion of the CJI in the appointment of judges of SC is not the basic feature, rather to preclude the concentration of power regarding appointment of judges solely in the hands of the President or the CJI is the venture which should be inhibited. It was elucidated that the 99th Constitutional Amendment³⁴⁶ forming the NJAC³⁴⁷ had no such impediments within it which embraced such concentration of power and the Law Minister to some extent could be the sole mouth-piece of the Executive however the other five members which included the CJI itself could easily outnumber the Law Ministry's suggestion.³⁴⁸ However, it is pertinent that the zeal of granting exclusive and absolute power in the hands of the judiciary regarding its appointment led to the struck down of the NJAC leaving the President to persevere only his 'hands and seal'³⁴⁹ to put it in the suggestion by the collegium and thus defying him of all other powers which could act as a check on the judiciary. It is established by the fact that the recommendation of the collegium initiated by the CJI, even if rejected by the President at the first instance citing specific reasons, the next time it is forwarded by the collegium after re-consideration, it

becomes compulsorily binding on the President.³⁵⁰ Hence, what the Constitution assembly feared and as a result of which they used the word 'consultation' in Article 124³⁵¹ and purposely deterred from using the word 'concurrence' so as to preclude the vesting of any absolute power solely in the hands of a single body, the judiciary by using the basic structure doctrine as a ladder, successfully provided the ultimate and absolute primacy to itself.

Article 124³⁵² along with appointments, also vests another check on the judiciary which is the power of the President to remove judges of the SC on the grounds of misbehaviour or incapacity.³⁵³ However, an extensive write-up and research is not necessary at this point to arrive at the conclusion that how difficult it is to remove a judge by way of Article 124³⁵⁴ since till date no judge has been successfully impeached, though the process was initiated against one of the SC judge and two HC judges.³⁵⁵ Hence, at praesenti if the basic structure doctrine lets us to express the thought that it protects the Constitution from the hegemony of the legislatures at the same time we should also concede to the fact that it transposed the points of checks and balances imbedded in our Constitution which itself may one day be attributed as one of the basic features but the judiciary will be the last person to accrue it such status.

³⁴⁵ Supreme Court Advocates-on-Record Assn v. Union of India (2016) 5 SCC 1

³⁴⁶ The Constitution (Ninety Ninth Amendment) Act, 2014

³⁴⁷ National Judicial Appointments Commission Act, 2014

³⁴⁸ Supreme Court Advocates-on-Record Assn v. Union of India (2016) 5 SCC 1, ¶1213 (per Chelameswar J.)

³⁴⁹ The Constitution of India, 1950, Art. 124(2)

³⁵⁰ MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA, 509 (13th ed., 2017);

Supreme Court Advocates-on-Record Assn v. Union of India (1993) 4 SCC 441

³⁵¹ Supreme Court Advocates-on-Record Assn v. Union of India (2016) 5 SCC 1, ¶1176-1177 (per Chelameswar J.)

³⁵² The Constitution of India, 1950, Art. 124

³⁵³ The Constitution of India, 1950, Art. 124(4)

³⁵⁴ The Constitution of India, 1950, Art. 124(4).

³⁵⁵ MAHENDRA PAL SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA, 512,513 (13th ed., 2017)

**Conclusion**

Thus analysing the nuances of the doctrine it can be concluded that it may to some extent give some liberty to the judiciary or a bit leverage over the legislatures but at the end it is to be understood that an unlimited amending power is more heinous than a judiciary reserved with a doctrine open to interpretation where the judges are bound to reason their verdicts as to why the doctrine comes into play is and if such verdicts found untenable it is capable of being overruled. A cost-benefit analysis would suasion one to hold that codification of the basic structure is not desirable since the codification itself will be struck down on the grounds of the basic structure thus resulting in an otiose venture. Despite, if codification is ever endeavoured it should be drafted in such manner that the basic characteristics of the '*doctrine of basic structure*' itself, which is its inherent ability of '*open to interpretation and adaptation to changed circumstances*' is endured in the codified one too. However, the possibility of such arrangements are meagre and hence as of now, following the options which this paper provides in the introduction section of choosing between two evils, it is held that an undefined, in-exhaustive and un-codified basic structure is the lesser and necessary evil than the codified one.



ANALYSING THE LAWS RELATING TO REGULATION OF GMOs IN INDIA

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Keywords: genetically modified organisms, precautionary, biotechnology regulatory authority of India bill.

CHAPTER I

ABSTRACT

The debate over the coterminous effects of genetically modified organisms on the environment has been raging on in the recent years both in India and the international arenas. In the past decade alone, there has been a substantial rise in the number of groups that take a stand against the release of such organisms into the food chain. This opposition to the development and sale of genetically modified organisms has been, to date, successfully countered by the lobbying juggernaut of the major players in the genetic engineering industry who seek to capitalise on the established advantages of such organisms like higher yielding capacity and higher resistance to pests and diseases in the case of genetically modified agricultural crops. The primary objective of this paper is to present an overview of the law on regulation and release of genetically modified organisms. A brief discussion about the existing legislations has been attempted which is followed by a concise account of the functions of the regulatory committees on GMOs. An account of the associated liabilities and remedies that flow with the GMOs and transgenic products has also been provided. The precautionary principle which forms the backbone of the machinery deciding the deployment of precautionary action has also been elucidated. Lastly, with a forward looking perspective the merits and lacunae of the Biotechnology Regulatory Authority of India Bill has been explained with recommendations proposed for the emendation of the Bill.

1. INTRODUCTION

1.1 OVERVIEW

In the past decade alone, there has been a substantial rise in the number of groups that take a stand against the release of such organisms into the food chain. This opposition to the development and sale of genetically modified organisms has been, to date, successfully countered by the lobbying juggernaut of the major players in the genetic engineering industry who seek to capitalise on the established advantages of such organisms like higher yielding capacity and higher resistance to pests and diseases in the case of genetically modified agricultural crops.

The propaganda against and in support of genetically modified organisms is dangerous as it leads to the formation of an extremely reductionist view of the issue in the eyes of a layman who either sees the strictly against or staunchly for stance of the interest groups involved. Education regarding the existence of a common ground between the two stands needs to be imparted. It has become an imperative objective to inform the layman about the credible advantages and potential disadvantages of introducing a product of human intervention in the process of evolution and natural selection.

India's current legislative framework with regard to genetically modified organisms is arguably panoramic with statutes spanning the fields of science and technology, environment and its preservation,



agriculture and its advancement, food and health and also the trade of GMOs. Almost all the frameworks dealing with the regulation of GMOs have been briefly discussed in the following part of the paper. The only exceptions worth mentioning are the Patent Act, Biological Diversity Act, and Plant Variety Protection and Farmers' Rights Act which are remotely linked to the issue at hand but do not have the machinery expressly concerned with the regulation and release of GMOs.

1.2 RESEARCH PROBLEM

The debate over the environmental impact of genetically modified (GM) crops is becoming progressively mind boggling, serious, and extremely emotional. It is further complicated as new technology and research is done. Evaluating the environmental impact of GM crops is frequently troublesome as many factors are considered. The paper aims to present an overview of the law on regulation and release of genetically modified organisms.

1.3 EXISTING LEGAL SITUATION

Now-a-days with the rapid advance research and development in agricultural biotechnology, countries are approving many genetically modified crops for commercial release and agricultural production. ISAA reported in 2017, the 21st year of commercialization of biotech crops, 189.8 million hectares of biotech crops were planted by up to 17 million farmers in 24 countries. From the initial planting of 1.7 million hectares in 1996 when the first biotech crop was commercialized, the 189.8

million hectares planted in 2017 indicates 112-fold increase.³⁵⁶

In India, Bt cotton was approved by Government of India in March 2002 as the first transgenic crop for commercial cultivation for a period of three years. Apart from cotton, there are more than 20 crops under research and development in about 50 public and private sector organizations in India. Out of these, 13 crops have been approved for contained limited field trials in India.³⁵⁷

1.4 REVIEW OF LITERATURE

Drew L. Kershen in his paper 'Of Straying Crops and Patent Rights' talks about genetically modified crops which hold an inherent potency of causing a genetic contamination which might onset claims of nuisance, negligence and strict liability against the farmers and the developers of the seeds. Adding to that his next paper on 'Agricultural Biotechnology: Legal Liability Regimes from Comparative and International Perspectives' says that the other torts are also included in it namely trespass he wrote this paper with another author named Stuart J. Smyth.

Stuart J. Smyth said any economic loss resulting from physical contamination caused by the adulteration of seeds by unapproved substances and loss of markets caused thereby are valid claims for instituting suits on tort of negligence, private nuisance and public nuisance as well.

³⁵⁶ Transgenic Crops-Biosafety Concerns and Regulations in India < <http://vikaspedia.in/agriculture/crop-production/advanced-technologies/transgenic-crops-biosafety-concerns-and-regulations-in-india>> Accessed 21. September 2019.

³⁵⁷ Biotech Crop Highlights in 2017 < <https://www.isaaa.org/resources/publications/pocket/16/>> Accessed 21 September 2019.



David Kriebel, in his paper of ‘The Precautionary Principle in Environmental Science’, spoke about precautionary principle and the four primary objectives of the precautionary principle which are - enforcement of preventive measures in situations of scientific uncertainty, transpose the burden of proof on the exponents of an inherently harmful activity, probe for the alternative procedures to achieve the same goal and involve the invested participants in the decision making process. *Anne I. Myhr*, in ‘The Precautionary Principle in GMO Regulations’ also spoke about the precautionary principle and the practical projections of the principle’s objectives and how it remains controversial to their varied interpretation.

Also *S.M. Garcia*, in ‘The Precautionary Principle: its Implications in Capture Fisheries Management’ spoke about the Rio Declaration 1992, which states that “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation”. The author also says that articulation of the approach is similar to that of the principle and the only variance exists in that firstly, the Rio Declaration recognises that there may be differences in local capabilities to apply the approach and secondly, that it appeals for the accounting of economic and social costs.

David J. Schnier, in his study and paper ‘Genetically Modified Organisms and the

Cartagena Protocol’ talks about the Cartagena Protocol on Biosafety to the Convention on Biological Diversity which has promulgated one of the most robust references to the precautionary principle in contemporary international law. The protocol is the first of its kind to expound the precautionary principle outside of its preamble i.e., delineate the principle in its operational titles. According to the author, the consequence of this the Protocol has been credited with “propelling the precautionary principle to the forefront of international environmental law”.

Dhan Prakash, Professor at Amity University, Amity Institute of Herbal Research and Studies examines the various risks associated with biotechnology in his article *Risks and Precautions of Genetically Modified Organisms* (2011). Prakash states that the introduction of genetically modified organism can create hazards for ecological stability (2011). Genetic contamination, competition with natural species, and the inability to control genetically modified organisms once they are released into the ecosystem all present potential problems. Prakash sees biotechnology as a paradox, “The use of genetically modified organisms is important in order to meet increasing demands and improve existing conditions prevalent in our environment. We are at an anxious juncture where, on one hand, we are faced with unprecedented threats to human health and environment, while on the other hand we have opportunities to change the way things are done” (2011).³⁵⁸ While Prakash states that there are potential human health risks associated with biotechnology, he does not elaborate.

³⁵⁸ Dhan Prakash, ‘Risks and Precautions of Genetically Modified

Organisms (2011) <<https://erikrothrichmond.wordpress.com/tag/gmo/>> Accessed 24 September 2019.



Further the Recombinant DNA safety guidelines, 1990 speaks that, the environmental release, the geographical position of the site, the dimensions of the area, the expected effects on the ecosystem in the proximity of the site, the method and quantity of the release and contingency plans need to be made out prior to the release and assessment of the risks associated with the release needs to be made on a case-by-case basis before the release.

The National Biotechnology Regulatory Bill, 2008 says that BRAI also establishes that it does not have jurisdiction with respect to any matter which the appellate tribunal under the bill is empowered to decide further also no injunction can be granted by any court in respect of any action taken under the Act. It also adds that the provisions that make the bill are almost unimpeachable as very limited space is provided for interventions and the conventional mechanisms have been completely dismantled.

1.5 SCOPE AND OBJECTIVES

The scope of the present study is mainly focused on the framework of the legislation regarding the GMOs and the liabilities associated with it. The main objective of the paper is to evaluate the laws and how certain principle or bill are being the backbone to support the regulation of GMOs in India. Further, it will try to focus on specific liabilities like liability under tort, general environmental liability etc. Finally, it will try to focus on how the precautionary principle is needed to protect the environment and future it will talk about what recommendations are needed on the BRAI Bill 2013.

1.6 RESEARCH QUESTION

1. Is the Precautionary Principle needed to protect the Environment?
2. What are the recommendation on the BRAI Bill?

1.7 HYPOTHESIS

- Principle 15 of the Rio Declaration, 1992 states the precautionary principle: “in order to protect the environment, the precautionary approach shall be widely applied”.
- Biotechnology Regulatory Authority of India Bill encroach upon the legal rights of the farmers and the consumers generally.

1.7 RESEARCH METHODOLOGY

Considering the objective of the paper the ‘qualitative research method’ is applied. Qualitative research is generally more explorative, that is dependent on the collection of verbal, behavioral or observational data that can be interpreted in a subjective manner.

CHAPTER II

2. LAW AND LIABILITIES

2.1 FRAMEWORK OF LEGISLATIONS

The regulations pertaining to biosafety in India constitutes primarily of the biosafety rules and guidelines. However, the central legislative authority for biosafety regulations in the country is arguably the Environment (Protection) Act, 1986.³⁵⁹ The sections 6, 8 and 25 of this Act jointly form the preamble through which all the currently existing biosafety regulations flow in India. Section 6 of the Act gives the authority to the Central Government to form the essential rules on the standard procedures, implement safeguards and

³⁵⁹ The Indian Environment (Protection) Act, 1986.



place the necessary restrictions for handling of hazardous substances and outright prohibit the others. On the other hand, Section 8 of the Act imposes a prohibition on a person from handling any substances considered to be hazardous under the Act except when the procedures and safeguards have been complied to. Lastly, the Section 25 of the Act places the responsibility of stipulating the rules regarding procedures and safeguards for handling hazardous substances³⁶⁰ on the Central Government. As a direct consequence of this, the general consensus in the Indian Judicial System is that the biosafety rules are of a statutory nature as their genesis lies in the abovementioned provisions of the Environment (Protection) Act. These abovementioned provisions have also led to the promulgation of the 1989 Biosafety Rules by the Ministry of Environment and Forests.

The 1989 Biosafety Rules apply to the products made from genetically engineered micro-organisms and other gene technology produce and regulate their manufacture, storage and import. These Rules also cover the pre-release facet of genetically modified organisms, namely their research and development besides the large scale applications and trials. Hazardous organisms which are not genetically modified are also regulated by the 1989 Biosafety Rules. The Rule 8 of this statute mandates the requirement of an approval by the regulatory bodies prior to the discharge or even the production of genetically modified organisms and cells. The Rules no. 10 and 11 necessitates the requirement of an approval for any such substances that contain genetically

engineered organisms or even cells. However, the Rule 9 of this statute is the foremost in significance as it expressly prohibits the deliberate and/or unintentional discharge of genetically modified organisms (for experimental purposes) covered under its schedule, barring a situation where it has been approved as a 'special case' by the appropriate authority. The abovementioned schedule is a feature of the 1989 Biosafety Rules which classifies human and animal pathogens in terms of their risk profiles.

The 1989 Biosafety Rules have been augmented aptly by the Biotechnology Safety Guidelines which have been put into effect by the Department of Biotechnology.³⁶¹ The Biotechnology Safety Guidelines are the consequence of Rule 4(2) of the 1989 Biosafety Rules which mandates the requirement of guidelines manuals which are to be stipulated by the Review Committee on Genetic Manipulation. This committee is a departmental off-shoot of the, and serviced by the Department of Biotechnology. These guidelines are concerned with the assessment of biosafety levels of which it carries a detailed analysis. A detailed admonishment on recombinant DNA or rDNA related activities, experiments, shipments and quality control produced by genetic engineering is also provided. The Biotechnology Safety Guidelines, before reaching its current form and after being issued by the Department of Biotechnology in 1990 were revised and emended two times and finally amended in 1998 in accordance with the progressive strides made in the field of rDNA research.

³⁶⁰ Ibid.

³⁶¹ Revised Guidelines for Research in Transgenic Plants and Guidelines for Toxicity and Allergenicity

Evaluation, 1998 <
http://venturecenter.co.in/brc/doc/dbt/rev_res.pdf>
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2.2 GENETICALLY MODIFIED ORGANISMS AND ASSOCIATED LIABILITIES

Presently, there does not exist any specialised statute that deal with genetically modified organisms and the liabilities arising out of the misappropriate handling or use of such organisms in India. However, there exists effective legal machinery that ensures the awarding of appropriate legal remedies to the aggrieved persons. Instances where damage and injuries caused by the misapplication of genetically modified organisms and violation or oversight of any biosafety regulation can be discerned with the aid of specific legal provisions and precedents of the judiciary.

Specific GMO Liability Provisions

If a measure adopted by the defendants is found to be in contravention of the 1989 Biosafety Rules, then the section 15 of the Environment (Protection) Act, 1986 is attracted. Such a failure to concur with the Biosafety Rules is punishable by an imprisonment term extending to not more than five years or a fine not extending the amount of one Lakh rupees or both. An additional fine can be imposed if such a contravention of the Biosafety rules continues and this amount shall not exceed five thousand rupees for every day. The court has the authority to take cognizance under section 15 of the Environment (Protection) Act, 1986 only on a complaint instituted by either the central government or an officer authorized on its behalf and even a person who has given a due notice of a minimum of sixty days in the prescribed manner to the central government or an authorised officer.³⁶² However, the general consensus regarding the liability provisions

³⁶² The Indian Environment (Protection) Act, 1986 (Act 29 of 1986), s. 19.

³⁶³ The Indian Environment (Protection) Act, 1986 (Act 29 of 1986), s. 29(3).

under the Act is that they are tenuous and time consuming. Any genera or species that involve the use of 'any technology' which makes them potent to either the life or health of human beings, animals and plants cannot be registered under the Protection of Plant Varieties and Farmers' Rights Act, 2001.³⁶³ The explanation of the sub-section clarifies that the term 'any technology' includes the genetic use restriction and terminator technology. The Environment (Protection) Act, 1986 deals specifically with the liability arising from the non-performance of a propagating material that is registered under the Act. The developers of such varieties are duty-bound to make a disclosure to the farmers about the expected performance under differential conditions. Upon the failure of the developers to do so, the aggrieved farmers can institute a suit for damages before the Plant Variety Protection Authority under the Act³⁶⁴, which has the authority to award compensations accordingly.

General Environmental Liability

The Articles 32 and 226 of the Constitution of India are the legal pathways through which the fundamental rights guaranteed under part III of the Constitution can be enforced by any qualified citizen or a legal person under certain cases. The Article 32 is invoked to move the Supreme Court and likewise Article 226 is invoked to move any particular High Court under the jurisdiction of India. Both of these courts are clothed with the power to issue appurtenant writs for the enforcement of fundamental rights and as a remedial measure for their infringements. The apex court has by way of its pronouncements, which have had the effect of considerably relaxing the rule of

³⁶⁴ The Indian Environment (Protection) Act, 1986 (Act 29 of 1986), s. 39(2).



locus standi, has onset a plethora of public interest litigations seeking to enforce the fundamental rights of the socially and economically handicapped who were previously inept to approach the courts. Furthermore, the increasingly broadening horizon of the interpretations under the head of Article 21 has brought to the fore previously unimportant rights like the right to a clean environment and the right to health. This has further enabled persons to approach the High Courts or the Supreme Court for the remedy of the violations of such rights. The remedial measures employed by the courts involve the closure of polluting establishments and mandatory requirement of caution deposits, following the final report of fact-finding commissions constituted by the respective courts. A number of judicial pronouncements have emphasized the requirement of establishing specialised 'environmental' courts across the nation to handle the complicated issues with expertise.³⁶⁵ The environmental liability principles are primarily built up on Supreme Court judgments like the precedent of *M.C. Mehta v. Union of India*³⁶⁶. In this case, the apex court examined the absolute and strict liability of enterprises in the event of an accident particularly if the respondent is engaged in hazardous or inherently dangerous industry. The court also examined the rule laid down in the *Ryland v. Fletcher*³⁶⁷ case and was of the opinion that this rule was archaic as it was promulgated in a period when science wasn't as developed and hence this precedent was inept for accounting the "present day economy and social structure". Consequently it was held that an

enterprise that causes harm as a result of any accident is strictly and absolutely liable to compensate the affected. This liability³⁶⁸ was held to not be subjected to the exceptions allowed under the *Ryland v. Fletcher* rule.

As regards the factor of accounting for the amount of damages to be paid by the violating enterprise, it has become an established practice to keep the amount payable to be directly proportional to the capacity and wealth of the violators. The objective for awarding a compensation of such a nature is to create deterrence among the enterprises handling hazardous substances. In *Union Carbide Corporation v. Union of India*³⁶⁹ the Supreme Court dismissed the precedents set in the *Oleum Gas Leak* case as obiter dicta citing the fact that a conclusion about the status of the defaulting company under Article 12 of the Constitution was not drawn. However, the apex court adopted a different point of view while deciding in the matter of *Indian Council for Enviro-Legal Action v. Union of India*³⁷⁰. It was observed by the Hon'ble court that although the court hadn't directed any specific damages to be paid in the *Oleum Gas Leak* case, the bench had dictated that cases on the basis of the principle of absolute liability can be instituted. Therefore, the apex court in the *Indian Council for Enviro-Legal Action* case followed the principles of absolute liability in discerning the immediate issues of the matter. Concurrently, it was also observed by the court that damages based on the absolute liability principle must account for the costs of restoring the

³⁶⁵ Law Commission of India, 186th Report on Proposal to Constitute Environment Courts (September, 2003)

³⁶⁶ *M.C. Mehta v. Union of India* 1987 SCR (1) 819

³⁶⁷ *Ryland v. Fletcher* (1868) UKHL 1.

³⁶⁸ The Public Liability Insurance Act, 1991 (Act 6 of 1991).

³⁶⁹ *Union Carbide Corporation v. Union of India* 1990 AIR 273.

³⁷⁰ *Indian Council for Enviro-Legal Action v. Union of India* AIR 1996 SC 1446.



environmental degradation besides the compensation for the victims. On the other hand, in *M.C. Mehta v. Kamal Nath*³⁷¹, the perspective adopted by the Supreme Court was to view pollution as a tortious act against the 'community as a whole'. The court also awarded exemplary damages to be paid by the respondent. Thus, it can be reasonably inferred that the guilty party is liable to pay damages to the victims who have suffered loss and the same should also account for the restoration of the ecology and environment. A classification of different types of liabilities associated with pollution was attempted by the Supreme Court in the case of *K.M. Chinnappa v. Union of India*³⁷². The court categorized the liabilities as follows: (i) criminal liabilities through which imprisonment sentences can be awarded; (ii) administrative sanctions; (iii) costs for clean-up of the pollution caused; (iv) civil liability based on the principle of strict liability; and (v) adverse publicity. In the case of *Research Foundation for Science Technology and Natural Resources Policy v. Union of India*³⁷³, the polluter pays principle was further clarified by the Supreme Court. It was held that this principle includes the costs for preventing and tackling any pollution caused by the polluter.

Liability under Law of Tort

The liability under law of tort, in majority of the cases, can be traced to the pernicious effects which result from mixing of genetically modified organisms with

unmodified or 'natural' organisms and even due to the supplanting of genetically modified plants as substitutes or volunteers. However, given that pollen transfer is a biological phenomenon, in order to determine liability, some damage needs to be proved. To date, no specific precedents have been established in India. Thus, reliance can be made on analogical deduction from trends set in the United States and Canada. These trends show that suits have been instituted by non-transgenic plant growers against the developers of genetically modified plants or crops. The genetically modified crops hold an inherent potency of causing a genetic contamination that might onset claims of nuisance, negligence and strict liability against the farmers and the developers of the seeds.³⁷⁴ Claims pertaining to trespass³⁷⁵, and nuisance³⁷⁶ based suits, have failed thus far in both the American as well as Canadian courts. However, suits resulting from negligence have found considerable success in establishing precedents and it has been held that it is reasonable to expect a duty of care from persons handling genetically modified organisms. A breach of that duty would invite liability on the basis of negligence. Any economic loss resulting from physical contamination caused by the adulteration of seeds by unapproved substances and loss of markets caused thereby are valid claims for instituting suits on tort of negligence,

³⁷¹ *M.C. Mehta v. Kamal Nath* (1997)1 SCC 388.

³⁷² *K.M. Chinnappa v. Union of India* AIR 2003 SC 724.

³⁷³ *Research Foundation for Science Technology and Natural Resources Policy v. Union of India* (2005) 13 SCC 186.

³⁷⁴ Drew L. Kershen. 'Of Straying Crops and Patent Rights' (2004) 43 Washburn L.J. <https://www.researchgate.net/publication/265872786_Adventitious_Presence_Inadvertent_Crossing>

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³⁷⁵ Stuart J. Smyth and Drew L. Kershen, 'Agricultural Biotechnology: Legal Liability Regimes from Comparative and International Perspectives' (2006) 6 GJA <<http://jay.law.ou.edu/faculty/kershen/articles/34NatureBiotechnology493.pdf>> Accessed 23 September 2019.

³⁷⁶ Ibid.



private nuisance and public nuisance as well.³⁷⁷

As many as five instances can be anticipated in United States of America and Canada based disputes where genetically modified organisms related liability might come to the fore. They are as follows:

- (i) damages arising from the admixture of GMOs with conventional crops;
- (ii) damages originating from the loss of premium for a traditional commodity or food products without GMOs;
- (iii) an admixture rendering the registered identity of the product as lost;
- (iv) damage caused due to the loss of markets and
- (v) damage from inability of a farmer to plant a crop due to the proximity of transgenic crops.³⁷⁸

GMOs and Product Liability

The genesis of the liability arising from products causing injury lies in the House of Lords decision of *Donoghue v. Stevenson*.³⁷⁹ It was held that the manufacturer of a product owes a duty of care towards the consumer when he has the knowledge that there does not exist any intermediate mechanism for the examination of the manufactured product and that an omission of reasonable care on his part towards the product can cause injury to the consumer's life or property or both.³⁸⁰

The Consumer Protection Act, 1986

The central objective behind the promulgation of this Act was to promote and protect the consumer's rights in the market. The consumer rights include but are not limited to the right to be shielded from the marketing of potentially hazardous goods; right to be informed about the quality, quantity, purity, standard and price of goods and the right to consumer education. Under the Act, all movable properties with the exception of actionable claims and money bills are considered goods.³⁸¹ Therefore, genetically modified organisms based products are also considered as goods under the Act. The Act also provides for a consumer³⁸² to file a complaint³⁸³ against a trader³⁸⁴ for defects in the goods sold or for the deficiency in service accompanying the sale of goods. Thus, actions against defective GMOs or the inept services accompanying them are maintainable under the Act. Suits³⁸⁵ can also be instituted against the malpractices of excessive pricing, offering sale of hazardous or potentially hazardous goods and services. Restrictive trade practices that could lead to the manipulation of prices and unfair conditions of delivery, which in turn can cause unjustified costs and restrictions for the consumer, are also covered by the Act. Fraudulent or bogus claims aimed at deceiving the consumer by misrepresenting goods and services, fall within the ambit of the Consumer Protection Act, 1986. Such a contrived representation of the standard, grade and composition of genetically modified organisms are considered to be unfair trade practice. Therefore, the

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ *Donoghue v. Stevenson* (1932) UKHL 100.

³⁸⁰ Ibid.

³⁸¹ Sale of Goods Act, 1930 (Act 3 of 1930), Sec. 2(7).

³⁸² The Consumer Protection Act, 1986 (Act 68 of 1986), Sec. 2(1)(d).

³⁸³ The Consumer Protection Act, 1986 (Act 68 of 1986), Sec. 2(b).

³⁸⁴ The Consumer Protection Act, 1986 (Act 68 of 1986), Sec. 2(j).

³⁸⁵ The Consumer Protection Act, 1986 (Act 68 of 1986), Sec. 2(c).



marketing of GMOs without the labels indicating their grade and composition, especially when a legal requirement to label the GMOs exists, tantamount to a fallacious and bogus representation and is consequently an unfair trade practice prohibited by the Act.

- (i) Enforcement of preventive measures in situations of scientific uncertainty;
- (ii) Transpose the burden of proof on the exponents of an inherently harmful activity;
- (iii) Probe for the alternative procedures to achieve the same goal and
- (iv) Involve the invested participants in the decision making process.³⁸⁶

CHAPTER III

3. PRECAUTIONARY APPROACH AND BARI BILL

3.1 PRECAUTIONARY PRINCIPLE AND PRECAUTIONARY APPROACH

For the execution of an environmental release, the geographical position of the site, the dimensions of the area, the expected effects on the ecosystem in the proximity of the site, the method and quantity of the release and contingency plans need to be made out prior to the release. Assessment of the risks associated with the release needs to be made on a case-by-case basis before the release. The Genetic Engineering Appraisal Committee bears the duty of handling and monitoring all large-scale operations involving GMOs. The applicant has to submit his operational details on the management and disposal of harmful wastes before the GEAC. The precautionary principle is a doctrine through which pragmatic resolutions can be made in situations of scientific uncertainty. There are four primary objectives of the precautionary principle:

However, the practical projections of the principle's objectives remain controversial due to their varied interpretations.³⁸⁷

Numerous versions of the principle continue to exist and essentially two formulations of the principle exist in International law- the precautionary approach and the precautionary principle.

Principle 15 of the Rio Declaration, 1992 states regarding this principle: "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The articulation of the approach is similar to that of the principle and the only variance exists in that firstly, the Rio Declaration recognises that there may be differences in local capabilities to apply the approach and secondly, that it appeals for the accounting of economic and social costs.³⁸⁸ It is a general consensus that this 'approach' is a dilution of the more stringent 'principle'.

³⁸⁶ David Kriebel et.al., 'The Precautionary Principle in Environmental Science', (2001) 109 Environ Health Perspect 871. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1240435/>> Accessed 23 September 2019.

³⁸⁷ Anne I. Myhr, 'The Precautionary Principle in GMO Regulations', T. Traavik and L.C. Lim (eds.), Biosafety First Chapter 29 (Tapir Academic

Publishers, 2007) <<http://genok.no/wp-content/uploads/2013/04/Chapter-29.pdf>> Accessed 23 September 2019.

³⁸⁸ S.M. Garcia, 'The Precautionary Principle: its Implications in Capture Fisheries Management' (1994) 22 Ocean Coast Manage 99. <<https://core.ac.uk/download/pdf/39857159.pdf>> Accessed 23rd September 2019



Precautionary Principle in International Law

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity has promulgated one of the most robust references to the precautionary principle in contemporary international law. The protocol is the first of its kind to expound the precautionary principle outside of its preamble i.e., delineate the principle in its operational titles. As a consequence of this the Protocol has been credited with “propelling the precautionary principle to the forefront of international environmental law”.³⁸⁹

The precautionary principle firstly dictates the requirement of a minimum level of risk that warrants the application of precautionary action. Enterprises that deal with even remotely risky yet economically profitable activities often employ “higher risk- triggering levels”. The Rio Declaration requires the existence of both threats of serious and of irreversible damage to onset a precautionary action. Whereas, the level of risk established by the Protocol is “potential adverse effects”, which tends to be significantly lesser than the levels established in the Rio Declaration. Thus, the inference that precautionary action is much easily justified under the Protocol than the Rio Declaration holds true. Secondly the Protocol makes an allowance to the responsible party during a period when precaution is triggered by making a “decision as appropriate with regard to import in order to avoid or minimize such potential adverse effects”. More importantly, the Protocol does not seek any considerations for the profits of an activity

or its economical quality. By doing so, the Protocol allows for the focus on the potential harmful impacts on the biodiversity. Thirdly, and in stark contrast to the Rio Declaration’s requirement of “lack of full scientific certainty”, the Protocol only demands the “certainty” for the conjuring of the precautionary principle. This renders the need for scientific consensus before the invocation of precautionary principle mute. Furthermore, the Protocol also necessitates the need for subjecting the decisions made to the assessment of risk.

Article 15(3) of the Protocol states that parties may ask the exporters to carry out the requisite risk assessments which will consequently enable the developing economies of the world to promulgate measures constituted on the precautionary principle, even in a situation where they do not possess the administrative machinery to perform those risk assessments themselves. Although the Protocol does not mandate the requirement of scientific knowledge and consensus for taking precautionary action, this should not be construed as the existence or non-existence of a risk. Notwithstanding such articulation in the Protocol, risk assessments are to be conducted on a case-by-case basis and in a manner that conforms to the principles and laws of the associated science.

In postlude it can be summarised that the Precautionary Principle has an ambiguous language which makes it difficult to discern the acceptable levels of risks, how such potentially harmful trade-offs should be addressed, and what measure of scientific

³⁸⁹ David J. Schnier, ‘Genetically Modified Organisms and the Cartagena Protocol’ (2001) 12 Fordham Envtl. L.J. 377. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?>

[referer=https://www.google.com/&httpsredir=1&title=1551&context=elr](https://www.google.com/&httpsredir=1&title=1551&context=elr)> Accessed 23 September 2019.



evidence is adequate in deriving at decisions.

Precautionary Principle in India

The precautionary principle is not promulgated by any explicit statutory authority in India. The resulting lacunae in biosafety regulations is however supplanted by judicial pronouncements of the Supreme Court which has adopted the matrix of the principle in adjudicating legal disputed regarding genetically modified organisms. In *Vellore Citizens' Welfare Forum v. Union of India*³⁹⁰, the polluter pays principle and the precautionary principles were held to be indispensable parts of promoting sustainable development in India. The precautionary principle from the perspective of municipal law would suggest that:

- (i) Authorities have to 'anticipate, prevent and attack the causes of environmental degradation;
- (ii) No postponement of cost effective measures in the face of scientific uncertainty and irreversible consequences; and
- (iii) The proponent bears the burden to prove that a proposal is environmentally friendly.³⁹¹

The apex court was of the opinion that even though the principle is not promulgated by any Articles of the Constitution of India or any other of the several environmental legislations, it can be incorporated into the domestic law as a cardinal principle of international environmental law which is not contrary to municipal laws and should be taken into account for deciding cases by the judiciary. In another case³⁹² it was held by the Hon'ble court that reversal of the

burden of proof, good governance and principle of intergenerational equity are indispensable ingredients of the precautionary principle. The Supreme Court while deciding the case of *Narmada Bachao Andolan v. Union of India*³⁹³ held that the precautionary principle needs to be followed in all cases of uncertainty of ecological effects. Conversely, if the effects are certain or are known, mitigating steps should be employed to contain the harmful quality as much as possible. It was also established that a mere change in the ecology should not be equated with an ecological disaster and that to counter such a claim, the defendant will need to prove the inert nature of the activity.

3.2 RECOMMENDATIONS ON BRAI BILL

The Government of India has in conformity with the provisions of the Cartagena Protocol, of which it is a signatory, proposed the promulgation of National Biotechnology Regulatory Authority through the Biotechnology Regulatory Authority of India Bill which will, subsequent to its establishment, be the supreme authority on regulations and policies that flow with the genetically modified organisms in India. The Bill proposing BRAI is yet to be passed by the parliament. However, it has met with severe oppositions from the farmers and non-governmental organisations like Greenpeace India due to several of its questionable provisions that encroach upon the legal rights of the farmers and the consumers generally. It is submitted that these conflicting provisions of the Bill be emended and alternate measures be taken to ensure the prevention of such gross

³⁹⁰ *Welfare Forum v. Union of India* AIR 1996 SC 2715.

³⁹¹ *Ibid.*

³⁹² *A. P. Pollution Control Board v. Prof. M. V. Nayudu*, 1999(2) SCC 718.

³⁹³ *Narmada Bachao Andolan v. Union of India* AIR 2000 SC 3751.



violation of constitutional and legal rights. A brief account of the controversial provisions and their repercussions has been discussed below.

BRAI is abrogating the powers of the State Legislature

Section 2 of the bill avers that the Union or the parliament alongside the central government has the authority to take actions pertaining to the regulation of genetically modified organisms and associated products. In addition to Section 2 of the bill, Section 81 reinforces the stance of the former by stating that even if such an empowerment of the Union is found to be in conflict with any previously existing legislation, the law under the Section 2 will prevail. Such provisions are explicitly against the Constitution. The Constitution expressly states that the parliament cannot legislate on matters enumerated in the State list without prior authorisation by the State Legislative Assemblies.³⁹⁴ Item 14 of the State List (List II) provides for the state legislative assemblies to deal with matters concerning agriculture and plant diseases.³⁹⁵ This goes to show that matters pertaining to the regulation of genetically modified foods and products and their mass cultivation should be monitored by the state legislature. Therefore, the provisions of the BRAI Bill are in contravention with the Constitution as they override the powers of the state legislature.

Infringement of the Right to Information

Section 27(1) of the BRAI Bill states that the information pertaining to the research and development of genetically modified organisms and transgenic foods and products shall be confidential and will not be revealed in the public sphere. This is in direct contravention to the Right to Information Act. The Right to Information Act, 2005 was passed with the intention³⁹⁶ of keeping the citizens of India informed about the machineries of the government and to counter corruption. This Act is a vital part of a democracy as it promotes transparency and acts as a catalyst to hold the governments and their agencies accountable to the public.

Legal Lacunae

Section 1 of the BRAI Bill³⁹⁷ states that the provisions of the Food Safety and Standards Act, 2006, would no longer be applicable to the genetically modified organisms and associated products covered by the Bill. This can lead to an extremely dangerous situation as the Food Safety and Standards Act provides for the explicit labelling of genetically modified foods. This oversight of an essential requirement can be catastrophic as there would no longer be any legislation affirming the need for labelling genetically modified foods. This would lead to a dire situation where the consumer, who will most likely be a layman, would be rendered inept in differentiating between transgenic and organic food and associated products. This is to be understood in the context of

³⁹⁴ The Constitution of India, Art. 249(1).

³⁹⁵ No. 14 of State List (List II): Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

<<https://www.mea.gov.in/Images/pdf1/S7.pdf>>

Assessed 23 September 2019.

³⁹⁶ The Right to Information Act, 2005 (Act 22 of 2005).

³⁹⁷ Schedule II, Part II of the National Biotechnology Regulatory Bill, 2008
<<http://www.indiaenvironmentportal.org.in/files/Biotech-authority-bill.pdf>> Assessed 23 September 2019.



'labelling' being the operative part of the consumer's 'right to choose'.³⁹⁸

Cognizance of Offences and Lack of Jurisdiction

According to Section 70 of the Bill, all courts are universally barred from taking cognizance of any offence punishable under the Bill except when a complaint has been instituted by an authority or an authorised person under the Bill. Therefore, the department set up by the Bill cannot be challenged unless the authority feels so, ergo, they are answerable to themselves. In addition to this, the BRAI also establishes that does not have the jurisdiction with respect to any matter which the appellate tribunal under the Bill is empowered to decide.³⁹⁹ Further, no injunction can be granted by any court in respect of any action taken under the Act.⁴⁰⁰ These provisions make the BRAI Bill almost unimpeachable as very limited space is provided for interventions and the conventional mechanisms have been completely dismantled. These issues are further amplified by the free leash provided to the adjudicatory board to be established through the Bill that will not be subject to the provisions of the Code of Civil Procedure, 1908⁴⁰¹ or the Indian Evidence Act, 1872⁴⁰². It is proposed that the board be regulated in accordance with the principles of natural justice.⁴⁰³

4. CONCLUSION AND SUGGESTION

The use of genetically modified organisms is important in order to satisfy the expanding needs and improve existing conditions prevalent in our environment. We are at a restless crossroad where, on one hand, we are faced with unprecedented threats to human health and environment, while on the other hand we have opportunities to change the manner in which things are done.⁴⁰⁴ Regulations concerning utilization of GMOs need a more extensive basis for decision. Post release effects of GMOs can preventive and precautionary measures dependent on risk assessment and management. Observing and identification techniques are vital for risk assessment and the management to control the negative environmental and health impacts. The international biosafety regulatory frameworks are sufficiently stringent so as to protect against genuine ascertainable risks, as well as the ability of decision makers to discern the appropriateness of data necessary to adequately conduct a risk assessment, which all have considerable consequences.⁴⁰⁵ Consideration of social, economic, and ethical issues needs to be taken care of. Use of the precautionary approach provides avenues for future development and use of genetic engineering.

India is a signatory to the Cartagena Protocol on Biosafety to the Convention on

³⁹⁸ Yves Bertheau (ed.), *Genetically Modified and non-Genetically Modified Food Supply Chains: Co-Existence and Traceability*, (Oxford: Wiley-Blackwell, Oxford, 20th edn., 2013). <<https://pdfs.semanticscholar.org/2cbc/cb230c2432980b5482603f3b14eb135376b8.pdf>> Assessed 23 September 2019.

³⁹⁹ National Biotechnology Regulatory Bill, 2008, Sec.77.

⁴⁰⁰ Ibid.

⁴⁰¹ National Biotechnology Regulatory Bill, 2008, Sec. 56(7).

⁴⁰² National Biotechnology Regulatory Bill, 2008, Sec. 56(3).

⁴⁰³ Ibid.

⁴⁰⁴ Dhan Prakash, 'Risks and Precautions of Genetically Modified Organisms (2011)' <<https://erikrothrichmond.wordpress.com/tag/gmo/>> Accessed 24 September 2019.

⁴⁰⁵ Ibid.



Biological Diversity, according to which, all signatories of the convention must enact an explicit law dealing with the regulation and release of genetically modified organisms. Keeping in conformity to this direction of the protocol, the Government of India proposed the BRAI Bill which would most likely be the future of the legal and administrative aspects of genetically modified organisms in India. However, as elucidated in the preceding section of this paper, such a governing body would be extremely autocratic and almost unimpeachable. This conflict between the Bill and the consumer's rights has given rise to an undesirable situation; the resolution of which lies in amending the aforementioned provisions of the Bill before it is passed by the parliament. Encouragement of new monitoring and detection methods and tools is therefore vital for assessment, control of environmental, and health impacts as well as collection of ecological knowledge of relevance to future releases.

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GENDER VULNERABILITY AND DEMOLISHING 'GENDER- NEUTRAL LAWS

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ABSTRACT

Gender neutrality in India is a work that is still in the process. Though world wide most number of societies are moving towards reformation, there is also an understanding that there is too much to be changed. In India, only men can officially be said to commit rape, and only women can officially be raped. Rape is the fourth most common crime that is committed against women in India. According to the National Crime Reports Bureau of 2013 annual report 24,923 rape cases were reported across India in 2012. Out of these 24,470 that were committed by someone related or known to the victim (98% of the cases). In India, rape is defined under section 375 of the Indian Penal Code in a very narrow manner. It states only a man can rape a woman. This does not mean that male and other rapes cannot be prosecuted. The term 'other rapes' are criminalized under Section 377. There is a need for just one definition of rape, that should cover all forms of rape, be it inflicted on a man or a woman or people from some other gender. There exist a huge taboo that surrounds rape, in particular male rape, and it is an extremely difficult task to break down the barrier. We many a times tend to overlook the plight of the transgender community, which takes into its ambit the hijras and kothis in the Indian context and the inter sex, which is a condition in which one's

sexual organs are ambiguous. Bisexual or gay men are often targeted for their sexual orientation. This sort of an assault is known as hate crime. Bisexual and gay men suffer through the same types of mental and physical plight. Despite male rapes not being researched as vividly as female rape, there are various numbers to suggest that men are raped. The National Intimate Partner and Sexual Violence Survey (2010) is a telephone survey that identifies the magnitude of sexual and other form of violence among adult men and women in the United States.

Diverging Arguments against gender-neutral rape laws

"It is physically impossible for a woman to rape a man. Arousal implies consent." – Dr. Anand Kumar, Department of Reproductive Biology, AIIMS, in an interview.

"I oppose the propose to make rape laws gender neutral, There is physicality in the definition of rape, there is use of power and the victim has a stigma attached to her. If made gender-neutral, rape laws will not have the deterrence value and it will make it more complicated for judges in court." – Agnes told The Times of India.⁴⁰⁶

A woman raping a man is quite impossible according to feminists, doctors, professors, lawyers etc. In this scenario, it is difficult to proceed with the argument for gender-neutral rape laws.

The anomaly of Rape laws in India
Male on female rape (Section -375)
The Criminal Law (Amendment) Act, 2013, Section 375 of the Indian Penal Code reads such:

⁴⁰⁶ Rape law amendment : 'Where are the cases of sexual violence against men?', available at: <https://www.firstpost.com/india/rape-law->

[amendment-where-are-the-cases-of-sexual-violence-against-men-384227.html](https://www.firstpost.com/india/rape-law-amendment-where-are-the-cases-of-sexual-violence-against-men-384227.html) (last visited on October 19, 2019).



A man is said to commit “rape” if he has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

1. Against her will
2. Without her consent.
3. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
4. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
5. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent.
6. With or without consent, when she is under eighteen years of age.
7. When she is unable to communicate consent. Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception1- A medical procedure shall not constitute rape.

Exception2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. Here, the law is absolutely gender-specific. Rape does not only include Penile-vaginal penetration. The laws related to stalking, sexual harassment are all gender specific in nature.⁴⁰⁷

Male on male rape [LGBT] Section 377

⁴⁰⁷ Indian Penal Code, 1860, s.375.

⁴⁰⁸ Indian Penal Code, 1860, s. 375

Section 377 of Indian Penal Code, 1860 reads as :“Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”⁴⁰⁸ In simple words, the section makes physical relations existing between two consenting adults of the same sex a punishable offence. The reference to “intercourse against the order of nature” also criminalizes sexual activity like anal sex, fellatio (commonly known as blowjob), etc; even if it that happens between a man and a woman. There are two main issues with this law: one, that the offence is not termed as rape; and two criminalization of gay sex, or a specific process of having sex for that matter, cannot be a part of a progressive society and nation.

Female on female rape : The law on gang rape (Section 376D) reads as - “Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment....”⁴⁰⁹

Thus it is very much possible to convict a woman of raping a woman as part of a gang. Other female on female rape is not considered as punishable under law since even under Section 377, penile penetration is an essential condition. Transgendered/ transsexual rape : This too can be made

⁴⁰⁹ Indian Penal Code, 1860, s.376D



punishable under Section 377 provided there is penile penetration. Female on male rape :There have been several cases of female on male rape. There have been different surveys with enough empirical data to prove that women do rape men. "Victim surveys of British and American male have shown that 3 to 8 percent of males reported atleast one adulthood incidence of sexual assault in their lifetimes .While the majority of these crimes are committed by male offenders, as estimated 6 to 15 percent of these sexual assaults can involve female perpetrators." (Pino& Meier, 1990,Coxell& King ,1999). There has been growing identification of male victimization all around globe. Countries that have adopted gender-neutral laws include Canada, all Australian states, the Republic of Ireland, Finland , England and Wales and the majority of states within the United States.

Writ Petition in the High Court of Delhi

Naz Foundation (India) Trust vs Government of Delhi and Ors. [Writ Petition (Civil) No. 4755 of 2001]⁴¹⁰ In 2001, Naz Foundation (India) Trust, filed a writ petition in Delhi High Court challenging the constitutionality of Section 377 on the grounds of violation of right to privacy, dignity and health under Article 21 of the Constitution of India, equal protection of law and non-discrimination under Article 14 and 15, freedom of expression under Article 19 of the constitution. A notice was given to Union of India in 2002 and the Attorney General was asked to appear before the court. The Ministry of Home Affairs filed an affidavit opposing the petition in September ,2003. The petition was dismissed by the High Court on 02..09.2004 for derth of cause of

action as no prosecution was pending against the petitioner. The petitioner filed a review, a petition (RP 384/2004) in the High Court against the order of dismissal but that was also dismissed on 03.11.2004. Aggrieved by the same, the Petitioner filed a Special Leave to Appeal (C.N. 7217-18/2205) in the Supreme Court of India in 2005. On 03.02.2006,the Supreme Court passed an order holding that "the matter does require consideration" and is not of a nature which could have been dismissed on the ground afore-mentioned. Taking the matter back to the High Court of Delhi to be decided on merits, the Supreme Court set aside the said order of the High Court. Subsequently, the Ministry of Health and Female Welfare through National AIDS Control Organization (NACO) submitted an affidavit supporting the petition in the High Court contending that Section 377 acted as an impediment to HIV prevention efforts in July 2006. On, 02.07.2009, the Delhi High Court passed a very famous judgment holding Section 377 is in violation of Article 21,14 and 15 of the Constitution, so far criminalized various sexual acts of adults in private.

How Men are Affected

Fraizer(1993) examined 74 male and 1,380 female rape victims and found that male victims were more in depression and hostile immediately post rape compared to female victims.

Carpenter(2009, citing Mezey,1987) noticed that the "male coping strategy characterized by denial and control renders them more prone to later psychiatric

⁴¹⁰ 160 Delhi Law Times 277



problems and diminishes the likelihood of seeking help.”⁴¹¹

Perhaps, rape does not affect men and women in a similar way, it does, however, affect men vehemently. Non-consent should be enough to qualify any sexual act as rape. It does not matter whether the victim is a male or a female. Seriousness of rape is same in both the cases. Rape is an act of power and control over the other person, not just sex. Susan Brownmiller has a very broad definition of rape:

“...rape became not only a male prerogative but a man’s basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestation and struggle became the vehicle of his victorious conquest over her being, the ultimate test of his superior strength, the triumph of his manhood.” (Brownmiller 1975,14)⁴¹²

Steve Pinker, a cognitive scientist says in an “Ask me Anything” on popular website reddit

“I believe that the rape-is-not-about-sex doctrine will go down in history as an example of extraordinary popular delusions and the madness of crowds. It is preposterous on the face of it, does not deserve it’s sanctity, is contradicted by a mass of evidence, and is getting in the way of the only morally relevant goal surrounding rape, the effort to stamp it out.”⁴¹³

⁴¹¹ Frazier, Patricia A., A comparative study of male and female rape victims seen at a hospital-based rape crisis program, 8(1) *Journal of Interpersonal Violence*, 64-76

⁴¹² Interview with Brownmiller, Feminist Journalist, *Time*, October 7, 2015.

⁴¹³ Ask me anything, available at: <https://www.reddit.com/r/IAmA/comments/1a67x4>

Recommendations

The most note worthy view against complete gender neutrality is the patriarchal mindset of the Indian society and the negative results of female victims that it might lead to. The supporters of complete gender neutrality supports the argument of right to equality and the social stigma that surrounds rape. After taking both the sides into consideration one must create an equal society and try to achieve gender neutral laws. We should adopt a step-by-step approach. As recommended by the Verma Committee⁴¹⁴, the rape law must be amended to make the victim gender inclusive while the perpetrator remains gender specific.

The recommendations can be summarized as follow:

1) Presence of male and transgender rape in India cannot be denied. By not having gender-neutral rape laws, we are denying a lot more men justice.

2) Gender-neutral laws are extremely unlikely to be used against women just to harass them. We must try to balance out the rights of all identities.

3) Justice Verma Committee Report suggested a solution to make the victim gender inclusive while the perpetrator remains gender specific. This will be used as a protection of transgender community and male victims from homo sexual rape.

[/i am steve pinker a cognitive psychologist at/](#) (last visited on October 19, 2019).

⁴¹⁴ Justice Verma Committee report on rape laws addresses sexuality concerns, available at: <http://orinam.net/justice-verma-committee-report-on-rape-laws-addresses-sexuality-concerns/> (last visited on October 19, 2019).



4) Prior to making rape laws are made gender neutral, homosexuality must be effectively decriminalized. As Kapur (2013) writes “Criminalizing non-consensual sex regardless of gender can only work if sexual minorities are granted the right to have consensual sex in the first place. Otherwise, such a provision is likely to be applied to further harass sexual minorities who are not recognized as citizens entitled to rights, but continue to be viewed through the lens of contamination and deviancy, to be criminalized and stigmatized.”

5) A gender neutral rape must still in essence be a rape law and not simply a sexual assault law.

If a woman’s complaint accusing her husband and in-laws of cruelty the dreaded Section 498A of the Indian Penal Code turns out to be false, then the man is entitled to divorce, the Supreme Court has ruled.

Conclusion

The courts and the legislature have to make various changes if the laws of rape are to be any encumbrance. The term of punishment, which under normal situation varies from one to ten years, where on an average most number of convicts scot free with three to four years of rigid imprisonment with a meager amount of small fine; and in some scenarios, where the accused is famous or influential- may even get free by paying huge amounts of money. The courts have to decipher the fact that these conscienceless criminals- who at times even beat and torture their victims- which even include small children, are not going to be free by serving for a small time of imprisonment. Thus, in the best interest of justice and the

society, these criminals should be sentenced to life imprisonment.

However, if they in reality have realized their mistake and wish to return to society, the Court and jail authorities may give freedom such men on parole; but only on the ground that they have served a minimum of half the sentence imposed on them.

It is downright clear that sexual offences are to be punished, but if death sentence is given to such convicts- so as to deter the rest, then no doubt that the number of rape cases will come down considerably- but it can also happen that those who commit such offences will simply have to leave no witnesses or evidence, may even murder their victims and be done away their bodies (whereas it is noticed that in most cases- it is the victim who is the only source of evidence in most cases), thereby serving no purpose the main object of the Indian Penal Code and the legislature. Practicing and studying the laws, the process, the application of those laws, one thing is certain- the entire structure of justice needs an over haul, otherwise the victim will be no longer the woman or man, but humanity



REDRESSAL AND ENFORCEMENT MECHANISMS UNDER INTELLECTUAL PROPERTY LAWS

*By Mehak Rai Sethi and Gunjan Arora
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ABSTRACT

This paper aims to give to the readers, an overview of the mechanisms to provide remedies under the Intellectual Property Law. There are certain remedies under this law which are common to the infringement of different intellectual property rights, but they are not exactly similar in their applicability. So, this paper also highlights the differences between the remedies available for different types of intellectual properties. Further, while the remedies are set out in legislation, we seek to interpret and substantiate them through various case laws.

Also, a need is felt to understand as to how ADR is evolving as a redressal mechanism to cater to the intellectual property regime.

1. GENERAL

Globalization and opening the doors of economy, i.e. Liberalisation has consequently resulted in making 'intellectual property' to be the key driver of wealth in the scenario of international trade.

The Intellectual property regime is evolving, and people are becoming aware of their rights. As a result, there is an increase in IP disputes. Even though the words of law provide for the means to achieve 'enforcement of rights' of the IP owner, but when it comes to actually giving effect to those words of law, serving

substantial justice with the application of caution is a great challenge for the Courts or the authorities concerned. Since enforcement is rightly provided in the substantive legislation, there arises a need for an effective redressal mechanism

IPRs have already become very prominent in the arena of understanding the "legal horizons" of India, in accordance with differing "IP" policies, both being in terms of judicial interpretations and pronouncements and in terms of the Specific Statutes of our country. The intellectual property protection gives 'exclusive rights' to the intellectual property owner against the world at large to use his own ideas or other intangible product of intellect.

India is a signatory to TRIPS Agreement and also happens to be a Common Law country, so it does not only follow codified law, by incorporating the principles of the TRIPS Agreement by modifying them according to its own circumstances, but also follows the common law principles which are not codified. So, the remedies against violation of IPRs in India is not just *infringement*, but also includes *passing-off* action.

The remedies to infringement of IPR are further sub-divided in different categories, which are enlisted herein:

Civil Remedies

- Injunction
- Damages
- Account of Profits
- Additional Damages
- Preliminary Remedies (Interim Injunction)
- Search Order

Criminal Remedies:

- Imprisonment



- Fine
- Penalties

Apart from the above-stated redressal mechanisms, there is another mechanism also which is even though not followed in India, but is followed in few other countries, and that redressal mechanism called the “Law of Breach of Confidence”.

One thing to be kept in mind before using these mechanisms is that, they are to be used as ‘Armour’, not as ‘Sword’. Consider a scenario where the remedy is used as a Sword- A Patent owner accuses or alleges that the act of the retailer or proprietor is resulting in an infringement of the right of the IP owner. Won’t this amount to injustice being caused to the defendant? In this case, the remedy to the IP owner shall be granted very cautiously, considering all the relevant factors, as unnecessary and arbitrary use of these remedies may amount to more injustice than justice, thereby defeating the whole purpose for which they are provided by law.

1.1 INTELLECTUAL PROPERTY OWNERS’S ARMOURS AGAINST INFRINGEMENT

The in-depth study of the law of intellectual properties proposes that there exist similarities and differences between various rights. These rights are not mutually exclusive, but two or more right can co-exist in relation to a certain thing. These rights provide monopoly to the owner and hence, there arise legal concerns w.r.t. rights coupled with creativity, reputation or goodwill. The subject-matter, hence, becomes very wide.

The Law acts as a deterrent to the person *vis-à-vis* the community, from copying or taking unfair advantage of their work or

reputation or commercially exploiting the goodwill. Therefore, there are certain armours available against the above-stated acts, the civil which are discussed as follows:

1.2 CIVIL REMEDIES

1.2.1. INJUNCTIONS

“A Court order commanding or preventing an action. To get an injunction, the complainant must show that there is *no plain, adequate, and complete remedy at law* and that an *irreparable injury* will result unless the relief is granted”.⁴¹⁵

Injunction is a remedy available to the IP owner against both possible and actual infringement of his IPR. The remedy against the former is in the nature of an Interim/temporary pre-trial injunction and for the latter, it is a permanent/mandatory post-trial injunction.

This remedy is usually sought against future infringement of IP rights. It is Court’s or the granting authority’s discretion to allow/disallow the grant of an injunction.

Limitation of this Remedy

Seeking this remedy might fall short of effectiveness, *for instance*, where a trade secret comes to the knowledge of the public, it becomes free for the public to make use of such information. Therefore, against a breach of confidence a limited injunction may be available to the wrongdoer.

The framing of the scope of an injunction may at times be difficult for the authorities and any error in such framing may result in gross injustice to the defendant. So an order of injunction and its scope must be clear in its terms and must not be of such a nature

⁴¹⁵Black’s Law Dictionary 855 (9th ed. 2009)



which restrains the defendant from exercising his right to do what he may legally do, Rather, injunction shall merely prevent the defendant from doing what he is not legally authorised to do and what he is not doing legally, thereby infringing the rights of the IP owner. The scope so framed must also not be vague and ambiguous⁴¹⁶

A plaintiff is expected to show a “strong Prima facie case” at trial to obtain an interim injunction. Another major essential is the requirement to show Balance of Convenience. It becomes incumbent upon the defendant to specify the extent of business risk he is likely to face, upon the grant of an injunction. Though as a matter of fact, the principles do not make it mandatory for the court to consider the merits of the case. The basic condition that remains to be satisfied is that the defendant has an arguable case⁴¹⁷.

