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Editor:

Maharishi Journal of Law and Society
Maharishi Law School, Noida
Maharishi University of Information Technology Noida
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FROM CHANCELLOR'S DESK



Shri Ajay Prakash Shrivastava

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Change comes when all individuals' efforts are combined together which collectively ensure greater enforceability. His Holiness Maharishi Mahesh Yogi Ji advocated the power of deliberation by stating that every human is a world in itself and therefore, connected to other small worlds and then to nature as a whole. It is indeed a matter of great honor and prestige that our Maharishi Law School is coming up with Volume III of the Maharishi Journal of Law & Society which is related to research encompassing various contemporary issues pertaining to law.

It is a peer-reviewed journal that strives to provide a new and apt platform for the exchange of ideas on all facets of legal studies. It intends to keep you updated on current revelations and reforms in the legal world through articles, research papers, case studies, and other means. In the realm of law, research has benefited both industry and academia and through this journal, Maharishi Law School has attempted to exhibit its continuous endeavor of promoting research and growth of individuals. This issue covers a wide range of topics in the areas of Environmental Law, Company Law, Fundamental Rights, Consumer Protection Laws, Constitutional Law, Administrative Law, Cyber Law and Intellectual Property Rights.

The excellent response that we have received towards the call for research papers is remarkable and worth appreciation.

With immense pleasure, we thank all the Authors, Law Academicians, Editorial Board and Editorial Advisory Committee, who have contributed in making Maharishi Law Journal, a quality Journal. We request our readers for their continuous support and comments for the Journal to keep on expanding and providing high-quality learning to all its readers.

On this note, we bestow our best wishes to the upcoming Maharishi Law Journal-2021 edition!!

FROM VICE CHANCELLOR'S DESK



Prof. (Dr.) Bhanu Pratap Singh

Vice-Chancellor

Maharishi University of Information Technology

It's a matter of great honour for the Maharishi University of Information Technology that the Maharishi Law School (MLS) is coming up with Volume 3 of Maharishi Journal of Law & Society. Law has undergone tremendous changes with passing time. The outlook of the society towards the legal system has completely changed which has given way to new issues and their solutions. This journal is a step towards contributing to the law jurisprudence and helping the readers enhance their knowledge and develop their opinions regarding several contemporary issues.

Maharishi Law Journal is the result of all the cumulative efforts of our dear authors, members of the Editorial Board and Advisory Committee. Contributing to this publication allows authors to conduct in-depth research in certain areas of the law and improve their legal research writing and analysis skills.

I would like to congratulate our Ho'ble Chancellor, Director General, Dean Academics, Dean and Deputy Dean of Maharishi Law School and other staff members at MLS for the success of this Journal. We hope that the readers find the articles in this volume, interesting and useful. We will look forward to the various comments and suggestions from our valuable readers in our endeavour to make Maharishi Law School Journal a leading global journal on contemporary legal issues.

DIRECTOR GENERAL'S MESSAGE



Happy to present this issue of Maharishi Law School Journal. This journal is a peer reviewed journal that aims to promote and disseminate research in the areas of law. The journal has wider reach and acceptance across the country. The journal focuses on presenting new frontiers of knowledge and realizes the goal of the law school of creating intellectual capital. The articles as collected in this issue directly address the specific issue focusing on Law as well as Society, the thematic words used so prudently in the name of the journal Maharishi Journal of Law & Society.

The journal of sensitizing academia on high quality, assiduously researched original research papers besides encouraging valued comments on legislative and judicial developments. The main motive of this journal is to place emphasis on rigors of good and holistic research. I take this opportunity to place on record my appreciation for all contributors whether of authors, or of editors board or of advisory board for quality product of high level.

This is my belief that this journal will be a pleasant experience for our readers. It encompasses twenty four research papers covering wide range of topics pertaining to contemporary issues in the new emerging laws and look forward to their continuous support in taking the journal to greater heights of in the readers' fraternity to please to give their supportive suggestions the feedback is welcome.

FROM THE DESK OF DEAN ACADEMICS



Prof. Ajay Kumar

Dean Academics

Maharishi University of Information Technology, Noida

At MUIT, Our sole mission is helping students to become “competent adults who are also principled value-based leaders”. We have succeeded in our mission by embracing a 100% interactive educational philosophy, which is practiced organization-wide - by students and faculty. Alumni and corporate leaders holding various esteemed positions in various reputed organizations lend a supporting hand in this endeavour.

We are committed to providing world-class higher education and this journal of Maharishi Law School is a step forward towards achieving the aim of world class higher education by promoting research regarding contemporary issues in the field of law. The journal received humungous response from authors all over the country and thus is a great contribution towards legal research and jurisprudence.

I feel very enthusiastic to witness the response that this issue of the journal receives from our esteemed readers. I would like to convey my best wishes to all contributors, may you uphold the spirit. Many Congratulations to the Editorial Team, faculty members and students of Maharishi Law School of Law and hope to see many more successful publications related to the field of law.

I firmly believe that this Journal will provide the platform for the academicians, experts from legal fraternity/ Researcher Scholars and law students to showcase their research.

I wish the Journal & the team a grand success.

FROM THE DESK OF EDITOR



Prof. (Dr.) K. B. Asthana

Dean, Maharishi Law School

Editor, Maharishi Journal of Law & Society

I consider this a great opportunity to introduce this issue of Maharishi Law Journal all the readers and contributing authors. The major goal of producing this journal was to provide a forum for the exchange of ideas on all parts of legal studies, and we promise to keep you up to date on the newest legal advancements.

At Maharishi Law School, we provide personalized and professional, top grade education delivered by an experienced and well-qualified faculty who bring an intellectual rigor and practical focus to their classrooms. We draw students from diverse and multi-cultural backgrounds, which provide a very vibrant and stimulating classroom environment. Our students also benefit from our International Partnerships and possibilities of Internships and Career Opportunities in the numerous Law Firms, Advocate and Institution located in Delhi, other part of India and International also. We, at MLS, continuously strive to enhance our programs to stay at the forefront of higher educational trends. We also have signed Memorandum of understanding with the Institute of Company Secretaries of India which has embarked the beginning of a remarkable journey for the career of our students. We also organized an international conference and the research papers received in the conference have been published in UGC Journal and ISBN book.

This is worth noting that many Jurists, practitioners, law professors, and students have offered scholarly research papers and case comments on many topics of law to the publication. The fundamental goal of this publication is to give readers with in-depth knowledge of many topical and contemporary legal topics. Contributing to this publication allows authors to conduct in-depth analysis in certain areas of the law and improve their legal research composition and analytical skills. This publication contains contributions from many professors, intellectuals, lawyers, and students, all of whom are concerned with current issues. In terms of this Journal, it's fantastic to be a part of such a remarkable endeavour that gives all relevant data to the legal community.

I hope you will find this edition of the Law Journal to be both useful and interesting. Your response will determine the success of this journal. It would be you all could provide us with your valuable comments.

MESSAGE FROM ASSOCIATE EDITOR



Dr. Annu Bahl Mehra

Associate Editor, Deputy Dean Maharishi Law School

It is a pleasure to be the part of this journal titled as Maharishi Law Journal. I feel honored and privileged in writing a message towards this issue. I am sure this venture will serve as a platform for dissemination of high-quality research in the field of law. Maharishi Law Journal is a peer reviewed journal and focuses on promoting and covering with its vastness all fields of law and all the legal advancements. It shall advance research through various articles, research papers and case comments between the legal fraternity, researchers, academicians and students. It is my firm belief that it is about to outshine other such endeavors in the law.

The purpose of bringing out a Law Journal is to share knowledge with all the people concerned with legal fraternity.

The Maharishi Law School has not confined its activities to this publication but also has expanded the scope of the work being done by the law school in many ways. The law school actively organizes webinars and conferences on national and international level for disseminating legal knowledge. The university has also recently signed a MoU with Institute of Company Secretaries of India which has opened a gate of opportunities for the students. Our call for research papers for this issue of the journal has received a tremendous response and volume of high quality research papers out of which twenty four have been published. I would like to congratulate the higher management of MUIT along with our Dean, Prof. (Dr.) K.B Asthana for the success of this journal. This would not be complete without thanking our editorial team for cooperating and working hard for the success of this journal.

I once again wish it an overwhelming and tremendous success!

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THE LEGALITY AND MORALITY OF ZOOLOGICAL PARKS IN INDIA

Dr. KB Asthana*
Snehal**

ABSTRACT

Morality and Legality are different concept of the same coin named society, where one is protected by norms and the other is guarded by written laws. Today, each and every aspect of the society is backed up with laws which has made it easy to regulate and maintain order among the organisms within the State. Animals have become one of its entity as man-made laws as the human society has developed overtime. Further, India has a long history with having a cordial relationship with the animals and therefore it has always tried to create a balance between the essential rights provided to them in comparison with fundamental rights of the citizens as Constitution of India under the Article 51(G) states that it shall be the duty of every citizen to protect the wildlife and to have compassion towards living creatures. The Central Zoo Authority was established under the Wild Life (Protection) Act, 1972 to strengthen the procedures and practices that are used to protect the biodiversity and it mainly focuses on fauna of the country. Despite having a protection laws and other precautionary rules, there always have been a tussle between the authority and other factors for the maintenance of the rules and regulations which are laid down. The gradual rise in the human conscience, there has been an increase in pressure on the zoo authorities which has eventually led to a creation of imbalance and loopholes within the functioning of the higher authorities.

The paper throws light upon the functioning of the laws and authorities set up for the preservation of biodiversity and will look into the practices and loopholes present within the same. Is it successful in providing a promising atmosphere to our rich fauna and how the outlook of the society shapes the same?

KEY WORDS: Morality, Fauna, Legality, Constitution of India, Central Zoo Authority, Wild Life (Protection) Act, 1972, Biodiversity.

INTRODUCTION

The ecology of the earth consists of both flora and fauna cohabiting together and thus forming a biodiversity from where a balance could be maintained in the functioning of the lifecycle. The humans are connected to the biodiversity from the beginning itself wherein the whole system is inter-dependent on each other for the availability of food and other resources. With the evolution of human beings, the situation graduated justifying the ideology of “survival of the fittest” where the superior

* Dean, Maharishi Law School, Maharishi University of Information Technology, he can be reached at kbasthana001@gmail.com, Mob. 9289460910.

** She is a Law Graduate, Campus Guru Gobind Singh Indraprastha University, Dwarka Sector 14, New Delhi, can be reached at snehalasthana001@gmail.com.

(human) started to hunt in order to satisfy their requirements and thus it exceeded in becoming a mere entertainment process and a memento for glory and pride. This further resulted in clearance of the wilderness present on the globe making a tense situation for the countries. Thus, the creation of laws made a formal proclamation to protect and preserve the wildlife area.

The creation of zoo, as per the supporters, is to maintain the blur connection between the humans and wildlife in pursuance with the prevalent biodiversity. In India, people were always attached to the animals and other wildlife resources through various ways and continue to do so since the ancient period. For instance, the edicts which are available from the Harappan Civilization depicts the human figures along with the engravings showing animals, this demonstrates that people were closely related with the wildlife. As the time passed and with more advancement in technology, there was increased amount of animal hunting and poaching and abundance in trade. This resulted in formation of various laws in order to protect the wildlife and sudden extinction of various animals, the most prominent of them being the Wildlife (Protection) Act, 1972 which was primarily enacted to improve the animal condition and conservation of rich biodiversity.¹

Wildlife, as a resource, is in need of protection for the existence of mankind and the same thing was adopted in the World Commission on Environment and Development in the report called “Our Common Future”, which directed the preservation of our biological diversity and ecosystem. It was taken as a base for the implementation of National Forest Policy. Zoological Parks are considered to be ex-situ preservation of species, where the conservation takes place outside the wildlife zones and that to maintain the connect with the human beings. The Silent Valley Case, the Court decided that preservation of endangered species is necessary and the State has considerable obligation to fulfil the duty as per mentioned in the Entry 17² of the Concurrent List and Article 48A³ of the Indian Constitution. The State over a period of time have made reforms in order to protect the rich wildlife and resources present in India.

PROTECTING THE WILDLIFE: A STORY TO ENCOURAGE CONSERVATION

When a coin is tossed in the air, the probability of getting an outcome is one, which means that out of two expected outcomes only one can be seen as a result, but we can't deny that the other outcome is also there which can be a result next time as well. This same phenomenon occurs with the other aspect of life as well and most importantly when the policy is being framed by the State regarding a particular issue. The animals were always part of the human life since the man learnt the process of domestication, it has never left the side the people. But domestication does mean that all the wild animals were being domesticated, some of them stayed being the part of wilderness and away from the human intervention. The people started their intervention with the evolution of time and this resulted in further depletion of the green cover and animals entering into the extinct zone. India, being second most populous country in the world, is also the occupier of the 15% of the world's wildlife reserve.

¹ Kumara ShambhavaShrivastava, *Supreme Court Bans Tourism in Core Tiger areas*, DOWN TO EARTH, (Nov. 29, 2020, 10:30 AM), <https://www.downtoearth.org.in/news/supreme-court-bans-tourism-in-core-tiger-habitats-38731#:~:text=The%20Supreme%20Court%20has%20temporarily,core%20areas%20of%20tiger%20reserves.&text=The%20bench%20of%20justices%20Swatanter,further%20orders%20of%20the%20court.>

² Constitution of India, 1950.

³ Ibid.

With this, it becomes an implied obligation of the country to maintain a balance between the two, which it has tried to accomplish with the well-established concept of sustainable development.

The Convention on Biological Diversity is an international agreement adopted in 1993 in order to reverse the situation of depletion of wildlife cover and restore it back to the previous state. Its three main objectives are to conserve the biodiversity, sustainable use of the biodiversity resources and fair utilization of other natural resources.⁴ Taking this as base, India formulated its own policies and strategies in order to preserve the natural resources and came up with National Biodiversity Action Plan which is reviewed after a fixed period. The List II of Schedule 7⁵ also states that the State has to make laws to preserve, protect, and improve the livestock and to prevent animal diseases and on fisheries, which has to be taken care by the State.

A series of complex communities of which a man is a part of and only the part or section of that land should be given to trespass because if given the entire control, then the resources are bound to diminish and it is considered that the human intervention especially after the growth of advanced civilization and directly through excessive commercial trade.⁶ As far as the conservation of the wildlife resources are concerned, there were many laws which came into force to implement the ideals mentioned in the Constitution such as Wildlife (Protection) Act, 1972, Prohibition of Cruelty to Animals Act, 1960 and Biological Diversity Act, 2002. The reason for sudden rise in animal trade is because it is majorly used as food, fuel and building material, as medicine and health care, and as religious items. Furthermore, it has resulted in many species turning endangered and some of them becoming extinct.⁷ Here, the role of the State come into picture where it has been empowered with duty to enlighten the citizen of the country to conserve the “natural wealth” of the country.

ZOOLOGICAL PARKS: AN EX-SITU CONSERVATION STRATEGY

An ex-situ conservation focuses on the preservation of biodiversity outside the natural habitat which is supposed to be the opposite of in-situ, which throws light on protecting the wildlife while keeping them within the blanket of nature.⁸ This kind of conservation is found in national parks and biosphere reserves but zoological parks are mainly to build a connect with the people living outside the forest circle.

There are many advantages for the ex-situ conservation strategy where the competition for the food and shelter and other resources required for subsistence by the endangered animals and plants can be minimized to a certain level but the condition is that the animals staying as a part of that arena should be identified and enlisted within a record.⁹ With the coming of the Wildlife (Protection) Act, 1972, the whole outlook towards the protection and preservation aspect of the wildlife changed incorporating various new viewpoints of conservation and judiciary has also become vigilant in these matters over a period of time.

⁴ National Biodiversity Action Plan, 2019.

⁵ Constitution of India, 1950.

⁶ State of Bihar v. Murad Ali Khan, 1 1988 SCR Supl. (3) 455.

⁷ S.C. SHASTRI, ENVIRONMENTAL LAW 396-397 (6th Ed. Eastern Book Company).

⁸ NIGEL MAXTED, ENCYCLOPEDIA OF BIODIVERSITY, (2nd ed. 2013).

⁹ IYYAPPANJAISANKAR, BIODIVERSITY AND CLIMATE CHANGE IN TROPICAL AREAS, 2018.

The Wildlife (Protection) Act, 1972 contains six schedules which are directly focused towards the protection of endangered animals and plants from unnecessary human intervention and regards hunting and poaching of any animal, whether endangered or not, as illegal and can be sentenced with the imprisonment of maximum seven years and a fine of ten thousand rupees.¹⁰The illegal trade of animal skin is also been done away with and punishment is prescribed as per the crime committed by the person. The Supreme Court in 2015 banned tourism in core tiger areas, as it was one of the major reasons in decline in the population of tiger in the country. The petition was filed by Bhopal based non-profit called Prayatna, asserting that the tiger habitat should be kept inviolate of all types of human disturbances. The court further stated that the banning should be conducted phase wise and when some States did not apply the guidelines, a fine was imposed on them.

The zoological parks didn't develop in one night, it was an evolution which took place over a period of time. It was about 19th and the end of 20th century; the zoo came under formal shape where it was mainly to educate people about the diversity of flora and fauna the earth possesses. Each region provides shelter to the sundry species and having these parks as base provides the knowledge about the animals and their habitat, therefore, zoological parks became a popular tourist spot for animal enthusiasts. India also formulated Central Zoo Authority for the regulation of these zoological parks. These places are also considered to be the hub for wildlife researchers in order to explore the diversity and decode the behavioral aspect of these animals.

CENTRAL ZOO AUTHORITY: THE GOVERNING BODY

Central Zoo Authority is the body which is mainly constituted to govern the functioning the regulate the maintenance of zoological parks. Earlier, the zoos were controlled by the Indian Board for Wildlife and thus a committee send its report which finally led to an amendment in the Wildlife (Protection) Act in 1991 and thus gave birth to the body of Central Zoo Authority. This made a further addition to the Wildlife Act in the form of Chapter IVA and Section 38A to Section 38J, which is under Ministry of Environment and Forests, Government of India. The body consists of the Chairman, ten members and one-member secretary.

The Authority mainly focuses on maintaining minimum standards for the upkeep and healthcare of the animals and control the mushrooming of unplanned and ill-conceived zoos. The zoo has to gain recognition from the Authority laid down under Recognition of Zoo Rules, 1992. There is large scale exchange between the indigenous and foreign zoo which are again regulated by the body. It has a ultimate vision to provide a proper environment to the animals which suits them and a near in- situ preservation. But these goals and vision is barely achieved by the governing authorities as there have been many cases regarding the mis-treatment of animals residing in the respective zoos and some are often subjected to illegal trade and are utilized to obtain valuable resources. While there are some instances where the animals have been subjected to negligence of humans and at the same time the humans face the frustration of the animals.

As in the case of *Fatima & Ors. v. National Zoological Park*, where a tourist was killed by a White Tiger and it was alleged that the guard which was in charge of the cage was untrained and the deceased was alive for almost 15 minutes as he accidently fell in the cage whose protection barrier was

¹⁰ Section 51, Wildlife (Protection) Act, 1972.

less than 5 feet, i. e., 2.5 feet. The case was decided on the basis of negligence on the part of Zoological Authority and it was ordered to maintain the proper safety measures in order to avoid future accidents.

Similarly, in *Nitin Walia Minor v. Union of India*,¹¹ a three-year-old child was grabbed by a tigress while he was standing near the enclosure. The doctrine of strict liability was applied here. The Court alleged that the purpose of this zoo is not only entertainment but education so it is the duty of the Zoological Authority to take care that the animals which are kept under enclosure should not be capable of posing any threat to the people visiting. The authority was charged with the negligence on their part. This shows that despite being a body which is empowered to provide *ex-situ* conservation has ultimately failed to do so.

A “MORAL” SHADOW: THE HIDDEN ASPECT

The animals which are kept under the zoo are considered to have a less age as compared to their other wild relatives. Animal, as said by Rousseau regarding humans that men are born free possessing each and every kind of liberty to grow in their respective lives, also have some rights for themselves. A cage is something for which animals or anyone was not created and providing a boundary to them in turn molds their inherent behavior and leaves the animal to behave in uncertain manner. There are much more ways which are adopted by the authority to keep the animals in the cage do possess a harmful effect on animals. There are some instances where the animals coming from the circus are not able to withstand the atmosphere so they embrace an uncertain death. No artificial atmosphere or environment can match with the natural habitat to which they are adapted to, so there is a sharp imbalance between the moral aspect of the wildlife preservation.

Furthermore, many animals which are kept in zoo are not endangered species and therefore their captivity does not serve the purpose of conservation at all. Interestingly, a very similar question was raised before the Hon'ble Bombay High Court in *Ethical Treatment of Animals v. Commissioner, Brihar, Mumbai Mahanagarपालिका* as it was argued that keeping animals which are not declared to be endangered in the zoo can't be said to be done in furtherance of animal conservation and hence is not in line with the objective of the Act. However, the Hon'ble High Court restrained itself from making any observation or ruling on this contention and only noted the reply of the central government on this issue, which weakly claimed that the practice was necessary to inspire empathy among zoo visitors. The stand of the government here was quite oxymoronic as it claimed that for ensuring public empathy towards wild-animals, it is necessary to deprive them from their natural habitat and way of life. An act which may be reasonably argued to be sign of indifference itself.

CONCLUSION

Article 51A(g) provides each and every citizen of the country to provide protection to wildlife and preserve it. It is necessary to address right in the start that the concept of zoo is not totally deprived of merit. Many species which were dangerously close to extinction have indeed been saved by breeding in captivity. Hence it is safe to conclude that zoo does act as an effective tool of *ex-situ* conservation. But the question remains that 'is keeping animals in captivity the only way of saving them from extinction?'. The answer is in negative, as other methods of *In-situ* conservation do exist. It may also

¹¹ I (2001) ACC 275.

be argued that Ex-situ conservation is actually less desirable, as once animals become adapted to captivity it is difficult for them to survive in their natural habitat and are made dependent on human care forever. The major issue which is faced by the country and authorities is that there is a huge imbalance between moral and legal obligations as moral obligations are not enforceable, they are somewhat left behind.

RESERVATION -A TOOL OF SOCIAL ENGINEERING FOR BACKWARD CLASSES NOT A FUNDAMENTAL RIGHT A CASE STUDY

Prof. (Dr.) Pallavi Gupta

Principal, School of Law

JIMS Engineering Management Technical Campus

986834667/ 9971210840

pallavi.gupta@jagannath.org, Pallavigupta2000@yahoo.co.in

ABSTRACT

Reservation in India was introduced as an instrument of social engineering. Reservation had been a hot bowl since India got its Independence. Reservation in India varies from state to state and group to communities, employment to studies. Reservation prevails almost in every government sector i.e education, employment at initial level or promotions level. This research paper shall highlight some jurisprudence related to reservation besides historical part of reservation. Researcher shall research whether State is under obligation to provide reservation in direct employment or promotion as a tool of social engineering. Can a candidate of schedule casts and schedule tribes claim reservation in the post of promotion as fundamental right? This research paper is a case study with reference to reservation in employment at promotion level in the state of Uttrakhand.

Key words: Reservation in Promotion, Enabling Provisions, Backward Classes, Adequate Representation, Concession, Relaxation, Writ Petition, Review Petition, Special Leave Petition.

INTRODUCTION

“The claim to equality before the law is in substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties”

Judge Lauterpacht of the International Court of Justice, 1945

History of Reservation System in India

In India roots of reservation system had prevailed since British rule. It is opined that reservation is one of those tools that have always been eager to preserve and protect the concept of equality so that a harmony can be maintained between the over-privileged and under-privileged in a civil society.

Reservation during British India

In 1882 for uplift of the primary education *Hunter Education Commission*¹ recommended that: i. *special care should extend to the primary education*, ii. *Literary and vocational training should be in secondary education*, iii. *Adequate facilities should be available for the female education in the*

¹ Lord Ripon, constituted Hunter Education Commission under the chairmanship of William Wilson Hunter in 1882.

country.² To achieve this task the Local government, Local Boards and Municipal Boards should be responsible. During this time Social Reformer Mahatama Jyotiram Phule had made a demand for proportionate reservation in government jobs and free & mandatory education for everyone. The first ever Government Notification 1902 regarding reservation had provided a scheme for the protection, upliftment and safeguards for the backward classes of the society. The notification had provided 50% reservation for the backward classes in the State administration. This reservation policy was introduced to eradicate poverty in the state of Kohlapur by Chatrapati Sahuji Maharaj. The Government of India Act, 1909 had introduced separate electorate system for Muslims in India and continued to be adopted under the 1919 Act. The Communal Government Order, 1921 had provided reservations for Dalits³ and also increased reservation for Muslims and Indian Christians. This reservation policy was implemented in Madras Presidency by the Raja of Pangal. The Government of India Act, 1935 provided separate electorates to Dalits and certain number of seats were allocated to the depressed classes if that the classes has adequately represented in Civil services.

Reservation in Independent India

After independence in 1950s, *State of Madras v. Champakam Dorairajan* (AIR 1951 SC 226)⁴ case is of utmost importance to discuss the reservation system in India. The Supreme held that any notification, order, scheme providing cast basis reservation in government services are unconstitutional and violate Article 29(2) and Article 16(2) of the constitution. This judgment led to the First Amendment of the Constitution of India to enable the Government to make provision for reservation. Constitutional Amendment of 1951 inserted Article 15(4) which states that “nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”⁵

In 1960s, in the case of *General Manager, S. Rly. v. Rangachari* (AIR 1962) Supreme Court held that under Article 16(4) reservation of posts also includes promotions as well.⁶ In the case of *M R Balaji v. Mysore* (AIR 1963)⁷ Supreme court held that reservation cannot be provided more than 50% in any government sector. In 1990s in the case of *Indira Sawhney & Ors v. Union of India*⁸ Supreme Court first time permitted separate 27% reservation for other backward classes in central government jobs provided i-the creamy layer of backward classes will be not be entitled for any reservation, ii-reservation is limited upto 50% within reservation, iii reservation shall be a one-time affair, iv. Reservation shall be confined to only initial appointments, no reservation in promotions and overruled the judgment of Rangachari case.⁹ However, the policy makers of our country were of the view that this judgement of supreme court would be having adverse affects on the depressed and scheduled classes and led to amend the constitution as stated in the ‘Statement of Objects and Reasons’ of The Constitution (Seventy-Seventh Amendment) Act, 1995:

² <http://www.gktoday.in/hunter-education-commission-1882-83/> (Last visited on March, 2021).

³ http://www.liquisearch.com/p_subbarayan/as_chief_minister_of_madras_presidency/reforms (Last visited on march, 2021).

⁴ *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226.

⁵ The Constitution of India, 1950.

⁶ *General Manager, S. Rly. v. Rangachari* AIR 1962 SC 36 .

⁷ *M R Balaji v Mysore* AIR 1963 SC 649 .

⁸ *Indira Sawhney & Ors v. Union of India.* AIR 1993 SC 477 .

⁹ Supra Note.12.

*“This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interest of the Scheduled Castes and the Scheduled Tribes, the Government has decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend article 16 of the Constitution by inserting a new clause (4A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes”.*¹⁰

In the case of *S. Vinodkumar v. Union of India* (1996)¹¹ apex court held that no relaxation in the matters of reservation is permissible and lowering of the qualification marks or examination marks is in violation to Article 16(4) of the Constitution of India it must read with Article 335¹². Against this judgment several representations were submitted from different quarters of the country, challenging that it will have adverse affects on the interests of Scheduled Castes and Scheduled Tribes, thus the Government had reviewed the position and get passed the 82nd Amendment Act and following proviso was added to Article 335 of the Constitution namely:

*“Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State”.*¹³

In 1920s in the case of *M. Nagraj & Ors v. Union of India and Ors.* (AIR 2007)¹⁴ Supreme Court held that 77th and 82nd constitutional amendments are constitutional and valid and insertion of Article 16(4A) and (4B) do not in destroy the structure of Article 16.

Regarding reservation in education in the case of *P.A. Inamdar & Ors. v. State of Maharashtra* (AIR 2005)¹⁵ Supreme court held that the State cannot impose its reservation policy on private unaided educational institutions, it led to amend constitution again to impose State’s reservation policy on unaided and aided private educational institution. The Constitution (93rd Constitutional Amendment) Act 2006 was enacted with the object as follows-

“To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the

¹⁰ The Constitution (Seventy-Seventh Amendment) Act, 1995, “Statement of Objects and Reasons”.

¹¹ *S. Vinodkumar V. Union of India* 1996 6 SCC 580.

¹² Article 335: Claims of Scheduled Castes and Scheduled Tribes to services and posts The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

¹³ The Constitution of India, Article 335.

¹⁴ *M. Nagraj & Ors v. Union of India and Ors.* AIR 2007 SC 71.

¹⁵ *P.A. Inamdar & Ors. v. State of Maharashtra* 2005 AIR(SC) 3226.

minority educational institutions referred to in clause (1) of article 30 of the Constitution, it is proposed to amplify article 15.”¹⁶

The following clause was inserted in Article 15 which states that:

“(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.”

Under this constitutional provision the Central Educational Institutions (Reservation in Admission) Act, 2006 was enacted to provide reservation to backward classes in unaided private institute including central education system. It was challenged in the case of *Ashok Kumar Thakur v/s Union of India (SCC 2008)* on the ground that “the Union of India has failed in performing the constitutional and legal duties toward the citizenry and its resultant effect and the Act shall have wide consequence and ultimately it shall have the result in dividing the country on caste basis”¹⁷. But Supreme Court upheld its constitutional validity.

After considering the journey of reservation it can be said that Reservation had been a hot bowl since India got its Independence. Reservation is a beam of hope to the backward people to raise themselves as a respected member of the society. They wanted to get rid of stigma of being Inferior in the eye of the society. Babasaheb Ambedkar chairman of drafting committee of Constitution realised that Indian caste system is not appropriate. Framers of the constitution of India were conscious about the fact that the elimination of socio-economic inequalities in the society was the need of the hour and required the highest of attention for egalitarian of the society, but it was left to the future legislator. They guaranteed that the constitution of India contains in itself sufficient protection and adequate safeguards for uplifting the underprivileged and socially & educationally backwards classes of the society. Reservation policy was brought as tool of social engineering under several articles (16), 16(4A), 16(4B), 16(5) and proviso to 335 of the constitution of India. These articles enable the State to make provision to introduce reservation in employment and education as a tool of social engineering. On the one side Article 16 (4) of the constitution empower the State to formulate provisions of the reservation for the backward class of citizens in the initial stage of appointments or posts if State thinks that representation of backward class/ classes is not adequate in the government services. On the other side Article 16 (4A) empowers State to make provision of reservation in the favour of the scheduled castes and the scheduled tribes to any class of post of promotion in the services if State thinks, their representation is not adequate in the State services. Under article 335 speaks about concession, relaxation. For reservation in promotion in State services in favour of the Scheduled Castes and the Scheduled Tribes, State can relax qualifying marks of any examination or lower the standards of evaluation. Further constitutions provides that claims of the backward classes (scheduled castes and

¹⁶ The Constitution (Ninety-Third Amendment) Act, 2005.

¹⁷ *Ashok Kumar v. Union of India Writ Petition (Civil) No. 265 of 2006 and WP (Civil) Nos. 269 and 598/2006 and 29 and 35/2007.*

the scheduled tribes) for appointment to services of the state, shall be consider but keeping in mind the fact that efficiency of administration shall not effect.

For the purpose of reservation, backward class means socially & economically backward classes, schedule cast and schedule tribe. Schedule cast and schedule tribe are defined in article 366(24) & (25). Scheduled Castes means those castes, races or tribes or parts of groups etc which are deemed to be Scheduled Castes under Article 341 and Scheduled Tribes means such tribes or tribal communities etc which are deemed to be Scheduled Tribes under Article 342 for the purposes of the Constitution of India. Enabling Provisions with reference to reservation means it empowers the States to make provision for reservation. It depends upon discretion of State if the representation of particular class of society in services is not adequate. Writ Petition means constitutional remedy under article 32 and 226 of the Constitution of India available to aggrieved person to access to court against States action for breach of their fundamental rights. Review Petition means remedy available under article 137 of the constitution of India, section 114 and order 47 of the Civil Procedure Code, 1908 to the aggrieved person against an order or judgment to the same court. People take recourse to review petition, where appeal is not filed. Special Leave Petition means remedy available under article 136 of the Constitution of India to aggrieved person to access to court with special permission of Supreme Court, if high court refuses to grant certificate for appeal.

In the case of *Mukesh Kumar and Ors. vs. The State of Uttarakhand* (2020) controversy was raised related to the reservations to the candidate of scheduled castes and scheduled tribes in promotions in the posts of Assistant Engineer (Civil) in Public Works Department, of state of Uttarakhand In this case during hearing several writ petitions, civil appeals, and Special Leave Petition were clubbed and decided accordingly.

STATUS OF RESERVATION IN THE STATE OF UTTARAKHAND

The Uttar Pradesh Public Services (Reservation for SCs, STs and OBCs) Act, 1994 was enacted to provide reservation in public services and posts in favour of SCs, STs & OBCs of citizens. Under Section 3(1) of the UPPS Act, 1996¹⁸ provides *reservation at the stage of direct recruitment*. While Section 3(7)¹⁹ of provide *reservation in public posts by promotion* by government order, although such Government order is subject to modification or revocation time to time.

In 2001, the State of Uttarakhand was created under the UP Reorganisation Act, 2000 and for the purpose of providing reservation in the public post the Uttar Pradesh Public Services (Scheduled Caste, Scheduled Tribe and Other Backward Caste Reservation) Act, 1994 was adopted and

¹⁸ The U.P. Public Services (Reservation For Scheduled Castes, Scheduled Tribes And Other Backward Classes) Act, 1994- Sec 3(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitment's are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, - (a) in the case of Schedule castes- twenty-one percent,(b) in the case of Schedule Tribes- Two percent,(c) in the case of Other Backward Classes of citizens- Twenty-seven percent

Provided that the reservation under clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made;

¹⁹ 3(7) If, on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked.

accordingly Government Notification was issued on dated 30.08.2001. However for the implementation of this Act in Utrakhand certain changes were made in the percentage of reservations. For Scheduled Castes from 21% to 19%, for Scheduled Tribes and percentage of reservation was increased from 2% to 4% and for Other Backward Classes reservation was modified from 21% to 14%. Section 3(7) of the 1994 Act, was also extended to the State of Utrakhand to provide reservation in promotion. It was challenged in the case of *Vinod Prakash Nautiyal case (2012)*²⁰. The HC of Utrakhand upheld the validity of notification regarding section 3(7) of the 1994 Act²¹. Supreme court correct the judgments of the High Court given in *Uttar Pradesh Power Corporation case (2012)*²² and held that Section 3(7) of the 1994 Act as unconstitutional insofar as it is opposing to the pronouncement in *M. Nagaraj case (2006)* regarding reservation in promotion²³. It is directed that no promotion can be given on the basis of reservation by the State by taking recourse to Section 3(7) of the 1994 Act. However, the State Government was given freedom to enact the law according to provisions of the Constitution of India.

In the meanwhile a review petition was filed to review the judgment of *Vinod Prakash Nautiyal case*, but it was dismissed. State Government was directed by to High Court to constitute a committee for collection of data relating to the backwardness of the reserved communities in the State and to identify inadequacy of their representation in public posts. Although State Government constituted a committee for collection of Data but on 05.09.2012, a notification was issued by the State Government to fill all public posts without any reservations. This order superseded all previous orders related to reservation.

First writ petition- Govt. order struck down- Mr. Gyan Chand (candidate of Scheduled Caste Community) working as Assistant Commissioner (Civil), State Tax, challenged the Government order and filed a *Writ Petition* for quashing the Government order dated 05.09.2012. The High Court on 01.04.2019 struck down the Government notification as against the decision of supreme Court in *Indra Sawhney case.* (1992) and *Jarnail Singh case (2018)*²⁴. Against this judgment of the High Court a Civil Appeal @ SLP was filed.

Second writ petition -directions to fill post by reserved category-Vinod Kumar and three others (candidates of the scheduled castes) working in the PWD, Uttarakhand filed a writ petition of mandamus in the High Court seeking a direction to prepare two lists by the to the State. One list of eligible selected candidates and another list for each category of eligible candidates of General, SCs and STs to be prepare for promotion to the post of Assistant Engineer (Civil) in PWD. They further asked to hold a departmental promotion committee by government to fill the post Assistant Engineers by promotion by giving reservation to Scheduled Castes and Scheduled Tribes according to the Government Orders dated 30.08.2001 and 17.02.2004. The High Court disposed off the writ petition (15.07.2019) and directed the Government to implement reservations in promotion to the members of scheduled castes and scheduled tribes only in future vacancies and to maintain the quota allocated for

²⁰ Vinod Prakash Nautiyal and Ors. v. State of Uttarakhand and Ors. W.P. (S/B) No. 45 of 2011.

²¹ Mukund Kumar Shrivastava v. State of U.P. (2011) 1 ALL LJ 428; .

²² Power Corporation Ltd. v. Rajesh Kumar and Ors. (2012) 7 SCC 1.

²³ Prem Kumar Singh v. State of U.P. (2011) 3 ALL LJ 343;.

²⁴ Jarnail Singh and Ors. v. Lachhmi Narain Gupta and Ors. (2018) 10 SCC 396.

these categories. Against this judgment dated 15.07.2019 another Civil Appeals @ SLP were filed in Supreme Court.

Review petition- realized error- not necessary to collect data- not obliged to provide reservation-In the meanwhile, the State Government filed a review petition against the judgment of HC dated 01.04.2019. In review petition the High Court realized that it committed an apparent error in its judgment dated 01.04.2019. The High Court elucidate that it is not necessary for the Government to collect data regarding backwardness of the SCs & STs. Further the High Court observed that *as Article 16(4-A) of the Constitution is an enabling provision* therefore government is not bound to provide reservation in promotions to candidates of SCs and STs. The High Court directed on 15.11.2019 the State Government to take a decision within a period of four months from the date of receipt of the judgment regarding reservation, whether they have to provide reservation or not in the services of the State, after considering the data relating to the adequate or inadequate representation of SCs and STs.

Civil Appeals @SLP-Agrieved by the order dated 15.11.2019 passed in review petition, the Civil Appeals @ SLP were filed. State Government contended that Article 16(4) and 16(4-A) are merely enabling provisions and State has no constitutional duty to provide reservations, therefore people are not having fundamental right to claim reservation in direct recruitment or promotions to the posts in government service. Government relied upon the judgment of *Vinod Prakash Nautiyal case* by which Section 3(7) of the 1994 Act was declared unconstitutional to provide reservation in promotion. The State government said on the basis of the decision of *M. Nagaraj and Ors. Case* that State is not bound to make reservations, they have rightly decided, after due consideration, that there shall be no reservation in promotions and there is no necessity for collection of any quantifiable data when the Government has already decided not to provide reservations. State Government further contended that the collection of data is required only to justify a decision to provide reservation. State Government argued as per the decision of *Suresh Chand Gautam case (2016)*²⁵ that state cannot be directed by court to identify quantifiable data and to provide reservation.

On the other hand, aggrieved parties i.e, employees of reserved category argued that the State cannot refuse to collect data to identify representation (adequate or inadequate) of the scheduled castes and scheduled tribes in public services. They argued that there is constitutional mandate for the State to provide reservations for upliftment of the members of the scheduled castes and scheduled tribes whether it is promotions or direct recruitment. They have right to equality and this right cannot be defeated by the State Government by not implementing Article 16(4) and 16(4-A) of the Constitution. They further urged that although State can decide not to provide reservations but only after satisfying that the scheduled castes and scheduled tribes are adequately represented in public posts on the basis of data. They condemned the decision of *Suresh Chand Gautam(2016)* case for decided incorrectly. They further informed that as recommended by Supreme Court in *M. Nagaraj case (2006)*, State government has already constituted a Committee to collect data regarding of representation of candidate of SCs & STs in public posts. Finally they contended that the State Government was constitutionally obliged to provide reservations on the basis of the data, collected by the Committee

²⁵ Suresh Chand Gautam v. State of Uttar Pradesh and Ors. (2016) 11 SCC 113.

because representation of the scheduled castes and scheduled tribes in government services is inadequate.

In the present case of *Mukesh Kumar* (2020) three issues were framed in these civil appeals, writ petitions and special leave petitions to decide-

- Whether the State Government is constitutionally obliged to make reservations in public posts
- Whether the State Government can take decision for not providing reservation to the candidates of SCs and STs.
- Can the writ of mandamus be issued by the Court to direct the State Government to provide reservations in public posts?

Regarding first issue, Supreme Court relied upon judgments of *Ajit Singh case* (1999)²⁶ that Article 16(4) and 16(4-A) are enabling provisions in nature and these articles empowering the State Government to consider providing reservations or not, if the circumstances so necessitate, the Supreme Court held that Article 16(4) and 16(4-A) although part of right to equality but do not confer fundamental right to claim reservations in promotion. It is established law that direction cannot be given to the State Government to provide reservations for appointment in public posts. Likewise, the State is not obliged to make reservation for SCs & STs in matters of promotions in public posts. Hence it is concluded that constitutional provisions under Article 16(4) and 16(4-A) give the discretion to the State Government to make reservation in matters of service in favour of the STs & SCs candidates, 'if in the opinion of the State they are not adequately represented in the State services'. Apex court held that if State exercise its discretion and provides reservation in public services, the State has to collect data showing inadequacy of representation of that class. And to provide reservations in promotion, the State government has to satisfy on the basis of data that such reservations became necessary due to inadequacy of representation of SCs & STs in the particular post without affecting efficiency of general administration as required under Article 335 of the Constitution.

Regarding second issue, i.e. can state government take decision for not providing reservation to the candidates of SCs and STs, SC held that it is within the jurisdiction of the State Government to decide whether reservations, in the matter of appointment and promotions are required or not. As per provisions of Article 16(4) and (4-A), the inadequate representation of SCs & STs is an issue of subjective satisfaction of the State. The State can form its own opinion on the basis of data available by Committee etc. Regarding the scope of Article 16(4) and 16(4-A) of the Constitution, Law is already settled by judiciary. Accordingly Supreme Court dismissed the SLP. At this stage, it is important to mention that after the formation of the State of Uttarakhand certain notifications were issued to provide reservation in promotion to public posts with certain modifications. A Committee was appointed by the Government of Uttarakhand for collection of scientific data for adequate or inadequate representation of the members of SCs and STs in public services in the State. This

²⁶ *Ajit Singh and Ors. v. The State of Punjab and Ors* (1999) 7 SCC 209.

Committee recommended that representation of SCs and STs was inadequate and it was approved by State Cabinet on 12.04.2012, but the State Government decided on by notification to set aside all previous Government notifications relating to reservation in promotions to the post of State services. Since the Government is not obliged to provide reservation in promotions, we are of the opinion that there is no justifiable reason for the High Court to have declared the proceeding dated 05.09.2012 as illegal. Therefore State can take decision not to provide reservation, if circumstance warranted.

Regarding third issue, i.e. Can the writ of mandamus be issued by the Court to direct the State Government to provide reservations in public posts? According to the law established by Supreme Court, it is clear State Government is not obliged to make reservations. It is not their fundamental right to claim reservation in promotions. The direction given to state government to collect scientific data is not necessary, as State is already having the required data. Relying upon the judgement of *Suresh Chand Gautam case (2016)* it was held that mandamus cannot be issued to the State to collect data to identify the adequate representation of the SCs and STs in public services and to provide reservations in public post. Therefore, the direction given by the High Court that the State Government should collect data first regarding status of representation of SCs and STs in Government services after that the State Government should take a decision to provide reservation in promotion or not, is contrary to the law laid down by this Court and is accordingly set aside.

CONCLUSION

After analysing the various stages of reservation system in India it is concluded that reservation system has been part of India's history. India as a society was always divided and compartmented into sections based on color, caste, religion, etc. and because of this continuous evil that has been prevailing in our society reservation system was chanted to be the tool to protect and embrace equality and to accelerate vertical mobilization to under-privileged and backward classes of the society. Since the time of hunter commission the wheel of reservation system has continued to roll and accelerate and develop to bridge the gap between the long lost under-privileged section of our community and the cream, well to-do community. It is questionable as to why does caste is still a basis for reservation in jobs and colleges. Now the backward classes have risen onto a level equal to that of the "general" class population and poverty, illiteracy is still an issue of concern amongst some of the upper castes. Social disharmony is also one of the negative aspects of the reservation system, for example being of that of the '*Jatt agitation and Patel's agitation*'. There was evidence saying *Jats and Patels have protested enough for them to be termed as 'backward'*²⁷. Our reservation system clearly needs spiral clean change and amendments so as to reach the desired goals.

In the present case while delivering judgment, division bench of L. Nageswara Rao and Hemant Gupta, JJ. discussed various provisions of constitution of India, UPPS (Reservation for SCs, STs & OBCs Act, 1994), various rules in length. After considering various judgment of Supreme Court in *Indra Sawhney (1993)*, *Ajit Singh (II) (1999)*, *M. Nagaraj(2006)* and *Jarnail Singh(2018)* it is clear that Article 16(4) and 16(4-A) do not confer fundamental right to anyone to claim reservations in promotion. These articles are just enabling provisions in nature and the collection of data regarding representation of SCs and STs in public service is a sine qua non for providing reservations in

²⁷ Abhineet Maurya, "Why I Strongly Believe That The Reservation 'Crisis' Could Become Dangerous If Not Solved", available at <http://www.youthkiawaaz.com/2016/03/reform-of-reservation-system>.

promotions. The collection of data by the State Government is only to justify reservation to be made in the public posts. Hence State government is not constitutionally obliged to provide reservations in promotion and further government is not bound to justify its decision that there is adequate or inadequate representation of members of the Scheduled Castes and Schedules Tribes in State services. Even if the under-representation of SCs & STs in State services is brought to the notice of this Court, no mandamus can be issued to the State Government by this Court to provide reservation as laid down in the case of *C.A. Rajendran (1967)*²⁸ and *Suresh Chand Gautam (2016)*.

Considering historical aspect of reservation and its evolution and keeping in mind facts of present case it is concluded right to reservation cannot be claimed as fundamental right, it is enabling provision and adopted as tool for social engineering of Indian society.

²⁸ C.A. Rajendran v. Union of India (UOI) and Ors. A.I.R. 1968 SC 507.

IMPACT OF MEDIA TRIAL ON THE JUDICIAL SYSTEM AND POLICE INQUIRIES

Dr. Annu Bahl Mehra

Deputy Dean & Associate Professor
Maharishi Law School, MUIT, Noida

Ms. Aparna Bhat

LLM student, Maharshi Law School

ABSTRACT:-

It is indispensable for a nation governed by the 'rule of law' to have an impartial and accountable media, considered to be the fourth pillar of the democracy, the other three being Legislature, Executive and Judiciary. Media has been provided with many freedoms and immunities so that this fourth pillar of democracy stands tall and strong. Media has to play its role ethically and with responsibility in the 'administration of justice, the basic element of which constitutes 'natural justice' and 'rule of law'. Freedom of media is the freedom of the people as they should be informed of the public matters. Media has the power to influence the thought process of the public and therefore its role in the society cannot be ignored or undermined. A free media is pre-requisite to democracy.

The purpose of this Research paper is to provide deeper insight into the impact of media intervention and media trial over the judicial system and police inquiries. This research paper tries to critically analyse the role of media activism in the administration of justice and its effects on fair trial, on the basis of the materials on the topic, such as newspaper articles, case studies, journals, interviews of the legal luminaries. On carefully analysing the material available on the topic, I have come to the conclusion that, there are both pros and cons of the role of media in the society. On one hand it is important that in a healthy democracy, media should have a freedom to express themselves freely, but on the other hand this freedom should be exercised with a great deal of responsibility so as not to hinder the administration of justice. There is an immediate need to regulate the freedom of press.

Keywords:- Media activism, media trial, police inquiries, administration of justice, regulation of freedom of press.

Hypothesis:-

1. Whether media access and activism facilitates or is a hindrance to dispensation of justice?
2. Whether uncontrolled or unregulated media trials interfere with the dispensation of justice?
3. Whether there is need to draw a balance between the independence of judiciary, freedom of press and respect of the rights of the individual?

INTRODUCTION:-

Media constitute the fourth pillar of the democracy i.e. the fourth estate apart from Legislature, Executive and Judiciary. Media plays an important role in generating a democratic culture in the society. Media identifies the problems in our society and serves as a medium for deliberation. In a healthy democracy it is important that people have freedom of speech of expression i.e. they have freedom to express themselves freely and express their ideas, opinions. In this aspect, media can play a positive role in democracy only if there is an enabling environment that allows them to do so. People become aware about so many aspects of life they normally are ignorant of. Media has become increasingly popular among people from all walks of life and it has the potential to influence the thoughts of its readers/ viewers to a large extent.

Media plays a very constructive role in today's society. It has an important role in increasing the public awareness and collects the views, information and attitudes towards certain issues. Media is considered as the watch dog of the society. It is important in any democratic set up, that there is free and fair media which functions without any form of bias and prejudice. The freedom of press is regarded as the mother of all liberties in a democratic set up. The role of media in ensuring and guaranteeing the citizens their rights and liberties can be traced back to the times of the Nationalist movement in India.

The freedom of press is not expressly provided in the constitution of India. Media draws its freedom from Article 19(1) (a)¹ of the constitution, which confers freedom of speech and expression. This freedom however is not absolute and subject to reasonable restrictions in the interest of sovereignty and integrity of India, State security, public order, decency, morality or in relation to defamation or incitement to an offence.

Therefore along with the freedom comes a responsibility towards society. Therefore, the need of the hour is that the media should regulate itself and show accountability and cover the story and events rather than making them so as not to hamper the administration of justice and serve the interest of justice in true sense.

History and Evolution of 'Media Trial'

'Trial by media is a phrase which got popular in late 20th century and early 21st century to describe the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt or innocence before or after a verdict in a court of law.²

Its first inception was the phrase 'Trial by television' which found light in the response to the 3rd February 1967 television broadcast of the Frost Programme, host, David Frost. The confrontation and Frost's adversarial line of questioning of insurance fraudster Emil Savundra led to concern from ITV executives that it might affect Savundra's right to fair trial³.

¹ H.M.Seervai, *constitution of India*, (volume 1).

² Middleweek, Belinda "Dingo media? The persistence of the trial by media" frame in popular frame, and academic evaluations of the Azaria Chamberlain case. *Feminist media Studies*. Vol (17), 4th May 2017, Issue 3, 2017.

³ Jeffries Stuart (1st September 2013) "Sir David Frost obituary", *The Guardian*, Sep.1,2013 ISSN0261-3077.

During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria similar to lynch mob which not only makes a fair trial nearly impossible but means that regardless of the result of the trial the accused will not be able live the rest of their life without intense public scrutiny.

Although a recently coined phrase, the idea that popular media can have a strong influence on the legal process goes back certainly to the advent of the printing press and probably much further. This is not including the use of a state controlled press to criminalize political opponents, but in its commonly understood meaning covers all occasions where the reputation of a person has been drastically affected by ostensibly non- political publications.

Often the coverage in the press can be said to reflect the views of the person in the street. The responsibility of the press to confirm reports and leaks about individuals being tried has come under increasing scrutiny and journalists are calling for higher standards. There was much debate over U.S President Bill Clinton's impeachment trial and prosecutor Kenneth Starr's investigation and how the media handled the trial by reporting commentary from lawyers which influenced public opinion⁴.

In United Kingdom, strict contempt of court regulations restrict the media's reporting of legal proceedings after a person is formally arrested. These rules are designed so that a defendant receives a fair trial in front of the jury that has not been tainted by prior media coverage. The newspapers the Daily Mirror and The Sun have been prosecuted under these regulations, although such prosecutions are rare.⁵

In Indian context, Europeans brought in the press culture into India, to spread Christianity in the Subcontinent. The first newsletter was started by James Augustus Hickey in 1780.⁶ The British Government was not keen on this because being in English it wouldn't really incite people, but anyhow due to some defamation charges Hickey was stopped. In 1799, the first act pertaining to press was passed that was the Lord Wellesley's Press Act 1835. The Act had provisions for pre-censorship wherein every newspaper was first inspected by the Government secretary and then published. On insistence with the act the offender was deported back to Europe. A Press Act, 1813 was passed which regulated publishing pertaining to the military. In 1818, another press act was passed related to censorship of articles relating to peace and tranquility. The licensing regulation and Metcalf's act were also there. The actual strict regulations on press began after the mutiny of 1857 wherein stringent laws were put in so that incitement to Indian people was avoided. The Vernacular Press Act, 1878 was passed so that no paper could be published in a language the British had a problem in interpreting. The Indian National Congress and other ardent libertarians took to a more assertive and insightful media. After the independence freedom of the press and media was welcomed by the leaders. The major burden that was put on media was at the time of emergency. Since then Indian media has had a fairly good relationship with their rights.

International Perspective on the Media's Freedom of Speech and Expression:-

⁴ "Legal News: Newshour with Jim Lehrer". *Public Broadcasting System (PBS)*, Oct.19, 1998. Retrieved Mar.12,2011.

⁵ Bowcott, Owen "contempt of court rules are designed to avoid trial by media", *The Guardian*.

⁶ Hickey, William, "The memoirs of William Hickey" Volume II (1775-1782), *Hurst and Blackett; London*,1918, P. 175.

The media has been called the handmaiden of justice; the judiciary, the dispenser of justice and the catalyst for social reforms. Thus both are essential for the progress of a civil society. In 1807, in the United States of America with the case of Aron Burr United States v. Burr, subsequently, it erupted in England; it has finally reached the shores of India. The Indian Judiciary finds itself at a cross road to balance the competing fundamental rights of the media and of the accused. The United States of America, England and India are the torch bearers of democracy. We are progenies of the common law. We thus share a common political ideology, a common legal heritage. The constitutions, whether written or unwritten, proclaim, protect and promote the same set of fundamental right

One of the most important functions of an independent judiciary is to ensure the right to a fair trial. The obligation is enshrined in the 1985 UN Basic principles on the independence of the judiciary, in Article 6, which states the judiciary is entitled and required to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. The principles enunciated in this article are also stated in similar language as in the International Covenant on Civil and Political Rights (ICCPR),⁷ which provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal in the determination of any criminal charge or in a suit at law.⁸ The ICCPR acknowledges that the right to a public trial is not absolute and that certain limitations on public access are necessary.

In 1994, a group of 39 distinguished legal experts and media representatives met and lead to the development of the Madrid Principles.⁹ The objectives of the meeting were, to examine the relationship between the media and the judicial independence, to formulate principles to help the media and the judiciary to develop a relationship that serves both freedom of expression and the judicial independence. Section 10 of the Madrid Principles outlines permissible on the freedom of expression: Laws may restrict the Basic principle of a free press in relation to criminal proceedings in the interest of administration of justice to the extent necessary in a democratic society for the prevention of serious prejudice to a defendant, for the prevention of serious harm to or improper pressure being placed upon a witness, member of a jury or a victim.

Reasons for Media Trial:-

Media is growing as the fastest medium to provide the information rapidly. Be that any field, media gets us the information very fast. Media helps in promoting the schemes of the government and plays its role for the welfare of the society. Media helps in bringing forth the social and political changes. Media also plays a significant role when justice is totally denied or delayed. Media's involvement in under trial matters has also become a powerful tool of investigations journalism to find out the lapses and discrepancies in the matters. It has played a commendable job in bringing accused to the hook.

Although there are no special provisions to safeguard the rights of the media, the Hon'ble Court has time and again confirmed that the rights of the press are implicit in the guarantee of freedom of speech and expression under Article 19(1) (a) of the constitution.¹⁰

⁷ UN Basic Principles on the Independence of Judiciary G.A. Res.146 U.N.GAOR, 40th Session (1985) art. 6.

⁸ Adopted and opened for signature, ratification and accession by General Assembly 220 A (XXI) of Dec.16, 1966. Entered into force on Mar. 23, 1976 in accordance with art. 49.4.

⁹ Art. 14(1), I CCPR, (1966) 999 UNTS 171, 1976 Can T.S.No. 47, in force, including Canada, 1976.

¹⁰ H.M.Seervai *constitution of India*, Vol 1.

Supreme Court has on number of occasions struck down laws that abridge the freedom of press and media. In *Romesh Thapper Vs. State of Madras*, the Supreme Court of India held that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. Further highlighting the 'liberty of press', the court observed that it is an essential part of Article 19(1) (a) of the constitution¹¹ (AIR 1950S.C.124).

In *Sakal Newspaper Vs. U.O.I.*,¹² the Supreme Court held that the State could not make laws which directly affected the circulation of a newspaper for that would amount to violation of freedom of speech.

Media provides information and makes people aware about the social and economic evils e.g. the suicide of farmers in various States, issue of honour killings in many places (Khap Panchayats). There have number of cases where media has played vital role in discovering evidence and properly analysing witnesses and helped judiciary to meet ends of justice.

It is important to mention that one of the reasons for media activism was failure on the part of the judicial system, police administration, the hierarchy of the system, owing to various reasons, be that corruption, delaying justice or for any other reason. In such a situation media intervention remains the ultimate option for getting fair justice. Media has undoubtedly played an effective role in the awakening of the nation and uniting for common cause. There are matters like Priyadarshini Mattoo's murder case,¹³ Jessica Lal murder case,¹⁴ Nitish Katara murder case¹⁵ where the media movement made sure that the justice was served. The media pulled out the information due to which the justice was surely delayed but it was not denied. In Delhi gang rape case¹⁶ (Nirbhaya's matter) the media took up its strongest stand, which accelerated into one of the biggest people's movement of recent time and demanded an effective action. Also recently journalist Akshay Singh found mysterious death in the Vyapam Scam during trial. It shows that the trial was fair because it shows reality to the person who are connected with this scam.¹⁷ In the recent Sushant Singh alleged murder case, which was initially being closed as a suicide case, it was only after the rigorous media activism that gathered, thereby direction passed by the court that the matter be investigated by CBI.

Undoubtedly, media's activism has exposed many criminals in high profile cases and unearthed facts and helped the dejected common citizens in getting justice. The above stated matters are the examples of the drastic effects of positive media intervention and bringing about the positive impacts.

Effects of media coverage on investigations and judicial proceedings: -

There have been number of occasions when the serious crime investigations attract substantial amount of media / press interest. Media makes a significant contribution to investigations and extracts the

¹¹ AIR 1950S.C.124.

¹² AIR 1962 SC 305.

¹³ *Santosh Kumar Singh v. State through CBI* ((2010) 9 SCC 747).

¹⁴ *Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC1.

¹⁵ *Vikas Yadav v. State of U.P.*, (2016) 9 SCC 541.

¹⁶ *Mukesh and Anrs. v. NCT Delhi*.

¹⁷ Vyapam Scam: Mystery over journalist's death, Bhopal, 04 July 2015, Updated 12 Sep. 2016, "The Hindu" (<https://www.thehindu.com/news/national/other-states/journalist-from-tv-today-group-covering-vyapam-scam-dies-suddenly/article7386904.ece>).

information from the general public which helps in unlocking an enquiry. When an offender is charged, the due process comes into force until the trial begins. The media can make a considerable contribution to the investigation by providing access to, and engaging the support of the general public. An effective media strategy can result into integral part of an investigative strategy. But this has to be properly managed for positive contribution of the media to serious investigations.

But media trial has its own fallouts. According to criminal jurisprudence, no person charged of any offence should be judged by the media. If the police investigations are ongoing or criminal proceedings are underway, the media coverage can affect this process and potentially impact the criminal case. Media coverage can have both positive and negative effects. It can sometimes jeopardize a criminal case. Some activities of the media interfering with the witnesses, scenes more generally threaten the legal process. Media interventions may cause witnesses to exaggerate, distort or withhold their account of matters, which may be subject of evidence.

It's not about criticising democracy. In a democracy press is fourth pillar and is a very important pillar. It is very important pillar. It is because of the press that numerous cases come to the foray and the media is something instrumental in bringing forth various information to the public, who otherwise do not have the information. It is well settled media is actually educating people of what they have right to know because of the concept of court is under the CrPc. But in the guise of informing the public about right or exercising their freedom of speech and expression under Article 19(1) (a) of the constitution of India, the press believes they are the watch dogs of democracy, they have the right to communicate. But it is subject to exceptions under Article 19(2) of the constitution of India. This freedom is not absolute.

.... Accused is presumed to be innocent until found guilty.

.... Accused has a right to silence.

.... Guilt has to be established beyond reasonable doubts by a lawfully, legally constituted court not by T.V. channels.¹⁸

.... This right stems from the numerous rights, under various articles, Universal Declaration of Human Rights. The presumption of innocence is also recognised in the covenants i.e. Covenant of Civil and Political Rights, 1966 which India ratified in 1976.

The accused cannot be held guilty before the trial starts. Otherwise what would be the value of this presumption of innocence. Media's publicity prejudices the subjudice matters. Judges are also human beings. Media publicity somehow remains in the subconscious mind and impacts the mind of the judge causes prejudice to the final verdict. This is violation of Article 21 of the constitution and this is the violation which seriously affects the life and personal liberty of the person.

Nowadays a very changed and disturbing trend is emerging. Today the electronic media and particularly news channel have taken it upon themselves to carry out parallel investigations into crimes. The media in the guise of exercising their freedom of speech and expression, interfering in the ongoing investigations and court trials, bypassing the golden principles of 'presumption of innocence

¹⁸ Ram Jethmalani Memorial Lecture Series, "Pros and Cons of Trial By Media". Held on Sep.12, 2020, available at <https://www.youtube.com/user/newsxlive/>.

until proven guilty beyond reasonable guilt', in fact does more harm to the administration of justice than good.

In the 2002 Godhra riots case¹⁹, Narendra Modi was accused of killing Muslims in Gujarat. The media declared Narendra Modi as the culprit. Besides in 2014, High court of Gujarat gave a clean chit in Godhra riots to Mr. Narendra Modi, but still most of the people believe that he was mastermind behind 2002's killings. Hence forth, the reputation, respect and dignity suffer even after you have been proven innocent. Media trial does have an adverse effect on the reputation of a person in the society. Media should maintain its code of laws and ethics, social responsibility and credibility by not interfering in the matters of court so early. Instead should do research, keep a check on high profile cases, find the evidences and keep it to them until and unless they find the truth find the truth suppressing. Trial by media is a requisite in this 21st century where violence, crime and corruption are at its peak and where human life is not anymore.

The role of media in 26/11 incident in Mumbai was also very dismal. The Supreme court while confirming the death sentence of the Pakistani terrorist Ajmal Kasab pulled the media for its role and hinted that there should be some regulatory measures to keep a check on the irresponsible behaviour of the media. Any attempt to justify the conduct of the T.V channels by citing right to freedom would be totally wrong and unacceptable.²⁰

Trial by media emerged as the colloquial origin, indicating perhaps the media's assignment to itself the adjudicatory process. The media is often found publishing opinion and spreading prejudice under the garb of 'news'. The Supreme Court in R.K. Anand Vs. Registrar, Delhi High Court²¹ made an observation:

"The impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny".

A trial by media amounts to travesty of justice if it causes impediments in the accepted judicious and fair investigation and trial.

In T.Nagappa Vs. Y.R.Muralidhar, the Supreme Court held that an accused has right to fair trial. He has a right to defend himself as part of his human dignity, a fundamental right as enshrined under Article 21 of the Constitution of India.²²

¹⁹ "Report on Godhra riots" www. Sabrang.com. Concerned citizens Tribunal Report , Archived from the original on 15th January 2020. Retrieved 4 July 2017.

²⁰ *Mohammad Ajmal Amir Kasab Vs. State of Maharashtra* (2012) 9SCC1.

²¹ 2009 (8) SCC 106.

²² Appeal (Crl.) 707 of 2008, Supreme Court of India, decided on 24.4.2008, <https://indiankanoon.org>.

In recent Sushant Singh Rajput Case, very changed and disturbing trend is emerging where the electronic media, particularly news channels have taken upon themselves to carry out the parallel investigations into crimes that have hardly even been converted into FIR, suicide or natural death. In a democracy like ours, we are governed by the CrPc and the Indian Evidence Act. Method of collecting evidences and method of investigations are laid down in Chapter 12 of the CrPc. The way media broadcasts everything beyond the realms of fairness certainly affects the justice delivery system.

In a significant pronouncement in the aforesaid matter, the Bombay High Court held that media trial during criminal investigation interferes with the administration of justice and hence amounts to 'Contempt of Court' as defined under the Contempt of Courts Act, 1971. The court held that media reports interfering with criminal investigation before the initiation of trial, can amount to interference with the administration of justice.²³

Trial by media/pre-judgment while a police investigation is in progress could lead to interference with / obstruction to administration of justice. The court observed "The expression "administration of justice" in Section 2 (c) (iii) of the contempt of Courts Act is sufficiently broad to include civil as well as criminal justice. The stage from which "administration of justice" commences may be prior to institution/ initiation of judicial proceedings. In the backdrop of media trial in the Sushant Singh Rajput death case²⁴ the court issued a number of directions to regulate media reporting of an ongoing criminal investigation. Some of the guidelines pronounced by the Bench in the open Court are as follows:-

...Publishing a confession alleged to have been made by an accused as if it is an admissible evidence without letting the public know about its inadmissibility should be avoided;

...While reporting suicide, to suggest that the person was of weak character, should be avoided;

...Reconstruction of crime scenes, interviews with potential witnesses, leaking sensitive and confidential information should be avoided;

...The court held that the following can prejudice the ongoing inquiry /investigation :

- (a) Holding interviews with the victim, the witnesses or any of their family members and displaying it on screen;
- (b) Analysing versions of the witnesses, whose evidence could be vital at the stage of trial;
- (c) Publishing a confession made to police officer by an accused and trying to make the public believe that the same is a piece of evidence which is admissible before a court and there is no reason for the court not to act upon it, without letting the public know the nitty-gritty of the Evidence Act, 1872;
- (d) Criticising the investigative agency based on half-baked information without proper research;

²³ "Media Trial hinders justice" Bombay High Court, *The Print*, Published on Jan.18,2021, <https://theprint.in>.

²⁴ *Nilesh Navalakha and others v. U.O.I and others and connected cases* PILST.92252.2020+4, Bombay High Court on Jan.18,2021) reported <https://indiankanoon.org>.

- (e) Pronouncing the merits of the case, including pre-judging the guilt or innocence qua an accused or an individual not yet wanted in a case, as the case may be;
- (f) Recreating a crime scene and depicting how the accused committed the crime;
- (g) Predicting the future course of action including the steps that ought to be taken in a particular direction to complete the investigation; and
- (h) Leaking sensitive and confidential information from materials collected by the investigating agency;

Acting in any manner so as to violate the provisions of the programme code as prescribed under section 5 of the cable TV Network Act read with rule 6 of the CTVN rules and thereby inviting contempt of court;

And indulging in character assassination of any individual and thereby damaging his reputation.

In a recent panel discussion hosted by DAKSH on 26th January 2021 on the topic of Media and its role in governance, Justice Shakder in his opening statement said

“It is important for the media to put in place checks and balances whereby reporting is such that it alludes to facts and does not draw inferences. That is the job of the court. (Otherwise) You are being unfair to the accused, you are being unfair to the entire system”

He said journalist should be aware of other people’s rights because if, one day, the journalist is at the receiving end, it might not be a happy situation.

All the same, he said that he was not in favour of issuing any guidelines or straight jacket formula for media reportage, while opining that it is on the media to show restraint in reporting by bearing in mind the rights of others affected by its reportage.

“They (journalists) need to be sensitive to what their role is as journalists. You can bring facts, raise shindy about a slow or enept investigation. But once the judicial process is triggered, you should, to my mind, unless something is grossly wrong, allow the judicial process to be completed. There have been scores of instances where the electronic media discussed pending investigation in a way that caused a lot of grief on the person. Because it is not known whether the person is guilty or not”²⁵

Conclusion:-

Media trial is an appreciable effort, which has been able to start a revolution. But at the same time the welfare of the society has to be kept in mind. It is the moral duty of the media to show the truth and that too at the right time. Ethics cannot be above law. So, media needs to follow a line of control at the time of public trials. The emphasis should be on culling out the truth and help the court to project the right verdict for right justice.

²⁵ Meera Emmanuel, “journalists while reporting criminal cases should be more sensitive to rights of accused: justice Rajiv Shakder”, Published on jan 28,2021) <https://www.barandbench.com>.

The freedom of the media to express themselves freely cannot be throttled but this freedom is not absolute. Along with this freedom comes the duty and responsibility towards the society. The need of the hour is that media should regulate itself and show accountability and cover the story and events rather than making them so as not to hamper the administration of justice and serve the welfare of the society in true sense.

NATIONAL GREEN TRIBUNAL IN CONSERVING ECOLOGY: GLIMPSES FROM INDIA

Dr. VED PAL SINGH DESWAL

Assistant Professor, Faculty of Law
M.D. University Rohtak (Haryana) INDIA
Email: vpdeswal@gmail.com
Mobile No: +91-9466901134

ABSTRACT :

The global society has been suffering from on account of various problems such as terrorist activities, health issues, pollution of environment, management of waste and drug abuse among youths. While dealing with environmental issues it is correct to say that since the birth till we met with death, we remain in touch with nature. Therefore, natural vegetation plays a vital role in sustenance of life. In order to cater the needs of huge population for the purpose of food and shelter (construction of houses) we have destroyed a large amount of area of agricultural and forest land. For the purpose of earning livelihood and better facilities (rural areas are very poor with respect of facilities such as light, drinking water, health services and quality education) there is a rapid growth of migration of nationals from rural area to urban consequently leading to create an imbalance between development and ecosystem.

To deal with environmental issues the Parliament of India enacted National Green Tribunal 2010 with an objective to speed up the disposal of the cases pertaining to environment which are pending with various courts. The Tribunal has passed various landmark judgments. Few of them are as follows:

- ❖ Almitra H. Patel vs. Union of India
- ❖ Srinagar Bandh Aapda Sangharsh Samiti vs. Alaknanda hydro Power Co. Ltd. & Others
- ❖ Samit Mehta vs. Union of India
- ❖ Save Mon Region Federation vs. Union of India
- ❖ Srinagar Bandh Aapda Sangharsh Samiti vs. Alaknanda hydro Power Co. Ltd. and Others

In these judgments the tribunal in nutshell said that we need to follow two principles

1. Polluter pays principle
2. Precautionary principle

Further the tribunal said that in order to maintain environment pollution free which is our Fundamental Right, we need to protect our wildlife and forests. We can have a lesson from the cartoonist movie, "Delhi Safari" the provisions of Forest Conservation Act, 1981 and Environment Protection Act, 1986. Recently, on 7th April 2019 the National Green Tribunal has imposed an exemplary penalty of Rs 100

crore on Andhra Pradesh State Government over illegal sand mining. The green panel said it is the duty of the government to provide complete protection to the natural resources as a trustee of the public at large.

Keywords : Pollution, management, enforcement, awareness and health.

Introduction

Protection of environment is a matter of concern of all the citizen of the country. Environment protection and its preservation is the duty of every human being living on the earth. It is our fundamental right to live in a pollution free environment. The Supreme Court of India has passed many judgments for the prevention of environment pollution. In this Socio Economic Developing Era protection of Environment and its preservation is duty of all nations around the world. The environment as it exists today is of the example that human activities are correlated with nature and human beings cannot remain aloof after causing damage to the environment. No doubt, environmental degradation and pollution in various forms is affecting human life in the present times.

To deal with the problems of industrialization and overexploitation of natural resources, nations all over the world came together at the United Nations' Conference on Human Environment held at Stockholm in the year 1972 and to deal with problems of environmental protection, the concept of sustainable development was evolved. The term sustainable development was used at the time of the Tokyo Declaration on Environment and Development in the early 1970s and it received impetus in the Stockholm Declaration of 1972 which is called the "Magna Carta" of environment protection and its development. The concept of sustainable development was also discussed by the World Commission on Environment and Development in its report of 1982 and the Brundtland Report of 1987. Sustainable development as defined in the Brundtland Report of 1987 means development and meeting the needs of the present without compromising the ability of the future generation to meet their own needs. In this case it was observed that some of the salient principles of sustainable development as well as from the Brundtland Report and other international documents are intergenerational equity, use and conservation of natural resources, environment protection, precautionary principle, polluter-pays principle, obligation to assist and cooperate in eradication of poverty and financial assistance to developing countries. We are, however, of the view that the precautionary principles and polluter-pays principle are essential features of sustainable development.¹

India employs a range of regulatory instruments to preserve and protect its natural resources. As a system for doing so, the law works badly, when it works at all. The legislator is quick to enact laws regulating most aspects of industrial and development activity, but chary to sanction enforcement budgets or require effective implementation. Certain environmental laws were in force in India well before the Stockholm Declaration of 1972, such as the Indian Forest Act etc. Besides this action could also be taken under Sections 268 and 290 of Indian Penal Code against public nuisance relating to environment. However, with India's participation in the United Nations' Conference on Human Environment held in Stockholm in the year 1972 the need arose to enact specific laws. All these circumstances led to enactment of the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986 and the

¹ Vellore Citizens' Welfare Forum v. Union of India (AIR 1996) 5 SCC 647.

Forest (Conservation) Act, 1980. Not only around the world, but in India also, people have shown positive response to the need for protection of the environment and full support has been given by the judiciary. People cautious of their rights to a healthy and pollution-free environment have formed groups such as Centre for Science and Environment seeking directions from the courts to protect the environment and it has been done so by way of public interest litigation. These groups have often pressurized the executive to take decisions on certain development projects only after making proper environment-impact assessment. Chipko Movement and Appiko Movement in Karnataka for saving the trees from exploitation are examples of initiatives taken by public-spirited persons.

The primary effort of the courts while dealing with environmental issues had been to not only punish the offender but also to seek proper enforcement of such laws.

In this case the Hon'ble Court held that even though, it is not the function of the court to see the day-to-day enforcement of the laws, that being the function of the executive, but because of the non-functioning by the enforcement agency, the courts as of necessity have had to pass orders or direction to the enforcement agencies to implement the law for the protection of the fundamental rights of the people.²

The Hon'ble Supreme Court has time and again dealt with various environmental problems and orders have been passed for this purpose. Courts not only pass orders at the initial stage but also monitor the functioning of the Pollution Control Boards and the polluters. Some of the leading cases are mentioned hereinafter.

In this case the Apex Court directed for shifting/relocation of 168 industries identified as hazardous and large industries operating in Delhi to other towns of NCR as per the master plan of 2001.³

The Court passed several directions for preventing air pollution in Delhi. While reaffirming the need for public transport system to run on CNG it directed for phasing out of diesel buses in a time-bound manner.⁴

The Hon'ble Court took note of the environmental pollution due to stone-crushing activities in and around Delhi, Faridabad and Ballabhgarh complexes and directed for relocating of such units within six months.⁵

In this case the intervention of the Court was sought to prevent pollution of River Gomti in U.P. due to discharge of effluents from the distillery of Mohan Meakins Ltd. The Court directed the removal of deficiencies in the effluent treatment plant as well as imposed a fine of Rs. 5 lakhs on the Company.⁶

In this case the Court held that shrimp industry is to be permitted only after passing a strict environment test.⁷ In this case the Court dealt with the problem of pollution being caused by enormous discharge of untreated effluents by tanneries in the State of Tamil Nadu and also imposed a fine of Rs.

² Indian Council for Enviro Legal Action v. Union of India(AIR 1996) 5 SCC 281.

³ M.C. Mehta v. Union of India (AIR 1996) 4 SCC 750.

⁴ M.C. Mehta v. Union of India (AIR 2002) 4 SCC 356.

⁵ M.C. Mehta v. Union of India (AIR 1992) 3 SCC 256.

⁶ Vineet Kumar Mathur v. Union of India (AIR 1996) 7 SCC 714.

⁷ M.C. Mehta v. Union of India (AIR 1997) 2 SCC 87.

⁷ S. Jagannath v. Union of India (AIR 1996) 3 SCC 212.

10,000/- on the polluting industries.⁸ The Court directed closure of industries in Bichhari village in Udaipur (Rajasthan) discharging highly toxic effluents leading to soil and water pollution and also directed for removal of the sludge etc.⁹

In Calcutta Tanners case, the Court directed for shifting/relocating the tanneries in question causing pollution.¹⁰ Here the question is whether civil action against the polluters by applying the precautionary principle and polluter-pays principle is enough or penal action should also be initiated against such offenders. Environment laws besides providing for protection of the environment also provide for penal action against the polluters. For e.g. Section 15 of the Environment (Protection) Act, 1986 provides for contravention of the provisions of the Act and the rules and regulations issued under the Act to be punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and in case contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues.

Similar are the provisions provided by the Air (Prevention and Control of Pollution) Act, 1981 as well as the Water (Prevention and Control of Pollution) Act, 1974. The Pollution Control Boards have powers to initiate action against the polluters. However, these Boards had till the recent past been functioning as record-keepers maintaining statistics regarding pollution and only during the last few years these Boards have taken some initiatives to protect and improve the environment after being directed by the courts. It is a matter of surprise that even where pollution was easily visible or was being felt for e.g. air pollution in Delhi, the Boards acted as silent spectators till the Court intervened. In this case it was observed by the Hon'ble Court said that enactment of law but tolerating its infringement is worse than not enacting the law at all. Violation of anti-pollution laws not only adversely affects the existing quality of life but its adverse effects will have to be borne by the future generation.¹¹

In fact, criminal prosecution of the polluters has been a low priority amongst the Pollution Boards. Though the Apex Court has time and again given directions for taking penal action, offenders will go scot-free unless the Boards start taking penal action against them. Therefore, the need of the hour is to initiate criminal prosecution against the offenders in appropriate cases.

The past experience regarding the functioning and performance of the statutory authorities including the Pollution Control Board shows that the powers conferred upon them have not been properly exercised.

There can be no doubt that there is any shortage of the environmental statutes or that there are not enough statutes to deal with various aspects of environment for example air, water, soil, and their interrelationship with human beings. The need is to effectively involve the common man in initiating appropriate penal action against the offenders.

⁸ Vellore Citizens' Welfare Forum v. Union of India (AIR 1996 SCR 241).

⁹ Indian Council for Enviro Legal Action v. Union of India (Bichhari Case) (AIR 1996) 3 SCC 212.

¹⁰ M.C. Mehta v. Union of India (AIR 1997) 2 SCC 411.

¹¹ Enviro Legal Action v. Union of India (AIR 1996 SC 1446).

The judiciary, a spectator to environmental despoliation for more than two decades has recently assumed a pro-active role of public educator, policy maker, super administrator and more generally amicus environment.¹²

The environmental laws provide for a certain procedure for taking cognizance of offences for e.g. Section 49 of the Water (Prevention and Control of Pollution) Act, 1974 provides that no court shall take cognizance of any offence under this Act except on a complaint made by a Board or any officer authorized in this behalf by it; or any person who has given notice of not less than sixty days, of his intention to make a complaint, to the Board or officer authorized as aforesaid.

Similar are the provisions relating to cognizance under Sections 43 and 19 of the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986 respectively. The procedure for filing complaint should be simplified. The requirement of giving notice to the Board or to the Central Government in case of offences under the Environment (Protection) Act, 1986 should be done away and instead of this, it should be provided that every person should have a right to directly file a criminal complaint against the offender in accordance with the procedure laid down in Section 200 Criminal Procedure Code, 1973. However, as a matter of safeguard against malicious prosecution it can be provided that the court shall call for a report from the Pollution Control Board concerned before summoning the accused. But at the same time it should also be provided that the complainant shall have the right to challenge the report of the Board by way of scientific or other evidence.

In this case the Supreme Court of India held that Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the Fundamental rights of a citizen. Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life. A petition under Art. 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists. But recourse to proceeding under Art. 32 of the Constitution should be taken by a person genuinely interested in the protection of society on behalf of the community. Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32, are entertained it would amount to abuse of process of the Court, preventing speedy remedy to other genuine petitioners from this Court. Personal interest cannot be enforced though the process of this Court under Art. 32 of the Constitution in the garb of public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Art. 32 must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed

¹² T.N. Godavarman Thirumulkpad v. Union of India (AIR 1997 SC 1228).

or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation.¹³
Pollution Free Environment a Basic Human Right of the inhabitants.¹⁴

Everyone has the right to live in a world free from toxic pollution and environmental degradation, the United Nations Commission on Human Rights has concluded.

The decision, the first time the Commission has addressed the links between the environment and human rights, was made at its annual meeting which ended today in Geneva.

"Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well," he said.

"Human rights cannot be secured in a degraded or polluted environment," said Mr. Toepfer. "The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes, and contaminated drinking water."

"For this reason, we believe that the successful implementation of environmental treaties on biodiversity, climate change, desertification and chemicals can make a major contribution to protecting human rights. Mr. Toepfer said, " We would welcome the Commission's continued work on the environmental dimensions of human rights, including enforcement and compliance."

Conclusions

In the conclusion, I would like to say that proper management is required at all level. We, the citizens of India, need to create awareness in this field to protect our natural resources and environment so that we can live in pollution free environment which has been declared as a fundamental right of the citizens. As a teacher of Law, I humbly make a request to all the citizens of the global village to be law abiding persons so that we can fulfil our duty towards our Great Mother i.e. Earth and live in pollution free in order to make it true that health is wealth and a healthy mind resides in a healthy body. We need to report the cases so that law can begin its action, because Nothing is an offence, until it is reported. For the said purpose the digital society i.e. media should play it imperative role so that we can remain healthy and peacefully.

¹³ Subhash Kumar v State of Bihar, WP 381/1988.

¹⁴ International Conference at Geneva/Nairobi, 27 April 2001.

CLIMATE CHANGE & BIO-DIVERSITY: A LEGAL STUDY

Dr. Arti

Assistant Professor

Faculty of Legal Studies, Desh Bhagat University, Mandi Gobindgarh, Punjab

Ph.: 7895729171

Email :- kmarti2512@gmail.com

ABSTRACT:-

Bio-Diversity is a significant aspect of maintaining ecosystem and climate change in society. It is not national issues as well international because biodiversity is a more affected part of the environment. After Earth Conference on the world level is started movement to promote biodiversity and climate change. Indian Constitution has committed to the protection of the natural resource & life below water. It is a very nice aspect and appreciated by the Sustainable Development Goal 2015 which is enumerated the protection and preservation of biodiversity & is the savior of life on the earth. The Indian legal system has concerned international law and members of the Earth Conference focused on the preservation of climate change and biodiversity through the enactment and government policy. The chapter is evaluated all enactment efforts and the impact of the policy on the protection of climate change & biodiversity. The object of the study is to find out the present status of climate change and biodiversity in a legal way. The methods used in the study are analytical and descriptive on the basics of legal document, commission report, Ministry actions, and judgment of the Apex Court.

Key Words: Ecosystem, Bio-Diversity, Judiciary, Enactment, International Conference

INTRODUCTION

An ecosystem denotes a family of living organisms on the Earth and along with forest, hills, mountains, land, water, rivers, and sea¹. Biodiversity Convention is a landmark, for several reasons. Above all, it embraces biological diversity as such as a common concern of humankind, while at the same time recognizing the responsibility of each State to conserve it². Law mechanisms are enumerated standards and attracted other attention³ to preserved climate change and the environment. The international obligations play a crucial role to promote common commitments and measures to preserve them and also National Schemes provides a framework to regulate certain behaviour, to affect the area of biodiversity. Ministry of Environment, Forest, and Climate Change has also declared many policies concerning biodiversity and climate change as well⁴. In 2000 the Law Commission of India

¹ Ecosystems, available at: <https://www.ugc.ac.in/oldpdf/modelcurriculum/Chapter3.pdf>(last visited on 06/05/2021).

² Cyrille de Klemm & Clare Shine, Biological Diversity Conservation and the Law Legal Mechanisms for Conserving Species and Ecosystems, XV IUCN – The World Conservation Union (1993).

³ Non- governmental organization, International organization in the context mentioned United Nations Environment Program.

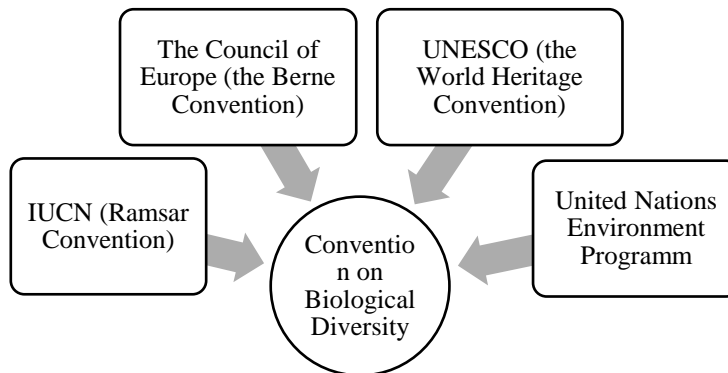
⁴ Annual Report 2020-2021 , Ministry of Environment, Forest & Climate Change, available at: <http://moef.gov.in/wp-content/uploads/2017/06/Environment-AR-English-2020-21.pdf>(last visited on 06/04/2021).

has recommended formulating legal policy for the protection of biodiversity⁵. Global Biodiversity outlook has also collected data periodically on biodiversity and focus on the implementation of the biodiversity convention. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Service has played a greater role to provide information, data, and status on Biodiversity around the globe⁶. Biodiversity is more affected by livelihood, poverty, and climate change itself⁷. Another side the climate change is also affected by biodiversity in the manner of flooding, pollution at sea level, and Global warming⁸. So we can say that climate change is directly affected to biodiversity and it is also affected by climate change and a very debating question arises that what did legal efforts about the biodiversity and climate change. What the government policies are more effective to preserved of biodiversity. The study depends to find out answers to the above query below.

INTERNATIONAL CONVENTIONS ON BIODIVERSITY AND CLIMATE CHANGE

The Convention on Biodiversity and climate change is started on 5th June 1992 and provides comprehensive provisions, standards, and protection about biological diversity. It is given a very vast significance status of climate change and biodiversity. The convention has scientifically defined Biological Diversity and includes the variability among living organisms from all sources for example terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species, and of ecosystems⁹. The convention has defined other words biological resource including the value of humanity and biotechnology etc. The main objects of the Convention have utilized genetic resources and making legal frameworks on the national level also. Article 7 of the Convention has provided the responsibility of the member states to identify the components of biodiversity and conservation¹⁰.

In 2020 Global Biodiversity Framework was also enumerated few ideal new goals proposed¹¹ the convention has also concerned with –



⁵ Report No. 171 of the Law Commission of India,(2000).

⁶ Intergovernmental Science- Policy Platform on Biodiversity and Ecosystem Service(IPBES) available at: <https://ipbes.net/about>(last visited on 06/05/2021).

⁷ Hannah Reid and Saleemul Huq, Climate Change – Biodiversity and livelihood impacts, 57Center for International Forestry Research (2005).

⁸ Ibid.

⁹ Article 2 of the Convention on Biological Diversity, 3 United Nations (1992).

¹⁰ Article 7 of the Convention on Biological Diversity,5 United Nations (1992).

¹¹ Report of the Open- ended working Group on the Post-2020 Global Biodiversity Framework, United Nations Environment Program, Second Meeting, Rome, (2020).

The impact of the convention on biological diversity in the Indian system has passed legislation Biological Diversity Act 2002. The United Nations Convention on Climate Change has also organized conferences concerning climate change on a global level. The Ministry of Environment, Forest & Climate Change has started SDG Co-ordination Unit for the implementation of Goal 13 of the Sustainable Development initiated by UNFCCC¹². May 2021, United Nations Climate Change press has released for the preservation of climate change all country has updated their climate change action plan and demanded national contribution for the protection on climate change¹³.

INDIAN LEGAL FRAMEWORK ON THE CLIMATE CHANGE & BIODIVERSITY

The Indian constitution has declared protection of the environment is a prominent task of the government under Article 48A. The problems set with Climate Change & Biodiversity are very critical and need to protect it. For this reason, the Indian parliament has passed separated legislation on biodiversity, that known as Biological Diversity Act, 2002. No doubt much other legislation¹⁴ is applied on the protection of climate change and biodiversity but exactly it's not covered all aspect of the biological and biodiversity. The main objectives of the enactment are-

- ❖ To provide measurements for conservation of biological diversity,
- ❖ To sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources,
- ❖ To provides knowledge concerning biodiversity and its incidental impact.¹⁵
- ❖ To utilization of genetic resources in the protection of climate change and
- ❖ To give effect to the principles of the Convention on Biological Diversity.

The Act has defined biological diversity¹⁶ and commercial utilization¹⁷ National Biodiversity Authority¹⁸ etc.

Section 3 of the Biological Diversity Act, 2002 provides rules and regulation to certain persons not to undertake Biodiversity related activities without approval of the National Biodiversity Authority. Under clause (1) of section 3 confers without previous approval of Authority, obtain any biological resource occurring in India or knowledge associated thereto for research or commercial utilization or bio-survey and bio-utilization.¹⁹ In-State of Jharkhand and another v. Govind Singh²⁰ the Apex Court has observed that the language of the Act is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been saying. A construction that requires, for its support, the addition or substitution of words

¹² United Nations Climate Change, available at: <https://unfccc.int/>(last visited on 10/05/2021).

¹³ COP25 and COP26 Presidents Urge Governments to Strengthen the Climate Ambition Alliance, available at: <https://unfccc.int/>(last visited on 10/05/2021).

¹⁴ Water (Prevention & Control of Pollution) Act, 1974, Air (Prevention & Control of Pollution) Act, 1981, Environment Protection Act, 1986, Ozone Depleting Substances (Regulation and Control) Rules, 2000, Wild protection Act, 1972 etc.

¹⁵ Preamble, Biological Diversity Act, 2002.

¹⁶ Section 2(b) Biological Diversity Act, 2002.

¹⁷ Section 2(f) Biological Diversity Act, 2002.

¹⁸ Section 2(j) Biological Diversity Act, 2002.

¹⁹ Biological Diversity Act, 2002.

²⁰ (2005) 10 SCC 437.

or which results in rejection of words has to be avoided unless it is covered by the rule of exception, including that of necessity, which is not the case here. In the case, Supreme Court has explained words of enactment as indicating the will of the legislature and the court has the responsibility to interpret any legislation in favour of social and natural justice.

In *Kavalappara Kottathil Kochuni v. State of Madras and Kerala*,²¹ the Higher Judiciary has explained Fair and Equitable Benefit Sharing is one of the three important parts of the entire movement of conservation of biodiversity, and one of the basic principles of the enactment. It is emphasizing the value of the preamble of the Act of 2002. So that fair and Equitable Benefit Sharing is imposing responsibility on the Indian company and organization.

In *Divya Pharmacy v. Union of India*²² Justice, Sudhanshu Dhulia has described the significance of the international convention concerning biodiversity and the protection of the Environment. The effort of the world community for a sustainable biodiversity system goes back to the United Nations conference on the human environment, which is better known as the Stockholm conference of 1972. It was the first United Nations conference, which focused on international environmental issues. The Stockholm manifesto authorized that earth's resources are finite and there is an urgent need to safeguard these resources²³.

Section 7 of the Biological Diversity Act of 2002 is incorporated who is used biological resource. According to the section no person, who is a citizen of India or a body corporate, association, or organization which is registered in India, can obtain any biological resources for commercial utilization, etc. without giving a prior intimation to the State Biodiversity Board concerned. Only local communities, vaidas and hakims are exempted from this provision²⁴. The legislation has given a very strong point for the safety to use the biological resource by any company, organization, and association, etc. only one ground to the use the biological resource on prior permission State Biodiversity Board. Section 23 has provides the power and functions of the State Biodiversity Board.

State Biodiversity Board has functioned to advise the Government of the State on matters relating to the conservation of biodiversity, sustainable use of its components, and equitable sharing of the benefits arising out of the utilization of biological resources. These types of functions are dealt with by the National Biodiversity Authority²⁵.

Section 8 of the Act has provided the establishment of the body of National Biodiversity Authority and having corporation status it has used power and function under section 18 of the Act. The main function of the authority is to advise the central government and state government in areas of biodiversity. It's also having the power to refuse the grant of intellectual property rights in any country outside India in the context of any biological resource obtained from India. The Act is provided Constitution of the National Biodiversity Fund under section 27 that means it can provide grants and loan and received it.

²¹ AIR 1960 SC 1080.

²² Writ Petition (M/S) No. 3437 of 2016.

²³ Ibid.

²⁴ Section 7, Biological Diversity Act, 2002.

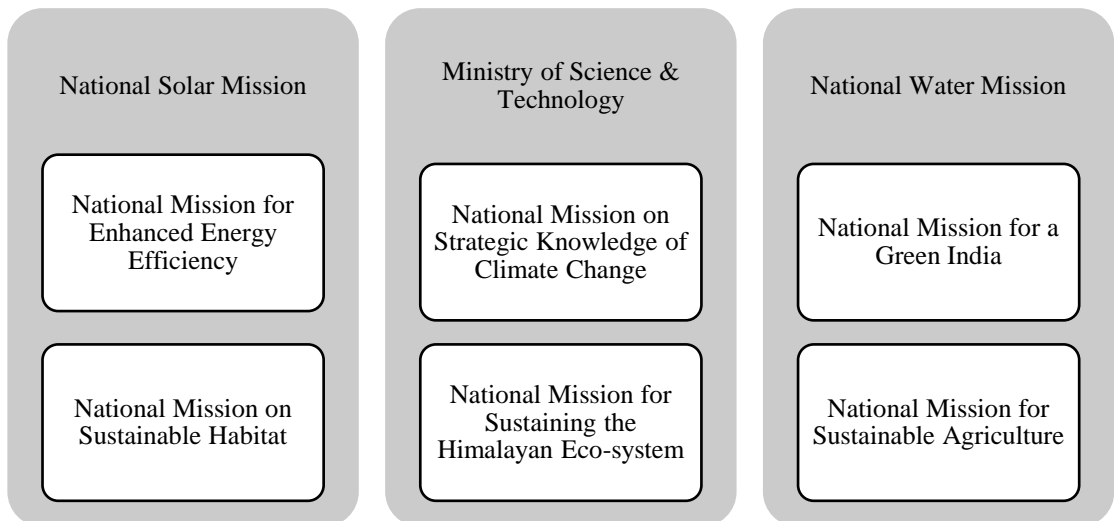
²⁵ Biological Diversity Act, 2002.

The fund is used in the conservation of biodiversity and research resource-related biodiversity. It is a very significant aspect of the legislation deals with by the National Biodiversity Authority. Section 27(2) (b) confers conservation and promotion of biological resources with the development of areas from where such biological resources or knowledge associated thereto has been accessed. The Authority has also prepared an annual report on biodiversity, concern problem, funding body, and other measurements related to the conservation of biodiversity.

The Biological Diversity Act ensures and promotes the preservation of biological things and issues which are directly connected with the protection of the environment. The main purpose of the funds is to provide assistance in the financial matter and concern with the State Biodiversity Board for protection and regeneration of biological diversity so that long-term sustainability is ensured and the indigenous and local communities get incentives for benefit of conservation and use of biological resources²⁶. Section 52A of the Biological Diversity Act of 2002 has enumerated an appeal provision against the order of the National Biodiversity Authority and State Biodiversity Board before the National Green Tribunal, the matter regarding the determination of benefit sharing²⁷.

GOVERNMENT POLICIES: CLIMATE CHANGE & BIODIVERSITY

National Environment policy 2006 has enumerated the problems concerning environmental components like land, water, soil, noise, natural heritage, biodiversity, forests, wildlife, etc and their impact on climate change²⁸. In 2008 the Indian government has launched National Action Plan on Climate Change, which is work on the domestic level, and in 2015 the Indian government has submitted Intended Nationally Determined Commitments to UNFCCC in the context of the Paris Climate Change Summit²⁹. Many climate change programs has started by the Indian Government in 2008 under NAPCC.



²⁶ Ibid.

²⁷ Section 52A, Biological Diversity Act, 2002.

²⁸ Development of Legal Institutional and Financial Framework of National Program, available at: <http://moef.gov.in/wp-content/uploads/2017/06/Development-of-legal-Institutional-and-Financial-Framework-of-National-Program.pdf> (last visited on 10/05/2021).

²⁹ Shyam Sara, India's Climate Change Policy: Towards a Better Future, Government of India, (2019).

The Ministry of Environment & Forest and Climate Change have played a vast role in the conservation of biodiversity and climate change in India. The ministry is promoted Collaborative research programs on Biodiversity with other Organizations including non-governmental organizations³⁰. The Ministry of Environment achievement has mentioned below about the Biodiversity & Climate Change during Covid pandemic.

1. Monitoring of Biodiversity Plots
2. Organized many workshops, training, and webinar on climate change & biodiversity studies for example Impact of Climate Change on Pollinators of High Altitudes of North-West Himalaya, Island Biodiversity, Conservation and Management, COVID-19 and its link with Environment and its Biodiversity and Taxonomy and Biodiversity³¹, etc.
3. Digital Zoological Survey of India has also helped library assistance and promoted research reports regarding the conservation of biodiversity³².
4. Convention on Biological Diversity was adopted Virtual Consultation on Sub-regional to framework concerned Global Biodiversity Post 2020; it was held on 4-5 August 2020³³. The agenda is having vision 2050 and the name of vision 'living in harmony with nature would be fulfilled by India till 2050³⁴.
5. Post-2020 climate goals in India are climate actions are intended to be taken under the Paris Agreement and adopted eight goals concerning climate change.
 - i. To propagate a healthy and sustainable way of living.
 - ii. Economic development and friendly climate
 - iii. To reduce the emissions intensity till 2030³⁵.
 - iv. Green Climate Fund
 - v. additional forest and tree cover
 - vi. To enhance better adapt to climate change by enhancing investments in development programs in sectors vulnerable
 - vii. Adaptation of fund with developed countries
 - viii. To framed domestic framework and international construction
6. Climate Change Action Programme has estimated scientific and technological development with protection of the environment. The National Action Plan on Climate Change has encompassed eight core missions in the specific areas mentioned below

³⁰ Annual Report 2020-2021, Ministry of Environment, Forest & Climate Change.

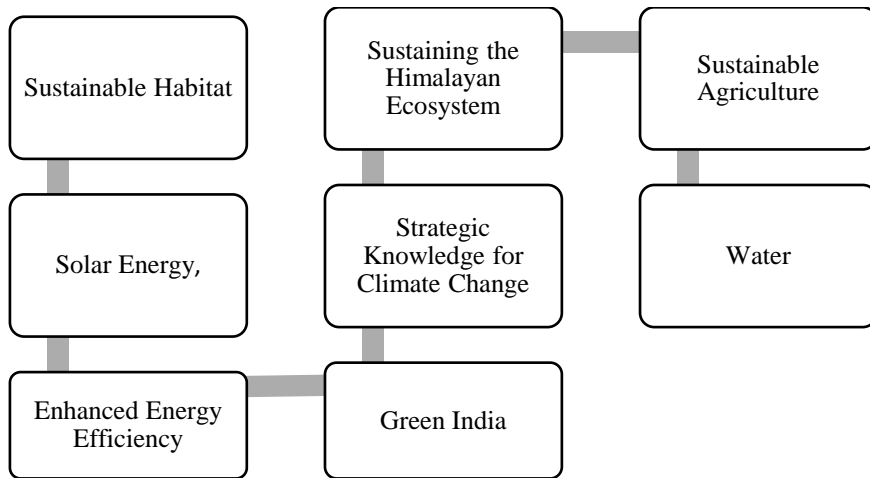
³¹ Id. at 6.

³² Id. at 8.

³³ Id. at 29.

³⁴ Annual Report 2020-2021, Ministry of Environment, Forest & Climate Change.

³⁵ Id. at 254.



7. National Adaptation Fund on Climate Change is known as NAFCC. It is a Central Sector Scheme that agenda to support concrete adaptation activities to deal with the adverse effects of climate change.
8. Climate Ambition Summit dealt by the United Nation, UK and France and The focus of the Summit was to bring world leaders together to make new commitments to tackle climate change and deliver on the Paris Agreement.
9. In November 2020, India has to Launch the Climate Change Knowledge Portal³⁶for more information concerning in conservation of climate change.
10. CEO Forum on Climate Change is a private sector that plays a pivotal role in creating low carbon sustainable economies. The Indian government has started a new virtual CEO Forum on Climate Change on 5th November 2020.
11. G20 Environment Ministers’ meeting is also played a greater role to promote the solar system in India. The Clean Development Mechanism is concerned with a flagship programme addressing climate change mitigation and simultaneously allowing developing countries in meeting their sustainable development objectives.
12. The India Cooling Action Plan has been appreciated internationally as an important policy initiative, a very potential to provide socio-economic and environmental benefits related to reduced refrigerant use, climate change mitigation, and Sustainable Development Goals.
13. The Ministry of Environment, Forest and Climate Change has collaborated with International Corporation means international friend for the protection of climate change & biodiversity.
 - i. The United Nations Environment Programme
 - ii. Global Environment Facility & GEF Agencies,
 - iii. International Resource Panel

³⁶ Climate Change Knowledge Portal, available at: <https://www.cckpindia/>(last visited on 10/05/2021).

- iv. The World Bank and regional bodies like the Economic & Social Commission for Asia & Pacific (ESCAP),
- v. Brazil-Russia-India-China-South Africa
- vi. South Asian Association for Regional Cooperation (SAARC),
- vii. South Asia Cooperative Environment Programme (SACEP),
- viii. Association of South-East Asian Nations (ASEAN),
- ix. Asian Development Bank (ADB),
- x. European Union (EU),
- xi. India-Brazil-South Africa (IBSA)
- xii. Summit on Environment amongst others.

The body organizations or institutions are supported by annual contributions working on environmental matters, climate change, and biodiversity. The all of above point has indicated the ministry of environment, forest and climate change has played a crucial role to maintain the ecosystem and climate change. The ministry has funded the promotion of the project for the assistance of conservation of biodiversity and climate change. On the other side, we can see not more effective improvement shown about the preservation of climate change and biodiversity. During the pandemic, more improvement can be seen in the field of the environment but post-Covid pandemic what will be facing about the biodiversity and climate change. So we all have no free from difficulties regarding climate change and biodiversity.

CHALLENGES BEFORE BIODIVERSITY & CLIMATE CHANGE

Covid 19 has given a lot of pain but given lessons to everyone who preserved our earth and nature. Many challenges are facing the Indian legal system in the protection & conservation of biological diversity and climate change.

- ❖ Lack of Public Participation- it is rooted in challenges before the preservation of the ecosystem when former prime minister Indira Gandhi has to attend to Stockholm Conference said Poverty, Population and Protection of the environment (3PPP) is the main problem of India. So that less public participation is an obstacle in the conservation of climate change and biodiversity.
- ❖ Lack of effective Environmental Impact Assessments- Indian system has faced a lot of difficulties concerning effective environmental impact assessment, by the reason ends of promotion, protection, and preservation of the environment is defeated.
- ❖ Lack of Environmental Education- it is a very basic part to not understand the significance of the environment, biodiversity, sea protection, conservation of the forest, and wildlife. Environmental education is played a pivotal role in awareness of the protection of the environment. It was the basic agenda of the Stockholm Conference in 1972.

- ❖ The not good impact of Biodiversity Plans and Surveys³⁷- the biodiversity survey may be considered to Habitats and campus features of biodiversity, Species surveys regarding organism, and Monitoring and repeat surveys. But in India has not more effective in this field so that it is a major challenge to reduce the destruction of climate change and biodiversity.

- ❖ Lack of Institutional Arrangements- environmental protection and maintained ecosystem not only government responsibility it is also the duty of all organizations as well as individuals to understand and helped in the conservation of the biodiversity. If institutional arrangements are working in the favour of the promotion of the ecosystem so that makes it very easy to conserve biodiversity. Social corporate responsibility has also incorporated these types of principles.

CONCLUSION

The concluding remarks about the research study on biodiversity & climate change is a crucial part to understand changing environment, newly diseased, changing climate, and prevailing serious pandemic. The Convention on biological diversity and its Protocols provide a mandate for countries to develop laws and policies on the preservation and viable use of biodiversity, and benefit-sharing relating to genetic resources, to access the traditional knowledge concerning genetic resources, and biosafety. Many Countries have formulated legislation and schemes towards the protection and conservation of climate change and biodiversity. India has also framed and proposed policies related preservation of the environment, forest, wildlife, and climate change with biodiversity. The main difficulties are arising impartial implementation of all measurements provides by the Indian government for the protection of biodiversity. Same similar problems are concerning the implementation of the Convention's regarding climate change, global warming, and biodiversity. The existing laws and policies are also necessary to reviewing time to time. The Strategic Plan on Biodiversity 2011-2020 provides guidance and sets a target for effective national implementation. Awareness, webinars and conference are the very best tool for the implementation of the Conventions, legislations and policy.

I acknowledge to Ms Aasha Devi have contributed to making the study happen as well as preparing the manuscript.

³⁷ Jorge Cabrera Medaglia, Freedom-Kai Phillips and Frederic Perron-Welch, Biodiversity Legislation Study A Review of Biodiversity Legislation in 8 countries, GLOBE International aisbl, 35- 36, the World Future Council and the Centre for International Sustainable Development Law (2014).

DIRECTION FOR USE AND WARNING INSTRUCTIONS IN PRODUCT LIABILITY: ISSUES IN PERSPECTIVE

Dr. Gbade Olomu Akinrinmade

Senior Lecturer

Department of Jurisprudence & International Law

Faculty of Law Olabisi Onabanjo University

Ago-Iwoye, Ogun State, Nigeria

Telephone: +234-8033005582

E-mail: akinrinmadegbade23@gmail.com, gbadeakinrinmade_co@yahoo.com

ABSTRACT :-

The manufacturers duty to warn from time immemorial until date is an important obligation owed to consumers. While a product may have been produced to its correct specification, the law may still adjudge such product as being defective where it lacked proper or inadequate warning instructions. A lot of manufactured products transcend their country of origin in terms of marketing and usage. Most of these products are accompanied with inadequate warning instruction or direction for use. This, ultimately result into loses in terms of physical damages and loss of life. There are instances when warning instructions are couched in language that are alien or foreign to the user and or are placed in an obscure part of the package/ written in very tiny prints. Law being an instrument of social control is expected to protect consumer's interest in this regard. It is in the light of the foregoing that this paper discuss the current position of the law on warning instructions in product liability claim Anglo-American jurisdictions, identify the areas which need to be improved upon, and also proffer solution in this regard by drawing inspirations from comparative jurisprudence.

INTRODUCTION

In order to promote the quality of human life, concerted efforts must be made to ensure that safe products, accompanied by appropriate warning instructions /direction for use, are marketed, while adequate instructions and/or directions for use accompany such products. Virtually every product, no matter how safely made, has the potential of being a source of danger to human life and the environment in the absence of warning instruction / direction for use. The essence of a warning instruction or direction for use is to apprise consumers of how best the product can be put to use or to draw consumers attention to dangers associated with the use of such products. To accomplish this objective, direction for use must be couched in clear and comprehensible language and the use of bilingual warnings or universal symbols in cases where consumers cannot read or comprehend English language must be encouraged. Many challenges are associated with directions for use and warning instructions in product manufacture, sale, use, and the management of waste generated during the course of production. It is as a result of these challenges that this paper examines the current state of the law and its challenges with regard to direction for use and warning instructions in Anglo – American jurisdictions. Incidentally, the state of the law in these jurisdictions has had a pronounced

influence on the development of the law in other jurisdictions, particularly in developing countries. The scope of this work is restricted to tort law, which in other jurisdictions is known as law of *Delict*. The paper is divided into four segments comprising of:

1. Conceptual clarification of terms;
2. The jurisprudence of direction for use / warning instruction;
3. Issues in perspective; and
4. Conclusion and recommendation.

1. Conceptual Clarification of Terms

Words evidently are not instruments of mathematical precision;¹ by nature, words are elusive and some words are capable of at least three meanings.² In view of this, it is necessary at the outset to put some principal words employed in this work into context.

1.1 Product:

The word 'product' within the context of product liability law has been defined variously depending on the theoretical principle adopted to ground the liability of the tortfeasor.³

Product is defined broadly as,

"Something that is distributed commercially for use or consumption and that is usually. (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption".⁴

The word 'product' is also defined under the provisions of the *Consumer Protection Act of United Kingdom*⁵ which introduced a strict liability principle as an additional theoretical basis of liability to complement the existing negligence regime. In this enactment, product is defined in section 1(2) of the *Act* as "... any goods or electricity and ... [including] a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise."⁶ While the Indian Consumer Protection Act, which came into existence on 20th July 2020, in its section 33 defined product as:

"...any article or goods or substance or raw material or any extended cycle of such product, which may be gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as

¹ See *Seaford Estate v Asher* [1949] 2 KB 481.

² Words ordinarily have three meanings; these are the usual, intended and comprehended meanings. The failure to put a word into context is capable of causing confusion or making it difficult for the reader to comprehend the message being communicated.

³ There are many conceptual shelves under which product liability cases may be commenced; the ones relevant to this discourse are the negligence and strict liability theories.

⁴ Black's Law Dictionary 7th ed.

⁵ 1987. See also section 2, 61(a-c) of the South Africa Consumer Protection Law, where 'product' was defined as "all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable...." The Nigerian Federal Competition and Consumer Protection Act 2018 does not expressly define product, but only provides that product includes service.

⁶ Article 2 of the Product Liability Directive defined 'product' as follows, "Product means all movable (assets, goods,) even if incorporated into another movable or into an immovable object (?). 'Product includes electricity.' In the aftermath of the BSE or 'mad cow' crisis, the Directive was amended, and the definition of product in Article 2 was replaced by 'all movables even if incorporated into another movable or into an immovable.' 'Product' includes electricity.

wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs.”

It must be noted that the Indian provision expressly exclude human tissues, blood products and organs as what could qualify as product.

1.2 Product Liability and Defective Product

The subject product liability was until very recently not treated as a separate field of law. The reason for this is that there are many conceptual shelves into which product frustration cases may be shelved. In general, product liability refers to the liability of producers and others for damage or loss caused by product, which has failed to meet the standards claimed expressly, or implicitly for them and which are dangerous or otherwise defective.⁷ A defective product on its own is defined as "...a product that is unreasonably dangerous for normal use, as when it is not fit for its intended purpose, inadequate instructions are provided for its use, or it is inherently dangerous in its design or manufacture."⁸ A product may also be adjudged as being defective if proper guidance is not given for the disposal of its accompanying container / package, for instance "insecticide can" or "battery", among a host of other hazardous products.

1.3 Direction for use / Warning instructions

Within the context of this work, the phrase "direction for use" will be used interchangeably with "warning instruction". Either concept or terminology has different meanings and serve different purposes in the product liability regime. The difference between both words was brought to fore by Dillard and Hart in their work where "the *McClanahan v California Spray Chemical Corporation*⁹*The Virginia apple grower's case.*" In this work, learned authours posited that there is an important distinction between 'warnings' and 'directions for use'. The function of a warning is to call the attention of user or a responsible third party to dangers associated with a product, while the phrase 'directions or instructions for use' is regarded as indicating how the most beneficial results can be obtained when a product is put to use. The learned writers gave the following illustration which pertained to a new brand of toothpaste which, if used more than twice daily, was likely to discolour the teeth permanently. They commented as follows:¹⁰

"Not only would directions such as, 'For Best Results Use Twice Daily' be clearly inadequate; even such forthright statements as, 'Do Not Use More Than Twice Daily' would be inadequate unless accompanied by a warning statement cautioning the user that permanent damage was likely to result from more frequent applications. A bold cautionary statement setting forth the exact nature of the dangers involved would be necessary fully to protect the manufacture. Such factors as the likelihood that the average toothpaste user would not otherwise take more than a cursory glance at the label of an ordinary toothpaste container must be taken into account."

⁷ See Miller and Goldberg *Product Liability* 2004 Oxford University Press. para 1.01.

⁸ Black's Law Dictionary 7th ed.

⁹ 75 SE 2d 712 (1953), above, para 14.90. See 'Products Liability: Directions for Use and the Duty to Warn', 41 Va L Rev 145 (1955).

¹⁰ See "Product Liability: Directions for Use and the Duty to Warn", 41 Va L Rev 145, 151 (1955).

In addition, a full warning as to the dangers associated with a product may be inadequate unless they are accompanied by directions on how its wastes are to be managed effectively.

In ascertaining whether a product is defective in terms of the accompanying warning instruction, recourse may be had to the provisions of section 3(2)(a) of the Consumer Protection Act of the United Kingdom.¹¹

2. Jurisprudence of Direction for Use/Warning Instructions.

The position under Anglo-American law is that appropriate warning instructions must be given to all foreseeable users of a product. This is in line with the decision in the seminal case of *Donoghue v Stevenson*¹², a case in which the neighbour principle¹³ which has had a profound influence in shaping and also directing the scope of liability in product liability law, was enunciated. The case laid down the firm proposition of law that a manufacturer is under an obligation to ensure that his/her product must not harm or injure his/her consumers. Section 3(2)(a) of the Consumer Protection Act of United Kingdom provides that courts should take account of 'any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product'. In the United States, both strict liability and a negligence-based liability impose a duty to accompany products with appropriate warnings and instructions.¹⁴

The reason why a manufacturer is under an obligation to give appropriate warning are as follows: (a) appropriate warning may reduce the risk of a product-related injury by allowing consumers to behave more carefully than if they were ignorant of risk related to the product use, and (b) warnings may provide consumers with information which will allow them to make informed choice.¹⁵

The proposition that warning must be given to foreseeable users of the product is delimited by the fact that it will be manifestly impracticable to require that a warning or direction for use should "reach any person who might conceivably be exposed to injury from it".¹⁶ The general rule is guided by the foreseeability of use doctrine. This is to the effect that the seller of a product which is capable of posing an unreasonable risk of injury, if not accompanied by a warning or instruction for use, owes a duty to purchasers of such goods.¹⁷

¹¹ This provision stipulates that, in ascertaining whether a product is defective or not, courts should take account of "any instructions for or warnings with respect to, doing or refraining from doing anything with or in relation to the product."

¹² 1932 AC 562.

¹³ *Ibid* at 597; the neighbour principle enunciated by Lord Atkin in this case is to the effect that, "The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

¹⁴ In the case of *Wilson v US Elevator Corp* 972 P 2d 235 (Ariz, 1998), the court stated that: "[S]trict liability as well as negligence standards "impose a duty to products with appropriate warning instructions". A product faultlessly made may be deemed "defective" if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning. The duty to warn arises when the product is perfectly manufactured but is unreasonably dangerous without an appropriate warning of its dangerous characteristics": *ibid* 237-8. However, on the facts, the manufacturer had no legal duty to warn past customers of the availability of safety improvements in the door closing mechanism of an elevator, since its initial sale in 1974: *ibid* 241.

¹⁵ Miller and Goldberg *op cit.* para. 12.06.

¹⁶ Hodges, *Product Liability Europeans Laws and Practice* para 3-049.

¹⁷ See for instance the case of *Galanos v US* 608 F. Supp 360, 374-5.

There is an obligation on the part of every manufacturer or producer of a product to ensure that such a product is accompanied by an appropriate warning instruction and direction for use. Failure to do this may result in liability if the product in question is mishandled or becomes a source of danger where such a warning or direction for use was lacking. This also makes it imperative that manufacturers ought to accompany their products with specific label instructions about its storage and the disposal of its wastes where such have dangerous characteristics. Such labelling must be separately placed and clearly distinguishable from other directions for use. For instance, in the case of *Vacwell Engineering Ltd v BDH Chemical Ltd*,¹⁸ the defendants supplied a chemical by the name of "boron tribomide" to the claimants in glass ampoules which were labelled "harmful vapour". The suppliers had no knowledge that the chemical sold would react violently when it came into contact with water. A scientist who accidentally dropped one of the ampoules in water was killed in the ensuing explosion. The supplier was held not to be liable, as he had no knowledge of the fact that such an explosion could occur. The manufacturer of the chemical was, however, held liable with regard to negligence for having failed to give adequate warning of the dangerous properties of the chemical which had been published in scientific journals.¹⁹

There is no obligation on the manufacturer to warn in cases of obvious dangers.²⁰ If there is a need to give warning, such a warning must be adequate²¹ and, where it is foreseeable that the product might be put to a dangerous use, there is a duty to warn of such dangerous propensity; failure to do this will lead to liability.²²

Where the dangers associated with the use of a product are obvious or known, there is no obligation to warn in respect of such dangers.²³ Under such circumstance, recovery will not be allowed for a product-related accident caused by such known or obvious dangers. There is also no obligation to warn in respect of unknown and unavoidable risks.²⁴ Furthermore, in some American cases, it has been held that strict product liability cannot be based on the absence of a warning in cases where the danger was unknown and undiscoverable,²⁵ while some others held otherwise.²⁶

An adequate warning may discharge the duty altogether. This principle will also apply to a warning that a product is unsafe in its existing condition. In *Hazeldine v CA Daw & Sons Ltd*²⁷ Goddard LJ observed as follows:

"Suppose a lift repairer told the owner that a part was worn out so that, while he could patch it up, he could not leave it in a safe condition. If he were told to do the best he could, and an accident then happened, I cannot conceive that the repairer would be held liable. He has fulfilled his duty warning

¹⁸ (1971) 1QB 88.

¹⁹ See, however, the case of *Fisher v. Harrods* (1966) 1 Lloyd's Rep 500, where a retailer was held liable for the harm occasioned by a jewellery cleaning fluid which came in contact with the claimant's eye.

²⁰ See the case of *Farr v Butter Bros* (1932) 2 KB 606.

²¹ See *Vacwell Engineering Ltd v BDH Chemicals Ltd*, (1971) 1QB 88, where the label "harmful vapour" on the ampoules was held not to be adequate.

²² See *Hill v James Crowe (Cases) Ltd* (1978) 1 All ER 812.

²³ For instance there is no duty to warn the purchaser of a knife or an axe that both may cut and that dynamite will explode.

²⁴ See the case of *Farr v. Butters* (1932) 2 KB 606.

²⁵ See *Oakes v. Geigy Agricultural Chemicals* 77 Cal Rptr 709 (Cal App, 1969).

²⁶ See the cases of *Berkebile v. Brantly Helicopter Corporation* 337 A 2d 893 and *Jackson v. Coast Paint and Lacquer Co* 499 F 2d 809. (9th Cir, 1974).

²⁷ (1941) 2 KB 343.

the employer, and , if the latter, in spite of that, chooses to allow the lift to be used, the liability rests on him.”²⁸

A situation, which has generated controversy in product liability regime and closely connected to the above illustration, is whether a warning not directly communicated to the consumer but to a ‘learned intermediary’, will be enough to fulfill the manufacturers’ duty. This issue came up for consideration in the case of *Holmes v Ashford*.²⁹ The defendants are manufacturers of hair dye who issued a warning to their customers that the dye may be an irritant to certain skin types and recommended testing every consumer before use. A hair-dresser used the product on the plaintiff without the test, and without telling her of the recommendation to test. The plaintiff contacted dermatitis, and sued the manufacturer. She was not successful, the Court of Appeal holding that the manufacturer’s warning to the intermediary was sufficient to discharge his duty of care. Tucker LJ said:

“...Hairdressers may be expected to interpose their judgment and reason whether they are going to use a hair-dye or not. In my view, if [the manufacturers] give a warning which, if read by a hairdresser, is sufficient to intimate to him the potential dangers of the substance with which he is going to deal, that is all that can be expected of them. I think it would be unreasonable and impossible to expect that they should give warning in such form that it must come to the knowledge of the particular customer who is going to be treated...the most that can be expected of the manufacturers of goods of this kind is to see that the hairdresser is warned.”³⁰

The view expressed by the court in respect of the above case is just in the circumstances because it is in line with practical realities; while it will also be an up-hill task if a manufacturer is expected to give such notice to every intending customer.

The onus of establishing a warning of a defect is on the plaintiff who must show that the product was defective because it was distributed with inadequate or insufficient warning instructions which ought to notify the ultimate user of the dangers inherent in the product.³¹ The court, in the case of *Mackowick v Westinghouse Electric Corporation*,³² observed that a manufacturer is not required by "section 402A of *Restatement 2nd* or Pennsylvania law to educate a neophyte in the principles of the product."³³ A warning will be considered sufficient if it adequately notifies the intended user of the unobvious dangers in the product. To establish the existence of a defect under this head, the plaintiff must establish that he or she would have avoided the risk had he or she been warned by the seller.³⁴

To recover on the basis of a failure to warn, the plaintiff must show that the manufacturer’s or producer’s failure to warn made the product defective and that this defect was inherent in the product as at the time of distribution which, in turn, was the proximate cause of the injury sustained by him or

²⁸ Ibid.

²⁹ (1950) 2 All ER 76.

³⁰ (1950) 2 All ER 76 at 80.

³¹ Dinsmore 2012 “Pennsylvania Product Liability Law Monograph” at <http://www.dinsmore.com/files/upload/Pennsylvania%20Products%20Liability%20Monograph.pdf> accessed on 1 May 2021.

³² 575 A 2d 100, 102 (Pa 1990).

³³ Shapo MS "A new legislation: remarks on the draft Restatement of Products Liability" 1997 30 *U Mich JC Reform* 215.

³⁴ *Philly’s v. A Best Prods Co*, 665 A 2d 1167, 1171 (Pa 1990).

her.³⁵ In the case of *Moran v Johns-Monville Sales Corp.*,³⁶ it was held that, under the strict liability regime, the obligation to warn arises when a reasonable person needs to be informed in order to decide whether to undertake the risk by exposing himself or herself to it. It follows that where a foreseeable unreasonable risk existed, which can be avoided by giving appropriate warning, the failure of the manufacturer to warn leads to his liability.³⁷ In *Berkebile v Brantlay Helicopter Corporation*,³⁸ the court observed that issues concerning warning defects are not to be determined by the reasonable person standard, but whether the product was accompanied by appropriate warnings and instructions to make it safe. Comment (j) of the *Restatement 2nd* is relevant to the issue of warnings or directions. It provides an explanation of what the producer has to do to make his product not defective for lack of warning. A seller, however, is not required to warn consumers with respect to products or ingredients in its product which are dangerous or potentially dangerous only when such product is consumed in excessive quantities or over a long period of time when the danger or the likelihood of danger is generally known and recognised.³⁹ In ascertaining whether there is the existence of a warning of defect, courts adopt the "consumer expectation" test and the "risk-utility" test.

The consumer expectation test was applied in the case of *Soprani v Polygon Apartment Partners*.⁴⁰ In this case, an action was instituted against the manufacturer of the windows installed in her apartment by the mother of a 20-month-old child who had fallen through the window. The manufacturers were held not to be liable on the ground that before liability could be imposed for failure to warn cases under the strict liability regime, the plaintiff must show that the offending product was unsafe beyond the expectation of an ordinary consumer.⁴¹

Some jurisdictions in the United States adopt the risk-utility test as the basis for ascertaining defect in warning cases. In the words of Goldberg and Miller,

"[I]n the context of strict liability for failure to warn, this required one to ask whether the product's utility outweighs its risk and, if so, whether the risk has been reduced to the greatest extent possible consistent with the products utility."⁴²

Adopting the risk-utility test in respect of duty to warn under the strict liability regime entails some element of reasonableness and foreseeability, which ordinarily are requirements or components of the negligence regime.⁴³ This has led to the query about whether there is any difference in failure-to-warn cases under both regimes.⁴⁴ There are conflicting judicial authorities and opinions on this issue. For instance, in *Carlin v Superior Court*,⁴⁵ the court observed that the application of the strict liability

³⁵ Miller and Goldberg *Product Liability* para 12.21.

³⁶ 691 2 Fd 811, 814 (6th Cir, 1982).

³⁷ Miller and Goldberg *Product Liability* para 12.22.

³⁸ 337 A 2d 893 (Pa, 1975).

³⁹ See comment (j) *American Restatement of Tort Law 2nd*.

⁴⁰ 971 P 2d 500 (1999).

⁴¹ See also comment (j) of *Restatement 2nd* which states: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use."

⁴² Miller and Goldberg *Product Liability* para 12.28.

⁴³ Stoppa A "The concept of defectiveness in the Consumer Protection Act 1987: a critical analysis" 1992 12 Legal Studies 210.

⁴⁴ See *Johnson v. District of Columbia* 728 A 2d 70 (DC, 1999). See also Miller and Goldberg *op cit* para 12.10.

⁴⁵ 920 P 2d 1347 (Cal, 1996). The court then gave the following illustration: "[S]tated another way, a reasonably prudent manufacturer might reasonably decide that the risk of harm was such as not to require a warning as, for example, if the manufacturer's own testing showed a result contrary to that of others in the scientific community. Such a manufacturer might

principle in failure-to-warn cases is a combination of the traditional strict liability and the negligence doctrine and that there is a significant difference between the two. However, Henderson and Twerski have expressed a contrary view which is to the effect that there is little or no significant difference between the two.⁴⁶

An attempt will now be made to highlight the various doctrinal principles guiding the practice of whom to give warning notice or instruction to use in a product liability regime. This often depend on the nature of the product concerned. In a situation where the seller can reasonably foresee that a warning conveyed to the immediate purchaser will be inadequate in reducing the risk that may be occasioned to the foreseeable user, the duty may be extended to those foreseeable users.⁴⁷ It must be noted that the majority of sales where the seller's product will be used by someone other than the immediate buyers are sales to commercial or industrial buyers.⁴⁸

2.1 Sophisticated user doctrine

The sophisticated user doctrine is to the effect that, where products are targeted towards professionals, a warning or direction for use which ought to have been directed to the consumer may be communicated to a third party. This may suffice as communication to the consumer depending on the circumstance.⁴⁹ For instance, where it is expected that a product will be installed by a professional, direction for use or a warning instruction given to such a professional will suffice under such circumstance.⁵⁰

2.2 Subordinate workers doctrine

The application of the sophisticated or professional user doctrine is relaxed in cases of subordinate workers. The essence is to avoid a situation where a subordinate worker who may not know as much as his superior about the characteristics of certain products, might be denied recovery. It is necessary for the manufacturer seeking to rely on the sophisticated user doctrine or defence to establish that he/she informed the buyer-employer of the risk associated with the product and the buyer employer could be reasonably relied on to provide sufficient warning to his employees.⁵¹ In the case of *Curtis v*

escape liability under negligence principles. In contrast, under strict liability principles the manufacturer has no such leeway; the manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product. Similarly, a manufacturer could not escape liability under strict liability principles merely because its failure to warn of a known or reasonably scientifically knowable risk conformed to an industry-wide practice of failing to provide warning that constituted the standard of reasonable care."

⁴⁶ See Henderson and Twerski, in Reporters' Notes to Restatement, Restatement of Torts 3d S2 comment m, 105. See also their rejoinders to the illustration given in the case of *Carlin v Superior Court* 920 P2d 1347 (Cal 1996) 106.

⁴⁷ Miller and Goldberg *op cit.* 12:34.

⁴⁸ Restatement Second Torts (1965) S. 388 provides as follows: "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (B) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or the facts which make it likely to be dangerous".

⁴⁹ See Miller and Goldberg *op cit* para 12:37.

⁵⁰ See the case of *Ex-Parte Chevron Chemical CO* 720 So 2d 922 (Ala, 1998). See also *Helene Curtis Industries Inc v. Pruitt* 385 F 2d 841 (5th Cir 1967). See also S. 388 Restatement Second Torts (1965) and also Section 388 (b) and the case of *Strong v. El. Di Pont de Nemours Co Inc* 667 F 2d 682 (8th Cir, 1981).

⁵¹ See *Curtis v. M&S Petroleum Inc* 174 F 3d 661 (5th Cir, 1999)

M & S Petroleum Inc.,⁵² the court held that the manufacturer had discharged its duty to warn of the hazards of a toxic product (Heavy Aromatic Distillate [HAD]) by providing adequate warning to the refinery operator and lessees.

2.3 By stander doctrine

This doctrine is to the effect that a manufacturer would be taken to have discharged his duty to warn by giving warnings of the products risks to the immediate purchaser as distinct from the person who has been injured. The decision in the case of *Sills v Massey – Ferguson Inc*⁵³, supports this principle of law. The court, commenting on this principle, observed as follows:

“...while it would be admittedly difficult for a manufacturer to warn the general public, it might be that a warning as to safety precautions given to the user of the mower would discharge the duty.”⁵⁴

2.4 Learned Intermediary Doctrine

Under this doctrine, a manufacturer is exempted from liability for his failure to warn users of products when it is reasonably foreseeable that they may be injured once the relevant information or warning is given to a responsible intermediary. This doctrine is often applicable in medicinal products, where doctors or physicians are provided with information about a product’s risk. This is the position under English law and to some extent in the United States of America. However, the practice is not universal in all the states of the Union.⁵⁵

It must be noted that there is an exception to the above general rule. Typical of such exception is where a conventional physician/patient relationship does not exist. Under such circumstance the learned intermediary rule may not operate.⁵⁶ This proposition is supported by the decision in *McDonald v Orho Pharmaceutical Corp.*⁵⁷

There is no post marketing obligation to warn of subsequent dangers under the strict liability regime once a product is sold. There is, however, an obligation to take into account “new information and rising standards as products of the original design continue to be supplied.”⁵⁸

⁵² 174 F 3d 661 (5th Cir, 1999). The above decision can be contrasted with the decision in *Jackson v Coast Paint & Lacquer Co*, 499 F 2d 809 (9th Cir. 1974). In this case, a painter brought an action against a paint manufacturer after he had been severely burned when the epoxy paint he was using to paint the inside of some railroad tank cars ignited, the paint fumes fuelling the fire. While there was evidence that the plaintiff’s employer may have been aware of the possibility that flammable vapours permitted to accumulate in a closed, inadequately-ventilated area could be ignited by a spark resulting in a fire or explosion, the plaintiff was not so aware. Reversing a verdict for the defendant, the Ninth Circuit held that an instruction to the jury that knowledge of the hazard on the part of the plaintiff’s employer would obviate a duty to warn the plaintiff was erroneous. As the Court explained: ‘At least in the case of paint sold in labeled containers, the adequacy of warnings must be measured according to whatever knowledge and understanding may be common to painters who will actually open the containers and use the paints; the possibly superior knowledge and understanding of painting contractors is irrelevant’.

⁵³ 296 F.Supp 776 (ND Ind. 1969).

⁵⁴ *Ibid* 783

⁵⁵ See the case of *Griffiths v. Blatt* 51 P 3d 1256

⁵⁶ This rule also does not apply in vaccine cases and direct marketing cases. See *Perez v. Wyeth Laboratories Inc.* 734 A 2d 1245 NJ, 1999) See para 12:54 – 12:56 of Goldberg and Miller.

⁵⁷ 475 NE 2d 65 (Mass 1985)

⁵⁸ Miller and Goldberg Product liability *op cit* para 12.90.

3. ISSUES IN PERSPECTIVE

The above fairly summarizes the position of the law concerning warning and direction for use in the product liability regime.⁵⁹ It is important to note that many challenges persist in this area of the law which demand urgent attention because of its legal, environmental and health implications. Some of these challenges impact negatively on environmental sustainability and the welfare of human beings.⁶⁰ Due to human vagaries, it is acknowledged that it is impracticable to have a perfect situation where warning instruction or direction for use given in respect of a product will suffice for all situations. Also, bearing in mind that the sale/marketing of a product may transcend the borders of the country of manufacture; there is need to reassess the challenges associated with the current law and practice on direction for use and warning instructions. There is need to review/update the provisions of the law in the following areas:

3.1. Language barrier

There are so many countries with different nationalities, speaking different local languages, though English language may be country's official language. For instance, this is the case in Nigeria. Some of the country's nationals cannot even speak the official language, such category communicate in their local dialect. This scenario is not peculiar to Nigeria.⁶¹ If, indeed, the essence of warning and direction for use is to inform the consumer about the dangers associated with the use of a product or draw the consumer's attention to how such product can be used effectively, then such rationale is defeated in the scenario mentioned above.⁶² How effective would a warning instruction or direction for use be if couched in a language which most consumers may not comprehend? Such a position is capable of being unjust by defeating the philosophical justification or rationale behind a warning instruction and thereby occasioning product-related injury⁶³ to individuals and the environment generally.

3.2 Inadequacy of Warning.

There are instances where a warning may be misleading or where a product is mislabeled. Typical of such instances is the case of *British Chartered Company of South Africa v Lennon Ltd.*⁶⁴ In this case, the respondents, who were a firm of druggists, had distributed an arsenite cattle dip in drums which were mislabeled. The appellant relied on the formula indicated on the label in preparing the dip meant for his cattle. The dip was too strong and about 180 cattle were killed and the respondents were held liable for mislabeling.

⁵⁹ For a detailed reading, see generally Goldberg and Miller *op cit* cap 12.

⁶⁰ Direction for use may also direct on how some waste products which have a hazardous effect on the environment may be disposed of.

⁶¹ Nigeria for instance has over 250 nationalities, with different languages most of which live in remote areas and do not understand the English language.

⁶² For instance see the case of *Hubbard-Hall Chemical Co v Silverman* 340 F 2d 402 (1st Cir, 1965). This was an action brought against an insecticide manufacturer for the death of two farm labourers who had been administering the pesticide Parathion. In the ensuing action, the court held that the manufacturer should have foreseen that its product would be used by those of 'limited education and reading ability' and, thus, a warning, even if it complied with Federal statutory requirements from the Department of Agriculture, would still not be adequate in the light of its 'lack of a skull and bones or other comparable symbols or hieroglyphics', *Ibid* 405.