Purpose of Injunction

“The power given to courts to issue injunctions in order to make illegal practices cease is, by all accounts, a fundamental right of any legally-established sovereign state. International conventions, as well as several European Regulations and harmonisation Directives, which pre-date the IPRED, had already compelled the Member States, in most areas of IP law, to empower their national courts to issue injunctions against counterfeiters. The overriding purpose of injunctive relief is to ensure that IPR infringements cease as soon as possible. However, necessary guarantees must be in place to safeguard the rights of defence of all parties. Under applicable international agreements and

under the express terms of the IPRED itself, there must be an easy, effective and cost-efficient means open to rights-owners to ensure that the protection of their legitimate rights is respected. It is not sufficient for legislation to state that the rights-owner has this right: it has to be de facto effective and enforceable quickly. To be able to enforce his rights, the rights-owner should not have to spend an unaffordable amount of money. Nor should he be forced to post an excessive security deposit with the court. Where required, the posting of a security deposit should not be unreasonably complicated or burdensome, as this would also deter the rights-owner (in particular a foreign-based right-owner) from taking an expedited basis against IP infringements.”⁴¹⁸

Copyright Law

Under the Copyright Law, the nature of proceedings which can be initiated against the alleged infringer can be both civil and criminal. Injunction forms part of the former. The law authorises the courts to pass an order granting the interim or final injunction against the copyright work, on reasonable conditions being imposed. Interestingly, the defendant also has the right to question the validity of plaintiff’s copyright basing the same on a “originality requirement” or taking the defence of “fair use”.

Trade Mark

Injunction is an important relief granted to the IP owner in Trademark infringement cases. The rationale for the same being that,

⁴¹⁶ Bainbridge David I., *Intellectual Property*, 916 (9th ed. 2015)

⁴¹⁷ *American Cynamide Co V. Ethicon Ltd* [1975] 1 All ER 504

⁴¹⁸ Injunctions in Intellectual Property Rights <https://euipo.europa.eu/ohimportal/documents/1137/0/80606/Injunctions+in+Intellectual+Property+righ> (Last visited on 04/09/2019)



it is affecting the Public at large due to the fact the consumers are deceived by the wrongful use of the trademark by the defendant which appears to be confusingly similar to that of the Plaintiff’s mark. Hence to prevent this confusion amongst the public an order of injunction by the court becomes extremely important.

Patents

The rationale of protecting the patented invention is to promote research and innovation, giving the patent owner an exclusive to the owner of his invention for a “certain time”. Since it becomes difficult to quantify the damages, a plaintiff is expected to show a “strong Prima facie case” at trial to obtain an interim injunction along with a proof of irreparable hardship and balance of convenience.⁴¹⁹ On the contrary, where there is a question of grant of injunction, the public interest outweighs the above requirements as in the “realm of life saving drugs.”

Geographical Indications

In the way as Trademark require “speciality”⁴²⁰ and “territoriality”⁴²¹ to be present, GI is subject to same principles. The primary objective for which the GI is granted is to protect the interests of ‘a community’. In order to claim the Injunction, the registered proprietor/authorized user must establish that his IP is a validly registered GI and must also prove infringement. The same

exception of ‘public interest dimension’ applies here too.

Designs

The protection is available only in case of designs which are registered. The rationale behind the protection given is to provide a safeguard to the visual appeal and aesthetics of design without granting a monopoly to the IP owner w.r.t shape, configurations etc. an injunction may be granted if the same is “registered” and is “used unauthorizedly” be the defendant. The defence available against design piracy action is to question its validity on the grounds of- a prior publication⁴²² and functional value.

In a case⁴²³, the Hon’ble Delhi High Court expounded the key points of difference between an action of “passing off” and “infringement action” as follows:

“PASSING OFF ACTION”	“INFRINGEMENT ACTION”
“It’s a Common-law remedy”	“It’s a Statutory Remedy”

⁴¹⁹ Mareva injunction is said to be granted either under Order 38 Rule 5 and 6 or under Order 39 Rule 1 of the CPC,1908

⁴²⁰ *Speciality* here means that the IP is only given protection limited to the nature and kind of products on which it is actually used.

⁴²¹ *Territoriality* means that the IP is given protection only limited to a particular territory and is

subject to rules and regulations specifically applicable in that particular territory.

⁴²² Ritika Pvt. Ltd. Vs. Biba Apparels Pvt, Ltd. MANU/DE/0784/2016; Microfibers Inc v. Girdhar and co. MANU/DE/8193/2006

⁴²³ Cadbury India Limited and Ors. v. Neeraj Food Products 142 (2007) DLT 724



<p>“Is an action of ‘Deceit’, as the person accused of passing off is alleged to have been using the goods of oneself and portrays the same to be the goods of another”</p>	<p>“Here the Plaintiff being the ‘registered proprietor’, claims himself to be the exclusive right-owner w.r.t. the disputed goods”</p>
<p>“No requirement of ‘use’ is there in this action”</p>	<p>“The use by the defendant of the IP of the plaintiff may be a pre-requisite herein”</p>
<p>“In the case of passing off, the defendant may escape liability if he can show that the added material is sufficient to distinguish his goods from those of the plaintiff”</p>	<p>“If the essential features of the trademark of the plaintiff have been adopted by the defendant, the fact that the getup, packing and other writing or marks on goods or on the packets in which the defendant offers his goods for sale show marked differences or indicate clearly a trade origin different from that of a registered proprietor of the mark, would be immaterial for the case of infringement of the trademark. The liability of the defendant for such infringement may be absolute”</p>

The Hon’ble Supreme Court of India is of the opinion that infringement action is narrower in scope than a Passing Off action; the reason for the same being that the latter works on a general principle i.e. *“No person is entitled to represent his or her business as business of the other person”*⁴²⁴.

1.2.2. DAMAGES

According to Black’ Law Dictionary:

*“Damages refer to the Money claimed by, or ordered to be paid to, a person as compensation for loss or injury”*⁴²⁵.

The assessment and calculation of damages is done mainly with the object of placing the plaintiff in the same position where he would have been, had there been no infringement of his IPR. This sets the basis for grant of damages. For instance, in case of patent infringement where the license has been granted to others for exploitation of the invention, the calculation of damages would be on the basis of royalties the defendant would have paid, had he acted legally.

In the *“Ferreto Rocher v. Ruchi International”*⁴²⁶, staggering damages of Rs. 10,00,000/- were awarded to the claimant wherein, the claim was over the use of ‘trade dress’ and not ‘registered trademark’. The acts of the defendant in adopting and using the identical/deceptively similarly impugned marks and dress in respect of identical goods has caused and will continue to cause irreparable damage and loss, further, *the impugned mark which forms a part of their trading name, infringes the claimant’s right under S.29(5)*

⁴²⁴ S. Syed Mohideen v. P. Sulochana Bai
MANU/SC/0576/2015

⁴²⁵ *Black’s Law Dictionary 416 (8th ed. 2009)*

⁴²⁶ MANU/DE/1265/2018



of the Trademarks Act. Claimants were entitled to damages owing to the immense loss of goodwill and reputation.

Additional Damages

“In case of possibility for infringement of copyright, related rights and UK

unregistered design rights, additional damages can be granted. It is

because the justice of the case so requires, and the court should take into

account all circumstances and benefits accrued to defendant.”

1.2.3. ACCOUNT OF PROFITS

Account of profits acts as a remedy alternative to damages and it is upon the claimant to elect. This remedy is also available against equitable action of breach of confidence and also as a “common law tort of passing off.”

The rationale is to prevent unjust enrichment by defendant. In actual practice, both remedy of awarding damages and accounts should be considered to be alternatives. In appropriate cases like copyright, related rights and UK

unregistered design rights, there can be only a claim of ordinary damages and not an account of profits.

1.3. CRIMINAL REMEDIES

Deterrence has a ripple effect, which is more effective when done by means other than carrying out civil litigations. It works even in the sphere of IPRs and provisions to give effect to the same have also been incorporated in the statutory provisions.

Copyright

Section 63⁴²⁷ of the Copyright Act deals with **Offences of infringement of copyright or other rights conferred by the Act** and provides for:

- An *Imprisonment* for a term of minimum six months and maximum of 3 years
- Plus, *Fine* of minimum fifty thousand rupees and maximum two lakh rupees.

The above-stated term of imprisonment and fine *can be enhanced* under the provisions of **Section 63A⁴²⁸** of the Copyright Act, 1957.⁴²⁹

The Supreme Court observed that “*Nobody has a right to represent his goods as the*

⁴²⁷ Copyright Act, 1957

⁴²⁸ **63A. Enhanced penalty on second and subsequent convictions-**

(1)Whoever having already been convicted of an offence under section 63 is again convicted of any such offence shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakhs rupees:

Provided that [where the infringement has not been made for gain in the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of

imprisonment for a term of less than one year or a fine of less than one lakh rupees: Provided further that for the purposes of this section, no cognizance shall be taken of any conviction made before the commencement of the Copyright (Amendment) Act, 1984 (65 of 1984).

⁴²⁹ IPR & Criminal Remedies in India: Civil vs. Criminal Remedy In IPR: Search, Seizure & Raids By Police

<http://www.mondaq.com/india/x/444510/Trademark/IPR+Criminal+Remedies+In+India+Civil+vs+Criminal+Remedy+In+IPR+Search+Seizure+Raids+By+Police> (Last visited on 07/09/2019)



*goods of somebody*⁴³⁰. Lord Diplock formulated a 5-elements test⁴³¹ to determine the tort of passing off, which has already been discussed above.

Section 64 of the Copyright Act further provides for the powers of police to conduct search and seizure.

Trademark

Section 115 of the Trademarks Act, 1999 provides the police the power of search and seizure, subject to the condition that the opinion of the Registrar of Trade Marks, w.r.t. the similarity in between the ‘original mark’ and the ‘infringing mark’ is important before conduct such search and seizure⁴³².

Design

“Piracy of a design means the application of a design or its imitation to any article belonging to class of articles in which the design has been registered for the purpose of sale or importation of such articles without the written consent of the registered proprietor.”

Note-“Publishing such articles or exposing terms for sale with knowledge of the unauthorized application of the design to them also involves piracy of the design.”

If anyone violates/infringes the copyright in a registered design, he shall be faced with the liability:

- “To pay a maximum sum Rs. 25,000/- to the registered proprietor, subject to

a maximum sum of Rs. 50,000/- recoverable as contract debt in respect of anyone design.”

The proprietor of the registered IP, can file a “suit for the recovery of the damages” in case of contravention/violation and for “injunction against repetition” of the same.

Total damages which he shall be able to “shall not exceed Rs. 50,000/- as contract debt as stated in Section 22(2)(a).”

Patent

Section 108(2) states that:

“The court may order that the goods which are found to be infringing and materials and implement, the predominant use of which is in the creation of infringing goods shall be seized, forfeited or destroyed, as the court deems fit under the circumstances of the case without payment of any compensation.⁴³³”

14. PASSING OFF

Passing off is a tortious remedy available to the infringement cases in the IP Laws. The underlying idea behind making passing off a remedy available under the IP regime was well interpreted by Lord Langdale MR as:

“A man is not to sell his own goods under the pretence that they are the goods of another trader”⁴³⁴

An action of passing off essentially requires the element of ‘misrepresentation’, which may either be express or implied. The law restrains one trader from passing off the goods belonging to him and misrepresenting the same to be the goods of

⁴³⁰ *Cadila Healthcare Ltd. v. Cadila Pharmaceutical Ltd.* 2001 (21) PTC 541 SC

⁴³¹ *Erwen Warnink BV v. J.Townend & Sons* [1971] AC 731

⁴³² Proviso to S. 115(4), Trademarks Act, 1999

⁴³³ The Patents Act, 1970

⁴³⁴ *Perry V. Truefitt* (1842) 49 ER 749



another trader. So, it covers not the ‘origin’ of the goods but the ‘quality’.

Lord Diplock very succinctly adumbrated the essential ingredients of passing off action by deriving inspiration from the case of *Spalding & Bros. v, AW Gamage Ltd.*⁴³⁵. these essentials so enumerated by his lordship are enlisted as follows:

- “Misrepresentation;
- Made by a trader in the course of trade;
- To prospective customers of his ultimate consumers of goods or services supplied by him;
- Which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); and
- Which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a *quia timet action*) will probably do so”.

The list given by Lord Diplock was modified in subsequent cases by various judges and was later reduced to mainly three elements, stated and enlisted by Nourse LJ in a case⁴³⁶ before him as follows:

- “The goodwill of the Claimant
- The Misrepresentation made by the defendant; and
- Consequential damage”

Since passing off is a tortious remedy, fraudulent or malicious motive and intention are not necessary to be proven, thence, passing off may be granted, even

when the infringement is not intentional or is ‘innocent’⁴³⁷.

The Supreme Court of India observed:

“The principle of similarity could not to be very rigidly applied and that if it could be prima facie shown that there was a dishonest intention on the part of the defendant in passing off goods, an injunction should ordinarily follow and the mere delay in bringing the matter to Court was not a ground to defeat the case of the plaintiff”⁴³⁸.

CONCLUSION

The authors have observed that there are different mechanisms to provide redressal to the IP owners in case they face any kind of infringement with respect to their intellectual property. Law is ever changing and it adapts itself to the changing circumstances and the needs of the society. It is required that the law should keep pace with these changing facets so that it does not end up becoming old, stale and unsuitable to the fast changing or a progressive society.

“The ever changing circumstances in the legal field have made the society realise that it is not always necessary to take out swords and indulge into unnecessary and long stretched legal fights, when it is possible to settle disputes amicably and without promoting discord in the society. The authors do not propose complete abandonment of the above stated statutory procedures and remedies in the forms of civil and criminal actions, rather they believe that where ever necessary or suitable, as the case may be, scope must be there to settle the disputed via alternative

⁴³⁵ (1915) 84 LJ Ch 449

⁴³⁶ *Consorzio de Prosciutto di Parma v. Marks and Spencer plc.*, [1991] RPC 351

⁴³⁷ *Croft v. Day* (1873) 7 Beav

⁴³⁸ *Corn Products Refining Co. v. Shangrila Food Products Ltd.* AIR 1960 SC 142



dispute mechanisms as they embody within its veil, the several distinct means of resolving a dispute, apart from the ones provided by the regular modes of litigation. ADR mechanisms like those of Conciliation, Mediation, etc. are few of those models which have proven to be effective substitutes for the conventional court litigations.

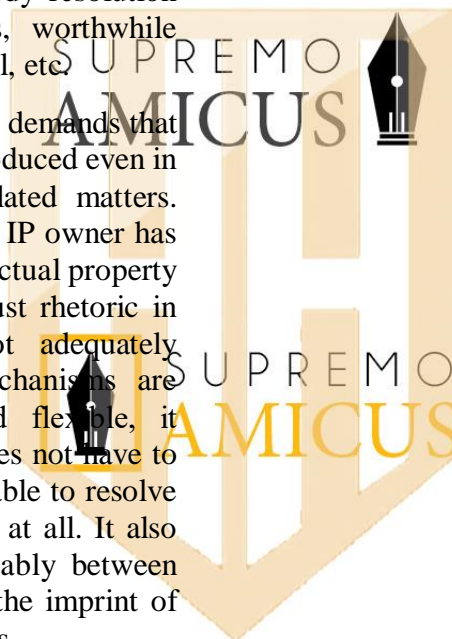
There is an Act in India which specifically deals with 2 key forms of ADR's i.e. "Arbitration and Conciliation Act, 1996".

The benefits of resorting to ADR mechanisms against the traditional court-based proceedings, are: speedy resolution of disputes, clandestineness, worthwhile and cost-effective, less formal, etc.

Thence, the Need of the hour demands that the ADR modes shall be introduced even in resolving disputes in IP related matters. This is important because an IP owner has a vested interest in his Intellectual property and that right will remain just rhetoric in nature if the same is not adequately protected. Since, ADR mechanisms are "less time-consuming", and flexible, it ensures that the IP owner does not have to face undue vexation and be able to resolve complex disputes in no time at all. It also aims to settle disputes amicably between the parties, without leaving the imprint of bitter memories in their minds.

ADR Models have already proven to be successful in various fields, especially depicting a marked growth and progress in the sector of commercial dealings and transactions. This road to ADR is expanding and is on the verge of taking over the traditional court litigation mechanisms. This highlights very strongly, as to the amount of weight carried by the alternative dispute settlement mechanisms and also as to how it is going to benefit the resolution

of disputes in the realm of Intellectual Property law.





RIGHT TO PRIVACY: SOCIAL NETWORKING SITES (SNS)

By Nikita

From Amity Law School, Noida

Introduction

Social Networking Sites is utilized as a means to connect with people by sharing their common interests, activities, backgrounds or real life-connections.

Since early 2000 it is evident that usage of social networking sites has expanded widely and the most common social networking sites in India are Facebook, Instagram, Twitter, & Snapchat.

Social networking has drastically changed the way of people to interact with their friends, family members and associates. Social networks like Facebook, Instagram, Twitter, Snapchat, Google+, Youtube plays a major role in our day to day lives.⁴³⁹

Social networks have opened up a new outlet of communications for millions of people around the world. The major cause of this technology to attract the people is the ease with which people can share their personal information with their friends.⁴⁴⁰

In any case, with such huge interconnectivity, meeting of connections, and data sharing by singular clients comes an expanded danger of security infringement.

The increased prevalence of use of information of the personal lives using

communication technologies have transformed many people's lives regarding how they work, function, shape, plan, keep up their social relations.⁴⁴¹

However, these media social sites could also pose certain serious privacy risks. While using these social sites it's become important to know about these social risks which can be obtained by using our own personal information.

Some people might think that sharing of their personal information is in their own hands, if you don't want any of your information getting out online, then don't put it on social media as simple as that. However that's not true and keeping information on their own is not depend upon our own choices but our friends choices too.

When somebody joins a social network, the primary request of business is, obviously, to discover companions. To help the procedure, numerous applications offer to import contact records from somebody's telephone or email or Facebook, to discover matches with individuals as of now in the system.⁴⁴²

Since sharing email-id and phone numbers with their friends isn't like they are doing something wrong as they want to stay in touch with those persons but so many times social media share information with such persons with whom the user doesn't want it to get shared and which causes problems and the privacy of the user get affected.

⁴³⁹ https://www.huffingtonpost.com/sam-cohen/privacy-risk-with-social-_b_13006700.html

⁴⁴⁰ <https://www.isaca.org/Journal/archives/2012/Volume-6/Pages/Lack-of-Privacy-Awareness-in-Social-Networks.aspx>

⁴⁴¹ <https://www.tandfonline.com/doi/full/10.1080/15228831003770775>

⁴⁴² <https://www.sciencenews.org/blog/sciurious/social-media-privacy-no-longer-personal-choice>



Indian constitution and Right to Privacy

A nine - judge bench of the Supreme Court unanimously has ruled on 24 August 2017 that Right to Privacy is a Fundamental Right that it is intrinsic to life and liberty and enshrined under part 3rd of Article 21 of the Indian Constitution.

- Privacy is a naturally shielded right which develops fundamentally from the guarantee of life and individual freedom in Article 21 of the Constitution.
- Freedom and nobility are alternate perspectives protection which are ensured by the Fundamental Right.
- SC decision that security is the center of human poise.
- Privacy incorporates individual affections, holiness of family life, marriage, multiplication, home.
- Privacy likewise incorporates ideal to be allowed to sit unbothered.
- Having individual decisions representing a lifestyle.
- Protection of our way of life.⁴⁴³

Although the Indian supreme court has ruled right to privacy as a fundamental right but it lacks in many aspects that to which extent it would be applicable to human life. As today everything is digital, every minute, every action of humans can be determined by their gadgets. Anyone can trace the location of people via connecting them to any social site. All they have to do is just link their social site with the another one.

Both positive and negative norms are there of these social networking sites. Positive aspect is that it can help to catch the criminal the way more easier by

tracking the location of their gadgets and in other aspects also.

For ex. Nowadays, lots of people make fake social id's by putting the information of any other person and can misuse it any manner due to which the innocent user who has become victim suffers a lot but thanks to the modern digital by which the victim can go to the cyber crime (which handle cases of those who suffer mis happening regarding social sites) and then the officers their can locate the IP address of the gadget which can give information about the owner of the gadget and helps the victims and officers to catch the criminal in faster way.

Negative aspect is any normal citizen can track down the location of anyone via digital system and can obtain information about them.

The thing is if the above statement is correct and the information of any person can be obtained so easily then how can privacy be protected and how would the right to privacy will work.

Article 19(1)(a) of Indian constitution gives the citizens to freedom of speech and expression. But nowadays if any social user update anything socially and if it doesn't seem appropriate to the society , they tracked down the user address and the user can be arrested.

Hence these online sites doesn't only seize the privacy of humans but also seize the right of freedom of speech and expression. In India, no less than one digital assault was accounted for at regular intervals in the initial a half year of 2017. In 2017, according to the Indian Computer

⁴⁴³ <http://www.financialexpress.com/india-news/what-fundamental-right-to-privacy-means->

[and-what-it-doesnt-10-points-from-supreme-court-verdict/823334/](http://www.financialexpress.com/india-news/what-fundamental-right-to-privacy-means-and-what-it-doesnt-10-points-from-supreme-court-verdict/823334/)



Emergency Response Team (CERT-In), an aggregate of 27,482 instances of cybercrimes have been accounted for over the world.

➤ **OFFICIAL WEBSITE OF MAHARASTRA GOVERNMENT HACKED⁴⁴⁴**

Vice president Minister and Home Minister R.R. Patil affirmed that the Maharashtra government site had been hacked. He included that the state government would look for its assistance and the Cyber Crime Branch to explore the hacking.

The state government site contains itemized data about government offices, brochures, reports, and a few different themes. IT specialists taking a shot at reestablishing the site revealed to Arab News that they expect that the programmers may have pulverized the majority of the site's substance.

As indicated by sources, the programmers might be from Washington. IT specialists said that the programmers had distinguished themselves as "Programmers Cool Al-Jazeera" and guaranteed they were situated in Saudi Arabia. They included this may be a red herring to divert examiners from their trail.

As per a senior authority from the express government's IT office, the official site has been influenced by infections on a few events previously, yet was never hacked.

➤ **Three people held guilty in on line credit card scam**

Clients charge card points of interest were abused through online means for booking air-tickets. These offenders were gotten by

the city Cyber Crime Investigation Cell in Pune. It is discovered that points of interest abused were having a place with 100 individuals.

Mr. Parvesh Chauhan, ICICI Prudential Life Insurance officer had sobbed for the benefit of one of his client. In such way Mr. Sanjeet Mahavir Singh Lukkad, Dharmendra Bhika Kale and Ahmead Sikandar Shaikh were gotten. Lukkad being used at a private establishment, Kale was his pal. Shaikh was utilized as a part of one of the branches of State Bank of India .

As showed by the information gave by the police, one of the customer got a SMS based alert for getting of the ticket despite when the charge card was being held by him. Customer was alert and came to know something was fishy; he enquired and came to consider the manhandle. He achieved the Bank in this regards. Police watched commitment of various Bank's in this reference.

The tickets were book through online means. Police asked for the log subtle elements and got the data of the Private Institution. Examination revealed that the points of interest were acquired from State Bank of India . Shaikh was working in the Master card office; because of this he approached charge card subtle elements of a few clients. He gave that data to Kale. Kale consequently passed this data to his companion Lukkad. Utilizing the data acquired from Kale Lukkad booked tickets. He used to pitch these tickets to clients and get cash for the same. He had given couple of tickets to different establishments.

Digital Cell head DCP Sunil Pulhari and PI Mohan Mohadikar A.P.I Kate got

⁴⁴⁴ <http://www.cyberlawsindia.net/cases.html>



accompanied with eight days of examination lastly got the guilty parties. In this respect different Banks have been reached; likewise four aircraft businesses were reached.

Privacy risks on social media

When someone joins a social network then that site aids a process to find phone numbers or friends in your contact list so that the site can make a connection between the user and the friends in their contact list to make the process easy for the user so that the user can connect with their friends easily and can stay in connect with them.

However, in such process the network also get information of the user from their data which might a site is not supposed to.

This extra ability of collection of extra data of social platforms and curate this extra information is called shadow profiles which first came into light in 2013 as a Facebook bug. The bug unwittingly shared the email-id and phone numbers of the users of around 6 million with all of their friends which the users didn't even made the information public.

However, the Facebook immediately addressed the bug but even so, many of users found their phone numbers on the social sites which they didn't even filled on Facebook.

Garcia chased for designs in the information. A great many people don't have an arbitrary arrangement of companions. Hitched individuals have a tendency to be companions with other wedded individuals, for instance. In any case, individuals additionally have associations that entangle the capacity to

foresee who's associated with who. Individuals who distinguished as gay men will probably be companions with other gay men, yet in addition liable to be companions with ladies. Straight ladies will probably be companions with men.

Utilizing this data, Garcia could demonstrate that he could foresee attributes, for example, the conjugal status and sexual introduction of clients' companions who were not on the web-based social networking system. Also, the more individuals in the interpersonal organization who shared their very own data, the more data the system got about their contacts, and the better the forecast about individuals not on the system got.⁴⁴⁵

Also a user is not in full control of their own privacy, if their family or friends are on the social platform and do share some pictures or information related to the user then the user can't do anything in that matter. The more you connect with other people, more is the probability of the leakage of information of the user, protecting privacy isn't something in your hands but also with whom the user is connected.⁴⁴⁶

Sharing pictures, videos, location, music is very common nowadays. Everything we share violates our privacy. More sharing of data with more people increase the risks by privacy attackers and every piece of data we share hinders our privacy which violates our fundamental right.

Technically, violation of fundamental right remark as the grievous crime in our Indian constitution, however, violation of right to privacy by using these social sites happens in our day to day lives and no action can be taken against them. Thus, the enshrinement

⁴⁴⁵ by [Bethany Brookshire](#)

⁴⁴⁶ Supra(4)



of right to privacy as fundamental right seems really absurd.

➤ **Puttaswamy vs. Union of India**⁴⁴⁷

In this case justice K.S. Puttaswamy retired judge filed a petition in the supreme court in 2012 against Aadhaar project by saying that it infringes the right to privacy of citizens and challenged the constitutionality of Aadhaar.

Aadhaar project, which aims to assemble a database of individual personality and biometric data covering each Indian. It issues a 12 digit number to every individual which is unique using specific biometric such as eye scan and finger prints. It was made mandatory by linking with filling tax returns, purchasing of 50,000 or above, securing loans, opening bank accounts, selling property etc.

In August 2015, the case came in front of 3 bench judges who referred it to the larger bench of the court. In July 2017 5 bench judges ordered the matter to be heard by the 7 bench judges.

Judgment : It is held that security is an unavoidably ensured right which rises, basically, from Article 21 of the Constitution. This isn't a flat out right yet an obstruction must meet the triple requirement of (i) Legality; (ii) the requirement for a honest to goodness point and (iii) proportionality.

➤ **Kharak Singh vs. State of UP**⁴⁴⁸

In this case the petitioner Kharak Singh was challenged in a case of dacoity, but got released as no evidence could be found against him. The police officers of

Uttar Pradesh opened up a history sheet against him and brought him under surveillance.

- a) Secret picketing of the house
- b) Domiciliary visits at night
- c) Used to go through under inquiries on daily basis for all the activities, income, expenses, occupation
- d) Every movement was reported by chaukidars and constables, if there is an absence from home
- e) Verification of movements
- f) Collection and record of history sheet of all information

Then the petition was filed in the supreme court by the petitioner under article 32 of Indian constitution, he challenged the constitution validity under chapter XX that the fundamental right has been infringed under articles 19(1)(d) i.e. right to freedom of movement and Article 21 i.e. right to life and personal liberty by the powers of police conferred to them.⁴⁴⁹

In the defence the defendant stated that there hasn't been any infringement of the fundamental right of the petitioner and even if they were, then they should be framed under the interests of the general public and public order and they should have been given the right to exercise there rights in the reasonable manner under the following circumstances.

Judgment : The petition was adjudicated by 6 bench judges in which they held that clause (b) i.e. domiciliary visits at night must be struck down as unconstitutional which is violative under Article 21 and the petitioner has right of *mandamus* against defendant to not continue domiciliary visits

⁴⁴⁷ <https://inform.org/2017/09/04/case-law-india-puttaswamy-v-union-of-india-supreme-court-recognises-a-constitutional-right-to-privacy-in-a-landmark-judgment-hugh-tomlinson-qc/>

⁴⁴⁸ <https://indiankanoon.org/doc/619152/>

⁴⁴⁹ <http://indianexpress.com/article/explained/m-p-sharma-and-kharak-singh-the-cases-in-which-sc-ruled-on-privacy-4756964/>



where the rest of the clauses could be upheld.

It was also stated that right to privacy is not guaranteed right under the Indian constitution therefore the attempt to check on the movements of someone can be in the manner of invaded the privacy but can't be stated as the infringement of the fundamental right under part III of the Indian constitution.

Cyber crimes and the IT laws

As the usage of computers became more popular which gave rise to the technology also and more people became familiar of the word Cyber. The advancement of data innovation offered ascend to the internet wherein web gives rise to chances to every one of the general population to get to any data, information accumulation, investigate and so on with the utilization of high innovation. What's more, because of the addition of the utilization of innovation abuse of innovation additionally raised up and the need of cybercrimes appeared at both local and universal level.

As the word crime describes its general meaning as legal wrong, cybercrimes would be described as unlawful acts relating to the computers, technology or accessing the internet in the wrongful manner.

There are certain types of crimes which affect the personality of individuals can be defined as :

- **Harassment via e-mails** : it is one of the most common type of harassment includes letters, sending messages, files via email. Harassment is common as usage of social sites like Facebook, Twitter, G-mail.
- **Cyber – stalking** : it creates fear of physical threats by using computer

technology like Facebook, g-mail, phone calls, texts, webcam, website videos.

- **Dissemination of Obscene Material** : it includes obscene or lewd material like child pornography or indecent material to corrupt the mind of the adolescent to torture them.
- **Hacking** : it includes the unauthorized access or control over someone's computer system through which they can get in the touch of the data of the system by which they can black mail an adolescent or torture them, can also destroy the whole data of the system.
- **E-Mail Spoofing** : sometimes users get mail through unknown identity which represent their fake origin i.e. the mail shows origin of e-mail which is different from the actual origin.
- **SMS Spoofing** : it includes unwanted uninvited messages. Here a wrongdoer takes personality of another as cell phone number and sending SMS by means of web and recipient gets the SMS from the cell phone number of the casualty.
- **Carding** : it includes unauthorized use of ATM cards, can be credit card or debit card which the offender steals and misuse the cards for their monetary benefits.
- **Cheating & Fraud** : here the offender steals the password of someone's system and data storage with guilty mind to misuse them which results into fraud and cheating.
- **Child Pornography** : It includes the utilization of PC systems to make, appropriate, or get to materials that sexually misuse underage youngsters.
- **Assault by Threat** : here the offender threatens a person with fear of their lives or their family members lives via phone, texts, videos, e-mails etc.⁴⁵⁰

Need of Cyber Law:

⁴⁵⁰ Dhawesh Pahuja Advocate in Bangalore



Information technology has spread all through the world. The PC is utilized as a part of every last division wherein the internet gives measure up to chances to all to financial development and human advancement. As the client of the internet becomes progressively assorted and the scope of online cooperation extends, there is development in the digital violations i.e. rupture of online contracts, execution of online torts and wrongdoings and so on. Because of these results there was have to embrace a strict law by the internet expert to manage criminal exercises identifying with digital and to give better organization of equity to the casualty of digital wrongdoing. In the cutting edge digital innovation world it is particularly important to manage digital violations and in particular digital law ought to be made stricter on account of digital psychological warfare and programmers.⁴⁵¹

Penalty For Damage To Computer System:

- According to **section 43**⁴⁵² of Information technology act 2000, whoever tries to commit any offence by hacking another system and tries to steal the data or try to destroy the system, deletes, alters or cause any disruption with the intention to harm someone's system or tries to misuse them without the permission of the owner then that person would be liable to pay fine up to Rs. 1 Crore to the person who has been affected by the offender.
- According to the **section 43A**⁴⁵³ which was inserted in 2008 under Information technology act where a body corporate

maintains and protects the data and information of the users provided by the central government, if there is any negligent act in part of the corporate body which fails to protect the data or information then that body will be liable to compensate the person who got affected by this.

- **Section 66** deals with "hacking with computer system" which provides imprisonment for 3 years or fine which may extend up to 2 lakh rupees or both.

3 Important Cases That Highlight the Need to Take Care :⁴⁵⁴

Every now and then a news story comes up that reminds you precisely how revealed we overall are through relational associations. Or then again perhaps not 'revealed', but instead 'accessible'. All that we say or do on social is traceable, prepared to be attributed back to us and there's a broad assortment of conduct by which people can use this information for wiped out purposes, if they were so arranged. In this manner, there were three news stories this week that went about as something of a refresher on the reliably contracting data region of our related world. Each case, in a surprising path, fills in as a sign of the ought to be careful in what we say, what we do and how we respond by methods for social stages - and the essentialness of remaining aware of how our data can be gotten to.

➤ Arizona Facebook Scammers

⁴⁵¹ <https://www.legalindia.com/cyber-crimes-and-the-law/>

⁴⁵² Information technology act 2000

⁴⁵³ Information technology (amendment) act 2008

⁴⁵⁴ Andrew Hutchinson, Social Media, Privacy and Scams - 3 Recent Cases That Highlight the Need to

Take Care available at ; <https://www.socialmediatoday.com/news/social-media-privacy-and-scams-3-recent-cases-that-highlight-the-need-to/454720/>



For this situation an Arizona lady was held subject for detainment for a long time for engineering an expense refund plot where she with her countrymen utilized Facebook information to discover and target individuals for identity burglary.

The procedure as follows :

- The scammers generally target unemployed people in their local area by using Facebook data.
- Then they contact their targets by using the information which they found using Facebook data by saying that, they are government officers or from some government agency who seek to help them out.
- The con artists at that point attempt to get more data through them with the goal that they could utilize it to influence an expense to guarantee for their benefit.

In this case the culprits were able to entangle dozens of people by obtaining their personal information which they used to make false tax claims. The motive of targeting the unemployed people was to reduce the risk of detection. There were many cases where the victims were unaware that their information had been stolen till they go to submit their own tax returns.

This sort of data fraud is on the ascent. By utilizing individual data accessible by means of Facebook profiles, sharp con artists can display exceptionally bona fide exchanges that would propose they are, indeed, authorities who approach your own records and can be trusted with your information. They'll frequently utilize qualifying questions the way official outlets would - something like "would i be able to simply put forth a couple of inquiries to

affirm your personality?" Then they have a qualified posting of inquiries and answers that they've possessed the capacity to set up from your social profiles. With a particular accumulation of the information focuses they'll require, and with an offer being displayed, similar to a financial boost program, you can perceive how jobless individuals who may require a couple of additional bucks could be hoodwinked into giving over their information.

Key lesson : The case highlights the facts that no one should give detailed personal information to just any random person without having knowledge that who they are and where are they from.

F1 Driver Robbed⁴⁵⁵

Formula 1 driver Jenson Button house had robbed in St. Tropez where Button and his wife were staying in rented holiday villa, where the thieves broke into and cleaned out and other things. The perspective was that the robbers might know about the location of Button and his wife and by keeping that in mind they broke the house when they were outside their villa.

The main question was that how could they have possibly know their location. The fact was that Michibata, wife of Jenson was broadcasting it via her Instagram account by tagging the location with all her pictures and that's how the robbers came to know about their location. This is how the burglars determined the best time to target the couple. It highlights that the users must be aware before sharing their location in public as it can be misused by anyone.

The same goes for pictures posted inside your home - on the off chance that you post a photo of your most recent DIY venture and there's a look at your costly home

⁴⁵⁵ *ibid*



studio out of sight, you may very well make yourself an objective.

Key lesson : To guarantee you're just offering conceivably delicate data to individuals you know and trust. Likewise abstain from posting content that may connote that you're out of the house for a broadened time frame.

➤ **Imprisonment for 30 years for Facebook posts⁴⁵⁶**

In this case a 48 years old man, insulted the Thai Monarchy via Facebook which resulted him sentencing for 30 years imprisonment. The man posted 6 different Facebook posts and the original sentence for this was 60 years which further reduced to 30 years after admitting the commission of offence.

There are few nations which carry strict punishments in order to post contents on social media. People should consider what they are posting on social media as every picture or thought you post on social media even if it as a joke can come back to you.

This is especially applicable on account of those searching for work - while bosses need to apply some level of rational in surveying competitors in light of their online networking action, spotters are, undoubtedly, judging applicants on that substance. In case you're posting about how you 'loathe your activity', about how you're getting squandered each night, about participating in criminal movement, that substance will be utilized as a part of any appraisal of you, and keeping in mind that you may think not all businesses are doing this, investigate demonstrates that the developing dominant part are.

Key lesson : People should always be wise enough of what they are putting on social sites, if any post seems like an offensive one whether against public policy or seems insulted against government can be later used as assessments.

As our reality turns out to be more associated and is united through web-based social networking and online correspondence, so too are we more presented to mis-employments of our information and judgments in light of the substance we distribute. In the lion's share, this shouldn't be a noteworthy concern - the advantages of an online networking availability far exceed the negative ramifications on most fronts - however it is something we as a whole should know about. Stories like these help us to remember the should be cautious and receptive to potential issues as we approach our every day advanced communications.

Tips For Protecting Privacy On Social Media

- **Password :** By creating strong password; the stronger the passwords are, the harder it will be to crack down. One can make password strong by using some symbols, capital letters, using special characters or something personal which can't be easy to find out by any random person.
- **Avoid sharing sensitive information :** One should pay close attention while putting their information on social sites and try to avoid sharing any sensitive mater which could be mis used against them.
- **Privacy settings :** Social sites like Facebook gives us the opportunity for restricting access to certain friends, family members and colleagues. We can use the enhanced private setting options to reduce

⁴⁵⁶ Supra(16)



the harm like blocking the messages of strangers.

- **Antivirus software :** One must install a good antivirus software and antivirus-spyware that will protect the system from malware, viruses and spyware. Keep in mind to update the software time to time with all the latest malware definitions.
- **Online posts :** When you utilize web-based social networking, you are essentially posting individual data on the web. Exactly when that information gets posted on the web, it is never again private, and may end up falling into wrong hands. Despite whether you have set up the most dumbfounding possible well being endeavors, some of your sidekicks, partners and associations you speak with by means of online systems administration media, can end up discharging your own information. Thus, you ought to be greatly wary about what you post on the web, else, you will end up giving the possible hoodlums, stalkers, advanced oppressive bastards and identity tricks the information they require to cause hurt.⁴⁵⁷
- **Watch your mailbox :** Sometimes we get mails from unknown origins which contain links to be clicked , one should be aware of that , cause sometimes the viruses spread through links are so strong which can destroy our system very badly.
- **Don't be too personal :** Nowadays almost everyone put their date of birth, residence, phone number, schools or colleges they get on social sites as information. Imagine how easy for some random person to find about you which can be misused in any way. Thus one must think before post anything on social media.

⁴⁵⁷ Sam Cohen, Privacy Risk with Social Media, available at; https://www.huffingtonpost.com/sam-cohen/privacy-risk-with-social-_b_13006700.html

⁴⁵⁸ <https://us.norton.com/internetsecurity-privacy-5-tips-for-social-media-security-and-privacy.html>

- **Lock your phone :** Your phone can end up in any stranger's hand, and as all the social sites can be easily accessed through mobile phones, the stranger can obtain your e-mail address, target your friends and can be mistreat in any way. Thus one must lock their phones.⁴⁵⁸

- **Location :** It has become hobby of people to post their location wherever they go, though they do it just for fun but it can put them in danger situation or can say it's like a welcome board for kidnappers. So keep in mind before posting anything unusual.

- **Contest :** "Free iPad if you share this post, fill this form and get a new Playstation, win a trip to Switzerland if you visit this site.... We could go on and on. Are you really buying this?"

As most of the messages we get are spams and other harmful intrusions, so one should not fall for this.

Make sure that the contest really exists (a quick Google search), and make sure that the post is actually coming from the official account of a reputable company.⁴⁵⁹

- **Not Referring to Other Social Media Accounts :** Numerous online networking stages enable you to fill in a profile field connecting over to your other interpersonal interaction accounts. Be that as it may, it can be a smart thought to keep up a detachment between accounts, particularly in the event that they include distinctive individual and expert characters. For instance, you won't not need LinkedIn groups of onlookers to discover your Facebook account. Abstain from associating these records to build the protection and security of your advanced characters.

⁴⁵⁹ By Enric Oon, Ways to Protect Your Privacy on Social Media, available at ; <https://en.softonic.com/articles/7-ways-to-protect-your-privacy-on-social-media-z>



- **Use two-factor authentication :** One can lock down their social sites like Facebook, Google, Twitter, Microsoft and other accounts with two- factor authentication. It means when one log in to their account, they will also need to enter a special code which site texts to their mobile phones. Some sites requires it each time when one log in, however, some sites only requires when one is using new device or web browser. Two-factor confirmation works perfectly to keep others from getting to your records, albeit a few people feel it's excessively tedious. In any case, in case you're not kidding about security, you'll endure the rubbing.
- **Turn on private browsing :** In the event that one doesn't need anybody to get to physically their PC then they should empower "private browsing" a setting accessible in each web program with the goal that nobody can perceive what were your history records or where you were hanging on the web. It erase treats, brief web documents, perusing history after they close their window.
- **Set up a Google alert for your name :** This is a basic method to watch out for anything somebody may say in regards to you on the web. It's simply an issue of disclosing to Google what to search (for this situation, your name), and in addition what sorts of site pages to seek, how regularly to look and what email address the web crawler giant should use to send you notices. Set up a Google alarm here.⁴⁶⁰

Conclusion

Social networks are a great way to make connection with others and to express the views with oneself and others. It helps the users to connect with the whole world and

to remove the barriers between them because of space and time. It provides opportunities in vast manner and many organisations are making use of this medium in a better practice. The world is getting closer by connecting through these mediums.

People are no longer depends on the media for the advertisement of any news as the internet is providing every information in very easy manner.

However, these social networking sites have its danger side too which can be proven very dangerous to humans by violating their right as right o privacy.

These perils are considerably to a greater extent a danger presently on account of the inexorably boundless pattern of enrolling on a few locales utilizing a solitary client account. In response to this situation, each Internet user must remain vigilant and governments must put more pressure on the operators of these sites in order to safeguard the security of Internet users.

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DOUBLE JEOPARDY

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Introduction:

Fundamental Rights which is guaranteed under Article 20(2) of Constitution of India incorporates the principles of “autrefois convict” or Double Jeopardy which means that person must not be punished twice for the offence. Doctrine against Double Jeopardy embodies in English common law’s maxim ‘nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa’ (no man shall be punished twice, if it appears to the court that it is for one and the same cause). It also follows the “audi alterum partem rule” which means that no person can be punished for the same offence more than once. And if a person is punished twice for the same offence it is termed Double Jeopardy. At Common Law a defendant may plead *autrefois acquit* and *autrefois convict* (peremptory plea), meaning the defendant has been acquitted or convicted of the same offence. If this issue is raised, evidence will be placed before the court, which will normally rule as the preliminary matter whether the plea is sustained, and if it so finds, the projected trial will be prevented from proceeding.

The principle was inexistence in India even prior to the commencement of the Constitution- Section 26 of the General clause Act 1897 says: *Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence*

Article 20 of the Constitution of India provides protection against double jeopardy. It has been enshrined as a part of the Fundamental Right by the fathers of our Constitution. The Indian Constitution, which has been beautifully written as poetry-in-prose, guarantees to the people certain basic human rights and freedoms, *inter alia* freedom against double jeopardy. Accordingly, no person can be prosecuted and punished for the same offence more than once. The provision apotheosizes the principle that a person cannot be tried twice for the same offence by an equally competent court.

When a person has been convicted for an offence by a competent court, the conviction serves a bar to any further criminal proceedings against him for the same offence. The idea is that no one ought to be punished twice for one and the same offence.

As per Indian Constitutions Article 20 “Protection in respect of conviction for offences” in the Constitution of India 1949 says,

1. No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
2. No person shall be prosecuted and punished for the same offence more than once
3. No person accused of any offence shall be compelled to be a witness against himself

Meaning of Jeopardy



The word Jeopardy refers to the “danger” of conviction that an accused person is subjected to when one trial for an criminal offence⁴⁶¹.

Meaning of Double Jeopardy

Double jeopardy is a criminal procedural defense that prevents a criminal defendant from being tried for the same criminal act twice after an acquittal or conviction or in other words The act of putting a person through a second trail of an offence for which he or she has already been prosecuted or convicted⁴⁶².

History and origin of this principle

Judicial and academic statements on the principle that a person should be protected against double jeopardy tend to either assume or imply unquestioningly the belief that the rule is one with a long historical background and sound doctrinal foundations.⁴⁶³

The principle of double jeopardy was not entirely unknown to the Greeks and Romans, although the legal environment was quite different.⁴⁶⁴ This principle found final expression in the Digest of Justinian as the precept that “the governor should not permit the same person to be again accused of a crime of which he had been acquitted.”⁴⁶⁵ No statement of the double jeopardy clause appears in Magna Charta, nor can it be discovered by implication.

Both the continental and the English systems drew the doctrine of double

jeopardy from the common source of Canon law.⁴⁶⁶ The origin of the maxim that, “not even God judges twice for the same act” was present in church canons as early as 847 A.D.⁴⁶⁷

Purpose

The double jeopardy protection exists for several reasons. First, it prevents the government from using their seemingly unlimited resources to attempt to bring to court innocent individuals multiple times until the government gets a conviction. An example of this could be a man who is accused of punching his wife who is found not guilty after a jury trial. This would prevent the prosecutor from charging the defendant over and over until he is finally found guilty.

Secondly, it protects people from the social and financial costs of multiple proceedings. A court process is expensive: the costs of hiring a lawyer, the emotional costs on the defendant and that person's family and the funds that have to be paid to the court can all add up. The double jeopardy defense protects the person from these emotional and financial costs.

Lastly, it minimizes judges being able to punish defendants multiple times for the same crimes. For example, if a judge sentenced a man who was accused of punching his wife, this would prevent the same judge from sentencing him twice for the same action.

⁴⁶¹Find Legal law dictionary

⁴⁶²The American Heritage law dictionary

⁴⁶³ Jill Hunter, *The Development of Rule Against Double Jeopardy*.

⁴⁶⁴ Jay A. Sigler, *A History of Double Jeopardy*, *The American Journal of Legal History*, Vol. 7, No. 4 (Oct., 1963), p. 283

⁴⁶⁵ Digest of Justinian, Book 48, Title XVII, as translated in Scott, *The Civil Law* (1932)

⁴⁶⁶ Radin, *Anglo- American Legal History* 228 (1936)

⁴⁶⁷ Brooke, *The English Church and the Papacy* 205 (1952)



Defense

If a defendant claims double jeopardy in court, the attorney will put evidence in front of the court to review if the claim is accurate. The court will consider documents and facts from both proceedings in making the determination. Some of the documents the court may review would be police reports from the act, doctor evaluations and paperwork from prior court proceedings.

Indian law and Double Jeopardy

The Double Jeopardy principle was existed in the India prior to the enforcement of the Constitution of India. It was enacted under in section 26⁴⁶⁸ section 26 states that “provision as to offences punishable under two or more enactments,- where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted or punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

And section 403(1) of (the old) CrPC⁴⁶⁹, 1898 (Section 300 of the amended Criminal Procedure Code, 1973), which states, 300(1) a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been under subsection (1) of the section 221 or for subsection (2) there of. It is to be noted that, the Code of Criminal procedure recognize both

the pleas of *autrefois acquit* as well as *autrefois convict*. The condition which should be satisfied for raising either of the plea under the Code are: firstly; that there should be previous conviction or acquittal, secondly; the conviction or acquittal must be by a court of competent jurisdiction, and thirdly; the subsequent proceeding must be for the same offence. The expression “same offence” shows that the offence for which the accused shall be tried and the offence for which he is again being tried must be identical, and based on the same set of facts.⁴⁷⁰

Section 71 of IPC⁴⁷¹ runs as- limits of punishment of offence made up of several offence where anything which is an offence is made up of parts is itself an offence, the offender shall not be punished of more than one of such his offences, unless it be so expressly provided.

The ambit of Article 20(3) is narrower than the English or the American rule against double jeopardy. The Indian provision enunciates only the principle of *autrefois acquit*. In Britain and in U.S.A., both these rules operate and a second trial is barred even when the accused has been acquitted at the first trial for that offence. In India, however, Article 20(2) may be invoked only if when there has been a prosecution and punishment in the first instance.⁴⁷²

Constitutional Implication

In constitution of India, Double Jeopardy is incorporated under Article 20(2) and it is one of the fundamental rights of the Indian Constitution. And the features of fundamental rights have been borrowed

⁴⁶⁸ Section 26 of General Clauses Act, 1897

⁴⁶⁹ Criminal Procedure Code, 1897

⁴⁷⁰ State of Rajasthan v Hat Singh, (2003) 2 SCC, 152

⁴⁷¹ Section 71 of Indian Penal Code, 1860

⁴⁷² Kalawati v State of Himachal Pradesh, AIR 1953 SC 131



from U.S. Constitution and the concept of Double Jeopardy is also one of them. Principle of Double Jeopardy is incorporated into the U.S. Constitution in the Fifth Amendment, which says that “no person shall be twice put in Jeopardy of life or limb”.

Article 20 of the Indian Constitution provides protection in respect of conviction for offences, and article 20(2) contains the rule against double jeopardy which says that “no person shall be prosecuted or punished for the same offence more than once.” The protection under clause (2) of Article 20 of Constitution of the Indian is narrower than the American and British laws against Double Jeopardy.

Under the American and British Constitution the protection against Double Jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under Article 20(2) the protection against double punishment is given only when the accused has not only been ‘prosecuted’ but also ‘punished’, and is sought to be prosecuted second time for the same offence. The use of the word ‘prosecution’ thus limits the scope of the protection under clause (1) of Article 20. If there is no punishment for the offence as a result of the prosecution clause (2) of the article 20 has no application and an appeal against acquittal, if provided by the procedure is in the substance a continuance of the prosecution.⁴⁷³

In the case of *Kalawati v State of Himachal Pradesh*⁴⁷⁴, a person accused of committing

murder was tried and acquitted. The State preferred an appeal against the acquittal. The accused could not plead Article 20(2) against the State preferring an appeal against the acquittal. Article 20(2) would not apply as there was no punishment for the offence at the earlier prosecution: and an appeal against an acquittal was in substance a continuation of the prosecution.

Where there are two distinct offences made up of different ingredients, embargo under Article 20(2) or Section 26 General Clauses Act 1897 has no application, though the offences may have some overlapping features. The doctrine of double jeopardy protects a person from being tried and punished twice for the same offence but not from different offences arising out of violation of different laws by the same set of facts. The Supreme Court in the recent case of *Monica Bedi v State of Andhra Pradesh*⁴⁷⁵ has ruled that a passport on fictitious name amounted to a double jeopardy for her as a Portuguese court too had earlier convicted her for owning forged passport.

Doctrine against Double Jeopardy in Constitution of India, Article 20(2) says that ‘no person shall be prosecuted and punished for the same offence more than once.’ But it is subjected to certain restriction. And it is to be noted that Article 20(2) of constitution of India does not apply to a continuing offence. There is also the concept of ‘continuing offence’ which means that where an act or commission constituting the offence is continued from day to day, a fresh offence is committed every day and each offence can be punished separately.⁴⁷⁶

⁴⁷³ Smt. Kalawati v State of H.P , AIR 1953 SC 131 at p. 152

⁴⁷⁴ *Kalawati v State of Himachal Pradesh* , AIR 1953 SC 131

⁴⁷⁵ *Monica Bedi v State of Andhra Pradesh* , 2011 1 SCC 284

⁴⁷⁶ *Mohd. Ali v Sri Ram Swarup*, AIR 1965 All 161



Enhancement of punishment by the revising authority does not amount to second punishment⁴⁷⁷ Preventive Detention is not 'prosecution and punishment' and, therefore, it does not bar prosecution of the person concerned.⁴⁷⁸ In the case of *State of Bombay v S.L. Apte*⁴⁷⁹, the Supreme Court explained the legal position as follows:

"The crucial requirement for attracting Article 20(2) is that the offences are the same, i.e., they should be identical. It is therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out..."

For instance, the offence under Section 161 I.P.C., is different from the offence of criminal misconduct punishable under Section 5(2) of the Prevention of Corruption Act, though some of the ingredients of the two offences may be common.⁴⁸⁰ When a person was convicted in U.S.A. under its drug laws and on the same set of facts tried in India under the Narcotics Drugs and Psychotropic Substances Act, 1985, it was held that the application of the principle of double jeopardy was not available since the offences in USA and India are distinct and separate.⁴⁸¹

There are some examples of cited cases mentioned below which throw light on the above question:

In *venkataraman v Union of India*,⁴⁸² an enquiry was made before the enquiry commissioner on the appellant under the Public Service Enquiry Act, 1960 and as a result, he was dismissed from the service. He was later on, charged for committed the offence under Indian Penal Code and the Prevention of Corruption Act. The court held that proceeding held by the enquiry commissioner was only a mere enquiry and did not amount to a prosecution for an offence. Hence, the second prosecution did not attract the doctrine of Double Jeopardy or protection guaranteed under Fundamental Right Article 20(2).

It is to be noted that Article 20(2) will be applicable only where punishment is for the same offence, in *Leo Roy v Superintendent District Jail*⁴⁸³, The Court held: if the offences are distinct the rule of Double Jeopardy will not apply. Thus, where a person was prosecuted and punished under sea customs act, and was later on prosecuted under the Indian Penal Code for criminal conspiracy, it was held that second prosecution was not barred since it was not for the same offence.

In *Roshan Lal and ors v State of Punjab*,⁴⁸⁴ the accused had disappeared the evidence of two separate offences under section 330 and section 348 Indian Penal Code. So, it was held by the court that the accused was liable to be convicted for two separate sentences.

In this case,⁴⁸⁵ the appellants were charged under section 409 IPC and Section 5 of the

⁴⁷⁷ *D.A. Kelshikar v State of Bombay*, AIR 1960 Bom 225

⁴⁷⁸ *Ghulam Ahmad v State of Jammu and Kashmir*, AIR 1954 J&K 59

⁴⁷⁹ *State of Bombay v S.L. Apte* AIR 1961 SC 578

⁴⁸⁰ *Kunji Lal v State of Madhya Pradesh*, AIR 1955 SC 280

⁴⁸¹ *Jitendra Panchal v Narcotics Control Bureau*, (2009) 3 SCC 57

⁴⁸² AIR 1954 SC 375

⁴⁸³ AIR 1958 SC 119

⁴⁸⁴ AIR 1965 SC 1413

⁴⁸⁵ *A.A. Mulla and Ors v State of Maharashtra and ans.*, AIR 1997 SC 1441



prevention of Corruption Act, 1947 for making false panchnama in which they have shown recovery of 90 gold biscuits while according to the prosecution case, they had again tried for the offence under section 120-B of Indian Penal Code, Section 135 and 136 of the Customs Act, Section 85 of Gold (control) Act and Section 23(1-A) of FERA and Section 5 of Import Export (control) Act, 1947. The validity of the subsequent prosecution was challenged by the appellant by the appellant on the ground that it contravened the constitutional guarantee embodied in Article 20(2). The court held: "After giving our careful consideration to the facts and circumstances of the case and submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offences for which the appellants were charged in the first trial are entirely different. The second trial with which we are concerned in this appeal, envisages a different fact-situation and the enquiry for finding out constituting offences under the Customs Act and Gold (control) Act in the second trial is of a different nature. Not only the ingredients of the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial is also not indented (sic). Accordingly, the second trial was not barred under Section 403 CrPC of 1898 as alleged by the appellants."

In *Union of India and Anr v P.D. Yadav*,⁴⁸⁶ In this case, the pension of the officer, who was convicted by a Court-Martial, had been forfeited. The court held: "this principle is embodied in the well-known maxim *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa*, meaning no one ought to be vexed twice if it appears to the

court that it is for one and the same cause. Doctrine of Double Jeopardy is a protection against prosecution twice for the same offence. Under Article 20-22 of the Indian Constitution, provisions are made relating to personal liberty of citizens and others offences such as criminal breach of trust, misappropriation, cheating, defamation etc., may give rise to prosecution on criminal side and also for action in civil court/ other forum for recovery of money by way of damages etc., unless there is a bar created by law. In the proceedings before General Court Martial, a person is tried for an offence of misconduct and whereas in passing order under Regulation 16(a) for forfeiting pension, a person is not tried for the same offence of misconduct after the punishment is imposed for a proven misconduct by the General Court Martial resulting in cashiering, dismissing or removing from service. Only further action is taken under Regulation 16(a) are entirely different. Hence, there is no question of applying principle of Double Jeopardy to the present cases.

UP
AM
Double Jeopardy and Res Judicata/ Issue Estoppel

In essence, the policy of protection against double jeopardy expounds that a matter, once put to an end, may not be reopened or re-litigated. The finality principle found expression in the Roman-law doctrine of *res judicata*. The basic tenet of the doctrine is that a matter or question raised by one's adversary who has already been the subject of adjudication in previous legal proceedings, cannot be raised once again. Roman texts on the principle of *res judicata* reveal a concern that a community ought to be protected against what may be regarded as oppressive multiplication of

⁴⁸⁶ (2002) 1SSC 405



suits.⁴⁸⁷ Our Supreme Court has held that the application of the above rule of *res judicata* in India is not excluded by the fact that the rule against double jeopardy has been codified in s. 300 of the Cr. P.C., and also guaranteed by Article 20(2) of the Constitution⁴⁸⁸ because the scope of the two principles is not identical. For, the rule of *res judicata* rests on the principle where an issue of fact has been tried by a competent court on a former occasion and the finding of that court has been in favour of the accused, such finding would constitute an estoppel against the prosecution- not as a bar to the trial but as a precluding the reception of evidence to disturb the finding of fact when the accused is tried subsequently even for a different offence. Since the doctrine of *res judicata* rests on the identity of the issues at the two trials, it is also known as the doctrine of 'issue estoppel'. The basic difference between the principle of double jeopardy and *res judicata* is that while the rule of double jeopardy is not applicable unless the offence involved in the subsequent proceeding is not the same as in the former proceeding, the rule of *res judicata* applies even though the offence for which the subsequent proceeding has been brought is a different one.⁴⁸⁹

In India, the starting point of issue estoppels was the Privy Council decision in *Sambasivam v Public Prosecutor, Federation of Malay*⁴⁹⁰. Lord MacDermott in this judgement said that:

“The effect of a verdict of acquittal pronounced by a competent court on a

lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all the subsequent proceedings between the parties to the adjudication. The maxim, ‘Res judicata pro veritate accipitur’ is no less applicable to criminal as to civil proceedings.”

Hedge J. in *Assistant Collector, Customs v Malwani*⁴⁹¹ has also observed that the issue estoppel rule was but a facet of the doctrine of *autrefois acquit*. And that it was based on the principle of *res judicata*. The subsequent position of Law.