⁶³ Miller and Goldberg *op cit* para 14.02.

⁶⁴ (1915) 31 TLR 585 PC.

3.3 Watered down warning.

There are cases where warnings and instructions for use may fail to point to the true nature of the extent of danger with sufficient clarity.⁶⁵ Typical of such an instance is where warning points to a particular danger which may suggest that other dangers do not exist. In such an instance, a warning about a harmful vapour may not indicate the danger of explosion.⁶⁶ For instance, in the case of *Saparito v Purex Corporation*⁶⁷ it was held that the words "keep in cool place" might be understood as indicating that a bottle of bleach might deteriorate rather than explode.

3.4 Warning instruction/Direction for use written in small prints

There are instances where products are accompanied with directions for use or warning instructions written in small prints and colours which are not conspicuous. At times, such small print is hidden. Such instances are likely to make consumers fail to pay attention to such information. For instance, in the case of *McLaughlin v Mine Safety Appliances Co*,⁶⁸ the warning was on the cardboard container, whereas the same ought to have been on the magnesium heat blocks themselves.

3.5 Non-Direct communication where necessary.

Related to the problems associated with warnings and direction for use is the fact that there are occasions where a warning may not be adequate unless there is direct communication with the consumer personally or at least with a responsible intermediary.⁶⁹ Where such circumstances exist, the manufacturer or seller must ensure that there is direct communication with the consumer to apprise him/her of the dangers associated with the use of the product.

3.6 Misrepresentation of promotional activities.

Accompanying products with misleading promotional literature which may mislead the consumer is a common occurrence in product cases. For instance, in the case of *Watson v Buckley, Osborne, Garrel & Co Ltd*⁷⁰ a hair dye, which caused dermatitis, had been advertised as needing no preliminary tests. The danger associated with this practice is also brought to fore in the case of *Maize v Atlantic Refining Co*.⁷¹

⁶⁵ Miller and Goldberg *op cit* para 14.102.

⁶⁶ *Ibid* para. 14.102.

⁶⁷ 255 P2d 7 (Cal, 1953).

⁶⁸ 181 NE 2d 430 9 NY, CA 1962).

⁶⁹ See the case of *Yarrow v Sterling Drug Co* 263 F. Supp 159 (DCSD, 1967). In this case, the District Court observed as follows: "The most effective method employed by the drug company in the promotion of new drugs is shown to be the use of detail men (*scil.* Sales representatives); thus, the Court feels that this would also present the most effective method of warning the doctor about recent developments in drugs already employed by the doctor, at no great additional expense. The detail men visit the doctors at frequent intervals and could make an effective oral warning, accompanied by literature about the development, and that would affirmatively notify the doctor of side effects such as shown in the facts of this case".

⁷⁰ (1940) 1 All ER 174.

⁷¹ 41 A 2d 850 (Pa, 1945) This case related to the deceased, a woman aged 33, who had been working in a confined space with a carbon tetrachloride carpet cleaner marketed by the defendant company under the trade-name 'Safety Kleen'. Her estate commenced an action following her death from renal failure. The Supreme Court of Pennsylvania, granting recovery in the favour of the deceased, said of the two gallon container in which the cleaner was supplied: "The word 'Safety' was so conspicuously displayed on all four sides of this can of dangerous fluid as to make the word 'Caution' and the admonition against inhaling fumes and as to use only in a well-ventilated place seem of comparatively minor import." See Miller and Goldberg *op cit* para. 14.107.

3.7 Learned intermediary rule.

The learned intermediary rule is capable of causing a problem. This is a common occurrence in cases of direction for use or warning instruction associated with medicinal products. There are instances where patients are not properly informed about the attendant consequences of the type of treatment to be administered to them.

3.8 Waste management

Most hazardous products which are capable of having negative impact on the environment, for instance batteries and other related or similar products, are not accompanied with detailed instructions on how to manage such waste which pollute the environment and cause serious health hazards.

The above discourse is a summary of the jurisprudence of direction for use and warning instruction in product liability claims. It proceed with conceptual clarification of salient terms employed in the paper and discussed in summary Anglo American Law on the focus of the paper. It highlights the philosophical justification behind the need for direction for use and warning instruction along with the importance of warning instruction and direction for use in a product liability claim. It also identify the various intermediary rules and the challenges associated with the current practice on warning instructions and direction for use.

4.0 CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The current position of the law on warning instructions and direction for use is capable of working injustice and result into loss of lives in developing countries particularly those having various ethnic nationalities. Language barrier is a major hindrance for nationals of such country to appreciate and comprehend the implication of warning instructions and direction for use. This position deny them of the opportunity to make informed choices and put such products to effective use. It is important that concerted efforts be taken to ensure that products are accompanied by appropriate warning instructions and directions for use couched in comprehensible language. In addition, where the product would be harmful to the environment, special emphasis, in terms of warnings and directions for use for the disposal of waste arising from the use of the product or waste generated during the course of its production, should be provided in order to ensure the safety of the environment.

4.2 Recommendations

In order to ensure human safety and safe environment it is paramount that pragmatic efforts be taken to improve the current practice and law relating to direction for use /warning instructions which accompany products. Towards achieving this, the following recommendations are suggested in order to reduce the frequency of product-related accidents and to ensure a safe environment.

4.2.1 Clarity, Explicitness and Adequacy of Direction for Use and warning instructions.

It is suggested that warning instructions and/or direction for use should be couched in comprehensible language or, better still, translated into the local language of the area where such products are to be sold. The author is not unmindful of the fact that a product manufactured in Asia or Europe may find its way into a remote village in Africa, but this does not make translation into the local language impossible. Such an obligation should be imposed on the importer, distributor or marketer of the

product in that locality. The warning instruction should be clear, explicit and couched in simple language devoid of technical jargon.

4.2.2 Learned Intermediary Rule.

The learned intermediaries rule strives to ensure that directions for use or a warning instruction which may not be easily communicated to consumers are passed through intermediaries. There are, instances where such a rule has caused mishap or injury to consumers. For instance, in *Yarrow v Sterling Drug Co.*,⁷² the plaintiff suffered permanent damage to her eyes having taken chloroquine phosphate for arthritis. Though, the manufacturer had warned through the accompanying literature of such a side effect. Notwithstanding this, the court held that the warning was not sufficient.⁷³ This case may be contrasted with the English case *Holmes v Ashford*,⁷⁴ where the court held that the learned intermediary rule adopted as a medium through which the side effect of the product in question was communicated to the claimant was appropriate in the circumstances of the case.⁷⁵

As rightly observed by the court, in circumstances similar to the above, where new products are involved, say for instance a drug, the most effective method employed for sale in the promotion of new drug, could be the use of sales representatives and the court suggested that this method be adopted or employed.

4.2.3 Location of Warning.

There is need to place importance on the location of the warning or direction for use which accompanies a product. While being aware that most warnings or directions for use are contained in the package in which the product is enclosed; at times it may be appropriate that the warning should be printed or embossed on the product itself where practicable. This is likely to alert a consumer than where the warning is contained on the external part of the product package or in the accompanying leaflet within.⁷⁶

4.2.4 Effective Management of Waste Product.

There is need to provide appropriate and adequate guidelines on how waste hazardous by- products generated from used products or those generated during the course of production should be managed effectively. This is to be done in clear, explicit and spoken language/in the native language of the area where such a product is being offered for sale. The obligation for doing this should be imposed on the importer or manufacturer of the product in the locality concerned.

⁷² 263 F. Supp. 159 (DC. SD 1967).

⁷³ *Ibid* 163.

⁷⁴ [1950] 2 All ER 76.

⁷⁵ See also the case of *Kubach .v Hollands*. [1937] 3 All ER 907, DC.

⁷⁶ See the case of *McLaughlin v. Mine Safety Appliances Co.* 181 NE 2d 430 (NY) 1962.

ANALYSING RIGHT TO ACCESS TO SAFE WATER AND SANITATION FACILITY: A DISCOURSE IN REFERENCE TO INDIA

Rahul D. Gangurde

Assistant Professor of Law, Department of Law, Savitribai Phule Pune University, Pune India.

Email:- adv.rahulgangurde@gmail.com

Mob . No. :- 7219799444

Sanjana Bharadwaj

Assistant Professor of Law, School of Law, MIT-World Peace University, Pune India

Email :- sanjana.b80@gmail.com

ABSTRACT:-

The right to safe drinking water is regarded as crucial to attaining all other civil rights. However, internationally, 2.1 billion people do not have clean drinking water at home, 2.3 billion do not have proper sanitation and 1 billion practice open defecation activities. Without water and sanitation, it is not possible to acquire equality and gender equity. There are thousands of women who are not experiencing this human right, which is crucial to their integrity and existence. Since they face yet another oppression, we do not understand the precise figure: the numerical invisibility, many of them are not counted in the censuses and thus do not even have the ability to denounce. Knowing all about their condition is important. 11% of the world's population does not have access to a safe source of water, and women usually take the burden because they are forced to trek for miles to get it. In order to avoid defecating in the open or trying to wait for the night to relieve themselves, to avoid being sexually assaulted, and to be able to provide intimate grooming at school, women require the protection and protection of the latrines. To protect their wellbeing, they will need hygiene education. Owing to poverty and the patriarchal taboos that despise femininity and menstruation, millions of them already do not have it.

Girls and women have responsibility for the administration of the provision of household water, sanitation and hygiene in low-income countries. Mostly, performing these positions precludes any other profession or involvement in schooling, and the anguish and vulnerability in finding no private place to go to the bathroom compounds their oppression. Acknowledging women's water, hygiene and sanitation needs is a crucial factor of achieving gender equality and protecting the capacity of half of the world's population. This paper is an attempt to evaluate the accessibility of groundwater resources, discoursing on right to water in reference to sanitation facility available to women and children. It will enquire to assess the constitutional provisions, the duties of the state as well as non-state players in providing the access to water and sanitation facility.

Keywords: Right to water, Drinking water, Sanitation facility to women

Introduction

The Universal Declaration of Human Rights (UDHR) of the United Nations (UN) engenders essential state obligations to uphold, meet, and secure a wide variety of socioeconomic rights. The United Nations General Assembly accepted the universal right to safe and clean drinking water and sanitation in 2010. Water, on the other hand, is vital to the fulfilment of other human rights including the right to food and livelihoods, as well as the Convention on the Abolition of All Types of Violence against Women. These wider water-related protections have been recognised, but they have yet to be enforced.¹

Water and sanitation facilities that are efficient and safe are generally recognised as important for living a good and prosperous life. Prior to the UN General Assembly's formal acceptance of the right to drinking water and sanitation, it was commonly believed that access to water and sanitation facilities was a precondition for securing other human rights.

As opposed to investment in other industries, the long journey to specifically acknowledging water as a human right has been due to a lack of political will, capacity building and investment in this region. Since the vulnerable, who suffer the most from a lack of access to better water and sanitation facilities, have a small voice in political forums, their demands for these services can be easily neglected by the State authorities. While improvement has been made, one explanation for the poor's persistent lack of access to water and sanitation facilities in developed regions over the past few decades is their lack of concerted action and control.

The Constitutional Court of Indonesia,² has also asserted the importance of Right to water. According to the Court, water use affects not just the imminent requirement, but also the "*guarantee of potential continuity, since it is directly linked to human life.*" As a result, the state must be deeply engaged in water supply policy planning. Even the Argentina SC upheld a decision of the Appeal Chamber³, where in it was held that the right to water is a fundamental human right that cannot be overlooked by State authorities (through action or omission), as it constitutes an essential component of the most elementary human rights such as the right to life, autonomy and human dignity. Any breach of this simple and universal human right gives rise to an injunction order, which may be used to re-establish its pleasure, as in this case. If an individual or a group of people is unable to exercise a constitutional right, such as access to potable water, the state is obliged to take the required action to ensure that the right is exercised at a minimum level. Even in extraordinary periods of crisis or emergency, this duty prevails, especially in the case of groups living in highly precarious circumstances. The right to water is an active right that must be respected without hesitation and without the need for pre-existing legislation regulating how it can be used.

The UNESCO in 2017, reported that 1 in 4 health are facilities lack basic water services. Around 892 million people around the world, practice open defecation. Around 2.4 billion people lack access to basic sanitation services, such as toilets or latrines.⁴ The data presented in Down to Earth projects the

¹ The Human Right to Water: The Importance of Domestic and Productive Water Rights, , <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4237907/> (last visited Mar 1, 2021).

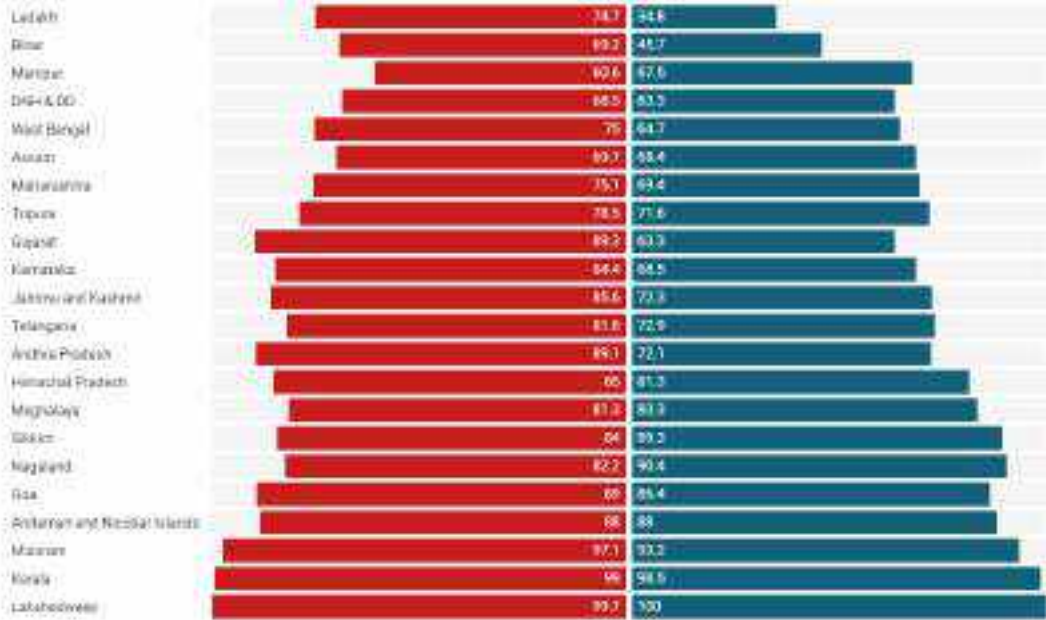
² Judicial Review of the Law of the Republic of Indonesia no 7 Year 2004.

³ Cámara de Apelaciones en lo Contencioso Administrativo y Tributario (Ciudad Autónoma de Buenos Aires) 18 July 2007.

⁴ The Human Right to Water: The Importance of Domestic and Productive Water Rights, *supra* note 1.

fact that there is an access to improved sanitation facility in the year 2019-2020 in comparison to 2015-2016. The reasons for the growth of sanitation facility can be attributed to the affirming schemes made by the Government of India under the Department of Drinking Water and Sanitation.⁵

The access to water for the year 2019-2020 is illustrated in the following image:



The data mentioned here, has covered the areas of flush to piped sewer system, flush to septic tank, flush to pit latrine, flush to don't know where, ventilated improved pit (VIP)/biogas latrine, pit latrine with slab, twin pit/composting toilet, which is not shared with any other household. However, it is to be noted that the present indicator does not shows the access to toilet facility. Hence, in this reference, it becomes imperative to evaluate the WASH in reference to emerging country like India.⁶

CONTAMINATION OF GROUND WATER:

It is to be submitted that although we are creating a narrative around the availability of water across the states and union territories in India, we shouldn't forget to analyse the aspect of the quality of groundwater in India. It is to be noted that around 3/4th of the Indian population depends on the groundwater for drinking, but the quality of groundwater is extremely dangerous, when consumed by an individual.⁷ It is hard to fathom the vital role groundwater plays as a localised source of drinking water for millions of rural and urban households. According to a few figures, the groundwater meets approximately 80% of rural domestic water requirements and 50% of urban water requirements in India. As compared to surface water sources, groundwater is usually less vulnerable to degradation

⁵ Home | Department of Drinking Water and Sanitation | GoI, <https://jalshakti-ddws.gov.in/> (last visited Mar 1, 2021).
⁶ Swachh Bharat Mission Phase II guidelines released, <https://www.downtoearth.org.in/news/rural-water-and-sanitation/swachh-bharat-mission-phase-ii-guidelines-released-71626> (last visited Mar 1, 2021).
⁷ Not just scarcity, groundwater contamination is India's hidden crisis, HINDUSTAN TIMES (2017), <https://www.hindustantimes.com/india-news/not-just-scarcity-groundwater-contamination-is-india-s-hidden-crisis/story-bBiwL1eyJJeMgFQcX4Cn7K.html> (last visited Feb 18, 2021).

and contamination. But the same cannot be said in the present condition, when there are reports strumming about the contamination of groundwater resources.

Human activity and natural systems both contribute toxins to the groundwater ecosystem. Solid waste from manufacturing units is deposited near factories, where it combines with percolating rainwater and gradually enters groundwater. A significant number of major pollutants are soaked up by the percolating water which enters the aquifer system and contaminates the groundwater. In some regions of the country, the issue of groundwater contamination has become so acute that groundwater supplies may be destroyed unless immediate measures are taken to mitigate it. Contamination, over-exploitation, or a mixture of the two affects a significant number of groundwater quality concerns. The bulk of groundwater quality concerns are difficult to identify and address. Typically, the solutions are very costly, time intensive & often not productive. Over time, radioactive elements emitted from factories and landfills, as well as diffused sources of pollutants such as fertilisers and pesticides, have resulted in elevated levels of contamination of groundwater, with nitrate levels reaching allowable limits in more than half of India's districts. The presence of fluoride, copper, arsenic, heavy metals and nitrate toxicity has also added cause to the worry.⁸

With reference to the importance of groundwater in a country, the High Court of Kerala in the case of *Perumatty Grama Panchayat v State of Kerala*⁹ held that, "Groundwater is a national wealth and it belongs to the entire society. It is a nectar, sustaining life on earth. Without water, the earth would be a desert." The High Court also mentioned the importance of sustainability, and mentioned that "every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nations in the best possible way".¹⁰ The Court also affirmed to the Principle 2 of the Stockholm Declaration on the Human Environment.¹¹

Overall, groundwater is polluted in as many as 386 districts with excess nitrate, followed by fluoride in 335 districts, iron in 301 districts, salinity in 212, arsenic in 153 districts, lead in 93 districts, chromium in 30 districts, and cadmium in 24 districts throughout India. There are more than one, two or three hazardous elements in several districts in their groundwater.¹² Another aspect of analysis comes from the Central Ground Water Board (CGWB) which assesses the chemical quality of groundwater every year. The report examined around 15,000 wells around the country of India. the details of the report mentions that in the States of Punjab, Haryana, Uttar Pradesh, Tamil Nadu, Telangana and West Bengal, there is a presence of a large number of toxins, heavy metals, in one or the other district.¹³

⁸ Across India, high levels of toxins in groundwater | India News - Times of India, , <https://timesofindia.indiatimes.com/india/govt-body-finds-high-levels-of-groundwater-contamination-across-india/articleshow/65204273.cms> (last visited Mar 1, 2021).

⁹ *Perumatty Grama Panchayat v State of Kerala* [2003] High Court (Kerala, Ernakulam) Writ Petition no 34292 of 2003, (2004) (1) KLT 731.

¹⁰ *Ibid*, Para 13 of the Judgement.

¹¹ The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future.

¹² *Supra* Note 8.

¹³ *Supra* Note 8.

Discourse on access to clean water facility

It is common for many international organizations to use access to safe drinking water and hygienic sanitation facilities as a measure for progress in the fight against poverty, disease, and death. It is also considered to be a human right, not a privilege, for every man, woman, and child to have access to these services. Even though progress has been made in the last decade to provide safe drinking water and sanitation to people throughout the world, there are still billions of people that lack access to these services every day.

In the case of *D. Viswanatha Reddy and Company, Kurnool versus Government of Andhra Pradesh*¹⁴, the Andhra Pradesh High Court found a mention of the international convention and the obligation of the Government in providing water to the people. The relevant portion of the judgment reads as: *"Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India, and can be served only by providing source of water where there is none."* It is also to affirm the UNO Resolution of 1997, to which India is a signatory wherein the Conference resolved to provide access to drinking water. *"All people whatever their stage of development of their social and economic conditions have the right to have access to drinking water in quantum and of a quality equal to their basic needs"*.

According to the World Health Organization and UNICEF, in 2015, 91% of the world's population used drinking water from improved sources (58% from a piped connection in their dwelling, plot or yard, and 33% from other improved drinking water sources), leaving 663 million people lacking access to an improved source of water.¹⁵ This raises a serious concern regarding the quality of water and the accessibility of water resources for the people.

Despite legal provisions and official pronouncements, India has underperformed, in the two most critical issues for people's well-being in any social system: hunger and access to safe drinking water and sanitation. Millions of Indians, particularly women and children, are surviving (or are being forced to live) in abject poverty with no prospects for a better life. Water and sanitation was associated to 37 diseases listed as major causes of death in developed countries. In developed nations, water-borne diseases kill over 4 million babies and children per year. As a result, the question of water quantity and efficiency becomes a central foundation of life.

Drinking water is a problem that elicits intense reactions in the country's electoral political debate, with drinking water being a top priority in election promises. However, sanitation and hygiene is largely absent from political agendas. Despite the State having continued financial resources, especially for drinking water, there are significant concerns about resource sustainability and investments made or to be made in the drinking water sector or providing access to sanitation facility.

Concerns over groundwater and surface water availability have arisen, as have issues about accessibility inequity, in both rural and urban areas. Over the last decade, the situation has worsened, affecting both rural and urban areas, but the entity which has been affected the most is women. Drinking water supply is becoming a limitation in many areas, with two-thirds of India facing drought,

¹⁴ 2002 (4) ALD 161.

¹⁵ Assessing Access to Water & Sanitation | Global Water, Sanitation and Hygiene | Healthy Water | CDC, (2018), <https://www.cdc.gov/healthywater/global/assessing.html> (last visited Mar 1, 2021).

increasing pressure on available water from intensive agriculture and industry, and raising levels of groundwater and surface water contamination. Healthy drinking water distribution and supply differs from state to state and also within the territory of the State.

Together with the reduced production in rural sanitation, the viability of financial spending in the rural drinking water sector is a critical issue. There is an evidence of low planning at a local or regional scale of, say, a district or a block in rural areas, as well as inapt continuous and regular tracking of the situation on the ground in terms of equitable accessibility and affordability.

The whole Rural Drinking Water and Sanitation Sector Reform process is a top-down process from the Centre to the Provinces, with State and District level water and sanitation missions being inefficient and understaffed. In decentralised programmes and initiatives, especially looking at the federal structure of the Indian country, the position of NGOs and civil society is poorly defined. Organizational decentralisation is limited due to a lack of political decentralisation, leaving PRIs with a limited role in implementation process. The problem is much worse in the field of urban water and sanitation, where there are no accurate projections of coverage, access, or funding conditions. The data presented in the annual budget presented by Ministry of Jal Shakti, Department of Water Resources, shows a ghastly image of funding operations at grassroots level.¹⁶ The schemes which are covered for this table is as follows:

1. Ground water Management and Regulation

The activities of the Ground Water Management & Regulation Scheme are as follows- National Aquifer Mapping; Ground water exploration; Ground water resource assessment; Ground water regime monitoring; artificial recharge & rainwater harvesting studies; Geophysical Studies; Hydro-chemical studies; and Regulation of ground water development.

2. Rajiv Gandhi Institute of Training and Research

Rajiv Gandhi National Ground Water Training and Research Institute (RGNGWT&RI) caters to the needs of ground water experts at the National Ground Water Board (CGWB) and other Central and State Government Bodies, Research Institutes, and Non-Governmental Organizations (NGOs) etc.¹⁷

3. Infrastructure Development

This scheme pertains to the activities related to lands & buildings and Information Technology development and specifically include the activities related to (i) Land & Building & Information Technology Plan of Central Ground Water Board, (ii) Land & Building of Central Water Commission, (iii) Information Technology Development Plan of Ministry of Water Resources, River Development & Ganga Rejuvenation and (iv) e-Governance of the Ministry of Water Resources, River Development & Ganga Rejuvenation.¹⁸

¹⁶ Outcome Budget | Department of Water Resources, RD & GR | Government of India, <http://jalshakti-dowr.gov.in/finance/budget/outcome-budget> (last visited Feb 18, 2021).

¹⁷ Ibid

¹⁸ Ibid.

Surface water schemes	2007-2008		2008-2009		2009-2010		2010-2011	
	Budget Estimates	Actual money spent	Budget Estimates	Actual money spent	Budget Estimates	Actual money spent	Budget Estimates	Actual money spent
Ground water Management and Regulation	62	48.11	95	54.37	70	68.82	100	80.92
Rajiv Gandhi NGWTR & RI	1.5	0.60	2.10	0.64	2.00	1.78	6.00	3.19
Infrastructure Development	4.55	1.27	7	2.07	4.5	2.15	10.50	6.86

Table 1: Surface water schemes: Ground water Management and Regulation, Rajiv Gandhi NGWTR & RI and Infrastructure Development (All figures in crores)

It is also be noted the ill ways and means, the Municipal Corporation uses to tackle with the problem at hand. Back in the year, 1993, we see the implementation of a problem which took place in 1980 because of the callous approach shown by the Municipal Corporation. To be precise, the Supreme Court (SC) ordered the Ratlam municipality in Madhya Pradesh to clean a locality in a landmark decision in 1980¹⁹, ruling that financial limitations did not excuse a municipality's inability to fulfil its constitutional duty to provide improved sanitation and water facility. The Ratlam Municipal Corporation almost undertook 13 years to partly enforce a Supreme Court decision on developing civic services in the prosperous Shastri Nagar community.²⁰ After three contempt notices were served against the civic body, the SC order about the drains was eventually enforced in August of this year. Despite the decree, which claimed that the municipality would not only build drains and fill cesspools, but would also use its sanitation workers to keep the city clean. Although we proclaim the fact time and again, that we have the Fundamental right to sanitation and water facility, but should it be at the cost of a legal battle to be fought for almost 13 years and which would also impact or detriment the life and wellbeing of thousands of citizens. It is to be highlighted that the aspect of 'Co-operative federalism' also fails, when the State shows an immature behaviour towards the protection of life and personal liberty.

The decision in Ratlam Municipal Council becomes important, because it was the first time that the court mentioned and highlighted the plight of the people living in areas with very less amenities. In its decision, the Court held, "*The rich have bungalows and toilets, the poor live on pavements and litter the street with human excreta because they use roadsides as latrines in the absence of public facilities. And the city fathers being too busy with other issues to bother about the human condition, cesspools*

¹⁹ Municipal Council, Ratlam v. Shri Vardhichand & Others, (1981) SCR (1) 97.

²⁰ Upholding the right to hygiene, , <https://www.downtoearth.org.in/coverage/upholding-the-right-to-hygiene-31592> (last visited Feb 18, 2021).

and stinks, dirtied the place beyond endurance which made well-to-do citizens protest, but the crying demand for basic sanitation and public drains fell on deaf ears”.

Millions of people lack the most important resource, water. over the last many years, we see a dwindling change in the economy, with increasing privatisation of water services in many countries, including India, rising opposition to water privatisation around the world, increasing recognition of citizens' social and economic rights, Supreme Court decisions, and the declaration of the right to water as an explicit right by the United Nations Economic and Social Commission. However, with reference to the right of life and drinking water, the right seems to be negated by the state players, as a result of which, it becomes imperative to question the right of water in light of the constitutional mandate. The importance of water in the fulfilment of all other Covenant rights has been highlighted. This covers nuances of the right to food, the right to health (including environmental hygiene), and the right to jobs, among other items. In no condition shall anybody be deprived of the bare minimum right of drinking water.

GENDER: SANITATION AND HYGIENE

In 2015, 4.5 billion people also lacked a secure sanitation facility, with bodily excretions being disposed of on-site or treated off-site, and 2.3 billion lacked a basic sanitation service. Almost 600 million of them had “constrained” facilities that they shared with other families, and 892 million people also defecated in fields, trees, woods, bodies of water, or in the open.²¹ The disadvantaged people and those who live in rural areas are the ones who are least qualified to use proper sanitation. According to a data by United Nations, women and girls are responsible for water collection in 8 out of 10 households with water off premises.²² This is illustrated in the diagram below:



Figure 2: Percentage of population involved in water collection

The use of communal sanitation services and open defecation places women and girls at risk of sexual harassment and makes it impossible for them to comfortably handle their monthly menstruation with privacy and confidentiality. Sanitation and feminine hygiene care are also closely linked to hygiene practises, such as hand washing with soap.²³

²¹ Frontiers | A Systematic Review of Water and Gender Interlinkages: Assessing the Intersection With Health | Water, , <https://www.frontiersin.org/articles/10.3389/frwa.2020.00006/full> (last visited Feb 14, 2021).

²² Water and Sanitation – United Nations Sustainable Development, , <https://www.un.org/sustainabledevelopment/water-and-sanitation/> (last visited Feb 13, 2021).

²³ Gender and water collection responsibilities – A snapshot of Latin America, , <https://blogs.worldbank.org/water/gender-and-water-collection-responsibilities-snapshot-latin-america> (last visited Mar 1, 2021).

Without appropriate menstrual health maintenance facilities and equipment, females in low-resource and disaster environments face shame and social isolation, as well as missing out on essential cultural, social, and economic resources. Gender-responsive WASH programming may be focused on this knowledge to address the needs of young girls and women.²⁴

Inappropriate rural sanitation coverage is triggered by a number of social and economic causes, not just human behavioural resistance, as seems to be the prevailing paradigm for understanding poor coverage. The way India's rural livelihoods are organised, as well as the growing migration from rural areas to squalid urban areas, has a negative effect on perceptions and behavioural modification.²⁵

In both rural and urban areas, social taboos of caste and status in coping with human faeces have diminished but still hold sway. Latrine implementation is also plagued by a lack of gender awareness in villages, with sanitation not being treated as a necessity by men, despite the fact that the improved social status associated with providing a lavatory also has the reverse reaction. When promulgating pit-based latrines, it is important to remember congested communities with minimal space for latrine development and a high risk of groundwater pollution. Aside from the reasons mentioned above, geographical and geography considerations such as hilly areas with restricted level land, flood plains, and coastal belts with high water tables exacerbate the development of proper sanitation. There is no evidence, either from research or field experiments, which the aforementioned causes have an impact on poor coverage levels in rural areas, but these problems are very significant, as illustrated by the low national coverage circumstance.

Rural sanitation funding should propose leveraging funds from local financial institutions such as rural banks, microfinance, and self-help organisations. The problem of sanitary supply and changing is also important, and the small-scale private sector's position in securing this supply on a long-term basis must be tackled. Long-term estimates of rural sanitation funding needs must also be centered on alternate possibilities of people's own investments.

The pandemic has uncovered India's water and sanitation system's significant shortcomings. Many of this can be due to India's poor public health budget – 1.29 percent of GDP (in 2019-20), which is smaller than most other countries.²⁶ Another significant explanation for India's poor public health is the lack of a legislative platform that guarantees a basic right to health. The right to health must be made a constitutional right, and it must be enforced within the context of legislative frameworks and human rights values of equality, procedural fairness, and openness, which will assist India in meeting the challenges raised by COVID19.

Hygiene and sewage must be available to anyone in the household or its immediate area, in adequate quantities and on a regular basis, for personal and domestic use, according to the normative material category of accessibility.

²⁴ Supra note 23.

²⁵ Gender and water, sanitation and hygiene, , UNICEF DATA , <https://data.unicef.org/topic/gender/water-sanitation-and-hygiene-wash/> (last visited Feb 12, 2021).

²⁶ Upholding the right to hygiene, <https://www.downtoearth.org.in/coverage/upholding-the-right-to-hygiene-31592> (last visited Feb 1, 2021).

Water, sanitation, and hygiene equipment and services must be accessible at all hours and in all areas where people spend large periods of time. People in public services (e.g. jails, schools, hospitals, refugee camps) and in public infrastructure have a particular obligation to have access to water and sanitation (e.g. markets). States must also maintain enforcement of non-state-controlled areas including (rented) homes, offices, private medical institutions, and schools. To ensure that there is adequate water for domestic and personal use – particularly in places where water is limited.

Analysing the Right to Life and Right to Water in India through the lens of the Supreme Court

The positive influence of international bodies, civil society organisations pounding on the doors of justice, and judicial actions by the Supreme Court and several High Courts has created an enabling climate for India to acknowledge access to drinking water as a right. Under Article 21 of the Constitution of India, there is protection of right and personal liberty except by a procedure established by law. Over the last couple of years, the Supreme Court using the tools of Public Interest Litigation and Judicial Activism, has breathed life in Article 21 of the COI. Although the Right to water has not been expressly mentioned under Article 21, the same has grown from the ashes of plethora of case laws filed by people, reiterating for Right to Water under Article 21.

The Supreme Court has reiterated the importance of safe drinking water for the human being and recognised it as one of the basic human rights. In the case of *Siromani Mittasala v. President, Brindavanam Colony*²⁷, the Hon'ble High Court observed, “*Every citizen has right and is entitled to pollution free air and water under Article 21 of the Constitution of India. No Municipality and no person can deprive the citizen of such basic human right by reason of its activity or inaction.*”²⁸ This case also becomes important for us to evaluate because the Court held, looking at the bare provisions of the Andhra Pradesh Municipalities Act, that it was the municipal authority's obligation to provide potable water and that economic hardships were not an appropriate reason for neglecting to do so.

A reference can be made to the catena of Supreme Court judgements, regarding the right of enjoyment of water as a resource and especially to be used in reference to potable drinking water.²⁹ Natural resources such as air, water, and soil cannot be used if doing so causes permanent environmental damage. The lack of successful implementation of environmental regulations and non-compliance with regulatory norms has resulted in increased environmental deterioration. The right to life has been ruled a constitutional right by the Supreme Court on several occasions. The Supreme Court in the case of, *Narmada Bachao Andolan*³⁰, emphasised that because water is a basic necessity for human life, the universal and universal right to water under Article 21 can only be fulfilled by having a supply of water where there is none, and that everyone has the right to consume water in amounts and condition that suit their essential necessities. As a result, it is well founded that every person has a fundamental right to sufficient drinking water, and it is the State Government's basic statutory fundamental obligation to guarantee the provision of drinking water.

²⁷ 2002 (1) ALD 136, 2002 (2) ALT 356.

²⁸ Ibid, Para 42.

²⁹ Subhash Kumar v. State of Bihar, AIR 1991 SC 420, State of Karnataka v. State of A. P. (Allmati case) (2000) 10 SCC 664.

³⁰ [2000] INSC 518.

Even the International courts, for instance the Kenya Supreme Court,³¹ has applied the provisions of ICCPR and reiterated and highlighted the importance of Right to water and of sanitation. The Court explained that ‘the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities’. The Court also held that the State has the duty to address the needs of vulnerable groups within society and that the people were entitled to the fundamental rights to accessible and adequate housing and to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education’ as guaranteed by international treaties.³²

CONCLUSION

In developed countries, inadequate sanitation is a leading cause of death and disease. Unsanitary conditions not only adversely affects the supply and quality of water, it also has the same negative impact on education, on healthcare, on hospitality, and on people’s moment and life prospects in general. The importance of sanitation in India's human growth has been widely acknowledged over the last two decades, and larger community contributions have been made in facilitating access to and enhancing sanitation. The WHO Recommendations for Drinking Water Safety stress an integrated approach to evaluating and controlling water quality from source to customer. It stresses quality safety and pollution prevention, as well as being inclusive and participatory in addressing the needs of those in developed countries who do not have access to piped municipal water sources. The recommendations highlight the importance of preserving microbial consistency in order to reduce waterborne communicable diseases. They also cover safety from toxic chemicals and other pollutants that are a health issue. In India, diarrheal diseases are perpetuated and transmitted by a lack of drinking water, inadequate environmental protection, insufficient treatment of human excreta, and sanitary conditions. The public health priority in completing the MDGs is ensuring that changes result in better water and sanitation for the most disadvantaged communities. To ensure the provision of low-cost, simple, and locally appropriate hygiene and sewerage solutions, as well as the incorporation of these approaches into established social systems such as classrooms, markets, and healthcare facilities, creative approaches are needed.

³¹ Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security, High Court of Kenya at Embu, Constitutional Petition no 2 of 2011 16 November 2011.

³² Ibid, Para 8 of the Judgement.

THREE FOLD COMPARATIVE ANALYSIS OF RAPE LAWS IN TERMS OF HETERONORMATIVITY, CORRECTIVE RAPE AND MARITAL RAPE

PALAK GUPTA

UNIVERSITY OF MUMBAI
LLM GROUP V – 2ND YEAR
9802810771/ 7988477112
guptapalak0209@gmail.com

ABSTRACT:-

Author in this article has chosen the new dimensions of rape laws by significantly analyzing the fact that criminal psychology of likeminded individuals is now gender liberal and not gender neutral anymore. Gone are the days when only female progeny was considered to be vulnerable towards the victimology of rape. Moving to the modern era where heinous crimes are emerging as part and parcel of society, this Threefold analysis of rape laws has author's vision of emphasizing the need of considering rape to be a crime phenomenally targeting all the three types of recognized as well as unrecognized genders of society be it Women, Men or The Third Gender inclusive of LGBT community. Author also proposes to take an insight into the Criminal Law Amendment Bill (2012) for giving a modern outlook and a base to revisit rape laws.

This article specifically extracts from the threshold of prevailing laws, the loop holes as well as a gender biased approach of society where rape has been given a very narrow recognition as per the norms but, today rape is no more a matter of sexuality and hence, structurally, law needs to be reformed and a new legislation has to be devised for eliminating the prevailing loop holes in gender biased, narrow legislation dealing with rape.

This article is an initiative of author to propose a suggestive measure of reforming the criminal law and take the readers of this Article to a conclusion where after the three fold comparative analysis, they can rethink and revisit the idea of rape laws concretizing it by introducing a proposal towards separate rape law legislation which shall no longer be gender biased or hypercritical towards single gender and shall eliminate all the prevailing loop holes.

The Article is not only an effort of author to glorify the prevailing loop holes and contingencies in the rape laws or compare interfold between the three categories but, the comparative analysis while elaborately deals with situation and necessity of separate legislation in India, it also lays down comparison of India with other countries of world.

INTERFACE

Section 375¹ of The Indian Penal Code, 1860 deals with the definition of rape wherein one can infer definition of rape from Oxford Dictionary² and Black's Law Dictionary³ as well. The first and foremost ingredient of being gender biased is the definition in itself which restricts itself to a man having a forceful sexual intercourse with a woman. The definition is silent about the fact of Man having forceful sexual intercourse with a transgender, A transgender having forceful sexual intercourse with a woman, A transgender having forceful sexual intercourse with a woman, A woman having forceful sexual intercourse with a man , A man having forceful sexual intercourse with a man and a woman having forceful sexual intercourse with a woman.

The basic question that shall come to the minds of readers is where is sexual intercourse? As the restricted definition of sexual intercourse itself as per oxford dictionary

“is sexual contact between individuals involving penetration, especially the insertion of a man's erect penis into a woman's vagina, typically culminating in orgasm and the ejaculation of semen.”

So when a man forces a woman for oral sexual intercourse without erupting her vagina... or vice versa or a woman black mails a man to undergo sexual intercourse with her without his consent... Consent and will being the foremost ingredient of holding a sexual intercourse as rape... Will the said instances be rape or not?

From here author opens the vast doors of scope into definition of sexual intercourse, definition of rape and finally giving a threefold gender neutral approach to rape laws so that it become easier for the readers to analyze and visualize that whether at first instance Heteronormative rapes, Marital Rapes and Corrective Rapes should be recognized as rapes or not.

¹ A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First) — Against her will.

(Secondly) —Without her consent.

(Thirdly) — 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.

(Fourthly) —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.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]
STATE AMENDMENT

(Manipur) —(a) in clause sixthly, for the word “sixteen” substitute the word “fourteen”; and

(b) in the Exception, for the word “fifteen” substitute the word “thirteen”. [Vide Act 30 of 1950, sec. 3 (w.e.f. 16-4-1950) (made earlier than Act 43 of 1983)]. COMMENTS Absence of injury on male organ of accused Where a prosecutrix is a minor girl suffering from pain due to ruptured hymen and bleeding vagina depicts same, minor contradictions in her statements they are not of much value, also absence of any injury on male organ of accused is no valid ground for innocence of accused, conviction under section 375 I.P.C. proper; Mohd. Zuber Noor Mohammed Changwadia v. State of Gujarat, 1999 Cr LJ 3419 (Guj). Penetration Mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case; Prithi Chand v. State of Himachal Pradesh, (1989) Cr LJ 841: AIR 1989 SC 702.

² The crime, typically committed by a man, of forcing another person to have sexual intercourse with the offender against their will. 1.1. Archaic The abduction of a woman, especially for the purpose of having sexual intercourse with her.

³ The unlawful carnal knowledge of a woman by a man forcibly and against her will.

INTRODUCTION

Heteronormativity is a concept evolving with the evolution of heterosexuality as a more acceptable concept especially after decriminalization of Section 377⁴ of Indian Penal Code, 1860 in *Navtej Singh Johar v. Union of India*⁵. Still we have reached far in recognizing the fact that in a country like India, women and girls are vulnerable to rapes as well as sexual assaults whereby most of the cases remain unreported, there is a lack of enforcement of legislation as well as doctrinal implications to the female rape survivors. Media trials have also played an important role in highlighting the same but, what has not been ever taken into account by the legislative authorities or the media is “A male victim suffering from rape and being forced to be engaged in unwanted sexual activities”.⁶ This definition is gender neutral and does not invoke any kind of stereotypes or role models in context with respect to sexuality or sexual assault or rapes.

Corrective rape also known as Curative or homophobic rape is performed as a treatment of so called victims of disrupted sexual orientation in terms of a common man who have been gifted such orientation by nature. It is a hate crime which has gained light after the non-acceptance of LGBT group where after doctor’s prescription, parents get their own Gay/Lesbian child raped from family members or relatives or siblings to straighten their orientation. This horrifying trend was brought into light by Times of India⁷ and New York Times in India as well as other parts of world.

Though rape is a matter of consent, it is ironical that same consent after marriage is a matter of age. While most of countries are at verge of recognizing Marital Rape as rape, a burgeoning power is still holding back. The former Chief Justice of India J. Dipak Mishra said:- “*Marital rape should not be legalized in India as it will lead to deviation from Indian culture*”.⁸

In *Independent Thought v. Union Of India*⁹, Division Bench of Hon’ble Apex Court held that “*marriage is personal and nothing short of the Indian State criminalizing marriage itself can destroy the institution of marriage*”. So a nation where even the customary practice of vedas in Manusmriti says “*Yatra Nariyastu Pujyante Ramante Tatra Devtah*” sexual intercourse with own wife by a husband if she is above 18 comes as a fundamental right.

HISTORICAL BACKGROUND

Heteronormativity

International Criminal Law Jurisprudence

Since time immemorial, be it any nation rape was served and seen as the rule of war. To overpower and outrage any nation, rape was considered to be the most powerful weapon. From the 1st century

⁴ Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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.

⁵ (2016) 7 SCC 485.

⁶ Origin of term male rape in Oxford online dictionary. Reference to be made to https://en.oxforddictionaries.com/definition/male_rape.

⁷ Reference to be made to Times of India Aarticle in <https://www.firstpost.com/india/horrifying-parents-india-using-corrective-rape-cure-homosexual-children-2273030.html>.

⁸ Reference to be made to Times of India Article in <https://timesofindia.indiatimes.com/city/bengaluru/no-need-to-make-marital-rape-an-offence-ex-cji-dipak-misra/articleshow/68785604.cms>.

⁹ W.P. Civil 382 od 2013.

itself, prevalence of rape prohibitory laws was traced.¹⁰ The first traces were derived after war of Rwanda whereof Prosecutor v. Akayesu¹¹ emerged out to be the very first recognized case law before International Criminal Tribunal For Rwanda also known as Aakayesu Trials where for the first time, rape was considered as Crime against humanity and Genocide. The traditional definition of rape was disregarded by the Court and Tribunal called it as “*a physical invasion of sexual nature*”. Since then, rape under International Criminal Jurisprudence was considered as crime against humanity irrespective of the gender.¹² Why this definition was considered as a glaring and classic example of astonishing deviation from traditional definition is the fact that this case recognized oral sex, anal sex, insertion of other substances into vagina giving vast scope to the definition of rape. In Prosecutor v. Furundizija¹³ which considered rape as grave contravention of Article III of Geneva Convention a new definition of rape was construed giving a wider perspective as follows:-

“(i) *the sexual penetration, however slight:*

- (a) *of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or*
- (b) *of the mouth of the victim by the penis of the perpetrator;*

(ii) *by coercion or force or threat of force against the victim or a third person.”*

Gacumbisti¹⁴ finally reconciled both the cases as well as definitions which was finally utilized by International Criminal Court as follows:-

“*The perpetrator invaded the body of a person by conduct resulting in penetration, how body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”*

Same was reviewed in Prosecutor v. Sesay,¹⁵ as follows:

“*The Accused invaded the body of a person by conduct resulting in penetration, h of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a pe (iii) The Accused intended to effect the sexual penetration or acted in the rea occur; and (iv) The Accused knew or had reason to know that the victim did not consent”*

¹⁰ Special Rapporteur of the Commission on Human Rights, Rep. on the Situation of Human Rights in Rwanda, Comm’n on Human Rights, ¶¶ 16–17, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996) (by René Degni-Ségui).

¹¹ ICTR-96-4-T.

¹² 16 See id. ¶ 598; Joshua Dressler, Understanding Criminal Law § 33.01[A]–[B], at 567 n.2, 568 (6th ed. 2012); 2 Wayne R. LaFare, Substantive Criminal Law § 17.2, at 605, 610 (2d ed. 2003). 17 See Dressler, sup.

¹³ IT-95-17/1-A.

¹⁴ Gacumbisti Case ICTR-2001-64-A.

¹⁵ SCSL-04-15-T.

This evolved Doctrine of Consent and recognition of Oral Sex, Anal Sex and all kind of penetrations forming the exclusive ingredients of constituting a rape which was later devised into a gender neutral approach therefore, leading to the recognition of the concept of heteronormativity with great acceptance.

Corrective Rape

Though historically facts are silent, still due to high prevalence, it is believed that the technique or crime of Corrective rape finds its origin from South Africa and led to the origin of term transformative constitutionalism in the country. It is something misled as a technique as prescribed even by the doctors to correct the sexual orientation of lesbians considering said orientation to be defective or at default. The said rape is performed consistently by the family members or others unless the said orientation is corrected and that is why the term coined as Corrective Rape. Apart from South Africa, its prevalence can be derived from countries namely- India, Jamaica, Kenya, Krygstan, Netherlands, Nigeria, Peru, Thailand, Uganda, Ukraine, United Kingdom, United States and Zimbabwe. The brutality of said rapes is more heinous than any other category of rapes as it is perpetrated as well as motivated by self- family members leaving no scope of escape and hence, it is a stigma on post-apartheid society.

Marital Rape

Guided by history, Marital Rape or Spousal Rape originated from 18th century whereby man who has always been looking at a woman as his property termed marital rape as a tort or theft or misappropriation of property during the reign of common law of England followed in the entire world. Hence, Marital Rape was never recognized as a crime earlier as it was construed that a husband can never rape his wife due to the fact of wife being his own property. It was in late 80s when the entire scenario was changed by the first case in United States of America namely *Keerchberg v. Feenstra*¹⁶ whereby “*the United States Supreme Court held marital rape and giving wife as property to husband to be unconstitutional.*”

By 90's US Courts under various jurisdictions started criminalizing marital rape and treating it as an offence.

Similarly in British India, right to sex was seen as a conjugal as well as common law right of a husband with his own wife. This rule also provided a husband with right to divorce his own wife on her denial to sex. The picture started changing with the evolvement of modern era. In India, Marital rape though ethically recognized has not been recognized as per drafted Section 375 of IPC and hence, the picture continues to be still in the light of marital rape being unrecognized.

Heteronormativity as the dimension to the pre idealized view of society pertaining to sexual behavior and orientation

Heteronormativity is something that has been romanticized by the media and hyped as a social stigma due to pre idealized view of society for looking at it as a false norm and suppressive queerness. One can trace the beautiful expression of empathetically connecting with the same from the phrase:-

¹⁶ 450 U.S. 455 (1981).

“When Taylor, one of my interview participants, first came out to her mother as bisexual, Taylor’s mother reacted negatively and proceeded to denigrate her daughter’s identity. Upset and screaming at Taylor, she questioned her daughter’s identity, telling her that bisexuality did not exist. Taylor, confused, hurt, and crying, began to hate herself and became depressed—wishing that she was not bisexual. In the below quote, this is what Taylor had to say about her coming out experience with her mother: When I came out to my mom she didn’t get it at all...[S]he said, “Why are you doing this to me? What’s wrong with you?” And then I was crying and freaking out and wishing that I wasn’t... [S]he tried to tell me that I’m either gay or straight. She told me bi didn’t make sense, and I just felt like she was ashamed of me. I still kinda do actually. Even now. Because she still doesn’t get it... She was just yelling at me, “You’re either this or you’re either this. You can’t be bi. That doesn’t even make sense. Bi isn’t a thing. It’s not real. You just don’t know what you want, Taylor.” She sounded pissed. And she’s like, “Why are you doing this to me? Why are you doing this to our family?” I Having established that Taylor’s bisexuality meant there was something wrong with Taylor, Taylor’s mother questioned why Taylor was coming out as bisexual. After Taylor came out to her mother, their relationship was strained. Her mother, ashamed of her daughter, did not want to hear anything about her bisexuality, nor be involved in any way with that part of her life. Taylor’s negative experience coming out to her mother as bisexual is not an uncommon one. In a society where heteronormative gender and sexuality is romanticized to such a degree that we feel we cannot be happy without it, non-heteronormative gender and sexuality comes to be seen as an unfortunate and indecent way of being”¹⁷

There are six main domains of sexual orientation out of which three major ones are attraction, behavior and fantasy. Ideally, society lives in a world where there is a pre decided mindset that a man can primarily only be attracted to and fantasize about woman and vice versa. Therefore this stage is in equilibrium in the mindset of a man and cannot lead to dynamism or change.

Predomination of Heteronormativity leading to the origin of Corrective Rape as a punishing and technical mechanism of correction

Unacceptance is followed by hatred that the society has for this unusual orientation in its so called language which leads to similar sexes raping each other and still getting unrecognized in terms of crime or outside the purview of legal definition of a criminal act. Same evolves at a later stage into once own perception of being ethically, morally, scientifically and socially right y devising their own way of punishment in the form of bully, harassment or rape of people with lesbian orientation as part of their betterment and correction. This rape has also been termed as anti-lesbian hatred treatment. This mechanism can also be seen as a typical example of patriarchal society modifying itself into new rules and regulations for the creation of oppression and masculinity on women.

Patriarchal society leading to the establishment of superiority over women by treating them as property and chattels

The approach of our society till today has been patriarchal where a man has always been given exclusive rights over a woman to establish his ownership, superiority and dominance. Why marital rape remains decriminalized in India lies in the crux of approach of the society in terms of women to

¹⁷ Reference to be made to Thurmond, Catherine Lynn, "The False Idealization of Heteronormativity and the Repression of Queerness" (2015). LSU Master's Theses. 2885. https://digitalcommons.lsu.edu/gradschool_theses/2885.

be submissive and act in accordance with the wills as well as wishes of her husband after marriage. This patriarchal approach is carried as a customary practice and Marriage from both point of views whether being a contract or a traditional customary practice binds a woman to oblige to his man. From the discriminatory approach to the subordinate of a patriarchal society, women have been considered similar to a property or chattel transferred to her owner who is none other than a husband with all exclusive rights of using and exploiting her the way he wants.

Interconnection between the three rapes

While discrimination is the major ingredient shared in common by Heteronormative Rape and Marital Rape, Patriarchy is what Marital Rape and Corrective Rape share in common. Heteronormative Unacceptance is something that laid to the foundations of Corrective Rape. Therefore the common ingredients and features that gave a set forward to these three fold new evolving and emerging dimensions of rape are:-

1. Discrimination
2. Unacceptance
3. Hatred for a particular sexual orientation
4. Patriarchal approach as well as dominance

Trends all over world

Heteronormativity

USA

Since the notion of marriage always assumes it to have a pre-requisite of a man and a woman, so comes to the notion of sexual relationships as well as physical attraction. In accordance with the Defence of Marriage Act (DOMA) 1996 same sex married couples were not recognized in U.S.A. This act was finally struck down after a movement that took place in entire U.S.A. from 1970's till 2013 whereby finally in it's landmark judgement *United States v. Windsor*¹⁸, notion of institutionalized heteronormativity was ended and DOMA was struck down in the light of it being violative of 5th Constitutional Amendment of U.S. Constitution. While this reform permitted and accepted marriage among same sexes to be valid, it was made a fundamental right in 2015 in *Obergefell v. Hodges*.¹⁹ Finally the notion of same sex sexual relationships as well as marriage was considered to be fundamental right as well as civil rights and human rights.

With the evolution of studies on patterns of attraction of same sexes, U.S. departments started finding out and highlighting that apart from sex, rape is also a gender neutral formula. In 2008, a survey was conducted interviewing 90 U.S. men and finally it was concluded that more than 48 % of U.S. men are victims of rape with women being the prey.²⁰ Similarly during Syrian wars, it was recognized that same sex rapes are becoming common whereby at least women rapes go recognized while male rapes are not recognized at all. In 2010 U.S. Centres for Disease and Control Prevention highlighted vulnerability of women to be raped by women, man to be raped by women, men to be raped by man and women to be raped by men. Henceforth in 2012, definition of rape was completely changed in U.S. and F.B.I.'s Uniform Report on Crime in 2012 redefined rape as:

¹⁸ 570 U.S. 744 (2013).

¹⁹ 576 U.S. 644 (2015).

²⁰ Weiss, K. G. (2008). "Male Sexual Victimization: Examining Men's Experiences of Rape and Sexual Assault". *Men and Masculinities*. 12 (3): 275–298. doi:10.1177/1097184X08322632. ISSN 1097-184X. S2CID 145351339.

"The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." The prior definition had not changed since 1927 and gained the attention of sexual assault awareness groups because it had alienated the victims who did not fit the definition – "the carnal knowledge of a female, forcibly and against her will"

Henceforth, this new definition in itself opened the doors for male victims to seek help in case of rape victimization.

United Kingdom

United Kingdom is the nation where male rape was recognized since beginning but, initially it was not recognized as crime. It was merely called as a no-consensual buggery (equivalent to unnatural sexual intercourse). This means that forceful sexual intercourse whether oral or anal with an animal and a man were considered to be in similar parlance. Later when even buggery was considered as an offence, main line of discrimination was that rape of women invoked life imprisonment or death penalty while buggery invoked only 10 years of imprisonment comparatively. The first major blow of amendment came with the introduction of Criminal Justice and Public Order Act, 1994 which penalized and recognized a male rape though by a man only.²¹ Finally the major development came with Sexual Offences Act, 2003 which included both oral and anal sex if forceful within the purview of definition of rape.²² However, even today in United Kingdom, a woman cannot be charged for a rape whether in parlance of a man or a woman. She can only be charged with sexual assault.

Indonesia

In accordance with "Kitaab Undang Undang Hukum Pidana- Indonesian Penal Code"

Pasal 285 (Paragraph 285)

*"Barang siapa dengan kekerasan atau ancaman kekerasan memaksa seorang wanita bersetubuh dengan dia di luar perkawinan, diancam karena melakukan perkosaan dengan pidana penjara paling lama dua belas tahun."*²³

Which means " Anyone who by force or threats of violence coerce a woman had intercourse with her inside or outside of marriage are said to have committed rape and are liable for punishment upto 12 years."

Despite of Komisi Perlindungan Anak Indonesia –KPAI- Indonesian Child Protection Commission report reportedly emphasizing on women raping men, child victims and women, it has been taken as a joke in Indonesia.

China

Chinese criminal law is governed by Criminal Law of People's Republic of China wherein before 2015, only female rape was recognized within the definition as enshrined under Article 236²⁴ of the

²¹ Reference to be made to Section 142.

²² *R v Ismail* [2005] All ER 216.

²³ Reference to be made to Kitaab Undang Undang Hukum Pidana.

said act. Even in case of child sexual abuse, sexual abuse of male child was unrecognized. An amendment to Article 237 of Criminal Law of China was made which though included male sexual assault and violence within its grievance and purview, still male rape is unrecognized in china. On a similar pattern, even a female can assault female but, rape of a female by a female is still unrecognized.

Singapore

Just like India, Section 375 of Singapore Penal Code defines rape as follows:-

“(1) Any man who penetrates the vagina of a woman with his penis — (a) without her consent; or (b) with or without her consent, when she is under 14 years of age, shall be guilty of an offence. [51/2007] (2) Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning. [51/2007] (3) Whoever — (a) in order to commit or to facilitate the commission of an offence under subsection (1) — (i) voluntarily causes hurt to the woman or to any other person; or (ii) puts her in fear of death or hurt to herself or any other person; or (b) commits an offence under subsection (1) with a woman under 14 years of age without her consent, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes. [51/2007] (4) No man shall be guilty of an offence under subsection (1) against his wife, who is not under 13 years of age, except where at the time of the offence — (a) his wife was living apart from him — (i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute; (ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute; (iii) under a judgment or decree of judicial separation; or (iv) under a written separation agreement; (b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded; (c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife; (d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women’s Charter (Cap. 353) made against him for the benefit of his wife; or (e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded. [51/2007] (5) Notwithstanding subsection (4), no man shall be guilty of an offence under subsection (1)(b) for an act of penetration against his wife with her consent.”

Similarly Section 376²⁵ also includes only women as victims of men for sexual assault.

²⁴ Whoever rapes a woman by violence, coercion or any other means shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years. Whoever has sexual intercourse with a girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment. Whoever rapes a woman or has sexual intercourse with a girl under the age of 14 shall, in any of the following circumstances, be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death: (1) the circumstances being flagrant; (2) raping a number of women or girls under the age of 14; (3) raping a woman before the public in a public place; (4) raping a woman with one or more persons in succession; or (5) causing serious injury or death to the victim or any other serious consequences.

²⁵ Sexual assault by penetration 376. —(1) Any man (A) who — (a) penetrates, with A’s penis, the anus or mouth of another person (B); or (b) causes another man (B) to penetrate, with B’s penis, the anus or mouth of A, shall be guilty of an offence if B did not consent to the penetration. [51/2007] (2) Any person (A) who — (a) sexually penetrates, with a part of A’s body (other than A’s penis) or anything else, the vagina or anus, as the case may be, of another person (B); (b) causes a man (B) to penetrate, with B’s penis, the vagina, anus or mouth, as the case may be, of another person (C); or (c) causes another person (B), to sexually penetrate, with a part of B’s body (other than B’s penis) or anything else, the vagina or anus, as the case may be, of any person including A or B, shall be guilty of an offence if B did not consent to the penetration. [51/2007] (3) Subject to subsection (4), a person who is guilty of an offence under this section shall be punished with imprisonment for a term

South Africa

In South Africa though non-normative sexual as well as gender minorities have received great attention of media as well as research centers, Study is clear that it is merely because of their prevalence and vulnerability towards all kind of sexual crimes to be more than any other nation. Undoubtedly be it a male or a female or a transgender, sexual violence in South Africa has been rated to be the topmost in the world.²⁶ This includes all kind of rapes and violences whether prison rapes, violence and rape against men, violence or rape against women, violence or rape against infants and children or be it corrective rape.

In the light of above mentioned scenario, In 2007, Parliament of South Aafrica enacted an act namely Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 wherein the common law statutory definition of rape was given a wider connotation in Section 3.²⁷

India

In India, the definition of rape is outdated and governed as per Section 375²⁸ of Indian Penal Code, 1860 where the code was drafted long back by Lord Maculay.

This definition does not contain the approach of international law neither is free from the tinct of being gender biased. This definition also sees penetration and recognized anal sex as well as forceful sex by a man to woman.

On a similar note, Section 377²⁹ was drafted whereby consensual sex between same sexes was termed as ununnatural offence.

which may extend to 20 years, and shall also be liable to fine or to caning. [51/2007] (4) Whoever — (a) in order to commit or to facilitate the commission of an offence under subsection (1) or (2) — (i) voluntarily causes hurt to any person; or (ii) puts any person in fear of death or hurt to himself or any other person; or (b) commits an offence under subsection (1) or (2) against a person (B) who is under 14 years of age, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

²⁶ Reference to be made to United Nations Office on Crimes and Drugs Report of 1999-2000.

²⁷ sexual penetration" is defined as:

any act which causes penetration to any extent whatsoever by—

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person[.].

²⁸ Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First) — Against her will.

(Secondly) —Without her consent.

(Thirdly) — 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.

(Fourthly) —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.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] STATE AMENDMENT.

²⁹ Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to

In India the gender orientation and prevailing myths had a long fight to get recognition pertaining to their existence and LGBTQ community had a long way for that. Though there were many initiatives as well as movements in India which fought for the recognition of these groups as well as acceptance of their needs whether being social or physical, the major stroke was with the first case vis a vis **Naz Foundation v. Govt. of NCT Delhi**³⁰ in 2009 whereby a division bench of Hon'ble High Court had struck down Section 377 after taking the *locus standi* into the matter. Naz Foundation NGO after 8 years of fight through their P.I.L. succeeded for the grant of justice to LGBTQ community.

But, the journey and struggle did not end here. Due to the deeply rooted gender prevailing preference in India, mass opposition lead to an activist Suresh Kumar Koushal to appeal against the said decision of Hon'ble High Court before the apex court in Suresh Kumar Koushal v. Naz Foundation in which the division bench of apex court again criminalized the said Section. Once again the discriminatory class of society won and the sexual orientation of third genders was disregarded. Finally, a five judge bench of Hon'ble Apex Court in Navtej Singh Johar v. Union of India³¹ decriminalized Section 377 of IPC . Justice Indu Malhotra beautifully referred in the said judgement that : “*Nation holds an apology for long term struggle of the community*”.

Though Section 377 has been decriminalized but, still being a third gender is a matter of joke as well as social stigma even today in our nation. There is neither a separate legislation to give recognition to the relationship or marital status of this community and hence, nor definition of rape has been amended taking cognizance of male rapes or rape by same sex. While the gender neutral rape laws is what we have as the need of hour, the new impetus is that “*mee too can even include a man*” has to be seen and realized.

Kenya

In Kenya, for the first time a demand for decriminalization of homosexuality as per the penal laws of Kenya was made in 2019 before the Hon'ble High Court of Kenya by Kenyan National Gays and Lesbians Commission (NGHLRC) whereby the motion is still pending. In accordance with the said campaign and petition, the criminalization of homosexuality in Kenya is violative of their 2010 Constitution which recognizes the aspirations of all Kenyans on the basis of equality, human rights, social justice, rule of law, freedom and democracy as the essentials of fundamental values.

Corrective Rape

South Africa

South Africa is the leading nation with world rape statistics where women a most vulnerable towards sexual violence and black lesbians can be traced to be on highest vulnerability towards corrective rape for the reformation of their wrong sexual orientation. The reason of corrective rape can definitely be traced from the mindset theory concluded significantly from the trend of world as well as their approach towards heteronormativity. The rape history in South Africa can also be correlated with brutal history of Apartheid as well as the atrocious mechanics that was used to control the black coloured population.

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.

³⁰ 160 Delhi Law Time 277.

³¹ (2016) 7 SCC 485.

Corrective rape is a hate crime whereby as previously specified that to correct the orientation of a lesbian, they are raped by men, be it their own family members in the name of a curative action. Paradoxically in 2000, more than 40 lesbians were reported to be the victims of corrective rape and murder.

Kenya

In Kenya, even the authorities have recorded hostilities as well as stigma of corrective rape. Due to their prevailing myths, false beliefs, sexual violence in Kenya is at par. Media has always emphasized on the need of change in the laws for alleviation of problem but, in vain.

India

In India, origin of Corrective rape can be traced majorly in South India and few parts of Bengal. In Delhi, the Thomson Reuters Foundation took the cognizance as well as research over lesbian rape survivors. Times of India reported more than 15 instances of corrective rape being used by Indian Parents to cure their children and correct their sexual orientation. The said tactics in India is not only used upon females but, on males as well. The most traumatizing part is that the act is performed by well known trust worthy relative, near one of own family member.

Jamaica

Kemone S.G. Brown has beautifully elaborated in his book “*When rape becomes acceptable- Corrective Rape in Jamaica*” which deals with the scars pains and struggles of more than 10 stories of women in Jamaica who have been victims of Corrective Rape. While few of them died, few evolved and stuggled into success stories and few kept on hiding from the society with their scars.

Quality of Citizenship Group (QCG) in Jamaica pointed out that more than 47 percent of women in Jamaica have faced threat of sexual assault, harassment and rape due to their lesbian sexual orientation to straighten them out. While the said study also brought on record that out of the case 77 percent of them went unreported.

Marital Rape

Zimbabwe

Zimbabwe is one of the examples where marital rape was explicitly criminalized in 2004 with the advent of Criminal Law (Modification and Reform Act) 2004 Section 68.³² In a report by International Court of Justice it was stated that:

‘Zimbabwe’s Domestic Violence Act refers to the establishment of sexual violence counsellors and safe houses for victims of sexual violence, but these are not provided for. There are also failures to provide adequate training for those administering domestic violence cases. Without adequate training the legislation is used as a middle path between criminal remedies and civil solutions, which creates

³² Unavailable defences to rape, aggravated indecent assault and indecent assault It shall not be a defence to a charge of rape, aggravated indecent assault or indecent assault (a) that the female person was the spouse of the accused person at the time of any sexual intercourse or other act that forms the subject of the charge: Provided that no prosecution shall be instituted against any husband for raping or indecently assaulting his wife in contravention of section sixty-six or sixty-seven unless the Attorney-General has authorised such a prosecution; or (b) subject to sections six, seven and sixty-three, that the accused person was a male person below the age of fourteen years at the time of the sexual intercourse or other act that forms the subject of the charge

uncertainty and impacts negatively on justice delivery. With a claim of marital rape, many police officers encourage complainants to seek a protection order rather than a criminal trial. Whether this is because they lack the willingness or resources to actively investigate claims, the result is that too many civil cases overburden magistrates. When there are conflicting issues around allocation of State resources, gender issues consistently lose out. NGOs need to consider how to better advocate for the resources needed to support the effective implementation of gender specific legislation.’³³ Still even after the said legislation it has been observed that spousal rape still receives less attention in the country.³⁴

United States of America

Marital rape in U.S.A is also denoted as spousal rape or non-consensual sex with your own spouse. Since 1993, a revolution in U.S.A. was being evolved for the criminalization of a man raping his own wife. Though the state legislation may vary, but, marital rape is a crime as well as punishable offence in all 50 states of U.S.A.

United Kingdom

In the Common law of U.K. marital rape was not earlier an offence as various rulings like *Popkin v. Popkin*³⁵ enunciated that marriage means wife gave her body as well as bodily rights to her husband. In the first edition of Archbold, Pleading and Evidence in Criminal Cases³⁶ it has been stated that “*a husband cannot be guilty of raping his wife*”.

First time in *Reg v. Clarence*³⁷, it was remarked by J. Hale that: “*If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority.*”

Finally in *Regina Respondent v. R. Appellant*³⁸ marital rape was finally granted criminal status.

Venezuela

Venezuela explicitly penalizes marital rape with its law “*LEY ORGANICA SOBRE EL DERECHO DE LAS MUJERES A UNA VIDA LIBRE DE VIOLENCIA*” i.e. “*ORGANIC LAW ON THE RIGHTS OF WOMEN TO A LIFE FREE OF VIOLENCE*”, Artículo 15 (7) states that: “*Acceso carnal violento: Es una forma de violencia sexual, en la cual el hombre mediante violencias o amenazas, constriñe a la cónyuge, concubina, persona con quien hace vida marital o mantenga unión estable de hecho o no, a un acto carnal por vía vaginal, anal u oral, o introduzca objetos sea cual fuere su clase, por alguna de estas vías.*”

³³ International Commission of Jurists, ‘Sexual and Gender Based Violence, Fair Trial Rights and the Rights of Victims Challenges in Using Law and Justice Systems Faced by Women Human Rights Defenders’, pages 19-20, November 2015, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&docid=57ee7f724&skip=0&coi=ZWE&querysi=women&searchin=title&sort=date..>

³⁴ “2017 Country Reports on Human Rights Practices”. U.S. Department of State. Bureau Of Democracy, Human Rights, And Labor. 20 April 2018.

³⁵ (1794) 1 Hag Ecc. 765n.,

³⁶ (1822), at p. 259.,

³⁷ (1888) 22 Q.B.D. 23.

³⁸ 1 AC 599.

This Article defines carnal forceful sex by a man with his spouse.

Similarly, **Artículo 43** states that :-

“Quien mediante el empleo de violencias o amenazas constriña a una mujer a acceder a un contacto sexual no deseado que comprenda penetración por vía vaginal, anal u oral, aun mediante la introducción de objetos de cualquier clase por alguna de estas vías, será sancionado con prisión de diez a quince años. Si el autor del delito es el cónyuge, concubino, ex conyuge, ex concubino, persona con quien la víctima mantiene o mantuvo relación de afectividad, aun sin convivencia, la pena se incrementará de un cuarto a un tercio. El mismo incremento de pena se aplicará en los supuestos que el autor sea el ascendiente, descendiente, pariente colateral, consanguíneo o afín de la víctima. Si el hecho se ejecuta en perjuicio de una niña o adolescente, la pena será de quince a veinte años de prisión. Si la víctima resultare ser una niña o adolescente, hija de la mujer con quien el autor mantiene una relación en condición de cónyuge, concubino, ex cónyuge, ex concubino, persona con quien mantiene o mantuvo relación de afectividad, aún sin convivencia, la pena se incrementará de un cuarto a un tercio.”

“Who through the use of violence or threats constrains a woman to access unwanted sexual contact that includes penetration by vaginal, anal or oral route, even by introducing objects of any kind by any of these routes, he will be punished with a prison of term of 10 to 15 years. If the perpetrator of the crime is the spouse, common-law partner, ex spouse or ex partner with whom victim maintains or maintained an affective relationship without coexistence, the penalty will increase from a quarter to a third. The same penalty increase will be applied in the cases where the author is the ascendant, descendant, collateral relative, blood or related of the victim. If the act is carried out to the detriment of a girl or adolescent, the penalty will be 15-20 years in prison.

Australia

In Australia as well, marital rape has been explicitly criminalized.³⁹

Therefore, the summarized data of marital rape as well as it’s status can be divided into following parts :-

1. Marital Rape explicitly criminalized by law
2. Marital Rape criminalized (either by law or judgement or any source of law)
3. Marital rape not criminalized
4. Marital Rape explicitly excluded from the purview of law.

LIST OF COUNTRIES

MARITAL RAPE EXPLICITLY CRIMINALIZED	MARITAL RAPE CRIMINALIZED	MARITAL RAPE NOT CRIMINALIZED	MARITAL RAPE EXPLICITLY EXCLUDED
1. Albania,	1 Andorra	1 Afghanistan	1 India
2. Angola,	2. Armenia	2 Algeria	2 Antigua and Barboda
3. Argentina,	3. Austria	3 Bangladesh	3 The Bahamas
4. Australia,	4 Azerbaijan	4 Cameroon	
5. Barbados,			

³⁹ "2017 Country Reports on Human Rights Practices". U.S. Department of State. Bureau Of Democracy, Human Rights, And Labor. 20 April 2018.^{id}

6. Belize,	5 Belarus	5 Botswana	4 Bahrain
7. Benin,	6 Belgium	6 Chad	5 Brunei
8. Bhutan,	7 Bosnia and	7 China	6 Equatorial Guinea
9. Bolivia,	Herzegovina	8 Democratic	7 Eritrea
10. Brazil	8 Bulgaria	Republic of Congo	8 Eswatini
11. Burkina Faso,	9 Cambodia	9 Republic of Congo	9 Ethiopia
12. Burundi,	10 Czech Republic	10 Djibouti	10 Iran
13. Canada,	11 Denmark	11 Egypt	11 Iraq
14. Cape Verde,	12 Fiji	12 El Salvador	12 Jamaica
15. Chile,	13 Finland	13 Guinea	13 Jordan
16. Colombia,	14 Gambia	14 Haiti	14 Maldives
17. Comoros,	15 Germany	15 Indonesia	15 Myanmar
18. Costa Rica,	16 Ghana	16 Kuwait	16 Nigeria
19. Croatia,	17 Ireland	17 Libya	17 Oman
20. Cuba,	18 Israel	18 Madagascar	18 Palestine
21. Cyprus,	19 Ivory Coast	19 Malawi	19 Saint Lucia
22. Dominica,	20 Japan	20 Morocco	20 South Sudan
23. Dominican Republic,	21 Kazakhstan	21 North Korea	21 Sri Lanka
24. East Timor	22 Kiribati	22 Pakistan	
25. Ecuador	23 Kosovo	23 Tajikistan	
26. Estonia	24 Kyrgyzstan	24 Saudi Arabia	
27. France	25 Lebanon	25 Tuvalu	
28. Gabon	26 Liberia	26 Uganda	
29. Georgia	27 Lithuania	27 United Arab	
30. Greece	28 Macedonia	Emirates	
31 Grenada	29 Malaysia	28 Yemen	
32 Guatemala	30 Mali		
33 Guyana	31 Marshall Islands		
34 Guinea Bissau	32 Mauritania		
35 Honduras	33 Montenegro		
36 Hong Kong	34 Micronesia		
37 Hungary	35 Netherlands		
38 Iceland	36 Niger		
39 Italy	37 Norway		
40 Kenya	38 Palau		
41 Laos	39 Papua New Guinea		
42 Latvia	40 Paraguay		
43 Lesotho	41 Poland		
44 Lichtenstein	42 Qatar		
45 Luxembourg	43 Russia		
46 Malta	44 Saint Kitts and Nevis		
47 Mauritius	45 Saint Vincent and The		
48 Mexico	Grenadines		
49 Monaco	46 Senegal		
50 Moldova	47 Seychelles		
51 Mongolia			
52 Mozambique			

53 Namibia	48 Somalia		
54 Nauru	49 South Korea		
55 Nepal	50 Somail		
56 New Zealand	51 Switzerland		
57 Nicargua	52 Sudan		
58 Panama	53 Tonga		
59 Peru	54 Turkmenistan		
60 Phillipines	55 Ukraine		
61 Portugal	56 United States of America		
62. Romania	57 United Kingdom		
63. Rawanda	58 Uruguay		
64 Samoa	59 Vanuatu		
65 Saint Marino			
66 Sao Tome and Principe			
67 Serbia			
68 Sierra Leone			
69 Slovakia			
70 Slovenia			
71 Solomon Islands			
72 South Africa			
73 Suriname			
74 Sweden			
75 Taiwan			
76 Thailand			
77 Togo			
78 Trinidad and Tobago			
79 Tunisia			
80 Turkey			
81 Uzbekistan			
82 Venezuela			
83 Vietnam			
84 Zambia			
85 Zimbabwe			

Therefore, in accordance with the said analysis, all over the world there are 144 countries that have criminalized Marital Rape out of which 85 countries are the ones which have explicitly criminalized marital rape. 49 countries have not recognized marital rape as crime though out of which provision for marital rape is present in their customary law, it is a matter of great regret that India is out of those 21 countries which have explicitly excluded marital rape from the purview of crime in it's penal laws.

INDIA NEEDS TO BORROW CRIMINAL LAWS JUST MAKING THE PENAL LAWS AS CONSOLIDATED AS THE INDIAN CONSTITUTION

Indian Constitution is the bible or geeta of law which runs as the longest constitution all over the world governing one of the largest populated nation. On the similar pattern it's high time when the loop holes as well as deficiencies in the definitions of Rape laws is to be critically examined and

analyzed. After due analyzation, one would find that why the definition of Section 375 still lags the developments that have been made by other nations of world by making it gender neutral as well as relationship neutral is the due fact that procedural deficiency in the implementation as well as execution in laws is what comes into confrontation when one goes to rely upon the system of law and justice.

Taking an insight into the Criminal Law Amendment Bill 2012 in India we can see it as an initiative as well as an idea for the implementation of rape laws as a gender neutral law along with consideration of fact that the definition needs to be reformed.

42nd Law Commission Report of India also proposed few reforms for adopting the modern view of rape laws though it disregarded the adoption of marital rape as crime. Undoubtedly the major reason behind this is the misuse of feminine laws as well as Legal Terrorism a term introduced for the first time by the Hon'ble Apex Court in *Sushil Kumar v. Union of India*⁴⁰ in which the Hon'ble Court was pleased to elucidate that:-

“ a New Legal Terrorism can be unleashed. This observation of Hon'ble Apex Court came in year 2005; now six more years have passed. The question is – does a provision of law have become synonymous of a very negative thought like terrorism? It is an arguable question and needs a close examination of prevailing socio-legal position. Law is always to protect its subjects and to ensure justice, which is its end. But if the situation arrives when a 'piece of legislation' becomes a 'symbol of terror' for the subjects, its horrible. Imagine the plight of unmarried girl, whose life and future prospects are ruined due to arrest and detention and frequent visits to courts, the sufferings of old aged persons, who went to jail, the pain of married sister, and other in-laws, falsely implicated, who never lived 33 Supra note 16 34 Kiran Singh, “Protection of ‘Innocent Victims’ Of Matrimonial “ Cri. LJ , Vol:116, September, p.243, (2012) 35 AIR 2005 SC 3100. Misuse of Legal Protection by Women Misuse of Legal Protection by Women 176 with the victim of 498 A and 304 B, of I.P.C. All these are terrorized in the hands of the law. Before we can term this scenario as New-Legal Terrorism, there has to be very strong and sound reason in support thereof. Terrorism has no face, no caste, no creed, no religion, no geographical limits, no defined objects, its lurking everywhere, be it temple, church, mosque, gurudwara sahib. Certainly, its war against humanity. What is terrorism? Terrorism is the philosophy that supports the acts of terror to cause extreme fear in the society, to destabilize the society, to end the peace and harmony of the society. The cases of false implications In dowry related matter has reached to such level that almost every married male persons and his relatives are fearful of it every time”

Henceforth, due to the prevailing misuse of laws, Judicial System does not suggest marital rape to be criminalized but, this clearly pin points to the lack of procedural implementations as well as stability in the execution of law as defined in the books which leads to abuse of process as well as law. This leads to injustice majorly to the true victims and the preys are getting even more confident in initiating criminal approach.

⁴⁰ AIR 2005 SC 3100.

PROPOSAL OF FRAMING A SEPARATE LEGISLATION WITH THE CHANGING SCENERIO AND DEVELOPMENTS IN RAPE LAWS

from the above said developments, there is a need of separate legislation for LGBTQ community to identify their needs and end the heteronormative approach discriminating among them so that they are completely governed by separate legislation as it prevails for women in terms of marriage, sexual relationships as well as rapes because just like women and children, this community also belongs to highly vulnerable as well as minority group.

- There is a need of separate legislation for rape laws whereby along with IPC it makes a step towards welcoming of completely new definition of rape making it gender neutral, recognizing male rapes as well as marital rapes.

CONCLUSION

This article is an attempt where the author concludes supporting it's stand of need of an amendment of vision in India towards the establishment of modernizing India in a positive manner approaching towards positive jurisprudence whereby abuse of law needs to be tackled with the consolidation of procedural aspect of laws making it's implementation redrafted so that India need not give it a though for introduction of new laws in terms of their consequence to be a grave misuse and injustice.

“A strong nation is recognized with the strength of it's law as well as legal system”.

Therefore, this article is an initiative for the introduction of reformation in the rape laws as well as criminal and societal mind sets.

CHILD TRAFFICKING AND SEXUAL VIOLENCE AGAINST CHILDREN: ISSUES & CHALLENGES

Kush Kalra & Prof. Pradeep Kulshrestha

Research scholar ,Professor

Sharda university

Email :- krrish.kush@gmail.com

Mob No. :- +919711128466

ABSTRACT:-

Sexual abuse against children is one of the most heinous offences. It is an appalling violation of their trust and an ugly breach of our commitment to protect the innocent. Although there is no exclusive national data on child trafficking for sexual exploitation, it is an open secret that children are particularly vulnerable to trafficking for sexual exploitation both within and beyond the borders of the country. The process of child trafficking for sexual purposes is a vicious cycle. Due to their tender age, children are inherently vulnerable to exploitation by miscreants. Once trafficked, these children usually end up in the bottom rungs of society and live in perpetual poverty until they are rescued and integrated with the society. The Protection of Children from Sexual Offences Act, 2012 (Act) has been enacted specifically to protect innocent child victims from any kind of sexual abuse. The Act is a comprehensive legislation on the subject. It gives a detailed framework of the procedure for investigation, medical examination and for recording of evidence. It has considerably widened the definition of sexual abuse and gave a gender neutral definition of a child. The Act has been amended by Protection of Children from Sexual Offences (Amendment) Act, 2019. The amendment stringently penalizes the offences against children even upto death penalty. The Act has although been very finely drafted keeping in mind the minutest details, but the problem lies with its implementation. A strict watch by the government accompanied by awareness campaigns for the ignorant people is all that is the need of time.

One of the biggest drawbacks of the POCSO Act is fixing the age of the child at 18 under Section 2(d); leaving no scope of any flexibility. The age should be ascertained by examining the mental capacity of the child. There might be cases of persons suffering from cerebral- palsy wherein a person aged 35 might have the brain of a child of 8 years. Then the only resort left is Section 375, IPC. This issue needs to be addressed.

KEYWORDS: child, abuse, health, trial suffer etc.

INTRODUCTION:

The future of a nation depends on its young generation.. The prosperity of a nation depends on the growth and development of the children of the nation. Still a large number of children are living under

very poor conditions, lacks even the basic necessities, which makes them vulnerable to various kinds of wrongs. Children are subjected to various crimes including trafficking, sexual abuse, child labour, begging etc. In 2018, 1,32,899 crimes were committed against children in India¹. Children are more vulnerable to all these kinds of wrongs mainly due to lack of proper care, attention and resources.

One of the most heinous of crimes not only against the children but the society collectively is that of sexual abuse. Children who are sexually abused develop many long-term problems such as depression, chronic anxiety, sexual problems, feeling of worthlessness, phobias etc.² There have been many cases of suicides subsequent to sexual abuse.³ Considering the heinous nature of this offence, the courts in India, time and again, urged the governments to enact a special law for protection of children against sexual offences. In the absence of such a law, the court themselves delved into judicial activism and laid down rules, guidelines and procedures for protection of children during investigation and trial for sexual offences involving children. Indian judiciary has adopted various types of approaches for the protection of children i.e. beneficiary, welfare, progressive, harmonious, sensitive as well as constructive approach. In the light, the judiciary has evolved and considered Public Interest Litigation, Judicial Activism, and Judicial Creativity, etc. In *Lakshmi Kant Pandey v. Union of India*⁴ the Supreme Court has delivered significant judgment on the welfare of children. The welfare of the entire community depends on the health and welfare of its children. Our constitutional schemes are announced feeling of the Constitution-Makers who want to protect and safeguard the interests and welfare of children in the country. In *Bandhua Mukti Morcha v. Union of India*⁵ the Apex Court has considered fundamental rights under Article 21 & 23 read with article 39 (e) & (f), Article 41, and 42 with the protection of children's rights. It is securing the release of forced labour as well as free from exploitation. Those provisions have enlightened the human respectability of a person including children. The court had adopted a beneficiary and progressive approach in this case. In the State of Rajasthan v. Om Prakash,⁶ the Higher Judiciary had conferred a special safeguard for the protection of children into article 39 and the court has adopted a sensitive approach when dealing with the rape case of the child. In *Vishal Jeet v. Union of India*⁷ case through the public interest litigation the Apex Court had expressed anguish on the pitiable condition of child prostitutes.

These efforts of the courts eventually led to the enactment of the Protection of Children against Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act'). Prior to this legislation, there was an absence of any special law for protection of children against sexual offences. The Protection of Children from Sexual Offences Act, 2012 provides for protection of children from the offences of sexual assault, sexual harassment and pornography keeping the interest and well being of the child intact at all stages of the case. It mandates the incorporation of child-friendly approach in justice delivery system. At the same time, to achieve these objectives there are provisions for the establishment of Special Courts for speedy trial. The legislation demands the police to be more

¹ Crime in India Statistics, 2018, Vol. I, National Crime Records Bureau, Available at- <https://ncrb.gov.in/en/crime-india-2018>.

² Hall, M., & Hall, J., "The long-term effects of childhood sexual abuse: Counselling implications", available at: http://counselingoutfitters.com/vistas/vistas11/Article_19.pdf (2011).

³ Lopez-Castroman, J., Melhem, N., Birmaher, B., Greenhill, L., Kolko, D., Stanley, B., Zelazny, J., Brodsky, B., Garcia-Nieto, R., Burke, A. K., Mann, J. J., Brent, D. A., & Oquendo, M. A., "Early childhood sexual abuse increases suicidal intent", *World psychiatry - Official Journal of the World Psychiatric Association (WPA)*, 12(2), 149-154. (2013).

⁴ AIR 1984 SC 469.

⁵ AIR 1984 SC 802.

⁶ (2002) 5 SCC 745.

⁷ AIR 1990 SC 292.

sensitive while handling the cases at all stages including reporting, recording of statement and investigation of the case.

Rape and other sexual crimes against children, are serious violations of international human rights law and may amount to grave breaches of international humanitarian law.⁸ Such acts of sexual violence may constitute a war crime, a crime against humanity. The Security Council, in its resolution⁹ added sexual violence against children as an additional trigger for listing parties to the conflict in the Secretary-General's Annual Report on Children and Armed Conflict.

Geneva Conventions and their Additional Protocols prohibited rape and other forms of sexual violence during armed conflict. Child-specific provisions of these IHL treaties expressly forbid sexual violence against children.¹⁰ Common Article 3 of the Geneva Convention implicitly prohibits rape or any other sexual violence, be it against children or adults.¹¹ Fourth Geneva Convention under Article 27 explicitly prohibits such acts of sexual violence stating that: "Women including girls shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."¹² The international tribunals for the former Yugoslavia and Rwanda, as well as the Inter-American Commission on Human Rights and the European Court of Human Rights, have recognised that rape amounts to torture and is absolutely prohibited.¹³

Moreover, a number of international treaties prohibit the sexual abuse and exploitation of adults and children. The Convention on the Rights of Child, 1989 and its Optional Protocol on Trafficking and Exploitation unequivocally affirm that children must enjoy protection from torture, cruel, inhuman or degrading treatment, including acts like rape and sexual violence against children.¹⁴

WHO IS A CHILD AS PER INDIAN LAW?

The age of a person is a significant factor in dealing with the law's rights and liabilities. A child offender cannot be treated as an adult under criminal law as special privileges have been granted to them by different statutes and by the Constitution of India. Therefore, a child's legal definition is

⁸ 'Rape and other forms of sexual violence is not specifically listed in article 147 of 4th Geneva Conventions casting some doubt in some scholars' minds as to its status as a "grave breach" of the Geneva Conventions. Nevertheless, most scholars, international and national courts that have decided on the matter conclude that it falls within the reasonable understanding of 'torture or inhuman treatment' or 'serious injury to body or health.'

⁹ UN Security Council, Security Council resolution 1882 (2009) [on children and armed conflict], 4 August 2009, S/RES/1882 (2009).

¹⁰ Article 27(2) Geneva IV; art. 75(2), 76(1), 77(1) Additional Protocol I; art. 4(2)(e) Additional Protocol II—which specifically adds "rape" to the list of forms of indecent assault. See also: Customary Rule 93 in: ICRC, *Supranote*. 18 at 323. Child-specific provisions: Art. 77 Additional Protocol I; art. 4(3) Additional Protocol II.

¹¹ Article 3 (1) (a) Common Article 3 of the Geneva Convention states as: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture are prohibited.

¹² Specific provisions in the Geneva Conventions relating to protection against rape and sexual abuse include: Common art. 3; art. 12, 50 Geneva I; art. 12, 51 Geneva II; art.13, 17, 87, 89 Geneva III; art.5, 27, 32, 147 Geneva IV; art. 75 Additional Protocol I; art. 4(1) Additional Protocol II; and Rules 87, 89-92 of: ICRC, Customary International Humanitarian Law, *Supra* note. 18 at 306.

¹³ The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 and Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, European Court of Human Rights, Aydin v. Turkey, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997), Raquel Martí de Mejía v. Perú, Case 10.970, Inter-American Commission on Human Rights (IACHR), 1 March 1996.

¹⁴ Art. 34, 35, 37 Convention on the Rights of Child, 1989, Art. 3, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000).

essential for Judiciary to deal with the child-related cases and provide them protection under the specific laws. The International Convention on Child Rights provides that a person below 18 is considered as a child. Still, the majority can be attained earlier, under the law applicable to the child.¹⁵ As most countries ratified this Convention, it can be considered a globally accepted definition of a "child". By scrutinizing the age under the Indian Laws, it has been observed that the legal definition of a child varies depending on the nature of the legislation and the rights and protection required for that particular age. Most of the legislations have considered the person below the age of eighteen years as a child; such as the Indian Majority Act, 1875, Sexual Offences Act, 2012, Domestic Violence Act, 2005 and The Juvenile Justice (Care and Protection of Children Act) 2015¹⁶ for their welfare and protection against sexual abuse and exploitation.

Regarding the Right to Education, Article 21A¹⁷ and Article 51A(k)¹⁸ of the Indian Constitution have recognized the child under the age group of six and fourteen. Under the Indian Penal Code 1860, the child's age has been classified into different groups depending upon the nature, liability, and the consequences of the offense. Such as a child below the age of seven cannot be held criminally responsible for his/ her action.¹⁹ In contrast, it can be raised to twelve years in mental disability.²⁰

The Child Labour (Protection and Regulation) Act, 1986 defines a child as "As a person who has not completed fourteen years of age."²¹ Whereas the Child Labour (Prohibition and Regulation) Amendment Act, 2016 has provided that any person below the age of fourteen years or of any age specified under the Right to Education Act, 2009, whichever is more, will be considered as a Child. A person under **the** age of 16 is regarded as a child in both the laws related to immoral trafficking²² and the Criminal Procedure Code 1973 to prohibit the age-old tradition of child marriage. For the development of a child under the child marriage prohibition law²³, the "child" means a person who has not completed twenty-one years of age (if male) and, if a female, has not completed eighteen years of age.

The POSCO Act defines a child as a person below eighteen years of age²⁴ and the term 'child' is gender neutral i.e. it does not differentiate between a male child and female child. It lays down different forms of sexual abuse including penetrative, non-penetrative, child pornography, sexual harassment etc. and provides for a more stringent quantum of punishments for each offence as compared to Indian Penal Code. It introduces a new offence 'aggravated sexual assault'²⁵ for sexual offences committed by persons who hold a position of trust over children like parents, siblings, teacher

¹⁵ Article 1 of the Convention of Right of the Child. *available at:* <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (visited on Sep 09, 2020).

¹⁶ The Juvenile Justice (Care and Protection of Children Act 2015) (Act No. 2 of 2016), S. 2(12).

"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

¹⁸ The Constitution of India, article 51A(k) "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."

¹⁹ Indian Penal Code, 1860 (Act No. 45 of 1860), S 82.

²⁰ *Id* at S. 83.

²¹ The Child Labour (Protection and Regulation) Act, 1986 (Act No. 61 of 1986), S. 2(ii).

²² Immoral Traffic (Prevention) Act, 1986 ((No. 104 of 1956), S. 2 (aa).

²³ The Prohibition of Child Marriage Act, 2006, S 2(a).

²⁴ *Ibid*, Section 2(d).

²⁵ *Ibid* Section 9.

etc. or against mentally ill children. The Act also penalizes child pornography²⁶ including storing or possessing child pornography and trafficking of children for sexual purposes²⁷, the latter being punishable as abetment under the Act. Further, the Act provides for establishment of Special Courts for trying offences committed under the Act. The Special Courts have been mandated by the Act to adopt child-friendly procedures at all stages of the case.

Hence, it has been observed that there is no uniformity in the statutes regarding the legal definition of a "child." Although legislation had specified different ages for a "child" depending upon the nature of the statutes but the maximum age limit of a child can be 18 only.

TRAFFICKING OF CHILDREN'S:

In 1994, the United Nations General Assembly defined the term 'trafficking' as

*"the illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption."*²⁸

Recognising the vulnerability of children and the need for special provisions to address the concerns of the children, the United Nations Convention on the Rights of the Child, 1989 (hereinafter 'CRC') was adopted.²⁹ Article 34 of the CRC states that "*States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity, (b) The exploitative use of children in prostitution or other unlawful sexual practices and (c) The exploitative use of children in pornographic performances and materials*".³⁰ The CRC also focuses on resettlement and rehabilitation of the victims of child trafficking along with psychological support and integration in the society. The CRC, along with the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000, prohibits all forms of child trafficking, including for CSE.³¹ In this connection, care should be taken not to confuse the trafficking and sale of children erroneously. While they may overlap, they do not necessarily mean the same. A child may be trafficked without being sold for trafficking merely implies the transfer of possession and does not necessarily involve the presence of a buyer or a seller in the entire process.³²

The leading cause of missing children is human trafficking, as children are the easy target for traffickers. Human trafficking is a group of a crime involving trafficking in person for sexual

²⁶ Ibid Chapter III.

²⁷ Ibid Section 16.

²⁸ Holly Cullen, *The Role of International Law in the Elimination of Child Labor* 39 (Martinus Nijhoff Publishers, Boston, October 15, 2007).

²⁹ UN General Assembly, *Convention on the Rights of the Child*, Treaty Series Vol. 1577(3), United Nations (1989).

³⁰ Convention on the Rights of the Child, 1989, Art. 34.

³¹ The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000.

³² Child Rights International Network, "Sale, Trafficking and Abduction" (CRIN London, 2020).

exploitation or financial gains.³³ Forced labour and sexual exploitation are the leading cause of trafficking. The Constitution of India has stipulated that child protection is the primary obligation of the Government under the Directive Principles of State Policy. Therefore, the State has to make necessary efforts to preserve childhood and child rights.

The living conditions of the trafficked victim are really poor and they have no access to health care³⁴. They are being provided with basic amenities and treated really badly by everyone³⁵. The treatment which is accorded to trafficked child is not humane and is even worse than that of a slave³⁶, there is restriction upon movement and they are not even allowed to take up education or pursue higher education as per her wishes³⁷.

The trafficking also happens for rearing of child specially male child and hence the cases of forced pregnancy and forced abortions are also there and the victim is merely used as a means for reproducing son for the family and she is forced to abort the child if it turns out to be a girl³⁸.

Apart from this there have been many children's homes or orphanages which are carrying illegal activities of trafficking and there is hardly any check on the activities of these unregistered institutions and also there are no regulations on activities of the middlemen who are involved in transporting children from the north east on false pretext of providing free education to them and later on selling the children³⁹.

The Government of India adopted a National Policy for Children in 1974. While enunciating the said policy the government stated that the nation's children are a supremely important asset and their nurture is our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose for reducing inequality and ensuring social justice. With a view to achieve various aims laid down in national policy for child welfare, it emphasized that the State will provide necessary legislative and administrative support. Facilities for training of personnel will be provided to meet the needs of expanding programmes for child welfare.

The Ministry of Women and Child Development has drafted a policy in the wake of Muzaffarpur Shelter Abuse case⁴⁰ for the protection of children which is also a part of broader National policy,

³³ Human Trafficking, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Chapter%206A-15.11.16_2015.pdf (Visited on Aug 30, 2020).

³⁴ Judicial Colloquium on Human Trafficking (July. 22, 2018, 10:00 AM) http://jajharkhand.in/wp/wp-content/uploads/2017/01/05_human_trafficking.pdf.

³⁵ Raped, then sold off as a bride in a distant land, <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/raped-then-sold-off-as-a-bride-in-a-distant-land/article5144031.ece>.

³⁶ Priyali Sur, Silent slaves: Stories of Human Trafficking in India (Aug 5, 2018, 08:00 PM) <http://www.womensmediacenter.com/women-under-siege/silent-slaves-stories-of-human-trafficking-in-india>.

³⁷ Deebashree Mohanty, Slave Brides, <http://www.dailypioneer.com/sunday-edition/sunday-pioneer/special/slave-brides.html>

³⁸ Singh Rana & Suman Rani, A Study of the Causes of Girls Dropouts in Haryana, Journal of Educational Science and Research, (JESR), ISSN (P): 2278-4950; ISSN(E): 2278-4969 Vol. 5, Issue 1, 13-20, (Feb. 2015).

³⁹ Child Trafficking in Indo-Myanmar Region- A Case study in Manipur, https://wcd.nic.in/sites/default/files/RESEARCH%20PROJECT%20REPORT_0.pdf.

⁴⁰ *The Hindu*, Published on September 18, 2018, available at: <https://www.thehindu.com/news/national/centre-drafts-child-protection-policy/article25776159.ece> (visited on 8.09.2020).

2013. In this case the SC directed to CBI for investigating 17 shelters home in Bihar for children, destitute women, senior citizen and beggars following the sexual abuse case of more than 30 girls in shelter home in Muzaffarpur and also asked the centre for framing a national policy for protection of such children's.

Poverty is the main reason due to which trafficking of children for sexual exploitation happens. Poverty is one of the main reasons for sale and purchase of children's.⁴¹

A victim can approach the police in one of the following ways:

1. The child can go directly to the police station for filing the complaint but it is rare incident as the child is of an impressionable age and cannot understand the nuances of the issue completely.
2. The victim can be taken to the police station by his/her family members, or guardian as the child might not be in a position to give his/her consent on the issue.
3. The police get to know about the incident of sexual abuse of a child through any means and the officials directly reach the victim's place.
4. When the Court takes cognizance of an incident of sexual abuse either on a suo-moto basis or after an application has been filed by the victim or his/her relatives.

After the report of the sexual abuse is filed in any of the ways mentioned above, it becomes the dual responsibility of the police officials and the family members (including guardian) to take the victim to the hospital for adequate care and treatment. But, if the victims (or their guardians) feel that they do intend to go ahead with any sort of legal recourses and are only interested in getting the treatment, nobody shall force the party to do something against their will. But, if the victims (or their guardians) directly proceed to the hospital for treatment without intimating the police personnel, then the doctors themselves are obligated to intimate the police officials about the Medico-legal case (MLC) they are tackling at that juncture. However, the government has talked about the essence of signing a consent form by the victim if he/she is above 12 years of age and the same form shall be signed by their guardian if they are less than 12 years of age. But, one important point to be noted is that the above stated consent form can be done away with in cases of life threatening situations when the life of the victim is in imminent danger.⁴²

The Courts in India have time and again reiterated the need and importance of protecting children against the evil elements of the society, keeping their innocence and ignorance intact. In addition to establishing and recognizing rights of children including right to education⁴³, right against child labour,⁴⁴ right to equality of opportunity, dignity, protection and rehabilitation⁴⁵, right against exploitation⁴⁶ etc., the courts have laid down guidelines for protection of children against offenders,

⁴¹ Deebashree Mohanty, Slave brides (July 28, 2017, 07:10 AM), <https://www.dailypioneer.com/2015/sunday-edition/slave-brides.html>.

⁴² B.M. Gandhi, *Indian Penal Code*, 125 (Eastern Book Company, 2015).

⁴³ *Society for Unaided Private Schools of Rajasthan v. Union of India* (2012) 6 SCC 1; The Constitution of India, Article 21-A.

⁴⁴ *M. C. Mehta v. State of Tamil Nadu* (1996) 6 SCC 756.

⁴⁵ *Gaurav Jain v. Union of India* (1999) 8 SCC 591.

⁴⁶ *People's Union for Democratic Rights v. Union of India* (1982) 3 SCC 235.

child prostitution, special procedure applicable to children during prosecution, juvenile justice system etc. The courts have thus been actively contributing to the development of justice system for children.

ONLINE SEXUAL ABUSE OF CHILDREN:

A lot of sexual abuse of children these days also happens online. India has been struggling with concerns of Child Pornography and banning such content. India has banned Child Pornography by the The Protection of Children from Sexual Offences (Amendment) Act, 2019, but the ban seems impossible with the number of proxy sites that provide access to such content easily. The uncontrolled nature of the digital world has made it very difficult to control the reach of any pornographic content with new proxy servers coming up every single day. These Proxy sites are easily available to be downloaded over the internet with a single search leading to uncontrolled and widespread distribution of illicit content. The difficulties in this area makes it really difficult to ban such content in the work-front of governments without undeniable help from the administrators of the web or the Intermediaries. Now, the ambiguity attached to the definition of the term pornography has been removed as it has been defined by the POSCO Act, 2019, and therefore making intermediaries liable for banning such content seems to be a possible option.

Section 67 B of the Information Technology Act, 2000 criminalizes:

“creating digital text, images, collecting, seeking, browsing, downloading, advertising, or distributing material in electronic form depicting children in obscene or indecent or sexually explicit manner”.

It also makes it an offence to record, in any electronic form own abuse or that of others pertaining to sexually explicit act with Children. Section 67 B also provides that it is also illegal to facilitate abusing children online. So, doesn't an Intermediary fall within this definition, doesn't it provide a platform to display content which could lead to such abuse. There needs to be some rethinking done with regard to controlling the usage of these Social Media platforms to make it more responsible in the new age India.

In India, there are also a number of legal provisions banning cyber-crimes against minors, such as if an individual has intercourse with a child, that individual can be charged with the offense of rape U / s 376 IPC, POCSO U / s 4 and other child pornography requirements Sexual 11 and 12 of POCSO Act deals with offences of child pornography.⁴⁷ Also showing along with distributing pornographic materials to children is an offence u/s 67 of IT Act.⁴⁸ In case of online child pornography, the POCSO Act has made all activities related to preparation, offering, production, transmitting, publishing, felicitation and distribution for the purpose of pornography to be treated as child pornography. In the case of online child pornography, the POCSO act has provided that all activities in connection with the preparation, offering, manufacturing, forwarding, publicizing, applauding and supplying for the reasons of pornography to be viewed as child pornography. U/S 15 of the POCSO act. And even the storage of such sexual material is made punishable by imprisonment which may extend to 5 years, or by fine or both. In addition, the IT Act u / s 66E preserves children's rights to privacy by making the deliberate recording photographs or videos of any individual's private parts and hence sending,

⁴⁷ Protection of Children from Sexual Offences Act, 2012.(Act 32 of 2012).

⁴⁸ Information Technology Act, 2000.(Act 21 of 2000).

uploading or releasing those captured images or videos, an offence. U/s 292 IPC, selling of books, paintings, etc. containing obscene materials has been made punishable offence which will even cover online sharing of any such materials including child pornography. U/s 354A IPC, showing pornographic contents against the will of a woman has been made a criminal offence which will also include a female child while Section 354C has made recording or watching women involved in private acts without the knowledge of such women or distributing such recorded contents without the knowledge of such woman concerned a criminal offence and woman here will also include female child.⁴⁹ These provisions also cover offences like sexting, offences violating the right to privacy of children, etc.

Furthermore, if a child is tricked by another individual via an online site, pressuring or causing such a child to perform another act likely to inflict injury to such a child, then the individual who has performed these acts will be charged with the crime of cheating u / s 415 and the penalty for such offenses may be levied u / s 417. Even when a child is misled by any individual for the conversion or loss of any land, that individual could be charged under Section IPC 420.⁵⁰ Apart from these, Section 66D of the IT Act explicitly states for punishments for those individuals who deceive any person through electronic communications or computer devices.

Cyber stalking has also been made punishable in the case of minors wherein Section 11(v) of the POCSO law which deals with such stalking with the aim of sexual abuse of a minor. There were cases when Section 509 IPC was used to combat cyber stalking as cyber stalking also comprises of infringement of the rights of privacy of women. Under these Sections, the term 'women' can also be construed to refer to a female child in circumstances where those offences are being committed against a female child.

In India, cyberbullying against children including abuse of a child through inappropriate and persistent physical, verbal or written actions also has been declared a criminal offence. Sections 503, 506 and 507 of the IPC deal with these kind of offenses where Criminal Intimidation is defined in Section 503; Section 506 offers provisions for these crimes and Section 507 allows for criminal intimidation through anonymous communications. Sections 499 and 500 IPC deal with defamation related offences. While it does not expressly allow for online defamation, but if any child suffers reputation damage owing to another individual's online defamation, the individual may be prosecuted under these Provisions.

TRIAL AND INVESTIGATION IN CASES OF SEXUAL VIOLENCE AGAINST CHILDREN'S:

The trial of cases of sexual violence against children's shall be held in camera as the camera would allow the victim of the crime to be more comfortable and answer the questions with greater ease. As a result, there would be an improvement in the quality of the evidence of prosecutrix as the child would not be exposed to the public gaze while giving testimony. As far as possible, the trial of such cases shall be presided over by a female judge so that the prosecutrix can make statements with greater ease and without much discomfort recalling the horrendous events.⁵¹

⁴⁹ Indian Penal Code, 1860.(Act 45 of 1860).

⁵⁰ Ibid.

⁵¹ *State of Punjab v Gurmit Singh*, (1996) 2 SCC 384.

While holding a trial, an arrangement should be made, through a video conference or screen, such that the child does not have to see the body or face of the accused person, thereby eliminating intimidation and protecting the child against the horrors it might have to revisit. Further, any questions in cross examination intended to be put to the child shall first be given in writing to the Presiding Officer of the court, who after proper assessment of the language and nature of the questions, put the questions to the child himself/herself in a clear language and ensure it is not embarrassing for the child.

There is a duty on Police shoulders to promptly and accurately record the complaint involving a cognizable offence against a child victim. The investigation shall be conducted by an officer not below the rank of Sub-Inspector, preferably a lady officer, trained to deal with sexual crimes against children. The statement of the child shall be recorded verbatim, if possible in video recording, at the victim's residence, in presence of the victim's parents and the person recording the statement shall not be in a police uniform. Also the child victim is not to be kept at police station. The investigating officer is allowed to seek assistance from a psychiatrist, if need be. If the child victim is at a hospital, the duty of Magistrate is to record the statement in the hospital itself.

MEDICAL EXAMINATION OF THE VICTIM OF SEXUAL VIOLENCE:

The medical examination of the victim of sexual violence should be conducted immediately and no hospital or doctor shall delay the examination for want of presence of police officers. However, the nursing home/hospital shall immediately contact the nearest police station.⁵²

Further the medical examination of a child victim shall be conducted by a doctor within 48 hours and if required, a psychiatrist shall be made available for the child. The parents/guardian of the child or any other person whom the child trusts shall be present during the medical examination. The report of the doctor shall be prepared expeditiously, signed and a copy shall be supplied to the child's parents/guardians. In case the results of the report are delayed, the reasons for such delay shall be mentioned therein. A prompt medical and psychological aid to the sexually abused children should be provided at all cost.

ANTI- HUMAN TRAFFICKING UNITS

Anti-Human Trafficking Units (hereinafter 'AHTU'), created by the MHA, maintained by state governments, serves as the primary investigative units for human trafficking crimes. According to guidelines of the MHA, there should be one AHTU in every district with exclusive human resource personal to function as a special unit to conduct investigation pertaining to cases related to human trafficking.⁵³ The government announced that it would expand AHTUs from 332 districts to all of India's 732 districts and provide additional training and resources to existing AHTUs. Unfortunately, it is an open secret that the majority of the AHTUs are either ill-funded or not solely dedicated to trafficking.⁵⁴ Even while the AHTU is the nodal agency to record data on trafficking cases, many of the states do not possess accurate data about trafficking cases in their respective states.⁵⁵

⁵² *State of Karnataka v. Manjanna*, 2000 SCC (Cri) 1031.

⁵³ Seema Sharma, "The plight of anti-trafficking unit and child care institutions in southern Haryana", *Times of India*, August 7, 2019, available at: <<https://timesofindia.indiatimes.com/city/chandigarh/the-plight-of-anti-trafficking-unit-and-child-care-institutions-in-southern-haryana/articleshow/70575622.cms>> (last visited on August 13, 2020).

⁵⁴ *Supra* at note 58.

⁵⁵ *Ibid.*

Since human trafficking falls within the domain of different ministries, the lack of coordinated planning and action becomes evident in the advisories/SOPs issued by the different ministries. In the Advisory dated 31.01.2012 issued by the MHA on Missing Children mandates treating every child missing cases as child trafficking cases and transfer such cases to the AHTUs for investigation.⁵⁶ However, in the SOP issued by the Ministry of Women and Child Development (hereinafter 'MWCD') on missing children provides that only if the missing child cannot be traced within a period of four months, the entire investigation shall be transferred to the AHTU of the concerned district.⁵⁷ The huge time duration provided for in the SOP has raised the eyebrows of many for it makes it too late to combat the exploitation of the child. The lack of proper coordination between the ministries, states and ATHUs has paved the way for increased rates of inter-state trafficking of children.

ISSUES & CHALLENGES OF POSCO ACT RELATED TO CHILD SEXUAL ABUSE:

There are infrastructural limitations faced by police as there are dearth of special courts constituted under POSCO Act and lack of forensic labs, so much so that the Supreme court of India in July 2019 has directed Chief Secretaries of all states and Union Territories to make the existing forensic labs more efficient and functional so that the vital medical evidences as DNA, finger prints are examined expeditiously for speedier disposal of cases. The Supreme Court noted that more designated Forensic Science Laboratories (FSL) were needed across the country to avoid delay in trial and for early disposal of cases covered by the POSCO Act. The Supreme Court directed the directors and the authorities concerned of every state forensic laboratory to ensure that the existing and available FSLs function in an effective manner in analysing samples collected under the POSCO Act. The court also directed that the reports of such analysis be sent promptly. Due to lack of FSL and its men power, the labs take a long time in preparing reports in each case thus the POSCO cases gets delayed.⁵⁸

There is shortage of woman police officers in efficient conduct of the proceedings as observed by Uttarakhand High court in recent 2019 judgement in *Smt. Reenu Saini v. State of Uttarakhand & others.*⁵⁹ The court directed that investigation in cases registered under POSCO Act as well as under Section 376 of IPC (rape) or any other sexual offence relating to child/girl will be carried out by a woman police officer not below the rank of sub-inspector and the victim shall only be examined by woman doctor.

The time delay in reporting of crime and its frequent impact on the evidence collection and related issues of evidence tampering is clearly witnessed. The time delay and gap leaves scope for investigation to be derailed with loss or disappearance of evidence. Besides these time delay, there is also long pendency for almost a year in conducting trial and investigation of POSCO cases. The POSCO Act mandates that there is a time period of 2 months for all investigation to be completed. In the government reports it has been found that there is delay of years in majority of cases for investigation to be completed and trial to be completed.

⁵⁶ Government of India, "Advisory on missing children-measures needed to prevent trafficking and trace the children-regarding" (MHA, January 31, 2012).

⁵⁷ Government of India, "Standard Operating Procedure for cases of Missing Children", (MWCD, 2016).

⁵⁸ IANS, Need for more forensic labs to expedite POSCO cases: SC THE NEWS SCROLL 26 JULY 2019 <https://www.outlookindia.com/newscroll/need-for-more-forensic-labs-to-expedite-pocso-cases-sc/1583189>.

⁵⁹ Writ Petition (Criminal) No. 1591 of 2018.

There is lack of human resources and the requisite staff in giving effect to the provision of POCSO Act. In this regard Supreme Court observed that there is a need to have exclusive special public prosecutors for cases registered under the POCSO Act. Such Public prosecutors must be trained to deal with child victims and witnesses in sexual harassment cases, there is also a need to develop a training programme where these special public prosecutors should be trained to deal with issues which will arise in their courts. 60.

The POSCO law is also vague and arbitrary with respect to obtaining informed consent for charge of rape cases alleged against the male child or adolescents involving a girl child between the age group of 12 – 17 years. Such cases are usually consensual, but there is no procedure of obtaining informed consent from such age group of male and female.

A huge challenge also remains in implementation of the beneficial provisions of the POCSO Act in the interest of victim as the POCSO act provides for compensation to be paid to the women victim. Though the Act provides of payment of compensation but this quantum of compensation varies and there is huge delay and in most cases, the victim are not able to avail the compensation amount.

CONCLUSION:

Sexual abuse against children is one of the most heinous offences. It is an appalling violation of their trust and an ugly breach of our commitment to protect the innocent.⁶¹ According to the Report on Missing Women and Children in India released by the National Crime Records Bureau in 2019, even while 63,407 children reported missing in 2016, the numbers rose to 67,134 in 2018.⁶² Although there is no exclusive national data on child trafficking for sexual exploitation, it is an open secret that children are particularly vulnerable to trafficking for sexual exploitation both within and beyond the borders of the country. The process of child trafficking for sexual purposes is a vicious cycle. Due to their tender age, children are inherently vulnerable to exploitation by miscreants. In all this, children are sold by the traffickers as merchandise to the potential customers to earn profits. Once trafficked, these children usually end up in the bottom rungs of society and live in perpetual poverty until they are rescued and integrated with the society.⁶³

Apart from the tender age of the children, there is an interplay of individual, economic, societal and cultural factors that makes children unusually vulnerable to trafficking for sexual exploitation. Reports suggest that children living in war-torn countries and societies riddled with increased levels of violence and conflicts are vulnerable victims.⁶⁴ For instance, reports show that after the 2015 earthquake that struck Nepal, many young girls in the country became victims of trafficking by persons posing as rescue workers.⁶⁵ Many believe the present pandemic raging across the world has also exacerbated the vulnerability of children to human trafficking, abuse and exploitation.

⁶⁰ PTI SC directs states to appoint exclusive public prosecutors in courts set up for POCSO cases 12 January, 2020 <https://theprint.in/judiciary/sc-directs-states-to-appoint-exclusive-public-prosecutors-in-courts-set-up-for-pocso-cases/348480/>.

⁶¹ *Supra* note 17.

⁶² Government of India, "Report on Missing Women and Children in India" (National Crimes Record Bureau, 2020).

⁶³ Save the Children, "The Fight Against Child Trafficking" (Save the Children International, 2015).

⁶⁴ United States, "Emergency Relief: Children in War & Conflict" (UNICEF, 2020).

⁶⁵ Manuela Brülisauer, Human Trafficking in Post-Earthquake Nepal Impacts of the Disaster on Methods for Victim Recruitment (2015).

Children of both sexes are vulnerable to sexual exploitation, most often girl children constitute the most vulnerable category for child trafficking for sexual exploitation. In many communities especially amongst the vulnerable communities, girl children are often seen as a burden to the families.⁶⁶ Studies have shown that girls belonging to historically socially excluded castes including the Scheduled Caste and Scheduled Tribes, are particularly vulnerable to exploitation.⁶⁷

In order to harmonise and integrate the existing laws, a new piece of legislation called Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill was recommended. It was in 2015 in the case of *Prajwala v Union of India*, that Prajwala (an anti-trafficking organization) invoked Article 32 of the Constitution to file a Public Interest Litigation demanding the Government to create a protocol for the rehabilitation of women and children who have been the victims of trafficking. Thus the aforesaid bill was introduced in the 2018.

As soon as the bill was introduced in the lower house of the Parliament in 2018 it sparked a lot of heated debates. Though passed eventually in Lok Sabha, it could not make it to the upper house, subsequently, never saw the light of the day as the term of the Government in power lapsed. There is a need that bill be reintroduced in both lok sabh and rajya sabha.

The Protection of Children from Sexual Offences Act, 2012 (Act) has been enacted specifically to protect innocent child victims from any kind of sexual abuse. The Act is a comprehensive legislation on the subject. It gives a detailed framework of the procedure for investigation, medical examination and for recording of evidence. It has considerably widened the definition of sexual abuse and gave a gender neutral definition of a child. The Act has been amended by Protection of Children from Sexual Offences (Amendment) Act, 2019. The amendment stringently penalizes the offences against children even upto death penalty. The Act has although been very finely drafted keeping in mind the minutest details, but the problem lies with its implementation. A strict watch by the government accompanied by awareness campaigns for the ignorant people is all that is the need of time.

One of the biggest drawbacks of the POCSO Act is fixing the age of the child at 18 under Section 2(d); leaving no scope of any flexibility. The age should be ascertained by examining the mental capacity of the child. There might be cases of persons suffering from cerebral- palsy wherein a person aged 35 might have the brain of a child of 8 years. Then the only resort left is Section 375, IPC. This issue needs to be addressed.

The principle of 'best interest of the child' should be the paramount consideration in deciding any temporary or long term measures associated with the trafficked child. To go a step further, consultation with the children depending on their mental capabilities can help the authorities take appropriate action.

The Hon'ble Supreme Court of India has also observed "such offenders (child sexual abusers) who are a menace to the society should be mercilessly and inexorable punished in the severest of terms."⁶⁸ The

⁶⁶ United Nations, "Report of the Consultative Meeting on Trafficking in Women and Children" (UNFPA, 2002).

⁶⁷ United Nations, "The Situation of Dalit Rural Women" (Office of the High Commissioner for Human Rights, 2013).

⁶⁸ *Madan Gopal Kakkad vs. Naval Dubey and Anr.* 1992 SCC (3) 204.

courts have therefore made it a practice to punish the persons guilty of sexual offences against children with the severest of sentences.

GENERAL ANTI - AVOIDANCE RULE (GAAR) - AN INDIAN AND INTERNATIONAL PERSPECTIVE

Aditya Gaggar and Amit Singh

Advocate-on-Record, Supreme Court of India and Advocate, Delhi High Court

Phone Number - 9910808321

Email Id - gaggar.aditya@gmail.com

ABSTRACT :-

India's General Anti-Avoidance Rules (GAAR) have been a matter of hot discussion since the Vodafone judgement. The Supreme Court judgment made the government revisit the issue of Capital Gains taxation which is the main bone of contention. This article provides a multi-faceted and broad-based textbook overview of the entire topic in short, clear and accessible language with a focus on the fundamental provisions. It starts by explaining the difference between tax evasion and tax avoidance. It then explains the background and basic concepts before proceeding to analyze the relevant provisions of Income Tax Act and other rules, merits, demerits, need etc. and in doing so acts as a mini commentary on such provisions of the Income Tax Act. It also provides a cross-jurisdictional analysis of the draft GAAR provisions as proposed under the Direct Tax Code and compares it to similar legislations the world over while using illustrations and precedents to explain wherever necessary to get its point across. It advocates the restrictive application of GAAR provisions and its phased implementation for serving its ascertained purpose. It also gives certain recommendations to make the provisions more effective.

Keywords : General Anti-Avoidance Rules (GAAR), Capital Gains Tax, Tax Evasion, Tax Avoidance, Income Tax Act

Introduction and Basic Concept

Evasion and Avoidance

Good governance requires adequate funds and to garner adequate funds is required an effective, equitable and efficient tax collection mechanism. However, internationally, there are two basic problems that undermine such a tax collection mechanism: tax evasion and tax avoidance.

The difference you ask? Why, there's the Grand Canyon, right there! Tax evasion is defined by the Royal Commission on Taxation of Profits and Income or Radcliffe Commission, (UK, 1955) as "unlawful escaping of tax liabilities." On the other hand, the Carter Commission Report (Canada, 1966) states that tax avoidance is "every attempt by legal means to reduce tax liability which would otherwise be incurred by taking advantage of some provision or lack of provision in the law". While Tax evasion uses illegal means such as falsification of books, suppression of income, overstatement of deductions, etc. to reduce tax liabilities, tax avoidance attempts to reduce tax liability through legal means of clever planning and management, so as to regulate your affairs in such a way that you pay

the minimum tax imposed by the statute.¹ Another way to look at it is that while tax evasion is a crime whereas tax avoidance is merely a breach of social contract.²

Rule of Law

*“Rule of law requires the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power.”*³

The Rule of law as propounded by A.V. Dicey and upheld time and again in the cases of *Kesavanda Bharti v. State of Kerala*⁴, *Maneka Gandhi v. Union of India*⁵ and *Indira Nehru Gandhi v. Raj Narain*⁶, and many more that followed them, not only forms the basic structure of the Constitution of India but also happens to be a universal prerequisite for any country in the world that aims for good governance, thus coming a full circle.

Tax Avoidance Techniques

Basically, there are four tax avoidance techniques that are generally followed⁷:

- a. Deferred payment of tax liability
- b. Re-characterization of an item or income or expense to tax at a lower or nil rate
- c. Permanent elimination of tax liability
- d. Shifting of income from a high-taxed to a low-taxed person
- e. The abovementioned practices are usually carried out using following methods⁸:
 - a) Use of tax Treaties for related-party transactions (i.e., "Treaty Shopping")
 - b) Use of international tax shelters through artificial intermediary companies
- f. (i.e., "CFC")
- g. c) Excessive use of debt over equity (i.e., "Thin capitalization")
- h. Non-arm's length transactions (i.e., "Transfer Pricing manipulation")
- i. Transfer of residence
- j. Branch entities
- k. Use of Tax Havens

Thus, the point to be noted here is that more often than not, tax avoidance techniques take advantage of the gaping inconsistencies and discontinuities in the legal framework of the various national taxation systems.

Anti-avoidance measures

The various anti-avoidance measures evolved over the years are:

¹ The General Anti-Avoidance Rules – Direct Taxes Code Bill, 2009 - Deloitte Haskins & Sells Pg 2.

² Anti-Avoidance Measures – T.P. Ostwald Vikram Vijayaraghavan Pg 61.

³ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (10th ed., reprt. 1965).

⁴ AIR 1973 SC 1461.

⁵ AIR 1978 SC 597.

⁶ AIR 1975 SC 2299.

⁷ Anti-Avoidance Measures – T.P. Ostwald Vikram Vijayaraghavan Pg 62.

⁸ Anti-Avoidance Measures – T.P. Ostwald Vikram Vijayaraghavan Pg 62.

1. Legislative measures i.e. General Anti-avoidance Rules, Specific Anti-avoidance Rules, Bilateral Treaties or Double Taxation Avoidance Agreements
2. Judicial measures i.e. judicial precedents
3. Administrative measures i.e. more comprehensive information gathering and implementing more effective counter-measures⁹

However, from hereon, we shall only restrict ourselves to the discussion on GAAR and allied measures.

Background

The Indian Taxation system taxes the gains from the sale of the shares of both the resident and the nonresident shareholders. However, Article 13 of the Indo-Mauritian tax treaty provides for attribution of taxation rights among the two countries for capital gains. Article 13 (4) provides that gains derived by a resident of a contracting State shall be taxable only in that State.¹⁰ Thus, in the context of the Indo-Mauritius DTAA, a resident of Mauritius can only be taxed at home, even for gains from the sale of shares of an Indian company.¹¹ Therefore, a foreign enterprise can set up a subsidiary in Mauritius, and use it to derive capital gains from acquisition and sale of shares. Although India follows the source rule for taxation of non-residents, which makes this transaction taxable under the Income Tax Act, 1961, yet Article 13(4) of the DTAA gives Mauritius the right to tax this transaction and since such gains are exempt from tax in Mauritius, the transaction becomes completely tax exempt, resulting in double non-taxation.¹² As a result, much of the Mauritian investment into India since the early 1990s, following the liberalization of the Indian economy, is actually round tripping by foreign investors as well as Indian companies setting up a Mauritian entity to avoid capital gains tax in India. Thus, the 'Mauritius holding company' route has become an interesting facet of the Indian tax system involving the re-arrangement of the residence rule of taxation. While this is so in most of India's other Double Tax Avoidance Agreements (DTAAs), the Mauritius treaty assumes special significance since Mauritius has no domestic level tax on capital gains, virtually making it exempt.

While this channel was always frowned upon, it did promote foreign investment due to easy access and tax exemption and hence was forgiven initially. India has repeatedly tried to renegotiate its agreements for past some time, in an attempt to impose a limitation on the benefits clause or make capital gains taxable in the source state, however Mauritius has been reluctant as its economy primarily functions through the import of such capital. Following India's more serious and pronounced recent attempts, in a desperate attempt to hold back such a policy alteration, in 2012 Mauritius even offered two of its islands to India as a compensation for its financial losses from the abovementioned channel.

It has been a cornerstone of law that a taxpayer is entitled to arrange his affairs so as to reduce his tax liability; the fact that the motive for a transaction is to avoid tax does not invalidate it unless a

⁹ Anti-Avoidance Measures – T.P. Ostwald and Vikram Vijayaraghavan Pg 63.

¹⁰ GAAR and its Implications – Care Ratings Pg 1.

¹¹ CBDT Circular No. 682, Clarification Regarding Agreement for Avoidance of Double Taxation with Mauritius (Mar. 30, 1994) (India).

¹² GAAR and its Implications – Care Ratings Pg 1.

particular enactment so provides. Genuine strategic planning is permissible.¹³ The English courts have laid down the cardinal Westminster principle in the case of *The Commissioners of Inland Revenue v. His Grace the Duke of Westminster*¹⁴ which states that *given that a document or a transaction is genuine, the Court cannot go behind it to some supposed underlying substance*. Interpreting and following this cardinal principle, the English Courts have held in the subsequent rulings of *W.T. Ramsay Ltd. v. IRC*¹⁵ and *Craven v. White*¹⁶ that *the Revenue cannot start with the question as to whether the transaction was a tax deferral or saving device but that the revenue should apply the 'look at' test to ascertain its true legal nature. It is the task of the Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach.*

In *Bank of Chettinad's* case,¹⁷ the Hon'ble Privy Council (PC) stated that *"The tax authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the tax authorities to unravel the device and to determine the true character of the relationship. But the legal effect of a transaction cannot be displaced by probing into the substance of the transaction"*

The Hon'ble Supreme Court in *A Raman's* case¹⁸ observed that *"The law does not oblige a trader to make the maximum profit that he can get out of his trading transactions. Income which accrues to a trader is taxable in his hands. Income which he could have, but has not earned, is not made taxable as income accrued to him. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislative injunction in tax statutes may not, except on peril of penalty, be violated, but may lawfully be circumvented."*

In *McDowell's* case,¹⁹ the Supreme Court while addressing the substance over form question reiterated the Westminster principle and held that *tax planning may be legitimate provided it is within the framework of law. However a colourable device cannot be a part of tax planning.*

While commenting upon the relevance of the *Duke of Westminster* judgment in the modern day context the SC in *Azadi Bachao Andolan's* case²⁰ held that *"It thus appears to us that not only is the principle in Duke of Westminster's case alive and kicking in England, but it also seems to have acquired judicial benediction of the Constitutional Bench in India, notwithstanding the temporary turbulence created in the wake of McDowell's case."*

Further, the court refuted the contention that the Double Taxation Avoidance Convention between India and Mauritius is ultra vires even if the same is susceptible to 'treaty shopping' on behalf of the

¹³ Removing the Fences – Looking through GAAR -PWC Pg 33.

¹⁴ [1935] All E.R. 259.

¹⁵ [1981] 1 All E.R. 865.

¹⁶ [1988] 3 All E.R. 495.

¹⁷ *Bank of Chettinad Ltd. v. CIT* [1940] 8 ITR 522 (PC).

¹⁸ *CIT v. A. Raman and Co.*, [1968] 67 ITR 11 (SC).

¹⁹ *McDowell & Co. Ltd. v. C.T.O.* [1985] 154 ITR 148 (SC).

²⁰ *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1 (SC).

residents of third countries and held that an otherwise legally valid act, cannot be said to be void merely on the basis of some ulterior motive that is against the national economic interest.

In the *Vodafone Case*²¹ the controversy centered on the taxability in India of the offshore transfer of shares in CGP, a Cayman Islands Company by the Hutchison Group to the Vodafone Group. The Indian Revenue Authorities contended that in view of the substantial underlying assets in India, the transfer was not of the share of CGP but in substance that of the underlying Indian assets and accordingly, the capital gain arising from the transfer was taxable in India. Reversing the High Court judgment, the Supreme Court finally adjudged that the gains arising on sale of the share of CGP were not taxable in India as the share of CGP was situated in the Cayman Islands and the transaction did not result in the transfer of any asset in India.

On 12th August, 2009, the draft Direct Tax Code Bill and discussion paper was released. On 30 August, 2010, the formal bill to enact a law known as DTC, 2010 was tabled in Parliament. The current Income Tax Act is proposed to be replaced by this bill. However, there was a lot of hue and cry over the proposed draft of GAAR as the provisions were totally in favour of revenue. This led the Hon'ble Prime Minister to set up a review committee on GAAR headed by Mr. Parthasarathi Shome, an income tax expert, to examine all GAAR related issues. On the 1st September, 2012, the Shome Committee recommended a delay in implementation by three years.

Analysis

Applicability of General Anti-avoidance Rule

95. *Notwithstanding anything contained in the Act, an arrangement entered into by an assessee may be declared to be an impermissible avoidance arrangement and the consequence in relation to tax arising therefrom may be determined subject to the provisions of this Chapter.*

Explanation.—For the removal of doubts, it is hereby declared that the provisions of this Chapter may be applied to any step in, or a part of, the arrangement as they are applicable to the arrangement.

Section 95 starts with a non-obstante clause which means, if there is a conflict with provisions, in other sections, then those of this section shall prevail over other conflicting provisions. The provisions allow the tax authority to, notwithstanding anything contained in the Act, declare an arrangement 'which an assessee has entered into, as an impermissible avoidance arrangement'.²²

Now it may be asked what an impermissible agreement means. To understand that it is necessary to know what the term 'arrangement' means.

The term —arrangement has been defined in section 102 as under-

- (1) *"arrangement" means any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, operation, scheme, agreement or understanding;*

²¹ *Vodafone International Holdings BV v. Union of India and Anr.*(Civil Appeal No. 733 of 2012 (arising out of SLP (C) No. 26529 of 2010), Judgment dated 20 January, 2012.

²² Report on general anti avoidance rule in Income Tax Act, 1961Pg 22.

The term arrangement has very wide interpretation it includes any part or whole of transaction, scheme, agreement .it also includes alienation of any property in such transaction.

Impermissible avoidance arrangement

96. (1) *An impermissible avoidance arrangement means an arrangement, the main purpose or one of the main purposes of which is to obtain a tax benefit and it—*

- (a) *creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;*
- (b) *results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;*
- (c) *lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or*
- (d) *is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.*

(2) *An arrangement shall be presumed to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit.*

S. 96 of the act states that an arrangement to be termed as an impermissible avoidance arrangement must satisfy two condition-

- a. The main purpose or one of the main purpose of arrangement is to obtain tax benefit
- b. If one or more elements as mentioned in clause (a) to (d) are satisfied then such arrangement is known as impermissible avoidance arrangement.

S.96 (1) (a) states that where an arrangement creates rights and obligations, which are not normally created between parties dealing at arm's length then it is impermissible avoidance arrangement.²³

Clause (b) states that where the arrangement is of such nature where form prevails over the substance then it is impermissible arrangement.

Clause (c) states that where the arrangement lacks commercial substance or it is deemed to lack commercial substance then it is known as impermissible avoidance arrangement.

Clause (d) states that arrangement which is carried out in, or by means of, a manner which is normally not employed for a bona fide purpose it is impermissible avoidance arrangement.²⁴

S. 96(2) places a presumptive purpose of obtaining tax benefit upon any an arrangement, if the main purpose of even a single step of the arrangement is to obtain a tax benefit (even if the main purpose of arrangement as a whole is not to obtain tax benefit).

²³ Final Report on General Anti-Avoidance Rule in Income Tax Act, 1961 Pg 23.

²⁴ Final Report on General Anti-Avoidance Rule in Income Tax Act, 1961 Pg23.

Arrangement to lack commercial substance

97. (1) An arrangement shall be deemed to lack commercial substance if—

- (a) the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part; or
- (b) it involves or includes—
 - (i) round trip financing;
 - (ii) an accommodating party;
 - (iii) elements that have effect of offsetting or cancelling each other; or
 - (iv) a transaction which is conducted through one or more persons and disguises the value, location, source, ownership or control of funds which is the subject matter of such transaction; or
- (c) it involves the location of an asset or of a transaction or of the place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit (but for the provisions of this Chapter) for a party.

(2) For the purposes of sub-section (1), round trip financing includes any arrangement in which, through a series of transactions—

- (a) funds are transferred among the parties to the arrangement; and
- (b) such transactions do not have any substantial commercial purpose other than obtaining the tax benefit (but for the provisions of this Chapter),

without having any regard to—

- (A) whether or not the funds involved in the round trip financing can be traced to any funds transferred to, or received by, any party in connection with the arrangement;
- (B) the time, or sequence, in which the funds involved in the round trip financing are transferred or received; or
- (C) the means by, or manner in, or mode through, which funds involved in the round trip financing are transferred or received.

(3) For the purposes of this Chapter, a party to an arrangement shall be an accommodating party, if the main purpose of the direct or indirect participation of that party in the arrangement, in whole or in part, is to obtain, directly or indirectly, a tax benefit (but for the provisions of this Chapter) for the assessee whether or not the party is a connected person in relation to any party to the arrangement.

(4) The following shall not be taken into account while determining whether an arrangement lacks commercial substance or not, namely:—

- (i) the period or time for which the arrangement (including operations therein) exists;
- (ii) the fact of payment of taxes, directly or indirectly, under the arrangement;
- (iii) the fact that an exit route (including transfer of any activity or business or operations) is provided by the arrangement.