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The Supreme Court in *Venkataraman v Union of India*⁴⁹², laid down that Art.20(3) refers to judicial punishment and gives immunity to a person from being prosecuted and punished for the same offence more than once. In other words, if a person has been prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in subsequent proceedings. If any law provides for such double punishment, such law would be void. The Article however does not give immunity from proceedings other than proceedings before a Court of law or a judicial tribunal. Hence a government servant who has been punished for an offence in a Court of law may be subjected to departmental proceedings for the same offence or conversely. In *O.P. Dahiya V Union of India*⁴⁹³, it was held that if the

⁴⁸⁷ 32 Comp. & Int'l L.J. S. Afr. 1 (1999) Appeal by the Prosecution and the Right of the Accused to be Protected against Double Jeopardy: A Comparative Perspective; Jordaan, Louise

⁴⁸⁸ *Manipur Administration v Thokchom Bira Singh*, AIR 1965 SC 87(90)

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Sambasivam v Public Prosecutor, Federation of Malaya*, (1950) A.C. 458

⁴⁹¹ *Assistant Collector, Customs v Malwani*, (1969) 2 SCR 438

⁴⁹² *Venkataraman v Union of India*, (1954) SCR 1150

⁴⁹³ *O.P. Dahiya V Union of India*, (2003) 1 SCC 122



accused was neither convicted nor acquitted of the charges against him in the first trial his retrial would not amount to double jeopardy and in *State of Rajasthan V Hat Singh*⁴⁹⁴, it was said that prosecution and other punishment under two sections of an Act, the offences under the two Sections being distinct from each other, does not amount to double jeopardy.

The Supreme Court in a recent decision of *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*⁴⁹⁵, explaining this proposition of law *inter alia* observed that a person cannot be convicted even for a different offence under a different statute if the facts leading to the conviction under both the statutes are the same. This decision does not discuss aspect of double jeopardy and is in considerable contrast from the earlier enunciation of law and it has been criticized.

Comparison with other countries

It is a fundamental principle of the common law that a person cannot be put in jeopardy twice for the same offence. Almost all common law countries incorporate this protection in their laws. While some countries have found it necessary to be included in their constitutions, others have incorporated it in their statutes. All agree that the protection has its origin in the English common law of the eighteenth century. Though its origin is thus common, it is found that its reception and implementation have been different. The purpose for which the protection has been accepted, the problems arising out of the implementation of these purposes and the

resolution of these problems etc., are dealt with differently.

Germany

In Germany, also principle of double jeopardy is stated in Article 103(3) of the Germany's Constitution:

*"No one may be punished for the same act more than once in pursuance of general legislation."*⁴⁹⁶

U.S.A.

While numerous countries maintain variations of double jeopardy, the American approach remains one of the more potent provisions. The American interpretation, however, has not always provided criminal defendants a formidable defence.

The Fifth Amendment to the United States Constitution provides:

"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The Double Jeopardy Clause encompasses four distinct prohibitions: subsequent prosecution after acquittal, subsequent prosecution after conviction, subsequent prosecution after certain mistrials, and multiple punishments in the same indictment. Jeopardy "attaches" when the jury is empanelled, the first witness is sworn, or a plea is accepted.

The protection has been held to be not only from punishment but also from a second trial, which commences when a man is

⁴⁹⁴ *State of Rajasthan V Hat Singh*, AIR 2003 SC 791

⁴⁹⁵ *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*, AIR 2011 SC 641

⁴⁹⁶ M.V. PYLEE, *Select Constitutions of the World*, 2nd Edition, p. 232



charged before a competent tribunal. But, a retrial does not come within the rule nor does the doctrine extend to the execution of the sentence.

The Double Jeopardy clause prevents the State from ‘punishing’ twice or attempting a second time to ‘punish’ criminally for the same offence.

Japan

The Constitution of Japan states in Article 39 that

“No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.”

However, if someone is acquitted in a lower District Court, then the prosecutor can appeal to the High Court, and then to the Supreme Court. Only the acquittal in the Supreme Court is the final acquittal which prevents any further retrial.

England

The above provision of the American Constitution is indeed founded on the English Common Law rule ‘*nemo debet bis vexari*’.

It enabled an accused to raise a plea not only for *autrefois convict* but also of *autrefois acquit* before the implementation of the Criminal Justice Act, 2003.

Following the murder of Stephen Lawrence, the Macpherson Report recommended that the double jeopardy rule should be abrogated in murder cases, and that it should be possible to subject an acquitted murder suspect to a

second trial if “fresh and viable” new evidence later came to light. The Law Commission later added its support to this in its report “Double Jeopardy and Prosecution Appeals” (2001).

These recommendations were implemented—not uncontroversial at the time—within the Criminal Justice Act 2003 and this provision came into force in April 2005. It opened certain serious crimes (including murder, manslaughter, kidnapping, rape, armed robbery, and serious drug crimes) to a retrial, regardless of when committed. Under the new system, a suspect can be tried again for the same offence if there is “new, compelling, reliable and substantial evidence”, which had not been previously available.

Conclusion

There are two pillars found in every legal system. One is legal certainty and the other is equity. When the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings. A sentence, whether absolutor or condemnatory, is a complete bar, not only to any subsequent trial for the same offence, but for any other crime involving the same *species facti*, whether at the instance of the public or private property. In every legal system there is provision for Double jeopardy as no person should be punished twice for the same offence. Doctrine of double jeopardy is a right given to the accused to save him from being punished twice for the same offence and he/she can take plea of it. Different cases present different circumstantial



situations. Therefore, the rule of double jeopardy cannot be made a strait-jacket rule and is hence interpreted differently for different cases. While interpreting the provision judges always keep a watch that innocent does not gets punished. The principle of double jeopardy has been a part of the legal system since man can remember and is an honest endeavour to protect the non-guilty ones. It can therefore be considered a positive and just doctrine based on equity, justice and good conscience.





ACCESS TO MARIJUANA: Basic Human Right

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Not all intoxicants cause crime. That's the case with marijuana that is rather beneficial to both individuals and the economy. It was banned due to various political reasons and all these years the people were denied of their right to life and health as guaranteed by the UN Convention and the Indian Constitution. Rather than restricting marijuana, the government can impose certain regulatory measures to ensure a balance is maintained between the right of a person to consume it and state's interest of protecting its citizens. Unlike alcohol or cigarette, marijuana brings with itself a lot of medicinal uses and its ban seems absolutely unfair and illogical. Marijuana has proven to be much more beneficial than the substances mentioned above. Presence of delta-9-tetrahydrocannabinol (often referred to as THC), and cannabidiol (CBD) in it provides wide-ranging benefits to the individuals' life and health. Legalization of marijuana also offers the government a huge opportunity of expanding its treasury by collecting revenue in the form of tax receipts, thereby boosting the economy and increasing the GDP. Every human has a right to live a life with dignity and happiness. That's the least of the human rights he should be assured of. Living happily is a relative term but it shall definitely include recreational activities. Marijuana therefore being a recreational activity, and being beneficial to individuals' health and the economy, should be legalized to ensure basic human rights are granted to everyone.

Introduction

"One of the very most basic of human rights is the right to be healthy and to take care of your health. Nature in all of her wisdom gave us a cure for every ailment there is and every human being has a nature given, a god given, a goddess given right to use the plants that nature has given us" Says Steve DeAngelo, star of Discovery's WEED WARS and Executive Director of the Harborside Health Centre in Oakland, California.

Marijuana, also known as cannabis, is a kind of drug which is prohibited from being consumed, stored, possessed, cultivated, produced or sold in any form or quantity as per Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985. The Act extends to the whole of India and it applies also to all Indian citizens outside India and to all persons on ships and aircraft registered in India. There are places where you can still find for it despite being banned: Kerala, Meghalaya, Manipur, Kashmir, Himachal Pradesh, Uttarakhand, Mysore, even Bihar. Its use is widespread despite being illegal. In Odisha, it is comparatively more acceptable and easier to procure. It has now become a part of tradition and local hospitality. Smoking culture has evolved in India. Presence of Cannabis or Opium has a long history in India and is not something new. According to Vedas, Cannabis / Marijuana was one of five sacred plants and a guardian angel lived in its leaves. Cannabis is considered by Vedas as a source of happiness, joy-giver and liberator that helps human lose their fears and attain delight. Lord Shiva is frequently associated with a kind of cannabis called Bhang. This association has made a lot of Hindu followers to consume bhang during festivals like Shivratri or Holi. Not only it was consumed in India but



was so highly consumed that the British commissioned a large-scale study in 1890s.

One thing that is now lucid is the fact that usage of cannabis or marijuana isn't a borrowed habit but a very integral part of Indian tradition. Over the years India tried to deal with marijuana more as a socially unacceptable thing than an economic good. The global legal marijuana market is expected to be touching USD 146.4 billion by the end of 2025, according to a report by Grand View Research, Inc.⁴⁹⁷ India should move forward and try to capitalize the huge industry available as it can give a major boost to economy. Not only can it capitalize the market but also bring the alternate market (illegal) under its ambit and gain revenue (taxation). Existence of an unregulated market having such high potential is a golden opportunity that the government should try to seize upon because an opportunity lost is like delaying growth. India, if it doesn't legalize and control the marijuana, then it may miss out on a sector with high market potential. Legalization isn't only necessary economically but it's a basic human right that cannot be ignored.

“Regulation allows cannabis buyers to know what they're consuming and moderate their intake, in the same way that a drinker can distinguish and choose between a whiskey and a beer. Imposing a tax on cannabis sales can create revenue that can be spent on educating people about the risks of cannabis use, as we already do with public service information on alcohol and tobacco,” writes Shashi Tharoor, in The Print.

⁴⁹⁷Legal marijuana market worth \$146.4 Billion by 2025/ CAGR: 34.6%, GRAND VIEW RESEARCH (April 20, 09:45 PM), <https://www.grandviewresearch.com/press-release/global-legal-marijuana-market>

The Dutch had made a slight change in their policy of prohibiting marijuana. The result was that removal of criminal prohibition of marijuana didn't increase the possession or presence of marijuana.⁴⁹⁸ This in fact shows that legalization of marijuana will not just boost the economy but also benefit the health of the individuals in terms of their health and happiness. All that is necessary is adequate planning and right implementation of the policy or the legislations.

Marijuana vs. Alcohol and Cigarette Marijuana vs. Alcohol

Alcohol, that is an intoxicant ingredient present in wine, beers, spirit and other drinks, is a depressant that slows down the body's system after it reaches the brain. It is a legal recreational substance as drinking it is not life threatening. Consumption of both marijuana and alcohol leads to short-term and long term-effects. When people consume too much alcohol, it may prove to be fatal leading to their death. If the alcohol content is not metabolized as quickly as it is consumed, it affects those parts of the brain that are necessary for survival. In contrast, one can never overdose on marijuana, as its impact is very much subtler. A fatal dose of marijuana would be 15-70gms of TCH content, which is in between 238-1113 joints. That's a lot to be consumed by a single person in one day.

Intake of both marijuana and alcohol affects the driving functions of a person. Alcohol intake impacts the driving ability of a person by causing the following affects on the body: Slow reaction time, lack of

⁴⁹⁸ R. MacCoun and P. Reuter. 2001. Evaluating alternative cannabis regimes. British Journal of Psychiatry 178: 123-128



coordination, reduces concentration, decreases vision and inhibits the ability of making a judgment. The legal limit of BAC (Blood Alcohol Content) as approved by the Union Cabinet is 0.05% or 30mg. Consumption of more than 30mg leads to fatal accidents. Due to an increased awareness of the notion that marijuana results in impairment, its users tend to drive well by utilizing a variety of behavior strategies in more complex tasks that requires conscious control. They drive more slowly, concentrate better on the road, leave adequate space between themselves and the other cars around them, and as such. It is noted that, low concentrations of THC do not cause accident, but in fact lowers the chances of accidents while concentration of THC higher than 5 ng/mL leads to an increased risk of accidents. This suggests that keeping 5 ng/mL as the legal limit can regulate marijuana.⁴⁹⁹

Alcohol damages brain health more than marijuana does. Alcohol has long term effects to the brain structure that damages its white and gray matter. Gray matter is a brain tissue that consists of nerve cell bodies. White matter is a deeper tissue in the brain. It contains myelinated nerve fibers that transmit electrical impulses to other cells and tissues. Loss in these tissues leads to impairments in the functioning of the brain. It has proved to cause severe damage to a person. On the other hand, research has proven that marijuana does not impact the gray or white matter of the brain. It leads to no such impairment and is comparatively better to consume than alcohol.

Marijuana is less addictive as compared to alcohol. While thousands of deaths have been accounted due to alcohol use, no deaths have been documented for marijuana use alone. Due to various reasons as such, it can be very well established that although marijuana may have certain negative consequences, it is nowhere near the negative consequences as alcohol. Either alcohol must be banned by the government in the same way as marijuana is, or marijuana must be regulated in the same way as alcohol is!

Marijuana vs. Cigarette

Cigarette contains psychoactive materials like tobacco, which contains around 7000 chemicals in it that is rolled into thin paper for smoking. Nicotine, a chemical in tobacco, is a very addictive substance that makes all its users highly addicted to smoking cigarettes. It harms nearly every organ in the body and causes many health issues and diseases. It causes more death than death due to HIV, illegal drug use, alcohol use, motor vehicle injuries, and firearm-related incidents combined!⁵⁰⁰ While smoking, oxygen from the blood is replaced by carbon monoxide due to which organs stop functioning properly. It is very fatal in large doses. Tar, another chemical present in smoking, coats the lungs and affects breathing. Smoking increases the possibility of a brain stroke by 2 to 4 times, which may cause brain damage and death. Smoking makes bones fragile and brittle. It increases heart-related problems and cardiovascular diseases such as, coronary heart disease, heart attack, heart-related chest pain. It causes a lot of other problems such as gum disease, pregnancy-related

⁴⁹⁹ Sewekk, R Andrew et al, *The effect of cannabis compared with alcohol on driving*, 18 (3) THE AMERICAN J. ON ADDCTIONS, 185-193, (2009).

⁵⁰⁰ Mokdad AH, Marks JS, Stroup DF, Gerberding JL, *Actual causes of death in the United States*, JAMA 2004, 291(10):1238-45.



issues, cancer, and as such. It ages the skin by 10-20 years, making it dull and grey.

Smoking cigarettes causes huge lung problems that includes respiratory symptoms, chronic obstructive pulmonary disease and lung cancer that accounts for huge number of deaths. Smoking marijuana can be equally harmful to health if taken in the same quantity as cigarettes are. But as the effect of marijuana stays for longer, people smoke less amount of marijuana as compared to cigarettes, which reduces their risk to lungs due to marijuana. As it is said, 'one joint is equal to ten cigarettes.' Nevertheless, marijuana if consumed in any other way than smoking, like in baked goods, edibles, vaporizing, etc. poses no threat as no chemical is added when there is direct intake of marijuana in contrast to when it is smoked.

Presence of nicotine in tobacco causes health problems such as cancer, and heart diseases. While THC in marijuana is a bronchial dilator that opens up the lungs and clears the smoke and dirt. It causes relaxation, and improves the health and well being. People smoke marijuana as vaporizers, inhalers, water pipes are not easily available as it is illegal. The reason why people don't eat it is because a large quantity of it required for it to affect your body if taken that way. Due to its illegality, it isn't cheap and thereby consuming large

quantity of it becomes expensive. If properly regulated, the more legal marijuana gets, the safer it is.

Benefits of Marijuana to the Individuals

- Studies indicate that marijuana users have comparatively lower body mass than nonusers. It is argued that marijuana users inculcate snacking behavior that in turn increases their body mass. But according to a study, there is no effect on food intake on **normal individuals** that consume low doses of it.⁵⁰¹
- The good part about its usage (oral and smoked cannabinoids) by **HIV/AIDS and cancer patients** is that it increases food and calorie intake in them and thereby helps them in gaining weight and body mass. Marijuana is also promising as a means of treating nausea among cancer patients.⁵⁰²
- It is an anti-depressant and changes mood causing feelings of energy and relaxation. It changes perceptions and increases creativity of a person. Other **psychoactive effects** include sensory perception, euphoria, concentration, coordination and changes in blood pressure.⁵⁰³
- It kills cancer cells in leukemia patients and is helpful in curing lowered intraocular eye pressure, pain, inflammation, muscle control problems, controlling epileptic seizures, mental disorders, migraine as well as general analgesic effects.⁵⁰⁴

⁵⁰¹ Foltin RW, Brady JV, Fischman MW. *Behavioral analysis of marijuana effects on food intake in humans*, Pharmacol Biochem Behav. 1986, 2:577-582.

⁵⁰² Haney M, *Effects of smoked marijuana in healthy and HIV+ marijuana smokers*, J Clin Pharmacol, 2002; 42:34S-40S. Also refer, Voth EA, Schwartz RH, *Medicinal applications of delta-9-tetrahydrocannabinol and marijuana*, Ann Intern Med, 1997; 126:791-798.

⁵⁰³ Fusar-Poli P, Crippa JA, Bhattacharyya S, et al., *Distinct effects of delta-9-tetrahydrocannabinol and*

Cannabidiol on Neutral Activation during Emotional Processing, Archives of General Psychiatry 66 (1); 95-105.

⁵⁰⁴ Carly Schwartz, *Marijuana May Stop The Spread of HIV, Study Finds*, The Huffington Post (April, 1, 2019, 04:16 PM), https://www.huffingtonpost.in/2014/02/11/marijuana-hiv_n_4767901.html. Also refer *Marijuana as Medicine*, National Institute of Drug Abuse (April 2, 2019, 08:18 PM)



- Endocannabinoid, a chemical compound in brain that is linked to feelings of overall well being, becomes lower during chronic stress. Marijuana contains THC that activates the same receptors as endocannabinoids. Therefore, it can be used in restoring endocannabinoids function and diminishing symptoms of **depression**.
- Numerous pre-clinical investigations in the U.S.A have validated the role of endocannabinoids in preventing **headache disorders** like migraine, trigeminal autonomic cephalalgias, chronic headaches, cluster headache, medication overuse headache and idiopathic intracranial hypertension. This suggests that a mechanistic role of cannabis (containing THC that activates the same receptors as endocannabinoids) can be used to cure headache disorder.⁵⁰⁵ It also helps in **Obsessive Compulsive Disorder** as endocannabinoid plays a role in it.
- A person going through **spinal cord injury** has to deal with chronic pain, muscle spasms, spasticity and experiences difficulty in sleep everyday. Cannabis is well known for treating chronic pain as it activates specific receptors around central nervous system that helps relieve pain. It triggers a neuroprotective response that is very helpful for people suffering with such an injury. It also improves muscle spasticity, sleep and motor functions.⁵⁰⁶
- Marijuana can be used to control the use of other harmful drugs as it has fewer side effects and is a better symptom management. It can be used as an **alternative** for alcohol, cigarettes and other illicit drugs.
- Marijuana can help prevent **diabetics** as it stabilizes blood sugar levels, lowers arterial inflammation due to its antioxidant properties, reduces neuropathic pain, provides relief from muscle cramps, relieves gastrointestinal pain and cramping, and keeps blood vessels open which reduces blood pressure overtime and improves circulation.
- **Cerebral malaria** is a life-threatening disease that affects over half a million children every year and can affect the sufferer throughout the course of their life. It has the potential to cause permanent neurological and behavioral deficits. It has been discovered that cannabidiol (CBD) can decrease the neurological damage caused by this disease.
- Studies show that legalization of marijuana shall lead to decrease in traffic fatalities, reduction in rates of homicide and assault, and improvement in creativity. It is also proven that one can never overdose on marijuana.

Benefits of Marijuana to the Economy

Legalization of marijuana not only grants one a basic human right but also brings with itself a major economic boost. At once it brings the complete black market of marijuana under the regulation of government. The most direct and immediate impact would be in the form of increased tax revenue. Legalization of marijuana has an important advantage over restriction because it allows for the Government to collect taxes from the

<https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>.

⁵⁰⁵ Russo E, *Hemp for Headache: an in-depth historical and scientific review of cannabis in migraine treatment*, J Cannabis Ther, 2001; 1:21-92.

⁵⁰⁶ Rachel Garland, *The Astounding Ways Cannabis Can Treat Spinal Cord Injuries*, GREEN FLOWER (May 20, 09:25 PM), <https://www.green-flower.com/articles/261/the-astounding-ways-cannabis-can-treat-spinal-cord-injuries>



legalized drug. A huge black market of marijuana in India indicates that legalizing the drug can significantly benefit the government. Currently the price of marijuana is high due to it being illegal and having high demand with limited supply. Due to this the free market price of marijuana would be much lower than the current level of price. This gives the government an opportunity to levy high taxes on marijuana post legalization also ensuring it gives proper competition to alcohol, tobacco and other intoxicants.

The taxation revenue of legalized marijuana products has already been proven in Colorado, in the United States, where marijuana is legalized since January 1, 2014. Colorado became one of the first states in the United States to allow for legal buying and selling of marijuana. The results from Colorado's first two years of legalization show significant monetary tax revenue. With recreational and medicinal sales reaching almost \$1 billion in 2015, Colorado collected more than \$135 million in taxation revenue and fees.⁵⁰⁷ If a state of USA is able to make such huge economic benefits, then a huge country like ours shall ensure it makes most out of this opportunity. The generated tax revenue from marijuana can be used for state's public school capital construction assistance fund and public programs such as substance abuse and regulation of marijuana use. This will ensure positive income along with considerable economic

boost. This ensures that its own generated tax revenue can be used for the adverse effects caused by the legalization.⁵⁰⁸

Apart from the tax benefits it also ensures that the government reduces its spending as it would have on prohibiting marijuana pre-legalization. Setting up marijuana nurseries and dispensaries would be the first step for the states that voted in favor of medical marijuana. This would not only create job opportunities but would also give rise to economic activities around it. In the case of states like California and Nevada where such infrastructure already exists, the economic impact has become more quantifiable as the sector has matured.⁵⁰⁹

Now that the economy has included this sector, the workers who weren't included in workforce earlier by economists will now be included. This will give a boost to the GDP of the nation. Legalization with itself brings in the whole chain of manufacturers, traders, agents and for obvious the consumers. This in turn generates considerable amount. It also could help to secure the investment portfolios of investors across the country and further afield as well.

While marijuana remains illegal on the federal level, it is difficult for investors to capitalize on the growth of the industries. Should marijuana become legal on the national level, marijuana companies would be free to list their stocks on all exchanges, thereby enhancing liquidity and opening up

⁵⁰⁷ Marijuana Tax Data, COLORADO DEPARTMENT OF REVENUE (may 15, 05:27 PM), <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data>

Also refer, *Marijuana Taxes, Licenses, and Fees Transfers and Distribution*, COLORADO DEPARTMENT OF REVENUE (May 15, 05:45PM),

<https://www.colorado.gov/pacific/sites/default/files/1215MarijuanaTax%2CLicense%2CandFeesReport.pdf>

⁵⁰⁸ See *id.*

⁵⁰⁹ Mrinalani Krishna, *The Economic Benefits of Legalizing Weed*, INVESTOPEDIA (May 16 12:30 PM),

<https://www.investopedia.com/articles/insights/110916/economic-benefits-legalizing-weed.asp>



access to many more investors. Should the growth rates for the cannabis space continue as they have in recent years, it's likely that investors would express a keen interest in the industry.

Basic human right

Right to health, which is a basic human right under Article 25 of the United Nations' Universal Declaration of Human Rights and WHO Constitution, and is also a fundamental right under Article 21 of the Indian Constitution, allows for a broader conception of 'health'. The conflict here is between state's interest (that restricts the use of marijuana to protect the health, welfare, morality and/or safety of its own citizens) and individual's right (right to privacy and to be left alone unless it harms anybody else). The definition of health constitutes for both externalist (biological condition) and internists (social condition) view. While the former is supported by the state, individuals support the latter. Determination of what constitutes as 'good health' is a crucial tension and it is important to consider the definition of health given by WHO as it is helpfully broad: 'a state of complete physical, mental, spiritual and social well-being and not merely the absence of disease or infirmity'. The definition clearly states that it is important for the state to consider both externalist view that can focus on what they believe to be good for citizens and internist view of what is beneficial for the individuals. While restrictions can be imposed, a total ban on the use of marijuana is completely unfair and violates basic human right to health.

The history of ban on marijuana provides that there was no appropriate scientific or legal standing for the imposition of its ban. The first ever policy formed for the restriction of marijuana is the Marijuana Tax Act, 1937 in the USA. After the Mexican revolution in 1900's, the Mexicans brought their native language, customs and traditions into the American country. Use of marijuana as a medicine and relaxant was one of their customs. The ban of marijuana was mainly to demonize Mexicans and the leading charge given against it was criminal insanity, moral decline and its role as a gateway to other drugs. It has been done with no scientific backing to prove the same.⁵¹⁰ Since it's ban in USA, India was pressurized by them as they were campaigning for a global law against all drugs. Therefore, the Rajiv Gandhi government enacted a law called Narcotic Drugs and Psychotropic Substance Act in 1985.

Right to health is incorporated in the constitution under Article 21 to attain highest attainable mental and physical health. A healthy mind and body leads to a healthy and happy life. In the case of *Vincent Parikurlangara v. UOI*,⁵¹¹ the Supreme Court held that right to maintenance and improvement of public health is included in the right to live with human dignity enshrined in Art. 21. The foundation for all human activities is a healthy body. In a welfare state this is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health. Right to health and medical care was upheld as a fundamental right even in the case of *Consumer Education and*

⁵¹⁰ James B. Slaughter, *Marijuana Prohibition in the United States: History and Analysis of a Failed*

Policy, 21 Colum. J.L. & Soc. Probs. 417, 474 (1988)

⁵¹¹(1987) 2 SCC 165.



*Research Centre v. Union of India.*⁵¹² The right to life with human dignity encompasses within its fold, some of the finer facets of human civilization that makes life worth living.⁵¹³ Marijuana users tend to enjoy its use. It can also be used to treat a lot of diseases or health problem. It is not justified how marijuana is banned for no proper reason. Our country needs to give a close look at its history and realize that as there is no apt reason for its ban, it is now time to legalize it and protect the basic human right of the citizens as enshrined upon them by the constitution.

CONCLUSION

It is to be duly noted and pointed out that the regulation of marijuana in the history is an error that has no scientific or legal backing. It is important to realize that even though marijuana is a soft drug, it is only mildly addictive and its effects can be compared to that of alcohol and cigarette. It is reported that around 65% who smoked marijuana are experimenting users and discontinues its use further. Around 25% of them smoke merely on social occasions, usually with the group. Only the other 10% are chronic users of the drugs and if regulated right by spreading proper awareness, they can be controlled.⁵¹⁴ If marijuana is legalized and put in par with cigarettes and alcohol, its manufacture, cultivation and sale would require license to be freely available in the market. This will create a barrier and restrict its use for the people. Furthermore as mentioned above, proper regulation and promotion of the advertisements showcasing the effects of marijuana will help the chronic users. A system must be developed with appropriate taxation, careful licensing to both

manufacturers and retailers and if required, stricter penalties to those growing and selling it unlicensed.

It is now time to let go of the myth that marijuana users causes violence and crime as there are no records to prove the same. If anything, marijuana users tend to be more calm and passive. Marijuana has proven to have no short-term effects on the body. To know the long-term effects, it is important to conduct a study and scientific research on the same. It has proven to be difficult due to its illegal nature. If legalized, scientists and doctors will be free to conduct research on the substance. Total prohibition of marijuana is not justified based on the existing knowledge.

THC helps to cure various diseases and the citizens must be allowed to use the same. It is for the benefit of the citizens and the society to have a healthy lifestyle. Besides there is no appropriate for denying the citizens from the same. Denying the use of it is violating their right to health and privacy. There are more addictive and dangerous hard drugs like cocaine, heroine, etc.; that needs to be distinguished from marijuana. Those drugs are extremely dangerous and it is not logical to provide the same punishment for all of them. As excessive use of marijuana is likely to produce adverse affects, it is pertinent to develop a public policy to restrain and restrict excessive use of it and limiting it to adults. It is important to provide the citizens with a sensible, responsible and truthful legislation.

⁵¹² (1995) 3 SCC 42.

⁵¹³ DR. J. N. PANDEY, CONSTITUTIONAL LAW OF INDIA, 288 (Dr. Surendra Sahai Srivastava, 55 ed. 2018)

⁵¹⁴ Nicholas N. Kittrie, *Marijuana- The right to Truth*, 23 S. C. L. Rev. 361 (1971)



UNDERSTANDING THE GOODS AND SERVICES TAX (GST): INDIAN CONTEXT

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1. A BRIEF INTRODUCTION TO THE HISTORY OF INDIA'S TAXATION STRUCTURE

1.1 The prime objective of Public Finance is to maximize the welfare of the society, by ensuring rational allocation of resources in conformity with the economy's priorities. The development of a nation to a large extent depends upon the mobilization of revenue and its spending. India is a federation. A salient characteristic of a federal government is legislative autonomy and financial independence. This principle has enshrined in the constitution of India. The Regularity Act of 1773 and Character Act of 1833 were the beginning of financial settlements in unified India. Thereafter, steps towards the separation of tax resources between the center and the provinces were taken on the recommendations of Mr. Montague, the then Secretary of State for India in 1919.

1.2 The basic framework for the tax system in independent India was provided in the constitutional assignment of tax powers. The important feature of the tax assignment is the adoption of the principle of separation in tax powers between the central and State Governments. Articles 268 to 300 of the Constitution of India deal with financial matters. Article 246 of the Constitution, lays down that Parliament has exclusive power to make laws with respect to any matter enumerated in Union List (List I of schedule VII). The states have complete power to make laws with respect to any

matter enumerated in the State List (List II of schedule VII) and both Parliament and State Legislature have power to make laws with respect to any matter enumerated in the Concurrent List (List III of schedule VII). The constitution of India under Article 265 clearly states that no taxes shall be levied or collected except by the authority of law. Entries 82 to 92B of List I of the VII Schedule describe the taxation powers of the Union Government. Entries 45 to 63 of List II of the VII Schedule specify the taxation powers of the State Governments. List III does not contain any head of taxation which means the Union and the states have no concurrent powers of taxation. This provision has been made in the constitution so as to avoid duplication in tax administration, and to minimize tax rivalry between the Union and States; and among the States.

2. THE INDIAN TAXATION SYSTEM

2.1 India offers a well-structured tax system for its population. Taxes are the largest source of income for the government. This money is deployed for various purposes and projects for the development of the nation. Taxes are determined by the Central and State Governments along with local authorities like municipal corporations. The government cannot impose any tax unless it is passed as a law. Central Government levies taxes on income (except tax on agricultural income, which the State Governments can levy), customs duties, central excise and service tax. Value Added Tax (VAT), stamp duty, state excise, land revenue and profession tax are levied by the State Governments. Local bodies are empowered to levy tax on properties, octroi and for utilities like water supply, drainage etc. Indian taxation system has undergone tremendous reforms during the last decade.



The tax rates have been rationalized and tax laws have been simplified resulting in better compliance, ease of tax payment and better enforcement. The process of rationalization of tax administration is ongoing in India, with the latest being the introduction of the Goods and Services Tax, the biggest indirect tax reform in India.

2.2 Broadly there are 2 types of taxes:

- **Direct Taxes:** In case of direct taxes (income tax, wealth tax, etc.), the burden of tax directly falls on the taxpayer.

➤ **Income tax:** According to Income Tax Act 1961, every person, who is an assessee and whose total income exceeds the maximum exemption limit, shall be chargeable to the income tax at the rate or rates prescribed in the Finance Act.

- **Indirect Taxes:** Indirect taxes are not directly paid by the assessee to the government authorities. These are levied on goods and services and collected by intermediaries (those who sell goods or offer services).

➤ **Sales tax / Central Sales Tax (CST):** Central Sales tax is generally payable on the sale of all goods by a dealer in the course of inter-state trade or commerce or, outside a state or, in the course of import into or, export from India.

➤ **Value Added Tax (VAT):** VAT was a multi-stage tax on goods that was levied across various stages of production and supply with credit given for tax paid at each stage of Value addition. Introduction of state level VAT was one of the most significant tax reform measures undertaken by India at the state level. The state level VAT had replaced the erstwhile State Sales Tax.

➤ **Excise Duty:** Central Excise duty was an indirect tax that was levied on goods manufactured in India. Excisable goods have been specified in the Central Excise Tariff Act.

➤ **Additional Duty of Excise:** Section 3 of the Additional duties of Excise (goods of special importance) Act, 1957 authorizes the levy and collection in respect of the goods described in the Schedule to this Act. This was levied in lieu of sales Tax and shared between the Central and State Governments.

➤ **Special Excise Duty:** As per the Section 37 of the Finance Act, 1978 Special excise Duty was attracted on all excisable goods on which there is a levy of Basic Excise Duty under the Central Excises and Salt Act, 1944. Since then each year the relevant provisions of the Finance Act specifies that the Special Excise Duty shall be or shall not be levied and collected during the relevant financial year.

➤ **Customs Duty:** Custom or import duties are levied by the Central Government on the goods that are imported. The rate at which customs duty are levied on the goods depends on the classification of the goods determined under the Customs Tariff.

➤ **Service Tax:** Service tax was introduced in India way back in 1994 and started with mere 3 basic services viz. general insurance, stock broking and telephone. Today almost all the services come under the ambit of service tax barring those mentioned in negative list.

3. TAX REGIME PRIOR TO GST

3.1 Before the introduction of the GST, the central government had the power to levy the major broad-based and mobile tax



bases, which include taxes on nonagricultural incomes and wealth, corporate income taxes, customs duties, and excise duties on manufactured products. Over the years, the last item had evolved into a manufacturers' VAT on goods. Before GST, the major tax powers assigned to the states included taxes on agricultural incomes and wealth, sales taxes, excises on alcoholic products, taxes on motor vehicles and on transport of passengers and goods, stamp duties and registration fees on transfers of property, and taxes and duties on electricity. States also had powers to levy taxes on entertainment and on income earned by engaging in a profession, trade or employment; some states had retained these powers for themselves, while others had assigned them to local bodies.⁵¹⁵ Although the state list also includes property taxes and taxes on the entry of goods into a local area for consumption, use, or sale, these have been assigned to local bodies. Until 2003 India's constitution did not explicitly recognize and assign to any level of government the power to tax services. However, since all residuary tax powers were assigned to the central government, in 1994, this authority became the basis for levying a tax on selected services. In 2003 an amendment to the constitution specifically assigned the power to tax services to the central government.⁵¹⁶

3.2 Prior to the introduction of the Goods and Services tax (GST), VAT was introduced as an indirect tax in the Indian taxation system to replace the then existing general sales tax. The Value Added Tax Act (2005) and associated VAT rules came into effect

beginning April 1, 2005 in many Indian states. Value Added Tax is a multi-stage sales tax levied as a proportion of the value added. (i.e., sales minus purchases which is equivalent to wages plus profit). Though the system of State-Value Added Tax has certain advantages such as simplification of the existing sales tax system, fewer rates and very few exemptions, less opportunity for tax evasion and total transparency in the operation of the system, it did suffer from certain deficiencies. In India, there had been a VAT (MODVAT) in respect of Central Excise Duties. At the state level, the VAT system had been introduced in terms of Entry 54 of the State List of the Constitution.

3.3 India's tax system had a multitude of indirect taxes, applied at the central and state levels. Table 1 shows the most notable ones, which the GST has subsumed. It also summarizes the current central tax rates in the first panel and the current range of rates of state taxes in the second.

Table 1: Overview of India's Tax System

CENTRAL TAXES	RATE
Central Value Added Tax (CENVAT) or Central Excise duty Tax levied on the production of manufacturing goods	12.5%
Service Tax levied on provided services	15%

government, with the proceeds being collected and appropriated by the central and state governments, in accordance with principles formulated by the Parliament.

⁵¹⁵While this tax applies to individuals based on the income earned, it is considered distinct from income tax, since the total tax leviable is limited by a cap spelled out by India's constitution.

⁵¹⁶The 88th Amendment to the Constitution of India assigns the power to levy a service tax to the central



Central Sales Tax (CST) Tax on cross-state trade.	2%	ced in most states by VAT, but not all.
Countervailing Duties (CVD) Additional import duty on imported goods which are produced in India in order to 'level the playing field' between domestic and foreign producer. Additional CVDs might be applied to offset the effect of concessions and subsidies granted by an exporting country to its exporters.	12.5%	Entry Tax Tax on the entry of goods for consumption, use or sale in that state.
		Luxury Tax Tax on luxury goods and services that include hotels, resorts, and congregational halls used for weddings, conferences, etc.
		Entertainment Tax Tax on feature films, major commercial shows, and private festivals.
Special Additional Duty of Customs (SAD) Additional import duty to counterbalance the sales or value added tax payable by local manufacturers.	4%	

At the central level the most important taxes were the Central Value Added Tax (CENVAT), the service tax, the Central Sales Tax (CST), the Countervailing Duties (CVD), and the Special Additional Duty of Customs (SAD). The CENVAT (or Excise Duty) was a tax levied on the production of movable and marketable goods in India and is set at 12.5 percent. The service tax is a 15 percent tax on all services provided, wherein the service provider collects the tax on services from the service receiver and pays it to the government. The 2 percent CST is a tax levied on all cross-state trade that is not⁵¹⁷destined for, nor originates from abroad. Even though the CST is a central tax, the revenue accrues to the state from which the sale originates. Finally, the government levies two additional taxes on imports in addition to tariffs. Those are the countervailing duties (CVD) and the special additional duties (SAD), which amount to 12.5 and 4 percent, respectively. The CVD

STATE TAXES	Range Rates
Value Added Tax (VAT) Tax levied on the production of manufacturing goods.	10%-14.5%
Sales Tax Additional tax levied on the production of manufacturing goods. It was repla	0%-15%

⁵¹⁷Import tariffs will not be subsumed by the GST.



is an additional import duty levied on imported goods that are also produced in India to 'level the playing field' between domestic and foreign producers. The SAD is levied on imports to ensure that local sellers do not lose out on competition by counterbalancing the sales tax or value added tax payable by local manufacturers.

3.4 At the state level the most important taxes included the state Value Added Tax (VAT), the entry tax, the luxury tax, and the entertainment tax. The VAT taxes manufacturing goods produced within the state and ranges from 10 to 14.5 percent across states. The sales tax is a tax on goods sold within the state and ranges from 0 to 15 percent. It has been replaced by the VAT in most states, but remains in a few states. The entry tax was levied on the entry of goods into a state for the consumption, use, or sale therein and it used to vary between 0 and 12.5 percent. The entry tax was similar to the CST in that it taxed cross-state trade, but unlike the CST, the revenues accrued to the importing state. Finally, each state raised its own luxury and entertainment taxes, which could go up to 20 and 50 percent, respectively. Luxury taxes were mostly levied on hotels, and entertainment taxes were typically levied on movie releases.⁵¹⁸

4. TAX SYSTEM UNDER THE NEW GST

4.1 Introduction of GST is a part of the ongoing tax reforms. Goods and Services Tax is the single most important tax reform since independence. This tax covers all goods and services. It replaces the complex levy of goods and services at the center and at the

state levels. The new GST will merge the aforementioned indirect central and state taxes into a single tax. There will be a four-tier rate structure of 5, 12, 18 and 28 percent. While necessity goods will be taxed at 5 percent and luxury and consumer durable goods at 28 percent, most goods and all services will be taxed at the standard rates of either 12 or 18 percent. The main purpose of the GST is to eliminate the compounding effect of the current multilayered tax system as well as the cross-state tax heterogeneity by fixing the final tax rate.⁵¹⁹

4.2 GST'S 17-YEAR TIMELINE⁵²⁰

- February 1986: Finance Minister Shri Vishwanath Pratap Singh proposes a major overhaul of the excise taxation structure in the budget for 1986-87.
- 2000: Prime Minister Shri Atal Bihari Vajpayee introduces the concept, sets up a committee headed by the then West Bengal Finance Minister Shri Asim Dasgupta to design a GST model.
- 2003: The Vajpayee government forms a task force under Shri Vijay Kelkar to recommend tax reforms.
- 2004: Shri Vijay Kelkar, then advisor to the Finance Ministry, recommends GST to replace the existing tax regime.
- February 28, 2006: GST appears in the Budget speech for the first time; Finance Minister Shri P Chidambaram sets an ambitious April 1, 2010 as deadline for GST implementation. He says the Empowered Committee of finance ministers will prepare a road map for GST.

⁵¹⁸The luxury and entertainment taxes has been subsumed by the GST.

⁵¹⁹The tax system retained the dual system, that is, the GST is to be split into a Central GST (CGST)

and the State GST (SGST). This implies that both the central and state government each collect taxes at half of the overall GST rate.

⁵²⁰<http://www.thehindubusinessline.com/economy/gsts-17year-timeline/article9743284.ece>



- 2008: Empowered Committee of State Finance Ministers constituted.
- April 30, 2008: The Empowered Committee submits a report titled 'A Model and Roadmap Goods and Services Tax (GST) in India' to the government
- November 10, 2009: Empowered Committee submits a discussion paper in the public domain on GST welcoming debate.
- 2009: Finance Minister Shri Pranab Mukherjee announces basic structure of GST as designed by Dasgupta committee; retains 2010 deadline.
- February 2010: Finance Ministry starts mission-mode computerization of commercial taxes in states, to lay the foundation for GST rollout.
- Shri Pranab Mukherjee defers GST to April 1, 2011.
- March 22, 2011: UPA-II tables 115th Constitution Amendment Bill in the Lok Sabha for bringing GST.
- March 29, 2011: GST Bill referred to Parliamentary Standing Committee on Finance led by Shri Yashwant Sinha.
- Shri Asim Dasgupta resigns, replaced by the then Kerala Finance Minister KM Mani.
- November 2012: Finance Minister Shri P Chidambaram holds meetings with state finance ministers; decides to resolve all issues by December 31, 2012 for GST rollout.
- February 2013: Declaring UPA government's resolve to introducing GST, Shri Chidambaram in his Budget speech makes provision for Rs. 9,000 crore to compensate states for losses incurred because of GST.
- August 2013: Parliamentary standing committee submits report to Parliament suggesting improvements on GST. GST Bill gets ready for introduction in Parliament.
- 2014: GST Bill cleared by Standing Committee lapses as Lok Sabha dissolves; BJP-led NDA government comes to power.
- December 18, 2014: Cabinet approves 122nd Constitution Amendment Bill to GST.
- December 19, 2014: Finance Minister Shri Arun Jaitley introduces the Constitution (122nd) Amendment Bill in the Lok Sabha; Congress objects.
- February 2015: Shri Jaitley sets April 1, 2016 as deadline for GST rollout.
- May 6, 2015: Lok Sabha passes GST Constitutional Amendment Bill.
- May 12, 2015: The Amendment Bill presented in the Rajya Sabha.
- May 14, 2015: The GST Bill forwarded to joint committee of Rajya Sabha and Lok Sabha.
- August 3, 2016: Rajya Sabha passes the Constitution Amendment Bill by two-thirds majority.
- September 2, 2016: 16 states ratify GST Bill; Hon'ble President Pranab Mukherjee gives assent to the Bill.
- September 12 year: Union Cabinet clears formation of GST Council
- September 22—23 year: Council meets for first time.
- November 3 Year: GST Council agrees on four slab tax structure of 5, 12, 18 and 28 % along with an additional cess on luxury and sin goods.
- February 18 year: GST Council finalizes draft compensation bill providing to make good any revenue loss to states in first five years of GST rollout.
- March 4 year: GST Council approves CGST and Integrated-GST bills.
- March 20 year: Cabinet approved CGST, IGST and UT GST and Compensation bills.
- March 27 year: Jaitley tables CGST, IGST, UT GST and Compensation bills in Parliament. Lok Sabha and Rajya Sabha pass all the four key GST Bills — Central



GST (CGST), Integrated GST (IGST), State GST (SGST) and Union Territory GST (UTGST).

- May 18 year: GST Council fits over 1,200 goods in one of the four tax slabs of 5, 12, 18 and 28 %. Over 80% of goods of mass consumption either exempted or taxed under 5% slab.
- GST Council fixes cess on luxury and sin goods to create kitty for compensating states.
- May 19 year: GST Council decides on 5, 12, 18 and 28% as service tax slabs.
- Jun 21 year: All states except Jammu and Kashmir pass SGST law.
- June 30 year Midnight: GST set to rollout.

4.3 CENTRAL GOODS AND SERVICE TAX (CGST)

Central GST or CGST would be levied under the CGST Act on the intra-state supplies of goods and services. Hence in case of intra-state supplies of goods and services, both the Central and State Government would combine their levies with an appropriate revenue sharing agreement between them. The power to levy CGST and SGST has been provided for in Section 8 of the GST Act, where it has been mentioned that: The following taxes shall be levied on all intra-state supplies of goods, or services or both, at such rates specified in the Schedule to the said Act on the recommendation of the Council, but not exceeding 14%, each. Such CGST and SGST is to be paid by a taxable person.

HIGHLIGHTS OF CGST

- CGST is applicable on both, goods and services.
- CGST is levied by the Central Government through a separate statute on all

transactions of goods and services made for a consideration.

- Proceeds would be shared between the Central and State Government.

4.4 STATE GOODS AND SERVICE TAX (SGST)

State GST or SGST is a tax levied under the SGST Act on intra-state supplies of goods and services, that is administered by the respective State Government. SGST liability can be set off against SGST or IGST input tax credit only.

HIGHLIGHTS OF SGST

➤ SGST is levied by the State Governments through a statute on all transactions of supply of goods and services within the State.

- SGST would be paid to the accounts of the respective State Government.

4.5 INTEGRATED GOODS AND SERVICE TAX (IGST)

Integrated GST or IGST is the tax levied under the IGST Act on the supply of any goods and/or services in the course of inter-state trade across India. Further, IGST would include any supply of goods and/or services in the course of import into India and export of goods and/or services from India. IGST will replace the present Central State Tax which is levied on the inter-state sales of goods. Thus, IGST would be applicable for all inter-state transactions, import and export of goods and/or services.

HIGHLIGHTS OF IGST

- Central Government would levy and collect IGST instead of CGST or SGST.
- Levied on inter-state supply of goods and/or services.

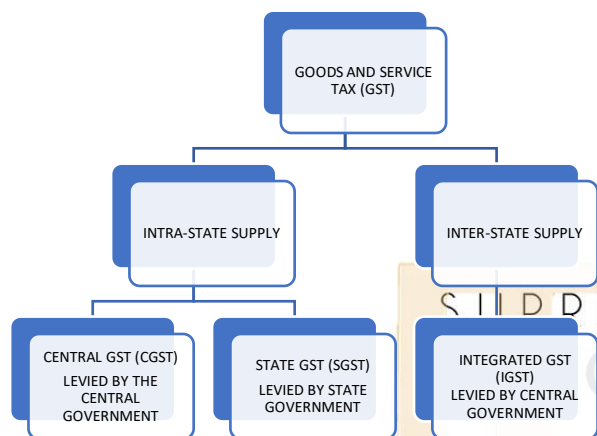


- Includes import of goods and/or services.
- Exports would be zero rated.
- IGST would be shared between the Central and State Government.

➤ IMPOSITION AND COLLECTION OF GST

- The power of making law on taxation of goods and services lies with both Union and state legislative assemblies. A law made by Union on GST will not overrule a State GST law.
- GST has two components CGST and SGST as discussed above. CGST will be collected by central government whereas states governments will collect SGST.
- IGST is levied on supplies in the course of interstate trade including imports which is collected by Central Government exclusively and distributed to imported states as GST is destination based tax. The proportion of distribution between center and state is decided on recommendation of GST Council.

OVERVIEW OF THE GST LEVY-



- mention here that GST is a destination based tax

➤ GST COUNCIL

5. FEATURES OF THE GST

➤ AMBIT OF GST

- It is applied to all taxable goods and services except the exempted goods and services and on transactions below the threshold limit.
- Exempted goods and services include alcohol for human consumption, electricity, custom duty, real estate.
- Petroleum products [crude oil, HSD (high speed diesel), motor spirit (petrol), natural gas, ATF (aviation turbine fuel)] are initially exempted from GST till the GST Council announces date of their inclusion.
- Tobacco products are included in GST along with central excise tax.

- It is set up by president under article 279-A. It is chaired by union finance minister.

- It constitutes of the union minister of state in charge of revenue and minister in charge of finance or taxation or of any other field nominated by State Governments. The 2/3rd representatives in council are from states and 1/3rd from the states.

- The decision of council is made by 3/4th majority of the votes cast and quorum of council is 50%.

- It will make recommendations on

- (1) Taxes, surcharge, cess of central and states which will be integrated in GST.
- (2) Goods and services which may be exempted from GST
- (3) Interstate commerce – IGST- proportion of distribution between state and center
- (4) Registration threshold limit for GST



- (5) GST floor rates
- (6) Special rates during calamities
- (7) Provision with respect to special category states especially the north east states
- (8) It may also work as Dispute Settlement Authority for GST.

➤ **ADDITIONAL 1% TAX**

- Additional 1% tax on interstate taxable supply of goods which is levied by center and directly portioned to the exporter state (origin state).
- This tax will be charged for two years or for longer time period recommended by GST Council.

➤ **COMPENSATION TO STATES**

- For maximum of 5 years' union will compensate states for the revenue losses arising out of GST implementation.
- This compensation will be made on the recommendation of GST Council.

6. ADVANTAGES OF GST

Under GST regime the burden of taxation will be allocated fairly between manufacturing and services via lower tax rates resulting in increased tax base and minimized exemptions. It is anticipated to help in establishing an effective and transparent tax administration. It is expected to remove the cascading effects of taxes and help in establishing of common national market. Apart from this some more advantages of GST are listed below:

➤ **IGST- EFFECTIVE LOGISTICS**

In current indirect tax system central sale tax (CST) is paid on interstate commerce of goods. 2% standard rate of CST is levied and distributed to exporter state as it is origin based tax. The input credit of CST

can be offset with CST liabilities only. CST is paid only on interstate commerce of goods and not on supply (transportation) of goods. So, to avoid this tax large corporates build their own go downs in different states and transport their goods among states without paying CST which finally leads to decrease in cost of their product. Because of this tax dodging through warehousing by big corporates growth of small and medium enterprises hampered and they cannot survive in the market.

But, in proposed GST tax regime IGST is levied on interstate commerce and supply (both) of goods and services. Due to this an effective logistics system will come up which will prevent the tax dodging through warehousing by big corporates. This will protect small and medium enterprises from unhealthy competition of big corporates.

➤ **ANCILLARIZATION**

In present indirect tax regime all big corporates want to produce each and everything in-house only in order to reduce CST and cascading effect of tax. But in proposed GST system there is no CST and cascading effect which will lead to outsourcing, subcontracting and division of labor. Because of this specialization will increase in future which will help in reducing the cost of production. With the reduced prices domestic goods will be more competitive in international market which will result in increased export and help country to reduce current account deficit.

➤ **SINGLE BASE COMPUTATION**

With the introduction of GST cascading effects of taxes will not exist and there will be a single base for computation of tax for both central government and state government. Initially state governments



will lose tax revenue due to less taxable value of goods. But in later years due to availability of cheap goods the number of taxpayers will increase and overall tax collection of states will also boost. This increase in tax revenue will lead to fiscal consolidation which is demanded by current state of Indian economy. As per CRISIL recent report GST is best reckon for fiscal consolidation as there is not much scope to cut government expenditure in India.

➤ EXPORT WILL BE ZERO RATE

No GST will be levied on exports because of which input credit of exporter will not be affected and he/she can use these input credit in future. With zero rated exports, domestic goods will be more competitive in international market and will help in increasing exports which in turn the fulfillment of objective of 3.5% share of India in world exports by 2020.

➤ SIMPLE TAX STRUCTURE

As multiple indirect taxes of state and central governments on goods and services will be replaced by a single tax, the tax structure will be hoped much simpler and easier to interpret. Reduction in the accounting complexities for business will make the manufacturing sector more competitive and boost the economy by 1%-2%.

7. CHALLENGES OF GST

➤ HIGH REVENUE NEUTRAL RATE (RNR)

RNR is the rate which neutralize revenue effect of state and central government due to change in tax system, means, the rate of GST which will give at least the same level

of revenue that is currently earned by state and central governments from indirect taxes is known as RNR. As per the 13th Finance Commission the RNR should be 12% whereas state empowered committee demanding 26.68%. Union government is reckoning the rate band should be 15%-20% which is very high as compare to other counties. Hungary implemented GST from 1/4/2014 with 7% rate. Due to high RNR:

- Competitive edge of India in Asian giants will decrease and domestic industry may be wrecking.
- Tax evasion and smuggling will increase.
- Regressive nature of indirect taxes will badly affect the purchasing power of poor people which will have negative impact on human development index.

So, before implementing GST, RNR should be minimized. This can be achieved by inclusion of petrol, liquor, land, electricity within the ambit of GST which will enhance the tax base and increase revenue of government.

➤ COMPENSATION TO STATES

Currently, VAT is highest contributor in tax revenue of state governments. But after GST reform this will be subsumed along with surcharge and cess into GST. Due to which State Governments will occur revenue loss for sure and they will be more dependent on finance commission for tax devolution (currently 42%). To neutralize their revenue losses states are demanding compensation from Union Government. As per the 14th Finance Commission Union has to compensate States for maximum of five years with tapering effects. For first three years 100% compensation reduced to 75% and 50% in fourth and fifth year respectively. This compensation by Union will lead to fiscal burden and may not fulfill



the fiscal deficit target of 3% by March 2017 announced by Finance Minister in 2015 budget. This fiscal target must be achieved for faster economy growth and full capital account convertibility in future. Industrialized states will be at loss in GST regime due to its destination based feature. It may demotivate the manufacturing industry and incite states to import more in order to increase their tax revenue. It is not good for manufacturing industry as well as for India because boosted manufacturing sector is the main driver of our economic growth in future. For temporarily relief to industrialized states additional 1% tax for two years on interstate sale and supply of goods is proposed in GST. with 1% additional tax, the main objective of GST to minimize cascading effect of taxes is fading out. So, to minimize cascading effect this additional tax at least should not be levied on supply of interstate goods.

➤ REGISTRATION THRESHOLD LIMIT

Initially there were different threshold limits for VAT (5 lacs), service tax (10 lacs) and excise duty (1.5 crore). But for implementation of GST common threshold limit for all indirect taxes is required. It will turn into a conflict between state and center. States want to fix the limit as 10 lacs opposing 25 lacs limit suggested by union. The lower threshold limit will broaden the tax base and increase the revenue of government but it will also require a robust IT infrastructure, to address the database of increased assess, which is presently missing out in Indian states. IT infrastructure will play a vital role in implementing IGST as union will electronically distribute IGST to states. To grapple the data base a strong network is required which is managed by GSTN (Goods and Service Tax Network) proposed in GST. GSTN has major

responsibility to tackle biggest challenge of IT infrastructure in a time bound manner.

However, the GST Council has decided that the GST will apply when turnover of the business exceeds Rs 20lakhs (Limit is Rs 10lakhs for the North Eastern States). [Earlier the limit was Rs 10lakhs and Rs 5lakhs for NE states.]

➤ OTHER ISSUES

- Union government need to coordinate with 30 states for “input credit” due to transfer of credit in SGST.
- State tax officials training and development before implementation of GST.
- Effective credit mechanism is essential for GST. Coming to CENVAT it is not a problem but for states again it is a major challenge.
- Analysts say that real estate market will be cramped by GST and it may result in 12% down turn in demand of new houses because of increased cost up to 8%. (A study commissioned by Curtin University of technology).

8. CONCLUSION

Due to dissilient environment of Indian economy, it is demand of time to implement GST. Consumption and productions of goods and services is undoubtedly increasing and because of multiplicity of taxes in current tax regime administration complexities and compliance cost is also accelerating. Thus, a simple, user -friendly and transparent tax system is required which can be fulfilled by implementation of GST. Its implementation stands for a coherent tax system which will colligate most of current indirect taxes and in long term it will lead to higher output, more employment opportunities and flourish GDP by 1-1.5%. It can also be used as an



effective tool for fiscal policy management if implemented successfully due to nationwide same tax rate. It execution will also results in lower cost of doing business that will make the domestic products more competitive in local and international market. No doubt that GST will give India a world class tax system by grabbing different treatment to manufacturing and service sector. But all this will be subject to its rational design and timely implementation. There are various challenges in way of GST implementation as discussed above in paper. They need more analytical research to resolve the battling interest of various stake holders and accomplish the commitment for a cardinal reform of tax structure in India.

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INDECENT REPRESENTATION OF WOMEN- A PERSPECTIVE

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Abstract

Advertising is the tool that creates awareness among the consumers. It is also a tool which is used to create awareness but it also shapes the perception of the public about the product and the services that the company is providing. In the 21st century where there is a cut throat competition scenario the race to the finish line is difficult. One of the biggest challenges of the companies is not only designing and selling the product but to also to create an advertisement to lure the people to try and buy their products.

To accomplish the purpose the firms use women as tools to create a brand image whether relevant or not. The portrayal of women in irrelevant ads which plunders their dignity is one issue which everyone turns a blind eye to. Even though there are laws that control the practice of representing women in irrelevant ads which compromising with their dignity, the marketers carry on this practice still with pride. This shows the effectiveness of the laws enforced for protecting the dignity of the most important part of the society i.e. women.

Through this paper the authors examine the scenario of unethical representation of

women in advertisements in light of current laws and whether the effects on them.

Keywords :-

- Dignity
- Advertising
- Women
- Unethical

I. PRECLUDE

Today advertisement is omnipresent. From dawn to dusk everything the people see and people use has some kind of distinct name or mark that is trying to advertise directly or indirectly. It has a big effect on our social structure and economical structure thus it plays a vital role in peoples life. If done in the right way it creates wonders but if not then it affects the society in the worst way.⁵²¹

Ad agencies use techniques to make the people look at the ad. They create the desire or want of the product or service by using different techniques. One of the dirty techniques used by the advertisers is by portraying women in unethical and unrealistic way. This is what the advertisers call the “sex sells method”⁵²². For them it is the easiest and best way to create the want for something in the brain. They portray beautiful models for irrelevant thinking it will drive sales upwards.⁵²³

Earlier when women were not socially and politically active they used women as substitutes for irrelevant ads but now even when the whole scenario of women’s status in a society has drastically changed the advertisers are still using these dirty tricks.

⁵²¹ Bolaños Melgar, Leandro & Elsner, “Robert, A Review of Advertising in the 21st Century”, 4 *International Journal of Business Administration* 67 (2016).

⁵²² Paul suggett, *Does sex really sell in advertising?*, *Balance careers*, available at:

<https://www.thebalancecareers.com/does-sex-really-sell-38550.html>, last modifies on June 25, 2019.

⁵²³ Alexander, W. M., & Judd, B. (1978). *Do nudes in ads enhance brand recall?* *Journal of Advertising Research*, 18, 47–51.



This creates pressure on the women as a false image is created and women are expected to excel in everything both inside and outside their homes.

Objectives

- To gain insight into the indecent representation of women in advertisement.
- To know about the various laws that prevent indecent representation of women in advertisement.
- To discuss the various court decisions that have set a precedent against indecent representation of women in advertisement.

II. Advertising – The tool of awareness

The dictionary meaning of advertising is “A notice or announcement in a public medium promoting a product, service, or event or publicizing a job vacancy.”⁵²⁴ The objective of advertising is to induce the public to buy or avail their product or services. There are many varieties like; television ads, Infomercials, Radio Advertising, online advertising, newspaper advertisements, out of home advertisements etc.

This is the soul of business strategy where the aim is to sell their product. Another term for this is commercial speech, where the people are informed about the product in the best way possible with the intention of making them buy the product. In other words it is just informing the public about the product. It even enhances the image of

the brand and the product if it is done in the right way. They use all the elements in their ad like using an informative idea, a sexual image of women or a fun element, etc. to induce their buyers.⁵²⁵

Women and Advertisements:

Women constitute almost half of the total population of India. In Indian culture, women occupy a critical position and esteemed place. In the past, the Vedas glorified women as a ‘Devi’ or Goddess.⁵²⁶ But this glorification was quite unreal as for at the same time, women were totally found suppressed and conquered in a patriarchal society. Presently, The treatment of women as a mere sex object in the advertisements is in contrast with the Indian culture. Advertisements which is a form of communication seeks out to communicate information to the buyer about merchandise. It can take any form in any medium. The advertisement is the most dominant and prevailing medium in the commercial society.