Clause (a) of the aforesaid section provides that where the substance of the arrangement is different from the form shown in the arrangement, then the tax should be assessed on the substance of the arrangement and not on form. In other words, the revenue is permitted to lift the 'corporate veil' to assess taxability.

Item (i) of clause (b) deems an arrangement to lack commercial substance if it involves round trip financing. The term round trip financing refers to any arrangement wherein funds are transferred among the parties through a series of transactions without such transactions having any substantial commercial purpose other than obtaining tax benefit. This is irrespective of the time or sequence in which the funds involved in the round trip financing were transferred or received and the means or manner in which such funds were transferred or received.

Item (ii) of clause (b) deems an arrangement to lack commercial substance which includes an accommodating party. The term accommodating party means a party to an arrangement where the main purpose of its direct or indirect participation in the arrangement in whole or in part is to obtain tax benefit, direct or indirectly. Whether or not it is connected person in relation to party to the arrangement.

Consequence of impermissible avoidance arrangement.

98. (1) *If an arrangement is declared to be an impermissible avoidance arrangement, then the consequences, in relation to tax, of the arrangement, including denial of tax benefit or a benefit under a tax treaty, shall be determined, in such manner as is deemed appropriate, in the circumstances of the case, including by way of but not limited to the following, namely:—*

- (a) *disregarding, combining or recharacterising any step in, or a part or whole of, the impermissible avoidance arrangement;*
- (b) *treating the impermissible avoidance arrangement as if it had not been entered into or carried out;*
- (c) *disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;*
- (d) *deeming persons who are connected persons in relation to each other to be one and the same person for the purposes of determining tax treatment of any amount;*
- (e) *reallocating amongst the parties to the arrangement—*
 - (i) *any accrual, or receipt, of a capital or revenue nature; or*
 - (ii) *any expenditure, deduction, relief or rebate;*
- (f) *treating—*
 - (i) *the place of residence of any party to the arrangement; or*
 - (ii) *the situs of an asset or of a transaction,*
at a place other than the place of residence, location of the asset or location of the transaction as provided under the arrangement; or
- (g) *considering or looking through any arrangement by disregarding any corporate structure.*

(2) *For the purposes of sub-section (1),—*

- (i) any equity may be treated as debt or vice versa;
- (ii) any accrual, or receipt, of a capital nature may be treated as of revenue nature or vice versa; or
- (iii) any expenditure, deduction, relief or rebate may be recharacterised.

S. 98 provides the consequences of impermissible arrangements. The consequence may be determined in such manner as is deemed appropriate in the circumstances of the case. Certain illustrations of the manner have been provided, namely:—

- (a) any or a part or whole of, the impermissible avoidance arrangement can be disregarded, combined or re-characterised
- (b) the impermissible avoidance arrangement can be treated as if it had not been entered into or carried out
- (c) accommodating party may be treated as one and same.

Treatment of connected person and accommodating party

99. *For the purposes of this Chapter, in determining whether a tax benefit exists—*

- (i) *the parties who are connected persons in relation to each other may be treated as one and the same person;*
- (ii) *any accommodating party may be disregarded;*
- (iii) *such accommodating party and any other party may be treated as one and the same person;*
- (iv) *the arrangement may be considered or looked through by disregarding any corporate structure.*

This section states that for purpose of determining if a tax benefit exist the connected person or parties should be regarded as one and same. It includes such benefits which occur to person connected directly or indirectly and includes associated person.

Application of chapter

100. *The provisions of this Chapter shall apply in addition to, or in lieu of, any other basis for determination of tax liability*

Section 100 is a non-exclusion clause that says that the application of the provisions of this Chapter are not hindered by any other such provisions for the determination of tax liability.

Framing of guidelines

101. *The provisions of this Chapter shall be applied in accordance with such guidelines and subject to such conditions and the manner as may be prescribed.*

Continuing upon the line of Section 100, Section 101 says that the provisions of this chapter are to be applied in accordance with the guidelines and the conditions that may be prescribed.

Definitions

102. *In this Chapter, unless the context otherwise requires,—*

- (1) "arrangement" means any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, operation, scheme, agreement or understanding;
- (2) "asset" includes property, or right, of any kind;
- (3) "associated person", in relation to a person, means—
- (a) any relative of the person, if the person is an individual;
 - (b) any director of the company or any relative of such director, if the person is a company;
 - (c) any partner or member of a firm or association of persons or body of individuals or any relative of such partner or member if the person is a firm or association of persons or body of individuals;
 - (d) any member of the Hindu undivided family or any relative of such member, if the person is a Hindu undivided family;
 - (e) any individual who has a substantial interest in the business of the person or any relative of such individual;
 - (f) a company, firm or an association of persons or a body of individuals, whether incorporated or not, or a Hindu undivided family having a substantial interest in the business of the person or any director, partner, or member of the company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member;
 - (g) a company, firm or association of persons or body of individuals, whether incorporated or not, or a Hindu undivided family, whose director, partner, or member have a substantial interest in the business of the person, or family or any relative of such director, partner or member;
 - (h) any other person who carries on a business, if—
 - (i) the person being an individual, or any relative of such person, has a substantial interest in the business of that other person; or
 - (ii) the person being a company, firm, association of persons, body of individuals, whether incorporated or not, or a Hindu undivided family, or any director, partner or member of such company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member, has a substantial interest in the business of that other person;
- (4) "benefit" includes a payment of any kind whether in tangible or intangible form;
- (5) "connected person" means any person who is connected directly or indirectly to another person and includes associated person;
- (6) "fund" includes—
- (a) any cash;
 - (b) cash equivalents; and

- (c) *any right, or obligation, to receive, or pay, the cash or cash equivalent;*
- (7) *"party" means any person including a permanent establishment which participates or takes part in an arrangement;*
- (8) *"relative" shall have the meaning assigned to it in the Explanation to clause (vi) of sub-section (2) of section 56;*
- (9) *a person shall be deemed to have a substantial interest in the business, if—*
- (a) *in a case where the business is carried on by a company, such person is, at any time during the financial year, the beneficial owner of equity shares carrying twenty per cent or more, of the voting power; or*
 - (b) *in any other case, such person is, at any time during the financial year, beneficially entitled to twenty per cent or more, of the profits of such business;*
- (10) *"step" includes a measure or an action, particularly one of a series taken in order to deal with or achieve a particular thing or object in the arrangement;*
- (11) *"tax benefit" means—*
- (a) *a reduction or avoidance or deferral of tax or other amount payable under this Act; or*
 - (b) *an increase in a refund of tax or other amount under this Act; or*
 - (c) *a reduction or avoidance or deferral of tax or other amount that would be payable under this Act, as a result of a tax treaty; or*
 - (d) *an increase in a refund of tax or other amount under this Act as a result of a tax treaty; or*
 - (e) *a reduction in total income including increase in loss, in the relevant previous year or any other previous year.*
- (12) *"tax treaty" means an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A.*

Section 102

Section 102 is the definition clause. The definition of key terms like 'arrangement', 'impermissible avoidance agreement', 'tax benefit' which have been provided in are quite wide.

International Perspective

More than 30 countries worldwide have already introduced some GAAR provisions within their tax codes to check tax evasion including the Australia, Canada, Singapore, South Africa and China while the UK and the USA are also actively considering the implementation of such provisions. Details of the provisions present in the various countries are given below.

Australia

GAAR was introduced in Australia as Part IVA of Income Tax Assessment Act, 1936. It applies to

schemes entered into after 27th May 1981. It applies whether scheme is carried out in Australia or abroad. Generally speaking Part IVA will only apply to arrangement if following conditions are satisfied:

1. There is a tax benefit obtained from a scheme which would not have been available if the scheme had not been entered into.
 - a. The overall practical financial consequences of the scheme and other outcomes of the scheme, and
 - b. Whether the same outcomes (other than the tax advantage) could be achieved in a more straightforward, ordinary or convenient way than the way in which they were achieved by the scheme.²⁵

2. With regard to the eight matters specified in Part IVA, can it be concluded that the scheme or any part of it entered into by any person for the sole purpose of obtaining the tax benefit, following matters need to be considered:
 - a. The manner in which the scheme was entered into or carried out;
 - b. The form and substance of the scheme;
 - c. The time at which the scheme was entered into and the length of the period during which the scheme was carried out;
 - d. The result achieved by the scheme under the income tax law if Part IVA did not apply;
 - e. Any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result from the scheme;
 - f. Any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, that has resulted, will result, or may reasonably be expected to result, from the scheme;
 - g. Any other consequences for the relevant taxpayer, or for any person referred to in matter 6 (above) of the scheme having been entered into or carried out; and
 - h. The nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in matter 6.²⁶

The current Australian taxation regime relies heavily on the dominant purpose theory. In a recent judgment of *Citigroup Pty Limited* the Australian court elaborated upon the dominant purpose theory and held that Part IVA should apply to disallow foreign tax credits (FTC) of approximately AUD 23 million claimed by the taxpayer in relation to two Hong Kong bond transactions. The relevant transactions were a bond strip trade involving the subscription of an interest bearing bond and an immediate sale of its interest coupon for a lump sum payment. The taxpayer claimed a FTC for the Hong Kong tax paid on this lump sum received. The Court held that the taxpayer had entered into the transactions for the dominant purpose of obtaining a tax benefit and noted that “*absent the foreign tax credits, the transactions did not make sense.*”²⁷

²⁵ Report on General Anti-Avoidance Rule in Income Tax Act, 1961 Pg 93.

²⁶ Report on General Anti-Avoidance Rule in Income Tax Act, 1961Pg 94.

²⁷ *Citigroup Pty Limited v. Commissioner of Taxation [2011] FCAFC 61.*

Canada

The Canadian GAAR is covered under section 245 of the Income Tax Act. It came into effect on 13th September 1988. However, it has been stipulated that transactions that began before 13 September 1988 and that were completed before 1989, would not be subject to the GAAR, nor would transactions entered into before April 13, 1988 where the taxpayer had received a confirmation or opinion in writing with respect to the tax consequences from the tax authorities.²⁸

In the words of the Canadian Supreme Court - *“The Income Tax Act remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the Income Tax Act, on the basis that they amount to abusive tax avoidance”*. The Court has also observed that the GAAR was enacted as a provision of last resort in order to address abusive transactions; it was not intended to introduce uncertainty in tax planning. The main issue was whether the GAAR applied to deny the capital cost allowance (CCA) claimed in respect of a sale-leaseback transaction.²⁹

The Explanatory Notes listed out the purpose of the GAAR as - *“New section 245 of the Act is a general anti-avoidance rule which is intended to prevent abusive tax avoidance transactions or arrangements but at the same time is not intended to interfere with legitimate commercial and family transactions. Consequently, the new rule seeks to distinguish between legitimate tax planning and abusive tax avoidance and to establish a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs.”*³⁰

Three questions must be answered before the application of the GAAR. These are:

1. Whether there is a “tax benefit” arising from a “transaction”.
2. Whether the transaction is an avoidance transaction in the sense of not being “arranged primarily for bona fide purposes other than to obtain the tax benefit”.
3. Whether the avoidance transaction is abusive.

Only if the answer to these above three questions is in the affirmative can the GAAR be applied.

China

Article 47 of Enterprise Income Tax Law which came into effect on 1 January 2008 includes a GAAR provision. It provides that: “If an enterprise engages in a business arrangement without bonafide commercial purposes that results in reducing its taxable revenue or taxable income, the tax bureau has the right to make adjustments based on reasonable methods.” This means that if any commercial establishment engages itself in some sham or eyewash business that is merely aimed towards the reduction of its tax liability and has no commercial substance, then in such a case the tax bureau can make reasonable adjustments.

²⁸ IC 88-2 – General Anti-avoidance Rule: Section 245 of the Income Tax Act.

²⁹ *The Queen v. Canada Trustco Mortgage Company* 2005 SCC 54 para 13 and 14.

³⁰ *The Explanatory Notes to Legislation Relating to Income Tax issued by the Hon’ble Michael H. Wilson, Minister of Finance (June 1988) “Explanatory Notes”*.

Germany

Section 42 of the German Tax Code provides for the GAAR. It came into application on 1st January 2008. This provision has three important features³¹, namely:

1. Inappropriate tax planning constitutes abuse
2. The presumption of abuse can be rebutted by the tax payer by demonstrating sound business reasons of the particular structure
3. The GAAR is superseded if a special anti-abuse rule applies

In Germany courts apply substance over form doctrine. Contrary to the Indian Tax Law where the onus to prove inappropriateness of legal structure is on the assessee, under the German taxation the onus to prove inappropriateness of legal structure is on the tax authorities. However, the taxpayer has a right to rebut and demonstrate that the overall structure is based on other than tax reasons.

South Africa

South African GAAR is codified under sections 80A to 80L of the South Africa Income Tax Act (No. 58 of 1962). The key provisions³² of the South African GAAR are as follows:

1. Existence of arrangement
2. Existence of tax benefit
3. Sole or main purpose of the avoidance arrangement is to obtain a tax benefit
4. The avoidance arrangement is characterized by presence of one or more of tainted elements for arrangements which renders it an impermissible avoidance arrangement.

United Kingdom (UK)

The UK does not have a legislative act however there are many specific pieces of tax legislation or targeted anti-avoidance rules designed to counteract, perceived and acceptable planning.³³ The anti-avoidance measures are applied by tax authorities of UK on the basis of interpretation of tax laws by judges however the uncertainties cannot be ruled out in complex situations.

In December 2010, a study group was constituted to analyse the need of legislative GAAR in the UK. In its recently submitted Report it has been pointed out that a broad spectrum GAAR would not be beneficial for the UK tax system as it would carry “a real risk of undermining the ability of business to carry out sensible and responsible tax planning”.³⁴

A disclosure regime, the Disclosure of Tax Avoidance Schemes (DOTAS) was introduced with effect from 1 August 2004 which today covers Income Tax, Corporation Tax and Capital Gains Tax. A tax arrangement must be disclosed:

- a. when it will, or might be expected to, enable any person to obtain a tax advantage.

³¹ Removing the Fences –Looking through GAAR -PWC Pg 45.

³² Removing the Fences –Looking through GAAR -PWC Pg 46.

³³ Removing the Fences –Looking through GAAR -PWC Pg 48.

³⁴ Removing the Fences –Looking through GAAR -PWC Pg 48.

- b. that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement.
- c. it is a tax arrangement that falls within any description ('hallmarks') prescribed in the relevant regulations.³⁵

While adjudging the case of *Barclays Mercantile Business Finance Limited v. Mawson*³⁶, the House of Lords sought to restrict the extent to which the Inland Revenue may strike down tax efficient arrangements by reiterating the importance of examining the relevant statutory provision. In essence, this decision gives guidance that the fact that a transaction is a circular or preordained transaction with no commerciality would not of itself be a relevant consideration, if it does not, and did not, affect the necessary elements of the relevant tax statute in question. Barclays Mercantile Business Finance Limited (BMBF) was a member of the Barclays group which carried on the trade of finance leasing or providing "asset based finance". BMBF borrowed money from Barclays Bank and then purchased a pipeline from BGE, an Irish statutory corporation, for the supply, transmission and distribution of natural gas in the Republic of Ireland, for GBP 91 million. Following the purchase, BMBF granted a lease back to BGE. The purchase money of Pounds Sterling (GBP) 91 million eventually went back to Barclays Bank through various transactions. The effect was that BGE never held the purchase money of GBP 91 million, but BMBF was entitled to capital allowances under section 24(1) of the Capital Allowances Act 1990. The Inland Revenue challenged the entitlement of BMBF to capital allowances. The Revenue alleged that the payment by BMBF to BGE achieved no commercial purpose, arguing that because commercially driven finance leasing is designed to provide working capital to the lessee, and in this case, the lessee, BGE, could not get its hands on the purchase money, by application of the 'Ramsay' principle, BMBF did not incur an expenditure of GBP 91 million in the provision of a pipeline for the purpose of its finance leasing trade. The House of Lords examined, using a purposive construction, what the statute actually requires. At the end, their Lordships held that section 24(1) of the Act is concerned entirely with the acts and purposes of the lessor, i.e. BMBF, and BMBF satisfied all the requirements of section 24(1) of the Act, and accordingly, BMBF should be and is entitled to capital allowances. What the lessee (i.e. BGE) does is "no concern of the lessor". Whatever arrangements BGE chose to make, even ones involving a circular flow of money or forming part of a pre-ordained transaction, the same were "no concern of the lessor", because none of the transactions of BGE were necessary elements in creating the entitlement of BMBF to capital allowances under section 24(1) of the Capital Allowances Act. In other words, if a transaction does not affect the necessary elements of a tax statute, be it circular or pre-ordained, it should not be considered a relevant factor in the determination of any tax entitlement under the tax statute.

United States of America (USA)

There is no provision like GAAR in US statutes instead US court apply five main common law doctrines to deny tax payers desired tax benefits, i.e. (1) "economic substance"; (2) "substance over form"; (3) "step transaction"; (4) "business purpose"; and (5) "sham transaction".³⁷

The US congress recently enacted section 7701(o) codifying the economic substance doctrine in Internal Revenue Code (IRC) on 30th March 2010.

³⁵ Removing the Fences –Looking through GAAR -PWC Pg 48.

³⁶ *Barclays Mercantile Business Finance Limited v. Mawson* [2004] UKHL 51.

³⁷ Report on General Anti-Avoidance Rule in Income Tax Act, 1961Pg 96.

Economic Substance Doctrine – A transaction to qualify for economic substance doctrine must have a separate substance as distinguished from economic benefit achieved by tax avoidance.

Sham Transaction Doctrine – Any transaction that gives rise to desired tax benefits but lacking economic activity is a sham doctrine.

Business purpose Test – This test applies where the basic purpose of taxpayer is solely to obtain a tax benefit.

Substance over form Doctrine – In this doctrine the substance of the transaction are looked at and not the form in which the transaction was undertaken.

Step Transaction Doctrine – Step transaction doctrine involves treating a series of separate step as a single transaction if such steps are in substance integrated, interdependent and focused towards one particular result.

Anti- abuse measures especially the economic substance doctrine in US are considered to have originated out of the *Gregory v. Helvering*³⁸ where in, Gregory (the taxpayer) wished to transfer stock from a corporation she wholly owned to herself. Had she done so directly, the transfer would have been treated as a taxable dividend. Instead, in an attempt to avoid taxation, Gregory formed a new corporation, transferred the stock there, liquidated the newly formed corporation, and claimed its assets. She argued that, this transaction should have no tax consequences because she had received the stock “in pursuance of a plan of corporate reorganisation.” Although the transaction satisfied the literal terms of the statute, the Court sided with the Commissioner, condemning the transaction as an “elaborate and devious form of conveyance masquerading as a corporate reorganisation.” The Court determined that to allow Gregory to avoid taxation would be to “exalt artifice above reality and to deprive the statutory provision in question of all serious purpose”.

Merits

To understand the benefits of GAAR, it is important to understand the reason behind why taxpayers choose to resort to tax avoidance scheme as understanding the underlying clause may be effective way of dealing with avoidance.

Early behavioral research on the tendencies of taxpayers to avoid tax typically used the deterrent theory which assumes that taxpayers are amoral profit seeker, who disregard tax law wherever the anticipated penalty and the probability of being caught are relatively small as compared to the anticipated profits.³⁹

Broad provision

The GAAR is broad set of provision which grant power to authorities to invalidate such arrangement which have been entered into with main purpose of obtaining a tax benefit.

³⁸ *Gregory v. Helvering*, 293 U.S. 465 (1935).

³⁹ Murphy K, “Aggressive Tax Planning: Differentiating those playing the game from those who don’t”, Centre for Tax System Integrity Research School of Social Sciences, the Australian National University, 13 December 2002.

It is not just restricted to residents but is applicable to all taxpayers whether residential or non – residential, corporate entity or non-corporate entity. It applies if the tax benefit accrue to taxpayer and he fail to prove that the main purpose was not to obtain tax benefit.

Zero tolerance of avoidance arrangement

GAAR provisions have zero tolerance of avoidance arrangement. It provides that the arrangement even if in part provides the tax benefit or is of such nature that the basic purpose is to avoid tax then GAAR provision comes into effect.

Illustration

X Ltd. sets up a factory in an under developed tax exempt area. Then X Ltd. diverts production from another connected manufacturing unit and shows the same to have been manufactured in the tax exempt unit while in reality it only packages the product there. Is GAAR applicable in such a case?

The main purpose of the arrangement is to obtain a tax benefit. The transaction lacks commercial substance and there is misuse of tax provision. GAAR provision can be invoked.

Prevents erosion of tax base

GAAR prevents erosion of tax base from use of sophisticated method of tax avoidance adopted by taxpayer. It provides revenue with wide power to tax those transactions where the main purpose is to merely treaty shop or obtain a tax benefit.

Complexity of tax anti-avoidance scheme

Another advantage of GAAR is that tax anti- avoidance scheme are getting complex day by day. the government wants to stop loosing billion of dollars which they would end up loosing if the specific anti-avoidance act are followed and strict interpretation of taxing statutes is still there. So GAAR can be introduced as a ‘catch –all’ provision

Illustration

X ltd. is a multinational co registered and working through its offices in Singapore, Cayman Islands. It has a subsidiary company Y ltd. and Z ltd. registered in Mauritius of which it holds 100% shares. Y ltd. purchase shares of Z ltd a company situated and working in India. India and Mauritius have signed a DTAA agreement by virtue of which a co can invest in India through wholly-owned subsidiary in Mauritius without being liable to capital gain tax in India. However if the GAAR as proposed is introduced it would prevail over any such treaty and save the country the loss of billion of dollars.

Demerits

The presumption that obtaining tax benefit is the main purpose of any arrangement unless proven otherwise, is an onerous burden upon the taxpayer. It invariably means that any doubtful borderline cases would in fact be adjudicated in favour of the revenue.

An arrangement will be deemed to lack commercial substance under GAAR if it involves the location of an asset or a transaction or a place of residence of any party that would not have been so located for any substantial commercial purpose other than obtaining tax benefit.

Uncertainty or ambiguity

GAAR in its present form is likely to create uncertainty. The provisions of GAAR are ambiguous and the same could create a negative impact on foreign direct investment. In GAAR the government has been given the power to lift the corporate veil of the companies

Wide power to revenue

Revenue have been announced with very wide power even the onus to prove that the transaction or arrangement is not for tax-avoidance has been shifted to assessee.

Prevents effective tax planning

It presupposes the existence of an alternative one of which would result in less tax than the other. A person who adopts one of the several possible courses to save tax should be distinguished from a tax payer who adopts the same course for business or personal results. In other words GAAR prevents the Multi-National Companies to efficiently manage the tax structure by investing through their subsidiaries which are situated in such countries where the taxation policies are lenient. Even though such transactions are legal in the eyes of law GAAR proposes to prevent them thereby preventing the companies from efficiently managing their tax liabilities.

Illustration

ABC limited is a MNC with its offices situated in USA, Mauritius and Hong kong. It purchases 15000 shares of YZ limited situated in India through its subsidiary X limited which is situated in Mauritius.

Need

General Anti-avoidance Rules are urgently required to address the following issues:

1. To provide a comprehensive and robust framework based on sound legal jurisprudence and principles to tackle abusive transactions, which tend to ride on the shortcomings of the tax system⁴⁰ and undermine the national annual tax and revenue collection objectives.
2. To deter the erosion of the tax base which has occurred as a result of the usage of increasingly sophisticated, clever and deceptive forms of tax avoidance by the tax payers and the spreading of the tax transaction to multiple jurisdictions due to the increasing integration of the Indian economy with the world economy.
3. To re-infuse some confidence into the industry and foreign direct investors in these torrential times of economic slowdown and rapidly increasing inflation.
4. To introduce a mechanism similar to an advance ruling to avoid uncertainty, protracted litigation and disputes.⁴¹
5. To better coordinate the close-knit network of bilateral and multinational treaties to reduce the violation of multinational treaties by way of bilateral treaty override and thus bring India's tax regime in greater harmony with the general international trend.
6. To reduce the undesirable and inequitable ramifications of the tax avoidance which in turn leads to greater economic class based disparities and distortion of the allocation of resources.

⁴⁰ General Anti-avoidance Rules – India and International Perspective –Deloitte Pg 4.

⁴¹ General Anti-avoidance Rules – India and International Perspective –Deloitte Pg 5.

Comment - Achievement of desired object

The present GAAR is likely to create uncertainty regarding the tax implications. It seems that it has been conceived primarily to serve the revenue purpose. The scope of the GAAR provisions is very wide in application and the revenue has been profusely empowered with enormous powers which can be misused. These provisions applied in the current economic scenario could lead to the creation of a negative environment for the incoming Foreign Direct Investments. The provisions provide for considering any arrangement as an impermissible avoidance arrangement even if a part or step of the arrangement is for the purpose of tax benefit irrespective of the fact that the main substance of that arrangement was not the tax benefit. It ignores the genuine investors who are merely exercising the legitimate option of tax planning. In the present draft of GAAR the onus is on the assessee to prove that tax benefit was not the purpose of the arrangement. This provision is against the adversarial system that is generally followed in the Indian legal system.

Recommendations

The Supreme Court, in *Vodafone's case*⁴², has observed that Foreign Direct Investment (FDI) “flows towards location with a strong governance infrastructure which includes enactment of laws and how well the legal system works. Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner. Investors should know where they stand. It also helps the tax administration in enforcing the provisions of the taxing laws.”

Therefore the provisions of proposed GAAR are to be viewed in this light and following questions are to be asked before implementing the same –

- a. Whether introduction of GAAR in current economic scenario is correct?
- b. If it is introduced whether it has to be introduced in present form?

A look at current provision shows that the provisions of GAAR are greatly tilted in favour of revenue. ‘God like’ wide powers have been granted to tax authorities. What is required is participation of all the stakeholders in framing the provisions so that it may address the concerns of all of the stakeholders.

Legislations like GAAR have very wide scope and have far reaching implications. Therefore it is suggested that instead of implementing it at once it should be introduced in phased form so that people can understand it better and as and when the need arises the same should be expanded.

Conclusion

The British who once colonized India, leached it of its natural resources and economic wealth for the advancement of their own domestic industry and to the detriment of our own. However, one cannot deny the fact that they also introduced services of great strategic importance such as the elaborate Indian rail and postal service network, the empowering modern education system and a sound and comprehensive legal framework even though we paid a heavy price for them. Farfetched as it may sound, yet one can draw a direct analogy between that colonization and the ‘Mauritius route to investment’. Freedom then, was just as inevitable as the implementation of GAAR is in the modern

⁴² Vodafone International Holdings BV v Union of India and Anr.(Civil Appeal No. 733 of 2012 (arising out of SLP (C) No. 26529 of 2010), Judgment dated 20 January, 2012.

context, and yet it took us almost 350 years to realize and achieve that objective. Thus, such an analogy gives rise to the resounding question of whether or not India has learned its lessons and if so, how well has it learned them? Are we in the midst of a new kind of economic exploitation or is this a mutually beneficial symbiotic relationship? The day when we are ready to answer this question would be the day when the time would be right for us to implement the provisions of GAAR.

A CRITICAL ANALYSIS OF THE DECISION OF THE MINISTRY OF LAW AND JUSTICE TO ABOLISH FILM CERTIFICATION APPELLATE TRIBUNAL WITH SPECIAL REFERENCE TO THE PROVISIONS OF THE CINEMATOGRAPH ACT, 1952

Ms. DivyaNandwani, Assistant Professor

Email: divyaa.nandwani@gmail.com
+91-9205135940

Advocate Snehanshu Bhowmick

Delhi High Court
Email: bhowmick_snehanshu@yahoo.com

ABSTRACT:-

Indian Film Industry is very popular among all the citizens of India. The shining and glamorous coating makes it more attractive for its viewers. Indian Film industry have evolved miraculously over so many decades. However, sometimes people who are working hard to make it successful are not much appreciated. To make any industry successful, the regulations play an important role. The Cinematograph Act was enacted for the first time in 1918. Over the years this law developed and came as Cinematograph Act, 1952 which is currently applicable. The Cinematograph Act, 1952 provides the current legal framework with respect to the certification of films. This act established Film Certification Board and Film Certification Appellate Tribunal. But in recent events, the Ministry of Law and Justice has abolished the Film Certification Appellate Tribunal. The abolition of Film certification Appellate Tribunal has received many comments across film industry. Film certification Appellate Tribunal commonly known as FCAT was established to hear the appeals from Film Certification Board in 1983. It played a major role in the release of films which were consist of issues related to sexuality, politics, any kind of communal conflicts, serious matters related to religion, scenes based in extreme violence and many more. This paper focuses on the important provisions of the Cinematograph Act, 1952 to critically analyse effects of the ordinance recently passed for the abolition of the Film Certification Appellate Tribunal.

Keywords: Film, Certification Board, Censorship, Appellate Tribunal, etc.

INTRODUCTION

The history of Indian cinema lies in the era of British Raj. The first film produced in India was Dadasaheb Phalke's "Raja Harishchandra" in 1913 which led to the formation of the first Indian law to regulate films when a bill was introduced in 1917 in the imperial legislative council as a result the

Cinematograph Act, 1918 was enacted which came into effect in the year 1920. With this the concept of film censorship was born in India. The meaning of the cinematograph includes any apparatus for the representation of moving pictures or series of pictures.¹ Censorship is the suppression of words, images or ideas that are offensive or may affect the sentiments of the people. Films are one of the ways to depict the events of the real life. It helps to educate people of their rights and values but it also warns people of certain serious and violent incidents which usually happens with the people across the world. To avoid serious impacts of these incidents on sensitive people, authorities have formulated the concept of censorship for those scenes which may affect people's mind extremely. To release a film, every film maker has to obtain film certification from the Film Certification Board. Only after getting the approval from the Board a film may be release in theatres for audience to see it. The Cinematograph Act, 1952 provides relevant provisions for this process. This Act also provides power and function to Film Certification Board. Part II of the Cinematograph Act, 1952 deals with the Board and Appellate Tribunal for film certification. Below are the major provisions of the Cinematograph Act, 1952.

MAJOR PROVISIONS OF THE ACT, 1952

The Cinematograph Act 1952 was enacted with the aim to provide certification to the cinematograph films for the purpose of exhibition and to regulate exhibitions of films made in India. This Act is applicable to the whole of India. Section 2 deals with various definitions. Some of the important definitions are 'Adult' means a person who has completed his eighteenth year;² 'Film' means a cinematograph film.³ Some other definitions are discussed further in the paper. The Central Government has power to establish at some regional centres advisory panel⁴ to enable the Board to efficiently discharge its functions as per the provisions of this Act. The composition of the advisory panel shall be decided and appointed by the central government which shall consist of qualified persons as in the opinion of the central government. These persons shall be eligible to judge the effect of the films on the public. The Board may consult these advisory panels with respect to any film for which any application has been made for its certification. The advisory panel is obligated to examine such films and make such recommendations to the board as they think fit as per the rules made by the central government. The board after examining a film may grant certification as per the provisions of this act. There are various categories of film certification which are discussed in the paper. There is "UA" certification for films suitable for unrestricted public exhibition.⁵ The film, if not suitable, for the public exhibition, the board shall grant "A" or "S" certification to the film. The guiding principles applied in the process of certification of the films in India are as follows:⁶

- The film or any part of it shall not be against the interests of the sovereignty and integrity of India
- It shall not be against the security of the state, friendly relations with foreign states, public order, decency or morality or
- It shall not involve defamation or contempt of court or is likely to incite the commission of any offence.

¹ Section 2 (c) of the Cinematograph Act, 1952 Definition of Cinematograph.

² Section 2 (a) of the Cinematograph Act, 1952.

³ Section 2 (dd) of the Cinematograph Act, 1952.

⁴ Section 5 of the Cinematograph Act, 1952.

⁵ Section 5 A (a) of the Cinematograph Act, 1952.

⁶ Section 5B of the Cinematograph Act, 1952.

Other important provisions with respect to the Film Certification Board and Film Certification Appellate Tribunal is discussed further.

FILM CERTIFICATION BOARD

The Central Government may constitute a board to be notified as Board of Film Certification which is headed by a Chairman and other members which may be between 12 to 25 in number, all being appointed by Central Government.⁷ All other requirements of board members including Chairman such as salary and allowances, their terms and conditions of services shall be determined by the Central Government. Central Government has been given power under the provisions of this act with respect to matters related to board similar to many other acts. The Board was constituted for the sanctioning of films for public exhibition. So, whenever a producer makes any film, it required to get it sanctioned by the Board of Film Certification. This process is commonly known as censorship of films. The procedure for the sanction is further mentioned in the other provisions of the Act. It is provided that an application has to be made to the board in the prescribed manner if any person desires to exhibit any film for the public. The Board only after examining the film may sanction the film.⁸ There are certain criteria for the sanctioning of the film. The Board while granting any sanction to the film for public exhibit may imposes restrictions for which they have created various categories. These categories state that which film can be seen by which type of audience. Any film may be sanctioned for unrestricted public exhibition which means different types of age groups of people are allowed to see the approved film. Here, if board is of opinion that a necessary caution has to be taken for child below 12 years of age, the board may allow them under the guidance of their parents or guardians. Then another category is that when film is restricted only to adults, below 18 years of age group is not allowed to see that film. This is well executed at the ground level as all the film exhibition centres allows viewers to enter to see that film only after showing a valid id proof as approved by the Government. It can be said that almost all major cities have this provision at their film exhibition centres.

Another category is that board may restrict exhibition of film to members of any profession or any class of persons, only after having regard to the nature, content and theme of the film. The board also has the power to give directions to the person applying for sanction of the film to modify or to remove any part of the film which they may think not appropriate for anybody to see. This clause may be imposed by the board before the sanctioning of the film. So basically, there are four types of certification which have been created by the board that is Universal (U), Parental Guidance (UA), Adults only (A) and Restricted to special class of persons (S). At last, the board has the power to completely reject the sanctioning of the film if it seems inappropriate or meaning less. However, the board before rejecting any sanction provides necessary opportunity to the applicant to present their views in the matter. Any person who tries to make a film has intention to bring out vivid imagination to general public which in normal circumstances nobody could ever think of. A person's imagination can beyond certain limits. It is the power of the mind of the person what they are creating inside. Thus, it is necessary to look after what type of imagination is being put inside other's head through these films and how much a normal person in normal circumstances can bear that imagination. Sometimes, creator of these film gives a shot to show what is really happening in the real life of the people by

⁷ Section 3 of the Cinematograph Act, 1952.

⁸ Section 4 of the Cinematograph Act, 1952.

showing real life stories of different people through these films. There also, an examination is required before sanctioning exhibition of that kinds of film as it may involve various sentiments of person or class of persons with whom that incident has took place.

When a person makes a film, he invests a lot of money and time to it. Upon rejection, it becomes all waste. So, a person has a right to object against the rejection order of the Film Certification Board. One of the such case was where the issue of censorship of film was raised is *K. A. Abbas v Union of India*,⁹ where the Supreme Court of India considered the vital question related to pre-censorship of cinematography in relation to the freedom of speech and expression that is guaranteed under the Constitution of India. It was held by Hidayatullah, C.J, that censorship of films which includes pre-censorship was constitutionally lawful. Though, he added, that unjustified restriction on freedom of expression by the Board should not be exercised.¹⁰ A person earlier was given a right to file an appeal before Film Certification Appellate Tribunal against the order of the Board of Film Certification. This right has been taken away by a recent decision of the Central Government regarding abolition of the Appellate Tribunal.

FILM CERTIFICATION APPELLATE TRIBUNAL

To deal with the grievances of the people who are aggrieved by any order of the Film Certification Board, an appeal may be filed to the Film Certification Appellate Tribunal within thirty days from the date of such order.¹¹ The Central Government, Ministry of Information & Broadcasting had constituted in 1983 an appellate tribunal which is a statutory body to hear appeals against any order of the Board. The Appellate Tribunal was consisting of a Chairman and not more than four other members appointed by the Central Government.¹² The qualifications required to be appointed as a chairman of the appellate tribunal was to be retired as a judge of a High Court or any person who is qualified to be a judge of a High Court. The appellate tribunal was given a status similar to the High Court. The Central Government appointed persons as the members of the appellate tribunal who were qualified to judge the effect of the films on the public. In addition to this, the Central government also appointed a secretary and other staff members who are necessary for the efficient performance of the appellate tribunal. Any appeal filed before the appellate tribunal was followed by a set procedure in accordance to the provisions of the Act of 1952. The tribunal after making required inquiry as it considered necessary and after giving reasonable opportunity to the appellant and to Board as well to present their case before the appellate tribunal, made such orders as it thinks fit in relation to the film and dispose the matter. The members of the appellate tribunal were also governed by the provisions of the Finance Act, 2017 with respect to term of office, salaries, allowances, resignation, removal and other necessary terms and conditions of their service.

“The Tribunals Reforms (Rationalisation And Conditions Of Service) Ordinance, 2021, which came into effect on April 4, amends the Cinematograph Act, 1952 by omitting some sections and replacing the word “Tribunal” with “High Court” in other sections. In effect, filmmakers will now have to

⁹ 1971 AIR 481, 1971 SCR (2) 446.

¹⁰ STA Law Firm, 2019 “India: The Cinematograph Act of India”.

¹¹ Section 5C of the Cinematograph Act, 1952.

¹² Section 5D of the Cinematograph Act, 1952.

approach the High Court with appeals they would have earlier filed with the FCAT.”¹³ This action of the ministry came as a shock to many people in the film industry. Few of them has expressed their views via their twitter post. “*Hansal Mehta took to Twitter to express his disappointment and called the move “arbitrary and restrictive”. He wrote, “Do the high courts have a lot of time to address film certification grievances? How many film producers will have the means to approach the courts? The FCAT discontinuation feels arbitrary and is definitely restrictive. Why this unfortunate timing? Why take this decision at all?”*”¹⁴ Similarly, Vishal Bhardwaj wrote, “such a sad day for cinema”. Few of them questioned that how does this happen overnight? Richa Chadha, Film Actress also expressed her view by sharing a GIF- Graphics Interchange Format.

MAJOR DECISIONS OF FCAT

There were many key decisions taken by the Appellate Tribunal when it was working. Some of them are: The movie named ‘Haraamkhor’ starring Nawazuddin Siddique was cleared by the FCAT, in order to give a social message to girls and to warn them of people in the society and to be aware of their rights. This film was based on the relationship between a school teacher and a young female student. It had been denied certification for being pro-active by the Board. Another Example is movie ‘Kalakandi’ starring Saif Ali Khan where the board suggested for 72 cuts whereas the Appellate Tribunal allowed the film under U/A certification with only one cut. There are many more examples like this where the film makers appealed to the appellate tribunal for their film certification. But now, with this power being vested to High court, it may not only overburden the High court with the procedure to approve film by judging its effect on the viewers which can be done only by seeing the film but it may also hang the film maker in between various dates to get the certification which may ultimately cost them a huge loss as the film makers invest a lot while making a film and long waiting for the film makers may frustrate them. Besides High Courts have been established to look after very serious matters than this. But there were many cases where film makers have approached even Supreme Court of India for the film Certification. Many of those cases involves the question related to fundamental rights. The procedure to get the film certification was easy before the abolition as it revolves around the people really associated with the film industry. Now with the provision to approach High Court makes it difficult for film makers to get their film certification at once. This may also affect the initial idea of the film maker while making a film as a film maker would start making a film keeping the procedure of getting approval from the Board and the High Court in mind. There are huge chances of loss to a film maker if the film does not get approval at once. So, there may be chances that no film maker would want to waste their time and money on this instead they will prefer to make those stories which are easy to get approval by the Board. It ultimately affects the true stories which should be seen by general public specially if it involves serious themes or violence. The result of this change can only be seen after its proper execution. Film Industry being one of the popular and rich industry, this action of ministry may also result in the enhancement of corruption. But surely it will definitely affect the small-scale investors and film makers.

¹³ *Explained: The role, Significance of film certification tribunal, not Abolished.* (12th April 2021, 10.56 a.m.) <https://indianexpress.com/article/explained/the-role-significance-of-film-certification-tribunal-now-abolished-7263409/>.

¹⁴ *‘Sad day for cinema’: Film Certification Appellate Tribunal abolished, Vishal Bhardwaj, Richa Chadha, Hansal Mehta criticize move*” (12th April 2021, 11.25 a.m.) <https://indianexpress.com/article/entertainment/bollywood/film-certification-appellate-tribunal-abolished-vishal-bhardwaj-richa-chadha-hansal-mehta-guneet-monga-criticise-the-move-7262324/>.

CONCLUSION

The basic purpose of all other Appellate Tribunals established under the provisions of the various acts is to assist the board or competent authority with the given procedure of the concerned Act. The Appellate Tribunal which was established in accordance to the provisions of the Cinematograph Act, 1952 was following the same purpose as other Appellate Tribunals. It helped board and film makers to reach to a conclusion and defeat all conflicts between them. To give this power and function to the High Court would only make High Court filled with more and more pending cases. In order to reduce the burden of High Court and Supreme Court, it was suggested many times to create more authorities like appellate tribunals where aggrieved people may approach for the solution to their grievances. But to abolish an appellate tribunal instead of creating more does not intend to reduce the burden of the Higher Courts. The true intentions of the Government behind their actions raises many questions. Whether the government does not trust the decisions given by the Appellate Tribunal? Is Appellate Tribunal not a competent authority to deal with the appeals against the decisions of the Board? Considering the provisions of the Cinematograph Act, 1952, all the major powers are vested in the Central Government. The Central Government is the ultimate authority under this Act. The true intentions of the central government can only be revealed by them with the passage of time. One issues which can arise with this action is that there will be an increase in the number of grievances of the film makers and to sort that they have to stand in the long queues of the High Courts. The actions of the higher authorities should decrease the burden of their citizens to make their lives better.

ALTERNATIVE DISPUTE RESOLUTION V. INSOLVENCY LITIGATION: A CRITICAL ANALYSIS

G. Mahith Vidyasagar

Advocate, High Court of Andhra Pradesh

E-mail id: mahitvidyasagar@gmail.com

Contact Numbers: +919133872528, +918919890966

ABSTRACT:-

In the debt recovery industry, the Arbitration Clause in the agreement between the parties and the insolvency law have attained importance as one of the speedy and most efficient ways for recovering debt from debtors who are malicious. In that a harmonious interaction between the both the law relating to arbitration and law relating insolvency. In India, Arbitration and Conciliation Act, 1996 governs all the matters relating to arbitration and Insolvency and Bankruptcy Code, 2016 (IBC) regulates all the issues pertaining to insolvency. As the use of alternative dispute resolution especially arbitration is increasing in the corporate sector for the settlement of disputes that arise between the parties. The existence of such arbitration agreements between the parties raises certain legal issues regarding the coordination of Arbitration Act and IBC while dealing with the insolvency application. In that light, this article made an attempt to analyse the relation between Arbitration Act and IBC. In India the insolvency matters are separated from ambit of alternative dispute resolution but, in certain other jurisdictions alternative dispute resolution is used to resolve the insolvency disputes also and it achieved access. An attempt has also been made to study the use of alternative dispute resolution in insolvency disputes in US and France and its advantages.

I. INTRODUCTION

Like most of the common law following countries, the law of India may broadly be divided as procedural laws and substantive laws. While substantive law determines the rights and liabilities of parties, or confers legal status or imposes and defines the nature and extent of legal duties, procedural laws prescribe practice, procedure and machinery for the enforcement or recognition of rights and liabilities.¹ In other words, the laws that are enforced are known as substantive laws, while the procedure or rules that help for the enforcement of substantive law is known as procedure laws.²

In India the dispute resolution takes place through courts, tribunals established for specific purposes (like those for recovery of debt by banks or company disputes, among others) or the mechanisms of alternative dispute resolution which includes arbitration, mediation and conciliation. The recent enactment of *Commercial Courts Act, 2015*, provides for the establishment of commercial courts at district level, other than the areas where ordinary civil jurisdiction is exercised by High Court and having commercial divisions (in all High Courts having ordinary civil jurisdiction) and commercial

¹ Glanville Williams, *Learning the Law*, 19 (Sweet & Maxwell, 1982); Law Commission of India 54th Report, At 8.

² *Bharat Barrel and Drum Manufacturing Company Private Limited v. Employees State Insurance Corporation* AIR 1972 SC 1935.

appellate divisions in every High Court for adjudicating and speedy disposing of commercial disputes³ of a specified value which shall not be less than three lakh rupees or such higher value notified by the central government⁴

The Indian Court Procedure is codified in two primary laws namely, Code of Civil Procedure, 1908 (CPC) and the Code of Criminal Procedure, 1973 (CrPC). The Letters Patent Rules may be applied to charter High Courts like, the High Courts of Bombay, Madras, Calcutta and Delhi, the CPC provisions may be overridden sometimes when they are applied. The procedure that is applicable for tribunals, is usually regulated by the statute that established the tribunal (and the rules made from it). It has been held by the courts that, for tribunals the principles contained in CPC would continue to be applicable even certain provisions of CPC not bound on the tribunals.⁵

The legislative and executive branches of the government of India, follow a federal kind of structure, whereas the judicial system of India consists of a three-tier unified structure, with the Indian Supreme Court at the apex level. Next to the Supreme Court, High Courts will function in every state. The subordinate courts that include the district level courts and other courts of lower level will be considered as the lower ones in the hierarchy.

Law declared by the Supreme Court is binding on all other courts in India.⁶ Through the doctrine of *stare decisis*, the law decided by High Courts will have binding nature on subordinate courts⁷ and it may also have persuasive value on other states' High Courts.⁸ Original, appellate and writ jurisdictions are conferred on Supreme Court and all High Courts. The Supreme Court and High Courts have the power to review the administrative actions that include the purposes of enforcing constitutional and fundamental rights guaranteed under Part III of Indian Constitution through writ jurisdiction.

In India the law relating to domestic arbitration, arbitration with foreign-seated and recognition and enforcement of foreign awards is governed by the Arbitration and Conciliation Act, 1996. The Model Law which was adopted by UNCITRAL on June 21, 1985 was the basis for the Indian Arbitration Act. Statutory recognition has also been given to mediation and conciliation through this Arbitration Act.

Alternative dispute resolution is even promoted by courts as a recent growth. In the case of *Afcons Infrastructure Limited v. Cherian Varkey Construction*⁹ the same was deliberated in great detail, where for the better implementation of Section 89 of CPC, guidelines were laid down by the Supreme Court for the courts to follow. Section 89 of CPC encourages for the settlement of disputes by parties through alternative dispute resolution. In *Perry Kansagra v. Smriti Madan Kansagra*¹⁰ recently Supreme Court, recognised for various kinds of disputes, alternative dispute resolution is considered to be a better substitute than litigation, like cases pertaining to trade, commerce and contracts including money claims arising out of contracts, etc. Disputes regarding specific performance or disputes in

³ Commercial Courts Act, 2015 § 2(c).

⁴ *Id.*, § 3, 4, & 2(i).

⁵ See *Groz Beckert Sabool Ltd v. Jupiter General Insurance Co Ltd and Ors* AIR 1965 P&H 477; *Sri Ramdas Motor Transport Limited v. Karedla Suryanarayana* 110 ComCas 193 (Andhra Pradesh).

⁶ Constitution of India, art. 141.

⁷ *Baradakanta Misra v. Bhimsen Dixit* (1973) 1 SCC 446.

⁸ *Pradip J Mehta v. CIT* (2008) 14 SCC 283.

⁹ (2010) 8 SCC 24.

¹⁰ *Perry Kansagra v. Smriti Madan Kansagra*, I (2019) DMC 568 SC.

between insured and insurer, bankers and customers were also considered to be better resolved through an alternative dispute resolution mechanism than litigation.¹¹

Arbitrability involves a simple question of what type of disputes can and cannot be submitted to arbitration. The concept of arbitrability is discussed in detail by Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*,¹² where the court held that:

*“The term ‘arbitrability’ has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under: i) where the disputes are capable of adjudication and settlement by arbitration? ... ii) whether the disputes are covered by the arbitration agreement? ... iii) whether the parties have referred the disputes to arbitration?”*¹³

In the same case the court also enumerated certain examples of disputes that are non-arbitrable, one such dispute is insolvency and winding up of a company.¹⁴

For the purpose of resolving the matters relating to insolvency, Insolvency and Bankruptcy Code, 2016 (IBC) has been enacted. The Insolvency and Bankruptcy Code, is a welcome for the previous fragmented and time consuming Indian insolvency regime which allows the flow of credit more freely and to regain faith in investors and for speedy disposing of their claims. IBC is a comprehensive insolvency legislation as it consolidates the existing laws relating to insolvent companies, limited liability entities (including limited liability partnerships), unlimited liability partnerships, and individuals into a single legislation.

As already stated insolvency and winding up disputes are non-arbitrable, this raises the question of the effects of arbitration on insolvency litigation and why insolvency matters are excluded outside the scope of alternative dispute resolution. In that light, this article made an attempt to analyse the alternative dispute resolution and insolvency litigation. For this purpose, this research paper is divided into several parts. Part II of the paper will analyse the relation between the Arbitration and IBC in India. Part III of the paper will explain about the development of alternative dispute resolution in insolvency litigation. For that purpose this part will study the insolvency law of the United States because it is the best example where alternative dispute resolution is used for resolving insolvency disputes. Part IV of the paper will explain about the application of alternative dispute resolution for resolving insolvency disputes and different models of alternative dispute resolution used in insolvency litigation. Part V deals with the conclusion of the article.

II. SYNC BETWEEN ARBITRATION AND IBC

For recovering outstanding debts, under Indian Law, several forums and/or courts are available for the creditors to approach. Recently, in the debt recovery industry, the *Arbitration Clause and IBC* have attained traction as one of the speedy and most efficient ways for recovering debt from debtors who

¹¹ Zia Mody & Aditya Vikram Bhat, *India in THE DISPUTE RESOLUTION REVIEW* (Damian Taylor ed., 12th edn., Law Business Research Ltd., 2020) .

¹² 2011 (5) SCC 532.

¹³ *Id.*, ¶ 21.

¹⁴ *Id.*, ¶ 22.

are malicious.¹⁵ This section attempts to analyse whether there exists correlation between the most preferred ways of recovering debt with its ultimate objectives or create any chaos to the process of recovery itself.

IBC was enacted to “consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons.” IBC brought a paradigm shift from the *debtor in possession* to the *creditor in possession* system in debt the recovery industry in India. Under the Corporate Insolvency Resolution Process (CIRP) in IBC, an insolvency application against a corporate debtor who failed to repay his debts can be filed by his creditor(s) (operational/financial) and the debtor himself. Section 7 of IBC deals with the initiation of CIRP by financial creditors, while Section 8 & 9 deals with the initiation of CIRP by operational creditors and Section 10 deals with the initiation of CIRP by corporate debtor himself. Let’s keep aside the initiation of CIRP by the corporate debtor himself for the sake of our discussion and concentrate on the financial and operational creditors’ process. IBC provides different procedure of initiation of CIRP by financial creditors and operational creditors.

So, when default is committed by a corporate debtor an application for initiation of CIRP can be filled by financial or the operational creditor(s) as the case may be against the debtor. Similarly, if there exists a dispute between the debtor and creditor the parties can refer the same for arbitration if there exists any arbitration agreement between them. In such a scenario the question here comes is *whether the ongoing arbitration proceedings bars the filing of insolvency petition under IBC or not?* Based on the creditor that filed the CIRP application, the answer to this question will depend.

A. Initiation of CIRP by Financial Creditor

As already stated, Section 7 of IBC deals with the initiation of CIRP by financial creditor(s).¹⁶ Section 7(5) of IBC deals with power of adjudicating authority either to accept or reject the application. This section says as follows:

“....

(5) Where the Adjudicating Authority is satisfied that –

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

....”

¹⁵ Sonam Chandwani, *Insolvency and Bankruptcy: Whether Challenge to an Arbitral Award is an ‘Existing Dispute’ under the Code?* (KS Legal Associates, Jun. 15, 2020).

¹⁶ Insolvency and Bankruptcy Code, 2016, § 7: Initiation of Corporate Insolvency Resolution Process by Financial Creditor- (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Plain reading of the above provision shows that Clause (b) lays down the criteria for rejecting the CIRP application filed by a financial creditor by the adjudicating authority. It says that if the adjudicating authority is satisfied that there is no default committed by a corporate entity, or the application of the CIRP filed is incomplete, or if there exists any disciplinary proceedings against the proposed resolution professional. Under any one of these circumstances only the adjudicating authority can reject the CIRP application. So, it is very clear that any ongoing arbitration procedures does not bar filing of CIRP application under Section 7 by a financial creditor.

The same point has been reiterated by NCLT in the case of *Reliance Commercial Finance Limited vs. Ved Cellulose Limited*.¹⁷ In this case during ongoing arbitration proceedings CIRP application is filed against *Ved Cellulose Ltd.* (respondent). The question that comes here is, how CIRP application is filed when there exists ongoing arbitration proceedings? The learned council on behalf of the petitioners has stated that *under Section 7 of the Code there is no bar to initiate Corporate Insolvency Resolution Process even if arbitration proceeding is pending*.¹⁸ He stated that such a bar only exists with regard to the claim made by the operational creditor under Section 9. For that, he relied on the decision of the Supreme Court in the case of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*.¹⁹ NCLT agreed with the learned counsel on behalf of the petitioner and held that *“The pendency of arbitration proceeding is also not a hindrance under Section 7 of the Code for initiating the Corporate Insolvency Resolution Process.”*²⁰

So it is well settled that ongoing arbitration proceedings cannot bar the initiation of CIRP application against a corporate debtor by the financial creditor. Now the effect of ongoing arbitration proceedings in case of CIRP application filed by an operational creditor has to be considered.

B. CIRP Initiation by Operational Creditor

The operational creditors can also file a CIRP application against a debtor under Section 9 of IBC. However, there is some difference in the process of filing a CIRP application by an operational creditor. Prior to filing of a CIRP application by an operational creditor against a corporate debtor, the operational creditor has to give a demand notice about the unpaid debt amount to the debtor under Section 8 of IBC. Under Section 8(2), the corporate debtor within a period of 10 days of the receipt of such notice shall inform the operational creditor regarding the existence of dispute, if any, or record of the any suit pendency or arbitration proceedings filed before the receipt of such demand notice or the payment of the unpaid operational debt.

If any payment has not been received by operational creditor from the corporate debtor or any notice regarding the existence of a dispute within 10 days of the expiry of receipt of such notice made under Section 8, then the operational creditor may file an application of CIRP under Section 9(1) of IBC. According to Section 9(5) the adjudicating authority shall upon the receipt of such notice within 14 days, either admit or reject the application. Section 9(5)(ii) says about the circumstances where the adjudicating authority reject the application of CIRP. It says as follows:

“...

¹⁷ (IB)-156(PB)/2017.

¹⁸ *Reliance Commercial Finance Limited v. Ved Cellulose Limited*, (IB)-156(PB)/2017, ¶ 5.

¹⁹ Civil Appeal No. 9405 of 2017.

²⁰ *Reliance Commercial Finance Limited v. Ved Cellulose Limited*, (IB)-156(PB)/2017, ¶ 6.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if -

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

...”

The existence of dispute between the debtor and bringing the same to the notice of the creditor is enough ground for rejecting the CIRP application by the adjudicating authority. According to Section 5(6) of IBC dispute includes a suit or arbitration proceedings pertaining to the existence of debt amount, or quality of goods or services, or the breach of a representation or warranty. This clearly shows that pending arbitration proceedings is a bar to file a CIRP application by the operational creditor.

In the case of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*,²¹ Supreme Court held that:

“...once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties.”²²

It has also been clarified by the by the Supreme Court that the existence of the dispute must be prior to the initiation of CIRP: “What important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.” It is also made clear that a dispute includes pending of suit or arbitration proceedings regarding the existence of debt.

Again in case of *K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd.*,²³ the scope of the word ‘dispute’ further expanded by the Supreme Court and held that if there is a petition made under Section 34 of Arbitration and Conciliation Act, 1996, against an arbitral award, is pending it will also be a dispute and it will bar from filing CIRP application. In words of the court: “...we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute...”²⁴ It has also been observed by the Supreme Court that when the petition made under Section 34 against an

²¹ Civil Appeal No. 9405 of 2017.

²² *Id.*, ¶ 40.

²³ Civil Appeal Nos. 21824 & 21825 of 2017.

²⁴ *Id.*, ¶ 18.

arbitral award is clearly and unequivocally barred by limitation in that instances only CIRP process can be invoked by the operational creditor against the corporate debtor.²⁵ In this case it was also clarified by the court that the process of CIRP cannot be initiated when there is application under Section 14 of the Limitation Act is pending in a court.²⁶

So, the effect of arbitration proceedings on CIRP applications filed by financial creditor or operational creditor as the case may be is settled. Now, at this point, the question whether the moratorium granted under Section 14 of IBC is affected by arbitration procedures will arise.

C. Moratorium and Arbitration Procedures

In the realm of insolvency a remarkable observation is, many instances of observation have been seen in the subject matter of moratorium under Section 14 of IBC. The one particular issue that comes every time pertains to inclusion or exclusion of specific proceedings within the scope of moratorium.

The Bankruptcy Law Reforms Committee Report, defined the aim and function of moratorium as:

“One of the goals of having an insolvency law is to ensure the suspension of debt collection actions by the creditors, and provide time for the debtors and creditors to re-negotiate their contract. This requires a moratorium period in which there is no collection or other action by creditors against debtors.”²⁷

*Alchemist Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd.*²⁸ is yet another important case relating the subject of moratorium and an answer to the above mentioned question. This case clarified an enigma relating to the conflict of arbitration with insolvency proceedings. In this case after the declaration of moratorium, the arbitration clause that existed between the corporate debtor and creditor was invoked by the corporate debtor (*Hotel Gaudavan Pvt. Ltd.*), and according to the loan agreement an arbitrator is also appointed. The NCLT, Principal Bench New Delhi, declared that the arbitrator appointment and the proceedings of arbitration were unlawful and not maintainable. Moreover, the bench restricted the corporate debtor from holding any arbitration proceedings. Even after the order of the NCLT, an appeal has been filed by corporate debtor under Section 37 of the Arbitration and Conciliation Act, 1996, before the District Court of Jaisalmer, Rajasthan and the court issued an order for the registration of appeal and a notice demanding reply was issued. It was against the admission of the above application an appeal was filed before the Supreme Court by way of a writ petition.

The Supreme Court in its order observed that, it has been mandated by IBC, that soon after the admission of insolvency application, moratorium period comes into effect under Section 14(1)(a) and subsequently, against corporate debtor, any admission of new proceedings or any pending suit continuation is barred. In the words of the court:

“The mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against Corporate Debtors.

²⁵ *Id.*, ¶ 19.

²⁶ *Id.*, ¶ 19.

²⁷ THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE VOLUME I: RATIONALE AND DESIGN, November 2015.

²⁸ AIR 2017 SC 5124.

This being the case, we are surprised that an arbitration proceeding has been purported to be started after the imposition of the said moratorium and appeals under Section 37 of the Arbitration Act are being entertained. Therefore, we set aside the order of the District Judge dated 06.07.2017 and further state that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is nonest in law.”²⁹

In such type of cases, the issue pertaining to the term *proceedings* in Section 14(1)(a) of IBC is that the word be interpreted in order to include ‘*all legal proceedings*’ or should it understood to consider a legal proceeding which is of particular in nature, like proceedings of debt recovery which may have adverse effects on the assets of debtor at the time of ongoing arbitration proceedings.

A bare reading of the text of Section 14 made it clear that all legal proceedings are included. The legislature intent with respect to the period of moratorium is that there should be a period during which any kind of debt recovery actions cannot be initiated against the debtor. The very nature of the proceedings of insolvency will be nullified if any legal proceedings are initiated against the corporate debtor.

Previously, in the case of *Power Grid Corporation of India Ltd. v. Jyothi Structures Ltd.*³⁰ also the matters of arbitration proceedings against the moratorium period arose. In this present case, under Section 34 of the Arbitration and Conciliation Act, 1996, a petition is filed for setting aside an arbitral award passed in favour of corporate debtor. The *locus classicus* argument of respondent (corporate debtor) was that, if there is a stay on the arbitration proceedings, it would not be possible for the respondent to execute the arbitration award and recover his own debts, which his financial situation will be affected further.

While deciding the case in favour of the respondent the Delhi High Court observed that granting relief to corporate debtor by way of a ‘standstill’ period during which it can build its financial capacity to clear off its debts.³¹ It was also observed that, “*extending of the unexecutability of the award would rather prevent the corporate debtor from recovering money due to it and adding to its financial corpus.*” Therefore it is declared by the court that “*Section 14 of the Code would not apply to the proceedings which are in the benefit of the corporate debtor*” and those proceedings should not be treated as ‘*debt recovery action.*’³²

Therefore, arbitration proceedings nature and the specific facts and situations will decide the application of moratorium under Section 14 to arbitration proceedings. The moratorium shall come into effect if the arbitration proceedings is harmful to the corporate debtors’ financial position and it shall not come into effect if the proceedings are for the ultimate advantage of the corporate debtor.

²⁹ *Id.*, ¶ 5, 6.

³⁰ O.M.P. (COMM) 397/2016

³¹ *Id.*, ¶ 8.

³² *Id.*, ¶ 10.

D. Conflict between Arbitration Act and IBC

Recently, the order of NCLT Mumbai Bench in case of *Indus Biotech Private Limited v. Kotak India Venture Fund-I*³³ becomes a centre of discussion for permitting the *Arbitration and Conciliation Act of 1996* to prevail over IBC. Based on the reason that there is an existence of an arbitration agreement between the parties, NCLT rejected the admission of an application made under Section 7 of IBC.

In this case under Section 7 NCLT was approached by *Kotak* to initiate CIRP against *Indus*. Prior to the decision of NCLT on the admission of the insolvency application, the arbitration clause present in the Share Subscription and Shareholders Agreement was invoked by *Indus*. Subsequently, before NCLT an interim application was filed by *Indus* under Arbitration Act Section 8 asking for the dismissal of the application initiated under IBC Section 7 as an arbitration agreement existed between the parties.

The primary question that came up for consideration before NCLT is “*Will the provisions of the Arbitration & Conciliation Act, 1996 prevail over the provisions of the Insolvency & Bankruptcy Act, 2016? If so, in what circumstances?*”³⁴The following are the findings of the Bench in this case.

It is established law that *generalia specialibus non derogant*- which means special law prevails over the general law. The Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*³⁵ declared that the Arbitration Act is a general law. In this case the court while answering a question under the Electricity Act, held that as the Electricity Act is a special legislation and it would prevail over the Arbitration Act. Whereas, the apex overturned its decision in *Consolidated Engineering Enterprises v Principal Secretary, Irrigation Department & others*,³⁶ stating that the Arbitration Act is a special one which consolidated and amended the law regarding arbitration and the issues concerned therewith.

The Supreme Court in *Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums*,³⁷ declared that if there is an existence of an arbitration clause between the parties there exists a compulsory duty on the court to refer the dispute that is being raised in between the parties to the contract, to an arbitrator. The decision given by same court in *P Anand Gajapathi Raju & others v. PVG Raju (dead) & others*,³⁸ is quoted with acceptance, in which it was declared that “*the language of Section 8 of the Arbitration and Conciliation Act, 1996, is peremptory and the court is under an obligation to refer parties to arbitration.*”³⁹

The Preamble of IBC reads that it is an Act to “*consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons ... in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, available of credit and balance the interests of all the stakeholders*” The Preamble of the Arbitration & Conciliation Act,

³³ IA No.3597/2019 & CP (IB) No.3077/2019.

³⁴ *Id.*, ¶ 5.5.

³⁵ (2008) 4 SCC 755.

³⁶ (2008) 7 SCC 169.

³⁷ (2003) 6 SCC 503.

³⁸ (2000) 4 SCC 539.

³⁹ *Id.*

1996, reads that “it is an Act to consolidate and amend the law relating to domestic arbitration ... as also to define the law relating to conciliation”

Section 238 of IBC reads as:

“238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

The interpretation rules are well-settled fairly:

- A specific subject is regulated by a provision of law and the same subject is regulated by provisions in a subsequent law, no presumption is there that the earlier law is repealed by the later law. At the time of making the later rule, it is deemed that the law making authority knows the law that is in existence on the subject. If the earlier rule is not repealed by the subsequent rule then no assumption of an intention to repeal the earlier rule could be there.
- If there exists general law provisions and special law provisions regulate an issue, endeavour should be made by the court to apply harmonious construction for the said provisions. But, if either expressly or impliedly it is clear from the intention of the rule making authority regarding which law should prevail, effect shall be given to the same.
- In spite of an effort to construe harmoniously if there is a persistence of repugnancy or inconsistency it is not presumed that the later general law is repealed by the prior special law. Despite the subsequent general law, the application of the earlier special law will continue. But if there is a clear intention of making universal application of a rule by way of overriding the prior special law is clearly evident, then such earlier special law will be prevailed over by the later general law.
- If the subsequent special law is inconsistent or repugnant with a prior general law, the prior general law will be prevailed over by the subsequent special law.

The NCLAT in *Innovative Industries Limited v. ICICI Bank & another*,⁴⁰ held that, it has been provided under Section 7(5) of IBC that the application filed by a financial creditor is admitted or rejected if the adjudication authority is satisfied that the documents are complete or incomplete. If the adjudicating authority is satisfied that a default has happened after ascertaining, then it may admit the financial creditor application. In other way, it has been mandated by the statute that the adjudicating authority has to determine and note down satisfaction regarding the happening of a default prior to the admission of the application. Simple claim of the financial creditor stating that a default has happened is not enough.⁴¹

Based on the above findings, the Bench in *Indus Biotech Private Limited v. Kotak India Venture Fund-I*,⁴² held that:

⁴⁰ 2017 SCC OnLine NCLAT 70.

⁴¹ *Id.*, ¶ 57, 58.

⁴² IA No.3597/2019 & CP (IB) No.3077/2019.

“the dispute centres around three things – (1) The valuation of the Respondent/Financial Creditor’s OCRPS; (2) The right of the Respondent/Financial Creditor to redeem such OCRPS when it had participated in the process to convert its OCRPS into equity shares of the Applicant/Corporate Debtor; and (3) Fixing of the QIPO date. All of these things are important determinants in coming to a judicial conclusion that a default has occurred. The invocation of arbitration in a case like this seems to be justified.”⁴³

In its decision the Bench failed to answer the primary question that “Will the provisions of the Arbitration & Conciliation Act, 1996 prevail over the provisions of the Insolvency & Bankruptcy Act, 2016? If so, in what circumstances?” It answered the way in which an application filed under Section 7 of IBC has to be dealt with.