Women play a very important role in respect to Advertisements. They are the viewers, endorsers, and victims also. As viewers of advertisements, Indian women are comparatively easily influenced. As endorsers, the models are promoting merchandise which is usually done by a woman. As victims that woman model in most cases are exploited.⁵²⁷

Women in many societies make the majority of expenditure decisions; consequently, they are chief target of these

⁵²⁴Lexico available at: <https://www.lexico.com/en/definition/advertisement#:targetText=noun,'advertisements%20for%20alcoholic%20drinks'.html>, last seen on 6/10/2019.

⁵²⁵ Ibid., at 2.

⁵²⁶ Ved-Pradip, The status of women in veda, available at:

<http://www.vedpradip.com/articlecontent.php?aid=65.html>, last seen on October 13, 2019.

⁵²⁷ The effects of using “real” in advertising, The university of Tulsa, Oklahoma, pdf available at: <https://pdfs.semanticscholar.org/41d4/631b5ab1630212e7f1b76aaf599c5eabca40.pdf>, last seen on October 13, 2019.



advertisers. The advertisements have many positive impacts also. Mainly the advertisements which educate women and bring awareness about issues not known to them such as the use of contraceptives to have safe sex, use of sanitary napkins, the importance of safe sanitation etc. With this, these advertisements get opportunities in career to women as models, designers etc. But on the other hand, most advertisements make women victims of cheap marketing practices. The representation of woman in obscene or indecent ways for whatever commercial ends is the worst thing done. The way women are represented is completely stereotypical. They are represented to be top at everything like being the perfect housewife, maintaining the perfect form at the workplace, staying beautiful to achieve the social status in the society, having a white and fair skin complexion and many more. These advertisements put an enormous amount of pressure on women to excel at everything. Moreover in India the advertisements are so detail oriented that they represent women as housewives always taking the household chores like washing dishes and cleaning and the males take the big decisions excelling at stock market, business, gym, etc.

Another way by which the advertisers put pressure on the women is by body shaming where in beauty products they are shown with the perfect body types which is difficult to achieve.

Women inherent right to Dignity

Dignity is derived from the roman word dignitas which means status. Romans related it to honour and respect.⁵²⁸ The expression 'life' assured in **Article 21** of the

Constitution does not connote mere animal existence or continued drudgery through life. Quality of life covered by Article 21 is something more than the dynamic meaning attached to life and liberty. Right to life includes right to human dignity also. Right to live with human dignity enshrined in Article 21 derives life breath from the Directive Principles of State Policy (DPSP).

In *Maneka Gandhi v. Union of India*, it was ruled by the Supreme Court that "right to life is not merely confined to physical existence but also includes within its ambit the right to live with human dignity."⁵²⁹

In *Francis Coralie v. Union of Territory of Delhi*, the Apex Court held that it "means something more than just physical survival and is not confined to protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world, but includes 'the right to live with human dignity'. Women are human beings. So every right pertaining to human beings is not alien to women. Women have right to live a dignified life."⁵³⁰

In *Chandra Raja Kumari v., Police Commissioner, Hyderabad*, it had been held that "right to live includes right to live with human dignity or decency and therefore holding of beauty contests is repugnant to dignity or decency of women and offends Art 21 of the Constitution."⁵³¹ The human dignity has been mentioned in International laws also. International Covenant on Civil and Political Rights has also recognized that human beings have dignity inseparable from them⁵³².

⁵²⁸ Remy Debes, *Dignity: A History*, 22 (1st ed., 2017).

⁵²⁹ 1978 AIR 597

⁵³⁰ 1981 AIR 746

⁵³¹ 1998 (1) ALD 810

⁵³² International Covenant on Civil and Political Rights, 1966, art. 10, available at



We the people of our country play the role in promoting the indecent representation of women. It can be curbed only if it is opposed or objected by masses. One should not be a silent spectator to the indecent representation of women. It is our duty to take cognizance of the activities that destroy the very foundation of Indian society and its culture. But with the progress and development by the passage of time what is obscene for the past generation may not be indecent for the present generation. The media should enable projection of women in a decent and dignified way and promote respect and dignity to women avoiding negative portrayal of women. No advertisements portraying women in vulgar way in any means shall be projected by the media. By various cases, the Supreme Court has recognized that the advertisements were in the nature of “commercial speech”, thereby liable to be protected under Art 19(1) (a). But it must be remembered that it is not a blanket protection because of the restrictions which includes inter alia grounds of morality and decency. He also points out that the models as well as the advertising agencies do have a right to livelihood and profession, but the so called social workers and activists and lawyers and media persons should come up to enlighten the society at large about the legal consequences of indecent acts.

Moreover, in 1995 the Delhi Bar Association demanded for cancellation of membership of a lady lawyer of Delhi High Court on appearing in nude and semi-nude photographs in some magazines. That lady lawyer advocated that in no way it amounts to professional misconduct and it is time

lawyers should learn to differentiate between professional and personal life. This is entirely a personal issue and has in no way affected her professional working.⁵³³

III. CODE AND LAWS FOR ADVERTISING ETHICS

1. The Indecent Representation of Women (Prohibition) act, 1986

The Indecent Representation of Women (Prohibition) Act, 1986 which was created to address representation of women which may not fall under the purview of *Obscenity*. The law was created to prohibit indecent representation through publication which can be communicated to any individual or general public through two main channels:

- (i) advertisements and
- (ii) physically sending any book, pamphlets, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women.

The term “*advertisement*” defined under *section 2(a)* of the act as: “advertisement includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas;”⁵³⁴

The term ‘indecent representation of women’ was defined as “*depiction in any manner of the figure of a woman; her form or body or any part thereof in such*

[:http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.html](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.html)

⁵³³ *Times of India* dated Nov. 15th, 1995

⁵³⁴ *The Indecent Representation of Women (Prohibition) Act, 1986, s.2(a).*



*way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals*⁵³⁵.

The act prohibits representation of women in a derogatory manner in the advertisements. Section 3 of this act states that “No person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form.”⁵³⁶

Whereas section 4 prohibits the publication which contains any indecent representation of women. It states that – “No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form.”⁵³⁷

The act also penalises the indecent representation of women. As per **Section 6** of this act

“Any person who contravenes the provisions of Section 3⁵³⁸ or Section 4⁵³⁹ of this act shall be punishable on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction with imprisonment for term of not less than six months but which may extend to five years

⁵³⁵ *The Indecent Representation of Women (Prohibition) Act, 1986, s.2(c).*

⁵³⁶ *The Indecent Representation of Women (Prohibition) Act, 1986, s.3.*

⁵³⁷ *The Indecent Representation of Women (Prohibition) Act, 1986, s.4.*

⁵³⁸ *Ibid, at 6.*

⁵³⁹ *Ibid, at 6.*

⁵⁴⁰ *The Indecent Representation of Women (Prohibition) Act, 1986, s.6.*

and also with a fine not less than ten thousand rupees but which may extend to one lakh rupees.”⁵⁴⁰

The Supreme Court in one judgement held “that freedom of expression cannot be suppressed, unless there is a situation where such a freedom is harming the interest of the society. It proves that not everything that looks indecent is not always indecent”⁵⁴¹.

The Indecent Representation of Women (Prohibition) Bill, 2012 was also introduced in the Rajya Sabha to give effect to the changes necessary to the existing framework. This was referred to the Parliamentary Standing Committee.

The Ministry of Women & Child Development has recently proposed to ban obscene depiction of women on the Internet and on SMS/MMS by amending the Indecent Representation of Women Act, 1986.⁵⁴² As technological revolution has resulted in the development of new forms of communication, such as internet, multi-media messaging and various other applications like Skype, WhatsApp, Snapchat, Instagram etc., the Ministry decided to widen the scope of the Law.

Often the activists and courts in numerous TV commercials and cinemas have witness the prime ingredients of indecent representation of women. Some of the famous advertisements which are banned are shown below in in TABLE–I.⁵⁴³

⁵⁴¹ *Ajay Goswami vs Union of India (2007) 1 SCC 143.*

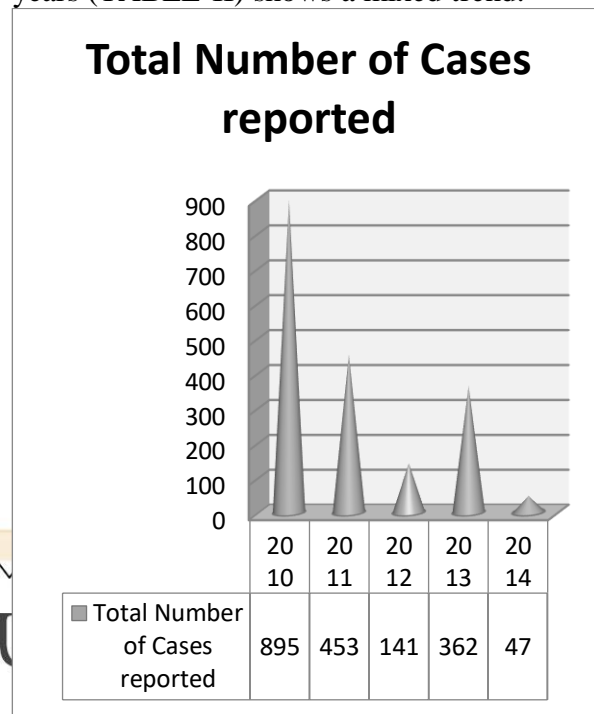
⁵⁴² *Jagriti Chandra, Ban proposed on obscene depiction of women on Net, The Hindu, available at: <http://www.thehindu.com/news/national/ban-proposed-on-obscene-depiction-of-women-on-net/article24082045.ece>, last seen on 06/10/2019.*

⁵⁴³ *Anurag Verma, HUFFPOST, available at <https://www.huffingtonpost.in/2016/11/15/12-indian-print-ads-and-tv-commercials-that-landed->*



S.NO	ADVERTISEMENTS	YEAR
1.	Kamasutra Condoms TV Commercial (1991)	1991
2.	Tuff Shoes Footwear Print Ad featuring Milind Soman and Madhu Sapre	1995
3.	Calida Print Ad featuring Dino Morea and Bipasha Basu (1998)	1998
4.	Amul Matcho TV Commercial	2007
5.	Motorola TV Commercial	2008
6.	Motorola TV Commercial	2007
7.	Zatak Deo Tv Commerical	2010
8.	Fastrack TV Commerical featuring Cricketer Virat Kohli and actress Genelia D'Souza	2011
9.	Idea TV Commerical	2011
10.	Ford Figo Print Ad	2013
11.	AC Black Apple Juice Commercial	2012

(Prohibition) Act, 1986 during last five years (TABLE-II) shows a mixed trend.⁵⁴⁵



The Ministry of Information and Broadcasting, in 2017, has also banned the telecast of condom advertisement on TV from 6AM to 10 PM as they are indecent specially for Children.⁵⁴⁴

As per the **National Crime Records Bureau (NCRB)** data which is available up to 2014, total cases reported in the country under Indecent Representation of Women

2. Indian Penal Code, 1860

The IPC has various sections to protect the women of India against indecent representations in advertisements.

Section 292 of Indian Penal Code (IPC) provides:

“a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be *obscene* if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”⁵⁴⁶

[into-controve_a_21606114/html](http://www.thehindu.com/news/national/govt-bans-condom-ads-from-6-am-to-10-pm-because-into-controve_a_21606114/html), last seen on 06/10/2019.

⁵⁴⁴ Govt. bans condom ads from 6 a.m to 10 p.m because they are “indecent”, The Hindu, available at: [https://www.thehindu.com/news/national/govt-bans-condom-ads-from-6-am-to-10-pm-because-](https://www.thehindu.com/news/national/govt-bans-condom-ads-from-6-am-to-10-pm-because-into-controve_a_21606114/html)

[they-are-indecent/article21461765.ece](http://www.thehindu.com/news/national/govt-bans-condom-ads-from-6-am-to-10-pm-because-into-controve_a_21606114/html), last modified on December 12, 2017.

⁵⁴⁵ Press Information Bureau, Government of India, Ministry of Women and Child Development at, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=136936>

⁵⁴⁶ The Indian Penal Code, 1860, s. 292.



Section 293 of the Indian Penal Code (IPC) states –

“Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished 2[on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees.”⁵⁴⁷

3. Young Person’s (Harmful Publications) Act, 1956

According to this act Harmful Publication means –

“any book, magazine, Pamphlet, leaflet, newspaper or other like publication which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures, being stories portraying wholly or mainly—

- (i) the commission of offences; or
- (ii) acts of violence or cruelty; or
- (iii) incidents of a repulsive or horrible nature;

in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit

offences or acts of violence or cruelty or in any other manner whatsoever;”⁵⁴⁸

Moreover section 3 contains the penalty for sale of harmful publications. It states that-

“If a person—

- (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, any harmful publication, or
- (b) for purposes of sale, hire, distribution, public exhibition or circulation, prints, makes or produces or has in his possession any harmful publication, or

(c) advertises or makes known by any means whatsoever that any harmful publication can be procured from or through any person,

he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(2) On a conviction under this section, the court may order the destruction of all the copies of the harmful publication in respect of which the conviction was had and which are in the custody of the court or remain in the possession or power of the person convicted.”⁵⁴⁹

4. National Human Rights Commission (NHRC)

NHRC has the power to look into matter for protecting the dignity of women in advertisements.

5. Advertising Standard Council Of India (ASCI)

This is a self-regulated organisation established in 1985, taking cognizance of

⁵⁴⁷ *The Indian Penal Code, 1860, s. 293.*

⁵⁴⁸ *THE YOUNG PERSONS (HARMFUL PUBLICATIONS) ACT, 1956, s. 2(a).*

⁵⁴⁹ *THE YOUNG PERSONS (HARMFUL PUBLICATIONS) ACT, 1956, s. 3.*



the fact that advertisers use different unethical and unrealistic representations to sell the products this council which drafted a code to be followed by the advertisers so that such practices are curbed. It stands for the “protection of the legitimate interests of consumers and all concerned with Advertising - Advertisers, Media, Advertising Agencies and others who help in the creation or placement of advertisements.”⁵⁵⁰ The code is to be followed by all which requires advertisements to be –

- i) Hones
- ii) Non-Offensive to the Public
- iii) Must be Against harmful products /situation
- iv) Fair Competition

6. Cable Television Networks (Regulation) Act, 1995:

This act prohibits transmission of advertisements or anything on the cable which are not in conformity with the **cable television network rules, 1994**. Rule 6 of this code states the programme code and prohibits any programme which “offends against good taste or decency”⁵⁵¹ or “Contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half-truths.”⁵⁵²

It also protects women from indecent representation. Under rule 6(k) it prohibits any programme -

“Denigrates women through the depiction in any manner of the figure of a women, her form or body or any part thereof in such a

way as to have the effect of being indecent, or derogatory to women, or is likely to deprave, corrupt or injure the public morality or morals.”⁵⁵³

Moreover **Rule 7** of this provides the advertising code. The rule for protection is given under 7(vi), it prohibits advertisements on television that –

“in its depiction of women violates the constitutional guarantees to all citizens. In particular, no advertisement shall be permitted which projects a derogatory image of women. Women must not be portrayed in a manner that emphasises passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society. The cable operator shall ensure that the portrayal of the female form, in the programmes carried in his cable service, is tasteful and aesthetic, and is within the well-established norms of good taste and decency.”⁵⁵⁴

7. The Press Council Of India

Established in 1966 on the recommendations made by parliament. Currently the press council of India is governed under the Press Council Act, 1978. It is the watch dog for the press in India. The preamble of the act states that it is an “An Act to establish a Press Council for the purpose of preserving the freedom of the Press and of maintaining and

⁵⁵⁰ *The advertising Standard Council Of India, India, available at : <https://www.ascionline.org/index.php/ascicodes.html>, last seen on 7/10/2019.*

⁵⁵¹ *The Cable Television Network Rules, 1994, Rules 6(a).*

⁵⁵² *The Cable Television Network Rules, 1994, Rules 6(d).*

⁵⁵³ *The Cable Television Network Rules, 1994, Rules 6(k).*

⁵⁵⁴ *The Cable Television Network Rules, 1994, Rules 7(vi).*



improving the standards of newspapers and news agencies in India.”⁵⁵⁵

Section 13 of this act provides for the objectives and functions of the council. According to this section some of the objectives are –

(b) “to build up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards;”⁵⁵⁶

(c) “to ensure on the part of newspapers, news agencies and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship;”⁵⁵⁷

(d) “to encourage the growth of a sense of responsibility and public service among all those engaged in the profession of journalism;”⁵⁵⁸

(e) “to keep under review any development likely to restrict the supply and dissemination of new of public interest and importance.”⁵⁵⁹

Moreover section 14 gives the council the power to censure. It states that-

“(1) Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or news agency has offended against the standards or journalistic ethics or public taste or that an editor or a working journalist has committed any professional misconduct, the Council may, after giving the

newspaper, or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act and, if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist, as the case may be:

Provided that the Council may not take cognizance of a complaint if in the opinion of the Chairman, there is no sufficient ground for holding an inquiry.

(2) If the Council is of the opinion that it is necessary or expedient in the public interest so to do, it may require any newspaper to publish therein in such manner as the Council thinks fit, any particulars relating to any inquiry under this section against a newspaper or news agency, an editor or a journalist working therein, including the name of such newspaper, news agency, editor or journalist.

(3) Nothing in sub-section (1) shall be deemed to empower the Council to hold an inquiry into any matter in respect of which any proceeding is pending in a court of law.

(4) The decision of the Council under sub-section (1), or sub-section (2), as the case may be, shall be final and shall not be questioned in any court of law.”⁵⁶⁰

So according to the norms the journalists shall not publish any obscene, vulgar or

⁵⁵⁵ The Press Council Act, 1978, (act no.37 of 1978).

⁵⁵⁶ The Press Council Act, 1978, (act no.37 of 1978), s. 13(b).

⁵⁵⁷ The Press Council Act, 1978, (act no.37 of 1978), s. 13(c).

⁵⁵⁸ The Press Council Act, 1978, (act no.37 of 1978), s. 13(d).

⁵⁵⁹ The Press Council Act, 1978, (act no.37 of 1978), s. 13(e).

⁵⁶⁰ The Press Council Act, 1978, (ACT NO.37 OF 1978), s. 14.



offensive material which is not accepted by the public. Moreover the display advertisements which are vulgar or contains any explicit material should not be used.

8. National Commission For Women

The National Commission for women is a statutory body set up in 1992. It is governed under the National Commission for Women Act, 1990. Section 10 provides the functions of the commission. Some of the functions according to this section in relation to protection of women dignity are –

a) "Investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws;"⁵⁶¹

d) "review, from time to time, the exiting provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislations;"⁵⁶²

e) "take up cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities"⁵⁶³

IV. EFFECTS OF UNETHICAL ADVERTISING

1. OBJECTIFICATION

A pertinent question that appears is that are women the target of advertising ? Are they the products ? or are they the products ?

⁵⁶¹ National Commission for Women Act, 1990 (Act No. 20 of 1990 of Govt. of India), s. 10(a).

⁵⁶² National Commission for Women Act, 1990 (Act No. 20 of 1990 of Govt. of India), s. 10(d).

This is a question that has led to a conundrum of debates. Advertisers use women in their advertisements as a sex object to sell the object. In most of the advertisements they have no relation to the product and they are chosen anyway in the advertisements because the advertisers believe that including them and showing off their bodies makes the product more appealing.

They are used in irrelevant advertisements as a product and the different advertisements like shaving cream, razor blade, innerwear, washing powder and even in iron and steel products. In short they are used to endorse products that are used by both men and women. The thinking of the advertisers is that they believe that since men are the purchasers including women in their ad makes them buy the product.

2. STEREOTYPING

In India the women are presented with a preconceived notion. In most of the advertisements they are represented as either housewives or mothers. In housewives they are represented as doing their housing chores like washing clothes and cleaning dishes with full makeup. The working women are represented even in the similar manner where they are represented as managing both their professional and personal lives in a balanced manner. They are represented as having a timid and pleasing personality. These amounts to great pressure on them as if they fail they are thought to be as inefficient as the society already has a notion of what is a woman according to the advertisements.

⁵⁶³ National Commission for Women Act, 1990 (Act No. 20 of 1990 of Govt. of India), s. 10(e).



3. ARTIFICIALITY

The advertisements portray women as having the ability to find happiness in all the things. The advertisements make the society believe that they are the women is the source of debit or credit of the husbands income. Certain advertisements have even attempted to compare women with cement making the public believe that they should be as strong as cement and age cannot catch them. While certain other advertisements like the beauty products show body shame women creating a farce notion that having fair skin and wearing lipstick all the time will fetch them a good husband, good life and even a good job.

4. CONSUMER BUYING DECISIONS

True advertising should not impact the right of consumers to be treated as fair and rational beings nonetheless advertisers manipulate the decisions of the consumers in making them buy the products. Moreover, as most of the population is still illiterate they are easily influenced by these advertisements.

V. JUDICIAL APPROACH

The dictionary meaning of word *obscenity* is the quality of being obscene which means “offensive to modesty or decency; lewd, filthy and repulsive”⁵⁶⁴. The test of obscenity was established by the Supreme Court in **Ranjit D. Udeshi v. State of Maharashtra**⁵⁶⁵. In this case *D.H. Lawrence’s Lady Chatterley’s Lover* book was banned. Booksellers found with copies of the book were prosecuted under **S. 292, IPC** that, inter alia, criminalises the sale

and possession of obscene books. The petitioners made two arguments in court were that -

“s.292 was unconstitutional since it violated Article 19(1)(a) and in any event, *Lady Chatterley’s Lover* was not an obscene book within the meaning of the provision.”⁵⁶⁶

In the judgement, in paragraph 8, **Hidayatullah J.**, speaking for the Court, observed:

“No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality... the word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity.”⁵⁶⁷

In the next paragraph, he went on to note: “Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law

⁵⁶⁴ *Obscenity: Meaning, Definition and Concept*, available at: <https://www.lawkam.org/criminal/obscenity-meaning-definition-and-concept/277/>, last seen on October 13, 2019.

⁵⁶⁵ *Ranjit D, Udeshi V. State of Maharashtra*, 1965 AIR 881

⁵⁶⁶ *Ibid.*, at 16.

⁵⁶⁷ *Ibid.*, at 16.



against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality.”⁵⁶⁸

Later in **Chandrakant Kalyandas Kakodar v. State of Maharashtra and Ors**, the court held:

“It is the duty of the Court to consider the article, story or book by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall; and in doing so the influence of the book on the social morality of our contemporary society cannot be overlooked. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect”⁵⁶⁹.

Later in **Dharmendra Dhirajlal Soneji v. State of Gujarat**, **K.J Vaidya J.** stated in his judgement in para 13 that “T.V., films, radio, newspapers, advertisements, dramas are powerful medias to influence, educate and give direction to the people. Through striking banner-lines, captivating words, dialogues, gestures, songs, music, good or bad side of life get itself projected through aforesaid medias and ultimately taking driver's seat in the mind of the people shapes and directs their ultimate character and destiny good or bad. The ordinary techniques adopted by those medias are: (i) repetition, (ii) exaggeration, (iii) identification, (iv) appeal to authority, (v) appeal to prevailing discontent, (vi) the

influence of slogan. All these, standing by themselves, are indeed quite good if canalized for the constructive purpose of rebuilding tomorrow's India. But unfortunately it is an experience of many that mostly the canalization is in wrong and destructive direction where it has tended to make people more criminal, more anti-social, more vulgar, more lifeless, more insincere, more dishonest, more sexual and more and more vulgar and shameless far away from the cultural and ethical values of life”⁵⁷⁰.

VI. CONCLUSION AND SUGGESTIONS

In the 21st century when the situation and social status of women have changed many of the practices that were against the dignity of women have been abolished but the practice of creating a stereotype of who cooks and cleans and who washes the dishes still in practice. To make their advertisements more appealing the advertisers use women as a product. The mere thinking that using women as a substitute for the product disgust the minds of many great researchers.

It is said that he who controls the media controls the flow of information. This is true for the advertisements as the use of women as a substitute proves that women's bodies are still not their own. The stereotypes set by the advertisers are so strong that breaking them becomes a social taboo.

This can only be tackled when the government takes certain steps like

⁵⁶⁸ *Ibid.*, at 16.

⁵⁶⁹ *Chandrakant Kalyandas Kakodar v. State of Maharashtra and Ors*, 1970 AIR 1390

⁵⁷⁰ *Dharmendra Dhirajlal Soneji v. State of Gujarat* (1997) 1GLR 198.



increasing education and awareness among women, establishing more stringent self-regulatory authorities that can keep an eye on them and using mass media to increase awareness against the stereotypes set and imposed on them.

The trend today calls for a more realistic advertising where the sexual objectification of women is not practiced. The constitution of India guarantees the freedom of speech and expression but this speech and expression should not derogate the dignity of any individual. The advertisers not only break the laws but also set a low standard that affects the women and leaves them in the shackles of stereotypes.

Suggestions

- Establishing stricter regulatory Authorities
- Increasing legal education among women to make them aware of their rights
- Use of mass media by government to create social awareness regarding the menace.
- Need for stricter punishments against such practices

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MODEL UNIFORM CIVIL CODE

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INTRODUCTION

All Indians irrespective of religion, caste, race or gender are governed by a single Constitution, a uniform Penal Code and a uniform Code of Civil and Criminal Procedure among other uniform laws. However, when it comes to personal laws, we do not have a Uniform Civil Code that is applicable to all religious faiths. The Uniform Civil Code finds its mention in our Constitution under Article 44 which states that it is the duty of the state to secure for the citizens a Uniform Civil Code throughout the territory of India. It backs the ideals of secularism as enshrined in the Preamble of the Constitution. A Uniform Civil Code ensures that the fundamental and constitutional rights of all the citizens are protected, leaving no room for discrimination.

Hindu Laws were codified in 1955 as the old Hindu laws and customs didn't stand the test of time. After 65 years since codification, the laws that were relevant immediately after independence have little or no relevance today. Muslim personal laws have also witnessed important amendments. Personal laws are inching towards a progressive outlook. It is time that archaic beliefs that are not backed by logic and reason be transformed to laws that encompass the welfare of the whole population without favoring one religion over the other.

We're moving into a more progressive world where the notion that a wife is subordinate to her husband on account of

his physical and intellectual superiority is no longer relevant owing to women empowerment. Uniform Civil Code would hence prevent discrimination against women on religious grounds. It is essential that some retrograde laws be altered to adapt to the changing conditions of India. Considering the fact that India is a diverse country accommodating various religious groups, it would seem difficult for all such groups to be governed by the same personal law. However, it is not impossible to implement the Uniform Civil Code. This research paper draws an outline of a model Uniform Civil Code that deals with uniform laws related to marriage and succession.

MARRIAGE

Marriage laws in each religion are worlds apart. The uniform civil code should not prevent any person from celebrating their wedding according to the customs and traditions associated with their religion, but it should seek to introduce such laws that bring about uniformity in the legal procedure associated with marriages.

1. COMPULSORY REGISTRATION OF MARRIAGES

In a Court of law, to prove the validity of a marriage is easy for the parties as there is no formal procedure that needs to be complied with. Invitation cards to the wedding and photographs from the wedding are usually used to prove the validity of the marriage. However, it is very easy to fabricate an invitation or photograph in order to deceive the Court. In such cases, an official marriage certificate by a Marriage Officer serves as the best form of evidence of the solemnization of marriage. Hence, registration of marriages must be made compulsory for all religions.

Section 7 of the Hindu Marriage Act states a marriage is solemnized in accordance



with the customary rights of either parties including saptapadi. However, it is vague as to what constitutes customary rites. This ambiguity can be misused by the parties to deny the validity of the marriage. In Islam, a valid marriage is said to come into existence when an offer is accepted. A written contract or presence of witnesses is not necessary making it difficult to prove the solemnization of marriage. In the absence of clear definition of customary rites or the absence of a written contract, compulsory registration would work wonders. Section 15 of the Special Marriage Act provides for registration of marriages solemnized under the Act. However, it is only a directory provision. Registration of marriages should be made compulsory.

Registration of marriages should come within the ambit of Schedule VII List III Entry 30 of the Constitution that deals with 'Vital Statistics'. It presently includes registration of births and deaths. It should be amended to include compulsory registration of marriages.

Such registration of marriage is to be accepted as a proof of marriage and be made admissible as evidence in a Court of law when the validity of the marriage is in question. If a marriage is not registered, it must be considered null and void before the Court of law. Registration of marriage in no way should stop people from celebrating their marriage according to their tradition and culture. Compulsory registration would ensure security to women as there will be hardly any chances of men denying the marriage and abandoning the women.

2. MONOGAMY

Section 494 of the Indian Penal Code makes bigamy punishable for all religions with a special provision for Muslim men. Section

494 applies to Islam only when a man marries more than 4 wives during the subsistence of the existing marriages. He is not punished if he marries another during the subsistence of his first marriage like the men of other religions. This is an unreasonable discrimination on the ground of religion.

In pre-Islamic Arabia, unlimited polygamy prevailed to provide security for the widows of war. This eventually became harsh on women. The prophet introduced limited polygamy up to taking of 4 wives as a definite step towards the amelioration of the oppression on women. A thorough reading of the Koranic verses states that a man can take up to four wives if he can treat all of them alike, which is humanly impossible to achieve. The Prophet himself was in favor of monogamy.

The objective behind polygamy to secure the lives of widows of war is no longer relevant today. This provision is misused by Muslim men to satisfy their sexual desires. It also paves way for immoral conversion to Islam to avail such a benefit.

This is discriminatory on the ground of religion as only Muslims are given this special exception. It is also discriminatory on the ground of gender as only Muslim men are the beneficiaries of this provision. Hence, regardless of religion, bigamy should be made punishable. Monogamy should be the prescribed form of marriage. This would ensure solidarity in the family and prevent immoral conversion. Polygamy is anachronistic and modern India cannot accommodate this practice.

3. MAINTENANCE

Laws related to maintenance enshrined under Section 18 of the Hindu Adoptions



and Maintenance Act, Section 3 in The Muslim Women (Protection of Rights on Divorce) Act, 1986 and Section 36 of the Special Marriage Act, 1954 are only applicable to women. They state that women are to be awarded maintenance in the event of divorce by the husband.

With the rise in financial independence of women, maintenance laws must be made gender neutral to include either the wife or the husband who is economically weaker and is needed to be maintained by the other spouse until they are able to maintain themselves. Maintenance should be awarded only when the spouse was dependent on the other during the subsistence of the marriage.

When a marriage is declared void, maintenance should not be awarded to the wife who freely consented to the marriage and knew at the time of such marriage that it is void in the eyes of law. But if the wife realizes the marriage was void after the solemnization of marriage, some quantum of maintenance must be awarded. In the case of *C Obula Konda Reddi v C Pedda Venkata Lakshmma*⁵⁷¹, the Court held that the second wife should not be given maintenance if she had reasons to believe that it was a bigamous marriage. But if she didn't know about the first marriage, she should be awarded reasonable maintenance.

Hence, maintenance must be made available to the economically weaker spouse or the spouse that is dependent on the other. Its applicability should not only be confined to the wife.

4. AGE

Marriage of a Hindu male under the age of 21 and a Hindu female under the age of 18 is voidable according to Section 5(iii) of The Hindu Marriage Act, 1955 but is punishable with rigorous imprisonment up to 2 years and fine up to 1 lakh rupees under Section 18 of the same Act. The Prohibition of Child Marriage Act 2006 and Section 4 of the Special Marriage Act, 1954 also prescribe the same ages for the two sexes. This difference in age is based on reasons that are not logical or reasonable and hence is discriminatory to the males under Article 14 of the Constitution of India.

Under Muslim Law, the legal age to be wed is determined by the age of puberty, i.e., 15 years. This is too early to be wedded and conjugal responsibilities would only divert school years from gaining the required education to lead a meaningful life. Section 2(vii) of the Dissolution of Muslim Marriage Act states that a woman cannot repudiate the marriage if she was given in marriage by her father/guardian before she attained the age of fifteen years and the marriage has been consummated. This provision causes grave injustice to child brides who are forced into the marriage by their guardians without the child bride's consent. The provision neglects child rape and disallows a minor married woman to repudiate her marriage on attaining majority on the 2 grounds namely- (i) her free consent was not obtained and (ii) she was forced into having sexual intercourse.

Hence, it is reasonable if all persons regardless of religion and gender to have completed 21 years of age to be legally wed. This is the perfect age as they would have completed their undergraduate studies and would have gained sufficient maturity, responsibility and financial independence.

⁵⁷¹ AIR 1976 AP 43



Marriage should be made void and punishable if either party is a minor, i.e., under 21 years of age. This would keep a check on child marriage and child rape.

5. INTER-RELIGIOUS MARRIAGE

No marriage should be declared void on the sole ground that the parties to the marriage follow different religion. Under Shia law, a marriage between a Muslim male/female with a non-Muslim is considered void. Under Sunni law, a marriage between a Muslim male with an idolatress or fire worshipper is void and a marriage between a Muslim woman with a non-Muslim man is considered void. This anomaly should be corrected and inter-religious marriages should be made valid. A penalty/punishment must be imposed on those who protest inter caste or inter religion marriages. When a marriage has been solemnized with the free consent of both the parties, religious disparity between the two should not come in the way of a perfectly valid marriage.

6. DIVORCE

Unilateral divorce

For dissolution of marriage to take place, a Court decree must be procured on reasonable grounds. Unilateral divorce and oral divorce without the intervention of the Court and without any cause must be held void. In Muslim law, a man can dissolve the marriage orally according to his whims and fancies. Hence, unilateral divorce without the intervention of Court must not be regarded as a formal dissolution of marriage and it should be presumed that the marriage is still in subsistence.

Expedited divorce proceedings

In order to ensure that the parties and their children do not get stuck in the legal battle for years, expedite divorce proceedings should be the mandate. Divorce proceedings should be concluded within 6 months of the filing of the divorce petition. A penalty must be imposed on advocates/parties who file for unnecessary adjournments that adversely affect the normalcy of lives of the parties and their families.

7. SAME SEX MARRIAGES

The landmark judgment of *Naz Foundation v. Govt. of NCT of Delhi*⁵⁷² is a progressive move by the Supreme Court. It decriminalized consensual sex between two people of the same gender. However, same sex marriages have still not garnered recognition in the eyes of law. It is now pertinent to legalize same sex marriages to bestow rights and obligations that flow out of a heterosexual marriage associated with inheritance, maintenance, divorce etc. Failing which, would be a glaring violation of Article 15 of the Constitution of India as it discriminates the conjugal relationship among same sex couples.

INTESTATE SUCCESSION

A uniform intestate succession should apply to all religions, doing away with the unnecessary and unreasonable methods of division of shares. In Hindu law, the division of shares is different for a man and a woman. In Muslim Law, it is too time consuming to calculate the shares of each heir while following the doctrines of radd and aul. Hence a uniform law that regulates intestate succession is needed.

1. ORDER OF PREFERENCE

⁵⁷² 160 Delhi Law Times 277



The property of the deceased, irrespective of the sex of the deceased, must be equally divided among the nearest relations and dependents, i.e.,-

1. their spouse,
2. their descendants of the first degree,
3. their ascendants of the first degree.

For instance, if A dies without leaving a will, his property should be divided equally between his wife [spouse], son(s), daughter(s) [descendants of the first degree], father and mother [ascendants of the first degree].

In case the son/daughter dies before the death of the person dying intestate, the share of such predeceased son/daughter, as they would have got had they been alive at the time of succession, should be allotted to the surviving dependents of such predeceased son/daughter. If a descendant dies before the death of the person dying intestate, the latter's property should pass on to the children of the predeceased child by following the doctrine of representation or per stirpes. The living parent of such predeceased child should not be allotted the share of the predeceased child passed on by the deceased parent on the ground that he/she is a dependent as such living parent has received shares of the deceased spouse already.

For instance, if A dies without leaving a will, leaving behind his

1. wife W,
2. son S1,
3. daughter GD1 of son S1,
4. daughter GD2 of predeceased son S2

his property should be divided equally between W, S1 and S2, i.e., each get $1/3^{\text{rd}}$ of the property. Since S2 is predeceased, his property by default passes on to his dependents, i.e., S2's wife and S2's daughter GD2. Hence they each get $1/2$ of S2's share, i.e., $1/6^{\text{th}}$ of A's property. Hence

property is devolved as if S2 died after the death of A. Since S2's mother W already received a share in A's property, the share in S2's share in A's property must not dissolve to W again. Hence, W finally receives $1/3^{\text{rd}}$, S1 receives $1/3^{\text{rd}}$, GD1 doesn't get a share in A's property as her father S1 is still alive. Since S2 is predeceased, his wife gets $1/6^{\text{th}}$ and his daughter GD2 gets $1/6^{\text{th}}$.

2. DEFINITION OF CHILD

The estate of the deceased should be divided among the children equally, irrespective of the gender, legitimacy and marital status of the children. It has already been established that adopted children are considered in par with the natural born children.

All children are legitimate. It's the couple who is illegitimate if they begot a child out of wedlock. Hence children born out of wedlock should be treated equally as the children born out of marriage.

Step children should not be made an heir as their original parent passes down their property. Property should hence be devolved to natural or adopted children and not step children.

3. CONVERSION

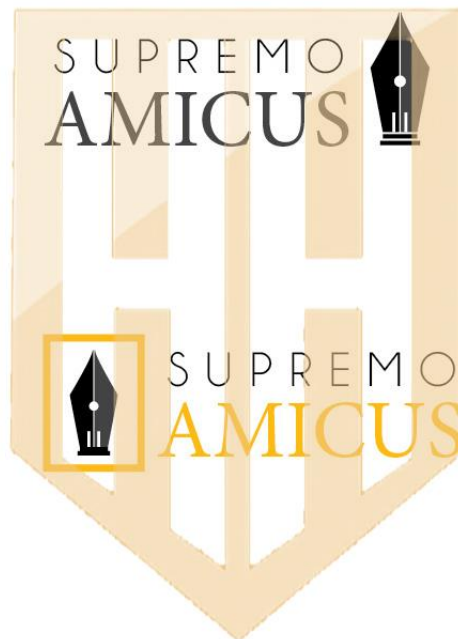
Conversion should not sever a person from his family or disqualify him from inheriting his share of the joint property. Section 19 Special Marriage Act, 1954 states that a marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jain religions shall be deemed to affect his severance from such family. Hence it is in bad taste.

CONCLUSION

With the implementation of the Uniform Civil Code, legal procedure associated with marriage, divorce, succession, maintenance



will prove to make personal lives easier. It is high time that archaic laws be put to the grave. Uniform personal laws will bring about unity in people as they will have to follow the same procedure and be guided by the same ideas of justice.





A RETIREMENT PACKAGE OR AN OFFICE OF RESPONSIBILITY? EXAMINING THE ROLE OF GOVERNOR IN STATE POLITICS

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Finally, the research is concluded stating measures needed to reform this prestigious institution.

Keywords: Governor, Discretionary Powers, Centre-State relations, Nominal Head, Dissolution

ABSTRACT

The basic premise of this research is to examine and analyse the role of the Governor in state politics. The office of the Governor has again come under a lot of criticism after the dissolution of the J&K State Assembly in November last year. The research aims to highlight the irregularities in the functioning of the office of the Governor.

The research aims to emphasise on the growing importance of the Governor in state politics and critically evaluates his/her role and functions in bridging the gap between the Centre and the State. Furthermore, the research looks into the historical significance of the office of the Governor. The office of the Governor underwent a paradigm shift after the 1967 elections. Subsequently, a few case studies have been discussed to understand the role played by the Governor in solving Centre-State disputes.

The author also purports to examine the discretionary powers of the Governor and the anomalies attached to such powers. Moreover, the research demarcates the dual role played by the Governor as the constitutional head of a State and as an agent of the Centre.

1. INTRODUCTION

“The Governor is the linchpin of the constitutional apparatus of the State. His role has emerged as one of the key issues in union-state relations. He has been criticised for want of impartiality and sagacity and for being used by the Central Government for its own political ends.” – Sarkaria Commission report⁵⁷³

The role of the Governor has become one of the fundamental issues in Centre-State relations. The Indian political scene was dominated by a single party for nearly two decades post-independence. Issues which arose in the working of Centre-State relations were usually matters for adjustment in the inter-party forums and the Governor had very little occasion for using his discretionary powers. The office of Governor remained largely ceremonial. Events which unfolded in Kerala in 1959 brought the role of Governor into prominence after the President’s Rule was imposed. A paradigm shift took place after the 1967 General and State elections when non-Congress parties emerged in many states. The subsequent decades witnessed saw breaking up of political parties and the formation of regional parties. Regular,

⁵⁷³ Chapter IV, Sarkaria Commission Report, Inter-State Council Secretariat, Ministry of Home Affairs,

<http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/>



sometimes unpredictable realignments of political parties and groups took place for the purpose of forming the government. These instances gave rise to a persistent instability in several State Governments. As a result, the Governors were asked to exercise their discretionary powers more frequently. The way in which they exercised those powers has had a direct impact on Centre-State relations.⁵⁷⁴

The role of the Governor has been attacked on the ground that some Governors have failed to display the qualities of impartiality and sagacity expected of them. It has been alleged that the Governors have not acted with necessary objectivity either in the manner of exercise of their discretion or in their role as a fundamental link between the Union and the States. Many have traced this mainly to the fact that the Governor is appointed by, and holds the office during the pleasure of the President. The part played by some Governors, particularly in recommending President's Rule and in reserving State Bills for the consideration of the President, has aroused vehement acrimony. Recurrent removals and transfers of Governors before the termination of their tenure have lowered the esteem of the office. Criticism has also been levelled that the Central Government utilises the Governors for its own political ends. Many Governors, looking forward to further office under the Union or active role in politics after their tenure, came to regard themselves as agents of the Union.⁵⁷⁵

2. POWERS AND FUNCTIONS OF THE GOVERNOR

⁵⁷⁴ Sibransan Chatterjee, Governor's Role in the Indian Constitution, p.1-2 (1992).

⁵⁷⁵ Era Sezhiyan, The Governor and her role, <https://frontline.thehindu.com/static/html/fl1813/18131070.htm>

The Governor of a State possesses Executive, Legislative, Judicial and Emergency powers to efficiently exercise his constitutional responsibilities.

2.1 Executive powers of the Governor

The executive powers of the State are bestowed on the Governor who is authorised to exercise them either directly or through officers subordinate to him.⁵⁷⁶ In the exercise of his responsibilities as the Head of the State, the Governor appoints the Chief Minister and other Ministers on the advice of the Chief Minister. The Ministers aid and advise the Governor and hold the office during the pleasure of the Governor. The Governor makes rules for the effective transaction of the business of the Government of the State and for the allocation among Ministers of the business.⁵⁷⁷ It is the responsibility of the Chief Minister to communicate the governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation.⁵⁷⁸ If the Governor demands, he must furnish information related to the administration of the affairs of the State and proposals for legislation. If the Governor so desires, the Chief Minister has to submit for the consideration of the Council of Ministers any matter on which decision has been taken by a Minister but which has been considered by the Council.

The Governor has the power to appoint the Advocate-General of the State who holds office during the pleasure of the Governor.⁵⁷⁹ The members of the State Public Service Commission, State Election Commission and the State Finance

⁵⁷⁶ Indian Const., art 154

⁵⁷⁷ Indian Const., art 166

⁵⁷⁸ Indian Const., art 167

⁵⁷⁹ Indian Const., art 165



Commission are appointed by the Governor.

In the States of Madhya Pradesh, Chhattisgarh, Jharkhand and Odisha, it is the special responsibility of the Governor to see that a Minister is placed in charge of tribal welfare. In States like Assam, the Governor is given certain special powers with respect to tribal administration under the Sixth Schedule of the Indian Constitution.⁵⁸⁰

2.2 Legislative powers of the Governor

As a fundamental part of the State Legislature, the Governor enjoys extensive legislative powers. The Governor is to summon either or both Houses of the State Legislature to meet at a time and place as he thinks fit. The only prerequisite is that both the Houses must reassemble within six months of prorogation or adjournment, i.e., both the Houses must meet at least twice a year.⁵⁸¹ He is empowered to prorogue either House of the State Legislature or dissolve the State Legislative Assembly. He may address either House and may send messages to it on a bill pending in the Legislature or otherwise. It is provided that the House to which the message will consider any matter required by the message to be taken into consideration. The Governor addresses the House or the Houses on the commencement of the first session of each year.⁵⁸² When a bill has been passed by a House of Houses, it must be presented to the Governor. The Governor must communicate that he has assented to it or that he has withheld his assent or that he has reserved the bill for the consideration of the President. The

Governor may return a non-Money Bill with a message of re-consideration of the whole Bill or parts of it. He may suggest amendments. The House of Houses must consider his suggestions without delay. If the bill is passed again by the House or Houses or without amendment and presented to the Governor for assent, the Governor shall not have any veto power over the Bill and must give assent to it.⁵⁸³

The Governor also has special legislative power of promulgating ordinances during the recess of the State Legislature, if he is satisfied that there exist circumstances which make it necessary for him to take immediate action. Such an ordinance has the same force and effect as an Act of the State Legislature. This ordinance ceases to operate at the end of six weeks from the re-assembly of the legislature unless a resolution disapproving it is passed by the House or the Houses before the expiry of the period.⁵⁸⁴ The Supreme Court has pointed out a glaring example of the abuse of the ordinance making power by the Executive. The Court held that continuously passing ordinances without any intention of passing the law subverts the legislative process and it is against the Constitution.⁵⁸⁵

The Governor has the power to nominate members of the Anglo-Indian community to the Legislative Assembly if they are not adequately represented.⁵⁸⁶ In respect to the Legislative Council, he has the power to nominate persons having special knowledge or practical experience in respect of matters such as literature, science, art, cooperative movement and social service.⁵⁸⁷

⁵⁸⁰ Brij Kishore Sharma, Introduction to the Constitution of India, p. 215 (7th Ed., 2015).

⁵⁸¹ Indian Const., art 174

⁵⁸² Indian Const., art 176

⁵⁸³ Indian Const., art 200

⁵⁸⁴ Indian Const., art 213

⁵⁸⁵ D.C. Wadhwa v. State of Bihar, (1987) SCR (1) 798

⁵⁸⁶ Indian Const., art 333

⁵⁸⁷ Indian Const., art 171



2.3 Judicial powers of the Governor

The Governor is entitled to be consulted by the President in the appointment of judges of the State High Court. He is the *de jure* head of the State and as such he has the powers which correspond to the prerogative of the British Crown. The Governor has been provided constitutional powers to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any convict of any offence against any law related to any matter to which the executive power of the State extends.⁵⁸⁸

2.4 Emergency powers of the Governor

The Governor has been provided constitutional powers under which he/she can submit a report to the President whenever he/she is convinced that a situation has arisen in which the Government of the State cannot be carried on in conformity with the provisions under the Indian Constitution.⁵⁸⁹

It is observed that there are a number of instances, when the President's role has been recommended by the Governors to provide Central government time to reorganise its political interests or effectuate crises.

2.5 Miscellaneous powers of the Governor

Amongst the miscellaneous powers, one of the Governor's most important functions is to receive the annual report of the State Public Service Commission and passes it on to the Council of Ministers for comments. After the comments of the Council of Ministers are available, he forwards the same to the Speaker of the Legislative

Assembly for the purpose of placing it before the House.⁵⁹⁰

3. DISCRETIONARY POWERS OF THE GOVERNOR

Discretionary powers of the Governor may be divided into two parts: *First*, the explicit discretion mentioned in the Constitution under Article 163; and *second*, the implicit or the hidden discretion which is derived from requirements of the political situation. It can be styled as 'situational' discretion'. In other words, the Governor has marginal discretion in a particular situation. It was the objective of the framers that the situational discretion would be exercised not in ordinary situations but under the urgent needs of the political circumstances existing in the State. The instances where the Governor's marginal discretion may be exercised are as follows:

- a) Appointment of the Chief Minister: The Governor exercises situational discretion in the appointment of the Chief Minister. If at the end of every general election, every State in India finds one party with a stable majority in the Legislative Assembly and a recognised leader, the Governor will have no choice but to appoint that leader. However, if there is no recognised leader and there is no clear majority, the Governor may get a chance to exercise his discretion. It is important to note that it is not necessary for a person to seek the vote of confidence before becoming the Chief Minister. The Governor may appoint him first and then ask him to seek a vote of confidence within a stipulated period of time.
- b) The question of appointing the Chief Minister came into being in 1952 in the State of Madras where no party returned

⁵⁸⁸ Indian Const., art 161

⁵⁸⁹ Indian Const., art 356

⁵⁹⁰ Indian Const., art 323



with a clear majority in the Assembly. The Congress Party emerged as the single largest party while T. Prakasham formed a United Democratic Front and claimed majority in the Assembly. After examining the political situation, the Governor Sri Prakasa invited C. Rajagopalachari for the formation of the ministry in the State on the condition that the Congress Party emerged as the `largest party` in the State. In Odisha, after the General Elections of 1952, no party secured an absolute majority in the State Assembly. The Congress Party emerged as the largest party in the State securing 67 seats in the House. The Governor exercised his discretion and summoned the leader of the largest party to form the Ministry. In Rajasthan, the Congress Party secured 88 seats in the House and the Governor of Rajasthan, while exercising his discretion, invited M.L. Sukhadia to form the government on the plea that he was the leader of the largest party in the Assembly. He did not invite Maharwal Laxman Singh, the leader of the United Front to form the government in spite of the fact that he had the majority of the members in the Assembly.⁵⁹¹

It is unfortunate that the practice of inviting the leader of the single largest party on the ground of the so-called `Sri Prakasa Doctrine`, was not followed by the Governors in many states. In many states where non Congress parties emerged as the `largest party` after the election, the Governors did not invite the leaders of the largest groups to form the governments.

According to the recommendations given by the Sarkaria Commission, if there is no single party having an absolute majority in the assembly, the Governor should select a

Chief Minister from among the following parties or groups of parties by sounding them, in turn, in the order of preference given below:

- i. An alliance of parties that was formed before the elections took place.
- ii. The single largest party willing to form the government with the support of others.
- iii. A post-electoral alliance of parties, with all the partners in the coalition joining the government.
- iv. A post-electoral alliance of parties, with some of the parties in the alliance forming a government and the remaining parties supporting the government from outside.

b) Dismissal of a Ministry: The discretionary power of the Governor to dismiss a Ministry also seems to exist if the Governor has reasons to believe that the Ministry is engaged in activities which are likely to threaten national security or integrity. It is likely that the Ministry has lost the confidence of the legislature as a result of a split in the party in power and the Ministry may like to continue in office and it may advise the Governor to prorogue the Assembly with a view to avoiding a censure motion which is likely to be passed. In the meantime, a majority of members in the Assembly may submit a petition to the Governor to the effect that the Ministry does not enjoy the confidence of the Legislature any longer and that it should be dismissed. The Governor, in this case, may adopt any of the alternatives including the dismissal of the Ministry.

Although the Governor does not normally dismiss a Ministry as long as it enjoys the confidence of the Assembly, yet the Governor`s use of his discretion to dismiss

⁵⁹¹ Ramesh Kumar Arora, Indian Public Administration: Institutions and Issues, p.195, (1995).



a Ministry which still enjoys the support of a majority will be justified if he is convinced that there have been clear cases of corruption to which the Ministry is a party, and that in the interest of purity in administration, the Ministry should be dismissed from office.

But the Governors of the States have adopted double standards in using their discretion in this regard. The dismissal of the Janata Dal government in 1989 created a widespread controversy. It clearly epitomised the misuse of the office of the Governor. The Supreme Court, after hearing this case, stated that:

*“The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more fairly, cautiously and circumspectly. Indeed it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly.”*⁵⁹²

It is pointed out that the Governor is within his constitutional right when he dismisses a Chief Minister on the ground that the administration was corrupt. The Karunanidhi government of Tamil Nadu was dismissed on the same grounds in 1976. But there are cases where Governors did not dismiss the Chief Minister on this ground. Biren Mitra in Odisha and Pratap Singh Kairon in Punjab resigned on the advice of the then Prime Ministers, but the Governors in both the cases kept silent. Similarly, in Rajasthan, the Governor did not ask the Chief Minister Sukhadia to resign, though the High Court had passed orders against him in a writ petition filed by a defeated candidate.

According to the Sarkaria Commission, the Governor cannot dismiss the Council of Ministers as long as they continue to command a majority in the Legislative Assembly. Conversely, he is bound to dismiss them, if they lose the majority but do not resign.⁵⁹³

When the Legislative assembly is in session, the question of majority should be tested on the floor of the House. If during the period when the Assembly remains in prorogation, the Governor receives reliable evidence that the Council of Ministers has lost `majority` he should not, as a matter of constitutional propriety dismiss the Council unless the Ministry has secured the vote of confidence. The Governor may advise the Chief Minister to summon the Assembly as soon as possible to test the majority.

Usually, it would be reasonable to allow the Chief Minister a period of 30 days for the summoning of the Assembly unless there is very urgent business to be transacted like passing of the Budget and in such case, a shorter period may be allowed. Under certain exceptional situations, the period may extend to 60 days.

c) *Dissolution of the Legislative Assembly:*

It is an abnormal practice to dissolve an Assembly before completion of its term. However, dissolution at an earlier date with a view to appealing to the electorate and seeking to solve a situation of political instability is an accepted principle. The Governor has been vested with the power to dissolve the Legislature. Is the Governor bound to accept the advice of the Council of Minister in this respect? The British practice has established this convention that a defeated Ministry has to choose between

⁵⁹² S.R. Bommai v. Union of India, AIR 1994 SC 1918

⁵⁹³ Naotem Sanajaoba, Law and Society: Strategy for Public Choice, p.319, (2001)



meeting the electorate to seek a fresh mandate in support of its policies and resignation. But in Britain, such elections have been rare. On the other hand, in India, there is no particular provision under the Constitution to govern a situation of this nature. In 1954, a defeated Ministry in the State of Travancore-Cochin advised the Rajpramukh to dissolve the Assembly and the advice was accepted. But in 1955, in the same State, the advice of another defeated Ministry was rejected.

An intriguing instance regarding the dissolution of the Assembly took place in Kerala after the General Elections in March 1965. No party emerged in a position to form the government after the election. The Governor reported to the President that there was no possibility of forming a viable government in the State. As a result, the Legislative Assembly was dissolved even without calling the first meeting.⁵⁹⁴

Therefore, it appears that the Governors, over the years, have not adopted uniform criteria with respect to dissolution of the Assembly. In fact, they have exercised their marginal discretion differently in refusing/granting the dissolution of the Assemblies of the States. The Governor has been empowered to use his discretionary powers in other instances as well:

- i. Demanding information regarding legislative and administrative matters from the Chief Minister.
- ii. Asking the Chief Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

- iii. Refusing to give assent to a Bill passed by the Legislature and sending it back for reconsideration.
- iv. Reserving a Bill passed by the State Legislature for the assent of the President.
- v. Seeking instructions from the President before promulgating an ordinance.
- vi. Submitting report to the President to enforce State Emergency.

3.1 Critical appraisal of the Governor's discretionary powers

It is pertinent to point out that the Governor's discretion under Article 163(2), although appears autocracy. The Governor cannot act as an autocrat under any circumstance, so long as he functions within the democratic structure. However, neither the Council of Ministers nor the State Legislature can check the discretionary powers of the Governor, but the President can. It indicates that the Governor cannot freely exercise his discretionary powers. If the power is misused to forward personal ambitions or as a partisan in the currents and the cross-currents of state politics, the President can always put a check on these and if necessary, he may dismiss him as well. Therefore, the Governor is not a free agent either during normal times or abnormal times.⁵⁹⁵

4. THE ROLE OF GOVERNOR IN STATE POLITICS: CASE STUDIES

The role of the Governor in state politics has always been disputed since independence. There have been instances where the role has been misused on the direction of the Central government. Scholars and experts have argued that the role played by the Governor is more of a

⁵⁹⁴ Subhash Shukla, Issues in Indian Polity, p.105, (2008)

⁵⁹⁵ Gautam Bhatia, Do we need the office of the Governor?, (May 24, 2018),

<https://www.thehindu.com/opinion/lead/do-we-need-the-office-of-the-governor/article23971800.ece>



spoiler instead of someone who can bridge the Centre-State divide.

4.1 A Case Study of the Kerala squabble in 1959

The outcome of the elections in Kerala in 1975 came as a shock to some as a communist government was elected through democratic means for the first time in history. Subsequently, on the invitation of the Governor, E.M.S. Namboodiripad was sworn in as Chief Minister. It was the first non-Congress government of the fourteen States of the Union. The victory for the communist party received international praise.

Soon after assumption of power, the Chief Minister announced that his government would try its best to eradicate corruption, initiate land reforms, and formally associate the communist people in the execution of administrative policies. To some extent, its policy helped the working class and tried to break all opposition to the government. The police of the State was neutralised and made toothless. The government adopted a policy of discrimination against the non-communist unions and other groups as well. It attempted to jeopardise the judicial system through administrative interference and withdraw a plethora of cases. As a result of this, the opposition parties jointly decided to carry out a civil disobedience campaign to bring down the government. The events of disorder, lawlessness and insecurity of life became the order of the day.

The Governor of Kerala forwarded a report to the President narrating the reasons behind the unrest against the government.

The President noted that the situation in Kerala has become very critical. He concluded it was extremely difficult to carry out administration under such circumstances. The Central Government responded by dismissing the Council of Ministers by invoking Article 356 of the Indian Constitution. The fundamental reason behind this move was the mass upsurge by the people of the State. The Ministry was dismissed and the Assembly was dissolved. On 31st July, 1959, the President of India took over the powers of the State executive.

This move led to a nation-wide frustration, especially amongst non-Congress parties. On the other hand, the Prime Minister of India felt that the intervention was inevitable and necessary to restore the order.

It was felt that the imposition of President's Rule in the State and the dismissal of the Ministry is not a healthy process. In a Parliamentary democracy, the method through which a government can be removed by the opposition should be strictly constitutional. In the case of Kerala, the Ministry enjoyed the full support of the Assembly and it had full right to continue its remaining term. Therefore, it was obvious that the Governor showed partiality in sending a report to the President.⁵⁹⁶

4.2 A Case Study of the Constitutional impasse in Rajasthan in 1967

Post-1967 elections, the Congress was unable to get absolute majority in Rajasthan in order to form the government. Although it emerged as the single largest party in the Assembly, the opposition parties wanted to

⁵⁹⁶ Mansi Jaiswal, Here's a timeline of controversial decisions by 'Honorable Governors', (May 21, 2018), [https://www.business-](https://www.business-standard.com/article/politics/here-s-a-timeline-of-controversial-decisions-by-honourable-governors-118052100857_1.html)

[standard.com/article/politics/here-s-a-timeline-of-controversial-decisions-by-honourable-governors-118052100857_1.html](https://www.business-standard.com/article/politics/here-s-a-timeline-of-controversial-decisions-by-honourable-governors-118052100857_1.html)



form their own government. Subsequently, they jointly forwarded a letter of the Governor staking claim to form the government since they had gathered requisite numbers.