If one looks at the IBC and Arbitration Act, it will be clear that both are special laws in their respective fields of operating. Arbitration Act is a consolidated Act to deal with the matters relating to arbitration both domestic and international and IBC is a consolidated Act to deal with the insolvency related matters. In such cases both the Acts have to be harmoniously interpreted. Like as stated by the Bench in *Indus Biotech Private Limited v. Kotak India Venture Fund-I*,⁴⁴ “seeking a reference to arbitration in a petition filed under Section 7 of the IBC- is something that is *res integra*,” and it is yet to be answered.

This is the current position of the relation between arbitration and insolvency law in India. While, in India it is clearly established that the matters of insolvency are not arbitrable, and the other modes of alternative dispute resolution also cannot be used for resolving insolvency disputes because IBC came as a special legislation to deal with the insolvency related aspects and no law or judicial precedent in the country providing for the settlement of insolvency disputes by using alternative dispute resolution. However, there are certain jurisdictions where alternative dispute resolution is applied even for resolving insolvency disputes. The use of alternative dispute resolution and the advantages of it has been discussed in the following section.

III. ALTERNATIVE DISPUTE RESOLUTION IN INSOLVENCY DISPUTES

Money is the major issue in insolvency disputes. At the time when debtor is encountered with financial difficulties, creditors want to be paid what they are promised. The usual problem in insolvency disputes is that if a case of insolvency is started, the creditors fight for the assets which are in a limited pool. Subsequently, the debtor will become liquidated, it means an end to the operations of business, employment and payment of tax. In negotiation terms, it is a lose-lose situation.

From long back, only courts are limited with the adjudication of insolvency disputes. It is because equality in respect of creditors’ claims (*pari passu*), impartial gathering and distribution of the assets of the debtor. However, over the last few decades, there is change in that perception, where not only through adjudication but also through the methods of alternative dispute resolution insolvency disputes are resolved. Usually an insolvency regime which is of either pro-debtor or pro-creditor will be chosen

⁴³ *Id.*, ¶ 5.14.

⁴⁴ IA No.3597/2019 & CP (IB) No.3077/2019.

by the legislator.⁴⁵ The methods of alternative dispute legislation benefits the parties in reaching an amicable agreement through negotiation and adjudication will be avoided.

A. Alternative Dispute Resolution development in Insolvency Disputes

In the 1960s, the United States had begun to use mediation to settle the community and family disputes because of the rise in disputes of civil nature and the changes of socioeconomic that were taking place at that time.⁴⁶ Although it attained a quick traction, it took some time to incorporate it for resolving the disputes of insolvency. The *Pound Conference* was the turning point, where “multi-door courthouse” was introduced by Frank Sander, Professor of Harvard and encouraged considering other dispute resolution methods. Instead of going through courthouse doors and starting adjudication, “alternative doors” - where similar results would be produced (dispute resolution) should be used. He emphasized that there is “a rich variety of different processes, which, I would submit, singly or in combination, may provide far more ‘effective’ conflict resolution.”⁴⁷ These words formed as 3 basic pillars of alternative dispute resolution. First one is, a variety of dispute resolution methods would be offered by different “doors”. Second one is, either “singly or in combination” those methods can be utilised, which means different methods of alternative dispute resolution may be used for resolving the same dispute (and alternative dispute resolution can go hand in hand with adjudication). Third one is, it must be effective.

When California Southern District Bankruptcy Court incorporated the mediation program in 1986, then alternative dispute resolution (mediation) was announced for disputes of insolvency.⁴⁸ After few years, in the United States the use of mediation has had happened when *Greyhound Lines Inc.* underwent bankrupt and a mediation plan of pre-reorganisation was established to settle thousands of claims regarding personal injury and damage to property that were brought against the company, by the claimants in regard to traffic accidents relating to Greyhound.⁴⁹ This case can be cited as a good example for multi-party dispute resolution where each creditor was individually dealt by the debtor.

In the dispute of Greyhound, the alternative dispute resolution method that was used contains three different steps. First one, an application for the wages that were lost, medical expenses and other damages had to be completed by the creditor (the “offer and exchange stage”). Second one, damages negotiation between the parties. In the case where the creditor is reluctant to take part in this phase or the parties did not reach any conclusive decision then, they participate in mediation for a 60 days period. Arbitration would be used as recourse in the third phase, if the parties did not come to an agreement. In the first phase itself, fifty percent of the claims were determined.⁵⁰ This helps to resolve the dispute quickly, avoid litigation and its associated costs, the parties’ interest is reconciled and settle the issue amicably, and the case is an illustration of win-win negotiation.

⁴⁵ Lechne, R., *Waking from the Jurisdictional Nightmare of Multinational Default: the European Council Regulation on Insolvency Proceedings*, 19 ARIZ. J. INT’L COMP. L. 975, 977 (2002).

⁴⁶ Welsh N. A., *You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 9 PENN STATE LAW LEGAL STUDIES RESEARCH PAPER 427, 431 (2010).

⁴⁷ McAdoo B. & Welsh. N. A., *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L. J. 399, 402 (2005).

⁴⁸ Welsh N. A., *supra* note 46, 441.

⁴⁹ *Id.*

⁵⁰ Desgrosseilliers. M. L. & Shelter G., *The Use of Alternative Dispute Resolution Procedures to Resolve Tort Claims*, 18 BANKR. NORTON J. BANKR. L. PRAC. 19, 32 (2009).

A law for regulating the alternative dispute resolution was established in the view of successful examples, increase in the bankruptcy cases number and increasing costs of litigation. An important legislative leap in the way of using alternative dispute resolution for settling insolvency disputes was the enactment of the Alternative Dispute Resolution Act, 1998. It required the authorization of alternative dispute resolution by each federal district court in “all civil actions, including adversary proceedings in bankruptcy.”⁵¹ For example, the Delaware District Bankruptcy Court in 2004 declared that through mediation an attempt has to be made by the parties to come to an agreement before some adversary proceedings. Subsequently, during the period of 2000 to 2011 in 60% of reorganisation disputes alternative dispute resolution method was used in the United States.⁵²

In the ‘*Proposal for a Directive Insolvency*,’ it was acknowledged by the European Commission that there is a requirement of a new mechanism for resolving insolvency disputes. Restructuring and giving second chance will be the foundations for the upcoming Directive on Harmonization of Insolvency Regulation in all member states of European Union.⁵³ Avoiding unwanted litigation and searching for new paths for rescuing the business will be encouraged by that legislation. Moreover, the latest Insolvency Regulation of Europe⁵⁴ has widened the ambit of regulation when compared with the previous ones and pre-insolvency dispute resolution is also included in it.⁵⁵

Member states of the EU gradually accepted the alternative dispute resolution. This is contrary to the United States alternative dispute resolution, in which it developed from legislation but not through case law. The methods of pre-insolvency dispute resolution that are basically aimed for debtor rescue, have been introduced by most of the member States in the EU.⁵⁶ For instance, in French Law two special procedures are provided: the ad hoc mandate (*mandat ad hoc*) and conciliation.⁵⁷ The insolvency plan procedure (*Insolvenzplanverfahren*)⁵⁸ in Germany allows to settle insolvency plan (*Insolvenzplan*) between debtor and creditors through negotiation.

The necessity to decrease the number of insolvency disputes and stability ensuring in the market become the reasons for the growth of alternative dispute resolution in resolving insolvency disputes. One of the prominent elements responsible for the proper functioning of civil and corporate law systems is, Insolvency law and on the complete economic structure it has a notable impact.⁵⁹ In socioeconomic view, stopping a company from becoming bankrupt at the time it is having financial problems an opportunity is provided for the continuation of employment, all sources that are available

⁵¹ Alternative Dispute Resolution Act of 1998 (28 U.S.C.A), § 654.

⁵² International Insolvency Institute, *International ADR 2.0: Big Solutions for Big Problems*, available at: <https://www.iiiglobal.org/sites/default/files/transnationalalternativesgrowingrolesofalternativedisputeresolutionintransnationalinsolvencycases.pdf>.

⁵³ European Commission Proposal for a Directive on Insolvency, Restructuring and Second Chance Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU.

⁵⁴ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141.

⁵⁵ *Id.*, art. 1(1): This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation.

⁵⁶ European Law Institute, *Rescue of Business in Insolvency Law*, available at: http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf

⁵⁷ Art. L611-1 L611-16 of the *Code de commerce*, available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379>.

⁵⁸ Art. 217-234 of *Insolvenzordnung*, available at: <https://www.gesetze-im-internet.de/inso/>.

⁵⁹ WESSELS, B., ET. AL., *INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS* (Oxford University Press, 2009).

will be utilized efficiently and protects relationships, like with small goods suppliers who are less in number and customers and buyers of goods and services.⁶⁰

From the past few decades there has been a paradigm shift in insolvency disputes because of the alternative dispute resolution. It has turned into a counterbalance to adjudication and attained prominence as an appropriate method for answering the problems of disputes of insolvency by permitting the parties for negotiating the repayment of debt other than lawsuit filing.

B. Advantages of Alternative Dispute Resolution in Insolvency Cases

Alternative dispute resolution is different from adjudication. Basically, alternative dispute resolution is any process which is specifically used for resolving legal disputes through compromise with the assistance of third-party and without any judiciary involvement.⁶¹ Different types of alternative dispute resolution is available, but third-party (a mediator, conciliator or negotiator) involvement is crucial. Based on the parties' negotiation skills and good faith, the success of alternative dispute resolution is dependent.

First thing is, the possibilities of a win-win situation will be increased and the possibilities of a lose-lose situation will be decreased by alternative dispute resolution. The physical claims of both the parties will be satisfied through the mitigation of their demands to certain periods with alternative dispute resolution. The negotiations happened in between the parties which are scrutinised by a third-party forms the basis for alternative dispute resolution. It is possible for the negotiation to "separate the people from the problem"⁶² and arrive at a common decision avoiding any of the limitations put-forth by law. Unfortunately it is on the "winner/loser" paradigm that adjudication is based,⁶³ which means at the end one party will lose the case. Because of this the commercial relations between the business partners and trustworthiness will be severed. In some cases, not only the financial exhaustion but the psychological depletion of the parties also resulted by adjudication.⁶⁴

Second thing is, in certain cases final resolution of the dispute is not the aim. Upon the parties often alternative dispute resolution is not binding because to resolve the dispute neither the parties nor the mediator are empowered.⁶⁵ It has been felt by certain scholars that alternative dispute resolution promotes dispute settlement⁶⁶ instead of attaining final resolution (alike to decision of *res judicata* in court). In other ways the parties are allowed to calculate their position and look for the ultimate resolution of dispute in future: "*Even if mediation fails to bring a settlement immediately, the shift in the parties' attitudes regarding their own positions can lead to a settlement in the future.*"⁶⁷ The

⁶⁰ *Id.*

⁶¹ Woodward, W. J. Jr., *Evaluating Bankruptcy Mediation*, J. DISPUTE RESOL. 1, 6 (1999).

⁶² Kelly, E. J., & Kaminskiene, N., *Importance of emotional intelligence in Negotiation and Mediation*, 2 INT'L COMP. JURISPRUDENCE 55 (2016).

⁶³ Tennille, et al., *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPPERDINE DISP. RESOL. L. J. 1, 66 (2010).

⁶⁴ Welsh N. A., *supra* note 46, 439.

⁶⁵ J. A. Esher, *Alternative Dispute Resolution in U.S. Bankruptcy Practice*, 4 UNI. MASS. L. REV. 76, 79 (2009).

⁶⁶ Tennille, et al., *supra* note 63, at 59.

⁶⁷ Davis, A., *Moving from Mandatory: Making ADR Voluntary in New York Commercial Division Cases*, 8 CARDOZO J. CONFLICT RESOL. 283, 293 (2009).

parties are encouraged to bargain and to arrive at a common solution in alternative dispute resolution.⁶⁸ In adjudication, in every case a final and binding order is rendered.

Third one is, between the parties a “normal” relationship is preserved by alternative dispute resolution.⁶⁹ Generally, it is a private process but not a public one, where the parties were allowed to avoid the dispute publicity. Specifically, in business relations this is a valuable benefit (protecting commercial secrets & other necessary information). In contrast, all the adjudication required disputes become public (selected cases are exempted) and as a common rule, for proceedings the court has to permit public access.

Fourth one is, flexibility is there in alternative dispute resolution⁷⁰—it permits the parties to come to an agreement by way of persuasion, and encourages “party-driven solutions.”⁷¹ The procedure as well as the substantive rules can be decided by the parties. Strict rules of procedure from which no derogation is allowed are bound upon the parties in adjudication (particularly in insolvency cases). The effectiveness of the speedy settlement of the dispute is reduced by the civil (insolvency) proceedings rules.⁷²

Wholly speaking, it is made possible by the alternative dispute resolution in insolvency disputes to get over the inherent deficiencies of adjudication (e.g., cost, publicity, lack of flexibility). This is valuable because on litigation, salaries of trustees and other costs the assets of the debtor are not wasted. The problematic financial position of the debtor is revealed with commencement of case of insolvency. Strong incentives are provided by alternative dispute resolution for both the parties to participate in speed and efficient process of dispute resolution and consider for a mutual business solution.

IV. APPLICATION OF ALTERNATIVE DISPUTE RESOLUTION IN INSOLVENCY DISPUTES

One of the best ways to resolve business disputes is alternative dispute resolution. However, the extent of which it can be used in insolvency disputes will be questioned. The disputes of insolvency related matters are different in nature of, public interest, a lot of people involvement, claims ranking, and stringent rules for the asset distribution of the debtor. In those circumstances it poses a question; is alternative dispute resolution a suitable way for reconciling all those inequalities?

For resolving insolvency three ways have been discovered by a recent comparative study:

- *Workouts* (an agreement between the debtor and the creditor on a solution for the debtor’s financial problems);
- *Pre insolvency proceedings* (rescuing the debtor’s business with minimal involvement of the judiciary or none at all);
- *Formal* (restructuring and insolvency) *proceedings*.⁷³

⁶⁸ Welsh N. A., *supra* note 46, 436.

⁶⁹ Tennille, et at., *supra* note 63, at 59.

⁷⁰ BLAKE, S., ET. AL., A PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION, at 6 (Oxford University Press, 2016).

⁷¹ Tennille, et at., *supra* note 63, at 3.

⁷² BLAKE S., ET. AL., *supra* note 70, 6.

⁷³ European Law Institute, *supra* note 26.

The aim of all the above three models is to resolve insolvency (or possible insolvency) disputes, but however there are differences in their ways and aims. Although an important role has been played by alternative dispute resolution in each of these models, the prominent where it can be applied is pre-insolvency proceedings, which helps for avoiding adjudication. Certain important features of these models are elucidated here.

Workouts:

In case of workouts, the position of debtor is still solvent and negotiations are made with the creditor(s) regarding the repayment of debt(s). Here the debtor's insolvency is probable, but not imminent.⁷⁴ Therefore creditors need not to fear about the losing of their debt payment. Against the debtor an enforcement stay is not pertinent because usually, the settlement doesn't involve every creditor and the activities of business of the debtor is still in continuation.⁷⁵

The agreements of workout include various modes for resolution of disputes, for example, re-financing, changes to the debt contract, a property/property swap, a property/equity swap, or an equity/equity swap. In other way round, there is negotiation regarding debt repayment between the debtor and creditor. This is referred to as *creditor's scheme of arrangement* under the UK law. This scheme of arrangement is not a process of insolvency but falls within the purview of Companies Act, 2016 in the UK.⁷⁶ It is a court accepted compromise or arrangement between a company and its creditors, or any class of them, to reorganise or reschedule the company's debts.⁷⁷ Generally, these workouts or scheme of arrangements are governed by law of contract (freedom of contract), and the laws of insolvency are not applicable (other than for some aspects of procedure).

Mostly there won't be any involvement of judiciary in case of workouts⁷⁸ and on the repayment of debt the parties have to bargain. Which rigid alternative dispute resolution methods are used will be based on the parties (or the legislator). For example, the conferences of mediation and judicial settlements can be applied, because there is no need of comprehensive financial analysis of the dispute. The process of *ad hoc mandate (mandate ad hoc)* in French system of insolvency is a very good example of a workout.⁷⁹ Typically, in case of workouts, contract law is applicable, which means on the repayment terms of the debt the parties are free to agree upon.

Pre-insolvency Proceedings

These proceedings are judicial proceedings.⁸⁰ Even though rescuing business is the aim, these insolvency proceedings mostly pertain to the application of insolvency law than to contract law. This process is classified into two types:

⁷⁴ *Id.*

⁷⁵ Remigijus Jokubauskas, *Alternative Dispute Resolution in Insolvency Disputes*, 9 SOCIETAL STUDIES 244, 250 (2017).

⁷⁶ For further discussion on the *company's scheme of arrangement* see Ian Johnson, *England and Wales in THE INSOLVENCY REVIEW* at 54 (Donald S Bernstein ed., 6 edn., Law Business Research Ltd., 2018). The English Courts' jurisdiction to sanction a scheme hinges on their jurisdiction to wind up on the scheme company to question.

⁷⁷ The court has, however, stayed proceedings for summary judgment in a case where steps to implement a scheme were well advanced and it had a reasonable prospect of success: *Re Vietnam Shipbuilding Industry Group & Ors.* [2013] EWHC (Comm) 1146.

⁷⁸ In some jurisdictions, courts participate in workouts. For example, in the UK, Belgium, Greece and Spain, the court may participate in this procedure in order to ensure the lawfulness of the agreement reached.

⁷⁹ Remigijus Jokubauskas, *supra* note 75.

⁸⁰ *Id.*

- *Workout supporting proceedings.* This process involves lesser instruments for bargaining over debt and all the creditors (shareholders) are not affected. There will be involvement of only some creditors. The threshold test of insolvency is not applicable.
- *Restructuring proceedings.* Various dispute resolution procedures are involved in this procedure and there is involvement of all the creditors. The test of insolvency threshold is also applicable (a debtor who is insolvent usually does not have right to commence this process).

These two types are usually distinguished with the effect they cause on the business of the debtor and claims of the creditors. No moratorium against the debtor in respect of claims is applicable, because only some creditors are concerned in this procedure. Accordingly, only upon the creditors involved in this procedure there will be the binding nature of the agreement. This is contrary to the restructuring proceedings. The extent of the judiciary involvement is another difference. There will be a minor role for the courts to play in case of workout supporting proceedings (generally, it opens the proceedings, appoints the mediator, and confirms the lawfulness of the debt agreement), and on the parties negotiation skills the dispute resolution is primarily depended. Whereas, in the second instance, a more active role is played by the courts in the resolution of the dispute.

Usually, prior to the commencement of this procedure the debtor must be insolvent, but this requisite depends on domestic law. For example, a conciliation process in France is applicable even for up to 45 days if there is a cash flow insolvency of the debtor. Maybe an enforcement stay is established against the debtor.⁸¹

Formal Proceedings

Managing the insolvency disputes of the debtor is the aim of formal insolvency proceedings.⁸² In contrast to workouts & pre-insolvency proceedings, rescuing the debtor is not an objective here. Here in this case, the prominent role will be played by laws of insolvency and the statutory rules regulates the negotiations between the creditors and debtors.

In *any* stage of insolvency disputes, alternative dispute resolution plays an important role. The use of alternative dispute resolution became common in both the United States and France. Pro-debtor insolvency regimes have been established by both the countries which are aimed for ensuring the continuity of business of the debtor. The key alternative dispute resolution models in disputes of insolvency is given in the following section.

A. Models of Alternative Dispute Resolution for Insolvency Disputes in U.S.

U. S. is known as the crib of alternative dispute resolution in insolvency disputes. The present model of alternative dispute resolution in the disputes of insolvency derived from labour, commercial, civil rights, environmental and family law.⁸³ New ways of resolving business disputes emerged in the 1970s

⁸¹ *Id.*

⁸² European Law Institute, *supra* note 26.

⁸³ STEFFEK, F., *REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS*, at 430 (Unbearth, H. ed., Oxford Hart Publishing, 2013).

and 1980s, like “*multi-party negotiation, mediation, arbitration and hybrid process like community consensus building.*”⁸⁴

The goal of United States bankruptcy law is to guarantee that there is a fair treatment of creditors and a fresh start is given to debtors (‘companies can reinvent themselves’).⁸⁵ The approach of pro-debtor means recovering the business is the aim of the bankruptcy regime. When there is a court order referring the parties to mediation then mediation will usually commence.⁸⁶

Nearly half of the bankruptcy courts in the United States currently, have either local rules/ general orders where mediation is required in particular issues.⁸⁷ The bankruptcy courts are given complete discretion for establishing local rules for alternative dispute resolution procedures which are court annexed. For example, the U.S. Bankruptcy Court for the District Delaware Local Rule 9079-5a, establishes that “*the Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case.*”⁸⁸

The Bankruptcy Reform Act of 1978 (Bankruptcy Code), is the primary legislation that governs the procedure of bankruptcy in the United States. The present kind of the Bankruptcy Code is codified as *Title 11 of the United States Code* and liquidation (winding company of a dying company), is regulated by *Chapter 7* and reorganisation- such as permitting negotiations between a creditor(s) and debtor which lead to finalisation of restructuring plan is regulated by *Chapter 11*.⁸⁹

The methods of alternative dispute resolution are not established in the U.S. Bankruptcy Code, but according to Alternative Dispute Resolution Act, 1998 Section 3(b), the district courts are empowered to the methods of alternative dispute resolution in all actions of civil nature which includes adversary proceedings in bankruptcy.⁹⁰ It has been expressly provided under this law that every district provide “*at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, mini-trial, and arbitration.*”⁹¹

The procedure of reorganisation contained in Chapter 11 can be started voluntarily (when a petition is filed by the debtor himself in the court)⁹² or involuntarily (when the aggregation of the claims of three or more creditors is more than 5,000 dollars or a single creditor whose claim is 5,000 dollars or above, to file a petition if there are less than 12 creditors).⁹³ In the second instance, it is on the creditors to prove that either the undisputed debt is not being paid by the debtor and became due, or to take charge on all the substantial properties of debtor a guardian or trustee was appointed, within one hundred and

⁸⁴ *Id.*, at 431.

⁸⁵ Vance D., *Corporate Restructuring*, at 243 SPRINGER (2009).

⁸⁶ F.N. ATLAS, ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK (S.K. Huber ed., American Bar Association, 2000).

⁸⁷ International Insolvency Institute, *supra* note 52.

⁸⁸ Mediation of District court of Delaware, Rule 9019-5a.

⁸⁹ Chapter 11 (11 U.S.C.), art. 1121-1129.

⁹⁰ Alternative Dispute Resolution Act of 1998 (28 U.S.C.), art. 651(b).

⁹¹ *Id.*, art. 651(a).

⁹² *Supra* note 89; art. 301(a): “A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.”

⁹³ *Id.*, Art. 303(a): “An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.”

twenty (120) days prior to petition filing.⁹⁴ If the petition is submitted by the debtor, an automatic stay of all collection actions comes into effect.⁹⁵ The usual mode of alternative dispute resolution used in the United States for resolving bankruptcy cases is mediation, it is used for everything ranging from “objections of simple claims to complicated multi-party negotiations of Chapter 11.”⁹⁶

B. Alternative Dispute Resolution for Insolvency Disputes in France

Providing sanctions for debtors who failed to repay the creditor’s debts went on for so many years in the insolvency regime of France. However, in the 1990s it was established that the primary aim of the insolvency law is to “*preserve the interests of the company... and its creditors, and only secondarily to preserve the interests of the creditors.*”⁹⁷ Book VI of the *French Commercial Code (Code de commerce)*, primarily governs the insolvency disputes in France, since 2006.

As per the insolvency regime of France, based on the debtor’s financial position the insolvency procedure that is used will be decided. The following are the options:

- Court-assisted pre-insolvency proceedings (ad hoc mandate and conciliation);
- Court-controlled pre-insolvency proceedings (preservation);
- Insolvency (bankruptcy) proceedings (judicial rescue and judicial liquidation).

Negotiations in between creditors and debtor will occur under the guidance of ad hoc mandate (*mandat ad hoc*)⁹⁸ or conciliator⁹⁹, in court-assisted pre-insolvency proceedings. The courts are conferred with limited powers in this situation (initiation and end of proceedings, debt repayment agreement approval). Whereas in the remaining two procedures there is a substantial role played by the courts for ensuring better insolvency (pre-insolvency) proceedings that aimed either to protect or liquidate the debtor.

The primary aim of the court assisted pre-insolvency proceedings is to make a possible harmonious agreement between the primary creditors and the debtor.¹⁰⁰ In contrast to preservation (*sauvegarde*) and insolvency procedures of other kinds, as alternative dispute resolution is not public it doesn’t trigger an order for enforcement of claims against the debtor. The aim of both ad hoc mandate and conciliation is to discuss legal, economic or financial problems of debtor only if he is a cash-flow solvent.¹⁰¹ It has been established by the *Code de commerce* that, only when the company is facing problems which may risk its business operations (“*difficultés de nature à compromettre la continuité de l’exploitation*”), these procedures can be utilised.¹⁰² Even though the notion ‘*difficultés*’ has not been defined by law, it is related to the economic, financial or fiscal difficulties that have been encountered by the debtor.

⁹⁴ Art. 303(h) of U.S. Code 301.

⁹⁵ Vance D., *supra* note 85, at 146.

⁹⁶ J. A. Esher, *supra* note 65, at 78.

⁹⁷ C. DUPOUX & C. NERGUARARIAN, COMMENCEMENT OF INSOLVENCY PROCEEDINGS, NATIONAL REPORT FRANCE (Faber D. et. al., eds., Oxford Univ. Press, 2012).

⁹⁸ Code de commerce, art. L611-3.

⁹⁹ *Id.*, art. L611-6.

¹⁰⁰ C. DUPOUX & C. NERGUARARIAN, *supra* note 97.

¹⁰¹ Except insolvency up to 45 days is allowed in conciliation procedure.

¹⁰² Code de commerce, art. L611-2.

Confidentiality and flexibility are the two prominent benefits of the ad hoc mandate and conciliation.¹⁰³ Confidentiality refers to all the information regarding the negotiations between the debtor and the principal creditors must be kept secret. The importance of this principle has been stressed by the French Court of Cassation (*Cour de cassation*). In a case¹⁰⁴, it had been ruled by the Court of Cassation that above the right to expression (announcing the financial position of the debtor in public), confidentiality will prevail in ad hoc mandate and conciliation. It has also been stated there is no right conferred upon the media to publish any information pertaining to the ad hoc mandate or conciliation and the financial situation of the debtor as it may affect the alternative dispute resolution outcomes. After analysing Art. L611-15 of the *Code de commerce*, it was concluded by the court that: “[b]ecause information related to conciliation or the ad hoc mandate is of a confidential nature, the law has restricted the freedom of expression for the legitimate purpose of preventing the financial difficulties of companies.”¹⁰⁵ In that case the court concluded that the freedom of expression granted under the European Convention of Human Rights is not an absolute one it is restricted through law.

Flexibility is related with the parties’ freedom to reach an amicable agreement in the manner they wished. The manner in which parties shall reach an agreement and the terms of an agreement is not established by the *Code de commerce*, although for rescuing the business of the debtor, peaceful settlement must help.¹⁰⁶

In either of the procedures for commencing the pre-insolvency procedures, only the debtor can approach the court.¹⁰⁷ Both the methods are used for the corporate entities, individuals who perform commercial and agricultural business operations, and self-employed persons who undertake non-commercial activities.¹⁰⁸ In case of conciliation the request (*requête*) of the debtor will be submitted to a commercial court (*tribunal de commerce*) and while in case of ad hoc mandate, the request will be submitted to high court (*tribunal de grande instance*) or a commercial court.

Prevention of the insolvency of the debtor is the basic aim of these procedures. This is alike to rescuing the business which is there in Chapter 11 of US Bankruptcy Code. Whereas, in the bankruptcy law of the United States, during the process of bankruptcy (after its commencement), only alternative dispute resolution is used. In the legal system of France the pre-insolvency proceedings will only be initiated by the debtor. It has been proven that in practice both the pre-insolvency procedures are successful. For example, in 2015 in France, nearly 1000 conciliation procedures were opened and nearly 70% is the success rate for these proceedings.¹⁰⁹

This is how the methods of alternative dispute resolution is used in insolvency disputes in the United States and France.

¹⁰³C. DUPOUX & C. NERGUARARIAN, *supra* note 97.

¹⁰⁴Cour de cassation, civile, Chambre commerciale, 15 décembre 2015, No 14-11.500.

¹⁰⁵*Id.*, “ALORS QU'en conférant aux informations relatives aux procédures de conciliation ou à un mandat ad hoc un caractère secret, la loi a restreint la liberté d'expression dans le but légitime de prévenir les difficultés financières des entreprises.”

¹⁰⁶Code de commerce, art. L611-8-II.

¹⁰⁷*Id.*, art. L611-2-I, art. L611-3 I.

¹⁰⁸C. DUPOUX & C. NERGUARARIAN, *supra* note 97.

¹⁰⁹ Directorate General for Internal Policies, *The Commission Insolvency Proposal and its Impact on Creditor's Protection*, available at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU\(2017\)583155_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf).

V. CONCLUSION

The aim of the insolvency law is to resolve the disputes of insolvency in a speedy manner so that the corporate entity can be rescued. This can be achieved if alternative dispute resolution is used to settle the insolvency disputes. The alternative dispute resolution models of France and the U.S. helps for the better settlement of insolvency disputes.

If the legal situation that is prevailing in India between Arbitration Act and IBC is concerned, the issues will become more complicated if the dispute involves mixed questions of contract validity, for which alternative dispute resolution (arbitral tribunal) is appropriate, and for insolvency NCLT is appropriate. It would become more complex if the issue of cross-border is also involved. When cross-border issues are involved, the resolution of contractual disputes through adjudication becomes difficult because the domestic laws of the States differ with each other. Such kind of issues could be resolved easily and quickly with the help of alternative dispute resolution. Therefore, for resolving the growing complex issues of insolvency disputes, the use of alternative dispute resolution in insolvency disputes has to be allowed.

It is necessary for India to develop a suitable model of alternative dispute resolution for resolving insolvency disputes. Time bond resolution is the goal of IBC but in reality most of the insolvency cases are going beyond the said time period provided in the legislation because of the complexity of the contracts agreed by the parties and in some cases the involvement of the cross-border issues. These issues could be better resolved by using alternative dispute resolution thereby the resolution of insolvency disputes becomes easier.

A COMMENT ON DHEERAJ MOR V. HON'BLE HIGH COURT OF DELHI: A LONG AWAITED INTERPRETATION TO ARTICLE 233

Deban Satyadarshi Nanda & Deepshikha Bhowal

Odisha Judicial Service, 2019-20, LL.M. (National Law University, Odisha), BA.LL.B

(School of Law, KIIT University)

LL.M.(National Law University, Odisha), BA.LL.B (Calcutta University)

Mob No. :- 8249697274

Email :- deban.ojs2019@gmail.com,deepshikha.bhowal@gmail.com

ABSTRACT:-

For a long period of time, there existed numerous ambiguities with regard to the question of appointment of Judges in the subordinate Judiciary especially of that of District Judges. The Supreme Court has, in very recent case of Dheeraj Mor v. Hon'ble High Court of Delhi, dealt with such issues by interpreting Article 233 of the Constitution and put to rest all controversies arising from the question as to whether the officers of the Judicial Service of a State are eligible to compete with the members of the Bar for direct recruitment to the posts of District Judges against the quota reserved for pleaders/advocates or not. This case not only settles this question but also clearly indicates systematically how the officers of the Judicial Service are to be appointed and promoted to the posts of District Judges. The Supreme Court has also authoritatively interpreted Article 235 in such a way that there is no confusion as to the ambit of power with regard to the appointment of judges and control over the subordinate courts, which is distributed between the Governor and High Courts of the respective States. This judgment is a welcoming step in bringing a harmonious environment in the appointment procedure of the subordinate Judiciary.

INTRODUCTION

The Constitution of India sets to create a framework of governance which can ensure a complete just, equal and righteous environment for every citizen¹. The justice delivery system is entrusted within the hands of the judicial branch of the State and the scheme of the Constitution is such that there is a distinct separation of powers² to create a vibrant and independent Judiciary³. The idea of complete justice is understood as justice which is all inclusive in nature and is according to law without any illegality⁴. The primary focus of the Constitution is to establish 'rule of law' and the actualisation of this objective is given to the Judiciary. Therefore the Judiciary is under the obligation to ensure that the basic ends of this democratic polity are intact⁵. We often forget that justice delivery actually starts from the subordinate courts as they are in most cases the first point where a person/citizen interacts

¹ Refer Preamble, The Constitution of India, 1950.

² The Constituent Assembly Debates- Official Report, Vol. IX (16th September, 1949), pp. 1572-1582.

³ Ibid, Article 50.

⁴ State of Karnataka v. Umadevi (3) , (2006) 4 SCC 1.

⁵ S. P. Gupta v. Union of India, 1981 Supp. SCC 87.

with Judiciary. There have been many instances when several ambiguities have arisen with regard to the question of appointment of Judges in the Subordinate Judiciary, especially of that of District Judges. A majority of such issues have been recently settled by the Supreme Court in the case of Dheeraj Mor v. Hon'ble High Court of Delhi⁶, thereby putting to rest any/all controversies arising from them.

Brief Facts:

This case came before the Hon'ble Supreme Court by a reference made by a divisional bench for the interpretation of Article 233 of the Constitution. The question which came before the Court was about the eligibility of the members of the subordinate Judicial Service for appointment of District Judge as against the quota reserved for the members of the Bar by way of direct recruitment. In the present case, the Petitioners, being the members of the Subordinate Judicial Service, wanted to be considered for appointment as District Judges under the direct recruitment quota for the members of the Bar as they had prior experience of 7 years of practice at the Bar as an advocate. It also came with the claim of two other categories which are incidental to former category of Judges in Subordinate Judiciary, which include Judicial Officers having seven years of experience as Judges and the Judicial Officers who have a combined experience of seven years as members of Judicial Service and advocates at the Bar. Therefore, the factual matrix of this case revolved around the question of eligibility of Judicial Officers to take the direct recruitment path for the appointment of District Judges reserved for the advocates practicing at the Bar.

The issue here is;

'Whether the officers of the Judicial Service of the State are eligible to compete with the members of the Bar for direct recruitment to the posts of the District Judges against the quota reserved for pleaders/advocates or not?'

Arguments of Parties:

The Petitioners based their whole argument on the fact that Article 233 (1) and (2) does not prohibit the Judicial Officers having an experience of 7 years from being appointed as the District Judges. The Petitioners also argued that the rules made by the High Courts debarring the Judicial Officers from participating in the selection process for the appointment of the District Judges are ultra-virus to the provisions of Article 233 and are arbitrary in nature. It was submitted that the rules which cut off one single stream completely from participating in the direct recruitment procedure are against the framework of Article 233 and violate various precedents set forth by the Hon'ble Supreme Court.

The appellants relied on various case laws of the Hon'ble Supreme Court and they completely based their arguments on those cases. At the same time, on behalf of the various High Courts and advocates, it was submitted that Article 233 (2) only speaks about the appointments from the Bar and excludes the Judicial Officers from it. It was contended that the appointments for the Judicial Officers must be through the promotion and the decisions such as Rameshwar Dayal v. The State of Punjab Others⁷ and Chandra Mohan v. State of Uttar Pradesh and Others⁸ negate the submissions advanced by the Judicial

⁶ 2020 SCC (Online) SC 213.

⁷ AIR 1961 SC 816.

⁸ AIR 1976 SC 1482.

Officers. It was submitted further that the decision in *Satya Narayan Singh v. The High Court of Judicature Allahabad and Others*⁹ has also laid down that there are two different streams who are considered for the appointment and therefore the Judicial Officers cannot claim the direct recruitment way. This was also reiterated in *Deepak Aggarwal v. Keshaw Kaushik & Ors*¹⁰. It was also brought into the notice of the Supreme Court that there are rules framed by various High Courts establishing the quota system for the Judicial Officers, who also have a roaster system fixing the seniority of the Judicial Officers for promotion¹¹.

Majority Decision:

The Supreme Court took the task of interpreting Article 233, which is the central issue in this case. The question of appointment can be based by the result of this interpretation and the vires of the rules framed by the High Courts in this regard.

The Apex Court held that Article 233 (1) provides for the appointments by way of posting and promotion and it can be said that the Governor, who is the appointing authority has to exercise this power of appointment in consultation with the respective High Court of the State. The Court also said that the meaning of term 'appointment' is broad enough to include direct recruitments, promotions and by absorption provided through the rules¹². At the same time, Article 233 (2) provides a negative connotation which States that a person can be appointed as District Judge when he has an experience of 7 years at the Bar and is recommended by the High Court for appointment. This same provision provides that a person who is not 'in service of Union or State' with above-mentioned requisite qualifications can be appointed as the District Judge. The Court pointed out there is nowhere mentioned about the Judicial Officers to be appointed as District Judges under the said provision.

The persons from any executive service of union or State cannot be appointed as District Judges which is held in *Chandra Mohan v. State of UP*¹³ case. The Court spoke about the Constitutional goal of separation of Judiciary from Executive and Legislature which is envisaged in Article 50¹⁴. The Court while discussing the above case also pointed out that the Governor can appoint the advocates whose names are recommended by the High Courts only. It is also mentioned here that the Governor cannot appoint a person in any other service because it violates the basic structure of separation of power. Furthermore, this system is made to get rid of the age old process of British era of appointing the police officers or civil servants as the Judges.

The Court further considered the provisions under Articles 234, 235, 236 and 237 and after cumulatively analysing these provisions, laid the following propositions of law.

- 1) There are two sources of recruitment by the Governor of the State.
 - a) Service of the Union or the State
 - b) Members of the Bar

⁹ AIR 1985 SC 308.

¹⁰ (2013) 5 SCC 277.

¹¹ *Punjab and Haryana High Court v. State of Punjab*, (2018) SCC Online SC 1728.

¹² *Supra* Note 6, p. 12.

¹³ *Supra* Note 8.

¹⁴ *Supra* Note 1, Article 50.

- 2) The said Judges from criteria (a) are appointed in the consultation with the High Court and from criteria (b) are appointed on the recommendation of the High Court.
- 3) The persons appointed in the Judicial Service are to be appointed in accordance with the rules made by the Governor in consultation with the High Court and the Public Service Commission although the High Court's shall have the control over the district Courts and the subordinate Courts.
- 4) It further said that the service here includes the Judicial Service.

The Supreme Court thereby rejected the contentions raised by the appellants which was based on the judgment of Chandra Mohan.

Then the Court delved into examining its decision in *Rameshwar Dayal v. State of UP*¹⁵, which is about the eligibility of a person for the appointment to the post of District Judge, who had his name on the roll of the advocates of East Punjab High Court before the partition of India. The Court in this case held that the practice done in the Lahore High Court is not open to objection under Article 233(2) of the Constitution. It was held that a person who continued to practice at the time of appointment as District Judge fulfilled the requirement of Article 233. The question, whether the period of practice before the Lahore High Court is to be taken into consideration or not, was answered in affirmative by the Supreme Court as it observed that there is no impediment under the said provision from considering the said period of practice before the Lahore High Court under the requirement of 7 years of practice.

The Supreme Court also discussed *Satya Narayan Singh case*¹⁶ where members of UP Judicial Service applied for the post of District Judge through direct recruitment process by showing that they had 7 years of experience at Bar before being appointed as the members of Judicial Service. It was held that the two streams of appointments which are prescribed under Article 233, the requirement of 7 years of practice is only applicable for advocates coming under the direct recruitment process and it has no application for the members of the Judicial Services. After considering these cases the Supreme Court in the present case held that the requirement of 7 years of practice means that the person is continuing to be an advocate during the said period on the date of application¹⁷. It also reiterated that the meaning of the expression 'advocate or pleader' in Article 233 includes the person who has a right to act and/or pleads in Court on behalf of the client. It includes a person who is a member of the Bar and conducts cases in the Court¹⁸. Therefore the Court held that the requirement under Article 233 (2) is that the person must have been an advocate immediately preceding the application and it cannot be for any time in the past (continuing period of 7 years).

The Hon'ble Supreme Court also went on to discuss *Vijay Kumar Mishra & Anr. v. High Court of Judicature at Patna and Ors*¹⁹, in which the Judicial Officers also staked their claim under the direct

¹⁵ Supra Note 7.

¹⁶ Supra Note 9.

¹⁷ Supra Note 6, p. 30.

¹⁸ *Sushma Suri v. Govt. (NCT of Delhi)*, (1999) 1 SCC 330.

¹⁹ (2016) 9 SCC 313.

recruitment provision for the members of the Bar. The Apex Court did not approve of the proposition put forth by the High Court of Judicature at Patna as it is clear from the provisions under Article 233 (2) that a person has to be in continuous practice in the past and at the time when he has applied and being appointed²⁰. Thereby the Court rejected the contentions raised by the appellants and held that the said decision of Vijay Mishra does not lay down the law correctly.

The Supreme Court in the present case also discussed the recommendations made by Shetty Commission which was constituted under All India Judges Association & Ors. v. Union of India and Ors²¹. It was held in the said case that appointment of the members of the Judicial Service as District Judges would be done through promotion and limited competitive examination. Since this case was decided the High Courts have been maintaining a roster as directed by the Supreme Court for identification of seniority. The 40 point roster system works to serve this propose and protects the existing seniority.

The Court after scrutinising its earlier decision in, O.P. Garg v. State of U.P.²², observed that if there are different sources of recruitment then equal opportunity should be given to all of them. The Court further said that to make the seniority rule functional, the recruitment procedure must be fair. It very well emphasised the dichotomy of different streams and separate quota system for recruitment. Therefore, a member of the Judicial Officer after joining the Judicial Service cannot claim the direct recruitment quota reserved for the members of the Bar even if he had 7 years of practice experience before joining the service.

The Supreme Court observed that there is a purpose hidden behind the recruitment from the Bar and it referred to the recruitment procedure for the Superior Courts. The Court rightfully observed that the advocates gather substantial amount of knowledge in their field and become experts as well as they gain the experience of appearing before various Courts²³. Further, the Supreme Court rejected the contention that the advocates can apply in any State for the recruitment to the post of District Judge but the Judicial Service members can only apply in one State, therefore the members of the Judicial Service should be given a chance to avail the direct recruitment opportunity similar to the advocates. The Court further said that Article 233 not only talks about the recruitment but it also includes the promotion aspect of the District Judges.

In this case, the Court also pointed out another interesting point which is that the Legal Assistants working in different institutions other than the Courts for the purpose of appointment in Judiciary are not eligible to avail the direct recruitment route as they do not possess the desired experience and exposure as of an advocate²⁴. The Apex Court also refused to accept that the Judicial Officers having 10 years of experience are to be treated as per the explanation given under Article 124 and 217.

The Supreme Court observed the following points as answer to the questions raised in the reference:

²⁰ Supra Note 6, p. 33.

²¹ (2002) 4 SCC 247.

²² 1991 Supp. (2) 51.

²³ Also refer P. Ramakrishnam Raju v. Union of India and Ors., (2014) 12 SCC 1.

²⁴ Supra Note 6, p. 46. Also refer All India Judges Association and Ors. v. Union of India and Ors., (1998) 8 SCC 771.

- The members of the Judicial Service are to be appointed as District Judges only through promotion or limited competitive examination.
- The Governor of the State is the authority for the purpose of appointment, promotion, posting and transfer. Further the rules framed under Articles 234 and 235 are to govern the eligibility criteria for such appointments.
- An advocate or pleader can avail the direct recruitment route if he has 7 years of practice experience and if he is not already in the Judicial Service of the Union or the State.
- The advocate to avail this direct recruitment quota must be in continuous practice for not less than 7 years as on the date of application and at the time of appointment also.
- The rules framed by the High Courts which prohibit the Judicial Officers from staking claim to the post of District Judge against the posts reserved for Advocates cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

The Supreme Court thereby overruled the Vijay Kumar Mishra decision²⁵ and at the same time held that the in-service candidates are not eligible to take part in the direct recruitment examinations. The in-service Judicial Officers who have been appointed as District Judges on the basis of such eligibility which is contested in the present case cannot continue as District Judges.

In a separate but concurring judgment, Justice S Ravindra Bhat agreed with the majority judgment. In his judgment he has created three categories to classify the Judicial Officers who are the Petitioners in this case, the categories are;

- a) Judicial Officers having less than 7 years or no experience at the Bar
- b) Secondly, the Judicial Officers who have 7 years of experience before joining the service
- c) Thirdly, the members who are having seven years or more experience at the Bar but are working in non-judicial posts.

It is pointed out here that the Petitioners have relied on the argument that the source of power under Article 233 vested with the Governor is an independent one and therefore he can appoint Judicial Officers as District Judges. It is also argued that the quota reserved for the advocates is discriminatory as it does not include the Judicial Officers as there is no such classification to be made. It was also submitted that the makers of the Constitution wanted to bring best minds to Judicial Service and it is evident from Article 233 (2).

Separate opinion of Justice Bhat:

In his concurring opinion, Hon'ble Justice Bhat referred to the various provisions especially Articles 233-237 and held that the power of the High Courts over the subordinate Courts is absolute. The recommendations as to the names of suitable persons by the High Courts to Governors for appointments are decisive and binding except for few exceptional cases²⁶. Therefore the control that is given to the High Courts is complete control and applies to the all the subordinate Courts. In his

²⁵ Supra Note 19.

²⁶ Hon'ble Justice Bhat relied upon cases such as State of West Bengal v. Nripendra Nath Bagchi (1966) 1 SCR 771 and High Court of Punjab and Haryana etc. v. State of Haryana, 1975 (3) SCR 365.

separate opinion, he went on to analyse every decision that was relied on by the parties. The decision in Rameshwar Dayal²⁷ was concerned about calculation of the practice years and it did not discuss any rule with regard to appointments.

His analysis of the decisions in both Chandra Mohan²⁸ and Satya Narain Singh²⁹ cases needs to be discussed. He pointed out that the Chandra Mohan case primarily says that the persons who are in executive service of the State or Union are ineligible under Article 233 and it does not include the Judicial Officers under this category. This decision is a clear authority on this point. Interestingly enough, under the Satya Narain Singh case, the Supreme Court held that disqualification of the Judicial Officers under Article 233 did not violate Article 14 as there is a clear distinction between the two sources of recruitment and the dichotomy is maintained. Therefore, after considering all the decisions of the Supreme Court and after making a close reading of all the Constitutional provisions, it can be deduced that there is nothing *ex facie* in Article 233 which excludes Judicial Officers from being appointed as District Judges but at the same time it does not prescribe any criteria for such candidates. The Judicial Officers can always show that they have seven years of practice experience but when it comes to the words 'has been for not less than seven years' under Article 233 (2) there is a requirement of continuous period of practice at the time of application and appointment, where the Judicial Officers fail to qualify³⁰.

It is also pointed out here that there is no doubt about the power of Governor with regard to appointments but the Governor can appoint a person after prior consultation with the High Court and the promotion to the post of District Judge is regulated by the rules framed by the High Courts. The very fact that there is no mention of any eligibility criteria for the judicial officer clearly indicates that the Judicial Officers are ineligible under Article 233. The classification between the Judicial Officers and the advocates is one of the Constitutional classifications and it is clear from the said provision only. It should not be ignored that the practicing advocates represent independent thought process and their insights are going to be useful for the better functioning of the justice delivery system. The advocates practicing have a direct link with the people and they have a different perspective about the functioning of the Court from the eyes of their client that gives them an advantage over the others. Therefore, the advocates having seven years of experience at the Bar are the only category under Article 233 to be considered for appointment as District Judges.

Conclusion:

The question which is answered in the present case has put an end to a controversy which existed for a long period of time. This judgment has clearly interpreted Article 233 and the eligibility of not only the advocates but also of the Judicial Officers for the post of District Judges. This decision also significantly focuses on the relation of Bar and Bench in the justice delivery process and in truest possible way it can be understood from the separate opinion of Justice Bhat.

²⁷ Supra Note 7.

²⁸ Supra Note 8.

²⁹ Supra Note 9.

³⁰ Supra Note 6, p. 22 (Concurring judgment of Justice R Bhat).

PROBLEM OF JUSTIFYING JUDICIAL DECISION IN HARD CASES

Bhawna

Research Scholar (Ph.D.),

Dr. Ram Manohar Lohiya National Law University, Lucknow, Uttar Pradesh, India.

Email:- bstevatia@gmail.com

Mob. No. - 7017742168

ABSTRACT

The article focuses on an actual hard case, *Shilpa Mittal v. State (NCT of Delhi)*, (2020) 2 SCC 787, to discuss how there is problem of justifying judicial decision given in a hard case. This case pertains to a hit and run situation involving a juvenile that resulted in death of the victim with no fault of his own. The judicial decision which is discussed in this article has been pronounced by the apex court of India, the Supreme Court. This article delves on the facts of this case and the major law which is in question in this case. It analyzes two contrasting views, one favouring the juvenile (perpetrator) and the other, the victim. It also highlights the legislative gap which exists in the law applicable and suggests possible changes in the same. The research method of the article is primarily doctrinal based on an analysis of legal principles, legislative provisions involved, judicial pronouncements, etc. This article advocates the idea that though there remain problems in justifying judicial decisions in hard cases, the settled principles of law cannot be changed based on a particular hard case conforming to the aphorism that hard cases make bad law.

Keywords : Delinquency; hard case; judicial discretion; Juvenile justice; legislative intent

INTRODUCTION

Whenever a court is encountered with a hard case, the judicial decision reached by the court is not easily justifiable. This is so because there will be two contrasting views possible while applying laws to the case. The problem of justifying judicial decisions is particularly acute in “hard cases,” those cases in which the result is not clearly dictated by statute or precedent (Dworkin 1975).¹ Judicial discretion is to be such that it must not be exercised arbitrarily by the judge. At the same time, when there is scope of discretion, it is inherent in the process itself that its justification will not be crystal clear. Likewise, any decision taken relying on the discretion will always attract scrutiny and criticism. Professor Dworkin has criticised the positivist position that law refers to what the ‘law is’ and not what it ‘ought to be’. Dworkin has provided an alternative theory for adjudication of hard cases. He has classified arguments as arguments of principle and arguments of policy and suggested that the judicial decisions arrived at in hard cases should rely on arguments of principles and not policy.

¹ Dworkin, Ronald. (1975) ‘Hard Cases’ *Harvard Law Review* 88(6) [Online]. Available at: <http://users.umiacs.umd.edu/~horty/courses/readings/dworkin-1975-hard-cases.pdf> (Accessed: 31 August 2020).

The case that has been thoroughly discussed in this article and which has also prompted this article to be written is the case of *Shilpa Mittal v. State (NCT of Delhi)*². In this case, a boy who is a juvenile (aged 4 days short of 18 years) caused the death of a 33-year-old IT Professional by over-speeding Mercedes Benz car in the month of April, 2016.

Before referring to the judicial decision pronounced in this case, relevant legislative provisions should be seen. Juveniles in India are dealt with under the Juvenile Justice (Care and Protection) Act, 2015. This article deals with that aspect of the legislation which has been introduced in the JJ Act, 2015 providing classification of offences as petty, serious and heinous. This introduction of classification of offences in the Juvenile Justice Act, 2015 was done in order to provide discretion to the Juvenile Justice Board to arrive at a decision with regard to the juvenile as to whether s/he could be tried as an adult or not. Consequent to that, the juvenile can be transferred to the adult criminal justice system from the juvenile justice system. This idea of trying a juvenile as adult in some cases originated with the gruesome rape in the Nirbhaya incident, where one of the offenders was 17 years old, just 3 months short from attaining majority. This incident fuelled the concern that the Juvenile Justice Act, 2000 was ill-equipped to deal with this new breed of delinquents, the so-called juvenile superpredators (Rolnick 2016).³ The policy elites, the media, as well as ordinary citizens, from all spectrums resorted to questioning the legitimacy of the juvenile legislation and the need for the adoption of stringent punishment, to act as a deterrent. Thus, the Parliament brought in the JJ Act, 2015 to make it easier to prosecute juveniles as adults. Under the existing framework, a child between the age of 16-18 years, alleged to have committed a heinous offence, may be transferred to an adult criminal court, known as children's court, to be tried as an adult. The pre-requisite for the Juvenile Justice Board to transfer a child to the Children's Court is that the child must have committed a heinous offence. Now the question arises, what will constitute a heinous offence? In order to answer this question, a look at the classification of offences as provided under the Act is must. The Juvenile Justice Act, 2015 has introduced a three-fold classification of offences as petty, serious, and heinous offences. Petty offences (Section 2(45)) are those offences for which the maximum punishment under the Indian Penal Code, or any other law, is imprisonment up to three years. For serious offences (Section 2(54)) the punishment is imprisonment between three to seven years. Heinous offences (Section 2(33)) include offences for which the minimum punishment under the Indian Penal Code or any other law is imprisonment for seven years or more.

Coming back to the case, the juvenile was alleged to have committed an offence that falls under Section 304 of IPC, where punishment can comprise of life imprisonment in one part or up to 10 years in second part. According to the Juvenile Justice Board's decision, since the teenager was accused of charges under Section 304 of the Indian Penal Code (IPC), he was to be tried as an adult owing to the "heinous offence" he was charged with.

The Delhi High Court, however, ruled in 2019 that the offence does not have a minimum sentence specified and therefore it cannot fall within the ambit of Section 2(33) of the JJ Act. This led to the appeal before the apex court of the land, the Supreme Court.

² (2020) 2 SCC 787.

³ Rolnick, Addie C. 'Untangling The Web: Juvenile Justice In Indian Country', *N.Y.U Jour. of Leg. & Pub.Policy*, 49, p. 101-102.

The above mentioned facts of this case prompt certain questions which are discussed in the subsequent portion of the article. The questions include, whether the High Court was correct in interpreting the relevant legal provision which is the definition of 'heinous offence', whether the power to exercise judicial discretion provided to the Juvenile Justice Board, properly exercised, can the courts go beyond the words of the law and whether the judicial decision be justified in cases where the victim does not seem to get any justice from the court.

Dworkin believed that in hard cases, the court or judge must pronounce the judgment by keeping in mind the individual rights instead of the community as the goal. According to this, judicial decisions may differ from case to case. Hart on the other hand was of the opinion that law consists of primary and secondary rules which are applicable to the whole society in a similar fashion. Dworkin's theory of hard cases pertains to the understanding that whenever the legal rule is unable to control the facts of the case, they can be deviated from and the judge can, in those cases, exercise discretion. In the case in question, the juvenile who was responsible for killing of the victim had been booked for certain offences earlier as well. This depicted his delinquent behaviour and the sense of irresponsibility he and his guardians had. The victim's family was alleging that the juvenile cannot be saved only because of his age as the maturity which he has is at par with the adults. This contention is not easily acceptable as it will require the overlooking of the legislative intent behind the whole set of juvenile laws as they have been drafted with the idea that a child cannot be treated as an adult and must not be punished as s/he has all the right to be given opportunity to reform her/himself.

LEGAL MATERIAL AND METHOD

This article is primarily based on doctrinal method of research in which analysis of an actual case has been done. This article has referred to the apex court's judgment in the case and the legal provisions involved in the same. The case has been analysed from the perspectives of both the parties and the problem of decision making in hard cases had been highlighted. The article has also referred the secondary data available on internet including various case comments about this case, newspaper articles related to it and even a television show broadcasted on a government's news channel. This article has advocated the idea that general principles of law should not be based on particular cases and argued on the same side as the aphorism stands that hard cases make bad law.

RESULT AND DISCUSSION

The Supreme Court in this case held the offence committed by the juvenile does not fall under Section 2(33) of the Juvenile Justice Act, 2015. It held that such offences shall be treated as "serious offences" within meaning of S. 2(54) till the legislature steps in to make provisions clearer. It relied on the legislative intent behind the juvenile laws that when two views are possible, one in favour of children is to be preferred. This indicates that the judicial decision was based on that theory of adjudication which refers to the principle that judges must interpret the law as it is and not go beyond the words of the legislature.

Background of the Law

Understanding the present juvenile justice system of the country requires to be looked at the history. The paradigm shift in the conception of children during the industrial revolution, led to the emergence

of a separate juvenile justice system in the western countries (Feld 1998).⁴ In India, the JJS originated during the British rule in India. The reform movements taking place in the United Kingdom influenced India heavily. However, the changes introduced in India, in order to deal with juvenile delinquency were not limited only to those measures adopted in the United Kingdom.⁵ The subsequent legislation in India, spearheaded the jurisprudence of criminal law and its procedural safeguards. The Indian courts took after the American juvenile courts in adopting a *parens patriae* model in relation to matters of juvenile delinquency. Juvenile courts assumed a paternalistic attitude pursuing the doctrine of *parens patriae*, emphasized supervision, treatment, and control towards juvenile delinquents (Mack 1909).⁶ As a result, juvenile offenders were treated differently. For some time, juvenile courts lent themselves to procedural informalities, owing to which the juveniles were not accorded the same procedural safeguards as their adult counterparts.⁷ This cavalier approach to the rights of the delinquents, led to due process concerns, and by the 1960s, a series of U.S Supreme Court decisions recognized due process rights in juvenile proceedings. For instance, the Supreme Court in *In re Gault* engrafted formal procedures onto juvenile courts. It observed that “the absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness”.⁸ Gradually, the ‘welfare’ approach (*parens patriae*) shifted to a ‘rights’ based approach, which complies with the Constitutional and procedural rights enshrined in the Constitution.⁹ From early 20th century onwards, each state in India had its own Act, dealing with the issue of juvenile delinquency. The Madras Presidency, an administrative subdivision of British India, was the first to enact its juvenile legislation. Shortly afterwards, Bengal and Bombay in 1922 and 1924, enacted their respective legislations on children. These courts implemented benevolent and paternalistic policies under the welfarist mode (Adenwalla 2006).¹⁰ The Government of India legislated the Children Act in 1960, to provide for the trial of juvenile delinquents in the Union Territories, as a model to be followed by the states, in the enactment of their respective legislations concerning juveniles. As per the act, a child was defined as a boy under the age of 16 years of age, and a girl, below 18 years of age.¹¹ Every state had its own children act and procedures. The cut-off age provided in each Act lacked consistency in terms of definitions as well as in the procedures adopted therein. The definition of “child” differed from state to state. This prompted the Apex Court to emphasize on the need for a uniform Children act. In the case of *Sheela Barse v. Union of India* (1986) the court observed: “we would suggest that instead of each state having its own children acts different in procedures and content from those in other states, it would be desirable if the central government initiates the Parliamentary legislation on the subject so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country.” Subsequently, the Parliament came up with the Juvenile Justice Act, 1986. However, there was a wide gap between the cherished principles and the actual practices under the JJ Act, 1986. Therefore, the Parliament enacted

⁴ Feld, Barry C. ‘Juvenile and Criminal Justice Systems’ Responses to Youth Violence, Crime and Justice’, *Uni. of Chicago Press*, 24, p.189-261.

⁵ Kumari, Ved. (2003) *The Juvenile Justice System in India from Welfare to Rights*, Oxford India Paperbacks.

⁶ Mack, Julian William. ‘The Juvenile Court’, *Harv. L. Rev.*, 24, p. 104.

⁷ Snyder, Howard W. and Sickmund, Melissa. National Ctr. for Juvenile Justice, *Juvenile Offenders and Victims: National Report 88-89* (1999).

⁸ *In re Gault*, 387, U.S. 1, 18 L. Ed 527 (1948); *Haley v Ohio* 332 US 596, 92 L. Ed 224 (1948).

⁹ Kethineni, Sessa. and Klosky, Tricia.’ The Impact of Juvenile Justice Reforms in India’, *Int’l Jour. of Offender Therapy and Comparative Crim.*, 44, p. 312-25.

¹⁰ Adenwalla, Maharukh. *Juvenile Justice Reforms in India*, Childline India Foundations (2006).

¹¹ The Children Act, 1960, Act no. 60 of 1960, § 2(e).

the Juvenile Justice (Care & Protection) Act, 2000. The new legislation, Juvenile Justice Act, 2015 has introduced a new provision enabling the transfer of children aged between 16-18 years to children's court, in cases where a heinous offence is alleged to have been committed by a child.

The provision that allows transfer of the juvenile from juvenile justice system to the adult criminal justice system is the Section 15 of the legislation. Section 15 of the JJ Act, 2015 mandates the Juvenile Justice Board (hereinafter referred to as JJB) to transfer cases involving a child between 16-18 years, alleged to have committed a heinous offence, to a children's court. This decision is to be made by the Board on the basis of a preliminary assessment conducted to examine the child's capacity to commit such an offence. This Section casts an onerous obligation on the JJB to take the assistance of psycho-social workers, psychologists and other experts, in order to come to a conclusion regarding the mental capacity of the said accused. If the Board is satisfied in its preliminary assessment, then it may transfer the child to be dealt by the Children's Court, under Section 18(3).

Now, coming to the classification of offences into the three categories viz., petty, serious and heinous offences, their definitions need to be closely scrutinised. The definition of petty offences does not pose any difficulty, as it includes only those offences that are punishable with imprisonment for a period not exceeding three years. However, the definitions of both serious and heinous offences are vaguely worded. There are several offences which fall within this ambiguous zone – where the maximum punishment is more than seven years and no minimum punishment has been mentioned or where the minimum punishment is less than seven years. Neither do such offences fall within the ambit of heinous nor serious offences. They also do not fall within the category of petty offences. The definition of heinous offences leaves out a considerable number of offences. For example, Section 304 of the Indian Penal Code, lays out the punishment for culpable homicide not amounting to murder. It is prescribed that the punishment may extend to ten years. As only the maximum period of imprisonment, and no minimum period is mentioned under Section 304, the offence will not fall within the category of heinous offence. Another such example is the offence of robbery which is punishable with imprisonment for a term which may extend to ten years...and, if the robbery is committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years. Therefore, such offences which are punishable with imprisonment not exceeding ten years as in Section 392, (or any other term exceeding seven years,) cannot be classified into any category of offences envisaged by the JJ Act, 2015. There is ambiguity as to whether such offences are to be treated as serious offences (as the minimum punishment rendered may or may not be between 3 to 7 years) or are they to be treated as heinous offences (as no such minimum punishment is mentioned under such sections)?

SC, in the hit and run case, deliberated upon the question whether an offence prescribing a maximum sentence of more than 7 years imprisonment but not providing any minimum sentence, or providing a minimum sentence of less than 7 years, can be considered to be a 'heinous offence'? It was held that court can add or subtract words from a statute only when the intention of the Legislature is clear. But when the wording of the statute is clear and intention of legislature is unclear, in that case court cannot add or subtract words from the statute to give it a meaning which court feels would fit into the scheme of things, in this case placing the offences falling under the ambiguous zone in heinous offenses by removing the word minimum from the definition. Court acknowledged the unfortunate gap in legislation but reasoned that it's not for court to legislate and to fill in the gap, it

cannot enact a legislation when legislature itself has enacted it. Court laying the general intention behind Act said that JJA is intended to protect the child and treatment of child as an adult is an exception to the rule. Exception is given restricted meaning in well settled principle of statutory interpretation. Court opined that it is for legislature to look into the matters of the offences falling in the ambiguous zone and till then exercising its power under Article 142, it directed subordinate courts to deal such offences as serious offences and not as heinous offences.

Conclusion and Suggestion

The SC in its recent decision has pointed out the unfortunate gap in the major legislation which can only be filled by the legislature. This can be done by enacting clear provisions with regard to the left out offences from the existing three categories. This can be achieved by amending the definitions of the petty, serious and heinous offences. As the major issue before the SC was posed due to the use of the word ‘minimum’ in the definition of heinous offences, there must be amendments made in this regard. A suggestion could be that the definitions of these categories of offences can be made in terms of the maximum punishment prescribed for the offences in the IPC. The following table is illustrative of the same:

Categories of Offences	Present Definition	Suggested Definition
Petty Offences s.2(45)	Includes the offences for which the maximum punishment under the IPC or any other law for the time being in force is imprisonment upto three years.	Remains same.
Serious Offences s.2(54)	Includes the offences for which the punishment under the IPC or any other law for the time being in force, is imprisonment between three to seven years.	Includes the offences for which the maximum punishment under the IPC or any other law for the time being in force, is imprisonment upto seven years and which is not a petty offence.
Heinous Offences s.2(33)	Includes the offences for which minimum punishment under the IPC or any other law for the time being in force is imprisonment for seven years or more.	Includes the offences which are not petty or serious offences.

After applying the above suggested definition, the lacunae faced in the infamous Mercedes hit and run case can be cured. As the offence committed by the juvenile was punishable with upto 10 years imprisonment, it would have fallen in the category of heinous offences. And once an offence is classified as a heinous offence, juvenile justice board gets the discretion to try the juvenile as adult after the assessment of the child. This discretion must be judiciously exercised as the arbitrary exercise of this discretion will result in adversities which are graver if a juvenile is to be treated as an adult. In such a case, the child may be deprived of the protection of the juvenile justice system. Therefore, the

juvenile justice board is the very crucial agency. Mere falling of the alleged offence in the category of heinous offences will not and must not result in the trial of such juvenile as an adult. Juvenile justice board has to decide on the issue of trial as an adult after the preliminary assessment with regard to juvenile's mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence. In the case in question, the juvenile justice board did give a finding that the juvenile should be tried as an adult. Had the definition for heinous offences been different, the victim's family would not have got injustice.

At the same time, legislature can come up with provisions regarding guardians or parents of the juveniles to be tried as co-accused along with the juveniles. This echoes with the settled principle of law of vicarious liability. As far as the cases involving accidents resulting in death are concerned, there can be legislative provisions requiring the owner of the car to be punished strictly. There is need for the society to understand that a vehicle is not less than a gun. Use of both can result in serious injuries to persons or even cause their death. If we, as owners of gun, can prevent our children from using it, can't we stop our children from driving vehicles till they become major. Is keeping the keys to the vehicles away from children is so difficult? Children should be made aware of their duties as well. Schools can play a major role after the family in this regard. There can be awareness programs organised in schools which shall instil a sense of responsibility among children. Even in cases of sexual offences involving children, the schools can play a major role by imparting sex education to the children as this will help them and prepare them to deal with the urge to be attracted towards the opposite gender.

Trying juveniles as adults should be rare and applied for only the most severe, violent crimes. Adult prisons affect the inmates negatively and it does not focus on rehabilitation either. Moreover, it results in creation of an atmosphere which encourages further criminal activity. The affirmative steps the system must take to rehabilitate the offender must necessarily focus on not causing more harm. This would facilitate the child into becoming a law-abiding citizen. In the words of Krishna Iyer, J, adult prisons are like "animal farms".¹² The future of child offenders in adult prisons, presents a bleak picture. Owing to such a system, the juveniles are at a greater risk of committing suicide and suffering from sexual and physical abuse meted out to them by older inmates. A direct causal link can be drawn to the effects of the brutalization and the harms suffered by juveniles (Bailey 1998).¹³ The culture and environment in prison, fosters behavior in juveniles that increases their chance of recidivism. They are also exposed to techniques which they can utilize, in order to indulge in illegal activities, on their return to the society (Redding 2006).¹⁴ It is suggested that rehabilitation plays a very crucial role in the Juvenile justice system. Rehabilitating a juvenile, who has committed an offence, itself can have a deterrent value, because successful rehabilitation results in specific deterrence. This must be kept in mind that the scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015 is that children should be protected. Treating children as adults is an exception to the rule. It is also a well

¹² *Satto v. State of UP*, (1979) 2 SCC 628.