Both Congress and non-Congress leaders claimed majority support in the State Assembly. Meanwhile, the Governor received twelve identical letters from Independent members expressing their support to the opposition. On 1st March 1967, the opposition leaders formed the United Front and expressed their desire to form the government to the Governor.

On 3rd March 1967, the United Front adopted a 17-point programme to be followed in case the coalition government is established. Simultaneously, the Congress leader met the Governor and tried to convince him that he had a right to be invited to form the government as he was the leader of the single largest party. Subsequently, the Governor made an announcement that the Congress leader has been invited to form the government. In the opinion of the Governor, the decision was made on the basis that the Independent candidates were uncertain about their policies and kept changing their stance during the election process. The Governor did not consider the independent candidates as an inalienable part of the opposition alliance.

However, this decision of the Governor was heavily scrutinised by the opposition parties. It was alleged that the Governor played a partisan role in inviting the Congress leader to form the government. It was pointed out that if the Governor was to follow the precedent, he should not have ignored the status and legitimacy of the

United Front which claimed majority in the Assembly. Moreover, it was argued that against all sense of reasonableness the Governor completely excluded the Independents. Ultimately, the Congress party was invited to form the government without having the requisite numbers in the Assembly.

The events in Rajasthan made it evident that the Governor was directly involved in the factional politics of Rajasthan. He exercised his marginal discretion to appoint the Congress leader as the Chief Minister of the State with an intention to help the Congress Party. The way in which the Governor ignored the affiliations of Independents was, therefore, unrealistic and tententious. It was not the duty of the Governor to enquire into the programme for which they contested the elections. One should not forget that this convention was not applied uniformly in the States of Punjab, Bihar and West Bengal where non-Congress parties emerged as the single largest parties.⁵⁹⁷

4.3 A Case Study of the role played by the Bihar Governor in 1998

In September 1998, the Governor of Bihar recommended for the imposition of the President's rule in the State. According to the Governor, "The Bihar Government epitomises the most malignant and uncouth levels of functioning in Indian politics." However, the President of India repeated history by returning a Union Cabinet resolution seeking the imposition of President's Rule in Bihar and the suspension of the Assembly. After mulling over and discussing the subject for nearly 80 hours, the President, in a long note asked the Government to rethink about the

⁵⁹⁷ S.A.H. Haqqi, Indian Democracy at the Crossroads, p.257, (1986).



decision. No evidence of constitutional breakdown was observed. After that, the Union Cabinet under pressure from the regional allies withheld its recommendation and did not press it further.

The President stated three grounds on which he felt the Central contention on Bihar was unsuitable. In his note to the Prime Minister, he discounted the Centre's position on deteriorating law and order condition. He noticed that law and order condition in some other States was also severe. Bihar was not an exception with regard to law and order as it has been projected by the Governor.⁵⁹⁸ Furthermore, the Sarkaria Commission report has also opposed the dismissal of a majority government in any State. The President referred to the report which mentioned that the situation of mal-administration in a State where a duly constituted ministry enjoying majority support in the Assembly, is in office, the imposition of President's Rule will be immaterial to the purpose for which the power under Article 356 is conferred. Moreover, the President examined that the Union Government did not give any warning to the aberrant State Government which has also been mentioned in the Sarkaria Commission report. The Supreme Court, too, in the *S.R. Bommai* case stated that the Centre must "warn an errant State in specific terms."

4.4 A Case Study of the Karnataka muddle in 2018

Elections to the State Assembly of Karnataka were conducted in 2018 where the Bhartiya Janata Party (BJP) emerged as the single largest party followed by

Congress and Janata Dal (Secular). The question arose whether Governor should invite the single largest party to form the government and prove its majority in the House or a post poll alliance to form a majority that overcomes the single largest party and form the government.

However, the Governor subverted the guidelines provided by the Supreme Court and Centre-State Commissions and invited the single largest party to form the government instead of the alliance which had the majority citing reasons like horse trading and defection politics. This decision perplexed some as in the case of Goa, Manipur and Mizoram, the single largest party was not given the preference to form the government unlike in Karnataka.

After the Governor invited the leader of the opposition party to form the government, the leaders of the opposition party approached the Supreme Court which ordered the floor test to be conducted within 48 hours. This order superseded the time period of fifteen days which the Governor had given to the single largest party.⁵⁹⁹ Subsequently, the leader of the single largest party failed to prove his majority and had to resign within 48 hours. However, this move by the Governor of Karnataka had set a terrible precedent to give preference to the ruling party at the centre to form the government.

The Governor must be true to the oath of the office and must ensure that the person he/she invites to be the Chief Minister will be able to form a responsible and a stable government. Even Dr. B.R. Ambedkar in

⁵⁹⁸ N.S. Gehlot, *New Challenges to Indian Politics*, p.64-65, (2002).

⁵⁹⁹ Archis Mohan & MJ Antony, *Karnataka verdict fallout: Supreme Court order a triple blow to the BJP*, Elections, (May 19, 2018),

https://www.business-standard.com/article/elections/karnataka-verdict-fallout-supreme-court-order-a-triple-blow-to-the-bjp-118051801475_1.html



his speech described how a Governor should use his discretion not as “representative of a party” but as “the representative of the people as a whole of the State”.

4.5 A Case Study of the premature dissolution of the Jammu & Kashmir Assembly in 2018

In November 2018, the Governor of Jammu and Kashmir surprisingly dissolved the State Assembly⁶⁰⁰ (which was in suspended animation) when two rival political parties staked claim to form a government.

The Governor, instead of forming an alternate government, decided to dissolve the Assembly citing extensive horse trading and two rival factions forming an unstable government as two major reasons behind the surprise dissolution.⁶⁰¹

The dissolution came into effect after the Governor issued a notification when the leader of the People’s Democratic Party (PDP) released a statement that the party is willing to form the government with its traditional rivals, the National Conference (NC) and Congress. The Governor was of the view that such an alliance would form an unstable government in the State and such alliance would lead to policy paralysis in the already disturbed state.

The Supreme Court has comprehensively stated that a floor test must be conducted to check the majority in the Assembly.⁶⁰² Furthermore, the Governor cannot shut out post-poll alliances altogether as one of the ways through which a government may be established. Moreover, unsubstantiated

claims of horse-trading or corruption in efforts at government formation cannot be cited as reasons to dissolve the Assembly.⁶⁰³

Describing an alliance as opportunistic is fine as far as it is a political opinion but it cannot be the basis for constitutional action. This event has, once again, jeopardised the neutrality and impartiality of the office of the Governor.

5. DUAL ROLE PLAYED BY THE GOVERNOR IN A STATE

The Governor of a State has a dual role to play – as the constitutional head of the State and as the agent or representative of the Centre.

5.1 Constitutional Head of the State

The Governor is the nominal head of the State. As per the Indian Constitution, there must be a Council of Ministers with a Chief Minister at the head to aid and advice the Governor in the exercise of his functions except when he can act in his discretion.⁶⁰⁴

The Council of Ministers is collectively responsible to the State Assembly.⁶⁰⁵ All the executive powers are exercised by the Cabinet in the name of the Governor who acts constitutionally on the advice of the Council of Ministers.⁶⁰⁶ However, the Constitution specifically lays down that except in matters where the Governor is required to act in his discretion, he shall not be bound to follow the advice of the Council of Ministers, but act in his discretion. If any question regarding the exercise of the discretion of the Governor

⁶⁰⁰ J&K Const., section 52

⁶⁰¹ Peerzada Ashiq, Amid contrasting claims J&K Governor dissolves Assembly, Other States, (November 21, 2018), <https://www.thehindu.com/news/national/other-states/amid-contrasting-claims-jk-governor-dissolves-assembly/article25560634>

⁶⁰² Id., at 20

⁶⁰³ Rameshwar Prasad and Others v. Union of India, AIR 2005 SCC 625

⁶⁰⁴ Indian Const., art 163

⁶⁰⁵ Indian Const., art 164

⁶⁰⁶ Vipul Singh, Jasmine Dhillon, Gita Shanmugavel & Sucharita Basu, History and Civics, p. 251 (2013)



arises, the decision of the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. The Courts do not have the authority to question the discretionary actions undertaken by the Governor. The Study Team on Union-State Relations appointed by the Administrative Reforms Commission examined that the following functions fall within the discretionary powers of the Governor:

- i. Appointment of the Chief Minister.
- ii. Dismissal of the Council of Ministers.
- iii. Dissolution of the State Assembly.
- iv. Withhold assent to a Bill passed by the State Legislature.
- v. Right to advice, warn and recommend.
- vi. Discretionary powers of the provided to the Governor of Assam, Nagaland, Arunachal Pradesh, Sikkim, Mizoram, Tripura and Meghalaya.

5.2 Governor as the agent of the Centre

Apart from being the constitutional head of a State, the Governor also acts as the agent of or representative of the Union Government. In fact, he is the only constitutional link between the Centre and the States. As his appointment is made by the President of India on the recommendation of the Prime Minister, his allegiance lies more towards the Centre. He ensures that the directives issued by the Centre to the States are carried out and the government of the State is carried on in conformity with the provisions of the Constitution. It is on the recommendations of the Governor that the President usually issues a proclamation of emergency in the State on account of the breakdown of the constitutional machinery. Even after the State is placed under President's Rule, the Governor is the chief representative of the

President in the State to run the administration of the State on his behalf. When the President's Rule has been imposed on a State the Governor ceases to be a constitutional head and acts as an agent of the President.⁶⁰⁷

G.N. Singh, the former Governor of Rajasthan, opined that the Governor in several cases acts as a 'link' between the Centre and the States. The Governor holds a fundamental position in the State and is a thread which binds the relations of the State with the Centre.

Thus, the Governor represents the Centre in the State and the State at the Centre. That he does in his periodic reports to the President in his meetings with the President and at the time of the Governor's Conferences. It is the Governor who aids in enhancing the reputation of the State and of the State Government at the Centre. He concentrates on the requirements and concerns of the State at the Central level.

As a matter of fact, the terms 'agent' and 'constitutional head' are two independent and contradictory things in the sense that the constitutional head is supposed to be impartial whereas an agent is always partial.

6. POSITION OF THE OFFICE OF GOVERNOR BEFORE AND AFTER 1967

The position of the office of the Governor underwent a paradigm shift post-1967 when the Congress party lost elections across the states in India. The loss in state elections indicated a weak position of the Congress for the first time since the independence of the country. This change also resulted in the formation of many regional and sub-

⁶⁰⁷ Pravin Kumar Jha, Political Science: University of Delhi, p.325-326, (2012).



regional parties and subsequently, the role of the office of the Governor also underwent a change.

6.1 Position and Role of the Governor before 1967

Governors were so powerless during the 1950-67 period that some of them wondered whether the office they held was of any consequence at all. Prof. K.V. Rao states, "*One of the casualties of the Nehru era is the State Governor.*" The role of the Governor was restricted in the Nehru era because a single party dominated the Centre as well as most of the States. During this period, the link through which the communication between the States and the Centre took place was outside the office of the Governor and, therefore, they did not have much opportunity of playing an important role. Moreover, the State governments which they headed had the fortune of having a great deal of political stability and, therefore, their role as Constitutional head of the State was also no more than purely ceremonial.⁶⁰⁸

No wonder renowned leaders like C. Rajagopalachari, K.N. Katju etc took the earliest opportunity to get out of Raj Bhavan, explicitly described by one of them, as '*gilded cages*'. They evidently felt that their time and potential were being ruined. Nor was this surprising in a situation of prolonged political stability through the bulk of the Nehru era, when the Congress dominated both at the Centre and all States. Consequently, a Governor had nothing exciting to do, except performing certain nominal functions, cut tapes or light lamps at functions, distribute prizes and so on. Predictably, people of real worth did not

accept the job while those not particularly qualified for it fell over one another to grab it because of its spectacle and privilege.

6.2 Position and Role of the Governor after 1967

The office of Governor came into great prominence post-1967 when tough situations arose due to coming into power of non-Congress governments in many States. This arduous situation started with Rajasthan and Madhya Pradesh. In both these States, the Governors, who happened to be ex-Congressmen, tried to aid the Congress Chief Ministers.

Controversies regarding the role and position of the Governor arose due to changed political scenario especially as no political party managed to get a clear majority. This provided Governors with an opportunity to exercise their discretionary powers. It was argued that the Governors were exercising their constitutional powers neither in their discretion not according to their individual judgment but according to the advice of the Prime Minister who was abusing the official power. It was evident that the decisions of the Governors, particularly in West Bengal in November 1967, and in U.P in September 1970, were taken under the pressure of the Prime Minister.⁶⁰⁹

7. GOVERNOR'S POSITION: THE ISSUE OF ROLE DIFFERENTIATION

The foregoing appraisal would show that the fundamental issue concerning the office of the Governor today is not one of rehabilitation but of role differentiation. The problem of role differentiation which could not take place and get

⁶⁰⁸ Verinder Grover, Political System and Constitution of India: Political Process, Government Structure and Administration, p.359-360, (1997).

⁶⁰⁹ P.L. Mathur, Role of Governor in Non-Congress States, p. 181 (1988).



institutionalised so far largely on account of one party dominance has assumed such severe proportions today as to become a case of crises of confidence in the political system itself.

The Governor has a dual role to play – one as constitutional head of the State and the other as an agent of the Centre. It can be argued that the expression `agent of the centre` sounds un-federal. Two premises may be developed to characterise the role of the Governor. Generally, speaking, there is no overlap between the two roles except where otherwise provided, the role of the Governor as an agent of the Centre begins where his role as constitutional head of the State ends. Moreover, it can be pointed out that there is another demarcating line in the Governor`s role as his role as the constitutional head of the State has primacy over his role as an agent of the Centre as the former relates to periods of normalcy and the latter to emergency situations. If these two premises are accepted, the two roles could be easily reconciled.

It can be concluded that the Governor has two key roles to play. As a representative of the Centre in the State, it is his duty to ensure that the federal equilibrium and political stoutness are not undermined and jeopardised. In his role as the head of the State government, he has been provided discretionary powers. He is not simply a nominal head, or a passive spectator but the extent of his powers would greatly rely on the political scenario that exists in the State. If there is a great deal of political consonance in the State, the burden of the Governor is greatly reduced. If political disharmony exists in the State, the role becomes extremely crucial.

Thus, this office is of fundamental significance having a multifaceted role. The Governor is the keystone of the constitutional framework and his office ensures continuity of government and it should not be disregarded.⁶¹⁰

8. RECOMMENDATIONS OF THE ARC TO REFORM THE OFFICE OF THE GOVERNOR

The First Administrative Reforms Commission in its report on Centre-State relations pointed out that the office of the Governor is no longer ceremonial. The Governor has to tackle situations, in which certain decisions have to be taken in view of the duty of the office to preserve and defend the Constitution and the law. The ARC report recommended that the Governor must be unbiased and must ensure fair play. He must have strong faith in the constitutional structure and democratic institutions. Furthermore, the report underlined the following recommendations:

- i. A person who is appointed as a Governor should have experience in public life and administration and should be detached from party politics.
- ii. The person appointed should be ineligible for reappointment and judges should not be appointed as Governors.
- iii. The convention of consulting the Chief Minister before the appointment should be religiously followed.
- iv. The person appointed must act according to fair judgment and discretion in forwarding reports to the President and reservation of bills for the consideration of the President.

⁶¹⁰ Himanshu Roy & M.P. Singh, Indian Political System, p.237-240, (2018).



- v. When the Governor has reason to believe that the Ministry has ceased to command a majority in the Assembly, he should arrive at a conclusion on this question by summoning the Assembly and ascertaining its verdict on the support enjoyed by the Ministry.
- vi. When a question arises as to whether the Council of Ministers enjoys the confidence of the majority in the Assembly, and the Chief Minister does not advise the Governor to summon the Assembly, the Governor may, if he thinks fit, *sou motu* summon the Assembly for the purpose of obtaining its verdict on the question.

9. THE WAY FORWARD

Far from being the fifth wheel in a coach, the prestigious post of the Governor is an esteemed social institution and constitutional necessity.

The operational aspect of the office of the Governor states that it was the involvement of the Governors in active politics of the State which made the office subject to significant public criticism. Throughout the 1950s and 1960s, there were considerable signs of this tendency, but after 1967 some of the Governors severely infringed their jurisdiction which led to public demands of their dismissal. The manner in which the power of appointing and dismissing the Council of Ministers, summoning, proroguing and dissolving the Assembly, and also of advising the imposition of President's Rule, has been used as a sad commentary on the role of some of the Governors.

The Governors in some of the States by using their authority purely for sectarian and personal ends not only deprived the

office of its prestige and dignity but also brought disrepute to it.

There are numerous reasons behind the office of Governor enjoying limited respect in the eyes of experts and even public at large. For better or worse, the Governors are not seen to be the elder statesmen acting as a bridge between the Centre and the States.

The Supreme Court has explicitly stated that the governorship "*is an independent constitutional office which is not subject to the control of the Government of India.*"⁶¹¹

In other words, the Governor of a State is not inferior or subservient to the Central Government. Again, the Supreme Court's judgment leaves no apprehension that when the Constitution states that the Governor shall hold office "during the pleasure of the President," it does not mean the whim and fancy of the President.

The Governor is a high constitutional office. The Governor takes an oath to "preserve, protect and defend the Constitution and the law." A mere appointment does not make the functionary an instrument of use by the ruling party at the centre. Therefore, it is imperative that persons of proven probity and character alone are appointed to this high-ranked office.⁶¹²

⁶¹¹ Hargovind v. Raghukul Tilak, AIR 1979 SC 1113

⁶¹² Dr. B.L. Fadia, Indian Government and Politics, p. 526-527, (2013)



HATE SPEECH IN INDIA

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Introduction

“Hate Speech is in the ear of the beholder.”- Mark Potok

The term ‘hate speech’ eludes a universal definition. It derives its significance from the particular context it operates in formed through the influence of peculiar sensibilities, “identities” and “assessments” in particular contexts. Black’s Law Dictionary identifies hate speech as the “speech that carries no meaning other than expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence”. Therefore, it can be said that hate speech is “speech that is, broadly speaking, derogatory towards someone else”. Most common grounds of hate speech across countries are race, ethnicity, religion or class. India presents a peculiar case for regulation of hate speech with its rich diversity of language, caste, race, religion, culture and beliefs. The words either spoken or written, or employing signs or any kind of visual representation qualifies as ‘speech’. If such speech offends the religious, ethnic, cultural, racial groups by vilification and is capable of spreading ‘hatred’ among the heterogeneous populace, we categorise it as ‘hate speech’.

Many reports, worldwide, have declared 2018 as the “year of online hate” Facebook, the social media giant, in its ‘Transparency

Report’ disclosed alarming statistics wherein it ended up taking down 3 million hateful posts from its platform, YouTube, which allows free sharing of video content on its site, removed 25,000 videos in a single month alone. These statistics are only the tip of the iceberg and indicative of how the situation is inching towards spiraling out of control. In its aggravated form, hate speech has led to horrendous hate crimes like we have recently witnessed in India, such as communal riots, series of violent clashes between religious communities all arising as a result of inflammatory speech propagated by divisive groups. Incidents of gruesome killings were widely reported wherein ‘hate’ for another group/community took a particularly perverse form of violence in the form of mob lynching. In these situations, words were employed in their most dangerous form, “...as weapons to ambush, terrorize, wound, humiliate and degrade” individuals and groups. The meaning of hate speech, in contemporary times, has travelled beyond mere offensive speech; it encompasses speech that is insulting, derogatory, discriminatory, provocative or even such that it incites and encourages use of violence or results in violent backlashes. It results in disturbing the harmony and order in society at large. But more importantly, hate speech becomes a particularly heinous type of hate crime causing direct physical and psychological harm to the victims of hate crime. It affects its victims in intangible ways leading to chilling effect on the victim’s right to free speech and expression, resulting in exclusion from participation in the democratic process and public discourse. The first task this article endeavors to achieve is to establish the case for necessity of controlling hate speech in light of its obvious harm; next it looks into the legal landscape of hate speech laws that



exist in India. It is the author's assertion that when it comes to legal regulation of hate speech, it is a classic case of over criminalisation, which is in urgent need of addressable by means beyond just penal laws. This becomes necessary because the harm in hate speech is so widespread that it travels beyond the obvious and pervades the human psyche to leave behind permanent damage which outlasts the physical. Therefore, the approach to tackling hate speech needs to necessarily evolve as a more nuanced and sophisticated response that can begin to tame the multi-headed Hydra monster form that hate speech has become today.

Jeremy Staton stated that targeting a person's "immutable characteristics, ethnic background or religious identity causes harm". Thus, to protect individual liberty, freedom and to ensure dignity it is essential that speech that targets a person's identity, based on ethnicity, race, religion etc., be not allowed to be propagated untrammelled. As victims of hate speech, such individuals "feel fear, may be nervous to enter public spaces or participate in discourse and may change their behavior or appearance in an attempt to avoid hate speech."⁶¹³ In this way, hate speech constructs its targets as those who are not only "discriminated against but are also seen by others as undesirable target and legitimate objects of hostility."⁶¹⁴ Such intangible effects of hate speech are the most insidious and damaging to an individual's sense of security and right to live with dignity.

However, most democracies in the world today ban hate speech today on the capacity of such incendiary words to not only cause harm but also disrupt public order by the power of hate speech which is capable of leading to violent consequences such as hate crimes amongst other violent results. Recently, while examining the scope of hate speech laws in India, the Law Commission in its report published in 2017 recommends further introducing new provisions within the penal code that specifically punish incitement to violence in addition to the existing ones⁶¹⁵. Perhaps this standard of 'incitement to violence' is seen as being a more concrete basis for prohibiting speech by means of legislation. Incitement to violence demands a greater level of harm to be demonstrated in comparison to other forms of hate speech (discussed previously) and therefore justifiably be the subject of censure by criminal law. As far as criminalization of speech is concerned, it remains a debatable issue with the legal scholars divided between what kind of speech should ideally be criminalized; should only a certain type of hate speech be banned and whether all hate speech be made punishable by criminal law or it can be dealt under civil law⁶¹⁶. However, it is agreed that hate speech which is shown to be able to incite violence is a serious case and merits stern action to prevent any further damage. Therein, criminal sanction is seen as most suitably employed to curb hate.

Legal Approach towards Hate Speech in India

⁶¹³ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, United States of America, 2012).

⁶¹⁴ *Ibid.*

⁶¹⁵ Law Commission of India, 267th Report on Hate Speech (March 2017).

⁶¹⁶ Tanya D'souza, Laura Griffin, et.al., "Harming Women With Words: The Failure Of Australian Law To Prohibit Gendered Hate Speech" 41(3) UNSW Law Journal 943 (2018) available at <http://li.ac.in/pdf/csi.pdf>.



In the matter of regulating hate speech, Benoit Frydman has identified two broad approaches that are adhered to by the various countries. One is the “slippery slope” approach which is largely seen in the case of United States which has a strong and persuasive First Amendment jurisprudence and, on whose test, any kind of fetters on freedom of speech and expression fails. A ban on hate speech would inevitably run afoul of the First Amendment and would be for certain measure, a tricky endeavor. Thus, United States has no anti-hate speech law so to speak of, the only restriction being on speech that incites imminent lawless action.

Second is the “fatal slope” approach that is commonly followed by a majority of jurisdiction like Europe wherein hate speech is expressly banned by way of laws that prohibit speech because of the danger that it may incite violence and lead to mass scale killings and other hate crimes.

India subscribes to the latter approach and bans hate speech on the basis of religion, ethnicity, culture or race. Even though no law in India defines what constitutes hate speech, E Article 19(1) of the Constitution gives all citizens the right to freedom of speech and expression. However, these freedoms are subject to “reasonable restrictions” outlined in Article 19(2). Speech that violates abuses or infringes in any way on “the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence” is subject to censure under these restrictions. The Indian

Penal Code has several sections that deal specifically with punitive action around these reasonable restrictions. For example, Section 153(A)⁶¹⁷ penalizes the “promotion of enmity based on religion, race, place of birth, language.” Section 298⁶¹⁸ penalizes speech that deliberately intends to wound religious sentiment. Sedition is punishable under Section 124A⁶¹⁹, and statements concerning “public mischief” under Section 505. Other laws in India that function as exceptions to the right to freedom of expression include the Representation of The People Act 1951, the Code of Criminal Procedure 1973, the Religious Institutions (Prevention of Misuse) Act 1988, and the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989. The issue of the right freedom of expression online was most effectively addressed in *Pravasi Bhalai Sangathan v. Union of India*⁶²⁰, upholding the right to free speech, the Supreme Court of India asked the Law Commission if “it deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of ‘hate speeches’ irrespective of, whenever made.” In its report on hate speech (267) released in May 2017, the Commission explained, “The standard applied for restricting Article 19(1)(a) is the highest when imposed in the interest in the security of the state.” It recommended that a restriction under Article 19(2) must have a “proximate and direct” connection to a threat to public order. Although many countries have laws against hate speech, their definitions of it vary significantly. The Law Commission Report says, “The analysis of hate speech in different countries suggests that despite not having a

⁶¹⁷ The Indian Penal Code, 1860 (Act 45 of 1860).

⁶¹⁸ Ibid.

⁶¹⁹ Ibid.

⁶²⁰ AIR 11 2014 SC 1591.



general definition, it has been recognized as an exception to free speech by international institutions and municipal courts.” Efforts to combat hate speech on Facebook are particularly relevant in the Indian context. Several cases that went to court over the last five years involved individuals whose posts on Facebook had been censored or taken down for being offensive to politicians and Parliament, inciting violence, and hurting religious sentiments. These users were arrested or charged under Section 66(A) of the Information Technology Act, which aims to punish “offensive, false or threatening information” through computers and communication devices. However, in *Shreya Singhal v. Union of India*⁶²¹, the Supreme Court declared that the section “arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance Encouraging Counter-Speech by Mapping the Contours of Hate Speech on Facebook in India between such right and the reasonable restrictions that may be imposed on such right.” Thus, due its ambiguous and open-ended nature, the court declared 66(A) “unconstitutional.” Different legal systems draw different distinctions between speech protected by ‘freedom of expression’ and ‘hate speech’. For this report, the researchers have classified speech in two ways:

- More lenient

Since some definitions include abusive speech that merely insults individuals, the study marks those instances as well.

- More restrictive

However, it recognizes that stricter definitions of hate speech only limit speech

that incites violence or discriminates based on group characteristics.

To better understand the dynamics of hate speech in a cross jurisdictional online environment, the study draws a distinction between personal abuse and hateful speech that incites violence.

Over- Criminalization of Hate Speech

In 2015, Indian author Perumal Murugan in a dramatic and extremely emotional twist of events announced his literary “death” and withdrew his entire set of published works from public domain, vowing to never write again.⁶²² This came as result of the violent backlash he faced at the hands of religious and caste-based groups that claimed that his fifth novel titled “Madhoragan” in Tamil or “One Part Woman” offended the religious sensitivities, insulted the Kailasanathar temple, Lord Shiva and female worshippers and appealed to prurient interest amongst other allegations.⁶²³ The novel’s plot revolved around a couple, Kali and Ponna and their struggles with conceiving a child. The objections to the novel were mainly around the fictional portrayal of tradition of annual festival in Tiruchengode revering the Ardhanareeswarar Temple’s presiding deity. While the novel was published in 2010 to critical acclaim, the protests started years later with burning copies of the book culminating in police advising the author to leave his own home when all ‘peace-talks’ with the groups failed. He was forced to apologise and withdraw his books. Finally, when the matter reached the Madras High Court in 2016, the Bench was pleased to dismiss the allegations against the book

⁶²¹ AIR 2015 SC 1523.

⁶²² Staff, “Author Perumal Murugan has died :Tamil writer withdraws all published work following protests” available at :

<https://scroll.in/article/700217/author-perumal-murugan-has-diedtamil-writer-withdraws-all-published-work-following-protests>.

⁶²³ Ibid.



and upheld the artistic liberty and expression of the author. It observed that freedom of speech and expression cannot be sacrificed and give into the demands of the mob so as to maintain law and order.⁶²⁴ It was only after this judgment in his favor did the author returned to writing. The above is not the first nor the last in the line of cases that have sparked time and again the debate around the way our laws are built that completely ban, in effect, any kind of purported critical speech against religion, group, caste or belief. This poignant case brings to the fore fundamental questions on what is speech that is protected under the ambit of Article 19(1)(a) of the Constitution and what becomes the cynosure of the criminal provisions of the law. Ultimately, this raises certain fundamental questions about the nature of our law itself. Upon closer look, such concerns are germane to the ongoing discussion on the scope and extent of criminalization of speech. Sanford Kadish referred to the ‘over criminalization’ phenomena in criminal law as using the law excessively to cover such conduct that should ideally not be the concern of legislature. In fact, it should be addressed under the ambit of “public policy objectives” rather than criminal law which is “poorly suited” to achieve the purported ends. In fact, a host of academics today warn against expanding the scope of substantive criminal law in light of a “cost-benefit” analysis that ultimately proves too burdensome on the criminal justice system and hence its use, unjustified. Erik Luna specifically points out that the “over criminalization phenomena” consists of “untenable offences, superfluous statutes, doctrines that overextend culpability

crimes without jurisdictional authority, grossly disproportionate punishments and excessive or pre textual enforcement of violations. “It aims to bring in, amongst other culpable behavior, offences where “harm is merely threatened but the risk has not yet materialized”. Most of the ‘speech’ related offences that criminalize various forms of speech have only burgeoned in scope “by prohibiting a myriad of crime prevention offences that target risk-creating speech”. This holds true for the Indian context as well. It is well recognized that freedom of speech and expression under the fundamental rights is not absolute and is subject to limitations itself listed in the Constitution. However, despite this, a plethora of offences can be found that impose further restrictions on speech (not only those related to hate speech) of individuals across the length and breadth of the legal landscape that is indicative of the ‘over criminalization of speech’ phenomena. The fact that most of these offences are so broadly worded and vague only adds to the list of ailments that plague the existing criminal speech provisions. What we understand as over breadth today has already been the cause of calling into question and subsequent declaration of statutes as ‘unconstitutional’ in various cases before the Supreme Court. This trinity of vagueness, broadness and the chilling effect in free speech cases has proved to be the undoing of speech-restrictive provisions of the Information and Technology Act, 2000⁶²⁵. Most of these speech-related offences in the Indian Penal Code mentioned previously within the legal framework have withstood the constitutional challenge on the basis of preserving “public order”. It is a matter of

⁶²⁴ “Fault in our speech”, available at : <https://www.thehindu.com/opinion/lead/perumal-murugan-book-controversy-and-madras-highcourt/article14476037.ece>.

⁶²⁵ Shreya Singhal v. Union of India, AIR 2015 SC 1523.



speculation that would the same laws is able to withstand the judicial scrutiny and muster pass if tested on the touchstone of today's evolved standard of judging free speech cases that are a healthy mix of judicial borrowings from foreign jurisdictions that lean heavily in favor of individual liberty and freedom of speech. Yet, the proliferation of 'criminal speech' provisions in criminal law seemingly continues unabated without any empirical evidence of its efficacy in actually combating the menace of harmful speech. Illustratively, the Law Commission of India in its report published in 2017 recommends further introducing new provisions within the penal code that specifically punish incitement to violence as well as discrimination. This kind of a framework, therefore, has made the criminal law as the "first response" in curbing hate speech. It stands in stark contrast to the principle of "alternative and least restrictive sanctions" which calls for employing such options for regulation that satisfy the government's interest of banning a certain type of speech short of making the speech a subject of criminal law which should ideally be the "last resort".

Effective Response to Hate Speech

The legal framework employs a variety of methods to curb hate speech in India. Primarily the law, as we have seen in the preceding section, makes it a crime to utter certain types of hate speech. This crime is punishable by imprisonment of varying durations, with or without fine. Most of these provisions are also cognizable as well as being non-bailable and non-

compoundable. In effect, this makes the legal provisions very stringent with serious implications. Apart from this, as per the medium of propagation i.e. print, television or internet, hateful content is banned, censored or leads to shutdown of the host site. In case of print, the authorities under the criminal procedure code have power of seizure of the material in question as well⁶²⁶. Despite this elaborate framework of law and policy hate speech cases continue to grow. It has been opined that this growth is certainly not because the law is lax rather it is the faulty implementation of the law that needs to be closely examined.⁶²⁷

The effective and judicious implementation of laws is a challenge that is not easily surmounted. At the same time, the question that begs to be answered is whether the legal framework is enough to address the challenges of regulating hate speech given the delicate balance that needs to be struck in dealing with hate speech cases and meting out justice to the parties involved. The harm that hate speech propagates is not only deleterious but has extremely dangerous consequences. The exposition of the legal framework above has shown that it works in a limited sphere. There is no scope for repairing the damage that hate speech does to the society at large neither is there space for victim rehabilitation or any means of redressal. It is the need of the hour, therefore, to look beyond the rigors of criminal law in search of answer to an effective response to hate speech. There are two such approaches discussed below that have worked with success in select jurisdictions and show great promise.

⁶²⁶ The Code of Criminal Procedure, 1973 (Act 2 of 1974), ss. 95,96.

⁶²⁷ National Law University Delhi, Report on Hate Speech Laws in India (April, 2018) available at :

<https://www.latestlaws.com/wp-content/uploads/2018/05/NLUD-Report-on-Hate-Speech-Lawsin-India.pdf>.



• **Alternative Dispute Resolution of Hate Speech Cases**

Alternative dispute resolution proposes a paradigm shift in the way the legal system administers justice. It shifts the focus from court-centered formal legal proceedings to the settlement of the dispute between parties by way of negotiation, mediation, arbitration and/or conciliation. The importance of this approach for redressal of disputes cannot be overemphasized in light of the fact that it works in a time bound manner focused at arriving at settlement between parties as opposed to pursuing the matter in a court of law which are already overburdened with the load of cases pending for years, bound by procedural formalities.

When it comes to adjudication of hate speech offences under the Indian criminal law framework, it is mired with time-consuming formalities of procedure. The criminal procedure code mandates that sanction for prosecution by the government is required.⁶²⁸ The sanction is a threshold limitation on the referral of incidents for criminal prosecution. But this grant sanction is itself based on individual discretion of the official. Once the complaint is registered with the police, the court can only adjudge the guilt of the accused after a full-length trial. During trial, there is a heavy burden of proof for the parties to prove that the act had been done with the culpable state of mind directed at inciting hatred, enmity or aimed to offend any group or class of persons. This entire process is time consuming and might take years to conclude. Justice for

the aggrieved parties in such cases is but a distant dream.

• **Counter Speech**

Counter speech is, simply put, a response to hateful speech which might alternately call for violence, promote hate or uses incendiary words to provoke or defame others. Counter speech is a definitive and exacting answer to such speech and is solely aimed at undoing the damage wrought by the hate speech in the first place. On social media, it is understood as “crowd sourced responses to extremist or hateful content,” that is used to “tone down the rhetoric” in cases of posts containing hate speech by way of a disagreement or agreement as posted by the users⁶²⁹. This response speech may take myriad forms depending upon the medium used to propagate hateful speech: it may be a direct answer in the form of true facts to a hateful message concocted out of a false claim or fake news; clarification of any dubious claims made or even using sarcasm, humor and cartoons, memes and caricatures to counter and defuse the tension that a hate message aims to promote. But perhaps what is more important to highlight is the fact that the proponent of counter speech can be anyone, even the victim herself. The victim may choose to respond to the hateful content in a positive manner and create an atmosphere of dialogue with the perpetrator rather than indulge in free-flying counter accusations at each other.

Recently in India, as response to several incidents of mob-lynching, violence and persecution based on religious, racial or ethnic identities of the victims from various part of the country the #notinmyname or

⁶²⁸ The Code of Criminal Procedure, 1973 (Act 2 of 1974), s.196.

⁶²⁹ Demos, Report on Counter-speech on Facebook available

file:///D:/Drive%20C/Desktop/PhD/Hate%20Speech/COUNTERSPEECH/Counter-speech-onfacebook-report%20Demos%20reports.pdf.



“Not In My Name” campaign was launched on social media⁶³⁰. This campaign started with the aim of collecting citizen support and countering the hate narrative being propagated that resulted in those violent incidents. With the joining of several prominent public figures, the campaign went viral with public protests being stages across Indian cities deploring the acts of violence. Overall, it was seen as a successful counter initiative and it continues to draw support from several quarters.

Conclusion

All the types of annoyance towards hatred should be treated with the same zero tolerance as these kinds of actions sometimes take place due to anger and frustration. Although free speech is quite valuable and important in the democracy of any country, it should be restricted only in exceptional circumstances like when it results in murder or violence. The most efficient way to dilute hatred is by the means of Education and Debate. Our prominent schools, public and social media figures have an important role to play in asserting such hatred, encouraging social benefits and helping to promote understanding and compassion with others. As it is rightly said by Desiderius Erasmus that **“Prevention is better than cure”** so in order to reduce and restrict hatred in the future we should start to build and imbibe the right education in us so that the chances of the occurrence of such kind of barbarity is curbed. Education and Debate not only seeks to prevent hatred in the first place, whereas illegalizing seeks to punish the culprit after he or she has already been

involved in the hatred. Although there are many laws regarding hate speeches in the country like India but the laws should be more strict in penalizing the person doing such kind of activities as the most precious thing for an individual are his religious sentiments and beliefs around which the life of an individual revolves and nobody can accept that anyone hurting their religious feelings.

The above are instances of how the challenge of countering hate speech has been approached outside of the existing legal framework. In both instances, it has seen success by direct and active engagement of the victims and the speaker, be it online or offline. Moreover, by bringing all the parties to the discussion table it may also begin the process of healing the harm caused by hateful speech. By resorting to alternate means of settlement in case of hate speech, it would provide both the parties a space for discussion and possible settlement outside of the formal rigors of the legal system. The outstanding characteristic of these approaches is that they do not impinge on freedom of speech and expression of an individual unlike the criminal anti-hate speech laws. In fact, in the case of counter speech, it encourages more positive speech in response to speech invoking hate or violence. In this way, it does not act as a restriction on free flow of views in the “marketplace of ideas”⁶³¹ in that is to be upheld as sacrosanct in today’s liberal democracies.

⁶³⁰ Web Desk, “What is the not in my name protest?” Indian Express, June 28, 2017. available at : <https://indianexpress.com/article/what-is/what-is-the-not-in-my-name-protest-lynching-junaidkhan-4725668/>

⁶³¹ Abrams v. United States 250 U.S. 616 (1919)



ARBITRATION IN COMMERCIAL DISPUTES AND PROBLEM OF JUDICIAL INTERFERENCE IN INDIA

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Abstract

When arbitration was first introduced in India through the enactment of Arbitration and Conciliation Act, 1996 it was covered to resolve business problems and smoothen the process of conflict resolution. Challenges in the realization of objectives of the Act have been deciphered by the Supreme Court and the High Courts through its numerous decisions. The courts understood the paradoxical perspectives in the Act that sought to destroy the rudimentary aspects of the Act. However, undue interference by courts on several occasions is uncalled for.

The objectives of this paper is to explore the various problems associated with international commercial arbitration in India. Arbitration is an indispensable tool for dealing with the problem of huge case pendency in courts. However, it should be made suitable to the local conditions of a given place and be kept away from unwarranted judicial interference in arbitral proceedings.

Keywords: Arbitration, Indian courts, award, foreign, relief.

Introduction

For doing business in India, a faster mode of dispute resolution is indispensable since

court cases take massive time in reaching settlement. Slow adjudication of disputes and overburdening of courts can derail further prospects of economic development for the country. Though arbitration was formally recognized under the Indian Arbitration Act, 1940, it was more of a general law based largely upon the English Arbitration Act, 1934. The Act was replaced by Indian Arbitration and Conciliation Act, 1996 to comply with the UNCITRAL Model Law on International Commercial Arbitration (hereinafter “Model Law”) adopted by the United Nations Commission on International Trade Law in 1985.⁶³²

Arbitral proceedings under the Act call for ad hoc arbitration, Institutional Arbitration, Statutory Arbitration and International Arbitration. Ad-hoc Arbitration commences with arbitration agreement. Institutional Arbitration involves streamlined procedures as arbitral proceedings are undertaken by Institutions of Arbitration. Statutory arbitration is provided and sanctioned by law and International Arbitration involves dispute resolution between nations or parties located in different jurisdictions or countries. These four kinds of arbitration are recognized under the Act. Owing to international relevance of arbitration, India is a party to the Geneva Protocol on Arbitration Clauses of 1923 (hereinafter “1923 Geneva Protocol”),⁶³³ Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (hereinafter “1927 Geneva Convention”)⁶³⁴ and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards

⁶³² UNCITRAL Model Law on International Commercial Arbitration, Dec. 11, 1985, G.A Res. 40/72, U.N. Doc. A/RES/40/72.

⁶³³ Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157.

⁶³⁴ Convention for the Execution of Foreign Arbitral Awards Geneva, Sept. 26, 1927, 92 L.N.T.S. 301.



(hereinafter “New York Convention”).⁶³⁵ The Arbitration and Conciliation Act, 1996 consists of Part I and II holding wider principles of Model Law. Part I encompasses provisions for structure of arbitral tribunal and non-intercession by courts. Part II is largely based on New York Convention and 1927 Geneva Convention. It is not a comprehensive code and is limited to implementation of remote recompenses legislated in these two conventions. Section 9 of the Act allows parties to request the court for interim measure at any time, before or during the arbitral proceedings.⁶³⁶ It is not incompatible with an arbitration agreement between the parties and is corroborated by Article 9 of the UNCITRAL Model Law.⁶³⁷ This right is available at all times and is not dependent upon parties’ issuing notice for invoking the arbitration clause.⁶³⁸

The Arbitration and Conciliation (Amendment) Act, 2015

The Indian courts have consistently practiced greater involvement in commercial arbitrations held outside India especially after Supreme Court’s decision

in *Bhatia International v Bulk Trading S.A. and Another*.⁶³⁹ For that matter, the court in *Venture Global Engineering v Satyam Computer Services Ltd. and Another*, went to the extent of assuming jurisdiction for hearings in cases challenging foreign awards.⁶⁴⁰ This being detrimental to India’s global image, the apex court took a stronger stance in *Bharat Aluminum Ltd. Co. v Kaiser Aluminum Technical Service Inc. (hereinafter “BALCO”)* by holding that Part I and Part II of the Act are mutually exclusive and that Part I will not apply in cases where seat of arbitration is chosen outside India. The Supreme Court went on to paralyze Indian courts for their interference with foreign awards in any manner except for enforcement.⁶⁴¹

Enormity of difficulties ensued post this decision as the interim relief was no longer made available to the parties in India. Even if sanctioned by the foreign arbitral tribunal, the relief became unenforceable in India since it ceased to be qualified as a “foreign award” under Part II of the Act. And therefore, the Act was amended in 2015 to restore the power of Indian courts

⁶³⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

⁶³⁶ Section 9 of the Act states that “A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or ii. for an interim measure of protection in respect of any of the following matters, namely: -

a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

b. securing the amount in dispute in the arbitration;

c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question

may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party) or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

d. interim injunction or the appointment of a receiver;

e. such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

⁶³⁷ *Supra* note 1.

⁶³⁸ *Sunderam Finance Ltd. v. NEPC India Ltd.*, AIR 1999 SC 565.

⁶³⁹ (2002) 4 SCC 105.

⁶⁴⁰ (2008) 4 SCC 190.

⁶⁴¹ (2012) 9 SCC 649.



to grant interim relief unless the parties themselves chose to opt out of this provision. The amendment did not clarify if the arbitration agreement should expressly exclude the jurisdiction of Indian courts leading to confusion. If the jurisdiction is impliedly excluded, it would have defeated the purpose of the amendment. Moreover, if two Indian parties are involved in arbitration which is foreign seated, it remains blurred if at all any interim reliefs will be made available to them by the Indian courts.

The 2015 amendment adds more strength to the order of arbitral tribunal by alleviating it to the order of a civil court. Even for interim relief, the parties can no longer approach the civil court unless the tribunal fails. Much of the interventions by the judiciary were at the pre-litigation stage comprising of application to court for seeking reference to arbitration in a proceeding pending under section 8 or for appointment of arbitrators in the event of a deadlock between the Parties under section 11 of the Act. Under both of these sections, the ultimate word of the court determined the validity and jurisdiction of the arbitration agreement and thus, ousted the jurisdiction of arbitral tribunals. The courts are now empowered to only determine the existence of the agreement to conclude validity. They can no longer tread on any other issues relating to arbitration agreement. While a third party is also allowed to make reference under section 8, it amends the existing position taken in *Sukanya Holdings Pvt. Ltd v Jayesh H. Pandya & Another*. In this case, non-signatories to the arbitration agreement were not allowed to refer the dispute to arbitration.⁶⁴² The Supreme Court's judgment in *N. Radhakrishnan v Maestro*

Engineers & Others also stands clear as now the courts will have to direct the parties to arbitration where the arbitration agreement exists even in cases of fraud. However, the extent of judicial intervention went to the extreme before 2015 especially where the award was challenged on the grounds of public policy.⁶⁴³

With the amendment, stricter timelines for quick disposal of arbitration proceedings are provided for along with the schedule of fees to be charged by arbitrators. The High court now has the power to make rules for fixation of fees for arbitrators. Moreover, to ensure impartiality of Arbitrators, section 12(1) along with the fifth schedule of the Act requires the arbitrator to disclose circumstances which may lead to doubts regarding his credibility. This is keeping in tune with the IBA Guidelines on Conflict of Interest in International Arbitration. Also, for the purpose of boosting institutional arbitration, various international arbitration institutions have been set up in India making it a more conducive center for conducting international commercial arbitrations.

Arbitral Centers in BRICS Nations

In the conference on 'International Arbitration in BRICS-Challenges, Opportunities and Road Ahead', jointly organized by Department of Economic Affairs, Ministry of Finance, Government of India, Federation of Indian Chambers of Commerce and Industry (FICCI) and Indian Council of Arbitration (ICA) in New Delhi on August 27, 2016, the need for a task force comprising of experts and officials was recommended for the purpose of establishing arbitral centers in India and for looking into various challenges facing

⁶⁴² (2003) 5 SCC 531.

⁶⁴³ (2010) 1 SCC 72.



international arbitration with special reference to BRICS nations.⁶⁴⁴

Judicial intervention was disfavored by the Ministry and the credibility of lawyers was questioned in such cases. This issue was highlighted as one of primary importance as the arbitral awards are generally seen to target emerging economies. It was also emphasized that the disputes be settled in local courts for the first five years failing which they may be resorted to arbitration and the frivolous cases be quickly disposed. Successful arbitration could only be possible with regional cooperation and a common framework among BRICS nations. This would help in bringing down the arbitration costs and augment trust in investors across BRICS jurisdictions. It is imperative to improve international ranking of India for doing business as it fosters a healthy investment climate in India.⁶⁴⁵

Promoting Institutional Arbitration in India

Owing to inordinate delays in dispute settlement and lack of infrastructure for arbitration, India became an unattractive venue for international arbitration. Thus, the need was felt to promote institutional arbitration in India. For dealing with commercial disputes, it was suggested by FICCI to appoint expert judges.⁶⁴⁶ It was also suggested that arbitration must not be viewed as a part time activity reserved only for weekends or after court hours as majority of the lawyers do. It should instead be given more priority. Participation of foreign lawyers through 'fly-in, fly-out' can help play a significant role in turning India into a desired arbitration hub. A code of

ethics for arbitrators was emphasized by the Supreme Court in 2014 by Justice Sikri, a senior Judge, to enable the arbitrators to reflect upon the time frames for speedy conclusion of arbitral proceedings. The code was recommended to boost public and parties confidence at both domestic and international level. It was brought forth that although ninety-seven percent of the arbitral awards are upheld by courts yet there is a need to revisit the situation of their enforcement in India. It was felt that arbitration system of Singapore should be followed as a model for ensuring timely and inexpensive settlement of commercial disputes. Also, Institutional arbitration should be given preference over ad hoc arbitration.⁶⁴⁷ This is because ad hoc arbitrations involve long delays, huge costs and complicated procedures for settlements. These hindrances are the result of the retired judges who act as presiding officers to arbitration but hold expertise only in court procedures. They seldom recognize the intricacies of arbitration as a separate mode of dispute resolution. In this context, institutional arbitration proves advantageous as it has a more organized structure in the form of skilled staff, standard international rules and a proper fee structure.

India as Centre for Arbitration

For facilitating fast track resolution, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 has been passed. These reforms aim at improving the institutional capacity of the country and

⁶⁴⁴ FICCI, "Jaitley Suggests Task Force to help set up Arbitral Centers in BRICS Nations", *FICCI Business Digest* 18 (2016).

⁶⁴⁵ ASSOCHAM, Report on India needs dedicated bar for timely disposal of arbitration disputes (Ministry of Law and Justice, 2018).

⁶⁴⁶ FICCI, "Promote Institutional arbitration to make India a business haven", *FICCI Business Digest* 20 (2015).

⁶⁴⁷ *Ibid.*



have been undertaken by strong resolve of the government and the judiciary.⁶⁴⁸

ASSOCHAM Reforms

ASSOCHAM paper on 'Reforms in Indian Legal System,' contends that the delays in disposal of disputes have adversely affected the country's GDP and has resulted in divergence of these cases to foreign commercial courts. Pendency of such cases in Indian courts bring economic losses to parties. They create an environment of policy uncertainty much to the dilapidation of investors.

ASSOCHAM has, therefore, recommended various measures to reduce pendency in Indian courts. These measures involve creation of modern infrastructure, establishment of special benches to hear Intellectual Property cases, increase in number of judges and establishment of an international standard arbitration center in Delhi. For tackling with frivolous litigation, a National litigation Policy is suggested with a view to fix the responsibility in a more transparent manner. Also, cases in trial courts, whether criminal or civil, with pendency of over twenty years should be closed. This should be done under the policy guidelines of apex court and the government. For arbitration cases, the maximum period of pendency that should be allowed is one year failing which it may be brought under the scanner of the relevant High Court or eventually the Supreme Court.

Undue interference by Indian judiciary in foreign arbitral awards led to the diminished faith of investors for conducting arbitration in India. It became difficult for the foreign companies to get their awards

enforced in India as these awards were generally subjected to stay in most of the cases. This ran counterproductive to country's interest in attracting foreign investments. Since the awards cannot be challenged in Indian courts now,⁶⁴⁹ many experts are of the view that Indian parties will be restrained from seeking any relief from Indian courts in cases where the contracts have been executed with foreign parties. It would also not be possible for the Indian parties to obtain relief from foreign courts. Mired in such circumstance, even immediate relief is of no avail.

State of International Arbitration in India post reforms

As foreign investment is prominent for the growth of the country, it demands inexpensive and stable dispute resolution environment. While BALCO decision made a breakthrough in development of Indian arbitration law, there still remains certain areas highlighting the ways in which the arbitration disputes are handled in India.

To begin with, International commercial arbitration helps parties resolve disputes who may otherwise be insecure about foreign court systems. The Arbitration and Conciliation Act 1996 was enacted to provide a fairer mechanism for dispute resolution in the most cost effective manner. The Act is mainly divided into three parts. Part I consists of general provisions relating to regulation of arbitral proceedings. Part II deals with enforcement of certain foreign awards and Part III deals with conciliation. Section 34 of the Act allows the Indian courts to take decisions where the arbitration is seated outside India.

⁶⁴⁸ Press Information Bureau, "Global Conference to Make India the Centre for Arbitration gets underway in New Delhi" NITI AAYOG, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=151811> (Last Modified July 22, 2018).

⁶⁴⁹ Indu Bhan, "SC: Foreign arbitration awards can't be challenged in India" *The Financial Express*, July 24, 2018.



The Supreme Court of India has interpreted the various provisions of the Act in its numerous decisions. For instance, in *Bhatia International v. Bulk Trading S.A.*, the Apex Court took a broader stance in holding that Part I of the Act applies to foreign arbitrations and therefore, the Indian court can validly grant interim reliefs in the present case involving arbitration at Paris. In *Oil & Natural Gas Corp. v. Saw Pipes Ltd.*, the Supreme Court set aside a foreign arbitral award for being contrary to public policy and illegal as the award substantially varied with the domestic law.⁶⁵⁰ This case was further unfolded in *Venture Global Engineering v. Satyam Computer Services Ltd.*, by the Indian Supreme Court which invalidated an arbitral award on the application of a foreign party. In this case, a joint venture between U.S. and Indian company was entered into where the shareholder's agreement was the disputed issue. The agreement allowed the non-defaulting shareholder to purchase the defaulter's share at book value and cause dissolution. The Defending party won the arbitration and sought to enforce the same in U.S. The petitioners filed the case before Supreme Court of India and were successful in setting aside the decision of foreign arbitration.

These decisions culminated into direct intrusion of Indian courts into foreign seated arbitrations. This is not conducive with the purpose and objectives for which the Act was enacted. Such decisions also defeat the sole purpose of arbitration and depletes the benefits which could have been bestowed upon the parties by resorting to arbitration as a mechanism over lengthy

⁶⁵⁰ (2005) 5 S.C.C. 705.

litigation. Besides, The New York convention obligates the contracting parties to enforce foreign arbitral awards except under limited circumstances. Eventually in *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc.*, the previous decisions were altered by the Supreme Court by relying upon UNCITRAL Model Law. The court barred the Indian courts from granting any interim relief in cases of challenge of foreign awards. With the decision being prospective, the court forever banned the cancellation of foreign awards by Indian judiciary. However, the enforcement of foreign awards are left open for challenge on grounds of public policy as explained in *Oil & Natural Gas Corp. v. Saw Pipes Ltd.* This is not entirely in compliance with New York Convention. Mired in ambiguity, public policy as a ground can still be stretched by the parties to challenge foreign awards. Moreover, awards granted in countries that are non-signatories to the New York Convention or European Convention on International Commercial Arbitration,⁶⁵¹ and which fall outside the applicability of the Arbitration and Conciliation Act, 1996 cannot, therefore, be enforced in India.

Another prominent issue is the applicability of Indian law in a dispute involving Indian parties in a foreign-seated arbitration. The BALCO case suggested that it should be governed by Indian law. Prior to this decision, the parties were compelled to apply Indian law if asked by the arbitral tribunal under section 28 of the Act. This section is no longer applicable to foreign-seated arbitrations as it falls in Part I of the Act. So, now the parties are deprived from seeking adequate relief from Indian courts.

⁶⁵¹ European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349.



In such a scenario, the governing law could be bemusing, if not explicitly stated by the parties in their contracts. Sometimes, it may not be possible for parties to choose India as the desired seat of arbitration for lack of bargaining power. They may also lack financial resources to arbitrate in a foreign land. In such a case, they are left without a remedy. This may encourage taking away of assets from India by foreign parties thereby making it difficult to enforce foreign awards in India. Moreover, there are very few arbitral institutions in India. The Supreme Court in *S.B.P. & Co. v. Patel Engineering Ltd.*,⁶⁵² choose a Supreme Court or a High Court judge as the authority to nominate an arbitrator leading to interference by the judiciary and diminished role played by arbitral institutions in dispute settlement.

At this juncture, it could be useful if broad parameters of public policy are defined or else the enforcement of foreign arbitral awards can be successfully blocked. Moreover, remedy for interim relief should be made available to parties so as to prevent selling of assets situated in India. Parties should choose Indian law as the governing law in their contracts. The enforcement of non-convention awards should also be addressed.

Above all, the BALCO decision brought forth a conducive environment for conducting international arbitrations in India. It is also a symbol of nation's efforts in becoming one of the best places for international arbitrations worldwide. While certain areas still needing consideration, the case is a pristine reflection of the existing obstacles for India in becoming a much coveted arbitration hub.

Conclusion

Distressing state of affairs for arbitration in India is the result of various impediments encountered by parties every time a dispute is referred to an arbitral tribunal. Delays at different stages of arbitral proceedings fails to ward off the difficulties experienced in court systems throughout the country. As a consequence, the businesses suffer. The existing framework of arbitration law in India should meet the prerogative as devised by the UNCITRAL Model Law.

Although the Arbitration and Conciliation Act, 1996 has hitherto been subject to numerous modifications and amendments, many of these changes have largely remain inapplicable. These have been taken into notice by the Supreme Court and High courts from time to time. The courts have attempted to address the various issues through interpretations especially ones that have resulted in the failure in achieving the main objectives of the Act.

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⁶⁵² (2005) 8 S.C.C. 618.



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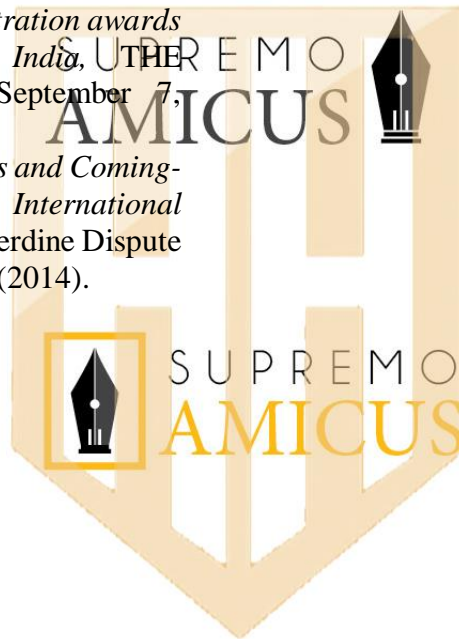
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**THE LOST ESSENCE OF MEDIA- AN
EXASPERATING FERRAGO OF
DISTORTIONS,
MISREPRESENTATIONS AND
OUTRIGHT LIES**

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INTRODUCTION

Freedom of speech and expression pumps the blood into the democracy of our country. If that is supposed to be our greatest strength then media which is the vocal representation of the people of this country is rightly called the fourth pillar of democracy. Media proudly takes up the responsibility to bridge the gap between what is happening around in this world and what about that is known to a layman sitting in front of his television or the one reading his morning newspaper with an intention to know it all. It is truly said that with great power comes great responsibility and it aptly goes with the role of media in this country.

The problem has been arising in the recent past and is certain to continue in future because the media is not weighing the powers and responsibilities equally. On one hand where our constitution makers gave all the powers of speech and expression to the media as is given to a citizen of this country they also expected it to be independent of any political or commercial control on the other hand. The problem becomes bigger when the media shifts responsibility from bringing the true picture in front of people to misrepresenting them by becoming endorsement forums for various political parties.

Corruption in media houses is the ultimate point of concern at this phase of developing India.⁶⁵³ The phrase 'pen is mightier than the sword' losing its spirit when the pen itself is becoming the sword used for slashing the essence of media and turning it into a brothel where the prostitution of journalism is the only candour. By becoming a puppet in the hands of anyone who offers money or by fearing anyone who demonstrates power, media has come down to be violence by words.

The transformation of media houses into corporate hubs is increasing the misery multiple number of times. Media and free press being the torchbearer of the free speech of the people must have its independence. However, the current mainstream media is trapped in the shackles of corporatization and commercialization. In the present era, media has become a corporate hub where news is sold depending upon the sensitization that it creates. The essence of media is lost the moment truth vanishes and favouritism takes over.

Media is now becoming dishonest not only to itself but to the millions of people of this country who vest their faith into it.⁶⁵⁴ It is sad to see how the bitter reality and true sufferings of this country escapes from the eyes of this media and how a small political stunt by a political party is exaggerated for months to influence the vote bank.

It also needs to be understood that the Honourable Supreme Court provides Right to Privacy as a fundamental right. Therefore, the sting operations that include a lot of undercover work and are done by

⁶⁵³Essel Infraprojects limited v Sanjeev Srivastava & Abhimanyu (2014) SCC Online Bom 1780

⁶⁵⁴Rajdeep Sardesai v State of Andhra Pradesh & Others (2015) 8 SCC 239



private media houses certainly become the debate of media ethics and authority. The sting operations are not only intrusion on someone's privacy but also unethical and indecent. The media recording anything that transpires in a closed room between consenting adults without their knowledge or permission can never be justified as Freedom of Press and Media.

The media of this country has evidently come down a long way towards hypocrisy and is losing its essence along with the faith of the people. It is high time analyse and makes things as they ought to be before it gets too late.

CONSTITUTIONAL AUTHORITY OF PRESS AND MEDIA

Article 19 (1) (a) of the Indian constitution guarantees the freedom of speech and expression.⁶⁵⁵ Freedom of Speech and expression means the right of a citizen to express his opinions freely by words of mouth, pictures, printing, writing or any other mode. It thus includes the expression of one's ideas through any communicable medium or visible representation, such as gestures, signs and the like.⁶⁵⁶ The expression also implies publication and therefore freedom of press and media is included in this category. Unlike the Constitution of U.S.A, the Indian Constitution does not expressly proffer the freedom of press and media. It is so because in the constituent assembly debates Dr. Ambedkar stated that a separate law for freedom of press is not necessary as he considered press and individual (i.e. citizen) to be one and the same as far as exercising the right of free speech and expression is considered. Even though there

is no separate provision for freedom of press and media in the Indian Constitution yet its existence in Article 19 (1) (a) is intrinsic and adds value to the right of freedom of Speech and Expression.

In the case of Romesh Thappar V State of Madras⁶⁵⁷ and Brij Bhushan V State of Delhi⁶⁵⁸ the Supreme Court presupposed that freedom of press is a vital and indispensable part of right to freedom of speech and expression.

Thus, it is established that the right to freedom of speech and expression contains in itself the right to spread and circulate one's ideas and opinions freely and without any hindrance by employing all modes of publication. However, this right is not absolute. There are certain restrictions imposed on this right under Article 19 (2) which empowers the Government to put reasonable restrictions on the exercise of right to freedom of speech and expression on the following grounds, e.g., security of the State, friendly relations with foreign States, public order, decency and morality, contempt of court, defamation, incitement to offence, and integrity and sovereignty of India.⁶⁵⁹

CORRUPTION IN MEDIA HOUSES – PRINT & TV MEDIA

The phrase 'pen is mightier than the sword' lost its spirit when the pen itself became the sword used for slashing the essence of media and turning it into a brothel where the prostitution of journalism is the only candour. Newspapers which once proved to be the voice of the people and helped the freedom fighters in propagating their ideologies and nationalist feeling are now

⁶⁵⁵ LIC v Manobhai D Shah (1992) 3 SCC 637

⁶⁵⁶ Lowell v. Griffin, (1939) 303 US 444

⁶⁵⁷ Romesh Thappar v State of Madras 1950 SCR 594

⁶⁵⁸ Brij Bhushan v State of Delhi 1950 SCR 685

⁶⁵⁹ Shreya Singhal v Union of India (2015) 5 SCC 1



reduced to be a bunch of papers advertising about a particular political party and the only effect that it now has is of creating controversies and adding fuel to the existing ones. Press is called the fourth pillar of democracy, with its other three pillars drenched in the sludge of corruption it is expected out of press to execute its duties with a sense of responsibility and live up to its glorious past. However, the media nowadays has miserably failed in understanding the meaning of the term 'responsible journalism' and has molded it to its own personal benefit.⁶⁶⁰ Responsible Journalism is not just a term instead it is the reason why press is called the fourth pillar of democracy. Media is like a mirror of the society which shows the people as to what is going on in the society. It has an obligation to communicate to the people the correct information relating to political, social, economic, cultural and other activities going on in the country. It is the responsibility of the press to act as the watchdog against the arbitrariness of the government or any of its organs. It is said that a responsible media can lift the nation to great heights but an irresponsible media can bring it down to mud. People tend to have a faith in media as it is believed that it projects the real face of the society that is hidden behind the mask of sophistication. However this belief was destroyed when Indian media was ranked second most untrusted institution in a survey conducted by Edelman Trust.⁶⁶¹ This did not come as a shock because with the emergence of spreading of fake news, creating false propaganda for the TRP, exaggerating unimportant issues, conducting unintelligent debates over religious matters

which creates unrest; media somewhere lost its reliability.⁶⁶² A flagrant example of corruption of media would be not covering the mysterious death of Justice B.H. Loya who was presiding over the Sohrabuddin Sheikh case.⁶⁶³ Even though it was supposed to be national news yet none of the news channels bothered to cover it because of the risk involved in it. It was only after the Indian Publication 'The Caravan'⁶⁶⁴ that published the story of the mysterious demise of the 48 year old Justice, the other big news channels reported on it and that too, to create more confusion than before.

It is very unfortunate to note that apart from an online news website none of the other news channels dared to report on how the company of Jay Amit Shah (son of Amit Shah) increased its turnover by 16,000 times after the Bhartiya Janta Party (BJP) came into power following the general elections of 2014.

Earlier corruption in media was limited to page 3 and Bollywood but now it has disseminated to political arena as well. There is a record of people admitting that representatives of newspapers like Dainik Jagran, Eenadu and Dainik Bhaskar created the news in their favour in exchange for money. There was an allegation against the newspaper Eenadumade by P Kodanda Rama Rao, a candidate of the party Loksatta of Andra Pradesh who accepted that he paid Rupees 50,000 to the newspaper for publishing an article in his favour.⁶⁶⁵ However, this is a mere allegation but the significance of such an

⁶⁶⁰ Common Cause v Union of India & others (2018) 13 SCC 440

⁶⁶¹ <https://www.edelman.com/research/2017-edelman-trust-barometer>

⁶⁶² Advocates Association v UOI (2013) 10 SCC 611

⁶⁶³ Rubabuddin Sheikh v Amit Anilchandra Shah 2015 SCC Online Bom 7806

⁶⁶⁴ <https://caravanmagazine.in/tag/bh-loya>

⁶⁶⁵ <http://news.rediff.com/interview/2010/apr/16/corruption-in-media-from-page-3-to-politics-now.htm>



allegation cannot be completely overlooked.

MEDIA TURNING INTO CORPORATE HUB

The essence of democracy lies in the freedom of speech and expression. Media and free press being the torchbearer of the free speech of the people must have its independence. However, the current mainstream media is trapped in the shackles of corporatization and commercialization. In the present era, media has become a corporate hub where news is sold depending upon the sensitization that it creates. The role of media in making the people aware is long gone instead it is replaced by providing entertainment. Today, news channels have become a medium of entertainment where one can witness the ridiculous exaggeration of a doltish piece of information over which the anchor rattles continuously for hours. For instance, instead of reporting on the verdict of the Salman Khan's Blackbug poaching case⁶⁶⁶ most of the journalists were more concerned about the disappointment that the verdict brought among his fans. There were journalists outside the court interviewing the so called fans of Salman Khan and asking illogical questions like "Kaisa lag raha hai aapko bhai jaan ko jail jaate dekh ke?" Such mindless journalism arose a tinge of sympathy in the hearts of the general public for a convict like Salman Khan and diverged the issue from his conviction to how great his fan following is. The most relevant question for media from past ten years is as to when and who Salman Khan will marry! This shows the level commercialization of media in the present scenario.

Earlier corporate houses and media houses were two very distinct and separate institutions. The only role of corporate houses in mainstream media was just to provide them the revenue in return of the advertising of their business. The media was unbiased but with the conglomeration of the two institutions, the media has lost its neutral foot. With the entrance of big corporate moguls in the ownership of media houses, the impartiality of the news is somewhere lost.⁶⁶⁷ Therefore, news which hampers the reputation or is not favourable to those businessmen who happen to own the media houses or is main source of revenue of such media houses, does not see the light of the day. Thus, even if the constitution has provided the freedom of press and media, these big businessmen have imposed self-ruled restrictions on the broadcasting of unbiased and neutral news which does not allow them to broadcast a genuine piece of news if it conflicts with the objectives of such corporate media houses. Thus, it can be said that there is a lot of corporate influence on media which is a barrier in the transmission of correct and relevant information. There are many instances of such influence where genuine information was suppressed from being published like Hindustan Times tried to keep itself away from publishing the news regarding the involvement of Kumar Mangalam Birla in CBI's Colgate investigation. Similarly, the Sahara group did not broadcast the arrest of Subrat Roy on any of its news channels. Mr. Vineet Jain, the Managing Director of BCCL stated in one of his interviews to Ken Auletta "We are not in the newspaper business, we are in the advertising business, and if ninety per cent of your revenue comes from advertising you are in the

⁶⁶⁶ State of Rajasthan v Salman Khan (2015) 15 SCC 666

⁶⁶⁷ Naveen Jindal & Another v Zee Media Corporation limited & Others (2014) 5 HCC Del 172



advertising business.”⁶⁶⁸This statement proves how the mission of media has changed from providing people the unbiased, correct and relevant information to fulfilling the interest of its advertisers.

The whoredom of media did not stop just here; it was taken to new heights when the face of Indian media took a one eighty degree turn with the introduction of strategies like “*Medianet*” and “*private treaties*.” The credit of conceptualizing and introducing the strategy of medianet goes to one of the biggest conglomerates in media industry called the BCCL (Bennett Coleman Company Limited) which is the publisher of Times of India (TOI), one of the largest selling English Newspapers in the country. In thirst of making profits it started the policy of medianet which in actuality is a kind of paid news service. Under the fancy tagline of Medianet, the media house openly put forwards the deal of covering product launches and personality related events for a price. When questions were raised about such malpractice, the owners of the media house took the defence that journalists in any case were “bribed” by the public relations firms for ensuring the coverage of their clientele and that theirs was a noble attempt towards the elimination of the intermediates. Other such brazen defence taken by the media house was that these kinds of paid content were published only on the city editions and not on the main edition. The idea of medianet may not look immoral on the face of it but it is one of the many species of paid news and therefore is a clear violation of the ethical standards of journalism.⁶⁶⁹Ashok

Chavan, is a former Chief Minister of Maharashtra whose use of funds for paid news was questioned by the Election Commission of India in 2010.⁶⁷⁰

Another such tactic adopted by media houses which again was introduced by BCCL was entering into “*private treaties*” with non-media companies.⁶⁷¹ Apparently the motive of BCCL (Bennett Coleman Company Limited) behind such a venture was to reduce competition to the Times of India. Private treaties are a kind of arrangement or understanding between the media houses and non-media companies wherein the media house gives an ‘advertising space’ to the company and in return gets share in equity of that company. This is mechanism of quid pro quo devised by the media house for earning more profits. Thus, by entering into a private treaty with a corporate organization, such media house becomes a part-owner of that organization. The New York Times described “private treaties” as an example of the commodification of business news.⁶⁷² An older report by media critic The Hoot identified how “private treaties” influence reporting.⁶⁷³ Such Private treaties provide threefold benefit to the corporate companies entering into this kind of arrangement with media houses;

- i) The media house entering into such a treaty with a company not only publishes ‘advertorials’ or rather ‘editorials’ in favour of such corporate organization but also suppresses or censors any news

⁶⁶⁸<https://ultra.news/d-r/8209/tra-i-details-corruption-in-indian-media>

⁶⁶⁹<https://ethicaljournalismnetwork.org/resources/publications/untold-stories/india>

⁶⁷⁰<https://www.thehindu.com/archive/>

⁶⁷¹<https://www.livemint.com/Politics/3ELPLCt9OgGceFmZSejplJ/Jindal-distributed-CDs-of-the-sting-operation.html>

⁶⁷²https://www.nytimes.com/2010/05/08/world/asia/08iht-letter.html?_r=0

⁶⁷³<http://asu.thehoot.org/web/home/story.php?storyid=3174§ionId=4>



- item which is not in the favour of that company.
- ii) Private Treaties between a corporate entity and a media house more often than not restricts such entity from investing for advertising in other rival media houses which results in blocking of the revenue of those media houses and in turn creating a kind of oligopoly in the media industry.
- iii) A media house entering into a private treaty with a corporate organization is under an obligation to lie in favour of that organization. It would be unreasonable to expect from a media house to publish or speak ill about a company in which it has a stake or of which it is a part owner.

These undue advantages are given to corporate houses by means of private treaties by slaughtering the spirit of ethical journalism and killing the essence of what is called as 'news' because what these media houses publish or broadcast is mere advertisements camouflaged as news. A New Yorker article says that the Times of India "have been dismantling the wall between the newsroom and the sales department" with Times MediaNet.⁶⁷⁴ In one of its reports the Press Council of India (PCI) expressed its concern over the growing prominence of private treaties under which the media houses (both print and broadcasting) enter into an agreement whereby these media houses help in building the goodwill or the so called 'brand' of a listed company or which is

coming out with a public offer through maximum media coverage, publishing articles, news editorials and various other means and in exchange of stake in the company.⁶⁷⁵ This fake news cum advertisements misleads the investors and keeps them in dark as to the actual position of the company in which they have invested their money. One such instance was the 2008 recession which the media houses termed as "temporary slowdown" of the economy in order to prevent the stock prices from falling of those companies of which they technically were a part off. Thus instead of making the country aware of the economic situation of the country these media houses led people believe that it is a minor slowdown in the economy in order to protect their interests.⁶⁷⁷ Making the situation worse the CEO designate of Times private treaties, in an interview with MediaNama, justified the practices as "there are two currencies for advertising – cash and treaties."⁶⁷⁸

Paid news is one of the biggest problems that the media of this country is facing from a long time.⁶⁷⁹ It is like rust that is eating up all the ethics and morals of journalism in India. There are many instances where media can be seen making fake news or adding colour to an original piece of information because it has been paid to do so.⁶⁸⁰ Paid news are mere advertisements for which the media houses are paid in big lumps but these advertisements are published or broadcasted (as the case maybe) as news because even though they

⁶⁷⁴<https://www.newyorker.com/magazine/2012/10/08/citizens-jain>

⁶⁷⁵<http://www.presscouncil.nic.in/OldWebsite/CouncilReport.pdf>

⁶⁷⁶http://www.indiatogether.org/uploads/document/document_upload/2147/PCIsc-mnetsebi.pdf

⁶⁷⁷ <https://ultra.news/d-r/8209/trai-details-corruption-in-indian-media>

⁶⁷⁸<http://www.medianama.com/2008/06/223-there-are-two-currencies-for-advertising-cash-and-treaties-were-not-buying-to-sell-s-sivakumar-ceo-designate-tim>

⁶⁷⁹<https://www.scribd.com/document/35436631/Th e-Buried-PCI-Report-on-Paid-News>

⁶⁸⁰<https://www.theguardian.com/media/greenslade/2011/feb/20/press-freedom-india>



are advertisements which favours any corporate organization or political party or a leader of any such party but these advertisements are circulated without an advertisement tag and are masqueraded as news. The election commission has detected multiple numbers of such cases.⁶⁸¹ Today, the scenario is such that the journalists have forgotten the difference between the front page and the editorial page as on both pages the readers can find the one sided opinion of the writer which is in favour of someone who has paid to get such favouritism. The media of the country set a new benchmark of immorality and corruptness when it stooped down to extortion and blackmail. One such instance of blackmail and extortion was revealed by Jindal Steel and Power Limited through a reverse sting operation conducted on the senior editors of ZEE News in which they were allegedly seen asking for 100 crore rupees from the company in the appearance of advertisements in exchange for suppressing the campaign against the company in relation to coal allocation scam.⁶⁸² There have been other instances where a political party used fake/paid news in order to defame the other political party and create unrest in the country. For instance, in recent past a communal clash had broken out in West Bengal. Instead of using media to maintain peace in the state one of the political parties used newspapers as a medium to spread its fake news which escalated the clash in the State. In another

such instance of paid news the COO of Sun TV, Hansraj Saxena had confessed on affidavit that his channel had fashioned a morphed video of holiness Paramahansa and Nithyananda and actress Ranjitha with the motive of extortion.⁶⁸³ Times Now, one of the leading news channels was slammed with a suit of 100 crore for airing a false news on 10th September 2008. The matter went to Supreme Court and the channel was asked to deposit the money.⁶⁸⁴ One of the biggest instances of paid news in the history of India was when Kannada news channel Samaya TV and its reporter was held guilty by the U.S court for civil conspiracy and defamation. It was established before the court that had conspired with a child molester Vinay Bharadwaj to attack against Paramahansa Nithyananda. In the process the channel also launched defamatory news programs against the U.S. mission of Nithyananda for which they were fined \$5million which is equal to 32 crore rupees.⁶⁸⁵ The Election Commission is reported to have identified more than 1,400 cases of paid news between 2009 and 2013 during which elections were held in 17 states of India.⁶⁸⁶⁶⁸⁷

EXAGGERATION AND MISREPRESENTATION BY MEDIA

If we observe (even from far) we will understand that the current Indian media industry survives on just three things, i.e. Entertainment, Entertainment and Entertainment. So much so that soon there

⁶⁸¹<https://www.scmp.com/comment/insight-opinion/article/1274036/media-collusion-politicians-business-weakens-indian>

⁶⁸²<https://ethicaljournalismnetwork.org/resources/publications/untold-stories/india>

⁶⁸³<https://hinduismnow.org/blog/2016/02/17/nithyananda-video-is-a-fake-sun-tv-coo-hansraj-saxena-confesses/>

⁶⁸⁴<https://timesofindia.indiatimes.com/india/SC-asks-Times-Now-to-deposit-Rs-100-crore-before->

[HC-takes-up-its-appeal-in-defamation-case/articleshow/10734614.cms](https://www.supremoamicus.org/HC-takes-up-its-appeal-in-defamation-case/articleshow/10734614.cms)

⁶⁸⁵ Life Bliss Foundation v Samaya TV, RSM Broadcasters Private Limited & Others (CIVRS 1410615)

⁶⁸⁶<http://www.lensonnews.com/lensonnews/1/59/48201/1/ec-detected-over-1400-paid-news-cases-during-assembly-polls.html>

⁶⁸⁷<http://archive.indianexpress.com/news/congress-goes-buying-reporters-in-chhattisgarh-offers-ours-rs-25000/1207579/0>



will be a need to create a separate category called ‘newstainment’ in order to protect the integrity of the actual news channels (if any left by then). We Indians are very fond of ‘masala’, be it in our food or our lives. Anything that is spiced up attracts our interest and that is the reason of growing *yellow journalism* in the country. Yellow journalism is a concept that was started by Joseph Pulitzer in 1890’s in order to get advantage over William Randolph Hearst’s New York Journal⁶⁸⁸. In yellow journalism a simple piece of information is presented to the viewers/readers in the most sensationalized and scandalized manner in order to attract their attention. As a profession journalism does not only mean reporting any bare piece of information without giving a second thought to its significance instead it is a process which involves a series of steps i.e. collecting of information through a reliable source or medium, segregating the valuable information from non-important ones, editing those valuable information and presenting them in the purest way possible. Unfortunately, this kind of responsible journalism is unknown to the current Indian media houses.⁶⁸⁹ Today’s journalism is nothing but an exaggerated and the most perverted version of insignificant events displayed as breaking news.⁶⁹⁰ Anything that is scandalous deserves the prime time is the motto of most of the news channels and perhaps this is the reason why Pratyusha Banerjee’s suicide became the favourite breaking of news of most of the news channels that none of them bothered to cover the Assam floods that took place at the same time. Apparently media has quite

a fascination for murder mysteries, be it the excessive coverage of Aarushi murder case⁶⁹¹ or the controversial murder mystery of Sheena Bohra⁶⁹², media has always been at its toes to cover anything related to such sensational issues even at the cost of violating the fundamental right to privacy of the people involved in it. However, increasing suicide rates of the farmers or struggle of the people stuck in Assam floods is not so exciting for the media to give it the required coverage.

If there would be a contest of perverted journalism we will have a cut throat competition. The Hindi news channel ‘AajTak’ has managed to cross all levels of absurdity and is continuing to do so with all its dedication and did not give a second thought before declaring Sashi Tharoor a murderer in their media trial long before the court’s decision can be foreseen.⁶⁹³ They have the talent to broadcast a half an hour story about a cat stranded on a terrace as the most important news of the day. Once they were so concerned about a commissioner’s dog being missing that they made a whole news story out of it.⁶⁹⁴ There is something called rhetoric and then there is rhetoric of the anchors of India TV which will make shiver run down your spleen. Some examples of such bizarre headlines are; “ye himdanav iss waqt aapke bedroom mei baitha hai” (A yeti is present in your bedroom right now). Once they reported about a witch who demands onions with the tagline “pyaz maagne vali chudail ka aatank.”⁶⁹⁵ Even the witch would have felt insulted with such cheap reporting. These people come up with stories that one

⁶⁸⁸ <https://medium.com/legalnow/is-indian-media-plagued-by-sensationalism-3f71a5929a0c>

⁶⁸⁹ Jagran T.V. Private Limited v Union of India (2016) 158 AIC 763

⁶⁹⁰ R K Anand v Delhi High Court (2009) 8 SCC 106

⁶⁹¹ Rajesh Talwar v CBI (2012) 4 SCC 2017

⁶⁹² <https://www.thequint.com/explainers/sheena-bora-murder-case-story>

⁶⁹³ Dr Sashi Tharoor v Arnab Goswami & Another (2017) SCC Online Del 12049

⁶⁹⁴ <https://lalitkumar.in/blog/yellow-journalism/>

⁶⁹⁵ <https://lalitkumar.in/blog/yellow-journalism/>



wouldn't imagine in the wildest of his dreams and present it as news but the funny part is that even after such horrendous charade in the name of journalism they are still running as news reporting channels and that too with average ratings.

Talking about exaggeration and misleading cheap headlines, a very recent example would be unfortunate death of a student of National Law University, Jodhpur which the media tagged as "selfie death" and claimed that she died by falling off the lighthouse while taking a "daredevil selfie". However, in reality she was not on the lighthouse and neither was the selfie the cause of her death. The actual fact was that she was flown away by a giant wave. It was mere unfortunate accident which the media twisted and turned into a sensational selfie death story which perhaps gained them a lot of TRP.

Journalists in India did not only stop at turning and twisting of facts for sensational headlines but also went on to the extent of creating their own facts by bribing small children to speak in their favour on camera. The reference here is to a video that went viral in November 2015 in which a reporter of Aajtak was seen bribing a child to speak negatively about a political party. In the video he was seen tutoring the child as to what he has to say and in return he would give him the money to buy his quarter (alcohol).⁶⁹⁶ The reporter did not even shy away from bribing a small kid in name of alcohol, such is the dedication and conviction shown by the journalists for collecting the news or rather creating them (whatever suits better).

⁶⁹⁶ <http://nithyanandatruth.org/world-economic-forum-reports-indian-media-as-the-most-corrupted/>

LAWS REGULATING MEDIA IN INDIA

In this country the media is significantly self-regulated by the backing of the Constitutional authority. However, the Press Council of India and News Broadcasting Standard Authority which is a self-regulated authority itself lay down certain standards to be followed by the newspapers and channels respectively. Although, these standards are more in the nature of guidelines in order to help the smooth functioning of media and are not laws backed by sanctions but adhering to them in the practical scenario can solve most of the problems that are arising on a daily basis.

PRESS COUNCIL OF INDIA- It was established in the year 1966 on the recommendation of the first Press Commission with an objective to preserve the freedom of press and to also maintain and enhance its standard. Currently its functions are governed under the Press Council Act, 1978.⁶⁹⁷ It adjudicates on complaints against the press for violation of someone's rights or of ethics and also on complaints by the press on complaints of violation of its freedom.

It is headed by a retired judge of the Supreme Court who is appointed as the chairman. It has 28 members out of which 20 essentially need to represent the press, 5 are allotted by both the houses of the parliament and 3 are representatives from legal and cultural fields and one nominee of the Bar Council of India.

FUNCTIONS OF PRESS COUNCIL OF INDIA

⁶⁹⁷ <https://samsn.ifj.org/wp-content/uploads/2015/06/India-Press-Council-Act-19781.pdf>



- Safeguards the independence of newspapers
- Builds a code of conduct adhering to high professional standards
- Promotes technical and other research areas related to the news
- Training of new journalists
- Promotes the supply of newspapers from one place to another on time
- Helps to keep a review of functioning, production and processing
- Acts as a watchdog over the rights and responsibilities of citizenship and ensures that the taste of the people is kept in mind.

POWERS OF THE PRESS COUNCIL OF INDIA

- The Council enjoys the power to censure any such rule that violates the ethical standards of journalism and public taste.
- The Council has the authority to hold an enquiry against any editor of the journal if anything leading to misconduct appears.
- The proceedings take place with regard to judicial hearing under section 193 and 228 of IPC.

The Press Council of India therefore is the best place to lodge a complaint against any such practice or incident that is against the essence of print media as its decision is final and cannot be challenged in any court. It also has the authority to cancel the licence of any journalist.

NEWS BROADCASTING STANDARD AUTHORITY- The objectives of this authority are somewhat similar to that of Press Council. It also lays down certain guidelines which help to enhance the

standards and regulate the ethics and practices with respect to broadcasting.⁶⁹⁸ It administers the Code of Ethics and Broadcasting Standards which the News Broadcasters Association drew for its members to adhere to responsible broadcasting and regulate themselves on these lines. NBSA does not interfere in the working of the broadcasters and does not monitor or censor news. It allows the broadcasters complete independence and creativity but only on the condition that it does not violate the ethical standards set by NBSA.

It is a nine member authority out of which four should be eminent persons having outstanding knowledge or experience in the field of law, education, science, literature, medicine, environment, consumer affairs, public administration, human psychology and or culture and for eminent editors who are working in a broadcasting channel and one chairperson who is an eminent jurist.

FUNCTIONS OF NEWS BROADCASTING STANDARD AUTHORITY

- Maintaining the independence of broadcasters
- Setting the standards of broadcast and maintaining and constantly improving it
- Ensuring that the broadcasters adhere to the code of conduct and high professional standards
- Encouraging a sense of responsibility towards the society and public service
- Review and scrutinize any development likely to affect the gathering, supply and dissemination of news
- Any other aspect which is incidental, consequential, related or materially

⁶⁹⁸http://cablequest.org/pdfs/i_b/NBA_Disputes-Redressal_Guidelines_English.pdf



concerned with the above mentioned points

The NBSA has the power to take up complaints under News Broadcasting Standards Disputes Redressal Authority by and against the broadcasters and adjudicate upon them in case of violation of freedom of media and the violation of ethical standards or code of conduct of broadcasting respectively. The decision of the authority is final and binding. However, the problem is that not all channels are members of NBSA and hence it becomes difficult to smoothly run the broadcasting business adhering to the code of conduct and professional standards.

STING OPERATIONS- A HINDRANCE TO RIGHT TO PRIVACY

Sting operations by media which can also be referred as undercover journalism or investigative journalism knows no end. In today's scenario it has become an order of the era. It is a well-planned process which includes a lot of undercover work in order to entrap a suspect. Since media derives its authority from article 19 (1) (a) under the light of freedom of speech and expression, there is no absolute legal mechanism to regulate these sting operations.

These operations can be simply classified into two categories:-

Legitimate i.e. when a person has agreed on taking bribe in return of a favour and this operation is carried out to record this incident already planned in order to create strong evidence against him.

Illegitimate i.e. when a person is just suspected of being into a habit of taking bribe and this operation is carried out by offering him the bribe under a mask and then recording it as evidence against him. What needs to be understood here is the fact that this person would not have committed that crime if he had not been pushed into that situation.

A lot of fingers have been raised on ethical and moral significance of sting operations. Considering the fact that these operations cannot be said to have more value than a person's fundamental right to privacy it can be evidently argued that the sting operations carried out by the media houses certainly invade the right to privacy guaranteed under article 21 of the Constitution. The sting operations are not only carried out on people who are in public domain and whose acts concern the national interest but also on people whose private life can provide sensational news content to the news channels and newspapers and enhance their TRP.⁶⁹⁹ A perfect example of the argument would be the widespread television expose of affair between a professor of Patna University named Matuk Nath Choudhary and his research student. The channels were flooded with sensational but disgusting pictures of private moments between the two.⁷⁰⁰ The concern here is however with respect to the urgency that the media felt to cover this and that with an expensive sting operation. Is the media genuinely the rightful authority to record anything going on between two consulting adults in a closed room? There is no second opinion about this operation invading the right to privacy of the above mentioned people.⁷⁰¹

⁶⁹⁹ R Rajagopal & Another V State of Tamil Nadu 1994 SCC (6) 632

⁷⁰⁰<https://mediamagazine.in/content/sting-operations-and-ethics-journalism>

⁷⁰¹People's Union for Civil Liberties v Union of India (2003) 4 SCC 399



A similar incident was carried out when a sting operation caught Swami Paramahansa Nityanand in a compromising position with a Tamil actress which later was declared as fake. Was this really essential to be covered under the garb of national interest and was it really helping a public cause? Even if it was true then also in an unethical act of professionalism the media once again invaded someone's privacy.

However, it will not be just to take this right away from the media houses completely. Therefore, the 17th law commission in its 200th report made recommendations to the centre to make laws to stop media from invading the privacy rights of the citizen.⁷⁰² The sting operations should be legally regulated and only allowed against people in public domain or against public servants and only in circumstances when the matter involves national interest and national security and only with the prior permission of an authorized committee which might be the Ministry of Information or Broadcasting or any other authority which the law deems fit. That is the only way out to safeguard people's privacy rights against the profit centric interests of the media houses.

The Delhi High Court however referred to the decision of the Supreme Court of the United States in *Keith Jacobson v. United States* (503 US 540) while deciding a case pertaining to a "Live India" sting operation. In the said decision, it was held by the Supreme Court of the United States that "in their zeal to enforce law, law protectors must not originate a criminal design, implant in an innocent person's mind a disposition to commit a criminal act, and

then induce commission of the crime so that the government may prosecute."⁷⁰³

The Delhi High Court held that the principles of the U.S. Supreme Court decision can be extended to the media. The Court held that inducing a person to commit an offence, which he is otherwise not likely and inclined to commit, so as to make the same part of the sting operation is deplorable and must be condemned by all including the media.

Nevertheless, Indian courts have adopted a contradicting view in responding to such sting operations. But, since the evidences recorded were earlier easily admissible in the court as the court did not bother itself with the way the evidence was obtained but in the recent past the court has been looking up to the evidences obtained by sting operations with more caution and only allow it to be admissible if it is in the larger public interest. Evidence by way of sting operations has been treated as extra-judicial confession in certain cases and thus, admissible. The extra-judicial confession cannot be sole basis for recording the confession of the accused, if the other surrounding circumstances and the materials available on record do not suggest his complicity. The recent practice of the Indian Courts as in the case of *State of Haryana v Ved Prakash*⁷⁰⁴ and *Godhra train carnage case*⁷⁰⁵ gives effective and clear reflection on its intention to cautiously consider the evidences obtained through sting operations.

An absolute statute or regulation needs to be enacted, enforcing standards which should be adhered to by the media, without

⁷⁰²<https://www.lawctopus.com/academike/tag/200th-law-commission-report/>

⁷⁰³*Keith Jacobson v United States* (503 US 540)

⁷⁰⁴ *State of Haryana v Ved Prakash Gupta* (1999) 1 Ren LR 689

⁷⁰⁵ *Amrishi N Patel v Commission of Inquiry 2009* SCC Online Guj 10926



invading the freedom of media to a great extent but considering the higher worth of people's privacy right. Courts must lay down unambiguous principles pertaining to the admissibility of evidence, considering the facts and circumstances. Indian courts in the recent past seem to have taken the stand that the sting operations are admissible when they help to combat corruption. In the light of preventing the privacy right of citizen and ensuring that false and fabricated operations are not widespread, the Delhi High Court, in the Uma Khurana case laid down certain guidelines for channels/newspapers.⁷⁰⁶

- A media house intending to telecast a sting operation must obtain a certificate from the person recording or producing it stating that it is genuine to the best of his or her knowledge.
- The channel must obtain permission from a committee appointed by the Ministry of Information and Broadcasting to telecast the sting operation.
- Reports should not be of a nature to create alarm or panic or amount to incitement to commit any crime and the media house should avoid overplaying certain parts and underplaying others.
- Media should observe general standards of decency, considering the sentiments of viewers, especially that of children.

This is just the beginning of a decent era of journalism but only if these guidelines are adhered to in the practical scenario. Media must acknowledge the privacy rights of the citizen fundamentally guaranteed by the constitution by a recent Supreme Court

judgement⁷⁰⁷ and must ensure that none of its acts in the garb of Freedom of Press invades the privacy rights of the citizen of this country like it did when a news channel carried out an illegitimate sting operation on actor Shakti Kapoor by a journalist masked as a lady who wanted work in the film industry and was asked to compromise.⁷⁰⁸ Sting operations like this are not in the national interest neither are for national security and therefore need a permanent halt.

CONCLUSION

India as a country is proud of being a democracy and media on the other hand is certainly proud of being its fourth pillar. There is no second thought to the fact that the media is an essential and integral part of this country upon whose independence and freedom the growth and development of this democracy lies. The powers vested in the media to question even the greatest in the country and to criticize even the most powerful is to ensure that nobody is able to escape from the eyes of the media. This power, freedom and independence undoubtedly are of genuine importance because without all these, it is impossible for the media to bridge the gap between truth and people.

However, the essence of this paper is to highlight the issue of utmost importance which is unarguably pushing the country towards darkness. The freedom and independence that we are relying upon as media's strength have been compromised off late which has led to enormous

⁷⁰⁶ Court on its own motion v State (2007) SCC Online Del 1662

⁷⁰⁷ K. S. Puttaswamy v Union of India (2017) 10 SCC 1

⁷⁰⁸<https://www.indiatoday.in/magazine/controversy/story/20050328-shakti-kapoor-caught-in-sting-operation-offering-work-in-bollywood-for-sex-788030-2005-03-28>



corruption in the media houses.⁷⁰⁹ The media has made it a habit of manipulating news and broadcasting sensational and interesting stuff which awakens the viewer's interest but never bring them into light. The World Economic Forum which was established in 1971 in Geneva and runs as a not-for-profit foundation declared Indian media as the second most corrupt media in the world after Australia on 16th January 2017 in a tweet that posted a screenshot of Edelman report.⁷¹⁰ This shows that the faith of people in media is constantly declining while credibility of these institutions is under question.

The powers vested in the media have been sold for pecuniary interest and making profit has become the sole motive of these institutions. A prime example of this is the COO of Sun TV has been arrested several times for cases of extortion and blackmailing.⁷¹¹ Another defamation case on ZEE TV worth 100 crore which was slapped upon them by Indian cricketer MS Dhoni⁷¹² and author Sree Iyer in his book 'NDTV frauds' significantly exposing how NDTV is one of the most corrupt media house in Indian history explains that all the other channels are not free from the evil practices and are contributing equally in ruining the essence of this profession.⁷¹³

Media houses have sadly turned into corporate hubs and have no shame in selling the most important news for some good amount of money and neither have shame in broadcasting manipulated and forged content in exchange of some interest. Paid

media is taking over the essence and significance of this profession in a rigorous manner. The media is working its heart out in misrepresenting the people of this country either due to the fear of people in power or due to its money making motives.⁷¹⁴

The problem gets doubled when the media in the garb of exposing the truth and in the race of multiplying profits does not respect even the privacy of the citizen of this country. Even after the Supreme Court's decision of Right to Privacy being a fundamental right under Article 21 the media is of the opinion that its powers are over and above any such right. The sting operations carried out by media houses on people whose acts have nothing to do with national interest and that to in illegitimate manner are a crystal clear violation of their privacy rights. The media houses should strictly follow the guidelines issued in the Uma Khurana case and none of the sting operations should be carried out without the permission of Ministry of Information and Broadcasting and if it is not a matter of national interest or security.

It is high time to understand that the corruption in media houses and the broadcasting of fake news by the media for some pecuniary interest has made the fourth pillar of the democracy lose its essence by far. The National Broadcasting Standard Authority has not been able to significantly manage the functioning of news broadcasting television media. The standards set by these authorities are more

⁷⁰⁹All India Anna Dravida Munnetra Kazhagam v L K Tripathi & Others (2009) 5 SCC 417

⁷¹⁰<http://nithyanandatruith.org/world-economic-forum-reports-indian-media-as-the-most-corrupted/>

⁷¹¹<https://www.news18.com/news/india/sun-pictures-coo-saxena-arrested-for-third-time-383351.html>

⁷¹²Mahendra Singh Dhoni v Yeraguntla Shyamsunder (2017) 7 SCC 760 : AIR 2017 SC 2392

⁷¹³<https://www.pgurus.com/ndtv-frauds-book-shows-indian-media-house-broke-rules/>

⁷¹⁴ Re Harijai Singh (1996) 6 SCC 106



in form of guidelines and therefore have been taken for granted by the media houses. Also the fact that not all channels are members of NBSA and therefore there is no control over those channels which are not its members and work arbitrarily. The media genuinely needs to work with more responsibility and concern towards the country as it has diverted itself from the actual path it was supposed to walk upon and has taken the path of corruption and dishonesty.

Therefore, it would be just and reasonable for the parliament to enact statutory laws by passing an act which would provide the news broadcasting channels with a list of activities that should not be done as they are criminal in nature and violate the Constitution of India. The Press Council Act 1978 is a symbol of the fact that enacting a similar act to regulate the media channels will not be unreasonable. It will penalise the corrupt practices like paid media, fake news, misrepresentation, exaggeration and violation of citizen's privacy rights by conducting sting operations. The act would also pre-scribe the code of conduct and professional ethics and standards which must be followed in order to achieve back the lost essence of media. These laws would be backed by sanctions and will expressly talk about the extent of liability of publishers, reporters and editors in case of fake news or violation of laws. Having an authoritative act to reasonably restrict the media practices in the country and putting an end to the self-regulated mechanism of the media is of utmost requirement to eradicate the ill practices in media houses. However, it is essential to understand that this act will not

intervene in the freedom and independence of media that has been vested into them by the Constitution under Article 19 (1) (a) but will regulate its functioning by imposing reasonable restrictions on the media so that in the garb of its freedom and independence it stops misrepresenting people with fake and paid news. This authority has been vested in the government by Article 19 (2) which allows it to impose reasonable restrictions in the interest of public order.⁷¹⁵⁷¹⁶ Since the freedom of speech and expression is not absolute in nature⁷¹⁷ it is time to enact laws codifying the reasonable restrictions and penalising the evil practices that are a blot on the essence and significance of media and stop the media from functioning like a trozan horse. It is time to stop the media from arbitrarily running its shop and making the country suffer under the garb of its freedom and independence and actually work towards its growth and excellence in order to get back the lost essence of media.

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THE TALEM QUALEM RULE ON LAWS GOVERNING PRE-EXISTING MEDICAL CONDITIONS IN INDIA

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Abstract

The below article analyses the *talem qualem* rule (also known as “thin-skull” or “egg-shell” rule) in the context of pre-existing medical conditions of litigants on their demands for compensation. This article has examined a number of Indian judicial pronouncements on the *talem qualem* rule and highlights the important ratios laid down in such judicial pronouncements. The author is a corporate lawyer and is a graduate from Gujarat National Law University.

History of Insurance in India

The history of insurance in India can be traced back to the vedic ages as it finds mention in the writings of Manu (Manusmriti), Yagnavalkya (Dharmasastra) and Kautilya (Arthasastra). The said writings mention pooling of resources that could be re-distributed in times of calamities such as fire, floods and epidemics. Since ancient time, insurance in India has evolved over time, heavily drawing influence from other countries, England in particular. In 1818, the Oriental Life Insurance Company was set up in Calcutta, ushering the advent of the commercial life insurance business in India. The Indian Life Assurance Companies Act, 1912 was the first statutory

measure brought about in India to regulate business of life insurance policies. In 1938, with a view to protecting the interests of the public, the earlier statute on life insurance was consolidated and amended by the Insurance Act, 1938 with comprehensive provisions for effective control over the activities of insurers. Post-independence, in light of allegations of unfair trade practices amongst insurance companies, the Government of India decided to nationalise the insurance business then, by passing an ordinance on January 19, 1956, thereby bringing into existence the Life Insurance Corporation (“LIC”), which absorbed 154 Indian and 16 non-Indian insurers as well as 75 provident societies (in total, 245 Indian and foreign insurers in all).⁷¹⁸

The Government of India set up a committee in 1993 under the chairmanship of R. N. Malhotra (former Governor of the Reserve Bank of India) to propose recommendations for reforms in the insurance sector. Amongst the many recommendations of the R. N. Malhotra’s 1994 report was for foreign insurers to be allowed to enter the Indian market *vide* entering into joint ventures with Indian companies. Following the opening of the Indian market to foreign and private company insurers, the Government of India constituted the Insurance Regulatory and Development Authority (“IRDA”) pursuant to the Insurance Regulatory and Development Authority Act, 1999⁷¹⁹, for regulating and promoting insurance and re-insurance bodies in India, and to also enhance customer satisfaction through increased consumer choice and lower

⁷¹⁸ Insurance Regulatory and Development Authority, *History of Insurance in India*, <https://www.irdai.gov.in/ADMINCMS/cms/NormsData/Layout.aspx?page=PageNo4&mid=2> (accessed on October 21, 2019)

⁷¹⁹ Insurance Regulatory and Development Authority Act, 1999, No. 41, Acts of Parliament, 1999



premiums, while ensuring the financial security of the insurance market.⁷²⁰

IRDA on Pre-Existing Medical Conditions

The IRDA has in place several mandatory guidelines to ensure that health insurance in India is customer oriented and all health insurance providers ensure coverage for existing and pre-existing diseases (“PED”). As per IRDA’s recently issued circular dated September 27, 2019 on ‘Guidelines on Standardization of Exclusions in Health Insurance Contracts’⁷²¹, the definition of PED has now been modified to include:

1. any diseases or ailments that is and/or are diagnosed by a physician 48 months prior to the issuance of the relevant health cover by an insurer;
2. any diseases or ailments for which any type of treatment was recommended by a qualified doctor 48 months prior to the issuance of the relevant policy; and
3. any condition whose symptoms or signs have resulted within 3 months of the issuance of the relevant policy will also classify as a PED.

The aforementioned circular also clearly stipulates to insurance providers that insurance companies can include permanent exclusions only after the due consent of customers are obtained. Further, the IRDA drafting panel has come up with a list of exclusion diseases in chapter IV (*Diseases allowed to be permanently excluded*) of the IRDA September 27, 2019

⁷²⁰ Insurance Regulatory and Development Authority, *History of Insurance in India*, <https://www.irdai.gov.in/ADMINCMS/cms/NormalData/Layout.aspx?page=PageNo4&mid=2> (accessed on October 21, 2019)

⁷²¹ Insurance Regulatory and Development Authority, *Guidelines on Standardization of Exclusions in Health Insurance Contracts*, circular

circular⁷²², wherein apart from the said list, no other exclusions will be permitted in health insurance policies. Some of the important and major diseases that have been added to this list include Alzheimer’s, Parkinson’s, AIDS/HIV and morbid obesity. Moreover, all health conditions and illnesses acquired after the issuance of policy will be covered under the policy.

One the most important developments under this circular has been the restriction on health insurance providers in India to exclude from policies ailments contracted due to:

1. hazardous activity;
2. artificial life maintenance;
3. treatment of mental illness;
4. age-related degeneration;
5. internal congenital diseases;
6. behavioural and neurodevelopment disorders;
7. puberty and menopause-related disorder; and
8. genetic related diseases and disorders.⁷²³

All provisions of IRDA’s aforesaid circular dated September 27, 2019, shall be applicable to all insurance products (including both individual and group health covers) purchased by customers on or after October 01, 2019. Furthermore, if any insurance provider currently has a medical

dated September 27, 2019 (<https://www.irdai.gov.in/ADMINCMS/cms/whatsNew/Layout.aspx?page=PageNo3916&flag=1>)

⁷²² Ibid., Chapter IV (*Diseases allowed to be permanently excluded*), pages 10-14

⁷²³ Ibid., Chapter II (*Exclusions not allowed in health insurance policies*), page 5



insurance in the market that is not in compliance with the September 27, 2019 circular, the same has to be mandatorily discontinued and withdrawn before October 01, 2020.

Talem Qualem Rule on Pre-Existing Medical Conditions

Talem Qualem means the “wrongdoer takes his victim as he finds him” and was explained in the famous South African case of *Smit v. Abrahams*⁷²⁴. It means that a defendant cannot use any pre-existing medical condition as an excuse to avoid liability for the entire claim of the insurance consumer. The following line of cases demonstrate how courts in India have always been in favour of analysing medical claims in the context of the rule on *Talem qualem*:

1. *Jubeda Kom Moulasab v. Kansoor Group*⁷²⁵

In this case, the claimant’s husband died pursuant to injuries sustained in an accident, which was aggravated as a result of his pre-existing infection of pneumonia. The respondent insurance company resisted liability on the grounds of the prevalence of the pre-existing condition of pneumonia. However, the court granted compensation to the claimant basis the rule of *Talem qualem* stating that:

“11. Thus, it is obvious that the injuries sustained were mostly regarding the lungs and the ribs and....it is so obvious that these injuries and the state of his health aggravated pneumonia, making it fatal....

12. It is settled law that a wrongdoer must take his victim *Talem qualem*, which

means that **the wrongdoer must take his victim as he finds him** (per Lord Parker *C.J. inn (1961) 3 All E.R. 1161*). In this case, the statement of the doctor is that *Moulasab* was suffering from pneumonia and it is to this victim of pneumonia that injuries were inflicted in the accident which in the normal course of events aggravated and resulted in the death of *Moulasab*.”

Ratio – The wrongdoer must take his victim *Talem qualem*. It is obvious that the injuries sustained were mostly regarding the lungs and ribs and it is so obvious that these injuries and the state of his health aggravated pneumonia making it fatal.

2. *Jaipur Golden Gas Victims Association v. Union of India*⁷²⁶

A godown, owned by the respondents, storing a consignment of rodent killing pesticides caught fire. In order to put out the fire, the fire brigade officials poured water which reacted with the pesticides emitting highly poisonous phosphine gas making 35 people in that particular vicinity unwell. 2 of the claimants were already suffering from pulmonary tuberculosis which got aggravated by the phosphine, causing them to die a week within the accident. The court here elaborated on the *Talem qualem* or the egg-shell rule:

“..’EGG-SHELL SKULL’ RULE (YOU TAKE YOUR VICTIM AS THEY CAME) APPLIES

76. It is further an established principle of law that a party in breach has to take his

⁷²⁴ *Smit v. Abrahams*, 1994 (4) South African Appellate Division (1 A)

⁷²⁵ *Jubeda Kom Moulasab v. Kansoor Group*, 1980 SCC Kar 32 (Division Bench)

⁷²⁶ *Jaipur Golden Gas Victims Association v. Union of India*, 2009 SCC Del 3357 (Division Bench)



victim talem qualem, which means that if it was reasonable to foresee some injury, however slight, to the claimant, assuming him to be a normal person, then the infringing party is answerable for the full extent of the injury which the claimant had sustained owing to some peculiar susceptibility.

77. In *Marconato v. Franklin* reported in [1974] 6 W.W.R. 676 (B.C.S.C) while on the road, Franklin (defendant) crashed into Marconato, causing her to incur some mild physical injuries. But Marconato had some paranoid tendencies and the accident caused her to develop a debilitating syndrome of psychological problems. Thin skull rule was applied and that means you take your victim as they come. Although the damage is remote and not reasonably foreseeable, the accident operated on the plaintiff's pre-existing condition and the defendant must pay damages for all the consequences of her negligence. This doctrine only applies when the claimant's pre-existing hypersensitivity is triggered into inflicting the injury complained of, or an existing injury is aggravated by the infringing party's act. A clear example of the hypersensitivity type of case is that of persons suffering from haemophilia or "egg-shell" skulls. MacKinnon L.J. said that "one who is guilty of negligence to another must put up with idiosyncrasies for his victim that increase the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one. See: *Owens v. Liverpool Corporation* (1939) 1KB. 394 at 400-401."

Ratio – Keeping in view the medical record of the deceased and the fact that

their pulmonary tuberculosis got aggravated due to inhalation of phosphine gas and they died at a premature age, the relevant claimants were entitled to full compensation.

3. *National Insurance Company Limited v. Pooja Verma*⁷²⁷

Three persons on a scooter met with an accident wherein two of them died on the spot and another died of renal failure after a month of treatment. The insurance company resisted liability claiming that the third claimant didn't die as a result of the accident. The court rejected that contention stating that:

*If between death and the accident, there had been no other intervening factor and a situation regressed gradually to result in death, I would take the most proximate cause for the death as the accident injury itself. It is a well-established theory in tort called talem qualem rule, also known as the egg-shell skull rule that one is required to take the victim as one finds him (see: *Dalian v. White and Sons* (1901) 2 R.B. 669; *Bourhill v. Young* (1943) A.C.C. 92 (H.C.). In other words, it is to the effect that the Court has to take the quality of health of the person as it is and cannot conjecture that death could have been due to any other reason. Even in a case where the person has a propensity for ill-health but ultimately it was the accident that precipitated the death, then it should be taken that he died only due to the accident."*

Ratio – The Court has to take the quality of health of the person as it is and cannot conjecture that death could have been due to any other reason. Even in a case where

⁷²⁷ *National Insurance Company Limited v. Pooja Verma*, 2010 SCC P&H 8936



the person has a propensity for ill-health but ultimately it was the accident that precipitated the death, then it should be taken that he died only due to the accident.

4. *Balaram Prasad v. Kunal Saha*⁷²⁸

The National Consumer Disputes Redressal Commission (“NCDRC”) had determined the compensation to be paid for medical negligence for INR 1,72,87,500 out of which 10% was deducted on account of contributory negligence by the claimant and INR 1,55,58,750 was given to the claimant.

The respondents highlighted the number of antibiotics which were said to have been administered by the claimant to his deceased wife while she was in AMRI contending that the said antibiotics were necessary. It was, however, observed by the Supreme Court of India that by admission of the claimant, the antibiotics were necessary for her treatment and therefore, NCDRC erred in holding that the claimant contributed to the negligence resulting in his wife’s death. The Supreme Court cited the judgement in the case of *Malay Kumar Ganguly v. Sukumar Mukherjee*, (2009) 9 SCC 221 wherein it was observed that:

“123. To conclude, it will be pertinent to note that even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default on part of the defendants. In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of the defendants is not diluted. To that extent, contributory

negligence is not pertinent. It may, however, have some role to play for the purpose of damages.

(Emphasis laid by this court) A careful reading of the above paragraphs together from the decision of Malay Kumar Ganguly’s case would go to show that the claimant though overanxious, did to the patient what was necessary as a part of the treatment. The National Commission erred in reading in isolation the statement of this Court that the claimant’s action may have played some role for the purpose of damage.”

Ratio – Just and fair compensation needs to be calculated on the basis of restitutio in integrum i.e., the victim needs to be put in the position that he/she was in prior to the injury. Assuming interference by claimant during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants.

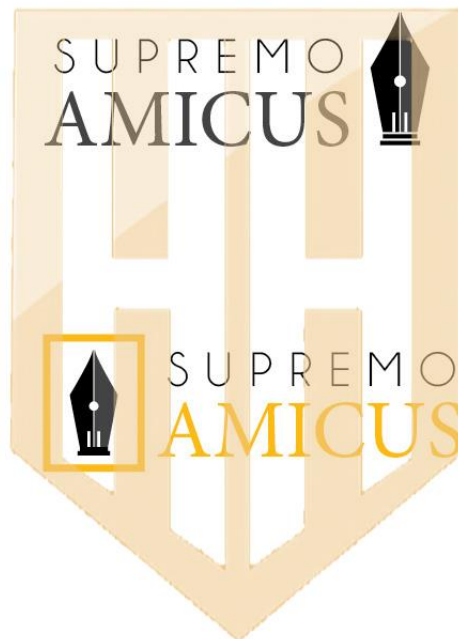
Conclusion

Thus, in light of IRDA’s efforts to ensure that pre-existing medical conditions are mandatorily covered within the framework of insurance policies provided by insurers and court rulings emphasising on the rule of *talem qualem*, the scope for denying insurance claims for pre-existing medical conditions has now been restricted. Recently, even before IRDA’s September 27, 2019 circular on PED, the NCDRC, in a revision plea filed by Reliance Life Insurance Co. Limited against the Maharashtra State Commission’s order dismissing an appeal challenging a district forum’s direction to pay INR 1,12,500 to the husband of one of its policy holders who died of diabetic ketoacidosis, held that even

⁷²⁸ *Balaram Prasad v. Kunal Saha*, (2014) 1 SCC 384



if the insured person was suffering from a disease and did not know about it nor was taking any treatment for the same, the claim cannot be denied by an insurance company.





ABORTION - WAR AGAINST CHILD OR WOMEN RIGHTS

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“There is no such thing as an Unwanted child , there are only Unwanting parents”

-Mother Teresa

INTRODUCTION:

Abortion is an issue which is difficult to speak on, yet impossible to remain silent on .Since the act has “ death of a vulnerable member” as its object. Abortion has been a topic of debate all over the world. India even in its 69th republic year is still debating upon abortion. Medical advancements, inter-generational gaps, technical advancement, dynamic change of society calls ‘abortion debates’ to be the need of the hour.

DEFNITION:

The Black’s Law dictionary had defined abortion as the artificial or spontaneous termination of pregnancy before embryo/fetus can survive on its own outside a women’s uterus⁷²⁹. In simple terms abortion is deliberate termination of human pregnancy. Miscarriage and abortion are words that had been interchangeable for centuries.

Miscarriage is a natural or spontaneous termination of pregnancy meaning the body expels the embryo/fetus on its own without any medical aid.On the other hand Abortion

is a procedure done with a purpose of terminating a pregnancy.

TYPES OF ABORTION:

Abortion can be classified into two broad categories:

- Medical abortion
- Surgical abortion

The types of abortion contracted will be in accordance to the trimester the mother is in.Both types of abortions are available in first trimester. Medical abortion is a procedure that uses medication to end a pregnancy. A Medical abortion doesn't require surgery or anesthesia. Two surgical abortion options are available to women during the first trimester.

- D&A (dilation and aspiration)
- D&C (dilation and curettage)

Second-trimester abortions must take place in a hospital setting .Medical abortion is not available during the second trimester. Surgical abortion options that are available to women during the second trimester.

- D&E (dilation and evacuation)
- D&X (dilation and extraction)

CONTEXT OF RELIGIOUS AND ETHICAL VALUES AND RATIONALE BEHIND ABORTION:

According to hindu mythology the most important thing for each soul is the unfolding of its karmic destiny toward this goal. Abortion can obstruct this unfolding, and therefore it is condemned⁷³⁰. The practice of abortion is negatively referred to in the earliest Hindu scriptures, the Vedas and the later *smrti* texts also contain injunctions against abortion, as well as protections for pregnant women. “ In the

⁷²⁹ [Black's Law Dictionary Free](https://thelawdictionary.org/abortion/) 2nd Ed. and [The Law Dictionary](https://thelawdictionary.org/abortion/) ABORTION

⁷³⁰ Lipner, Julius J. "On Abortion and the Moral Status of the Unborn", in *Hindu Ethics*, edited by Coward, Lipner, and Young. State University of New York, Albany. 1989.



Visnudharmasutra, killing either fetus or mother is equated to the worst crime possible in Hindu society. The *Gautamadharmasutra* tells us that two crimes that call for a woman to have her caste revoked are adultery and abortion.⁷³¹ Even the people who perform abortions are condemned in various texts such as the “*Satapatha Brahmana*” compares the reputation of those who eat beef with those who perform abortions, while in the Upanisads they are placed in a category with thieves and outcasts⁷³².

The word "abortion" is not mentioned in the Bible, but much in the Bible speaks to the issue. Its opposes to abortion follows from a belief that human life begins at conception and that “Human life must be respected and protected absolutely from the moment of conception”.⁷³³

ABORTION LAW ALL OVER THE WORLD:

Law regarding abortion are diverse and vary from country to country. In some countries it is available to women on request with or without exceptions while in others it is totally outlawed. Most states restrict abortion after specific point during pregnancy, known as gestational limit. In countries where abortion is illegal, exceptions may be made for a variety of cases, ranging from the victims of rape, contraceptive failures to no exceptions at all. Women in several countries where abortion is outlawed travel to other countries to get abortions done. Countries are categorised based on their legal regime on abortions.

CATEGORY A

⁷³¹Eubios Journal of Asian and International Bioethics 14 (2004), 149-50. <https://www.eubios.info/EJ144/ej144j.htm#_ftn4>

Countries which permits abortion on request. According to World Health Organisation 50 countries including United states allow abortion on women’s request with no requirement for justification however access & procedures varies.

CATEGORY B

Countries in which abortion is totally outlawed. In countries such as Brunei, Guatemala, Libya, Syria and Alabama (US) abortions are totally outlawed and only available to save the women’s life. Even exceptions for cases of rape and incest are not available to women in countries like Brunei, Guatemala, Libya, Syria, Alabama (US), Qatar, Mexico and Niger.

CATEGORY C

Countries in which abortion is permitted for protecting life of women and fetal impairments alone. In Qatar and Niger abortion is also permitted in cases of fetal impairment.

CATEGORY D

Countries with liberal law towards abortion. Abortion is looked upon with modern liberal approach in countries with liberal laws like United Kingdom, Finland, India and Japan where abortion based on socio-economic grounds are also permitted.

CONTROVERSIAL DEBATES SURROUNDING ABORTION

Abortion debate can be recapitulated in two terms- Pro Choice and Pro Life.

“No uterus, No opinion” famous dialogue by Rachel Green, a character on the

⁷³²Whitney, William Dwight, trns. *Atharva-Veda Samhita*. Harvard Oriental Series, vol. VII. Harvard University. Cambridge, MA. 1905.

⁷³³ [Catechism of the Catholic Church, 2270](#) (Oct. 19, 2019, 10:04 AM) Wayback Machine



popular American sitcom Friends clearly express the thoughts and ideology of Pro choice proponents. Proponents, contend that choosing abortion is a right that should not be limited by governmental or religious authority, and which outweighs any right claimed for an embryo or fetus.

“I am just the oven” is also a famous dialogue by Phoebe Buffay a character from the sitcom Friends depict the ideology of Pro life people as they argue that the cake doesn’t belong to the oven just because it is baked in there. Opponents, identifying themselves as pro-life, contend that individual human life begins at fertilization, and therefore abortion is the immoral killing of an innocent human being.

ARGUMENTS FOR BAN ON ABORTION

“If a mother can kill her own child - what is left for me to kill you and you to kill me - there is nothing between.”