¹³ Bailey, William C. 'Deterrence, brutalization, and the death penalty: Another examination of Oklahoma's return to capital punishment', *Criminology*, 36, p. 711-33.

¹⁴ Redding, Richard E. 'Adult punishment for Juvenile offenders: Does it reduce crime?' *Illanova Uni. School of Law Working Paper Series*, 47, p. 1-37.

settled principle of statutory interpretation that normally an exception has to be given a restricted meaning.

The steps undertaken by the government for the welfare of the child has paid less attention to the core issues which lead to juvenile delinquency. There must be efforts to tackle the core issues which lead to juvenile delinquency such as moral status of family, child's education et cetera to prevent delinquency at its nascent stage. As it has already been observed, criminal behavior is caused by unwholesome environmental determinism of a child.¹⁵ The current emphasis of the law should shift from assessing the social harm that the offender has done to assessing the social needs of the offender. According to Locke, education is the only way to "[set] the mind right" and help in finding a solution for juvenile delinquency (Grant and Tarcov 1996).¹⁶ Creating a system that focuses on early intervention is extremely important. The focus should lie in strengthening the institutions of education and family. These can be expensive, but much economical if the bigger picture is taken into account. Taking steps in this regard will most likely be practically useful to invest in the child's overall development, rather than labelling them as unredeemable.

There has and will always remain problem in justifying the judicial decisions given in hard cases. As there will always be a side that will feel that it was dealt with injustice. As in this case, the victim's family is of the opinion that it has been cheated by the judiciary or the legislature as the perpetrator of the offence was not tried as an adult despite being evidences against him. Their view is justified in the light of the unfortunate gap in the legislation. But, even if we consider that there was no such gap in the legislation, in that situation also, the Juvenile Justice Board would have got the discretion which must be exercised by it judiciously and cautiously. As the offence involved is accident, it's always difficult to prove mens are in such cases as it is absent in cases of hit and run. And when the mental element is itself not present, the person cannot be held guilty of the commission of the offence. Therefore, it is submitted that there cannot be a blanket rule to cover all cases. Also, the demand to change or alter the settled and general principles of law based of particular cases is also not yielding positive results. An example of this could be the gruesome case involving rape of Nirbhaya, which led to major changes in the rape laws of the country. The intent was that by enhancing punishments, deterrence would be created but the increasing numbers of similar offences do not depict the intended result. The answer to such issues lies in the proper and effective implementation of the existing laws. As had it been the situation where the juvenile was punished in the earlier cases, he might not have involved in commission of the offence in the present case. The question that must precede the 'what' and 'how' is the 'why' one. The reasons behind the acts of juveniles cannot be over looked as it will cause great injustice to them and consequently to the society as children and juveniles are the future of every society.

¹⁵ *Court on Its Own Motion v. Dept. of Women and Child*, WP (C) No. 8889 of 2012.

¹⁶ Grant, Ruth W. and Tarcov, Nathan. 'John Locke, Some Thoughts Concerning Education', Hackett Publishing Company, Inc., 49 (1996).

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RIGHT TO STRIKE FOR LAWYERS – A COMPARATIVE ANALYSIS OF INDIA, USA AND ITALY

Advik Rijul Jha

Jindal Global Law School

Email:- advik.ronaldhino@gmail.com

Mob No. :- 9868184500

Law Graduate (registered Advocate, cleared AIBE)

ABSTRACT

Strikes by lawyers was in the news recently, be it due to a clash with the police in November 2019 or over the transfer of Justice Murlidhar from the Delhi High Court in February 2020. In this backdrop, this paper seeks to analyze the legality and ethical aspects related to strike by lawyers in India. Although, prima facie no such right exists in India as well as it being held illegal by courts on numerous occasions, many strikes still take place. The legal and ethical issues raised by such actions by the lawyers are discussed through this article which cover not only the effects on the lawyers but also on the judicial process i.e. functioning of the courts and clients who are also an imperative stakeholder in this process. The framework of regulations followed in USA and Italy have also been looked at for the twin purposes of comparison and guiding light for changes in the Indian regulatory framework. Further, the recommendations put forth by the Law Commission of India in its 266th report of 2017 and amendments proposed to the Advocates Act, 1961 (2017 Draft Amendment) have also been looked at and analyzed. Based on this, certain recommendations to regulate the right of strike for lawyers have been put forth which will balance the needs of the advocates and the stakeholders of the judicial process i.e. judiciary and litigants/clients.

Keywords: Strike, Lawyers, Regulation, India, USA, Italy

INTRODUCTION

Through this paper, the author attempts to shed some light on the issues relating to strike by lawyers which has gained significant attention in the light of the tussle between Delhi Police and lawyers of the Tis Hazari and Saket district courts on 05 November 2019¹ or be it in relation to the transfer of Justice Murlidhar from Delhi High Court.² The main focus of this paper is to look into the legality and ethical issues surrounding strike by lawyers in India. In order to do the same, a few questions will be posed by

¹ *Delhi Police vs lawyers: Hundreds of cops protest against Tis Hazari violence*, ECONOMIC TIMES (Nov. 05, 2019), https://economictimes.indiatimes.com/news/politics-and-nation/delhi-police-vs-lawyers-hundreds-of-cops-protest-against-tis-hazari-violence/articleshow/71919062.cms?from=mdr,Delhi_policeman_thrashed_by_lawyers_2_days_after_Tis_Hazari_violence INDIA TODAY (Nov. 4, 2019) <https://www.indiatoday.in/india/story/delhi-policeman-thrashed-lawyers-saket-court-days-after-tis-hazari-violence-1615636-2019-11-04>.

² *Lawyers stay away from work over Judge's transfer*, THE HINDU Feb 21, 2020) <https://www.thehindu.com/news/cities/Delhi/lawyers-stay-away-from-work-over-judges-transfer/article30874954.ece>.

the author and answers to the same will be sought to be given through this paper. In Part I of the paper, the author will introduce the concept of what is a strike? And whether members of the legal fraternity can form unions/associations to strike, which will form the basis to examine the central question which is whether lawyers have the right to strike. In the next portion of the paper, issues such as whether there is a statutory/legal right of lawyers to strike in India, cases underlying the court's opinion on the same, is it ethical for lawyers to strike in India, impact on court proceedings owing to lawyers being on strike, impact on the client due to lawyers being on strike and who bears the cost in this situation in India etc. will be dealt with. In Part III of the paper, the author will delve into the question of whether lawyers have the right to strike in other countries or not and how is it regulated. Finally, in order to conclude, the paper will look to summarize the answers to these questions which were posed and provide a suggestion as to whether or not, lawyers in India ought to be entitled to the right to strike, weighing the pros and cons in the international perspective.

What is a Strike?

Strike refers to '*concerned stoppage of work by workers done with a view to improve their wages or conditions or giving vent to a grievance or making a protest about something or the other, or supporting other workers in their endeavour.*'³

In India no right to strike is conferred expressly under any statute. The Industrial Disputes Act, 1947 (ID Act) merely regulates the right and thus impliedly recognizes the right. The Industrial Disputes Act may be regarded as the source of the meaning and definition of strike. Industrial Disputes Act defines strike as '*a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment.*'⁴

However, these definitions and right to strike have been provided with regard to industrial disputes between workers unions and employers' associations. In order to analyze the right to strike for lawyers, it is *prima facie* imperative to establish whether lawyers can form unions/associations in the first place.

Can members of the legal fraternity form unions/associations?

The formation of a union is a *sine qua non* for any group of people to come together in order to protest for a common objective which may at times lead to a strike taking place. Hence, in order for lawyers to strike, they have to be able to form a union. However, in a recent judgment of the Bombay High Court, *I.A. Saiyed v State of Maharashtra*⁵ it has been held that the Federation of Labour Law Practitioners cannot be registered as a trade union under the Trade Unions Act, 1926. It was furthermore observed that '*we do not see any trade or business, we do not see any industry and we do not see any relationship of employer and employer or workmen and workmen. The district level*

³ *Halsbury Laws of England*, 4th Edition, Vol. 47 at 469 (para 567), See also Ardemus Stewart, *Legal side of the Strike Question* 42 *American Law Register & Review* 609 (1894); Mallikarjuna Sharma, *Right to Strike*, The Indian Law Institute (2004).

⁴ Industrial Disputes Act, 1947, s 2(q), 1947 (India) ; See also Satarupa Ghosh, *Right to Strike: A Conceptual and Contextual Anathema* 5 *Indian Journal of Law & Justice* 291 (2014); B. P. Rath and B. B. Das, *Right to Strike: An Analysis* 2 *Indian Journal of Industrial Relations* 41 (2005), <https://www.jstor.org/stable/27768011>.

⁵ Nitish Kashyap, *Federation of Labour Law Practitioners can't be registered as a Trade Union, Lawyers can't claim rights through such enactments*, *LIVELAW*(Sept 4, 2017), <https://www.livelaw.in/federation-labour-law-practitioners-cant-registered-trade-union-lawyers-cant-claim-rights-enactments-bombay-hc-read-judgment/>.

associations as members of the 3rd respondent, therefore, are not employees, nor is the Federation their employer.⁶

In this backdrop, owing to not fulfilling the conditions for having a union, right to strike for lawyers ought to be non-existent. The Indian courts have held on multiple occasions that lawyers have no right to go on strike. But in a similar case when 25 judges of the Punjab and Haryana High Court went on mass casual leave for one day and a Public Interest Litigation (PIL) was filed, the court held that the ban on strike was not applicable to the Constitutional Legal Functionaries.⁷ Such a ruling begs the question as to how can right to strike to lawyers be denied while judges are being allowed the same.

INDIA

Regulatory framework

The Advocates Act, 1961⁸ is the statute which governs the conduct of lawyers with aid from the rules framed by the Bar Council of India⁹ in this regard. This statute regulates various aspects of the legal profession, provides certain rights to lawyers while also laying down guidelines for their professional conduct.¹⁰ With respect to the discussion at hand, it is imperative to point out that there is no statutory right provided to the lawyers to strike nor is the term per say mentioned anywhere in the act. Professional misconduct is the broad ambit under which such actions can be looked into. Thus when an advocate ignores his duty or his conduct is such that it is creating a nuisance to his clients or the court, such conduct can be called as professional misconduct.¹¹ However, even the term professional misconduct of lawyers is nowhere defined in the Advocates Act, 1961. Though 'professional misconduct' is defined as behaviour outside the bounds of what is considered acceptable or worthy of its membership by the governing body of a profession, which *inter alia* can be interpreted to include 'strike'. When an advocate goes for a strike call made by the association and ignores or refuses to attend his brief, in such situation his behaviour can be termed as professional misconduct.¹² Moreover the scope and definition of the term 'misconduct' can be understood by keeping in mind the role and responsibility of an advocate..

However, there have been numerous instances in which lawyers have resorted to strike even in the absence of such a right. These have been in relation to violence against them¹³, arrest of a few lawyers,¹⁴ transfer of judges,¹⁵ against an ordinance hiking court fees¹⁶ etc. Moreover, in the case of *Hussainara Khatoon v. Home Secy., State of Bihar*,¹⁷ it was held that litigants have a fundamental right to speedy justice, which gets hampered due to strikes by advocates.

⁶ *Id.*

⁷ RATH AND DAS, *supra* note 4.

⁸ Advocates Act 1961, s 49(1) (c), Acts of Parliament, 1961 (India).

⁹ Bar Council of India Rules, Chapter II, Part VI (India).

¹⁰ G. Geethisha, *Disciplining the Lawyers: Law and Professional Ethics*, Cochin University Law Review, (2003).

¹¹ *Id.*

¹² *Noratanmal Chaurasia v M.R. Murli*, AIR 2004 SC 2440 (India).

¹³ *Delhi Police vs lawyers: Hundreds of cops protest against Tis Hazari violence*, ECONOMIC TIMES (Nov. 05, 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/delhi-police-vs-lawyers-hundreds-of-cops-protest-against-tis-hazari-violence/articleshow/71919062.cms?from=mdr>.

¹⁴ Sriram Panchu, *When lawyers stay away from courts*, THE HINDU (June 19, 2013) <https://www.thehindu.com/opinion/op-ed/when-lawyers-stay-away-from-courts/article4827463.ece>.

¹⁵ *Lawyers stay away from work over Judge's transfer*, THE HINDU (Feb 21, 2020) <https://www.thehindu.com/news/cities/Delhi/lawyers-stay-away-from-work-over-judges-transfer/article30874954.ece>.

¹⁶ P. Radhakrishnan, *Lawyers' Agitation in Tamil Nadu*, Economic and Political Weekly, (2002).

¹⁷ *Hussainara Khatoon v. Home Secy., State of Bihar* AIR 1979 SC 1360

Case laws

There are a plethora of case laws which reiterate the position that lawyers are not allowed to strike.¹⁸ In the case of *Common Cause Society v. Union of India and Others*,¹⁹ it was held that:

if any associations of advocates call for a strike, then the State Bar Council or the Bar Council of India must take action against those persons who call for strike. Therefore, the Bar Councils and the Bar Association can never accept any Association calling for a meeting to consider a call for a strike or boycott. The Bar Council has a duty towards the court. The Bar Council is represented by the lawyers, hence it is the lawyers' duty towards the court which matters.

Moreover in the case of *Ex. Capt. Harish Uppal v. Union of India and Another*,²⁰ the contention raised was whether lawyers have a right to strike or give a call for boycott of courts. It was held that:

the call of a strike or boycott by lawyers is illegal. It was observed that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying banners and placards out of court premises, wearing black or white or armbands of any colour, peaceful protest marches outside and away from court premises, etc. No Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike. Only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at issue, courts may ignore a protest involving abstention from work for not more than one day. Moreover the court will decide whether the issue involves dignity, integrity, etc. It is the duty of all courts to go on with matters even in the absence of lawyers. The Bar Council of India and state Bar Councils should issue rules, stating a code of conduct for advocates, which should also include banning of advocates strike or boycotting court proceedings.

Again, in the case of *B.L. Wadhwa v. State*,²¹ the Delhi High Court held that lawyers have no right to go on strike or give a call for boycott and they cannot even go on a token strike and observed specifically that any strike cannot be justified.

From the above mentioned rulings it is amply clear that lawyers have no right to strike nor do they have any basis to form unions in order to engage in other forms of protest as well unless the reason for their protest falls under the ambit of 'rarest of the rare' which will be decided by the judiciary.

Effect on Court Proceedings and Clients

The next consideration would be to look into the effect of strikes (as they take place nonetheless) on court proceedings. In the case of *Ramon Services Pvt. Ltd. v. Subash Kapoor*,²² the question was when

¹⁸ Rajeev Dhavan, *Arguments, Protests, Strikes and Free Speech: The Career and Prospects of the Right to Strike in India* 34 *Social Scientist* ½ (2006), <https://www.jstor.org/stable/3518171>.

¹⁹ *Common Cause Society v. Union of India and Others*, AIR 2005 SC 4442 (India).

²⁰ *Ex. Capt. Harish Uppal v. Union of India and Another*, (2003) 2 SCC 45 (India); See also DHAVAN, *supra* note 18).

²¹ *B.L. Wadhwa v. State*, AIR 2000 Delhi 266 (India); Tanya Singh, Pramod Kumar Singh & Sanju Singh, *Legal perspectives on right to strike : An appraisal* 1 *International Journal of Law* 1, (2015).

²² *Ramon Services Pvt. Ltd. v. Subash Kapoor*, AIR 2001 SC 207 (India).

a lawyer goes for a strike call made by the association and boycotted the court proceeding, whether his litigant should suffer a penalty. It was held by the court that when an advocate involves himself in a strike there is no obligation on the part of the Court to either wait or adjourn the case on that ground. It was further observed that advocates have no right to boycott court proceedings on the ground that they have decided to go on a strike. Further, in another case i.e. *K. John Koshy & Ors. v Dr. Tarakeshwar Prasad Shaw*,²³ one of the questions was whether the court should refuse to hear the matter and pass an order when counsel for both the sides were absent because of a strike by the Bar Association. It was held that the court could not refuse to hear or avoid a case as it would indicate that the court is also a part of the strike and is supporting it.

From the above-mentioned rulings it is amply clear that court proceedings will go on even if the lawyers are on a strike. It is thus imperative to look into the impact of a strike on the client as it is them who suffer ultimately. It has been held that any loss to the client solely because of the advocate holding his *vakalath* owing to being on a call for strike, the advocate would be personally liable to pay damages to the client.²⁴

Ethical issues

Having dealt with the legality of the right to strike, the next conundrum to deal with is the ethical issues raised by such conduct. Ethics are nothing but certain established guidelines which need to be followed by professionals (in this case lawyers). These are contained in the Advocates Act²⁵ and Bar Council of India rules²⁶ as mentioned earlier. From our earlier discussion regarding professional misconduct, it is amply clear that any action which goes against those guidelines should be considered unethical. In this backdrop it is safe to say that strike, boycott or any action done in deviance from the established guidelines would be considered a breach of professional ethics.²⁷

Law Commission Report

There have been numerous strikes by the advocates which was brought to notice by the Law Commission in its 266th Report (March, 2017).²⁸ It found that in the period of 2012-2016 the number of working days lost on account of strikes by advocates was rampant through the length and breadth of the country like for eg. in the state of Uttarakhand, 455 days were lost i.e. 91 actual working days per year while Rajasthan lost 142 days.²⁹ While reviewing the Advocates Act, it was felt that the conduct of the advocates, directly as well indirectly affected the functioning of the courts, and thereby contributed to the pendency of cases. For instance, a lawyers strike in December 1994 in Delhi had resulted in 35,000 cases being adjourned.³⁰

UNITED STATES OF AMERICA

Regulatory framework

²³ K. John Koshy & Ors v. Dr. Tarkeshwar Prasad Shaw, (1998) 8 SCC 624 (India).

²⁴ Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd., (1999) 1 SCC 37 (India).

²⁵ Advocates Act 1961, Acts of Parliament, 1961 (India).

²⁶ Bar Council of India Rules (India).

²⁷ Law Commission, *The Advocates Act, 1961 (Regulation of Legal Profession)* (Law Com 266, 2017) <http://lawcommissionofindia.nic.in/reports/Report266.pdf>.

²⁸ Khagesh Gautam, *Judicial Delays, Mounting Arrears and Lawyer Strikes* II Economic and Political Weekly 32 (2017).

²⁹ Law Commission, *The Advocates Act, 1961 (Regulation of Legal Profession)* (Law Com 266, 2017) <http://lawcommissionofindia.nic.in/reports/Report266.pdf>.

³⁰ GAUTAM, *supra* note 28.

The USA is the first country which will be taken up for purposes of comparison on the right to strike by lawyers. The National Labour Regulation Act (hereafter 'NLRA') is the main law which has governed collective bargaining in the USA since 1935 for employees.³¹ Although it was applicable to merely the private sector, federal laws which govern public sector also drew inspiration from it with regard to their provisions.³² However in relation to the discussion at hand, the NLRA has covered lawyers under the ambit of 'employees' through a series of judgments which were given by the National Labour Relations Board and the courts, where it was observed that attorneys in both public and private sectors are subject to the rules governing professional employees. In this backdrop, certain rights were made available to lawyers (meaning professional employees) such as "[T]he right to self-organization, to form, join, or assist labour organizations, to bargain collectively through representatives of [his or her] own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."³³ Thus, the basis for union activism and activities like strike have been provided to lawyers through the NLRA in the USA.³⁴

In this backdrop, a Model Code of Conduct was formulated and adopted in 1969 by the American Bar Association. Earlier the ABA Commission on Ethics was against allowing lawyers to unionize till 1967.³⁵ However, there was subsequently a change in stance on this matter by the ABA once the Model Code was adopted and lawyers were given some leeway.³⁶ This code contained no disciplinary rule that specifically prohibited membership by lawyers in unions or associations representing lawyers.³⁷

Case law on Strike and Effect on Court Proceedings

Along with this statutory framework and Model Code, the judiciary also has over the years supported the lawyers in this regard by not disbanding their unions. An example of this can be seen from a case from Santa Clara where it was categorically held that attorneys suing for wages or other conditions of employment do not violate their duty of loyalty.³⁸ The American Bar Association's Committee on Ethics and Professional Responsibility has determined that a lawyer may join a union without thereby violating a disciplinary rule.³⁹ Decisions of Ethics Committee such as of the New York County also concur with this view. The Committee based its decisions on two assumptions which are of significance to our discussion, i.e. the legal right of attorneys to form unions and (2) the legal right of

³¹ Laura Midwood & Amy Vitacco, *The Right of Attorneys to Unionize, Collectively Bargain, and Strike: Legal and Ethical Considerations*, 18 HOFSTRA LABOUR & EMPLOYMENT LAW JOURNAL 299, 303, (2000).

³² *Id.*

³³ *Id.*

³⁴ NOTE – this is not applicable to Partners of Law Firms for example and such high level personnel.

³⁵ Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, Minnesota Law Review, (2012).

³⁶ *Id.*

³⁷ Laura Midwood & Amy Vitacco, *The Right of Attorneys to Unionize, Collectively Bargain, and Strike: Legal and Ethical Considerations* 18 HOFSTRA LABOUR & EMPLOYMENT LAW JOURNAL 299, 303, (2000); See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983). The Model Code, which replaced the ABA's Canons of Professional Ethics, was approved by the ABA House of Delegates in August of 1969. By 1980, a Code of Professional Responsibility, patterned after the ABA Model Code, had been adopted by nearly every state. Since 1983, however, more than 35 states have adopted the Model Rules of Professional Conduct. The Model Code has not been amended since then and the ABA does not plan to amend it in the future. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 447- 48 (Aspen Law & Business 1999).

³⁸ Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession* Minnesota Law Review, (2012), citing Santa Clara Cnty. Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142, 1157-58 (Cal. 1994).

³⁹ MIDWOOD & VITACCO, *supra* note 31.

those unions to strike.⁴⁰ However, an important and imperative caveat was imposed on this right to strike which is logical in my opinion i.e. while taking part in such activities they are obligated to not disrupt the proceedings of the court or take such actions which are detrimental to the clients interest i.e. proper representation and a speedy trial.⁴¹

Ethical issues

Apart from the legal aspect of the right to strike for lawyers, emphasis also needs to be placed on the ethical side of the issue. In this regard, existing case law rejects the assertion that there is an ethical bar to lawyers forming unions. An example of the same can be an opinion of the New York County Bar Association's Committee on Legal Ethics where the question at hand was whether a strike by unionized Legal Aid Lawyers was ethical under the New York Code of Professional Responsibility (New York Code).⁴² In this case, it was held that lawyers have the right to unionize and strike subject to the caveat mentioned earlier. However, other strikes have taken place over the years which have not attracted any ire or ethical action from the state bar.⁴³

Another noteworthy decision on this issue was given in the case of *Santa Clara County Counsel Attorneys Association v. Woodside*. Public sector lawyers had filed a case to enforce their rights to collectively bargain in this case under statutory law.⁴⁴ The court in Santa Clara found that such suits do not categorically undermine a lawyer's traditional duty of loyalty or "any other ethical obligation" owed to the lawyer's employer or client.⁴⁵ Rather, the court recognized that "the growing phenomenon of the lawyer/employee requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee."⁴⁶ The National Labour Regulation Board has also over time held that there is no conflict between union membership and a lawyer's professional duties. Furthermore, on numerous occasions the National Labour Regulation Board has rejected the allegation that union activity is professionally irresponsible or unethical.⁴⁷ Thus, the right to strike has been held to be legally and ethically just in the USA over time.

ITALY

Regulatory framework

Moving on to examine the right to strike for lawyers in Italy. The regulatory framework regarding this issue is much clearer in Italy due to the fact that such a right has been provided to the lawyers in the Code of Conduct which governs attorneys. Article 60 of the National Bar Council's Code of Conduct for Italian Lawyers covers the right to strike by lawyers.⁴⁸ The code explicitly states 'A lawyer is

⁴⁰ MORTAZAVI, *supra* note 34.

⁴¹ Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, Minnesota Law Review (2012), citing Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URBAN LAW JOURNAL 171, 182, (2005).

⁴² Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, Minnesota Law Review (2012), citing N.Y. Cnty. Bar Ass'n Comm. on Legal Ethics, Op. 645, 1 (1975).

⁴³ MORTAZAVI, *supra* note 35.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ National Bar Council's Code of Conduct of National Code of Conduct for Italian Lawyers.pdf.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Italy_Code_of_Conduct_for_Italian_Lawyers.pdf.

entitled to participate in a strike called by the legal authorities in compliance with the provisions of the code of self-government of the lawyer's organization and the regulations in force.'⁴⁹

Furthermore, the concept of the need of a union to be in existence in order for lawyers to strike can be inferred from the provision which states 'A lawyer is not allowed to take part or to dissociate himself from a strike according to his own convenience.'⁵⁰ A further fillip to the requirement of collective bargaining and negating individual interests to derail strikes are seen from the subsequent provision which states 'A lawyer who agrees with the strike may not partially dissociate himself from it, participating only on certain days or to his own specific activities. Similarly, a lawyer who dissociates himself from a strike may not choose to participate partially and to dissociate himself only for certain days or for his own particular activities.'⁵¹ If these provisions alone aren't enough to showcase the right to strike for lawyers, the code also provides for penalties/disciplinary actions in the event of lawyers not adhering to the guidelines pertaining to strike. The Italian Parliament has also approved the right to strike for lawyers who are in essential public services i.e. public defenders.⁵²

A. Case law on Strike and Effect on Court Proceedings

Moving on, the courts in Italy have also upheld this right to strike subject to certain necessary restrictions. An example of this can be seen in a July 2018 judgment by the Italian Constitutional Court which held as legal:

*the constitutionality of the right of public defenders to strike, but in balance with other constitutionally protected rights, such as the administration of justice, personal freedom, and due process of law. The Court also alluded to its previous decisions sustaining that ordinary tribunals have a right and a duty to find a balance when those two rights collide in specific cases, with particular attention to limiting the lawyers' right to strike by requiring previous reasonable notice from them, and demanding a reasonable duration of the strike.'*⁵³ It was further observed that 'The Court reviewed other legislation that, in general, guarantees public servants' right to strike, but that also provide for the continuity of essential public services, especially in the area of administration of justice when the personal freedom of the accused is involved. Furthermore, the Court recalled that the Code of Self-Regulation does not authorize the right to strike in criminal procedures when the accused is under provisional custody or detention.'⁵⁴

⁴⁹ *Id.*

⁵⁰ *Id.*, See also Nicola Canestrini, *The ethical code for Italian lawyers* (Jun 11, 2013) <https://canestrinilex.com/en/readings/the-ethical-code-for-italian-lawyers/>.

⁵¹ *Id.*

⁵² Roberto Pedersini, *Parliament approves reform of law on strikes in essential services* (Apr 27, 2000), <https://www.eurofound.europa.eu/publications/article/2000/parliament-approves-reform-of-law-on-strikes-in-essential-public-services>.

⁵³ *Italy: Right to strike in essential public services*, GLOBAL LEGAL MONITOR (Oct 2, 2018), <https://www.loc.gov/law/foreign-news/article/italy-right-to-strike-in-essential-public-services/> ; See also <https://www.gazzettaufficiale.it/eli/id/2018/08/01/T-180180/s1>.

⁵⁴ *Id.*

A few newspaper reports are also present which showcase Italian lawyers resorting to strike on matters like better pay, job security⁵⁵, and even changes in the legal system such as against a new mediation law.⁵⁶

Hence from the regulatory framework and judgments of the courts in Italy, it can be seen that lawyers including public defenders have been conferred with the right to strike. Penalties for not conforming to a call for strike by a lawyers union is also enshrined in the code with the caveat of lawyers having the choice to not take part in strike or in the event of them taking part in a strike, they have to inform their opposing counsels of the same. Further, the right to strike has rightfully not been made absolute with restrictions such as the interests of undertrials for example being in force. Moreover, owing to the right to strike being guaranteed to lawyers in Italy, looking into ethical issues in relation to lawyers professional ethics seem redundant, even though moral issues may remain which are not within the scope of this paper.

RECOMMENDATIONS AND CONCLUSION

From the experiences of India based on news reports and Law Commission Reports, it is clear that Bar Council of India imposing a ban on the Right to Strike of advocates is not feasible (as strikes continue to take place even though they are declared illegal by statute and judgments) but we cannot ignore the fact that giving the advocates an absolute Right to Strike would be very perilous. The experiences of USA and Italy show that a Right to Protest has to be there, in order to have the lawyers express their grievances, which will inevitably help the functioning of the legal system on the whole. These can be looked at by the Indian legislature to modify existing rules on strike by lawyers.

The Constitution of India guarantees freedom of association as a fundamental right, but this right is subject to reasonable restriction in the interest of public order and morality.⁵⁷ The right to protest of the lawyers should not be curtailed. Wearing armbands etc. as per the case of *Ex. Capt. Harish Uppal v. Union of India and Another*,⁵⁸ are not effective methods of protest. Hence it is imperative that protests, if any, must be resorted to on a non-coercive basis as a last resort for a limited duration bearing in mind the workload of the courts and its effect on the administration of justice.⁵⁹

In this backdrop, the Law Commission of India Report 266th can be a guiding light as it has made some suggestions and has also submitted a draft of Advocate Act (Amendment) Bill 2017. It has suggested that:

at every district headquarters, the District Judge may constitute an Advocates' Grievance Redressal Committee headed by a Judicial Officer which will deal with the day to day routine matters, as large number of issues and grievances arise in the smooth working of the advocates. In this regard, the High Court may issue a circular in exercise of its power under

⁵⁵ Phillip Pullella & Cristiano Corvino, *No joke: Italy lawyers strike for better pay, job security*, REUTERS (March 15, 2012), <https://www.reuters.com/article/us-italy-lawyers/no-joke-italy-lawyers-strike-for-better-pay-job-security-idUSBRE82E0RY20120315>.

⁵⁶ *Italy's Lawyers Plan Strike Over New Mediation Law*, MEDIATE (Mar 8, 2011), <https://mediate.co.uk/italys-lawyers-plan-strike-over-new-mediation-law/>.

⁵⁷ Rajeev Dhawan, *The Right to Strike*, *The Hindu* (10 January 2003).

⁵⁸ *Ex. Capt. Harish Uppal v. Union of India and Another*, (2003) 2 SCC 45 (India); See also Dhawan, *supra* note 18).

⁵⁹ GEETHISHA, *supra* note 10.

*Art 235 of the Constitution providing for redressal of grievances of the advocates which will help in improving their efficiency. In case there is some grievance against a Judicial Officer, the Bar may raise the grievance before the Chief Justice of the concerned High Court.*⁶⁰

Further, recommendations were made through the Advocates Act (Amendment) Bill 2017⁶¹ to impose monetary penalty on advocates who engaged in misconduct.⁶² Other provisions relating to prohibiting boycott⁶³ and compensation from lawyers was also made.⁶⁴ However, attempting to outright banning lawyers right to protest/boycott may trigger an even stronger protest and be counterproductive.

It may have been better to follow the route taken by USA and Italy of allowing a right to protest with the caveat which provides for the continuity of essential public services such as functioning of the courts,⁶⁵ especially in the area of administration of justice when the personal freedom of the accused is involved such as not providing the right to strike in criminal procedures when the accused is under provisional custody or detention.⁶⁶

A suggestion to balance both these rights i.e. protest by the lawyers and non-disruption of court would be to use the lunch hour to resort to such activities.⁶⁷ This will enable the lawyers to exercise their right to protest while also not hampering the functioning of the courts or the interests of the clients. The ethical aspect of professional misconduct and legality would also be taken care of by ensuring protests only take place during this stipulated timeframe on larger issues. While the trivial matters be taken care of by the Advocates' Grievance Redressal Committee as suggested by the Law Commission Report.

⁶⁰ Law Commission, *The Advocates Act, 1961 (Regulation of Legal Profession)*(Law Com 266, 2017) para 4.3,<http://lawcommissionofindia.nic.in/reports/Report266.pdf>.

⁶¹ Draft of The Advocate (Amendment) Bill, 2017, <http://www.barcouncilofindia.org/wp-content/uploads/2017/03/Suggested-Amendments-to-the-Advocate-Act-1961-1.pdf>.

⁶² Insertion of clauses in sub section 3 of Section 35:

- a. Imposition of fine (upto 3 lakhs) and the cost of proceedings.
- b. Award compensation (upto 5 lakh) to the person aggrieved by the misconduct of advocate.
- c. Impose cost (upto 2 lakhs) on complaints if found vexatious, false or frivolous and if the advocate concerned is not cooperating in the disciplinary proceedings under the Act.

⁶³ Insertion of new section 35a after section 35 of the Advocates Act namely "35a – Prohibitions on boycotts or abstention from court's work.

⁶⁴ Insertion of new section 45A after section 45 of the Advocates Act, for claiming of compensation in certain cases -

- a. If any person suffers loss due to the misconduct of the advocate or for his participation in the strike other, such person may make a claim for compensation against the advocate in the appropriate forum established under any law for the time being in force.
- b. The non-payment of fees, either in full or part, by a person to his advocate, shall not be a defence available for the advocate against whom such claim for compensation is made.

⁶⁵ MORTAZAVI, *supra* note 34.

⁶⁶ *Italy: Right to strike in essential public services*, GLOBAL LEGAL MONITOR(Oct 2, 2018), <https://www.loc.gov/law/foreign-news/article/italy-right-to-strike-in-essential-public-services/>.

⁶⁷ *South Korea: Labor Rights Violations Under Democratic Rule*, HUMAN RIGHTS WATCH, (Nov 1, 1995),https://www.refworld.org/docid/3ae6a7d60.html#_ftn88.

INTELLECTUAL PROPERTY RIGHTS IN DIGITAL ERA: INDIAN DIGITAL SOCIETY

Harshit Kiran & Nistha Panwar

Students, Maharishi Law School,

Maharishi University of Information Technology, Noida

E-Mail: harshit.kiran260@gmail.com, nisthapanwar1020@gmail.com

Phone: +91-9472434013

ABSTRACT

Intellectual Property alludes to the responsibility for merchandise. This incorporates thoughts, plans, images, works and manifestations. It additionally alludes to advanced media such as sound and video cuts that can be downloaded on the web. Since intellectual property is theoretical, in the event that it is taken, it very well might be hard to recuperate. Say for instance, an individual concocts a good thought for another development. Copyright started during a time where the declaration of the scholarly item in actual structure, like a book.

Today, in the data age where computerized data can be effectively duplicated at negligible expense this regular actual impediment to unapproved replicating is eliminated¹. It is in this manner time to reexamine the guideline of the copyright model. The motivation behind intellectual property law is to adjust the privileges of copyright holders and clients. Existing intellectual property law is relevant in the computerized age moreover. As increasingly more data opens up in computerized design, libraries should be guaranteed that the public can appreciate similar access rights likewise with printed data. This paper manages scope and inclusion of different ideas associated with IPR, like scholarly item, licenses, copyright, plans, brand names, PC programming, information bases, Web and digital laws, etc.

Keywords: IPR, Digital Era, Rights, Protection

INTRODUCTION

The word intellect begins from the root "intellectus" in Latin which implies the force of knowing as recognized from the ability to feel. Man has own ability to get information and increment his insight bank by social event information for the duration of his lifetime. A scholarly item is only the mind offspring of his unique thought, inventive idea, which shapes an exceptional sort of property known as intellectual property. The intellectual property is responsible for elusiveness. A privilege is lawfully secured interest and the object of the privilege is the thing in which the proprietor has interest. The article on intellectual property rights is unimportant.

Digital property incorporates information, Web accounts, and different rights in the computerized world, including authoritative rights and protected innovation rights. Protected innovation rights

¹ Refer to Article titled, "*Intellectual Property Rights in Digital Environment*" by Sougata Chattopadhyay, accessible at: Title : Intellectual Property Rights in Digital Environment (rclis.org).

additionally can exist in advanced property, like pictures, music, films, abstract works, Website pages, PC code, and other imaginative works.

What is Intellectual Property Rights?

Intellectual Property is a classification of property that incorporates theoretical manifestations of the human acumen². It alludes to manifestations of the brain, like developments; abstract and imaginative works; plans; and images, names and pictures utilized in trade. IP is secured in law by, for instance, licenses, copyright and brand names, which empower individuals to acquire acknowledgment or monetary advantage from what they develop or make. By finding some kind of harmony between the interests of trend-setters and the more extensive public interest, the IP framework intends to cultivate a climate where inventiveness and development can prosper.

So, in general we can define Intellectual Property Rights as the rights given to people over the manifestations of their brains, psyches: developments, abstract and imaginative works, and images, names and pictures utilized in trade. They for the most part give the maker a restrictive directly over the utilization of his/her creation for a specific timeframe³.

These rights are laid out in Article 27⁴, which accommodates the option to profit by the assurance of good and material interests coming about because of the origin of logical, scholarly or imaginative creations.

The significance of licensed innovation was first perceived in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). The two arrangements are controlled by the World Intellectual Property Organization (WIPO).

In India, intellectual property rights recognised under statute are:

- The Patents Act, 1970;
- The Trade Marks Act, 1999;
- The Copyright Act, 1957;
- The Designs Act, 2000;
- The Geographical Indications of Goods (Registration & Protection) Act, 1999;
- The Semiconductor Integrated Circuits Layout Design Act, 2000;
- The Biological Diversity Act, 2002;
- The Protection of Plant Varieties and Farmers' Rights Act, 2001.

Intellectual Property Rights (IPRs) assume a critical part in each area and have become the reason for essential venture choices. IPRs are select rights and accordingly there is consistently a test to find some kind of harmony between the interests of trailblazers and the interests of the general public on the loose. Another significant factor is having a satisfactory legitimate system to secure the interests of

² "Understanding Industrial Property". World Intellectual Property Organization.

³ WTO | intellectual property (TRIPS) - what are intellectual property rights?.

⁴ Universal Declaration of Human Rights.

trailblazers and move certainty that their licensed innovation will be ensured, thus setting off additional development⁵.

IPR suit in India is very assorted attributable to the enormous number of courts, shifting level of involvement of the legal officials in IPR matters and differing habits of training. Subsequently, a few courts have become favored gatherings over others.

Intellectual Property Rights don't vary from other property rights. They permit their proprietor to totally profit by his/her item which was at first a thought that created and solidified. They likewise entitle him/her to keep others from utilizing, managing or altering his/her item without earlier authorization from him/her. He/she can truthfully be told to legitimately sue them to pause and make up for any harms caused to them.⁶

History of IPR

History has archived wonderful people which have contributed a lot of their realities to improving society. Intellectual Property Rights plays a very significant job in not simply securing the person to shield the utilization of their realities from abuse however, it was intended to advance inventiveness and innovativeness. Intellectual Property Rights has advanced with the presence of new advances its chance has developed and a few elements remembering globalization of economies just as changes for the manner in which organizations work and politicization of IPR issues have been factors impacting its bearing. If one somehow happened to evaluate the Philippine setting doubtlessly our advancement is moderately contrasted with our other neighbors. Our soonest record of laws on intellectual property rights dated back in 1947. We joined the World Association (WIPO) in 1980 solely after 10 years after it was set up furthermore, our intellectual property code has just produced results during 1987. Besides the nation is seen as one of the countries that are feeble in upholding laws overseeing Scholarly Property. Bringing about Millions lost in income for organizations and the public authority in charges.

Predictable requirement is basic in view of the truth that there are individuals who don't regard the intellectual property privileges of others. The explanation may change from ravenousness, absence of mindfulness, seen need, criminal purpose or even an honest slip-up. When unlawful duplicates take a portion of the overall industry or even slaughter a potential market the authorization instruments become crucial to ensure the players and the elements as well as the overall population also. Most of the businesses that are influenced incorporate PC programming, music, films, extravagance merchandise and style, fragrances, books, watches, medication among others. As per World Intellectual Property Organization (WIPO) the variables that impact the expansion incorporate a huge hole in the purchaser buying power, failure to satisfy the market need and development of new advancements making it simpler to deliver volumes of unlawful duplicates at a quicker rate. Authorization measures are activities including authoritative, criminal, common and mechanical. In any case, to succeed a deliberate exertion to upgrade public mindfulness and a solid political will can have an effect in limiting if not annihilating the issue⁷.

⁵ Refer to Article on, "Intellectual Property Rights" by LexOrbis, Intellectual Property Attorneys.

⁶ Bentley, Nicholas (2004). Distributed Intellectual Property Rights. Available at <http://www.commonrights.com>.

⁷ Refer to Article titled, "INTELLECTUAL PROPERTY RIGHTS (IPR) IN DIGITAL ENVIRONMENT: AN OVERVIEW IN INDIAN DIGITAL ENVIRONMENT" by Sumeet Handa & Kishore Bhatt published in Volume 5 Issue 2- 2015 of International Journal of Digital Library Services with ISSN:2250-1142 (Online), ISSN 2349-302X (Print).

It is even believed that IPR is certainly not another idea. It is even accepted that IPR at first began in North Italy during the Renaissance period. In 1474, Venice gave a law directing licenses insurance that allowed an elite ideal for the proprietor. The copyright traces all the way back to 1440 A.D. at the point when Johannes Gutenberg imagined the print machine with replaceable/moveable wooden or metal letters. Late in the nineteenth century, various nations felt the need of setting down laws directing IPR. Internationally, two shows comprising the reason for IPR framework worldwide had been marked; Paris Convention for the Protection of Industrial Property (1883) and Berne Convention for the Protection of Literary and Artistic Works (1886)⁸.

Types of IPR

IPRs are essential to empowering interest in research as without some type of assurance, financial backers and designers would not have the option to profit by their imaginative endeavors. Proprietors of rights can forestall unapproved utilization of their IP, to quit duplicating, to control dispersion, and to hold, permit or sell their IP⁹.

In general, there are several types of IPR, which are mentioned below:

- **Patent:** A patent secures a development. It gives the holder a selective option to keep others from selling, making and utilizing the protected innovation for a specific period (commonly a long time from recording date). A patent is utilized to keep a development from being made, sold, or utilized by another gathering without authorization. Licenses are the most widely recognized kind of protected innovation rights that go to individuals' brains when they consider protected innovation rights security. A Patent Proprietor has each option to popularize his/her/its patent, including purchasing and selling the patent or giving a permit to the development to any outsider under commonly concurred terms.
- **Copyrights:** Copyright secures the declaration of abstract or imaginative work. Insurance emerges naturally giving the holder the selective option to control generation or transformation. Copyright doesn't secure thoughts. Maybe, it just covers "substantial" types of manifestations and unique work—for instance, craftsmanship, music, compositional drawings, or even programming codes. The copyright proprietor has the selective option to sell, distribute, and additionally duplicate any scholarly, melodic, sensational, imaginative, or structural work made by the creator.
- **Trademark:** A trademark is an unmistakable sign which is utilized to recognize the items or administrations of one business from others & permits buyers to effectively distinguish the specific products or administrations that an organization gives. Brand names are regularly firmly connected to brands and are another recognizable kind of licensed innovation rights security. A few models incorporate McDonald's brilliant curve, the Facebook logo, etc. A brand name can come as text, an expression, image, sound, smell, and additionally shading plan. In contrast to licenses, a brand name can ensure a set or class of items or administrations, rather than only one item or interaction.

⁸ INTELLECTUAL PROPERTY RIGHTS What is IPR (dubaicustoms.gov.ae).

⁹ Types of Intellectual Property Rights (dmu.ac.uk).

- Design: Ensures the type of visible presentation or stylish style of an article. Doesn't ensure usefulness or inconspicuous (inside) plan components.
- Database: Database right forestalls replicating of generous pieces of an information base. The security isn't over the type of articulation of data yet of the actual data, however in numerous different viewpoints data set right is like copyright.
- Trade Secret: A trade secret is a recipe, practice, interaction, plan or arrangement of data utilized by a business to acquire a benefit over contenders. Proprietary innovations are by definition not uncovered to the world on the loose. These are the privileged insights of a business. They are restrictive frameworks, recipes, procedures, or other data that is classified and isn't intended for unapproved business use by others. This is a basic type of security that can assist organizations with acquiring an upper hand.

Although intellectual property rights security may appear to give a base measure of insurance, when they are used carefully, they can augment the advantage and worth of a creation and empower world-changing innovation to be created, ensured, and adapted¹⁰.

Categorization as per WIPO

WIPO is the worldwide gathering for licensed innovation (IP) administrations, strategy, data and collaboration. It is a self-subsidizing organization of the Assembled Countries, with 193 part states. It's central goal is to lead the advancement of a reasonable and viable worldwide IP framework that empowers development and innovativeness to serve all. It's the order, overseeing bodies and techniques set out in the WIPO convention, which set up WIPO in 1967d¹¹.

According to WIPO, there are nine types of IPR & they are as follows:

- Copyright: Copyright laws award creators, craftsmen and different makers insurance for their artistic what's more, imaginative works (for example books, films, music, compositions, photos, and programming) and give a copyright holder the selective option to control multiplication or variation of such works for a specific timeframe for example life of the creator in addition to a very long while¹².
- Patents: A patent is a selective right allowed for an innovation – an item or cycle that gives another method of accomplishing something or that offers another specialized answer for an issue. A patent gives insurance to patent proprietors to their innovations. Assurance is conceded for a restricted period, by and large 20 years. A patent can be three types: utility licenses (which are isolated into three classifications: mechanical, electrical furthermore, substance), plan licenses and plant licenses. Utility licenses are those creations that are regularly considered as machines, for example, a phone or a MP3 player. Configuration licenses are allowed to the plan of something useful. A plant patent is allowed on another sort of plant that is made by human intercession.

¹⁰ Different Types of Intellectual Property Rights and Why They Are Important (inquantik.com).

¹¹ Inside WIPO.

¹² Refer to Article titled, "Intellectual Property Rights in Digital Environment" by Sougata Chattopadhyay, accessible at: Title : Intellectual Property Rights in Digital Environment (rclis.org).

- Trademarks: Trademarks are signs or images for example logos and names enrolled by a producer or then again shipper to recognize labor and products. Assurance is generally conceded for ten a long time and is recharging as long as the exchange marks keep on being utilized. Brand names can be different sorts. A brand name might be a brand name, exchange dress, administration mark, accreditation imprint or aggregate imprint. For instance, a brand name would be CocaCola; an exchange dress would be the state of the Coca-Cola bottle; an aggregate imprint could be the CPA lettering after a bookkeeper's name that assigns an affiliation like Affirmed Public Bookkeepers.
- Integrated Circuit: Format plan (geology) of integrated circuits is a generally new territory in IP which has showed up with PC innovation. The programming directions on a microchip are carried out through a hardware imprinted on semiconductor layers. The plan of hardware on the chip requires incredible speculation of information, abilities and capital and these should be secured as IP¹³.
- Breeders Rights: A plant raiser's privilege is a type of protected innovation right allowed to reproducers of new plant assortments. Reproducers of new plant assortments are allowed plant raisers' rights for security of their assortments against misuse without their consent. A plant reproducer's privilege is conceded for a very long time on account of plants and trees, and for 20 years in any remaining cases¹⁴.
- Trade Secrets: A trade secret (which is either likened with, or a subset of, "classified data") is secret, non-public data concerning the business practices or exclusive information on a business, public divulgence of which may at times be unlawful. In contrast to licenses, exchange areas are secured as long as the data is kept secret.
- Geographical Implications: A geographical indication is a sign utilized on merchandise that have a particular topographical beginning and have characteristics or a standing because of that spot of beginning. Most generally a topographical sign comprises the name of the spot of beginning of the merchandise. For instance Kolhapuri chappals from Kolhapur, India. Geological signs might be utilized for a wide assortment of farming items¹⁵.
- Utility Model: This idea began in U. S. patent law. A utility model is a selective right granted for an innovation, which permits the correct holder to keep others from financially utilizing the secured development, without his approval, for a restricted time frame. Patent law in India doesn't give any enrollment of utility models. For instance, a copy key making machine¹⁶.
- Industrial Design: A modern plan right is a licensed innovation right that ensures the visual plan of an article. It is worried about three-dimensional highlights, for example, the shape or surface of an article, or two-dimensional highlights, like examples, lines or shading. Modern plan is applied to a wide assortment of items. From watches, gem specialists, extravagant

¹³ Id.

¹⁴ Supra.

¹⁵ Ibid.

¹⁶ Supra 11.

things to modern and clinical executions; from house products, furniture, electrical apparatuses to vehicles and architectural structures. In India, the Indian Plan Act, 1911 has been supplanted by the Plan Act, 2000. The expression for a plan is a long time from the date of enrollment. This period can be reached out by 5 years if application is made before the expiry of 10 years.

IPR in Digital Era

Deming Zhou while talking about Chinese copyright assurance framework has raised explicit issues of IPR in an advanced setting. These are additionally pertinent in the Indian setting. The coming of advanced innovation has significantly speed up the scattering and dispersion of data with incredible speed and precision never seen. It is a lot simpler to disperse abstract, imaginative and logical work to an enormous local area of Web clients and clients of electronic media. Simultaneously represents a few issues and issues for thought. The significant issues are¹⁷,

- Is digitization to be considered as like proliferation, for instance utilizing Xerox machines?
- Is digitization a deductive movement, for example, interpretation starting with one language then onto the next?
- Can transmission of digitized archives through the Web be considered as business circulation or public correspondence like telecom?
- Is the rule of weariness of the dispersion right still powerful in the computerized age?
- Would we be able to consider an information base as a unique gathered work that ought to be secured by the intellectual property law or it tends to be considered as an uncommon work requiring explicit enactment for its security?
- What can be considered as —Fair use in the Web climate?
- What are the worries of the library local area?
- In the computerized setting if access could be mechanically limited by the copyright proprietor, how is it possible that the public would exercise reasonable use as to those works?
- Regardless of whether libraries ought to be kept from utilizing computerized innovation to save work by making three duplicates a documented duplicate, an expert duplicate and a utilization duplicate?

Regardless of whether Network access Suppliers (counting libraries and instructive foundations) ought to be at risk for copyright encroachment only in light of the fact that they worked with the transmission of advanced information (Zeroes and Ones) that converted into another gathering's protected work.

The issues referenced above are explicit to the library local area. The libraries as an assistance have permitted their clients to peruse an archive, to peruse the entire assortment; to

¹⁷ Malwad, N. M and Anjanappa, M. "IPR in digital environment: issues of concern to library community". Available at <http://ir.inflibnet.ac.in/handle/1944/130>.

search through the library inventory; to supply Xerox duplicate for explicit individual examination also, schooling reason; to get copies of articles from different libraries or clearing focuses; to broadly appropriate the re-delivered duplicates of reports requiring public mindfulness what's more, to give bury library credit administration. Regardless of whether every one of these exercises will proceed in the computerized age? In the event that digitization is considered as proliferation, plainly in digitization the starting work is only changed into the computerized structure and the way toward changing is achieved by a machine, with no imagination. Simultaneously, in the event that it is considered as an interpretation starting with one language then onto the next, the digitization is additionally a change from normal language of people into parallel language of machine. In digitization be that as it may, there is no imagination included and it very well may be considered as an action like reprography. The copyright secures innovative works. Just change in to the computerized type of a unique record can't be considered as innovative¹⁸.

Stages of IPR Developments in India

- 1947: Patents & Designs Act, 1911
- 1995: India joins WTO
- 1998: India joins Paris Convention/PCT
- 1999: Patent amendment provided EMR retrospectively from 1/1/95
- 2003: 2nd amendment in Patents Act
- Term of Patent – 20 years after 18 months publication
- Patent Tribunal set up at Chennai
- 2005: Patents (Amendment) Act 2005
- 1999 – 2005: Plant Varieties and Farmers 'Rights Act & Biodiversity Act. Designs, TM/Copyright Acts updated GI Registry set up at Chennai. IP Acts TRIPS Compliance

Legislative ways of protecting IPR in India

The authoritative structure for getting IPR is as follow:

- Indian Contract Act, 1872
- The Trade Marks Act, & (Amendment) 1999, 2002
- Copyright Act, 1957 & (Amendment) 1994, 1999,2012
- The Patents Act, 1970 & (Amendment) 2005,2006
- The Designs Act, 2000, 2008
- Plant Breeder Right, 2001
- Geographical Indications of Goods (Registration and Protection) Act, 1999, 2002

Ways of Protecting Intellectual Property Rights in Digital Era

Digital Rights Management (DRM) innovations (otherwise called Electronic Rights Management Systems) guarantee copyright through recognizing and securing the substance, controlling access of the work, ensuring the respectability of the work and guaranteeing installment for the entrance. DRM innovations forestall unlawful clients in getting to the substance. Access is ensured through client ID and secret word, authorizing arrangements. Another approach to ensure computerized content is

¹⁸ DEMING ZHOU, Chinese copyright protection system and the challenges of digital technology.

through Technical Protection Measures (TPM). These advancements permit distributing organizations in getting and securing substances like music, text and video from unapproved use. In the event that a creator wishes to gather expense for utilization of their work, at that point DRM innovation can be utilized. The TPM and DRM advancements are progressively utilized to sell and convey content over the Web.¹⁹

- **Cryptography:** Cryptography is the most established component utilized to guarantee security and security of data over networks. This includes scrambling (or encryption) of the data to deliver it indistinguishable or not reasonable language, which as it were the authentic client can unscramble (or decode). Anyway cryptography secures the work during transmission or dispersion as it were. After the work is unscrambled, it does not give any assurance.
- **Digital Watermark Technology:** A digital watermark is an advanced sign or example embedded into a computerized report. It is like the electronic on-screen logo utilized by Stations. A novel identifier is utilized to recognize the work. The message may contain data in regards to proprietorship, sender, beneficiary and so forth or data about copyright authorization. The framework comprises a watermark generator, embedder and a watermark finder decoder. The lawful client can eliminate these watermarks with a foreordained calculation. The watermarking innovation is broadly utilized in securing interactive media works.
- **Digital Signature Technology:** Digital signature incorporates character of the sender or potentially beneficiary date, time, any extraordinary code and so on This data can be added to advanced items. This carefully stamps and ties a product item for moving to a predetermined client. Carefully marked fingerprints ensure archive credibility and forestall unlawful replicating.
- **Electronic Marking:** In this method, the framework naturally produces a novel imprint that is labeled to every one of the record duplicates. This procedure is utilized to ensure copyright just as in electronic distributing where archives are printed, duplicated or faxed.
- **Security Features of Operating System:** For security of documents, information and so forth the working arrangement of PC, for example, Windows 2000 Expert, Windows 2000 Worker, MS-SQL Worker has a few one of a kind unique security and trustworthiness highlights.

Conclusion

As indicated by this paper we discovered the end that, before the coming of Data and Correspondence Innovation, IPR and intellectual property laws were viewed as a dull and nearly superfluous space of law identifying with data arrangement. In any case, with the utilization of ICT the IPR now has become an essential issue and quite possibly the most powerful and quick spaces of law. In the present situation, IPR mindfulness is the way to mechanical advancements and in the arising information based economy; the significance of IPR is probably going to go further. The mindfulness among the

¹⁹ Refer to Article titled, "Intellectual Property Rights in Digital Environment" by Sougata Chattopadhyay, accessible at: Title : Intellectual Property Rights in Digital Environment (rclis.org).

makers of data and information about IPR has gotten fundamental in the advanced climate on the grounds that in the computerized climate it is getting hard to demonstrate rights infringement at whatever point they happen. With regards to computerized data, since it is disseminated to a bigger local area, it is hard to pass judgment, —fair use, access and control the encroachment of intellectual property law. It is practically unthinkable for a copyright proprietor to know which individual utilized his/her work. It is additionally unimaginable for copyright proprietors to utilize and get compensation. In this setting it is important to change the intellectual property law. The curators in the advanced climate have a similar obligation to gather data and help the perusers by giving it regardless of whether the structure is electronic data. The part of administrator is to be secured furthermore, upgraded. The copyright security ought to be empowering the utilization of data for inventiveness and not for making obstacles in the utilization of data. The Curators ought to keep on filling in as impetus for the free progression of data between the proprietors of copyright what's more, the clients of the data.

Various issues are related with the use of computerized data for example issue of single articles versus full issues of e-diaries, ease of use, inconsistent equipment and programming, arranging, designs, insightful acknowledgment and out of date quality. While it is imperative to secure the copyright of the distributors, it is similarly imperative to ensure interest of the libraries and the client. In a computerized climate it is hard to draw a limit line between what is passable, to what degree and what is encroachment. Little – scale infringement which doesn't struggle with proprietor's privileges might be acknowledged as a piece of reasonable use. With regards to advanced data, it is hard to pass judgment, appreciate reasonable use, access and control the encroachment of intellectual property law. It is practically unthinkable for a copyright proprietor to know which individual utilized his/her work. In this setting it is important to adjust the intellectual property law. The bookkeepers in the computerized climate have some duty to gather data and help the perusers by giving it regardless of whether it is an electronic structure.

The copyright security ought to be empowering the inventiveness and not for making obstacles in the utilization of data. The Bookkeepers should function as an impetus for the free progression of data between the proprietors of copyright and the clients of the data.

RECOGNITION OF TRANSGENDERS RIGHT: A ROAD AHEAD TO JUSTICE

Sanjana Dayal, Alankrita Katiyar

BBA LLB (corporate laws) - 3rd year

University of Petroleum and Energy Studies

Contact No. - 8210928725, 9140793805

EMAIL :- 04sanjanasingh@gmail.com, alankritakatiyar@gmail.com

ABSTRACT :

Transgender community includes Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv -Shakti etc. Transgender people face extreme legal issues when it comes to right to marriage. This paper will focus on the legal issues surrounding marriage for transgender people and suggests a few ways, which can help them to protect or validate their marital relationships. There are several other rights including health rights, inheritance rights, adoption rights, maintenance rights etc. that needs to be recognized for the benefit of the transgender community. The authors would be highlighting the landmark cases that paved the path for Transgenders rights in India. In the judgement of NALSA v Union of India¹, Supreme court has held that right for gender self-identification is significant under right to dignity and personal liberty under article 21 of the constitution and hence granting right to equality to them under article 14 of Indian Constitution. Following this judgement, The Transgender Person (Protection of Rights) Bill, 2016 was introduced to safeguard the transgender individuals and protect them from any kind of discriminations, followed by amendments in 2018 and 2019 in the bill. Finally, India has enacted The Transgender Person (Protection of Rights) Act, 2019, thus the authors would try to do a subtle analysis of the same. In the personal laws, it can be seen that Transgenders are granted minimal rights. However, when it comes to practical implications, it lags behind due to the existence of the stigma and stereotypes relating to the Transgenders. Recognizing them as third gender is the first step towards ending the discrimination against them. Thus, the authors would emphasize on the several aspects of the rights of the Transgenders. The paper would certainly try to give an idea about the Transgender person (Protection of rights) Act, 2019. The authors have also tried to give a brief idea of initiatives taken by different State governments across the nation. The paper would suggest ideas about bringing rights of the Transgenders at par with that of the cisgenders.

KEYWORDS: Transgender, Rights, personal laws, gender identity, The Transgender Person Bill, 2016, The Transgender Person (Protection of rights) Act, 2019.

“Sex is what you are born with, gender is what you recognize and sexuality is what you discover”.
Anitha Chettiar²

¹ NALSA v. Union of India AIR 2014 SC 1863.

² Anitha Chettiar, Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their

INTRODUCTION

Transgenders are the individuals whose gender identity does not pertain to any of the biological sex and thus they are very different from men and women. They are generally recognized by different identities, culture and experiences. *In India, they are usually recognized by the names such as Hijras, Eunuchs, Kothis, Jogas/Jogappas, Aravanis and Shiv-Shakti. In different states, they are called by different names*³. Hijras are the largest community among transgender and they are the biological males who does not behave like a male but favors feminine identity. They are described as neither male nor female. Most of them are not even accepted by their families and therefore they are forced to live with the community of similar people. It can be seen that their arrival is termed auspicious through the Indian history. However, in the society they are still seen as a bad omen. Eunuchs are the intersex individuals whose genital part are ambiguous. Transgender is considered as an umbrella term and it covers various people from bisexuals to cross-dressers⁴.

*While Kothis are the heterogeneous people who are male but shows femininity. Jogas/ Jogta are generally based on long superstition. According to the superstition, it is believed that Goddess Yellamma or Renuka has taken them. Therefore, they are kept away from family and are said to serve the goddess throughout their life. Similarly, Shiva- Shaktis are generally male to the female transgenders and it is believed that they have married to sword of Shiva, which is seen as representation of masculine power. Generally, they both belong to Hindu religion. Ancient Vedic texts had multiple times referred transgenders as Napunsak as they do not have reproduction ability and hence they are believed to have power to confess their blessings on people of society on auspicious occasions. In the literature text of ancient Hindu named as Kama Shastra they have been referred as 'tritiyapakriti'*⁵. It is seen that they were respected during the era of Mughal period. However, after the Britishers came in India and British Raj started, they were termed as criminal offenders and were denied all the civil rights. Though, at that time, Criminal Tribes act⁶ defined the transgenders and Hijras and if anybody was found involved in activities related to transgenders then they would be punished with an imprisonment for 2 years and fine. India got independence in 1947 and the act was abolished but nothing changed much as they are continuously fighting for their rights.

Transgenders were given importance in ancient sacred text of Sanskrit. The sculptures on Hindu temples at Khajuraho and Konark, which represents same sex desire in literature as well as in art. They are often found begging and involved in prostitution. After many years of independence, they were finally granted right to vote but even that lags behind when it comes to practical implementation. *It was first time in 2011 census that the actual population of transgenders was calculated in which it was estimated that there were 4.88 lakh transgenders in India.*⁷

According to survey which was conducted by NHRC, 89% of transgender person does not get opportunities of employment despite having all requisite qualification and skill required for job.

Health and Harassment by the Police, IJSSH 752, 2015, available at: [http://www.ijssh.org/papers/55 1-W10007.pdf](http://www.ijssh.org/papers/55%201-W10007.pdf).

³ Akhand Sharma, Identity Crisis for Transgender in India: A Case-study from Madhya Pradesh, 12 QUEST- J. UGC-HRDC NAINITAL 157 (2018).

⁴ Dr David Delvin, Transvestites and cross-dressing, (Jan, 14, 2015), <https://www.netdoctor.co.uk/healthy-living/sex-life/a2264/transvestites-and-cross-dressing>.

⁵ Amara Das Wilhelm, Tiritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity and Intersex Conditions through Hinduism 24 (Xilbris Corporation, 2013).

⁶ Criminal Tribes Act, No. 27, Acts of Parliament, 1871(India). (Repealed).

⁷ Transgender Census, <https://www.census2011.co.in/transgender.php>.

Partially this is the main reason which compelled them to do sex work for to earn livelihood⁸. During Covid-19 pandemic lockdown these transwomen have to face more difficulty and hard times to get employment due to the reason that most of them depend on sex work or blessing/ begging as livelihood means which was impossible and collapsed during the lockdown. *According to 2011 census of India literacy amongst all the transgender persons was 46 percent as compared to 74 percent of whole general population*⁹. *Many of among them hesitated to go school after noticing sudden changes in them and rest 64 percent of them belonged to low-income group*¹⁰. *The National AIDS Control Organisation (NACO) in 2015-16 found rate of HIV prevalence amongst trans-population to be 8.82%, which was the second highest amongst the high-risk groups*¹¹.

While through NALSA v Union of India¹², Supreme Court recognized transgenders as third gender in society. Various famous transgenders personality worked hard for their community to get social recognition. Jyoti Mandal became the first transgender judge in Indian History and is working for transgender rights organization. Prithika Yashini became first transgender sub inspector and entered into Police service. Shabnam Mausi was the first transgender who became Member of Legislative assembly from Madhya Pradesh and therefore proved that transgender can do all the things, which the cisgenders are able to do. Recently UP government has dedicated Noida metro station called as “*She-man station*” to transgenders to provide employment opportunities to them¹³. Manabi Bandopadhyay was India's first transwoman college principal. Kamla Jaan became the first woman transgender mayor. Kalki Subramaniam became the India's first successful transgender entrepreneur. Laxmi Narayan became the first transgender human right activist in the history of India¹⁴. These transgenders are the ones who made the difference in the society despite being a social stigma against them that prevailed in society and had proved that if they are given opportunities in various field and get support by government in employment area as well in education field then they can bring a pride for the nation. Government is also coming up with certain policies so that many big companies such as KPMG, Infosys, Accenture, Nestaway and Sodexo can hire them in companies.¹⁵ All central government departments were told to include ‘transgender’ as separate category for job applications.¹⁶ It can be seen that government is also working to provide them rights but it had to be seen that these policies actually are implemented strictly and more and more transgenders should get benefit under it.

RIGHTS OF TRANSGENDERS

The right to marry is right granted by constitution of India, which allows citizen to make the choice of life partners in accordance with their own choices and this right can never be taken away. Right to life and personal liberty given under Article 21 of the constitution of India not only deals with physical

⁸ The National Human Rights Commission, study on Human Rights of Transgender as Third Gender (2017).

⁹ Rema Nagarajan, First count of third gender in census: 4.9 lakh, The Times of India, (May, 13, 2014), Accessed on 13 April 2021.

¹⁰ Sridevi Shivakami, P.L. and K.V. Veena, Social Exclusion has a Negative Impact on the Health of Transgender, Indian Streams Research Journal, Solapur, 2011.

¹¹ Annual Report, Department of Health and Family Welfare, Ministry of Health and Family Welfare, Government of India (2015-2016).

¹² NALSA v Union of India AIR 2014 SC 1863.

¹³ <https://www.thehindu.com/news/cities/Delhi/noida-metro-seeks-suggestions-on-facilities-for-transgenders>.

¹⁴ <https://www.indiatoday.in/education-today/gk-current-affairs/story/6-indian-transgenders-who-dared-to-make-a-difference>.

¹⁵ <https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-opens-doors-to-transgender-employees>.