— **Mother Teresa**

Anti-abortionist and Pro life people opposes abortion as they consider abortion akin to murder. They fear that legalizing abortions may lead to gene selection and sex determined abortions. They argue with the quote of Dr. Suss “A person is a person no matter how small” stating that abortions are death penalty promulgated to innocent fetus .They also propose approving abortions would result in irresponsible behaviour . Legitimising of abortions traumatize its opponents as they fear abortions would replace contraception. They argue that abortions disregard the sanctity of life and curb the right to life of the fetus that starts at its conception. They express their care for women cause abortions have deteriorating effect on the psychological and mental health of women

and repeated abortions may have detrimental effect on women health. Selective abortion based on genetic abnormalities is overt discrimination. Abortion is opposed as it increases death rates as it did in Canada, i.e., 115 years of warfare has killed only 117,504 people in Canada while abortions has killed 2 million .Hence they contend that abortion is a inhuman practice and immoral killing of fetus that inflicts sufferings on them.

ARGUMENTS AGAINST BAN ON ABORTION:

“No woman can call herself free until she can choose consciously whether she will or will not be a mother.”

— **Margaret Sanger**

Pro choice people argue that ban on abortion deprives right to privacy and bodily autonomy of a women. Bodily autonomy is defined as the right to self governance over one’s body without external influence or coercion which is considered to be a human right. They state that criminalizing abortions will lead to increase in child labour, increase the number of orphaned children, maternal death and feminisation of poverty. They reinstate that forcing abortion will only create single parents who cannot provide proper care to the children. It is proposed that criminalisation of abortion doesn’t ban abortion but only makes it less safe as women will start preferring abortions done by quacks without any medical supervision which might be injurious to her life in certain situations. Pro choice people disregard the contention that abortion is murder by arguing that if abortion is murder then ultra sound scan is child pornography. Hence they oppose abortion since they consider right to abortion as their moral right and a vital step towards gender equality.



**REPRODUCTIVE RIGHTS IN INDIA:
“The Morality of a society depends on how
it treats its most vulnerable members”**

-Dietrich Bonhoeffer

The key aspect of personal autonomy is reproductive rights which can be defined as the right to make sexual and reproductive decisions, as recognised by the 1994 United Nations International Conference on Population and Development (UNPIN 1994)⁷³⁴

On 24th August 2017, a nine bench judge bench of supreme court unanimously affirmed that privacy as a fundamental right under The Constitution of India, in *Justice K S Puttaswamy v. Union of India*⁷³⁵. The bench unanimously held privacy covers personal autonomy relating to the body, mind, and to making choices, as well as informational privacy. In *Suchita Srivatsava v. Chandigarh Administration*⁷³⁶ which held that reproductive right of a woman include woman’s entitlement to carry a pregnancy to its full term, to give birth and subsequently raise children and that these rights form a part of a woman’s right to privacy, dignity, bodily integrity. The case arose in the context of the Medical Termination of Pregnancy Act, 1971, which governs abortions in India. The MTP Act allows for legal abortions only if certain conditions are met. In 2012, the High court of Madhya Pradesh in *Sandesh Bansal v. Union of India*⁷³⁷, a public interest litigation seeking accountability of increasing maternal deaths, recognizing that “the inability of women to survive pregnancy and child birth violates her fundamental right to live as guaranteed under Article 21

of the Indian Constitution and it is the primary duty of the government to ensure that every woman survives pregnancy and child birth”. However, the right of the unborn child cannot be ignored. An NGO based out of Tamil Nadu, also contend that an unborn child does not have the capacity to defend itself from “harm that could be inflicted by its mother”

“Personal freedom or an choice of an individuals cannot curtail the freedom of or choice of another individuals, especially the most vulnerable and persons who are defenseless. While most activists are emphasizing on the rights of the mother over her body, but it must be noted that it is not only the body of the mother entailed in case of an abortion but also the body of the unborn child (fetus). So it has its own legal rights which is known as **Fetal Rights** under natural or civil law, similar to woman having reproductive rights. The term Fetal rights came into wide usage after the landmark case *Roe v. Wade*⁷³⁸ which legalized abortion in United States in 1973. The **American convention on Human rights** is the only international treaty which envisages the right to life of the fetus. While international human rights lacks the inclusion of fetus as a person for the purpose of human rights. Many legal experts believe that there is an increasing need to settle the legal status of the fetus.

The Unborn Victims of Violence Act, 2004 of USA defines the term ‘Unborn child’ as a child in utero and the term ‘child in utero’ means a member of homo sapiens at any state of development who is carried in the womb. In India, despite there not being any

⁷³⁴ ["Report of the International Conference on Population and Development"](#), UNFPA, 1995

⁷³⁵ *Justice K S Puttaswamy v Union of India* (2012a): Writ Petition (Civil) No 494 of 2012 (majority

opinion), Supreme Court judgment dated 24 August 2017 (India)

⁷³⁶ S.L.P. (C) No. 17985 of 2009 (India).

⁷³⁷ Writ Petition No.9061/2008 (India) .

⁷³⁸ *Roe v. Wade*, 410 U.S. 113 (1973)



statutes or legislation that specifically defines the legal status of an unborn child, several statutes recognize and mention the unborn child and defined it to be a legal person by fiction (Sec.20 of the Hindu succession Act,1956 and Section 13,14 &18 of the Transfer of Property Act,1882), but they also mention that rights of unborn would only be acquired only after the child is born. And it is more on the government to protect the life of its citizens and also the members who are to be born.

The abortion conditions and laws are more liberal and it certainly does not invade the Right to Life of women. Moreover it cannot be claimed to be infringing Right to Privacy and Right to Life because there is the body of the third person involved (fetus) who cannot advocate for themselves.

INDIA'S LEGAL REGIME ON ABORTION:

Abortion is multi faceted because it involves the culmination of many aspects such as religion, ethics, medicine and law. Hence framing law for this particular social issue has been a tedious task. India affirmed its stand on abortion laws by enforcement of Medical Termination of Pregnancy Act, 1971. It is highly commendable that though Indian abortion laws are 50 years old are constructed liberally compared to many countries in the world. The pro-life/pro-choice binary has not gained currency in India.

JOURNEY OF ABORTION LAWS:

Until October 6, 1860 abortion was criminalised by Section 312 of Indian Penal Code, dubbing it as intentionally "causing miscarriage." On seeing the growing need

of abortion laws and development of abortion laws in many parts of the world and increased maternal deaths India formed Shantilal Shah Committee. The committee was set up in 1964 after 15 countries legalised abortions in the 1960s. After analysing a vast expanse of statistical data available at that time, this committee issued its report on December 30, 1966.⁷³⁹ On the basis of this report, the government passed the Medical Termination of Pregnancy Act, 1971 (MTP Act of 1971) and legalised abortion laws in India. The act was a forerunner and was way ahead of its time. The MTP Act was implemented in the month of April, 1972 and again revised in the year of 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. This Act was amended in the year 2002 and again in 2005. On October 29, 2014 the Union Ministry of Health and Family Welfare proposed a draft bill to amend the existing MTP bill. This came after the National Commission for Women had recommended that the 20-week gestation limit for abortion be raised to 24 weeks and urged that women, irrespective of their marital status should be given abortion rights. The bill was never placed in Parliament. On August 2, 2019, The government assured Delhi High Court in an affidavit that it was working on a draft legislation to amend the Medical Termination of Pregnancy (MTP) Act, 1971. The bill had been sent for inter-ministerial consultation.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The Act, consisting of just 8 sections, deals with the various aspects like the time, place

⁷³⁹ Government of India, Report of the Committee to Study the Question of Legalisation of Abortion 36 (Ministry of Health and Family, 1966).



and circumstances in which a pregnancy may be terminated by a registered medical practitioner. Under sec.3 of the act, only registered medical practitioners can terminate woman's pregnancy if they believe in good faith that continuing pregnancy would involve a risk to woman's life or gravely injure her physical or mental health; or that the child would be seriously impaired by physical or mental abnormalities. If the woman has been pregnant for under 12 weeks, the permission of one medical practitioner is enough and if the pregnancy is between 12 to 20 weeks, the permission of two medical practitioners is mandatory. Beyond 20 weeks, Section 5 of the act applies, which permits abortion only in situations where the medical practitioners believe that abortion is immediately necessary to save the woman's life. The law does not recognize other than medical grounds such as social, economical or personal opinions of the parents.

CONSTITUTIONAL VALIDITY OF MTP ACT

The constitutional validity of the act was challenged in several cases including *Nikhil D. Dattar v. Union of India*⁷⁴⁰ on grounds that it invades privacies and does not include eventualities. The state can, of course, place limitations on fundamental rights, but these limitations must pass tests outlined in constitutional jurisprudence. Since the MTP act limits the right to privacy of women, it must pass the "just, reasonable, and fair" test entailed in *Maneka Gandhi v Union of India*⁷⁴² that any law restricting Article 21 must

be "just, reasonable, and fair" to remain constitutionally valid. Justice Chandrachud described this test as comprising of three prongs: the privacy restriction should exist as a valid law; there must be a "legitimate state interest" behind it; and the restriction should be "proportional" to its aim. Since there is a rational nexus between its interests in protecting women's health and potential human life and preventing women from deciding on abortions on their own, the MTP act is deemed to be just, fair, and constitutionally valid.

AMENDMENTS SOUGHT:

In India, a country with immense social baggage, the act cannot be expected to be scrupulously followed. Even if it is liberal, the young generation and activists think it is not absent of fallacies. The Medical Termination of Pregnancy (Amendment) Bill seeks to expand reproductive rights under the act. Most crucially for privacy concerns, the bill allows abortion on "request" of a woman up to 12 weeks of pregnancy. Through Section 2(d), the bill also seeks to improve access to abortions by allowing "registered healthcare providers," including Ayurveda and homeopathy practitioners to authorize abortions, and nurses and auxiliary midwives to perform them (though additional regulation of such providers is necessary). Protecting a key aspect of "informational privacy," Section 5A of the bill also mandates that no registered healthcare provider shall reveal the name and other particulars of a woman whose pregnancy has been terminated as per the provisions of the act. The bill is yet to be passed.

CONCLUSION:

opinion), Supreme Court judgment dated 24 August 2017 (India).

⁷⁴²*Maneka Gandhi v Union of India* (1978): SCC, SC, 1, p 248 (India).

⁷⁴⁰ *Nikhil D. Dattar v. Union of India* S.L.P. (Civ.) No. XXXX of 2008 (India).

⁷⁴¹ *Justice K S Puttaswamy v Union of India* (2012a): Writ Petition (Civil) No 494 of 2012 (majority



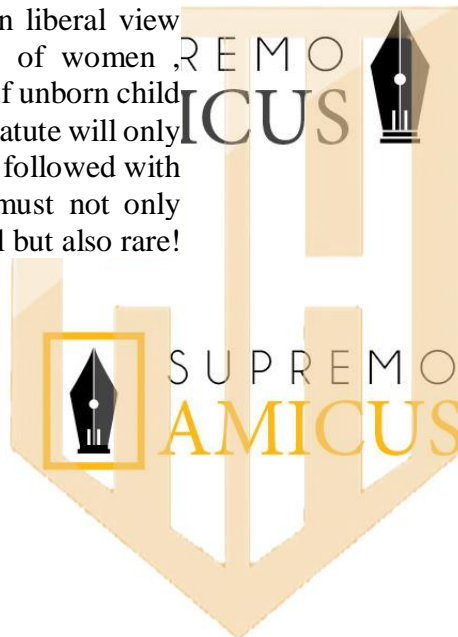
“I certainly supported a woman’s right to choose, but to my mind the time to choose was before, not after the fact”

-Ann

B. Ross

In this globalisation era, where the rights are conferred even to robots and Artificial Intelligence etc, the time demands that we consider rights of an unborn person at this critical juncture.

The abortion laws, should not only concentrate on gender equality and woman rights . It must emphasize right of women interalia with rights of unborn child. Abortion affects the mother in equal proportion as the fetus. In an liberal view anti-abortion upholds rights of women , Pro-abortion upholds rights of unborn child in their own way. Words of statute will only be a piece of paper if it is not followed with conscience. Abortion laws must not only make abortions safe and legal but also rare!





MERGER AND ACQUISITION AND THE COMPETITION LAW – AN ANALYSIS

*By Tanisha Mishra
From NLU Assam*

Abstract

In a growing and liberalised economy which is highly competitive, the mergers and acquisition as a corporate tool of restructuring has been going grooved in India, so also the associated rules and regulations governing these mergers and acquisitions.

Merger and acquisition (or combination) happen when two or more companies combine to form a new company for expansion and economic growth. However, these combinations may also lead to undesirable ant-competitive impact, reducing thereby the scope of competition or innovation, in addition to affecting the consumers unfavourably.

This situation needs to be regulated, monitored for greater good for which the competition commission of India (CCI) replacing old MRTP ACT came into fore through the competition Act 202 following Raghavan committee recommendation and also India becoming a signatory to WTO, in the era of economic reforms. The competition Act of 2002 is triggered by the articles 38 and 39 of the Indian constitution and comes under the directive principles of state policy. The competition Act revolves around 3 of its vital sections – section 3 and 4 for anti-competitive agreements and abuse of dominance by a single firm while sections 5 and 6 deal with regulations pertaining to merger, acquisition and amalgamations with regard to determining appreciable adverse effect on competition,

mandatory notifying to the competition commission on breach of threshold limits (set by the ministry of corporate affairs, govt of India) and scope of investigation wherever necessary. The competition commission has been over the years, taking many steps for the ease of corporate restructuring and transition of M&A in sync with economic reforms, globalisation of trade, in the country. this paper attempts to discuss some of the areas of importance under the competition act 2002 with regard to merger and acquisition.

The Liberalized era, fast emerging innovations and investments, the rapid changes in technologies and their access in the digital India, all have led to corporate restructuring for achieving desired sustainable growth, economies of scale and overall competitiveness in the Indian economy in recent times.

The Corporate restructuring through the routes of merger and Acquisition (M & A) has assumed much importance so also the associated regulatory provisions governing M & A, Legal-economic impact of M & A to the consumers, the market, the nation, have become critical in fast growing India.

Mergers and Acquisitions (or combinations) refer to a situation where the ownership of two or more enterprises is joined together, in other words, a merger happens when two or more companies combine to form a new company. This may be either merging with an existing company or the combination may mean a new company. The Assets and Liabilities of the transferor company become the assets and liabilities of the transferee company after the merger.



As a corporate strategy, corporate finance and better management tool, M & A deal with buying, selling, combining of different companies and similar entities that can help an enterprise grow rapidly in its sector, location of origin or a new field or a new location without creating a subsidiary or other child entity or a joint venture.

The rationale behind any merger and Acquisition is usually to create a bigger entity which leads to economies of scale, better operative performance, accelerated growth and expansion of business to gain more assets.

However, a merger may also lead to unwanted, socio-economic implications that are not desirable. Other than growth, performance, expansion motives, the another motive of merger may also be to create anti-competitive efforts-like, to reduce the numbers of competitors or to create dominance in market, reducing the scope of competition which is likely to harm consumers through prices, reduced choices, or less innovations.

It is in this background, the competition Act of 2002, a successor of the old monopolies restrictive trade practices (MRTP) Act came into force. Through the M & A are regulated by the provisions of the SEBI Act, the companies Act also, with the inception of the competition Act 2002, these (M &A) issues now come under the purview of the competition laws. Here we will limit our discussions of M & A with regard to the competition law only.

MRTP Act (from 1969 to 2009) was based on regulating firms on the criteria of size and market share and complemented existing license raj system. Several factors were responsible for paving the way for the repealing of MRTP Act as recommended

by the Raghavan Committee, in favour of competition Act, to provide a level playing field to both state-owned enterprises and the private sector, to help implement the economic reforms with India becoming a signatory of WTO (World Trade Organization) in 1995 and Institutionalization of several sectoral regulators.

Competition Law for India was triggered by Articles of 38 and 39 of the constitution of India. These Articles are a part of the directive principles of state policy.

The Competition Act was supposed to be passed in 2002 and section 66 of the new Act provided for the repeal of the MRTP Act and disposal of the pending cases of MRTP Commission, which got desated for several reasons though.

On 1st Sep, 2007, the parliament passed an Amendment Act, leading to creation of competition Appellate Tribunal (COMPAT) and so also section 66, with an extension of the life of MRTP commission by 2 years to clear unfair Trade Practices” pending cases. Eventually, in may 2009, the enforcement of competition Act 2002, became a reality, actually.

The Objectives of the competition Act are sought to be achieved through the instrumentality of the competition commission of India(CCI) which is established by the Central Govt. to achieve its objectives.

The Competition Commission of India (CCI) endeavors to do the following⁽¹⁾:

1. Make the Markets Work for the benefit and welfare of consumers.



2. Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
3. Implement Competition policies with an aim to effectuate the most efficient utilization of economic resources.
4. Develop and Nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulating laws in tandem with the competition law.
5. Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

BRIEF ANALYSIS OF THE COMPETITION ACT 2002:

The Competition Act revolves around 3 of its sections primarily. Section 3 deals with anti-competitive agreements (both horizontal and vertical) section 4 deals with abuse of dominance by a single firm whereas sections 5 and 6 deal with the regulations pertaining to mergers, acquisitions and amalgamations. The competition Act has jurisdiction over foreign carters and foreign combinations, likely to cause an “Appreciable Adverse effect on competitions” (AAEC) which the MRTPACT was not able to do.

The Act also allows for monetary penalties in case firms do not comply with competition commission of India Orders.

1. <http://cci.gov.in/images/media/Research/reports/competition%20Law%20in%20India%20us%20%20uk-A%2>

The Commission had imposed significant fines on 10 cement firms that were involved in a cartel which was

facilities by the cement manufacturers Association (CMA) in 2016. In 2018, the CCI imposed fines of Rs 135.86 crores (?) on Google for abusing its dominance for alleged manipulation of search results.

In Jan 2019, in the case of competition commission of India V.JCB India Ltd. And others, the supreme court held that the Director General (DG) of the commission has the power to search and seizure with magistrate’s authorization in context of section 41 (3) of the Competition Act 2002 and 240 A of companies Act, 1956.

COMBINATION:

Broadly, Combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing business, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of Assets or turnover in India and abroad.

The combination which causes or likely to cause an appreciable adverse effect on combination (AAEC) within the relevant market in India is prohibited and such combination shall be void. The provision of the Act relating to regulation of combinations have been enforced with effect from 1st June, 2011.

The Statutory Provisions as spelt out in section 5 and 6 of the Act primarily envisages that any merger or acquisition (M & A) taking place within the Indian sub-continent has to be examined on the touch stone of the competition Act , 2002 by the competition watchdog/regulator i.e.- competition commission of India (CCI) ⁽²⁾.

**MERGER AND ACQUISITION:**

Merger and Acquisition are often interchangeably used through they are two diverse modes of corporate restructuring. Merger refers to the process of amalgamation or merging of two companies to form a new company whereas acquisition takes place when one company is taken over by another company. Acquisition further can be hostile or friendly⁽³⁾.

The SVS Raghavan committee acknowledges mergers as a legitimate means by which firms can grow and are generally as much part of the natural process of industrial revolution and restructuring as new entry, growth and exit⁽⁴⁾.

Mergers can be Horizontal or Vertical conglomerate.

HORIZONTAL MERGER:

Horizontal Merger or Combination refers to merger of two companies at the same level of production or distribution in the relevant market. From the point of view of competition law, horizontal mergers normally come under the purview of regulation of competition commission, as they can have high AAEC (appreciable adverse effect on competition), simply put these mergers have the potential to curtail competition in market.

2. *Satish Sharma, Impact of merger Acquisition on competition – An Analysis, 25/10/18, Available at <https://www.waki/no1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>.*
3. *Satish Sharma, Impact of merger and Acquisition on competition-An analysis, 25/10/18.*

Available at <https://www.vakilno1.Com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>

4. *Satish Sharma, Impact of merger and Acquisition on competition-An analysis, 25/10/18.*

Available at <https://www.vakilno1.Com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>

VERTICAL MERGERS:

A vertical merger joins together a firm/company that produces an input with a firm that uses that input to produce the output. Vertical merger thus is an arrangement between the enterprises at different stages or levels of production chain and therefore, in different markets.

From the competition law point of view, such mergers are generally taken leniently by the commission as their impact to affect competition or market is perceived not as much that of Horizontal mergers.

CONGLOMERATE MERGS:

If the merger is neither horizontal nor vertical, it may be a conglomerate merger. Conglomerate merger operates in different product markets and are said to be a facture of any acquisition between the companies that are sufficiently diversified. From the point of view of competition Act, the conglomerate merger may not pose any threat to competition.

MAJOR AREAS OF INTEREST FOR COMBINATION UNDER COMPETITION ACT, 2002:

As the most important concern of competition commission of India while assessing a combination is to ensure that the proposed combination does not cause anti-competitive effects in the relevant market,



we may understand few important areas of interest under the Act, as under:

AAEC (APPRECIABLE ADVERSE EFFECT ON COMPETITION)

The Competition Act envisages appreciable adverse effect on combination in the relevant market in india as the critter on for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the commission to evaluate the effect on combination as per factors highlighted in sub-section (4) of section 20 of the act.

The factors to be considered, in this regard, by the commission while evaluating the AAEC in the relevant market, are⁽⁵⁾:

- a. Actual and Potential Level of competition through imports in the market;
- b. Extent of barrier to entry into the market;
- c. Level of concentration in the market;
- d. Degree of countervailing power in the market;
- e. Likelihood that the combination would result in parties to the combination being able to significantly and sustainably increase prices or profit margins;
- f. Extent of effective competition likely to sustain in a market or extent to which substitutes are available or likely to be available in market;
- g. Market share in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- h. Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

- i. Nature and extent of vertical integration in the Market;
- j. Possibility of a failing business;
- k. Nature and Extent of innovation;

5. *Subsection (4) of section 20 of the competition act 2002*

- l. Relative advantage by way of the combination to the economic development by any combination having or likely to have appreciable adverse effect on competition;
- m. Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

ABUSE OF DOMINANT POSITION AND PREDATORY PRICING:

The dominant position under the competition Act refers to a position of strength, enjoyed by an enterprise in the relevant market in India enabling it to⁽⁶⁾..:

- a. Operate Independently of Competitive forces in relevant market;
- b. Affect competitors, Consumers or relevant market in its favour.

Section 4(2) of the Act prevents following acts that result in promoting “Abuse of dominant position”⁽⁷⁾:

- (i) Impose unfair or discriminatory condition or price in sale and purchase of goods or services;
- (ii) Limit or restrict production of goods or services;
- (iii) Technical or scientific development relating to goods or services to the prejudice of consumers.



6. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*
7. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*

INDULGING IN PRACTICE LEADING TO DENIAL OF MARKET ACCESS, LIKE:-

- a. Make conclusion of contracts subject to acceptance by other parties.
- b. Use its dominant position in one market to enter into other relevant market.

PREDATORY PRICING:

Means Sale of goods or services at a price which is below the cost as may be with the view to reduce competition or eliminate competitors.

ABUSE OF DOMINANT POSITION – (CASE REFERENCES) :

In the case of Shri Neeraj Malhotra, Advocates V. North Delhi Power Ltd.,⁽⁸⁾ the competition commission of India (CCI) observed that-Section 4 of the Act does not prohibit an enterprise from holding a dominant position in a market, it does place a special responsibility on such enterprises, in requiring them not to abuse their dominant position.

The actions, practices conduct of an enterprise in a dominant position have to be examined in view of the facts and circumstances of each case to determine whether or not the same constitutes an

abuse of dominance in terms of section 4 of the Act.

ON MOTIVE OF DOMINANT ENTITY: IN THE CASE OF VELANKANI ELECTRONICS PVT. LTD. V. INTEL CORPORATION⁽⁹⁾,

The Commission held that at this stage, the commission is not required to go into the intent or motive of OP (Opposite Parties) in indulging into the alleged conduct, that has been, prime facie, found to be abusive and the motive of dominant entity does not play any role nor section 4 imposes any such obligation on commission.

8. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*
9. *Satish sharma, Recent Development in the competition law 14/3/19 available at <https://www.vakilno1.com/legal-news/recent-development-in-the-competition-law.html/amp>*

IN A RECENT CASE OF – MR. MEET SHAH AND ANOTHER V. UNION OF INDIA, MINISTRY OF RAILWAYS AND ANOTHER⁽¹⁰⁾,

It was alleged that the Ministry of Railways and IRCTC Ltd. Were rounding off the actual base fare to the nearest higher multiple of Rs. 5/- to arrive at the total base fare in contravention of the provisions of section 4 of Act i.e. by abusing dominant position.

The commission, in the absence of any valid justifications by the OP (Railways) held that this practice of rounding off to the next higher multiple of Rs. 5/- by the opposite parties, prima facie, amounted to an imposition of unfair



condition in the market for sale of rail tickets in India, particularly for online booking of rail tickets, in contravention of provision of section 4(2) (i) of the Act.

RELEVANT MARKET:

According to section 2® of the Act, “relevant Market” ⁽¹¹⁾ Means the market which may be determined by the commission with reference to the relevant product market or the relevant geographical market or with reference to both markets.

RELEVANT PRODUCT MARKET:

Relevant product market is understood as a market with all those products and services that are considered interchangeable or substitutable by the consumer, by reason of features of products or prices, their prices and intended use.

The factors to be considered by the CCI while determining “relevant product market” are covered in section 19 (7) of the competition Act 2002.

- 10. *Satish Sharma, Recent development in the competition law, 14/3/19, Available at <https://www.vakilno1.com/legal-news/recent-developments-in-the-competition-law.html/amp>*
- 11. *Satish Sharma, Impact of merger and acquisition on competition – An analysis, 25/10/18 Available at <https://www.vakilno1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>*

RELEVANT GEOGRAPHIC MARKET:

Refers to a market in a geographical area in which the conditions of competitions for supply of goods or provisions of services or demand of goods or services are distinctly homogenous and

can be differentiated from the conditions prevailing in neighboring areas⁽¹²⁾.

In the case of M/s Saint Gobain Glass India Pvt. Ltd. V.M/s Gujrat Gas Company Ltd; ⁽¹³⁾ the CCI, to determine geographical market, took note of factors like – Physical characters tics, endues of goods, price of goods or services, consumer preferences, exclusion of in house production, classification of industrial products etc. in terms of the provisions of section 19(6) contained in the Act.

- 12. *Satish Sharma, Impact of merger and acquisition on competition – An analysis, 25/10/18 Available at <http://www.vakilno1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>*
- 13. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*

MERGER CONTROL AND REGULATORY FRAMEWORK UNDER COMPETITION ACT, 2002

(A) THRESHOLD LIMITS FOR COMBINATION:

(B)

Threshold Limits play a major role under competition law especially related to combination. Under the section 5 of Act, It certain threshold limits (as revised by ministry f corporate affairs, MCA, Govt. Of India) are crossed the parties to combination are required statutorily to give notice about the combination to the commission.

According to the Ministry’s of corporate affairs (MCA) notification dated



4th March, 2016, the threshold limits (enhanced by 100% in value of assets and turnover) for combinations are appended here under:-⁽¹⁴⁾

14. <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.cci.gov.in/site/defavit/files/quick-link-document/revise>

(C) NOTICE CLAUSE FOR COMBINATION:

Under the competition Act 2002, Under Section 6, any enterprise desirous of entering a combination, if not otherwise exempted in terms of threshold limits prescribed, shall have to send a notice disclosing details of combination to the Commission (CCI) in specific form with fee applicable, within 30 days of approval of the proposal relating to merger or amalgamation by the board of directors or of the execution of any agreement or other document in relation to acquisition.

In case a notifiable combination is not notified, the commission has the power to impose a fine under section 43(A) that may be to the extent of 1% of total turnover or assets of combination, whichever is higher, for failure to give notice to commission.

Any combination for which notice has been filed with commission would not take effect for a period of 210 days from the date of notification or till the commission passes an order. If the order is not passed during 210 days (Section 6(2A) by CCI, the combination shall be deemed to have been approved, under section 31(11) of the Act⁽¹⁵⁾.

Section (54) of the Act empowers the central Govt. to notify exemptions of giving notice for certain enterprises for certain period.

15. *Competition act 2002, competition advocacy and awareness programme of CCI-Advocacy series (5)*

In a step forward and to streamline the merger control process, the commission on 9th Oct, 2018, issued amendments to the combination regulations, such as⁽¹⁶⁾

First : The Notifying Parties are now given an option to withdraw and refile a merger notification, before the CCI issues a show cause notice (SCN), with filing fee already paid, being adjustable against fee of new notification profiled that the new notification is given within 3 months from the date of withdrawal.

Second : To expedite the approval process, the amendment also clear files that the notifying parties can offer voluntary modifications, post the issuance of SCN under section 29 of the Act, while providing their responses to the SCN.

Third : It is clarified further that, the time taken by the parties in giving response, additional information, voluntary modifications etc shall be excluded from the 210 days timeline mentioned under section 6 (2A) of the competition Act.

IN THE CASE OF –SCM SOIL FERT LIMITED AND ANOTHER V.COMPETITION COMMISSION OF INDIA⁽¹⁷⁾:

Where the appellants on whom, due to failure to notify a proposed



combination, penalty of Rs 2.00 crore was imposed under section 43 (A)

16. *Bharat Budholia, Aishwarya Gopalkrishanan and Aishwaraya Gupta, competition. Cyrilamarchad blogs.com/2018/10/sixth-amendments-combination-regulations-competition-law/#more-2138.*
17. *Satish Sharma, recent development in the competition law, 14/3/19, available at <https://www.vakilno1.com/legal-news/recent-developments-in-the-competition-law.html/amp>*

of the Act and the case pertained to issue of 30days notice period as required, the supreme court observed that-“The notice of section 6(2) is to be given prior to consummation of the acquisition. Ex-Post facto notice is not contemplated under the provisions of section 6(2) and same would be in violation of the provision of the Act.

IN ANOTHER RECENT CASE OF COMPETITION COMMISSION OF INDIA V.THOMAS COOK (INDIA) LTD AND ANOTHER⁽¹⁸⁾;

The appeal was initiated by the CCI against the order passed by the competition Appellate Tribunal where the tribunal had set aside the order it passed by CCI imposing penalty of Rs 1.00 crore under section 43(A) for non-compliance of provisions of notification under section 6(2) of the Act. The issue in this case was about “Malafides” on the part of the respondents, in not complying with section 6(2) of the Act.

The Supreme Court while upholding the imposition of fine by the CCI, held that there was no requirement of mens are under section 43 (A) or intentional breach as an essential element for levy of penalty.

INVESTIGATION AND ORDERS OF COMBINATION BY THE CCI:

Wherever the commission, prima facie, observes that the proposed combination may lead to appreciable adverse effect on competition (AAEC) in the relevant market then the commission issues the show cause notice (SCN) to the parties concerned citing as to why investigation of such combination shall not be carried out. Also under section 20 of the Act, the commission can do SUO Motu inquiry, if it feels so⁽¹⁹⁾.

18. *Satish Sharma, recent development in the competition law, 14/3/19, available at <https://www.vakilno1.com/legal-news/recent-developments-in-the-competition-law.html/amp>*

19. *Competition Act2002, competition Awareness and advocacy by CCI, Advocacy series (5)*

The DG (Director General) of the commission then prepares a report based on the responses of the parties. The commission also directs the parties after the receipt of DG’s report or responses from parties concerned (Whichever is later) to publish the details of said combination within 7 days from the dates of D.G Report or responses received (whichever is later).

Under section 31 of the Act, the competition commission passes orders on combinations which can be either approving or prohibiting the combinations based on the yardstick of AAEC impact or may be of the opinion that the adverse effect of AAEC can be eliminated by certain modifications.

CONCLUSION:

The Competition Commission of India has cleared 666 mergers and acquisitions cases since inception with



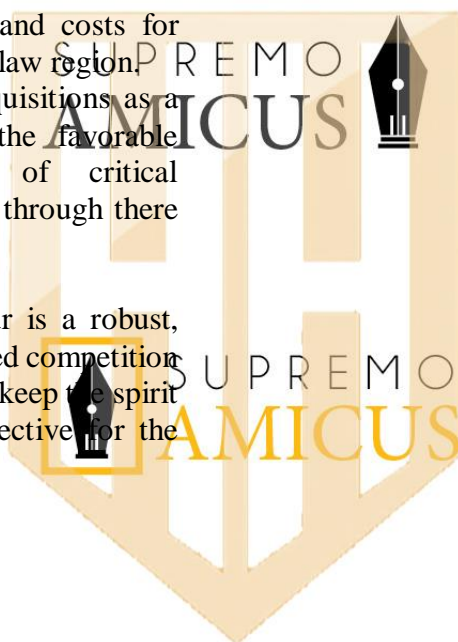
some approvals got through with some modifications. But no deals have been blocked by the regulator so far.

The average disposal time taken by CCI for M&A approvals has come down from 29days in 2016-17 to 23days in 2018-19, in the CCI's constant bid to streamline the competition affairs & processes.

With the recent initiative called "Green Channel" of CCI, an automatic system of approval for deals (Through more clarity is needed as to complementary overlaps areas), the things are poised to become more conducive and flexible ensuring reduction in time and costs for M&A under the competition law regime.

The mergers and acquisitions as a corporate restructuring in the favorable regulation scenario are of critical importance for the economy through there may be anti trust issues.

The need of the hour is a robust, result-oriented and empowered competition commission of India so as to keep the spirit of competition high and effective for the overall welfare.





**NATIONAL REGISTRAR OF
CITIZEN AND CITIZENSHIP
AMENDMENT BILL, 2016**

By Tanu Kapoor

*From Rajiv Gandhi National University of
Law*

The burning issue of the alleged illegal migrants in Assam and some other states in the North-East has assumed worrisome proportions, significantly in the light of the Citizenship (Amendment) Bill, 2016, that has been passed by the Lok Sabha and is awaiting its passage through the Rajya Sabha. The bill signifies the collective contorted thinking of the political system that is piloting it.¹ The research paper discusses a study to grasp the origin, background and aim of the Citizenship Amendment Bill, 2016. The government has started updating the National Register of Citizens in Assam so that to gain a specified number of illegal migrants from the neighbouring countries into the state of National Register of Citizens and describes its pros and cons in the society.

“Probably the most important event in the province during the last 25 years- an event, moreover, which seems likely to alter permanently the whole feature of Assam and to destroy the whole structure of Assamese culture and civilization has been the invasion of a vast horde of land-hungry immigrant.”²

Considering the seriousness of the matter regarding the persistent inflow of illegal migrants, the Government of India prepared for the first time in the province of Assam, The National Register of Citizens, during the conduct of 1951 census. In 1965 the government of India

collaborated with the government of Assam to expedite completion of the National Register of Citizens and to issue National Identity Cards on the basis of this register to Indian citizens in order to aid identification of illegal immigrants.³ But in 1966 the Central Government dropped the proposal to issue identity cards in consultation with the Government of Assam, having found the project infeasible.

However, ultimately it was taken up at the bid of the Honourable Supreme Court’s order following writ petitions by Assam Public Works. Hon’ble Supreme Court in 2013, headed by the Bench of

Justice Binjan Gogoi and Justice Rohinton Fali Nariman directed the Union Government and the State Government to complete the update of NRC, to be implemented in adherence to Citizenship Act, 1955 and The Citizenship Rules, 2003 in all parts of Assam with the objective to rule out immigrants from the state. Pursuant to the directive of the Hon’ble Court, the Registrar General of India notified commencing of NRC on December 6, 2013⁴. On July 19, 2016, The Indian Citizenship Amendment Bill was proposed in Lok Sabha, amending the Citizenship Act of 1955.

If this Bill is passed in Parliament, illegal migrants from minority communities like Hindu, Sikh, Buddhist, Jain, Parsi or Christian coming from Afghanistan, Bangladesh, and Pakistan will then be eligible for Indian citizenship but exclude Muslim community. The Bill relaxes the 11 year requirement of residing in India to 6 years for the above migrants to India.

Objectives of the Research



- To study the origin and aim of Citizenship Amendment Bill, 2016.
- To study the opposition being faced by the Citizenship Amendment Bill, 2016.
- To study the concept of National Register of Citizens of India (NRC).
- To study the difference between Citizenship Amendment Bill, 2016 and National Register of Citizens (NRC).
- To have a sociological aspect of the issue.

RESEARCH METHODOLOGY

The research follows doctrinal and qualitative method. The data is from secondary sources like books, articles, journals, law reviews etc. The research work is original and due acknowledgement has been given to the sources of this research paper. It involves descriptive analysis with critical analysis and evaluation of various steps taken by the government to curb the stated problem.

RESEARCH DESIGN

The research paper begins with a study of origin, background and aim of Citizenship Amendment Bill, 2016. As the bill is being opposed by the people in many states of India, the research paper studies the opposition being faced by the bill. Thirdly, the research paper describes the concept of National Register of Citizens (NRC) as it is being updated by the government to identify the illegal migrants in Assam. Many people take the wrong perceptiveness that Citizenship Amendment Bill, 2016 and National Register of Citizens is the same concept. Thus a study describing the difference between both of them has been done in the research paper. Lastly, the researchers have tried to connect the issue

of migration with the subject of Sociology and have described the sociological aspect of the issue.

Origin and Aim of Citizenship Amendment Bill, 2016

The original Citizenship Amendment Bill (CAB), 2016 was introduced in the Lok Sabha on 19 July 2016 by the Government of India. The Citizenship Amendment Bill (CAB), 2016 passed by the Lok Sabha on 8 January, 2019 seeks to amend the Citizenship Act, 1955 to provide citizenship to illegal migrants from Afghanistan, Bangladesh and Pakistan, who are of Hindu, Sikh, Buddhist, Jain, Parsi or Christian.

It doesn't have any provision for Muslims. The Bill also seeks to reduce the requirement of 11 years of continuous stay in the country to six years to obtain citizenship by naturalization. The Bill covers all the States and Union Territories. The Citizenship Act, 1955 was enacted to provide for the acquisition and determination of Indian citizenship. Under the existing provisions of the Citizenship (Amendment) Bill (CAB), 2016, persons belonging to the minority communities, such as Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who have either entered into India without valid travel documents or the validity of their documents have expired are regarded as illegal migrants and hence ineligible to apply for Indian citizenship. It is proposed to make them eligible for applying for Indian citizenship.

Many persons of Indian origin together with persons belonging to the aforesaid minority communities from the aforesaid countries are applying for citizenship



under section 5 of the Act but are unable to provide proof of their Indian origin. Hence, they are forced to apply for citizenship by naturalization under section 6 of the Act, which, inter alia, prescribes twelve years residency as qualification for naturalization in terms of the Third Schedule to the Act.

This denies them several opportunities and advantages that may accrue solely to the citizens of India, even though they are likely to stay in India permanently. It is proposed to amend the Third Schedule to the Act to make the applicants belonging to minority communities from the aforesaid countries eligible for citizenship by naturalization in seven years rather than the existing twelve years. The BJP led government is very much inquisitive about the bill because in the General Election Manifesto during 2014, the BJP had promised to welcome the Hindu refugees and give shelter to them and grant citizenship to Hindus persecuted within the neighbouring countries. Hence it may be seen as a part of the fulfilment of the BJP's election promise to the people. According to the Citizenship Act, 1955, an illegal immigrant as defined in section 2(1)(b) of the Act is a foreigner who entered India (i) without a valid passport or other prescribed travel documents or (ii) with a valid passport or other prescribed travel documents but remains in India beyond the permitted period of time.

With The Citizenship Amendment Bill, 2016, the government plans to alter the definition of illegal migrants by welcoming the Hindu refugees and giving shelter to them and grant citizenship to Hindus persecuted within the neighbouring countries.

The opposition being faced by the Citizenship Amendment Bill, 2016

Assam is in the whirlpool of pro and antimigrant politics and the immediate cause to it is the Citizenship Amendment Bill, 2016 which grants the Indian Citizenship to non-Muslim migrants from Bangladesh, Afghanistan and Pakistan on the grounds of religious prosecution. As per the bill, the last date for granting citizenship is December 31, 2014 from March 24, 1971 as mentioned in the 1985 Assam Accord. According to Bharatiya Janata Party (BJP), the provision will prevent Assam from being soaked by the Muslims. The party believes that Assam needs an additional Hindu population to ensure Muslims do not form a majority within the politics. In Assam, illegal migrants are not identified along with spiritual lines and people want such migrants from Bangladesh, both Muslims and Hindus, who are incidentally Bengali speaking, to be deported. The Assamese concern that illegal migrants from Bangladesh create a threat to their cultural and linguistic identity. In Bengali dominated Barak valley, most of the people welcome the religion-based citizenship rules, which they hope, will shield them from National Register of Citizens (NRC). Until now, nearly 40 lakh people have not found any place on the National Register of Citizens of India. Bengali speaking Muslims, who outnumber everybody else in a minimum of eight districts of western and central Assam, are against the proposal to offer citizenship only to non-Muslim migrants. The minority dominated All India United Democratic Front (AIUDF), headed by Bengali speaking Billionaire Badruddin Ajmal, supports the campaign launched by about 70 indigenous outfits, including Asom Gana Parishad (AGP) and All Assam Students' Union (AASU), against the proposed bill. In terms of percentage, Assam has the country's second highest



Muslim population after Jammu and Kashmir. Muslims, mostly Bengali speaking, comprise 34% of Assam's little over 3 crore people. Assamese speaking Muslims, who are miniscule in number, support campaigns against migrants from all religious denominations.

All North East states are against the Citizenship Amendment Bill, 2016. Meghalaya and Nagaland, where BJP shares power with regional forces, and Mizoram, where NDA ally MNP is in power, desire a review. Mizoram fears Buddhist Chakmas from Bangladesh may make profit from the Act. Meghalaya and Nagaland are apprehensive of the migrants of Bengali stock. Groups in Arunachal Pradesh, where BJP is in power, concern the new rules may benefit Chakmas and Tibetans. Manipur wants the Inner-line Permit System to prevent outsiders from entering the state. In Tripura, the BJP's ruling partner, Indigenous People's Front of Tripura, and opposition Indigenous Nationalist Party of Tripura are against the Centre's move.

The Concept of National Register of Citizens of India (NRC)

The National Register of Citizens (NRC) is a register containing names of all genuine Indian citizens residing in Assam. The register was first prepared after the 1951 Census of India. In the 19th & 20th century, Colonial Assam (1826-1947) witnessed migration from numerous provinces of British India especially after the Yandabo treaty (signed on 24 February 1825). The liberal perspective of the Colonial authorities further encouraged the continuous arrival of peasants from Bengal to Assam in search of fertile lands. Considering the seriousness of the matter

regarding the persistent inflow of illegal migrants, the Government of India went on to formulate the Immigrants (Expulsion from Assam) Act, 1950. This act which came into effect from 1 March 1950 mandated expulsion of illegal immigrants from the state of Assam.¹³ To identify illegal immigrants, the National Register of Citizens was prepared for the first time in Assam throughout the conduct of 1951 Census. It was administered under a directive of the Ministry of Home Affairs (MHA) by recording particulars of every single person enumerated during that Census. However, this measure against illegal migrants too suffered a significant setback due to the fact that only from October 1952 onwards the regulations of passport and visa became operational between India and Pakistan. Further, "the definition of a foreigner to cover a Pakistan national was only clearly spelt out with the amendment of the Foreigners Act 1946 in 1957". In 1965 the government of India collaborated with the government of Assam to expedite completion of the National Register of Citizens and to issue National Identity Cards on the basis of this register to Indian citizens in order to help identification of illegal immigrants.

However in 1966 the Central Government dropped the proposal to issue identity cards in consultation with the Government of Assam, having found the project infeasible. But ultimately it was taken up at the bid of the Hon'ble Supreme Court's order following writ petitions by Assam Public Works. Hon'ble Supreme Court in 2013, headed by the Bench of Justice Ranjan Gogoi and Justice Rohinton Fali Nariman, directed the Union Government and the State Government to complete the update of NRC, to be implemented in adherence to Citizenship Act, 1955 and The Citizenship Rules, 2003, in all parts of



Assam with the objective to rule out immigrants from the state. Pursuant to the directive of the Hon'ble Court, the Registrar General of India via its notification Number S.O. 3591 E dated December 6, 2013 notified Commencing of NRC that was the inception of the giant task of identification of illegal migrants and the Supreme Court thereupon took up the task of monitoring the entire process of NRC Update in Assam. The aim of NRC update is to identify illegal migrants residing in North eastern state who entered Indian territories after midnight on 24 March 1971 and to determine the citizenship of the applicants who have applied for inclusion of their names in the updated NRC thereafter making the states immigrants free. It is being done to incorporate the names of those persons (or their descendants) who appear in the NRC, 1951, or in any of the Electoral Rolls up to the midnight of 24 March 1971 or in any one of the other admissible documents issued up to mid-night of 24 March 1971, which might prove their presence in Assam or in any part of India on or before 24 March 1971. The update process of NRC started in the year 2013 under the strict monitoring of Supreme Court of India. On the midnight of 31 December 2017, Part Draft NRC was released and subsequently on 30 July 2018, the Complete Draft NRC was released.

The difference between Citizenship Amendment Bill, 2016 and NRC

Citizenship has been the biggest pain point of Assam's political and social life during the past several decades. The first draft of the National Register of Citizens (NRC) kicked up a storm as over 3 million people were said to have been left out of the roster.

The Citizenship bill and NRC is not one and the same thing. Much of the discourse has been seen to have confused one with another. The Bill seeks to facilitate acquisition of citizenship by six known minority communities namely Hindus, Sikhs, Jains, Buddhists, Christians and Parsis from Afghanistan, Pakistan and Bangladesh who came to India before December 31, 2014. Migrants from these communities were earlier given protection against legal proceedings in the years 2015 & 2016 and long term visa provision was made for them. Citizenship will be awarded to them only after due scrutiny and recommendation of district authorities and the State Government. The Minimum residency period for citizenship is being reduced from existing 12 years underneath the present law to 7 years. The law will not be confined to the state of Assam but will also provide relief to persecuted migrants who have come through western borders of the country to states like Gujarat, Rajasthan, Delhi and Madhya Pradesh. The beneficiaries of Citizenship Amendment Bill will be able to reside in any state of the country and the burden of those persecuted migrants will be shared by the whole country.

National Register of Citizens is a roster of all those who settled in Assam up to the midnight of March 24, 1971. In 1978-79, several local leaders spotted a rapid increase in the number of Muslims in electoral rolls. A six-year long agitation followed against illegal migrants from Bangladesh, which culminated with the signing of an agreement called the Assam Accord. The Assam Accord mandated that those who settled in the state after the cut off date of March 24, 1971 would be weeded out and stripped of citizenship rights. Over the next few decades the NRC was remained stalled until the Supreme



Court intervened. The apex court ordered the state government to update the NRC by a deadline and monitored its progress. Subsequently, the first draft of the roster was published on 30 July, 2018.

The general sentiment in Assam with relation to the bill has been that it will defeat the purpose of the NRC.

The perverse decision of the Centre to ram through the Citizenship (Amendment) Bill, 2016 against the desires of the people of Assam will end up in the migration of millions of Bangladeshi Hindus to Assam. While the Bill aims to grant citizenship to non-Muslim refugees persecuted in neighbouring countries, NRC does not distinguish migrants on the basis of religion. It will consider deporting anyone who has entered the State lawlessly post March 24, 1971, irrespective of their religion. currently there are six detention camps for illegal migrants in Assam but it is still not clear how long the people will be detained in these camps. The process of deportation or duration of detention is not clear as it has not been stated by the government. But if the Bill becomes an Act, the non-Muslims need not go through any such process, meaning this will be clearly discriminating against Muslims identified as undocumented immigrants.

Sociological Aspect of the Issue

In the context of situation of disorder in Assam, it might help us to replicate on the very fact that human story is, in fact, the story of migrations. All the variations observed these days among humans in terms of height, weight, hair texture, colour of eyes and overall complexion in different parts of the world have come about over just 2000 generations. After all, human

history has been a saga of migrations to a great extent. So now, if someone calls another a migrant or an immigrant, it just has to do with time in the sense that one had arrived earlier than the other. In a practical sense, everybody is a migrant and the only ones who can claim to be the original settlers are those who left Africa ages ago and settled in different parts of the world. Their habitats changed their habits and appearances. So, looking at the issue pragmatically, everybody is a migrant and this migration is necessary for founding and spreading the cultures. By granting citizenship to the migrants, it will boost the spread of culture and traditions and more people will be able to join the community and live a better life together.

CONCLUSION

The release of the National Register of Citizens (NRC) in Assam, containing names of 1.9 crore citizens out of 3.29 crore applicants, has brought up questions about the contested idea citizenship in India, and its evolving nature. Assam is the only state to have come out with such a list, and its updated draft is being seen as a new chapter in addressing the inflow from Bangladesh. This issue has dropped at the surface important questions about citizenship, and how we view it in the Indian context. The debate is not in any way new and can be found in the discussions of the Constituent Assembly. The introduction of this Bill has sparked off a dialogue around the religiously biased manner in which this Bill gives preferential treatment to minorities coming from these Muslim majority countries. It must be clarified at the first instance, however, that this Bill does not immediately grant citizenship to said minority communities. It just makes them



eligible for applying, something that illegal immigrants cannot do as per the current provisions. This Bill also does not describe whether or not they will definitely secure citizenship, a process which is often protracted and highly rigorous. The Bill must be taken in a positive sense to the extent that it legalises the existence of these refugees in India. However, just as suffering and cruelty are not partial to some, we must not be partial in our generosity. The central government must look to accommodate the Ahmadiyyas, Uyghurs and Rohingyas who are persecuted minorities and have knocked at India's door in times of need. Further, the central government must also state how it shall provide opportunities for employment, education, and a better life that these people have been bereft of. It must be noted here that a national spirit to give shelter and refuge is noble. Indeed, India has had a protracted history of hosting the victims of persecution. Be it the Zoroastrians in the 12th century, or more recently, the Tibetans, India has always shown humanity and generosity in opening her arms for people seeking asylum.

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RIGHT TO DIE AS RIGHT TO LIVE

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1. INTRODUCTION

Euthanasia is the recent debated topic. There is a dilemma with respect to the professionals in the medical industry in euthanasia involving the Hippocratic Oath, which they have to take at the time when they start with their professional life. The oath centers to the idea that the medical practitioner will not give a deadly medicine to anyone if asked nor suggest any such counsel. Thus, it is the utmost duty of the doctor to treat the patient in all circumstances.

There are two-fold objectives in the medical profession:

1. Preservation of life
2. To provide relief from the suffering

The death related concept changed with the advancement in science and technology. Earlier death meant ceasing of respiration. Then it was replaced by the absence of heartbeat. Now death is defined as cessation of brain function.

Life support techniques in the modern world have allowed brain dead persons to be artificially kept alive by making the other organs function. The concept of "quality of life" conflicts with the "preservation of life".

Due to the various technological development in the medical field and advancement in the socio-economic and

political areas, there has been modification in the original Hippocratic Oath. Now the duty of the doctors has changed, i.e., not to unnecessarily prolong life by artificial methods but to serve the best interest of the patient.

If the patient is not allowed to die with dignity and the inevitable death is prolonged by the doctor, then the doctor has not acted in the patient's best interest. Prolonging life violates the promise of relieving the patient from the pain, whereas on the other hand, relief from the pain by killing violates the promise to protect and prolong life.

This brings us to the question, whether a patient who is under extreme pain should be allowed to die? Does the right to live life with dignity include right to die?

DEFINITIONS

The word "Euthanasia" is derived from the Greek word "youthanazia" which literally means to die well. Euthanasia means to end a person's life who is suffering from a terminal disease. Terminally ill means fatally ill and also includes person in a persistent vegetative state. The other names used interchangeably for Euthanasia are "mercy killing" and "compassionate killing". Euthanasia means painless termination of life to end physical suffering.⁷⁴³ It is the process whereby human life is ended by mostly to avoid the distressing effects of an illness.⁷⁴⁴

Kinds of Euthanasia

Euthanasia can be classified into various types as:

⁷⁴³ 20th Century Encyclopedia

⁷⁴⁴ Andrew Grubb, Principles of Medical Law 844 (198)



- 1) Active Euthanasia
- 2) Passive Euthanasia
- 3) Voluntary Euthanasia
- 4) Involuntary Euthanasia
- 5) Pediatric Euthanasia⁷⁴⁵
- 6) Geriatric Euthanasia⁷⁴⁶
- 7) Battle Field Euthanasia⁷⁴⁷

In active euthanasia the terminally ill patient's life is ended by taking active steps, for example, giving lethal injection or high dosage of tranquilizer etc. Whereas in passive euthanasia the patient's life is ended not by taking active steps, for example, withdrawing medical support with the intention to cause death of the patient.

If the patient gives consent for termination of his life, then it is termed as "Voluntary Euthanasia" and where the patient is not in a condition to give consent for ending his life, for example, the patient living in coma or brain death, then his life can be terminated by taking the consent of some other person on his behalf, e.g., parent, spouse etc., then it is termed as "Involuntary Euthanasia".

Prior to the Supreme Court's decision in *Aruna Ramchandra Shanbaug v. Union of India*⁷⁴⁸, euthanasia whether active or passive, voluntary or involuntary was categorized as crime under the Indian Penal Code, 1860. The man who killed the patient was punished as a murderer and the person who consented to be killed was punished as an instigator and abettor of homicide or murder under Section 107, Indian Penal

Code, 1860, read with Section 302 and Section 304 of Indian Penal Code, 1860, irrespective of the fact whether euthanasia was done or not.

1.1 ACTIVE EUTHANSIA

Active euthanasia putting an end to life for an individual, for merciful reason, using lethal substances or forces.⁷⁴⁹ The person dies instantaneously and painlessly.⁷⁵⁰

Two characteristics describing active euthanasia are:

1. Involves explicit act, to cause patient's death
2. Lethal agents are used

Active Euthanasia is a crime under Section 302 (Murder) or Section 304 (Culpable Homicide) of the Indian Penal Code, 1860. In the case of *Airedale N.H.S. Trust vs Bland*⁷⁵¹, Lord Keith stated that though life's sanctity is not absolute, "it forbids the taking of active measures to cut short life of a terminally ill patient.

2.2 PASSIVE EUTHANSIA

Passive euthanasia entails withholding or withdrawing of artificial life support systems or medical treatments needed for continuance of life of a patient.⁷⁵² Denying food to a person in coma or PVS may also amount to passive euthanasia⁷⁵³. In the strict sense passive euthanasia is not euthanasia. Instead passive euthanasia is: Withholding life sustaining treatment – foregoing life sustaining treatment, eg: switching off a heart-lung machine

⁷⁴⁵ Euthanasia of a child

⁷⁴⁶ Euthanasia of an aged person

⁷⁴⁷ Euthanasia on the war front of a soldier, who is badly wounded, and will die eventually

⁷⁴⁸ *Aruna Ramchandra Shanbaug v. Union of India* AIR 2011 SC 1290

⁷⁴⁹ *Aruna Ramchandra Shanbaug v. Union of India* (2011) 4 SCC 454 138 Supreme Court of India

⁷⁵⁰ Id at 142

⁷⁵¹ *Airdale N.H.S. Trust v. Bland*, 1993 2 W.L.R. 316, 362, House of Lords

⁷⁵² *Aruna Ramchandra* (2011) 4 SCC 454 138

⁷⁵³ Id at 152



Withdrawing life sustaining treatment – cessation of life sustaining treatment, eg: not carrying out a life-saving surgery

Thus, death is caused by an omission and no expressed act. In Passive euthanasia, the life sustaining treatment is denied by the patient, because of many reasons like religion, side effects of the medical treatments, medical cost and fess.

2.3 ACTIVE VERSUS PASSIVE EUTHANASIA

The settled legal position is that active euthanasia is illegal unless there is a legislation which permits it. Whereas, passive euthanasia is legal even without a legislation, provided the safeguards are maintained as given in the case of *Aruna Ramchandra*⁷⁵⁴ case. The reason behind such a distinction is that passive euthanasia has moral acceptance, whereas in the case of Passive euthanasia such moral acceptance is lacking. Acceptance is granted to the withdrawing/withholding treatment and letting the person die naturally by their disease but deliberately killing of a person by an expressed act is not acceptable. But there are some arguments that this distinction between active and passive euthanasia holds no value as withholding life-saving treatment is also a deliberate act. Thus, there is no real difference between the two types of euthanasia as both have the same result, i.e., the patient's death on the grounds of humanity. Further it is argued that active euthanasia causes less agony for the patient and family as death is faster and causes less pain. But in most jurisdictions active

euthanasia is illegal because the risk of its abuse is greater.

On the basis of this distinction an analytical question arises based on the distinction of the two types of euthanasia. Why the doctor who administers a lethal injection to the patient is guilty of murder and the doctor who discontinues life support and allows the patient to die, commits no crime. The answer lies in the “acts and omission doctrine”. An act causing harm is a legal wrong whereas an omission which causes the same harm is not wrong unless you have the duty to act.⁷⁵⁵

The right of denying treatment is given protection by the “Doctrine of Informed Consent”. The doctrine gives the right to the competent person to refuse medical treatment.⁷⁵⁶ A medical treatment without consent of the patient would be punishable liable and it is infringement of personal liberty and physical and bodily integrity.⁷⁵⁷

2.4 VOLUNTARY EUTHANASIA

The cognitive ability of the patient to request for euthanasia is known as voluntary euthanasia. Rationally and competently consenting to euthanasia for himself, is known as voluntary euthanasia. Causing death at the request of the person killed and includes the following cases:

- Requesting for help in dying
- Refusal of the burdensome medical treatment
- Refusal to eat
- Requesting for medical treatment to be stopped, or life supporting machines to be turned off

⁷⁵⁴ *Aruna Ramchandra* (2011) 4 SCC 454 142

⁷⁵⁵ *Aruna Ramchandra* (2011) 4 SCC 454 144, 45

⁷⁵⁶ *Cruzan vs Director*, 497 U.S., 261, 277 (1990)

⁷⁵⁷ Common law tort of trespass, *Airdale* [1993] 2 W.L.R. 316



2.5 NON-VOLUNTARY EUTHANASIA

In case of non-voluntary euthanasia, the person is in an unconscionable state or due to other reasons like young age, insanity etc. unable to make a wise choice between life and death, and the decision on their behalf is taken by an appropriate and authorized person according to their living will or expressed consent.

The main difference between the voluntary and non-voluntary euthanasia is that in the former the patient's consent is available, whereas in the latter the patient is unable to give consent because of the lack of capacity to consent.⁷⁵⁸ So in this case either the parents/spouse/children/close relatives take decision on behalf of the patient. In absence of close relative, patient's next friend may take the decision. This is known as the "substituted jurisprudence" in America. But only the surrogate's opinion is not sufficient. The court will have to make sure that the patient's best interest is guarded. The question arises whether the patient's life should be artificially prolonged by using the life supporting treatments. And this should be decided by a competent medical body in charge of the patient. History shows that mostly the opinion of the doctor and next friend coincide with each other.

2.6 LIVING WILL OR ACTIVE DECLARATION

The living will is also known as the medical power of attorney. A living will is an instruction given by the person when he is conscious specifying the action to be taken in a situation when he is incapacitated to decide and also appoints a person to decide on his behalf. The living will include the

direction of withdrawing the life support systems on certain events. Preparation of living will take place when the person is competent but comes into existence when he becomes incompetent and becomes incapable of deciding for himself.

It is advisable to make a living will during the initial stages of the illness as this will give the assurance that the patient has an actual idea of his medical condition and this allows the doctors to give suitable solution for the future medical situations. That is why it is named as advance directives or the active declaration.

2.7 ADVANTAGES OF LIVING WILL

- It facilitates doctors to decide the appropriate medical treatment
- It allows the patients to discuss their end life's decisions with family and doctor.
- The family members are spared from taking difficult decisions for the patient's life.
- The patient's human right of rejecting a particular medical treatment is respected.

2.8 DISADVANTAGES OF LIVING WILL

- The patient may change his decision of dying but the living will may specify contrary instructions.
- It is difficult for healthy person to imagine, what he would desire when a living will take effect.
- It can be hard to translate the words of living will into medical action

⁷⁵⁸ Aruna Ramchandra (2011) 4 SCC 454 140



In the case of *Tzadok v. Bet Ha'aleh Ltd.*,⁷⁵⁹ the court dealt with the living will's validity made months ago on the onset of the illness. The court held that patient will be dealt in the same way as mentioned in his "living will" and her life will not be prolonged by artificial medical lifesaving treatments. Treatments used in routine like pain killers, injections, medicines can be continued. Though it is not compulsory that the living will be continued in all circumstances. But the living will be having an overriding effect and more weightage will be given to it in comparison to sanctity of life and the ethical duty of the doctor to provide treatment to the patient. Thus, life will be artificially prolonged till the quality of life of the patient exists, and living wills must not be executed without due care.

2.9 MEDICAL POWER OF ATTORNEY

Medical power of attorney is a document which allows a person authorised by the patient to take decision on behalf of the patient, who is incapacitated to make or deliver such decisions.

2.10 DOCTRINE OF DOUBLE EFFECT

It is the mercy killing done indirectly, where the treatment is provided by the doctor to reduce pain and also it speeds up the dying process of the patient. This type of mercy killing is morally acceptable, as the primary intention is not to kill.

2.11 PHYSICIAN-ASSISTED SUICIDE (PAS)

When an individual is provided with the information and guidance regarding ending of life with the intention of committing suicide, it is known as "assisted suicide".

When a doctor assists or helps in killing the other person it is called as "physician-assisted suicide". PAS is a criminal offence under Section 306, Indian Penal Code, 1860. PAS is a form of active and voluntary euthanasia.

The US supreme court has given reasons why PAS is illegal:

- PAS involves ending of the patient's life by taking tangible steps. Therefore it is categorized as active euthanasia. The doctor may administer lethal drugs or injection to cause death of the patient.
- It is in the state's interest to protect the vulnerable sections of the society, like the poor, disabled and elderly from mistreatment, neglect and abuse.
- The court observed that patients suffering from terminal illness may opt for PAS in order to prevent their families from medical expenditure.

3. INTERNATIONAL PERSPECTIVE ON EUTHANSIA

*Aruna Ramchandra Shanbaug v. Union of India*⁷⁶⁰ discussed the Euthanasia law in various countries:

3.1 NETHERLAND

Mercy killing and physician assisted suicide is not punishable under the Termination of Life on Request and Assisted Suicide (Review Procedure) Act, 2002, provided the physician acts with due care.

The law on euthanasia was enacted after the conviction that took place in the "Postma" case in 1973 in which a physician was convicted for facilitating death of her mother on her repeated requests for

⁷⁵⁹ *Tzadok v. Bet Ha'aleh Ltd* [1992] IsrDC (2) 485

⁷⁶⁰ *Ibid* at pp. 1312, 1313



euthanasia. In this “Postma” case even though the physician was convicted but the court set a criteria that the doctor should not keep a patient alive in the case of absence of the patient’s wish.

The Act gives the Medical Review Board, the authority to vitiate and suspend the prosecution for Euthanasia of the doctor, if the following conditions are fulfilled namely:

- 1) The patient’s suffering is unbearable with no prospect of improvement
- 2) The patient’s request for euthanasia must be voluntary and persist over time. (The request cannot be granted when under the influence of other psychological illness or drugs).
- 3) The patient must be fully aware of his/her condition, prospects and options.
- 4) There must be consultation with at least one other independent doctor who needs to confirm the conditions mentioned above.
- 5) The death must be carried out in a medically, appropriate fashion by the doctor or the patient, in which case the doctor must be present.
 - 6) The patient is at least 12 years old. (Patient between 12 and 16 years of age require the consent of the parents)

It will be the doctor’s duty to report the cause of death in accordance with the Burial and Cremation Act, to the municipal coroner. The compliance of the due care criteria will be assessed by the regional review committee. On the basis of the findings the case will either be closed or brought to the attention of the public prosecutor. Euthanasia will be considered

valid on the written declaration of the will of the patient and such declaration can be utilized when the person is in coma and unable to communicate his will of euthanasia. Euthanasia becomes an offence, when there is non-compliance of conditions of law.

However, there are certain exceptions to the rule of euthanasia when it’s not considered as an offence, and the legal restrictions do not apply as they are counted as normal medical practices

It includes:

- 1) Stopping or not starting a medically useless (futile) treatment.
- 2) Stopping or not starting a treatment at the patient’s request.
- 3) Speeding up death as side-effect of treatment necessary for alleviating serious suffering.

Euthanasia of children below 12 years’ age is illegal but Dr. Edward Verhagon has developed the Groningen protocol in which the prosecutors will refrain from framing the charges.⁷⁶¹

3.2 BELGIUM

Euthanasia was legalized in Belgium in 2002. In certain conditions suicide can be practiced but the doctors do not possess the license to kill. For mercy killing, the patients must be in persistent physical or psychological pain arising from an accident or incurable illness. The patients who request to end their lives must be conscious and must repeat their request for Euthanasia.

⁷⁶¹ Aruna Ramchandra Shanbagh v. Union of India, AIR 2011 SC 1290 at pp.1312, 1313



The patients can get their lives ended with painkillers. The authorities will have to ensure that the poor patients do not ask for death due to lack of money for treatment. If a patient is not suffering from a terminal disease then a third medical opinion becomes essential. Every mercy killing case has to be filed at the special commission to ensure that regulations are being followed by the doctors.

3.3 SWITZERLAND

Euthanasia is illegal in Switzerland, whereas assisted suicide is permitted, which can be performed by non-physicians. The difference between the two is that in case of assisted suicide, the patient administers the lethal injection himself whereas in case of euthanasia a doctor or some other person administers it. Active euthanasia, i.e., administration of the lethal injection by the doctor or some other person is illegal.

Article 115 of the Swiss Penal Code, assisting suicide is an offence when it is done with a mal intention or with a selfish motive. There is no special requirement of a physician in assisted suicide, but they mostly have access to special drugs. The ethical condition in the Code cautions the physicians in prescribing deadly drugs. One loophole in the euthanasian law in Switzerland is that the recipient of euthanasia need not be a citizen of Switzerland and also it might be performed by a non-physician also. Therefore, citizens of other nations, like Germany visit Switzerland to undergo Euthanasia.

3.3 UNITED KINGDOM, GERMANY, FRANCE, ITALY, AUSTRIA

In these countries, mercy killing or physician assisted death is illegal.

3.5 UNITED STATES OF AMERICA

Active Euthanasia is illegal in U.S.A., whereas physician assisted death is lawful in Oregon, Washington and Montana.⁷⁶² The difference between euthanasia and physician assisted death is that who is administering the legal medicine for causing death of the patient.

3.6 CANADA

The physician assisted suicide is illegal in Canada under Section 241 (b) of Criminal Code of Canada. In the case of *Rodriguez v. British Columbia (Attorney General)*⁷⁶³, a woman aged 43, was diagnosed with Amyotrophic Lateral Sclerosis (ALS) requested the Supreme Court of Canada to aid her in dying. The doctors had informed her that her life expectancy was 2 to 14 months and she would lose her ability to breathe, swallow and she would not be able to move her body and so she would be confined to the bed. The Supreme Court rejected her plea of euthanasia. Justice Sopinka observed:

“Sanctity of life has been understood historically as excluding freedom of choice in self-infliction of death, and certainly in the involvement of others in carrying out that choice. At the very best, no new consensus has emerged in the society opposing the right of State to regulate the involvement of others in exercising power over individuals ending their lives”

⁷⁶² Oregon Death with Dignity Act, 1997

⁷⁶³ *Rodriguez v. British Columbia (Attorney General)* (1993) 3 SCC 519



4. EUTHANASIA IN THE INDIAN CONTEXT

Society for right to die with dignity (SRDD) was founded by Minu Masani in the year 1981. The society published the document named "Ichha Maran". The Maharashtra government introduced a bill for mercy killing in the year 1984, but it was subsequently dropped because of the lack of support.⁷⁶⁴ In the Indian methodology, many gods like Buddha, Mahaveer, Sant Vinoba Bhave ended their lives by refusing to take food. During the Vietnam war, many Buddhist monks committed suicide as a war weapon.

4.1 LAW COMMISSION REPORT

Law Commission in one of its recommendation allowed mercy killing for terminally ill people to end their lives and to be relieved from the long-term sufferings. Law Commission had also recommended earlier, in its 42nd Report, 1971 to abolish attempt to suicide as an offence under I.P.C. by deleting Section 309, Indian Penal Code, 1861.

The Law Commission of India has recommended in its 169th Report that Passive Euthanasia should be legalized and the same was not accepted by the Government. The Medical Treatment of Terminally ill Patients (Protection of Patients and Medical Practitioners) Bill 2006 was drafted by the Law Commission

and the same was modified in the light of Aruna Ramchandra Case.

A bill on Active Euthanasia named "The Euthanasia (Permission and Regulation) Bill, 2007 was introduced in the Lok Sabha. The bill stated that "before making euthanasia legal, sufficient checks and balances at the institutional level are necessary to ensure that system is not misused" and that the "life of the patient is taken only after due process has been adhered to and in a humane and compassionate manner in the presence of family members and elected representatives".

According to the bill, a completely bedridden person or who cannot carry out his daily chores without assistance can file a euthanasia application either with the civil surgeon or the Chief Metropolitan Officer (CMO) of the district government hospital.⁷⁶⁵ The application is presented before the medical board will examine the condition of the patient. A certificate recommending the person's case for euthanasia will be issued by the board in case the board is convinced about the incurable disease of the patient. But the bill elapsed.

In the case of *Gian Kaur v. State of Punjab*⁷⁶⁶, the Supreme Court declared the debate on physician assisted termination of life to be inconclusive. Every attempt, assistance or abetment to take one's life or other's life is an offence under Indian Penal Code, 1860.⁷⁶⁷ Involuntary Euthanasia cases are struck down by proviso one to

⁷⁶⁴ J.S. Rajawat, "Euthanasia" 2010 Cr LJ, Journal Section, p. 321.

⁷⁶⁵ Section 3, The Euthanasia (Permission and Regulation) Bill, 2007

⁷⁶⁶ *Gian Kaur v. State of Punjab* 1996 Cr LJ 1660 (SC)

⁷⁶⁷ Section 299 – Culpable Homicide

Section 300 – Murder

Section 304A – Causing death by negligence

Section 306 – Abetment of suicide

Section 309 – Attempt to commit suicide



Section 92, Indian Penal Code, 1860 and are declared illegal.⁷⁶⁸

There were various attempts made to make Euthanasia legal with reference to Article 21⁷⁶⁹ of the Constitution of India, 1950. Right to life includes right to live with dignity and peacefully.

In the case of *Maneka Gandhi v. Union of India*⁷⁷⁰, it was stated by the Supreme Court that: “*The term personal liberty in Article 21 is of the widest amplitude and covers a bundle of rights which go to constitute the personal liberty of man and some of them have a raised to the status of distinct fundamental rights and given additional protection under Article 19(1)*”.

This interpretation enlarged the scope of Article 21, wherein many rights were included under Article 21 like clean environment⁷⁷¹, right to education⁷⁷², right against bonded labour⁷⁷³ etc.

4.2 ARUNA RAMACHANDRA CASE⁷⁷⁴

Aruna Shaunbagh was an old lady who has been in a permanently on the hospital bed for 37 years after being sexually assaulted by a ward boy. Pinki Virani, the next friend of Aruna file a writ petition that force feeding should be stopped and should be allowed to die in peace. For the examination of Aruna, the Supreme Court set up a medical panel. After the receipt of the medical report, set aside the writ petition on the ground that Aruna’s brain is not dead and that Pinki Virani is not the next friend of Aruna Ramchandra and hence she cannot be euthanised.

The Supreme Court held that passive euthanasia is legal and permissible in India, provided the patient consents to the withdrawal of treatment. The Hon’ble Court laid down guidelines in cases where the patient is not able to consent, then euthanasia may be allowed after complying to the following guidelines:

1. The decision to withdraw life support has to be taken by the parents, spouse, close relative, in the absence these, next friend of the patient who is incompetent.
2. Due weightage has to be given to the attending doctor’s advice.
3. An application has to be filed under Article 226 before the High Court.
4. The bench will comprise of the chief justice of High Court and at least two other judges.
5. A committee will be formed consisting of three reputed doctors, preferably a neurologist, psychiatrist and a physician nominated by the High Court in consultation with the state government.
6. The committee will examine the patient and submit its report.
7. Simultaneously, the person representing the patient shall supply the copy of committee’s report to the court as and when its available.
8. The court shall dispose the matter expeditiously. The court will decide in the best interest of the patient and the reasons of the decision will be properly assigned.

⁷⁶⁸ Section 92 exempts criminal liability for acts done in good faith.

⁷⁶⁹ “No person shall be deprived of his life or personal liberty except according to the procedure established by law”

⁷⁷⁰ *Maneka Gandhi v. Union of India* 1978 SCR (2) 621 662

⁷⁷¹ *Subhash Kumar v. State of Bihar* (1991) 1 SCC 598 Supreme Court of India

⁷⁷² Article 21A

⁷⁷³ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161 Supreme Court of India

⁷⁷⁴ *Aruna Ramachandra* (2011) 4 SCC 454 13



4.3 DOES ARTICLE 21 INCLUDE RIGHT TO DIE?

In the case of *State of Maharashtra v. Maruti Sripati Dubal*⁷⁷⁵, it was held that right to life envisaged under Article 21 includes right to die. The Bombay High Court struck down Section 309, Indian Penal Code, 1860 being unconstitutional and violative of Article 14 and Article 21. The Court held that the desire to die is not unnatural rather just abnormal and uncommon. Also, the court listed the various circumstances under which people may end their lives including diseases, unbearable condition of life etc. But Euthanasia and suicide cannot be at the same footing. Thus, it was held that Mercy Killing is homicide, be it under any circumstances and is an offence under the IPC unless law makes some exceptions.

In the case of *Chenna Jagadeeswar v. State of Andhra Pradesh*⁷⁷⁶, it was held that that right to die is not covered under Article 21 and thus, Section 309 of the Indian Penal Code, 1860 is constitutional.

In the case of *P. Rathinam v. Union of India*⁷⁷⁷, the Supreme Court declared Section 309, of the Indian Penal Code, 1860 to be unconstitutional on the basis of Article 14, but upheld the challenge on the basis of Article 21 of the Constitution of India contending that Article 21 includes the “right not to live a forced life” which means right to commit suicide.

In the case of *Gian Kaur v. State of Karnataka*⁷⁷⁸, the Supreme Court overruled

Rathinam case and declared Section 309 to be constitutional and held:

“when a man commits suicide, he has to undertake certain positive over act and the genesis of those acts cannot be traced to, or be included within the protection of the right to life under Article 21. The significant aspect of sanctity of life is not to be overlooked.”

The court declared that “right to life” includes right to live with dignity upto death and includes a dignified procedure of death. But dying with dignity is not the same as dying unnaturally during a person’s lifetime. The withdrawal of life supporting system was held to be part of right to life with dignity and is permissible, when it is certain that the person will die naturally.

In the year 2004, there was a case before the Andhra Pradesh High Court where a patient named K.Venkatesh was suffering from muscular dystrophy sought a petition to be permitted euthanasia and that he could donate his organs to others. But the court rejected his petition and he died is the same year due to the disease.

5. CONCLUSION

A dilemma arises with respect to the right to die debate. An individual has complete autonomy over his body. But the question arises whether the person should be allowed to use this autonomy to cause prejudice to the interest of his family or the society at large? There is absolutely no surety that the right of self-determination will be utilized in the best interest of the individual. Various factors are taken into account by the individual like the fear related to the procedure, expenditure involved, burden on the family. E.g.:

⁷⁷⁵ *State of Maharashtra v. Maruti Sripati Dubal* 1987 Cr LJ 549 Bombay High Court

⁷⁷⁶ *Chenna Jagadeeswar v. State of Andhra Pradesh* 1988 Cr LJ 549 Andhra Pradesh High Court

⁷⁷⁷ *P. Rathinam v. Union of India* AIR 1994 SC 1884 Supreme Court of India

⁷⁷⁸ *Gian Kaur v. State of Karnataka* 1996 (3) SCR 697 Supreme Court of India



- Life-saving treatment can be a costly affair. Thus, to avoid this financial burden on the family, the person may deny the treatment and thus opt for passive euthanasia.
- The cancer patient may be needing chemotherapy but may be fearing the side-effects of the treatment and may request for the withdrawal of the treatment.

In case of voluntary euthanasia, the stakeholder's interest would be the compelling treatment of the patients. But that would infringe the person's right over his body and thus amount to battery. The State has a compelling interest to safeguard the individual's right to privacy and self-determination affecting the rights of third party in the society. There is lack of the state's compelling interest when an individual undergoes euthanasia or dies. Therefore, the state intervention in cases of euthanasia is unwanted. But the state shall take into account several considerations like abuse by the physician, the sanctity of the medical profession, the cost of keeping the terminally ill person alive. Thus, the state needs to balance the individual interest and the societal interest.

The courts all over the world have struggled to get the right balance between the individual and the societal interest. The Supreme Court, in the case of *Aruna Ramachandra*⁷⁷⁹ has held that voluntary passive euthanasia is legal, whereas the non-voluntary euthanasia requires proper guidelines laid down by the hon'ble court. From the angle of human rights, the voluntary denial of treatment is human right. But this decision of withdrawal of

treatment is not always rational. Thus, the need of law arises which ensures that the decision to deny treatment is taken in the best interest of the patient. Certain provisions can be made like the counseling sessions to be conducted mandatorily.

For the involuntary euthanasia, there are certain guidelines laid down by the Supreme Court. There are various drawbacks for the Supreme Court guidelines.

- It is a time-consuming process as it involves a judicial
- The procedure may be acceptable if there is vegetative state of the patient. But in case of a minor or an insane person, the delay van be extremely agonizing.
- The procedure lacks an expressed "cooling off" period
- The High Court cannot be expected to permanently supervise passive euthanasia in its jurisdiction.

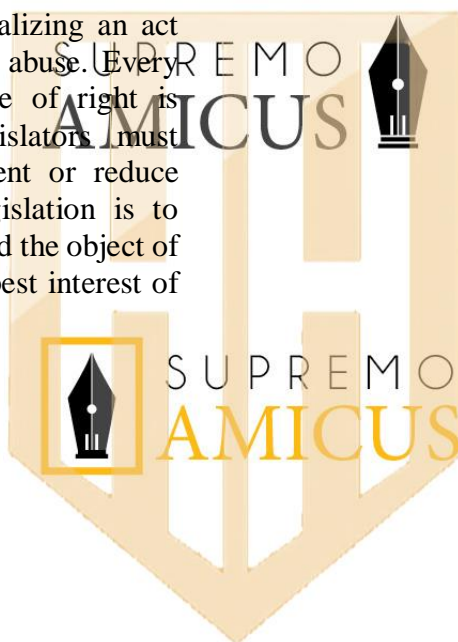
These guidelines are only a stop-gap arrangement. There is a need for the legislature to pass a law with this regard. There must exist an independent quasi-judicial body consisting of retired high court, social workers and doctors. The body must function. The court's function and must decide for the passive euthanasia application. Along with this committee there is a need for standing expert panel of doctors so that applications can be disposed without delay. The standing committee can consist of: a neurologist, a psychiatrist and a specialist in the field concerning the patient. The committee's function would be to assess the patient and to submit a record whether he is a fit case for euthanasia.

⁷⁷⁹ Aruna Ramachandra (2011) 4 SCC 454



For active euthanasia, there is no human right involvement for extinguishing the life by intervention done actively. Active euthanasia can be permitted only if a positive law is passed related to active euthanasia. Looking at the socio-economic scenario in India, it is better not to legalise active euthanasia in India. Whereas a legislation related to passive euthanasia must be passed in India. Its working should be observed effectively for a few years and then a legislation on PAS maybe considered.

People who oppose legalizing of euthanasia have the views that there is a possibility of abuse of right. But this should not lead to an absolute prohibition. Criminalizing an act cannot defend it against the abuse. Every right can be abused. Abuse of right is always a crime. The legislators must provide safeguards to prevent or reduce abuse. The object of a legislation is to prevent the abuse of rights and the object of law, i.e., furtherance of the best interest of the patient at any cost.





COPYRIGHT PROTECTION IN FASHION INDUSTRY

- Logo Design protected under the Trademark Act, 1999.

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1. INTRODUCTION

Fashion industry has a wide ambit of intellectual rights relating to clothes, shoes, perfumes, accessories, jewelry etc. Fashion industry with regard to its specialty is growing and includes protection under intellectual property rights such as Copyright, Trademark, Patent, Design etc.

PIRACY

Piracy in fashion design is the illegal copying of the original fashion design. It can be distinguished into two kinds:

- 1) Knockoffs: Knockoff is the copying of the original fashion design, but it is sold under a different label from the original design.
- 2) Counterfeits: Counterfeit involves piracy and fraud as there is attempt to deceive. It is a copy of the original design, its logo, label etc.

SUBJECT MATTER OF PROTECTION

Articles of the fashion designers can be protected under the following IP categories:

- Colour combination under the Copyright Act, 1957
- Fabric of the article protected under the Design Act, 2000 or the Patents Act 1970 involving an inventive step.
- Sketch Design protected as artistic work under the Copyright Act, 1957
- Article Design protected under the Design Act, 2000

LEGISLATIONS

From the Indian fashion industry perspective, the laws do not protect the entire garment, rather the particular features of the garment. There is a prohibition on the copyright protection if the same design is registered under the Design Act, 2000 according to Section 15(1) of the Copyright Act, 1957. Section 15(2) of the Copyright Act, 1957 states that if a design is capable of being registered under the Design Act, but the same has not been registered, such design will cease copyright protection as soon as the article to which such design is applied is reproduced more than 50 times by an industrial process. Section 2(d) of the Design Act, 2000 excludes the artistic work defined under section 2(c) of the Copyright Act from the definition of design under the Design Act, 2000.

1) Protection under the Design Act, 2000

The Design Act protects the non-functional aspects of the object such as colours, pattern, shape etc. applied to both 2D and 3D forms. The design is registered for a period of 10 years and can be extended upto 15 years.

In case of design piracy, According to Section 22 of the Act, the infringer shall pay Rs, 25000 to the proprietor of the design as contract debt. The proprietor can also obtain injunction and damages.

2) Protection under the Copyright Act, 1957

There is overlapping of the Design Act and the Copyright Act on the design protection. Section 15, Copyright Act, 1957 provides that copyright is not available where a design is registered or capable of being registered under the Design Act 2000. Also



copyright in the design ceases as soon as the design is reproduced more than 50 times by the industrial process.

Original artistic work, contrary to the applied artistic work, i.e. design would fall under the category of artistic work under the Copyright Protection.

3) Protection under the Trademark Act, 1999

Fashion designers usually incorporate logos on the garment at the times of creation of clothing or accessory. In these circumstances logos become part of the design, trademark provides protection for design copying. Also the brand names is protected under the Trademark Act, 1999.

2. OVERLAP BETWEEN COPYRIGHT AND DESIGN LAWS IN INDIA

The exclusive right, known as “copyright in design” is recognized under the Act. This right is different from the exclusive right granted for literary and artistic work which is categorized as “copyright” under the Copyright Act, 1957. There arises situation where a design can be granted registration under both the legislations, i.e., Design Act 2000 and the Copyright Act, 1957. The industrial and product designs can be registered under the Design Act, 2000 and once a design is granted protection under the Design Act then it cannot be protection under the Copyright Act.⁷⁸⁰

In a case where a design is capable of being registered under the Design Act, but the same has not been registered, copyright in such design will continue to subsist and can be registered under the Copyright Act, 1957. But the copyright will cease to exist

once the article to which the design is applied is produced more than fifty times.⁷⁸¹ Thus, under the Copyright law if an article is an “artistic work”, then the same cannot be granted protection under the Design Act. And if the work is capable of registration under the Design Act, then it will cease to have copyright protection as soon as the work is reproduced more than 50 times by the industrial process.

The analogy behind the drafting of Section 15(2), Copyright Act, 1957 was as follows:

1. To prevent the overlapping of Intellectual Property Rights
2. Prohibition of enjoyment of copyright protection, once the design protection is granted.

780 forbade a person from enjoying copyright protection which is reproduced 5- times by the industrial process

To distinguish between artistic work and design, there is a landmark judgment on the issue namely, *Microfibres v. Girdhar*⁷⁸². In this case there was allegation of infringement of copyright in artistic work by the defendant. The plaintiff had copyright protection on an artistic work, i.e., floral designs and defendant infringed the copyright by using those design on a fabric produced by the defendant.

The argument made by the defendant’s side was that the plaintiff is not entitled to copyright protection as the artistic work is actually designs and are covered within the ambit of Design Act, 2000. And as plaintiff failed to register his designs under the Design Act, 2000, therefore he was not left with any remedy under both the Copyright Act, 1957 and the Design Act, 2000.

⁷⁸⁰ Section 15(1), Copyright Act 1957

⁷⁸¹ Section 15(2), Copyright Act 1957

⁷⁸² *Microfibres v. Girdhar*, 2006 (32) PTC 157 Del



The first issue before the court was that whether copyright protection will be granted for the artistic work stated in the case? To deal with this issue the court applied the “object test” for the determination of work. The court held that in order to decide whether the work is “artistic work” or “design”, the object behind such work will have to be given importance. In this case, the work was floral design and the object of the design was to apply it to the upholstery fabric, i.e. industrial use of the design. And thus, it has to independent importance, and thus this work will fall under the Design Act, 2000.

In the case of *Ritika Apparels Limited vs Biba Apparels Private Ltd.*⁷⁸³, the Delhi High Court held that following the language of Section 15(2) of the Copyright Act, 1957, copyright doesnot subsist for drawing, design used for creating dresses, once there is manufacture of more than 50 dresses.

In the case of *Holland Company LP and Ors vs SP Industries*⁷⁸⁴, the court held that if a design can be registered under Section 14 (c), Copyright Act, 1957, copyright can be claimed. If the design is used for production of articles more than 50 times by the industrial process, the copyright ceases in the design.

In the case of *Interlogo v. Tyco Industries*⁷⁸⁵ held that the objective behind the design act was to grant protection to work which lacked artistic independence and there was assumption of significance only on the application to the article.

The court held that as the work falls under the Design Act, 2000 and has been

produced more than 50 times, copyright protection cannot be granted for the said work. Also in the case, the plaintiff did not get the registration done for his work under the Design Act. Thus protection cannot be granted in favour of the plaintiff.

In the case of *Aga Medical Corporation vs Mr. Faisal Kapadi and Anr*⁷⁸⁶, the Delhi High Court held that if a work is can be registered under the Design Act, 2000 but is not registered under the same, then that work cannot be granted copyright protection.

In the case of *Pranda Jewellery Pvt. Ltd. v. Aarya 24 kt & Ors*⁷⁸⁷, the plaintiff was in a business of designing, marketing and selling religious articles made of gold sheets like deities and religious symbols by the name of “Prima Art”. The plaintiff filed a copyright infringement case against the defendant who produced similar religious gold sheet articles. The defendant challenged the plaintiff’s copyright over the artistic work. The defendant pleaded that the artistic work was capable of being registered under the Design Act, 2000 and after not being registered under the Design Act, the copyright ceased after industrial application on the product for more than 50 times.

The court held that an “artistic work” after being reproduced in any form, if it can qualify as artistic work, it shall enjoy the copyright protection under the Copyright Act, 1957. But when it is used for designing an article by its industrial application.

In the case of *Smith Kline Beechan Consumer Healthcare Gmbh vs G.D.*

⁷⁸³ *Ritika Apparels Limited vs Biba Apparels Private Ltd.*, CS (OS) No. 182/2011

⁷⁸⁴ *Holland Company LP and Ors vs SP Industries*, IA No. 1375/2014

⁷⁸⁵ *Interlogo v. Tyco Industries* [1988] 3 WLR 678

⁷⁸⁶ *Aga Medical Corporation vs Mr. Faisal Kapadi and Anr*, 2003 (26) PTC 349 Del

⁷⁸⁷ *Pranda Jewellery Pvt. Ltd. v. Aarya 24 kt & Ors*, AIR 2015 BOM 157



*Rathore*⁷⁸⁸, there was multiplicity of proprietary claims by SmithKline for the zigzag neck of the toothbrush. They claimed trademark and design protection for the zigzag feature. The court invalidated the design registration of toothbrush as they were the subject matter of Design Act, 1911. Smith Kline then claimed copyright protection on the molds and drawing used for making the toothbrush. SmithKline was not allowed to claim proprietary right on flexible neck feature of tooth brush because once the design registration is invalidated, the design enters the public domain for free utilization.

In the case of *Jagdamba Impex vs Tristar*⁷⁸⁹, Tristar claimed copyright protection over the industrial drawing used to make equipments for comb. Jagdamba started manufacture of combs using identical machines based on Tristar's drawings. The court opined that industrial drawings were used to produce combs and hence it had no independent existence, and did not qualify as artistic work under the copyright law. Under section 15(2), copyright protection was lost once 50 combs were produced using an industrial process on the basis of the drawings. Since the drawings were not registered as designs, there was no cause of action against Jagdamba.

In the case of *Photoquip India vs Delhi Photo Store*⁷⁹⁰, the plaintiff made machine drawings and pilot molds from which flash lights was produced, thus copyright protection was given to both the molds and the drawings. The defendant's flash lights caused infringement of the copyright in drawings of the plaintiff. Plaintiff drawing was granted copyright protection as an

artistic work. It was not possible for the defendant to reproduce the article without reverse-engineering and then he prepared illicit drawings which infringed plaintiff's copyright

3. INTERNATIONAL PERSPECTIVE

3.1 COPYRIGHT AND FASHION IN UK

The term "creative economy" was adopted by the United Kingdom to denote the wide contribution of the creative industry in the economic and social life. Thus, there is recognition of the creative industries, in particularly fashion for the generator of jobs and management of culture. Despite of its immense importance to the economy, fashion industry is not given the same level of copyright protection as given in other creative industries.

The question arises whether this industry needs to invoke copyright protection, because the fashion industry thrives on the seasonal product lifespans and fashion become obsolete in no time. If United Kingdom's fashion industry is allowed to grow and prosper then copyright protection becomes of an immense importance. But in an age of technology where there is mobile cameras, 3-dimensional printers and online shopping websites which when combined can click pictures, recreate and sell their knock-off products in the same time when clothes are being displayed at the fashion show. Therefore, it becomes very difficult for the designers to protect their works of fashion from being copied and recreated.

⁷⁸⁸ Smith Kline Beechan Consumer Healthcare Gmbh vs G.D. Rathore, 125 (2005) DLT 725

⁷⁸⁹ Jagdamba Impex vs Tristar, FAO No. 128/2014 & CM Nos. 7778-79/2014

⁷⁹⁰ Photoquip India vs Delhi Photo Store 2014 (60) PTC 563



The question arises that why copyright law should protect the works of fashion industry when the appearance of the product can be protected by the design laws?

Every original work is automatically given protection under the Copyright law. However, under Article 2(7) of the Berne Convention for International protection of Literary and Artistic Works gives some latitude to the countries to protect their works of fashion. To be granted copyright protection under the UK law, the work must fall under the eight categories given under section 3 of the Copyright, Designs and Patents Act, 1988. Work of fashion should be an original artistic work, but case laws are not in favour of this argument as garments do not exactly fall into the listed sub-categories of the artistic works. Whereas, the most appropriate category for the works of fashion would be artistic craftsmanship. Thus the works of fashion needs to be both artistic work and work of craftsmanship.

The meaning of “artistic” has been discussed in many cases. The word “artistic” can be defined as the work aesthetically appealing to the general public. In the case of *Hensher v. Restawhile*⁷⁹¹, the court held that a distinctive lounge suite which was designed with the intention for mass production is not artistic. Similarly, a baby’s cape was not held to be artistic because the intention to create the artistic work was missing. Also a bedsheet with a patchwork was not deemed to be artistic because although the design was not sufficiently creative, although it was pleasing to the eye. Also, the sweaters and cardigans were not held to be artistic because although it was displayed in the

Victoria and Albert Museum, they were displayed as developments in fashion rather than the artistic works. Recently in a case the High Court held that the helmets used in Star Wars films was not artistic because the purpose intended was not aesthetic. Later the Supreme Court held that helmets were not sculptures, thus they could not be protected in that way either. These cases show that judges are not willing to affirm that works of fashion can be artistic

Whereas “craftsmanship” can be demonstrated much easily. Knitting and tapestry making has been treated as craft. Works of fashion are most likely to be considered as works of craftsmanship if they are one-off pieces, whereas the position of the products that are mass produced is unclear. In the case of *Hensher v. Restawhile*, Lord Viscount Dilhorne held that a hand-made work is craftsmanship, whereas Lord Simon held that craftsmanship cannot be limited to handicraft; nor is artistic work incompatible with machine production.

Thus it can be inferred that there is a high threshold fixed for showing that the work is artistic craftsmanship. The garments are not protected by copyright in the United Kingdom. Other countries like US, Germany and France any work which is original can be protected by Copyright law. These countries have the open list copyright systems, because they do not have to categorise the work into a specific category for availing protection.

In France, originality of work includes the work which “bears the stamp of author’s personality”. In Germany copyright protects the “personal intellectual creations”. Whereas in EU the “intellectual

⁷⁹¹ *Hensher v. Restawhile*, [1976] AC 64, [1975] RPC 31



creation” test is followed. The test was used for the first time in the case of literary works in Infopaq , copyright protection in the digital news reporting service.

3.2 COPYRIGHT PROTECTION IN THE US

In the United States of America, copyright protects the original work of the author. The test is that the work should contain “modicum of creativity”. The US copyright office has a voluntary registration system on the lines of Article 5(2) of the Berne Convention. The copyright registration system presumes the ownership and validity, and is a pre-requisite for filing an infringement action. Section 107 of the Copyright Act 1976 of the US provides for the fair use exception which is broader than the fair dealing exception of Europe. Fair use means that it must add value to the society or be “transformative”. Thus, the scope of protection of the works of fashion is greater in the UK. For the purpose of registration, the designers have to publically stake a claim in their designs.

FASHION BILL

The Innovative Design Protection Act, also known as the Fashion Bill was introduced in Congress in 2012. But the IDPA is yet to be passed by the Congress. U.S.A. gives protection to the designers, but copyright protection is not granted on clothes. According to the U.S. Copyright Office clothing is a functional and “useful article” is not entitled to copyright protection. Clothing designs usually are not granted copyright protection because they are inseparable to the clothes attached. The Supreme Court devised a test to determine whether a clothing design is useful article or not in the case of *Star Athletica vs.*

*Varsity Brands*⁷⁹². Even today the copyright protection is not freely given in fashion designs.

Thus, the IDPA covers clothes, foot wares, handbags etc. The Act provides for copyright protection to fashion designs for 3 years. Also, a design can be similar to an already copyrighted design and would be free from liability provided it is independently created without knowledge of such already existing design and was not copied)

Some people oppose the Fashion Bill and according to them copyright of fashion designs would kill the fashion industry. It is believed that copying is an integral for the development of the fashion industry. It is very natural for the product to be copied and produced on a large scale.

The retailers copy the latest season’s designs and sell it under their brand names. Copying can be good for the fashion industry due to two reasons:

1. Increase in the sales of the retailers
2. There is an incentive attached to coming out with new designs as the fashion life cycle is short.

The landmark case of *Star Athletica, LLC vs Varsity Brands, Inc.* had an impact on the fashion industry in the United States. This case is related to the copyrightability of designs on the cheerleader’s uniforms and the concept of “separability” which is a requirement for copyright protection in garments. US copyright law does not protect useful articles such as garments, dresses, shoes, bags are considered as useful items are not granted copyright protection. Only the design that by using the “separability” test can be separated from the garment or other useful items. This means that certain aspects of garments are

⁷⁹² *Star Athletica vs. Varsity Brands* 137 S. Ct. 1002



protectable and not garment as a whole. Thus, there is greater reliance on design patent protection in U.S. among more established brands with deep pockets. In this way these brands protect their staple products, that will be sold more than one season. Thus, the design patent protection is seen as an investment.

3.3 DIFFERENCES BETWEEN THE INTELLECTUAL PROPERTY LAWS IN EUROPE UNION AND UNITED STATES

The European Union has design right protection that give garments and accessories protection as a whole. This does not exist in U.S. and this a big advantage for the European designers.

European fashion markets existed before the US fashion industry, that's the reason behind the of the pre-existence and expansive IP laws in Europe. Whereas the New York's fashion industry started with the grant of license from the Paris designers for the production of low-cost garments and accessories. Now New York is a home for fashion licensing.

France was the first place in the world to produce original creative designs. Design has been protected in France since the 15th century, when the "fabrication of textiles" was granted protection. In France the Decree of the National Convention of July 19, 1793 granted the design protection.

The Christian Louboutin footwear designer case was regarding whether a single colour, i.e., red can be granted protection under the Intellectual Property Rights. Christian Louboutin was granted trademark protection in the U.S. over the red sole foot ware. The us trademark law also known as the Lanham Act registers trademark

consisting of colour. There is a case in which a French fashion house named Yves Sanit Laurant released its foot wares in various colours, including red. Louboutin filed a case against the YSL for claiming trademark infringement for the red-soul trademark. In defense, YSL challenged the grant of trademark protection to Louboutin, whether it was justified and whether the Louboutin's red sole qualified as trademark as it lacked distinctiveness and was ornamental. The United States Court of Appeals for the second circuit held that the Louboutin's red sole trademark is limited in cases where red outsole contrasts the colour of the remainder of the shoe. These cases has led to a rise in litigation cases in various countries where Louboutin is seeking to protect its red-soled shoes.

4. PERFUMES AS AN ARTISTIC EXPRESSION

Perfume, a muti-billion-dollar industry and therefore it requires protection. Trademark and passing off protects the perfume's name and packaging, whereas the scent of the perfume is not protected in UK.

Perfumes are already by copyright law in other jurisdictions. In the case of *Lancome Parfums v. Kecofa BV*⁷⁹³, the Dutch Supreme Court held that Tresor perfume by Lancome is under the purview of copyright protection. Dutch copyright law, similar to the French copyright law follows the civil law tradition and gives protection to the original work which bears the stamp of the author's personality. For the creation to be protected under the copyright law, it should be "perceptible to the senses". In this case, the Dutch Supreme court held that while the scent of perfume was "too fleeting and variable and dependent on the environment", the liquid making up the

⁷⁹³ *Kecofa B.V. vs Lancome Parfums Et Beaute et Cie S.N.C.*, LJN AU8940



perfume was “sufficiently concrete and stable”. Thus, the liquid satisfies the requirement of “perceptible to the senses” and as perfume is a creative work, it can be protected under the copyright law.

The French Cour de cassation in the case of *Bsiri-Barbir v. Haarman & Reimer*⁷⁹⁴ held that perfumes will not be granted protection under the French copyright law because they “are a product of the application of purely technical knowledge and lack, therefore a discernible association with the individual personalities of their creators.”

The court opined that the perfume makers were not artists, rather artisan or craftsmen. Cour de cassation in the case of *Beaute Prestige International v. Senteur Mazal*⁷⁹⁵ confirmed that perfumes are not within the ambit of copyright protection.

4.1 DISPUTED TREASURES

Lancome, a French cosmetics company sells a perfume named Tresor (Treasure) exclusively. Kecofa, a Dutch firm sells its female perfume at one tenth price. Lancome tried to stop Kecofa by invoking trademark right to the word Tresor, but failed. Courts held that consumers will not get confused between the two brands. After the passing of the Dutch Trademark Act, Lancome filed an infringement case again against Kecofa, the trademark failed, but Lancome succeeded in its copyright claim in the case of *Kecofa B.V. vs Lancome Parfums Et Beaute et Cie S.N.C.*⁷⁹⁶

The French Supreme Court linked perfumes to craftsmanship like carpentry, plumbing, rather than artistic work, and thus held perfumes are not eligible for copyright protection.⁷⁹⁷

4.2 LICENSE TO SMELL

In the Dutch Copyright Act, there does not exist an exhaustive list of protected subject matters of copyright law. But copyright protection is extended to those subject matters that are original and perceptible. The Dutch High Court held that the perfume’s smell fulfills these requirements and the smell can be perceptible through the nose. The court differentiated the perfume’s smell from the liquid containing the smell. Thus, a perfume with different ingredients/recipe/liquid but the same smell is not infringing, whereas a perfume with similar formula but different smell will not be infringing.

There can be consequences in the protection of the smell. On one hand, copyright gives permission to the copyright holders to prevent the unauthorized making available to the public his work. This can be interpreted as a person wearing perfume in public, would require a license to avoid the copyright infringement of perfume. But the High Court held that a person cannot be denied an ordinary usage of perfume. Thus, there is a need of adding exceptions to the Dutch Copyright Act to address such problems, if the scents are copyrightable.

There is a copyright protection requirement, like any other expression that is original and perceptible to the senses. Here originality means that a perfume which replicates the smell of the roses cannot be granted protection. Similarly, if a smell resembles some classic perfume that cannot be granted protection. But if the maker of the perfume, gives his own twist to the smell then he will be granted protection.

⁷⁹⁴ *Bsiri-Barbir v. Haarman & Reimer*, [2006] 28 E.C.D.R.380

⁷⁹⁵ *Beaute Prestige International v. Senteur Mazal*, (2008) 39 IIC 113

⁷⁹⁷ CdC, Arrêt No.1006, June 13, 2006, *Nejla X c. Soc. Haarmann & Reimer*.



4.3 PROVING ORIGINALITY

Kecofa challenged the originality of Tresor, as similar to the pre-existing perfumes. The High Court held that originality requirement does not imply that the product has to be absolutely new, but rather the makers should put their own creativity into it. As Lancome provided reports talking about the development of Tresor, the onus of proof was on Kecofa to demonstrate that Lancome had copied the perfume and that it lacked originality.

Dutch copyright law gives protection only against direct imitation or infringement, but in cases where there is a high degree of similarity, the infringer is assumed to have copied the original product and thus the burden of proof will be on the infringer that he created his product independently. This is known as the presumption of imitation. Thus, it is advisable to document the development of the perfume. If there is a similar smell already in the market, the documentation can help to prove that the similarity is a mere coincidence.

5. CONCLUSION

Just as an artist puts a great amount of energy and time into creating a painting which is unique, so does the fashion designer's hard work and creativity is invested in creating a unique apparel. It is a fair thing to do to protect that the product of hard work and creativity. The competition would be promoted and not stifled if the copyright protection will be extended to the fashion industry. The fashion designs have a short product life-cycle, therefore many a times fashion designers are reluctant in protecting their IP rights because of the time and the financial cost involved. Registration of design prevents others from counterfeiting of the design and also prevents to fight against the unscrupulous competitors. Fashion industry is based on creativity and protection of the intellectual

capital in the form IP rights protection helps in boosting of the economy through commercialization of the products. Also the good management of the IP rights helps in the enhancing of the goodwill of the business reputation of the eye of others.

One consequence of copyright protection of perfume is that it can lead to undue monopolies. Humans do not possess very high developed sense of smell and can differentiate only a limited set of smells. Thus, many perfumes can be held to be alike, and infringement can be quickly discovered. Thus, the protection of perfumes can undermine the competition, as only a few perfumes will be allowed to exist lawfully. Thus, the copyright protection of smell is meaningless as most manufactured scents would not be deemed to be original. In the Indian fashion industry, the entire garment is not given copyright protection, rather particular features of the garment. There is a prohibition on the copyright protection if the same design is registered under the Design Act, 2000 according to Section 15(1) of the Copyright Act, 1957. Section 15(2) of the Copyright Act, 1957 states that if a design is capable of being registered under the Design Act, but the same has not been registered, such design will cease copyright protection as soon as the article to which such design is applied is reproduced more than 50 times by an industrial process. The European Union has design right protection that give garments and accessories protection as a whole. This does not exist in U.S. and this a big advantage for the European designers.

European fashion markets existed before the US fashion industry, that's the reason behind the of the pre-existence and expansive IP laws in Europe.



RIGHTS OF PRISONERS

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Introduction- In India the socio-legal system is rooted on non-violence, mutual respect and to maintain the humanity of every individual. If an individual commits any crime then it doesn't mean that by committing a crime he or she ceases to be a human being. Every individual have the human right either it's a prisoner or not. Therefore, if any person who is a prisoner and is being tortured or harassed in some way then it will lead to injustice and in order to protect this injustice, rights are given to prisoners for their protection and welfare.

According to Black's Law Dictionary "prisoner" is "a person who is deprived of his/ her personal liberty" or "a person against whose will, he/ she would be kept in a confinement or a custody".

In layman's language the word 'prisoner' means that 'a person who is kept under legal custody in a jail or a prison since that person had committed any offence or act which is prohibited by the law'. A prisoner is also known as an inmate who is deprived of his/ her liberty.

According to Section 1(6) of Prison Security Act 1992- 'prisoner means any person for the time being in a prison as a result of any requirement imposed by a court or otherwise that he be detained in legal custody.'⁷⁹⁸

There are some basic legal rights which cannot be taken away from them like-

- Right to food and water
- Right to have a legal practitioner or attorney in order to defend himself
- Right to be protected against any violence, harassment etc.

Justice V.R. Krishna Iyer has rightly observed that- "In our world prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrums of inmates range from drift-wood juveniles to heroic dissenters."⁷⁹⁹

The notion about the discipline of prison has shown an extreme change in the modern administration of judiciary. The recommendations which were given by the Jails Committee of 1919-20 provided the way for the abolition of inhuman punishments given to prisoners of any indiscipline. After that the All India Jail Reform Committee 1980-83 also recommended various rights of prisoners and therefore, many changes were encouraged like the revocation of punishment due to good conduct, providing canteen facilities, payment of wages for services etc.

'In the case of **State of A.P. v. Challa Ramkrishna Reddy**, [AIR 2000 SC 2083] it was held that a prisoner is entitled to all his fundamental rights unless his liberty has been constitutionally curtailed. The Supreme Court has emphasized that a prisoner, whether a convict, under-trial or detenu, does not cease to be a human being and, while lodged in jail, he enjoys all his fundamental rights guaranteed by the Constitution of India including the right to life guaranteed by the Constitution. Even a person is convicted and deprived of his

⁷⁹⁸<http://www.legislation.gov.uk/ukpga/1992/25/section/>

⁷⁹⁹https://shodhganga.inflibnet.ac.in/bitstream/10603/46512/12/12_chapter%204.pdf



liberty in accordance with the procedure established by law; a prisoner still retains the residue of constitutional rights.⁸⁰⁰

Right to Fundamental Rights-

Article 14: Equality before law- It says that 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'⁸⁰¹

Article 14 of the Constitution contemplates that every person even it's a prisoner or not have the equal right to be treated equally irrespective of its religion, caste, sex, race, etc. As a prisoner is also a human being and should be treated alike.

In a landmark case of **T.V. Vatheeswaran v. State of Tamil Nadu**⁸⁰² it was held that 'Article 14, 19 and 21 are available to the prisoners as well as freemen. Prison walls do not keep out fundamental rights.'⁸⁰³

Article 19: Protection of certain rights regarding freedom of speech, etc- This Article guarantees six freedoms to every citizens of India. In the group of all the six freedoms prisoners cannot enjoy each one of them as because of the essence of the freedoms. But certain rights included in the Article like 'freedom of speech and expression' and 'freedom to become a member of associations or unions' are available for them.

Article 21: Protection of life and personal liberty- It says that 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'⁸⁰⁴

This Article specify two concepts- a) Right to life; and

b) Principle of personal liberty

The Supreme Court of India has many times widened the ambit of 'right to life' in many cases through different reasonings. In the case of **State of Andhra Pradesh v. Challa Ramkrishna Reddy, AIR 2000 SC 2083** the Supreme Court held that 'right to life is one of the basic human rights, guaranteed to every person by Article 21 and not even the State has authority to violate it. A prisoner does not cease to be a human being even when lodged in jail; he continues to enjoy all his fundamental rights including the right to life.'⁸⁰⁵

In **State of Maharashtra v. Prabhakar Panduranga**, the court held that the right to personal liberty includes the right to write a book and get it published and when this right was exercised by a detenu its denial without the authority of law violated Article 21.⁸⁰⁶

According to the view point of a famous constitutional writer 'Upendar Baxi' the meaning of Article 21 is so vast that it almost covers various types of rights such as right to bail, right to food, right to shelter, right to speedy trial, right against custodial violence etc.

Right to speedy trial-

Right to speedy trial is a fundamental right which has been inferred into our Constitution under Article 21 for the rights of prisoners. Every person is presumed to

⁸⁰⁰ <https://legaldesire.com/rights-prisoners-indian-law/>

⁸⁰¹ <https://indiankanoon.org/doc/367586/>

⁸⁰² AIR 1983 SC 361 : (1983) 2 SCC 68

⁸⁰³ <https://legaldesire.com/rights-prisoners-indian-law/>

⁸⁰⁴ <https://indiankanoon.org/doc/1199182/>

⁸⁰⁵ https://shodhganga.inflibnet.ac.in/bitstream/10603/46512/12/12_chapter%204.pdf

⁸⁰⁶ <http://www.legalserviceindia.com/articles/po.htm>



be innocent until proven guilty. If once a case has been brought before the court then the trial has to be conducted rapidly in order to punish the guilty and to relieve the innocent. Therefore, it is obligatory for the courts to punish the guilty person as soon as possible so that the accused person is not being harassed over the time and justice is not delayed. Because if there would be a delay in trial then the justice would be denied.

In **Kadra Pahadiya v State of Bihar, AIR 1983 SC 1167** the Supreme Court held that 'right to speedy trial is a part of the fundamental right envisaged under Article 21 of the Constitution. Delay in disposal of cases is denial of justice, so the court is expected to adopt necessary steps for expeditious trial and quick disposal of cases.'⁸⁰⁷

The Supreme Court held that 'No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair and just.'⁸⁰⁸

Right to Legal Aid-

Providing legal aid is one of the constitutional rights and its philosophy is that it should be provided easily to the person in need by the legal machinery who is not able to acquire it by itself.

Through the 42nd Amendment Act, 1976 free legal aid has been inserted as one of the Directive Principles of State Policy under Article 39A of the Constitution. Since this Article is placed under part-IV of the constitution among the Directive Principle of State Policy therefore, it is not enforceable by the courts. But it is an

important right which has been included into our Constitution.

'In the case of **M.H. Wadanrao Hoskot v. State of Maharashtra**, the Court held that the right to legal aid is one of the ingredients of fair procedure.'⁸⁰⁹

In '**Sukdas v. Arunachal Pradesh, AIR 1986 SC 991** the Supreme Court held that a free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty.'⁸¹⁰

Right against Solitary Confinement, Handcuffing & Bar Fetters:

'Solitary confinement' means the separate imprisonment of a prisoner or to isolate a prisoner in a separate cell in the form of punishment and is occasionally allowed to meet or access of any other person if the jail authority permits so. Basically solitary confinement means segregation of the prisoner completely from all human society.

Right against handcuffing means that if any person is arrested and if there is absence of solid proof against that person then he/ she is not subject to be handcuffed. For example- If any person selflessly providing its service for any public cause which is right and just and is convicted for bailable offence then in this case it is not necessary to handcuff that person to take from prison to the court.

'In the case of **Prem Shanker Shukla v. Delhi Administration**, the petitioner was an under-trial prisoner in Tihar jail. He was required to be taken from jail to magistrate

⁸⁰⁷ Kadra Pahadiya v State of Bihar, AIR 1983 SC 1167

⁸⁰⁸ Hussainara Khaton v. State of Bihar, AIR 1979 SC 1360

⁸⁰⁹<http://www.legalserviceindia.com/articles/po.htm>

⁸¹⁰https://shodhganga.inflibnet.ac.in/bitstream/10603/46512/12/12_chapter%204.pdf



court and back periodically in connection with certain cases pending against him. The trial court has directed the concerned officer that while escorting him to the court and back handcuffing should not be done unless it was so warranted. But handcuffing was forced on him by the escorts. He therefore sent a telegram to one of the judges of Supreme Court on the basis of which the present habeas corpus petition has been admitted by the court.⁸¹¹

In another case of **Sunil Batra v. Delhi Administration and Ors.**, the Supreme Court examined the validity of solitary confinement and also observed that constantly or continuously putting bar fetters to the prisoners day and night diminish the prisoner from being a human being to an animal and considered this type of treatment brutal and abnormal and held that it is also against the principles of the Constitution of India.

Right against Protection from Torture-

The prisoners have also the right to get protection against torture which is don't by the police officers or the investigating officers. As sometimes police officers who are supposed to protect the citizens and their rights they end up violating the rights of citizens. It should be the responsibility of the police to prevent ill- treatment against the prisoners and treat them as a normal human being.

In case of **Ajab Singh & Anr. v. State of Uttar Pradesh & Ors.**, the court held that- The death of any person under judicial custody is not appreciated and if such death occurs then such holding custody is not only responsible to give answers to the public at large but also to the court that

under whose custody such incident occurred.

Right to consult lawyer and meet friends-

Now a days prison are not treated to give prisoner relief from physical torture but to also provide mental support. In a case of **Sunil Batra (II) v. Delhi Administration** Supreme Court observed that prisoners have the right to meet their friends and relatives and mentioned that the visit of the friends or relatives should be searched properly and other security criterion should be maintained.

In another case of **Joginder Kumar v. State of U.P. and others** it was held by the court that if a public servant is arrested then that matter should be proclaimed to the superior officer before the arrest or if possible immediately after the arrest.

As the person who is arrested have the right to inform someone. And by requesting can consult privately with a lawyer according to section 56(1) of The Police and Criminal Evidence Act, 1984. This section says that- "Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there."⁸¹²

Right to reasonable wages in prison-

A person whether in a prison or a freeman have the right to get remuneration for the services rendered. If the payment is not analogous to the services rendered then it

⁸¹¹<http://www.legalserviceindia.com/articles/po.htm>

⁸¹²<http://www.legislation.gov.uk/ukpga/1984/60/section/56>



would be categorized as ‘forced labour’. Therefore, the prisoners who are made to do work in the prison must be paid reasonable wages.

In the case of **People's Union for Democratic Rights v. Union of India** the Supreme Court held that when a person is providing services and if the remuneration is less than the minimum wage then this service or labour provided by the person would fall within the scope of ‘forced labour’ as mentioned under Article 23 of the Constitution.

In another case of **Mahammad Giasuddin v. State of A.P.**, the court directed the state that the remuneration should be paid on a reasonable rate which means that it should not be less than the minimum wages. The work which is done by the prisoners is not only a part of the punishment but also a rehabilitation for the prisoners. They are provided with training for their work in order to prevent them from idleness, depression etc. The kind of work which would be regarded to every prisoner is determined by the medical examination by keeping in mind their mental and physical being.

Prisoner’s Rights under the Prisons Act, 1894-

Prisons Act, 1894 is the first Act legislated regarding prisons regulation in India. The main objective of the Act is to provide rehabilitation of prisoners in association with the prisoner’s rights. Sections which are related to the rehabilitation and reformation of the prisoners are-

- Section 4 of the Prisons Act, 1894- Accommodation for prisoners:

It says that- ‘The State Government shall provide, for the prisoners in the territories under such Government, accommodation in prisons constructed and regulated in such manner as to comply with the requisitions of this Act in respect of the separation of prisoners.’⁸¹³

- Section 7 of the Prisons Act, 1894- Temporary accommodation for prisoners:

It says that- ‘Whenever it appears to the Inspector General that the number of prisoners in any prison is greater than can conveniently or safely be kept therein, and it is not convenient to transfer the excess number to some other prison, or whenever from the outbreak of epidemic disease within any prison, or for any other reason, it is desirable to provide for the temporary shelter and safe custody of any prisoners, provision shall be made, by such officer and in such manner as the State Government may direct, for the shelter and safe custody in temporary prisons of so many of the prisoners as cannot be conveniently or safely kept in the prison.’⁸¹⁴

- Section 24(2) of the Prisons Act, 1894- Prisoners to be examined on admission:

It says that- ‘Every criminal prisoner shall also, as soon as possible after admission, be examined under the general or special orders of the Medical Officer, who shall enter or cause to be entered in a book, to be kept by the Jailer, a record of the state of the prisoner's health, and of any wounds or marks on his person, the class of labour he is fit for if sentenced to rigorous imprisonment, and any observations which the Medical Officer thinks fit to add.’⁸¹⁵

⁸¹³ <https://indiankanoon.org/doc/432764/>

⁸¹⁴ https://indiacode.nic.in/handle/123456789/2325?view_type=browse&sam_handle=123456789/1362

⁸¹⁵ https://indiacode.nic.in/handle/123456789/2325?view_type=browse&sam_handle=123456789/1362



- Section 27 of the Prisons Act, 1894- Separation of prisoners: ‘The requisitions of this Act with respect to the separation of prisoners are as follows- (1) in a prison containing female as well as male prisoners, the females shall be imprisoned in separate buildings, or separate parts of the same building, in such manner as to prevent their seeing, or conversing or holding any intercourse with, the male prisoners ; (2) in a prison where male prisoners under the age of 1[twenty-one] are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not; (3) unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners ; and (4) civil prisoners shall be kept apart from criminal prisoners.’⁸¹⁶

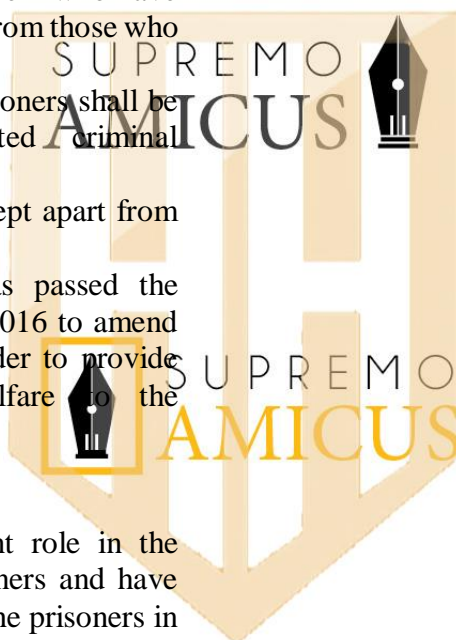
In 2016 the Parliament has passed the Prisons (Amendment) Bill, 2016 to amend the Prisons Act, 1894 in order to provide better protection and welfare to the prisoners.

Conclusion-

Judiciary plays an important role in the protection of rights of prisoners and have been acting as a saviour for the prisoners in cases where legislative and executive are not able to provide perfect solution to them. And the prisoners are also not deprived of their fundamental rights while they are behind the bars as Article 14, 19, 21 implicitly guarantees the rights of the prisoners.

Since in many cases Supreme Court has held that the prisoner is also a human being

and a natural person and should be treated likewise. Committing a crime does not reduce that person into a non person but punishment should also be provided in order to safeguard the society and let other person beware of doing such acts.



⁸¹⁶https://indiacode.nic.in/handle/123456789/2325?view_type=browse&sam_handle=123456789/1362