¹⁶ <https://timesofindia.indiatimes.com/india/include-transgender-as-separate-category-in-job-applications-centre-tells-its-departments>.

existence but also talks about the human life, which is meaningful for existence¹⁷. It is always seen that inherent dignity of human is required for granting rights under Article 21 of the constitution of India.¹⁸ Right to marry is very important for dignity of individuals. Courts of India itself has various times interpreted and said marriage is an important right that is given under Article 21 of the constitution of India.¹⁹

As right to marry by the person of own choice has been granted the status of civil rights and been regarded as a fundamental right but still transgender people are facing many problems and they are been deprived of this basic rights. The personal laws, which recognizes religious marriages and other law agencies that enforces them are not taking initiative regarding marriage rights of transgender which should be granted to them. The Madras high court gave a significant judgement in Arun Kumar and Another V. The Inspector General of Registration and Ors.²⁰ confirming that it is the fundamental rights of transgenders to marry the person of their choices. The Court upheld Hindu Marriage between the Arun Kumar and a Sreeja which was a transwoman who was refused by marriages registrar of Tuticorin as transwoman will never be qualified as a 'bride' under *Section 5 of Hindu Marriage Act, 1955*²¹. Various broad interpretations were made by the court and they referred to the Supreme Court's decision decided in NALSA v Union of India²², Justice K. Puttaswamy v Union of India²³ as well as Navtej Singh Johar v Union of India²⁴ to state that transgenders always have a right to self – identify their genders. It also held that sex and gender are very different because sex of person is determined biologically at time when he or she is born but that is not with the case of gender. The court while supporting and giving the judgement of their right of marriage also went to state that discrimination on the basis of sexual orientation or identity of gender would diminish the equality before law and will violate Article 14 of the constitution. NALSA judgement was quoted and referred to mention that self-determination of gender is always an integral part of personal enjoyment and self-expression and will therefore fall under Article 21 which deals with the individual right of personal life and liberty. Moreover, the choice of petitioner that she wants to express her identity of gender as a woman falls under personal liberty and state cannot question over it. Hence, transgenders have a right to marry.

From the case of Justice K. Puttaswamy v Union of India²⁵, it has to be inferred that Right to privacy also applies to the decision of the individual that want to enter into the marriage and relationship which can be seen as a foundation of family in the Indian Society. If personal laws are referred then the term "bride", mentioned in Section 5 of Hindu Marriage Act can never have a 'static' and 'immutable' meaning and the whole statutes and laws need to be interpreted in sense of current legal system.²⁶ The Court in one of the landmark case of Shafin Jahan V. Asokan K.M and Ors.²⁷ relied on

¹⁷ Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors., (1985) 3 SCC 545.

¹⁸ Maneka Gandhi v. Union of India, AIR 1978 SC 597; Francis Coralie v Union territory of Delhi, (1981) 1 SCC 608.

¹⁹ Mr. X v. Hospital Z, AIR 1999 SC 495.

²⁰ Arunmkumar and Another v. The Inspector General of Registration and Ors., WP (MD) No.4125 of 2019 and WMP(MD) No. 3220 OF 2019.

²¹ The Hindu Marriage Act, 1955, Act No. 25 of 1955, Parliament act of India.

²² NALSA v. Union of India AIR 2014 SC 1863.

²³ Justice K. Puttaswamy v. Union of India, (2017) 10 SCC 1.

²⁴ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

²⁵ Supra Note 21.

²⁶ <https://clpr.org.in/blog/breaking-new-ground-transgender-persons-fundamental-right-to-marry>.

²⁷ Shafin Jahan v. Asokan K.M and Ors., AIR 2018 SC 343.

the fact that *Article 16 of the Universal Declaration of Human Rights on Right* to marry and gave a judgement that right to marry a person of individual choice was always held to be an integral part of **Article 21** of the Constitution of India. Under Hindu marriage law, marriages are based on mutual love and attraction between the two persons. This type of marriage will always favor the marriage of transgenders but the condition requires that mutual love and attraction between the individuals should be there.²⁸ Therefore, in Hindu marriage law transgender person can marry another person like transmen and transwomen or transmen and women or men and transwomen but could not marry the person of same sex, which is a major drawback. While marriage in Muslim law is civil contract, therefore Muslim law does not recognize any such type of transgender right of marriage. However, it is to be considered that neither Hindu nor Muslim has special marriage law where transgender are given a right to marry exclusively. Even under Special Marriage Act²⁹, there are no provisions for transgenders to register their marriage.

The judgement of madras court where it was held that transgender have right to marry under Article 21 of the Constitution of India was first judgement by any court of India regarding transgender right to marriage. Although this judgement is seen as a major step towards for transgenders both legally and socially but it has to be also taken into consideration that it only talks about right to marry of individual who self-identify themselves and are in heterosexual relationship. However, at the same time, it does not legalize the same sex marriage for transgenders and neither grant fundamental right to marry under the Article 21 for LGBT community.

Therefore, it is need of the hour that same sex marriages are allowed in India because in Indian society it is often seen that person would be able to live dignified life only when they would be granted sets of fundamental rights. Supreme Court decriminalized Section 377 of Indian Penal Code and said that transgenders will come under third gender and same sex relationships are allowed in accordance with Article 14 and 21 of Indian Constitution³⁰. But granting them just mere existence would not be enough and hence various rights need to granted to them as well as proper provisions had to be made regarding the same sex marriage, adoption rights, divorce rights, maintenance rights, Inheritance rights, etc. because people of society see transgender and LGBTQ community against social morality. Hence, they suffer and face discrimination. *While decriminalizing section 377 of IPC, Supreme Court opined that they also have same fundamental right as others but the law is of no use until implemented practically as it has been seen they are not granted various rights, which is important for a person to survive and hence they are still fighting for their rights.*³¹

Transgenders are also not given right of inheritance. Hindu succession Act, 1956 only recognizes male and female who can inherit property rights because term used in the act like male, female, son, daughter are restricted only with the identity of gender and does not include third gender that is transgender. Therefore, the identity of gender for inheritance will only be recognized based on gender, which is assigned to them in the birth certificate, and this criteria of inheritance of property from parents as well as family is violative of article 15 of Indian constitution, which deals with prohibition

²⁸ Sir Dinshaw Fardunji Mulla, Mulla Hindu Law, 12th edition, Lexis Nexis.

²⁹ Special Marriage Act, 1954, Act No. 43 of 1954, Act of Parliament.

³⁰ Sawant, Neena. (2017). Transgender: Status in India. *Annals of Indian Psychiatry*. 1. 59. 10.4103/aip.aip_43_17.

³¹ <https://www.thehindu.com/news/resources/full-text-of-supreme-courts-verdict-on-section-377-on-september-6-2018/article24880713.ece>.

based on discrimination on the ground of sex.³² Therefore, the term ‘Sex’ is never limited to biological sex as a male and female but it also includes a person who never recognizes themselves as a male and female.³³ But under section 24 to 26 of this act transgender cannot be a ground for disqualification as these sections have term ‘person’ which includes wider term and which has been defined in General Clause act, 1897 as any company, body of individuals which are incorporate or not.³⁴ However, it has to be inferred that while having the broad interpretation it is only the intention of legislature who include male and female but not transgender that is third gender. Moreover, the same is followed in Muslim law as well. The Indian Succession Act governs the Christian inheritance property law³⁵.

Indian Courts were successful in recognising Transgender person as “Third Gender”. But still there are discriminatory laws such as there is not a single law that supports transgender persons marriage. Cabinet had approved the *Surrogacy (Regulation) Bill, 2020*³⁶ that had allowed surrogacy for divorcee, widow, heterosexual couples and single women but bill is completely silent on parenthood right of Transgender people. On the other hand, Adoption laws itself does not allow transgender persons to adopt children legally. Most of the times they do it illegally so as to support children who run away or abandoned by their families. Gauri Sawant is a self-identifying hijra who is mother to her adopted daughter³⁷. Motherhood is always perceived from a gender norm to fulfil the womanhood criteria. There is urgent need emerging to revisit the notions of motherhood and adoption. We need to look above the marriage and kinship outside the scope of binary gender sex³⁸.

Transgenders cannot marry and adopt child as these rights of adoption to them are neither given nor laid down in any provision of law. Marriage and adoption of children are huge issue for sexual minorities. If they want to get married then they have to face many challenges. However, if they are transman or transwoman then still, they need to have the identity cards of ‘cisman’ and ‘ciswoman’ if they want to get married. They can live together but their relationship would not be considered legal in eyes of law. The online form of adoption to adopt children does not have a third option listed there, other than male and female. Therefore, even if alone this huge financial burden of such legal adoptions are not taken into consideration but then these rules itself do not allow sexual minorities like third gender to legally adopt children and hence transgender are deprived of right of adoption.³⁹ It can be said that under Hindu marriage act, 1955 limited right is granted to transgender women to marry therefore we can say that adoption by only single LGBT people and transgender people is recognized but adoption by same sex couple is not allowed. In India, the laws of adoption are governed by The Hindu Adoption and Maintenance Act, 1956⁴⁰ that provides for a procedure to adopt child by Hindu people. In this transgender is given some restricted rights to adopt a child but when it comes to adoption by the same sex couples then it remains silent on that point. Personal laws of Muslim, Christian does not recognize this adoption right. Therefore, if they want to adopt a child then they can

³² <https://www.ijlmh.com/wp-content/uploads/2019/03/Inheritance-Rights-of-Transgender-A-Cry-of-Humanity.pdf>.

³³ MANJEET KUMAR SAHU, ‘A CASE STUDY ON NALSA v UNION OF INDIA & Ors. (AIR 2014 SC 1863); A RAY OF HOPE FOR THE LGBT COMMUNITY’ (2016) Volume III Issue 2 BRICS LAW JOURNAL.

³⁴ The General Clause Act, No. 10 of 1897, Act of Parliament.

³⁵ Indian Succession Act, Act No. 39 of 1925, Act of Parliament.

³⁶ <https://www.latestlaws.com/articles/surrogacy-regulation-bill-of-2020-balancing-interests/>.

³⁷ Ina Goel, What does it mean to be a Hijra Mother? Economic and Political Weekly, Vol. 53, Issue No. 8, (Feb, 24, 2018).

³⁸ Bianco, Marcie, Not Having Them At All: Why Childfree Women Are Banding Together, Quartz, (Oct, 9, 2015), available at <http://qz.com/520484/not-having-them-at-all-why-childfree-women-are-band>.

³⁹ <https://www.thehindu.com/news/national/kerala/transgenders-raise-the-adoption-question>.

⁴⁰ Hindu Adoption Maintenance Act, Act No. 78 of Parliament, 1956.

take 'guardianship' of the child under the provisions of *The Guardian and Wards Act, 1890*⁴¹ (recently amended in 2016). However, even this act also does not recognize the right of adoption to transgenders. Hence, it can be concluded that there are not a single law in the country, which govern rights of parenting and adoption rights to transgender community. Anybody who can take proper care of child with safe environment should be allowed to adopt a child and therefore child should not be denied this right only on the vague reason that society and religion are not accepting it.

As there has been no rights of marriage that is provided to transgender and hence there is no right of divorce and maintenance available to them. Not only are this right but there also other rights related to transgenders, which should be granted to them. If health rights are considered then they too have not been granted them with full effect. Transgenders are more prone to risk of HIV as most of them are involved in sex works and are easy target for violence and harassment and hence they have mental health issues due to which it can lead them to stress and suicidal attempts⁴². There is also not a separate public toilet for transgender community and neither there is medical facility like hospitals where they can go without any fear of discrimination. They always fear to tell that they are transgenders in hospitals, which is a major concern for health of transgender community⁴³. Hence, proper provisions should not only be made regarding the health rights but also implemented. Though central and state government are given directions to ensure the health of transgender in society but there is need of an hour that policies are made and they do not get discriminated in each and every platform.

EVOLUTION OF RIGHTS OF TRANSGENDERS THROUGH JUDICIAL PRONOUNCEMENTS

The legal tug of war for the rights of the whole LGBT community can be traced back to 1990s. In the post-independence era, the transgender community has faced numerous setbacks, in order to have same rights as that of any heterosexual couple. In 1860s, when the British ruled India, homosexual intercourse was not considered natural and thus, declared as a criminal offence under Section 377 of the Indian Penal Code. After the independence, the right to equality under Article 14 was implemented in the whole nation making the people equal in the eyes of law. However, the homosexual intercourse remained a criminal offence⁴⁴. Several decades later, the first known protest for transgenders rights was conducted on August 11, 1992. An organization *AIDS Bhedbhav Virodhi Andolan (ABVA)* organized a gathering in the front of Delhi police Headquarters to protest against the arrest of men from Central Park of Connaught Place charging them for homosexuality under Section 377. However, the outcomes were not at par with the expectations. The first attempt to legalize homosexuality and the first legal protest can be traced back to the year 1994. The ABVA activists filed a Public Interest Litigation (PIL), challenging the constitutionality of the Section 377, in the Delhi High Court. However, after the sudden demise of Siddhartha Gautam, a co-founder of ABVA and the first champion of gay rights, the organization failed to follow through the petition leading the case to dismiss in 2001. Amidst all this, in 1999 Kolkata held India's first Gay Pride Parade with only 15

⁴¹ The Guardian and Wards Act, No. 8 of 1890, Act of Parliament, 1890.

⁴² Transgender Health and Their Rights in India, International Journal of Research in Social Science.

⁴³ <https://www.deccanherald.com/metrolife/metrolife-your-bond-with-bengaluru/toilets-he-she-and-them-780085.html>.

⁴⁴ Moksha Sanghvi, "History of the pride movement in India" <https://www.deccanherald.com/specials/history-of-the-pride-movement-in-india-742950.html>.

attendees and was termed as “Calcutta Rainbow Pride”. The parade was aimed to send a message throughout the whole country i.e. “Being Queer and Being Proud”.⁴⁵

Though the movement for the rights of not only the transgender but also the whole LGBT community can be traced back to the 1990s but the major developments can be discussed through some landmark judicial pronouncements and aftermath. The major judgements that paved the way for the rights of the transgenders include a chronology of cases from Naz Foundation Govt. V. NCT of Delhi⁴⁶ to the case of Navtej Singh Johar V. Union of India.⁴⁷ The cases are discussed in detail below:

1. Naz Foundation Govt. V. NCT of Delhi⁴⁸

In the year 2001, the Lucknow Police, trying to be enthusiasts about enforcing Section 377, raided a park and arrested few men in the suspicion of them being homosexuals. They raided “Bharosa” as well that is an NGO working on the health issues and creating awareness about safe sexual practices and sexually transmitted diseases (STDs) among the people. Nine more men were arrested related to the said NGO. These men were denied bail, accusing them of running a sex racket. After a month, the Lawyers Collective, a legal aid organization, came forward and established that the charges against the men were not true and finally they were released on bail. After the incident, an NGO Naz Foundation along with the Lawyers Collective filed a PIL in the Delhi High Court challenging the Constitutionality of Section 377 of Indian Penal Code. It was argued that Section 377 violates the fundamental right to life and liberty, right to privacy, right to dignity, right to health, right to equality and right to freedom of the homosexuals. *Finally, in the year 2009, the High Court of Delhi delivered a landmark judgement stating that the restriction over two adults engaging in a “consensual sexual intercourse in private” under Section 377 of the Indian Penal Code is unreasonable. Therefore, it clearly violates the basic fundamental rights of the homosexuals enshrined under Article 14, 15, 19 and 21 of the Constitution of India.*

2. Suresh Kumar Koushal V. Naz Foundation⁴⁹

The landmark judgement in the case of Naz Foundation Govt. V. NCT of Delhi held that Section 377 of the Indian Penal Code is unconstitutional, which was rejected by various individuals, dwelled in the ethics and tradition of the rich history of India. They openly rejected the idea of decriminalizing homosexual relationships. Therefore, they appealed in the Supreme Court of India to reconsider the constitutionality of Section 377. The community of the homosexuals was just letting a sigh of relief, when just after two years, the Supreme Court of India on December 11, 2013, overturned the decision of the Delhi High Court and re-criminalised homosexuality under Section 377 of the Indian Penal Code. *A bench of Justice GS Singhvi and Justice SJ Mukhopadhaya held that the LGBT community constitutes a “minuscule minority” and thus, they “do not deserve constitutional protection”. Further, it was observed that Section 377 did not suffer from the vice of constitutionality.*

⁴⁵ The teleSUR Analysis, available at: <https://www.telesurenglish.net/analysis/The-History-and-Activism-of-LGBTQ-Community-in-India-20180909-0009.html>.

⁴⁶ Naz Foundation Govt. v. NCT of Delhi (160) DLT 277.

⁴⁷ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

⁴⁸ Naz Foundation Govt. v. NCT of Delhi (160) DLT 277.

⁴⁹ Suresh Kumar Koushal v. Naz Foundation AIR 2014 SC 563.

The unseen benefit was that the case rekindled the wave of activism in India regarding the rights of the community of the homosexuals. The judgement faced immense criticism from every corner of the country.

3. National Legal Services Authority V. Union of India⁵⁰

The transgender community in India has faced the most exploitation among the whole LGBT community due to their degraded social, economic and educational status. They were never considered a part of the society. The constant rejection from the society made them vulnerable to discrimination, and crimes such as human trafficking. The main issue in the case at hand was “whether there is a need to recognise the transgenders as a third gender for the purpose of public health, education, employment, reservation and any other welfare schemes.”

This case paved the way for the rights of the transgenders by recognising them as a “third gender”. Now, the transgenders do not need to describe themselves as male or female against their will. They can now proudly identify themselves as a transgender. The icing on the cake was the framework laid down to guarantee the basic human rights of the transgender community in India that is summarised below⁵¹:

- a) It was held that the non-recognition of the identity of the transgenders is in violation of Article 14, 15, 16 and 21 of the Constitution of India.
- b) The members of “third gender” shall be treated socially and economically backward.
- c) The third gender would be categorised as other backward classes (OBC) in order to provide them with the benefit of reservation related to government jobs and admission in educational institutes. The government should make proper policies in the light of Articles 15(2) and 16(2) for the transgender community.
- d) It was held that the conflict between one’s birth gender and identity is not a pathological condition essentially. Thus, the focus should be on “resolving distress over a mismatch” rather than adopting a “treatment of the abnormality”.

The court differentiated between the gender and the biological components of sex. According to it, the biological components of sex includes the genitals, secondary sexual characteristics etc. however, gender is the self-image of a person that is the person’s psychological sense of sexual identity. This is not restricted to binary sense of male and female. After this judgement, the transgenders can identify themselves as a third gender without undergoing any sex-change surgery.

4. K.S. Puttaswamy V. Union of India⁵²

The judgement of the case popularly known as “Aadhar Case” featured a section titled “discordant notes” in the Justice Chandrachud’s opinion. It dealt with two major judgements of the Supreme Court of India. The first case was ADM Jabalpur V. S.S. Shukla⁵³ that upheld the denial of basic

⁵⁰ National Legal Services Authority v. Union of India AIR 2014 SC 1863.

⁵¹ South Asian Translaw Database. 2021. NATIONAL LEGAL SERVICES AUTHORITY (NALSA) v. UNION OF INDIA - South Asian Translaw Database - THIRD GENDER. [online] Available at: <<https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/>> [Accessed 26 March 2021].

⁵² K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

⁵³ ADM Jabalpur v. S.S. Shukla 1976 SCC (2) 521.

fundamental rights. The second case was the Suresh Kumar Koushal V. Naz Foundation⁵⁴, which rejected the rights of the LGBT community. *It was observed that sexual orientation falls under the wide ambit of the right to privacy. It was stated that “minuscule minority” cannot be a ground to deprive the transgender community of their basic fundamental rights.* The observation established that the real impact of the law is not limited to the punishment but it has an indirect impact creating a hostile environment for the people belonging to the LGBT community of India. The case sparked a ray of hope among the people from the transgender community that Section 377 of the Indian Penal Code can be struck down in future.

5. Navtej Singh Johar V. Union of India⁵⁵

After overruling the Delhi High Court in the Koushal’s Case in 2013, the homosexuals were again criminals in the eyes of law. After that, India witnessed a large number of protests increasing simultaneously when some high profile names such as hotelier Keshav Suri, Ritu Dalmia, dancer Navtej Singh Johar came forward to file a petition before the Supreme Court of India challenging constitutionality of Section 377 of the Indian Penal Code. It was argued that Section 377 violated the right to privacy, right to freedom of expression, right to equality, right to human dignity, and right against discrimination enshrined under the Constitution of India. The issue was referred to a larger bench and it heard various petitions in relation to it. *Finally, on September 6, 2018, the Supreme Court of India unanimously ruled that Section 377 of the India Penal Code is unconstitutional. It infringes the fundamental rights of the transgenders. Thus, decriminalised homosexuality by reading down the Section 377 to exclude “consensual intercourse between adults of same gender/sex.” It was rationalised that Section 377 is vague. It does not create “intelligible differentia” between what is “natural” and what is “unnatural”. It infringes the right to freedom of expression under Article 19 of the Indian Constitution that includes Freedom of expression of one’s sexual identity. It was further opined that the transgenders constitutes a minuscule population is not a valid justification to deny them the right to life.* The Koushal judgement was highly criticised calling it arbitrary, manifestly unconstitutional and irrational. The Supreme Court also directed the government to create awareness regarding the LGBT community rights and try to eliminate the stigma and stereotypes surrounding them. It was also emphasised that sexual orientation is a natural phenomenon proven by scientific and biological facts. Therefore, discriminating someone because of sexual orientation is highly unconstitutional.

AN ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019⁵⁶

After gathering many criticisms on the previous bills pertaining to the rights of the transgender person, the government had again come up with a new bill in 2019. *The bill got the presidential assent on December 05, 2019 and it was published by the Ministry of Law and Justice in the Gazette of India as the Act no. 40 of 2019.*⁵⁷ The act came into effect on January 10, 2020 after the notification from the

⁵⁴ Suresh Kumar Koushal v. Naz Foundation AIR 2014 SC 563.

⁵⁵ Navtej Singh Johar v. Union of India AIR 2018 SC 4321.

⁵⁶ The Transgender Persons (Protection of Rights) Bill, 2019, , PRSINDIA (2019), <https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>.

⁵⁷ The Transgender Persons (Protection of Rights) Act, 2019. <http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>.

Ministry of Social Justice and Empowerment in the Gazette⁵⁸. One of the many commonalities between the previously criticized bills and the Act is that all of them in the name of protecting the rights of the transgender persons actually humiliate the transgenders living in India. It was expected that the bill would bring joy among the transgender community. However, the results were opposite and the day when the bill was passed in Lok Sabha was termed as “**Gender Justice Murder Day**”⁵⁹. This analysis is done in order to throw light upon the main provisions of the act and whether or not they pass the test of constitutionality.

The very first problem arises from the unintelligent definition of Transgenders under *Section 2(k) of the Transgender Persons (Protection of Rights) Act, 2019*. It defines the transgender person in two parts. The first says that transgender person are those whose gender does not match with the assigned gender at birth and includes transman and transwoman. The second part includes person with the intersex variations, genderqueers and person having socio-cultural identities such as kinner, hijra, aravani and jogta within the ambit of the definition of the transgender person. First of all the definition equates the gender identity with biological sex which is highly incorrect and by doing so it reinforces the stereotypical view about the transgenders being part-male and part-female. Moreover, the inclusion of intersex people in the definition of transgender persons is problematic because intersex people may or may not identify themselves as a transgender⁶⁰. Furthermore, the intersex people may have unique needs that are not corresponding to that of the transgenders⁶¹. These unique needs are neglected while viewing the intersex people as a sub-category of the transgenders. It implies that the Act is made with inadequate knowledge. Not every intersex identifies as transgender and not every transgender is intersex.

The 2016 Bill proposed to establish a screening committee to determine whether the person qualifies as a transgender or not⁶². The current act does not provide for the screening committees. However, according to the act a transgender person needs to acquire a “certificate of identity” which shall confer the rights of the transgender and be a proof of such person’s identity. The concerned person needs to make an application to the “District Magistrate” along with the “prescribed documents” to get the certificate of identity. Furthermore, if the transgender person undergoes a sex-change surgery then such a person needs to apply for the “revised certificate”. The District Magistrate will provide the revised certificate on the receipt of the application along with the certificate issued by the “Medical Superintendent” or “Chief Medical Officer and after “being satisfied with the correctness of such certificate”⁶³. Therefore, the Act does provide for the screening procedure without using the exact words. Moreover, the act says that the transgender person have self-perceived gender identity whether they have gone through sex reassignment surgery or not. However, it directly contradicts with the point of getting a “certificate of identity” from District Magistrate, proving that they have undergone

⁵⁸ Damini Nath, “*Transgender Persons Act comes into effect*”, <https://www.thehindu.com/news/national/transgender-persons-act-comes-into-effect/article30545336.ece>.

⁵⁹ Prachi Singh, “*Why is transgender community unhappy with Trans Persons Bill*”, <https://www.downtoearth.org.in/blog/governance/why-is-transgender-community-unhappy-with-trans-persons-bill--67158>.

⁶⁰ UNC Student Affairs, LGBTQ Center, “*Intersex*”, <https://lgbtq.unc.edu/resources/exploring-identities/intersex>.

⁶¹ InterAct, “*Understanding Intersex and Transgender Communities*”, <https://interactadvocates.org/wp-content/uploads/2016/05/LavLaw-Trans-and-Intersex-Fact-Sheet.pdf>.

⁶² The Transgender Persons (Protection of Rights) Bill, 2016, <https://www.prsindia.org/uploads/media/Transgender/Transgender%20Persons%20Bill,%202016.pdf>.

⁶³ The Transgender Persons (Protection of Right) Act 2019, § 7.

the sex change surgery. In the case of Anuj Garg V. Hotel Association of India⁶⁴, the Supreme Court held that protection of “*personal autonomy*” and “*self-expression*” is guaranteed under Article 21 of the Indian Constitution. Further, it was held that the indispensable aspects of personal autonomy and self-expression includes the self-determination of gender as well. Therefore, the self-determination of gender falls within the ambit of Article 21 of the Constitution of India. The same view was reiterated in the case of National Legal Services Authority V. Union of India⁶⁵. It was held by the Hon’ble Supreme Court of India that the transgender community has the right of self-determination of their identity and sexual orientation, mandated under the Article 21 of the Indian Constitution. Therefore, by putting the transgenders through the process of screening, the act takes away their right of self-determination of their identity enshrined under the Article 21 of the Constitution.⁶⁶

It is worth emphasising that the Act does not contain any provision that prohibits the District Magistrate, Chief Medical Officer or any other person in possession of any sensitive information related to a transgender person from disclosing or publishing the same. In the case of K.S. Puttaswamy V. Union of India⁶⁷, it was held that the right to privacy is a fundamental right under Article 21 of the Constitution of India. Thereto, the non-inclusion of a confidentiality provision in the Act clearly implies a further dent on the constitutionality of the Act.

Another big flaw in the *Transgender Persons (Protection of Rights) Act, 2019* comes from its ignorance regarding sexual abuse of the person from transgender community. Chapter VIII of the Act talks about the punishment regarding sexual abuse of a transgender person, according to which the punishment for such an offence is imprisonment for a term of six months extending to two years with fine. However, the sexual offences against a “ciswoman” attracts stricter punishments, which may extend up to life imprisonment⁶⁸. Therefore, it is evident that there is huge disparity between the penalties for sexual offences against a transgender person as compared to that of a ciswoman. This shows the discriminatory treatment of the transgender person and is unacceptable as it clearly violates right to equality enshrined under Article 14 of the Constitution of India. Further, such unequal treatment insinuates the violation of right to dignity guaranteed under Article 21 of the Constitution⁶⁹. This difference in treatment of a transgender person infers that in the eyes of the government, the impact of sexual abuse on a transgender is less as compared to that on ciswoman.

The act further provides that a transgender child cannot live separately from their family except on an order of a competent court. Hence, a child cannot choose on his own to reside with any supportive community even if the family is abusive. The act says that if the family of a transgender person is unable to take care of him, then such person shall be sent to a rehabilitation centre by the order of a competent court⁷⁰, therefore, denying their rights to join any other transgender community such as hijra community. Apart from having number of unconstitutional provision, the act also fails to acknowledge numerous pertinent issues of the transgender community in India. The act does not talk

⁶⁴ Anuj Garg vs. Hotel Association of India, (2008) 3 SCC 1.

⁶⁵ National Legal Services Authority vs. Union of India, (2014) 5 SCC 438.

⁶⁶ Global Citizenship Commission, Social and Economic Rights, 2 in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21ST CENTURY 63–70 (Gordon Brown ed., 1 ed. 2016), <https://www.jstor.org/stable/j.ctt1bpmb7v.12>.

⁶⁷ K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁶⁸ Sections 354, 354A, 354B, 376 of the Indian Penal Code, 1860.

⁶⁹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

⁷⁰ Section 12(3) of the Transgender Persons (Protection of Rights) Act, 2019.

about reservations to the transgender person despite of the fact that in the NALSA judgement, the court clearly said that transgenders are socially and economically backward, thus they are entitled to reservation in education and employment. The act does not talk about other basic rights of a person such as marriage rights, adoption rights, property rights, etc. It mandates the Government to frame welfare measures for the benefit of the transgender community but no timeline is provided for the implementation of the same.

Unlike its name, the *Transgender Person (Protection of Rights) Act, 2019*, actually humiliates the struggling transgender community of India. It is portentous that even after three attempts; the government has failed to come up with a holistic transgender protection act cleaving to the NALSA judgement. There are many lacunae in the *Transgenders Persons (Protection of Rights) Act, 2019* that needs to be addressed by the government. The Act fails to understand the basic difference between gender and sex, wreaking havoc in all the identities. It puts Trans identity and intersex in one box, which allows the stereotypes against the intersex or transgenders as believed by a cisgender. In the name of recognising the transgenders, the act somehow legalises humiliating them. Moreover, where the cisgenders do not need any certificate of identity, the transgenders need a certificate of identity to identify themselves as a third gender. It clearly discriminates transgenders from the cisgenders. The procedure to get a certificate of identity provides extraordinary power to the officials to arbitrate the qualification of a transgender to be recognised as who they are. It may make them go through medical procedures that the transgenders might not want, hindering their basic fundamental rights. *The penalties regarding the sexual abuse of transgenders are also not at par with the punishments for sexual abuse of a ciswoman, which indicates that the crimes against them are considered as “petty” crimes.* The Act gives power to everyone but transgenders to determine their lives, thus, making sure that the transgenders are not equal in the eyes of law. The Act fails to take account of the concerns of the transgenders. There are many flaws in the act, which needs to be rectified. As the name of the Act suggests, the main objective of the Act was to protect the rights of the transgenders. However, the Act itself fails to protect the rights of the transgenders, creating more hurdles for their community.

INITIATIVES TAKEN BY STATE GOVERNMENTS FOR TRANSGENDER PERSONS

In *National Legal Services Authority v. Union of India*⁷¹, courts had criticized government for discrimination that is happening against these people. The court had directed the central as well as state governments to take advancement steps for transgender community by including recognizing third gender as a “socially and educationally backward class of citizens” so as to entitled to reservations in educational institutions and public employment and to frame various social welfare schemes for the community.

Tamil Nadu was first state protects the Transgender people and provide them access to social protection schemes of the State and Central government. Free sex reassignment surgery for transwomen in some government hospitals in the state was started. Full scholarship and free housing facilities to and have issued notice to schools and colleges where Transgender people will not be denied admissions. Tamil Nadu government also offered training and financial assistance of Rs.20,000/- for community welfare⁷². Tamil Nadu government through welfare board have issued

⁷¹ NALSA v. Union of India, (2014) 5 SCC 438.

⁷² <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>.

identity cards to them so that they easily get rations as well as other welfare schemes.⁷³ Tamil Nadu media played significant role in spreading awareness about Transgender people rights. Database for transgender people was also created which is seen as big achievement⁷⁴.

Karnataka state government have established several welfare boards for the protection of human right issues of transgender community. 'Mythri' pension scheme is launched for them under which Transgenders between age group of 18 to 64 are entitled to directly receive 500 rupees monthly pension with annual income less than 17,000 in urban areas and in rural area annually income less than 12,000 are been made eligible to get benefit of this scheme.⁷⁵

Government of Delhi is providing 1,000 rupees per month to the Transgender people who are living in Delhi for 3 years. The Delhi government has directed all state departments, district authorities, municipal corporations and other autonomous bodies to set up separate toilet facilities for transgender persons at their respective offices which is itself a great step towards the health and safety of them.⁷⁶

On 15th July 2015 West Bengal government had set up a separate welfare board for the Transgender person to recognize transgender people as third sex so they can seek the help for address of all the grievances. For the welfare and their social recognition of community they appointed India's first transgender principle in college and have made separate toilets for them.⁷⁷ SRS facilities in government hospitals is started as it can be costly affair in private hospitals. Chief Minister of West Bengal, Mamata have also announced ration card for transgender people and free ration scheme amidst the Covid pandemic will also cover transgender till June 2021.⁷⁸

In Sikkim the state government is providing Rupees 2000 monthly stipends to new born transgender babies and provides free of cost education to these children.⁷⁹ Kerala government has set up the justice board on 10th January 2017, specifically for the Transgender people. Legal aid service is also been provided so as to ensure that these people need not face discrimination and harassment. Kerala, in 2015 have adopted a "State Policy for Transgenders" where men, women and transgender persons are having equal access to capabilities, economic opportunities, assets and services, right to dignity and freedom from violence and right to expression.⁸⁰ Reflecting the transgender policy of the state, athletic meet was also organized on April 28, 2017. Kerala state literacy mission authority (KSLMA) started mission SAMANWAYA, whose main focus was on to provide continuous education of transgender community. The Social Justice Department has commenced an initiative for providing identity cards for Transgender persons so as to ensure that benefits of the government run welfare schemes should

⁷³ <https://www.tnsocialwelfare.org/pages/view/third-genders-welfare-board>.

⁷⁴ The National Human Rights Commission, study on Human Rights of Transgender as Third Gender (2017).

⁷⁵ <https://translaw.clpr.org.in/laws-policies-reports/karnataka-state-policy-transgenders/>.

⁷⁶ <https://indianexpress.com/article/cities/delhi/separate-toilet-facilities-transgender-people-offices-delhi-govt-depts-mclds-7192469/>.

⁷⁷ <https://www.dnaindia.com/india/report-west-bengal-government-initiates-steps-to-upgrade-status-of-transgenders-2103567>.

⁷⁸ <https://www.timesnownews.com/kolkata/article/mamata-assures-ration-card-to-transgender-community-bengal-free-ration-scheme-to-cover-them-till-june/639055>.

⁷⁹ <http://sikkimsocialwelfare.gov.in/wp-content/uploads/2015/12/27.8.13-Sikkim-payment-of-grant-to-the-TRansgender-Rules-2013.pdf>.

⁸⁰ <https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015>.

reach Transgenders. The Transgender Identity card application services have been made available online for them.⁸¹

It can be concluded that many state governments are coming forward to help the transgender community and provide all those facilities which person should get. But still there are many states who have not come up with these policies and the policies which was taken out by state governments for transgender is good start but when it comes on practical ground, then it is hardly implemented. It is very important that all the state governments should not stop here and should make other policies which benefits transgender community. Central government should also make national policies for protection and benefit for transgender communities because transgender community is also a human being which deserved dignified life which is the responsibility of governments because Transgenders are a result of law of nature and law of nature cannot be changed. Hence it is very important that state government and people should understand this and treat them as citizen of this country.

CONCLUSION

The Transgender Person (Protection of rights) Act, 2019 was supposed to pave the way to justice for the transgender community of India. However, it is a flop in certain aspects. Even after several voices from all over the nation to bring amendments in the 2019 bill, the government failed to acknowledge them and thus, enacting an Act that was not able to satisfy the needs of the transgenders. The major drawback is that it was made without consulting any person from the community itself. The legislature along with the judiciary is trying to bring the transgenders at the same pedestal with the cisgenders. However, the laws alone cannot provide equality to the transgenders. Proper awareness regarding the same is required. Moreover, the blindly followed stigmas and the stereotypes regarding the transgenders needs to be curbed. If we go back to look at our epics like “Ramayana” and “Mahabharata”, we can come across several instances where the “the third gender” holds a significant role. For instance, “Shikhandi”, a transgender, holds an important role in the story of “Mahabharata” to defeat the “Kauravas”. Another major example can be “Sanskrit”, the language of God itself. It was used to write major Hindu epics where its grammar included three genders: masculine, feminine and gender neutral. Lord Shiva, who is grossly worshipped all over the country by the Hindus, considered himself “Ardhnarishvara”- half man and half woman. Trans-ness was clearly recognized in the Indian History.⁸² It proves that fluid genders and sexualities have been an integral part of India’s past and culture. Therefore, we can say that there has been recognition of genders other than male and female in the Ancient times. We just need to go back to our roots. There is a famous saying that “*The Devil works by separating you from your loved ones and then taking you to the darkness*”, maybe the discrimination between the transgenders and cisgenders is nothing but darkness. Therefore, instead of dedicating ourselves to the devil of division in the community in the form of Trans and cis, we should try to focus on the light and equalize every person not only in the eyes of law but every individual. We must never forget that every individual is a human being first. Therefore, if the cisgenders deserve the basic human right then why not transgenders. India is a democratic country where every person has right to freedom, right to equality and right to life. Therefore, the same rights shall be given to the transgenders. Not only the laws shall be made but implemented practically.

⁸¹ http://sjd.kerala.gov.in/scheme-info.php?scheme_id=IDE1M3NWOHVxUiN2eQ==.

⁸² Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity and Intersex Conditions through Hinduism* 24 (Xilbris Corporation, 2013).

PHARMACEUTICAL PATENT VIS-À-VIS RIGHT TO HEALTH

RAJ VISHNOI

Tamilnadu National Law University

B.COM LL.B. (Hons.)

5th Year

Contact No.:- 7976096823

Email :- rajvishnoi_ug16@tnnl.ac.in

ABSTRACT:

Initially, Intellectual Property Rights and Human Rights were two different fields of law. But recently, it has been very widely noticed that these two fields of study have been conflicting each other. This article attempts to explain this conflict in context of the collision between Intellectual Property Rights and Right to Health of the people and trace its detrimental impact on this basic human right of right to health. The article elaborates on how it is an irony that drugs which are being manufactured to improve the health conditions of people are not even accessible to them, due to its patent protection, let alone affording them. This article limits itself to the impact of patent protection on access to affordable medicines. It also tends to describe the impact of patent protection on biological resources which are used as a source of raw material for the development of new drugs. Further, this article discusses the patent protection of the pharmaceuticals and drugs under TRIPs agreement and its implementation in Indian pharmaceutical industry. It has also been the effort of the author to propose certain recommendations for the improvement of patent protection regime in furtherance of public interest. The article attempts to assert that compulsive attention is required to be paid to this conflict. There is a dire need to take into consideration the human physical wellbeing while allocating IP rights.

KEYWORDS: Right to health, Biological Resources, IP Rights, TRIP's Agreement & Affordable medicine

INTRODUCTION

As we know that Intellectual property right and Human rights are the two different branch or fields of law. Now-a-days there is too much unrest caused between these two fields of law. The unrest causes because the affordability or accessibility of medicines is effected due to the protection given by the patent law. On one hand, affordable access of medicines is a basic human right guaranteed by the Universal Declaration of Human Rights, and on the other hand, patent is given to the inventor in order to protect his invention from the unauthorized use of the same by the other. This paper enlightens the conflicts arise between the two emerging fields of law.

Human rights are the most fundamental or basic rights which must be guaranteed to every person irrespective of its nations because these rights are basic in nature so as to live in this world. It is the obligations of every state or nation to secure or prevent the violation of such basic rights. While the

patent is a protection given to the inventor for his inventions so as to prevent the other unauthorized agencies or company to produce the invented thing without consent. When the inventor maintains high cost for such medicines, this protection proves to be fatal to protect the basic human right i.e. right to health (which includes right to access medicines or right to get affordable medicines).

There are times when government issued a compulsory license to a local company to produce generic version of the same medicines so as to remove the factor of unaffordability. It is an irony that the medicines which are invented for its sole purpose to improve the health conditions of needy people are not even accessible to such needy people due to its patent protections. This paper also attempts to highlight which of the following law i.e. IPR or Human Rights, are prioritised over the other and what are the detrimental effects of such prioritization.

DILEMMA BETWEEN THE IP RIGHTS AND HUMAN RIGHTS

During the industrial revolution, raw materials and labour were the secret weapon, similarly intellectual property is the real knowledge based economy in the modern world. The patent protection is given to the inventor to realize the money which he has invested to research and development for such medicine. Flood gates will open for the companies which are normally invested money to develop new medicines, if such protection is taken by the government in the name of compulsory license. In order to give priority to one of them over the other, we need to study the theories and their objective of the IP rights and Human rights.

There are two theories which justifies protection of intangible property i.e. intellectual property, namely John Locke's labour theory and the Utilitarian theory. According to the John Locke's labour theory, whoever mixes labour with some property existed, he is the owner of such product or property which results from such mixing¹. The problematic situation comes when one ask about the ownership of property which was previously owned by a person but after mixing labour it is owned by the person who mixes labour with such property to make some other product or property. Suppose a person adds juice into the sea. Can such person say that now he is the owner of that sea? Now there are two probable solution viz. either the ownership of the sea must be vested to such person or he loses his juice in such mixing. That's why Nozick rejects this theory of distribution of property.

One of the objective or purpose of the IPR regime is to make people's lives better by inventing new products. On the other side, the same regime promotes monopoly and restricts access to such property. Now the question arises that if the purpose of regime is to promote monopoly right and also to make people's lives better, one must see the effects of such monopoly right. Monopoly rights result in high price of such property that means one who can afford such price can use and enjoy of such inventions but the others who can't afford, doesn't have a right to enjoy such property. Therefore, resources should not be monopolized if such monopoly creates people's lives in danger, especially in case of pharmaceutical patent.

According to the Utilitarian theory, well-being of human matters. Therefore rules of ownership must be subjected to tests for their consequence on human life. This theory simply promotes "maximum

¹ Ostergard, Robert L. "Intellectual Property: A Universal Human Right?" Human Rights Quarterly, vol. 21, no. 1, 1999, pp. 156-178. JSTOR, www.jstor.org/stable/762740. Accessed 5 Nov. 2020. ((Last accessed: 17:31 10th Oct 2020)).

happiness with minimum sadness". IP regime provides protection as an incentive for invention. It is equally important that some sort of incentive should be given to the inventor otherwise people can easily copy what was invested and no one wants to bear expenses and invest their efforts to produce new things. This theory promotes long term benefits over the short term problems. Here also, a question arises that can a long term benefits outweigh the short term problems created by monopoly right?

The word "Intellectual Property" is a general term used to denote the intangible property which has been developed or invented by investing creative efforts. The origin of such intangible property is the result of an individual's intellectual capacity.²

In this way, whenever patent protection is granted on any medicines, it directly affects the right to access of such medicines³. Sometimes government issues compulsory license to a local company to produce the generic version of patented medicines in order to protect aforesaid basic right. One of the instance is the issuance of the compulsory license for the Bayer's Cancer drug to a local company (Natco) by the Indian government.⁴ The aforesaid drug costs approximately 4500 dollars a month for the Indian Government which was held to be unaffordable by the Delhi HC. Thereby, patent controller issued a compulsory license on the aforesaid matter. The aforesaid case is an example where the human right i.e. right to affordable medicines is prioritised over IP right.

A gap between intellectual property and human rights is increasingly diminishing which results in intersections⁵ between these two different streams of law. These intersections raise conflicts as to the existence of certain human rights which are primary in nature and can't be superseded by other rights.

DETRIMENTAL EFFECT OF IP RIGHT AND PRIORTIZATION OF HUMAN RIGHTS OVER THE IP RIGHTS

Art. 25(1) of the UDHR states that "*everyone has a right to standard of living which includes adequate availability of food, clothing, housing and also medical care...e*". The adequate availability of medical care includes adequate availability of medicines at affordable price. The government of the member nation has an obligation to protect and to secure the right. Even Art. 12 of the United Nation International Covenant on Economic, Social and Cultural Rights, 1966 states that "*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*".

On the other hand, Art. 27 of the UDHR also gives protection to scientific, artistic or literary inventions as a human right, such right is not absolute but subjected to some limitations on the basis of public interest at large.

² K. Outterson, "Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets", 5(1) Yale J Health Policy, L & Ethics 193, 195 (2005). (Last accessed: 21:06 12th Oct 2020).

³ Edwin C Hettinger, "Justifying IP", 18 Philosophy and Public Affairs 31, 35 (1989). (Last accessed: 19:36 12th Oct 2020).

⁴ Wise, Jacqui. "Patent Wars: Affordable Medicines versus Intellectual Property Rights." BMJ: British Medical Journal, vol. 348, 2014. JSTOR, www.jstor.org/stable/26514007. Accessed 5 Nov. 2020. (Last accessed: 09:13 16th Oct 2020).

⁵ Laurence R. Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" 5 Minn. Intell. Prop. Rev. 47, 52 (2003). (Last accessed: 08:36 12th Oct 2020).

- **Access to affordable Medicines**

The right to get affordable medicines is also come under the ambit of right to health. When an invented medicine successfully is granted patent protection, the price of that medicine is controlled by the patent holder. It is obvious that if a person has a cure of Corona Virus in the form of medicines, he will make the price of that medicine as high as he wants. No one is going to stop such patent holder to make profit out of such medicines. People who are suffering from disease for which cure has been made in the form of medicine, first he will somehow try to get such medicine irrespective of its price. Now person who can manage such hefty charges for that medicine can avail the cure but who are not sound enough to manage such price, leaves the option to purchase such medicine⁶. That's why now-a-days many multinational companies invested hefty sums to get vaccine of corona virus. Henceforth, protection given by the IP regime in the form of patent to the newly invented medicine directly affects affordability factor.

The patent holders always claims that such price is the only way to balance what he was invested in the research and development. We can't deny the truth that the company which holds patent of any newly invented medicines claims more money than what it actually spent on the research and development program⁷.

- **Health Crisis in Developing Countries**

It is evident that the status of a developing country in terms of health of people is not at all meet the standard as expected under Art. 12 of the United Nation International Covenant on Economic, Social and Cultural Rights, 1966. The reason is the lower economic status of such country. That's why some of the parts of the Africa still today is fighting with health crisis (HIV/AIDS). The cost of medicines for such disease are very high in the Africa and people of that part have no access to medicines due to its unaffordability factor⁸.

Kenya is the best example to see the impact of patented medicines in the developing countries. The cost of medicine (Nevirapine) for HIV in Kenya is around \$874 per unit but the same medicine is available at very cheap cost in Norway which is around \$430 per 100 units⁹. In order to get cure of HIV, one must purchase such medicines which cost around \$10,000 per year, this type of invention is meaningless for the infected person.¹⁰

- **Prioritization of Human Right over the IP rights**

The conflict between the aforesaid two fields of law can be settled by prioritizing human rights over the IP rights. Though IP rights are also come under the domain of universal human rights. But the

⁶ Joseph A. Dimasi, Ronald W. Hansen & Henry G. Grabowski, "The Price of Innovation: New Estimates of Drug Development Cost", 22 Journal of Health Economics 151, 175 (2003). (Last accessed: 16:03 29th Oct 2020).

⁷ Light DW, Lexchin R, "Pharmaceutical research and development: what do we get for all that money", BMJ, 345 (2012). (Last accessed: 19:59 15th Oct 2020).

⁸ Michael Schull, "Effect of Drug Patents in Developing Countries", National Centre for Biotechnology Information, Sep 30, 2000, <https://www.ncbi.nlm.nih.gov/pmc/articles/PM C1118638/>. (Last accessed: 13:21 19th Oct 2020).

⁹ Donald G. McNeil Jr, "Prices for Medicine are Exorbitant in Africa, Study Says", New York Times, June 17, 2000, <https://www.nytimes.com/2000/06/17/world/pri ces-for-medicine-are-exorbitant-in-africa-studysays.html>. (Last accessed: 23:47 18th Oct 2020).

¹⁰ Hanefeld, Johanna. "Patent Rights vs Patient Rights: Intellectual Property, Pharmaceutical Companies and Access to Treatment for People Living with HIV/AIDS in Sub-Saharan Africa." Feminist Review, no. 72, 2002, pp. 84–92. JSTOR, www.jstor.org/stable/1395886. (Last accessed: 23:47 27th Oct 2020).

question is which of the rights are comprised. It is obvious that health of citizens is the paramount for any nation. We are not in support of violation of IP rights but we are only demanding priority of health over the price. Henceforth, the right to health as a human right should always be prioritised over the any other rights in question¹¹. There are ways by which both the aforesaid right can be protected as explained in the recommendation section of this paper.

RECOMMENDATION: WAYS BY WHICH BOTH HUMAN RIGHTS AND IP RIGHTS CAN BE PROTECTED

The problem to secure access to affordable drugs or medicines is real one and there are various arguments presented that how patent protection to pharmaceutical companies to manufacture new drugs effects the health and it only hurts the common man.¹² On the other hand, one can't ignore the reality that protection of such intellectual property provides incentive to their innovation which appreciates inventor for his invention. Therefore, a balance need to be maintained to avoid such conflicts.¹³ Followings are ways by which a balance can be maintained:

- ***Subsidy by the Government***

As earlier discussed that health of citizens is paramount for any nation. The objective of adequate access of patented medicines in affordable price can be achieved by the giving subsidy to the patent holder by the concerned government. The aforesaid subsidy may be given in the form of reduction of taxes on the medicines.

By subsidizing, patent holder will get same profits irrespective of its price in the actual market. Preference on subsidy should be given to the foreign multinational companies trading in the concerned medicines because if foreign companies do not get the wanted price of that medicine, then probably it will stop supplying such medicines to the country. For the domestic companies, policy should be drafted in which price can be restricted to the possible or agreed price, whichever is lower, in order to sell such medicines in the market of own country but parallel subsidy should also be given to reduce the price of the medicine.

- ***Compulsory licensing of patented drugs of the foreign companies***

We are not completely in support of compulsory licensing of the patented medicine or drug because this will lead into a trade retaliation situation. This method of compulsory can be seen as a way to resolve the conflict but some guidelines should be made by the WHO for compulsory licensing of the patented medicines. As we earlier discussed that in 2012, Indian government issued a compulsory license for the Bayer's cancer drug to a local company to produce a generic version of the patented drug. The government issued such compulsory license by invoking the provisions of TRIPS agreement which allows compulsory licensing of a patented drug in the public interest. The decision of Indian government was criticised by various multinational companies engage in such business. India is not the only country which override the IP provisions, there are other countries which also do the same,

¹¹ R. Shretta, G. Walt, R. Brugha & R.W. Snow, "A Political Analysis of Corporate Drug Donations: The Example of Malarone in Kenya", 16 Health Policy Plan 161, 163 (2001). (Last accessed: 22:07 19th Oct 2020)
<https://www.ncbi.nlm.nih.gov/pubmed/11358917>.

¹² Aditi Bagchi, "Compulsory Licensing and Duty of Good Faith in TRIPS", 55(5) Stanford Law Review 1529, 1545 (2003). (Last accessed: 22:07 21th Oct 2020).

¹³ K. Ravi Srinivas, "Interpreting Para 6: Deal on Patents and Access to Drugs", 38 Economic and Political Weekly 3975, 3977 (2003). (Last accessed: 20:39 20th Oct 2020).

namely, Indonesia, Thailand, and China etc. issued compulsory licensing for the seven hepatitis b and HIV treatment. The US has made political pressure on India for non-recognition of the IP rights in the Bayer's case.

- ***Voluntarily Licensing of Patented Medicine***

Voluntarily licensing is comparatively feasible option than compulsory licensing. International organization having objective of the health or well-being human, like WHO can obtain voluntarily licensing of patented medicines by giving agreed price to the patent holder. WHO is currently discussing this method voluntarily licensing for the corona vaccine.

Voluntarily licensing is appropriate way not only to protect the rights of the patent holder but also to protect individual's right to health by securing access of affordable medicines.

CONCLUSION

Health is a basic human right and for the protection of such right, access to medicine is an essential for ensuring health. It cannot be denied that outright unavailability of patented drugs is causing an impediment to this right. Every right has a corresponding duty¹⁴ and this duty is of the state to fulfil. State has to fulfil his duty by providing required or essential medicines in an affordable price to its citizen.

It is clear that visible conflict between Intellectual Property Rights and Human Rights is embodied in TRIPs agreement as well. Patentee by way of patent protection is actually snatching away the basic human right i.e. right to health and also restraint people from getting benefits of such scientific inventions.

Thus, it is necessary that more human-rights advocates get involved with intellectual property issues then only it is likely that many of the problems will also be considered to be violations. Developed countries are required to come forward and help developing countries in the protection of right to health of people. More opportunities have to be allowed and welcomed for propounding the issues of intellectual property from a human rights' perspective.

All the intellectual objects may not be important for every person. A person may enjoy the music with a simple headphone or a Bluetooth speaker which costs far less than Alexa. There are medicines whose non accessibility may take the life of infected people. So every patent holder should recognise some sort of moral duties towards the nation or its people before arbitrary fixing price of such medicine.

¹⁴ Hohfeld, Wesley Newcomb, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" The Yale Law Journal, vol. 23, no. 1, pp. 16-59 (1913). (Last accessed: 23:12 23th Oct 2020)

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ESTABLISHMENT OF MEDIA TRIBUNALS IN INDIA: IS IT A PLAUSIBLE STEP FORWARD?

Abhiraam Shukla

Student BA LLB [H.]

National Law Institute University, Bhopal

Email :- abhiraamshukla.ug@nliu.ac.in

Contact :- 8957395973

ABSTRACT:

Through this article, the author seeks to examine the plausibility of establishment of 'Media Tribunals' in India. The paper seeks to analyze the state of disinformation in India, the role of mainstream media in such disinformation and how it results in dissemination of false news, hate speech and breach of privacy of the citizens of the country. The paper aims to find whether the Right to Freedom of Speech and Expression of the press and media of the country is subject to restrictions enlisted in Article 19(2) of the Constitution. The author scrutinizes the working of Tribunals in India, the procedure followed by them and whether it will be possible for the Parliament to set up 'Media Tribunals'. Furthermore, the author examines whether the exercise of these restrictions by a 'Media Tribunal' will transgress upon the Right awarded in Article 19(1) of the Constitution. The author also opines if the self-regulatory mechanism of the media is followed, there may arise a possibility where the media may misuse regulatory goals for its own business goals and political motives. Further the author states that such self-regulatory mechanism fails to address many issues related to false news, hate speech, advertisement-oriented news and communal agendas of the media channels.

INTRODUCTION

Although it is veracious that *disinformation*, fake news and hate speech has been disseminated through the mainstream media since the institution of mass media, many scholars, researchers and academicians have concluded that the recent span of time has marked the '*rise of misinformation society*'¹ and an era of '*post-truth*'² and '*alternate facts*'³. The increase in *disinformation* (which means willful spread of spurious and malicious information and news as opposed to '*misinformation*' which is unintentional⁴) has been witnessed almost all over the world and across contexts from health issues to religion to social and political debates.⁵ One of major causes of *disinformation* is the spread of factual inaccuracies by the news stations who might commit such acts for political goals and

¹ Pickard v, *Media failures in the age of Trump. The Political Economy of Communication*, 118 [2016] <<http://polecom.org/index.php/polecom/article/viewFile/74/264>>.

² Benkler Y, Faris, R., & Roberts, H. *Network propaganda: Manipulation, disinformation, and radicalization in American politics*. Oxford University Press [2018].

³ Madrigal A. C. *What Facebook did to American democracy. The Atlantic*. [2017] <<http://www.cs.yale.edu/homes/jf/MadrigalFeb2018-2.pdf>>.

⁴ Chadwick A, & Vaccari, C. *News sharing on U.K. social media: Misinformation, disinformation, and correction*. [2017].

⁵ Benkler Y, Faris, R., & Roberts, H. *Supra* note at 2.

revenue.⁶ Another affliction spoliating the mainstream media is the presence of hate speech⁷. This is something which is ubiquitous in the Indian context⁸.

Recently a petition was filed in the Supreme Court of India endeavoring to establish an independent regulatory 'Media Tribunal' in the country to expeditiously resolve the complaints filed by citizens of the country viewing various media channels/corporations⁹. Film Producer Mr. Nilesch Navlakhya endorsed his petition by stating that in recent times, propaganda news, communal and hate speech, paid news and trial by media, have become a norm. He further submitted that no accountability for the incautious reportage by the press and media can be protected by the right to freedom of speech and expression enjoyed by the media.¹⁰

It was further stated by the petitioner that this was not aimed to curb the fundamental Right to Freedom of Speech of the media houses but only to curb the growing menace of fake news,¹¹ hate speech,¹² inflammatory coverage¹³ etc. in the country.

The primary purpose of this research paper is to evaluate the state of *disinformation* and hate speech in India. Further the author aims to scrutinize the state of *disinformation* in India the possibility of establishment of 'Media Tribunals' in India and to reach a conclusion whether such a development will be expeditious in the Indian context. The author seeks to find answers to varied questions vis-à-vis this issue:

1. Whether the freedom enjoyed by mainstream media and press is substantially higher than that enjoyed by an ordinary citizen? Can such freedom be self-regulated?
2. Whether Article 19(1)(A) of the Indian Constitution covers communal and hate speech, indecent reporting and scandalous misinformation, and propagandas within its ambit?¹⁴
3. Can news channels/corporations be regulated according to the parameters set by the Article 19(2)¹⁵ as whether it would amount to transgression of Freedom of Speech of the media channels?

⁶ Bennett, W. L., & Livingston, S. *The disinformation order: Disruptive communication and the decline of democratic institutions*. *European Journal of Communication*, 33(2), 122–139. <<https://doi.org/10.1177/0267323118760317>> [2017].

⁷ Buyse A, *Words of Violence: "Fear Speech," or How Violent Conflict Escalation Relates to the Freedom of Expression*. *Human Rights Quarterly*. 36(4), pp.779-797. [2014].

⁸ Pushkar Anand, Varsha Singh, *From Stürmer to Sudarshan: Indian Media Should Realise Incitement of Hatred is a Crime*, the Wire [Dec. 20, 2020, 8:56 PM] <<https://thewire.in/media/from-sturmer-to-sudarshan-indian-media-should-realise-incitement-of-hatred-is-a-crime>>.

⁹ Akshita Saxena, *Media Shall Be Made Accountable for Hate Speech, Fake News, Breach of Privacy": Plea In Supreme Court Seeks Establishment of Media Tribunal*, LiveLaw[Dec. 23, 2020, 3:34 PM] <<https://www.livelaw.in/top-stories/media-tribunal-supreme-court-self-regulation-hate-speech-fake-news-freedom-of-press-freedom-of-speech-accountable-167666>>.

¹⁰ *Id* at 9.

¹¹ Prachi Salve, *Manipulative Fake News On The Rise In India Under Lockdown: Study*, India Spend[Dec 21, 2020, 1:23 PM]<<https://www.indiaspend.com/manipulative-fake-news-on-the-rise-in-india-under-lockdown-study/>>.

¹² Pushkar Anand, Varsha Singh, *From Stürmer to Sudarshan: Indian Media Should Realise Incitement of Hatred is a Crime* *Supra*. Note at8.

¹³ Maya Mirchandani, *Digital hatred, real violence: Majoritarian radicalisation and social media in India*, *ORF Occasional Paper*. [August, 2018] <https://www.orfonline.org/wp-content/uploads/2018/08/ORF_OccasionalPaper_167_DigitalHatred.pdf>.

¹⁴ India Const. art. 19 § 1, cl. (A).

¹⁵ India Const. art 19 § (2).

DISINFORMATION IN INDIAN MEDIA- A PERPETUAL PROBLEM INTENSIFIED IN 2020.

Although the spread of fictitious news and information has been an unabating problem in context of the Indian media, the state of *disinformation* exacerbated around the time COVID-19 was starting to spread in the country¹⁶ according to a study conducted by scholars of University of Michigan. This study was conducted for the time period between 23rd January 2020 to 12th April 2020.

It was found that at least 62 stories relating to social, ethnic and religion culture and groups which were disseminated during this time were false¹⁷. Furthermore 54 instances were recorded where information related to government advisories and announcements was not correct¹⁸.

COMMUNAL INFLUENCE BY WILLFUL MISINFORMATION [DISINFORMATION]

In this study it was highlighted how *disinformation* was used as a method to manipulate people and to spread communal agendas in the country. Researchers noted that there was a constant increase of false news in relation to 'culture' and 'government' during the time period for which the research was conducted. The month of March saw a two-fold increase in number of fake stories¹⁹. *Tablighi Jamaat* was reported as a vector of the spread of COVID-19 in New Delhi and the surrounding areas²⁰ and thus, was made subject of numerous news-reports and articles which were patently communal in nature²¹.

MAINSTREAM MEDIA'S COMPLICITY IN DISINFORMATION

Although majority of the fake information was spread through social media, mainstream media was a major confederate in perpetuating *disinformation* in the country. Several instances can be noted where mainstream media published unchecked facts and stories without bothering about the integrity of the profession.²²

Death of the actor Sushant Singh Rajput led to chain of false stories²³ published in the media patently transgressing the Right to Privacy²⁴ of the Indian actress Rhea Chakraborty²⁵ and of other people²⁶

¹⁶ Akbar, S, Kukreti D, Sagarika, S., Pal, J. *Temporal patterns in COVID-19 related digital misinformation in India*. [2018] <<http://joyojeet.people.si.umich.edu/an-archive-of-covid-19-related-fake-news-in-india/>>.

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 16.

¹⁹ *Id.* At 16.

²⁰ Akash Bisht, Sadiq Naswi, *How Tablighi Jamaat event became India's worst coronavirus vector* Al Jazeera [DEC 12, 2020, 12:23 PM] <<https://www.aljazeera.com/news/2020/4/7/how-tablighi-jamaat-event-became-indias-worst-coronavirus-vector>>.

²¹ Sukanya Shantha *COVID, Communal Reporting and Centre's Attempt to Use Independent Media as Alibi for Inaction*, the Wire [DEC 22, 2020, 12:23 PM] <<https://thewire.in/communalism/tablighi-jamaat-communal-reporting-ib-ministry-coronavirus>>.

²² Nivedita Niranjankumar, Archis Chowdhary, *Sushant Singh Rajput To COVID-19: Fact Checking Indian Media in 2020*, Boomlive [DEC 22, 2020, 12:23 PM] <<https://www.boomlive.in/fact-file/sushant-singh-rajput-to-covid-19-fact-checking-indian-media-in-2020-11343>>.

²³ Anmol Alphonso, *AajTak, India.Com Run Fake Tweets as Sushant Singh Rajput's Last Words*, Boomlive [DEC 23, 2020, 8:23 PM] <<https://www.boomlive.in/fake-news/aajtak-indiacom-run-fake-tweets-as-sushant-singh-rajputs-last-words-8511>>

²⁴ INDIA CONST. art. 21; *KS Puttaswamy and Anr. v Union of India* (2017) 10 SCC 1.

²⁵ Archis Chowdhary, *Times Now Links Rhea Chakraborty's 'Imma Bounce' Chat to Bounced Cheque*, Boomlive [DEC 11, 2020, 11:23 PM] <<https://www.boomlive.in/fake-news/times-now-links-rhea-chakrabortys-imma-bounce-chat-to-bounced-cheque-9513>>.

²⁶ Swati Chatterjee, *TOI, HT, ABP News Fall For Fake Account Impersonating Indrajit Chakraborty*, Boomlive [DEC 23, 2020, 12: 11 PM] <<https://www.boomlive.in/fake-news/toi-ht-abp-news-fall-for-fake-account-impersonating-indrajit-chakraborty-9671>>.

who were close to the deceased. The *disinformation* also interfered with the Rule of Law operating in the country²⁷.

In the same way, misinformation was perpetuated by the media in relation to the India-China conflicts as well. *Aaj Tak* and *Times Now* aired a video showing a 1962 war memorial and labelled it as a footage of Chinese soldiers killed in the clash which occurred on June 20, 2020²⁸. In the same way, a video showing '*Chinese fighter jets being struck down by Taiwan*' was later refuted by the Taiwan's Ministry of National Defense²⁹.

Thus, it is clear that the mainstream media played a huge role in the spread of false news and information across the country in 2020. Even public figures played their part in the spread of *disinformation*. For example: it was tweeted by Kiran Majumdar Shaw that southern hemisphere countries were not affected by novel coronavirus.³⁰

Whether we talk about hate speech as in the case of *Tablighi Jamaat* or of breach of privacy in the Sushant Singh Rajput's suicide, the media of this nation has played the biggest role in perpetuating violence and lies across the country and thus, a check on the working of media is exigently required to curb this growth of *disinformation*.

CONCEPT OF TRIBUNALS IN INDIA

Before we analyse whether establishing a media tribunal is pragmatic for India, we have to analyse how Tribunal in India work and from where do they derive their powers.

"Tribunal is an administrative body established for the purpose of discharging quasi-judicial duties. An Administrative Tribunal is neither a Court nor an executive body. It stands somewhere midway between a Court and an administrative body. The exigencies of the situation proclaiming the enforcement of new rights in the wake of escalating State activities and furtherance of the demands of justice have led to the establishment of Tribunals".³¹

In India Tribunals are established for the following aims as illustrated by the Law Commission of India : *"To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other*

²⁷ Swati Chatterjee, *Sushant Singh Rajput: IANS, Jagran Fall for Fake Account Demanding CBI Probe*, Boomlive [DEC 11, 2020, 4: 23 PM] <<https://www.boomlive.in/fake-news/sushant-singh-rajput-ians-jagran-fall-for-fake-account-demanding-cbi-probe-8750>>.

²⁸ Anmol Alphonso, Nivedita Niranjankumar, *Aaj Tak, Times Now Air Video Of 1962 War Memorial As 'Proof Of Galwan'*, Boomlive[DEC 29, 2020, 12:11 PM] < <https://www.boomlive.in/fake-news/aaj-tak-times-now-run-1962-war-memorial-video-as-proof-of-galwan-9584>>.

²⁹ Anmol Alphonso, *Taiwan Refutes Indian Media Reports About Shooting Down a Chinese Jet*, Boomlive[DEC 23, 2020, 12:23 PM] <<https://www.boomlive.in/fake-news/taiwan-refutes-indian-media-reports-about-shooting-down-a-chinese-jet-9617>>.

³⁰ Archit, *Places most affected by coronavirus not situated on latitude 40°, misleading image viral*, Altnews [DEC 23, 2020, 2:22 PM] <<https://www.altnews.in/places-most-affected-by-coronavirus-not-situated-on-latitude-40-misleading-image-viral/>>.

³¹ Kagzi, M.C.J, *The Indian Administrative Law*, Metropolitan Book Co. Pvt. Ltd., Delhi, 3rd edn., 1973 at pp. 276 and 279.

tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the Constitution”³².

CONSTITUTIONAL AUTHORITY OF THE TRIBUNALS

In India, the 42nd Amendment to the Constitution provided for establishment of ‘Tribunals’ under Article 323A and Article 323B. Article 323A empowered the Parliament to establish administrative tribunals to adjudicate upon disputes and complaints vis-à-vis appointment and service of officers appointed to public services and offices under the Union Government of India, or any State Government, or any local authority within the country of India which is wholly or partially under the control of the Government or any association or corporation run by the Government of India.³³

Whereas Article 323B of the Indian Constitution provides that the appropriate legislature may provide for establishment of tribunals to adjudicate upon “*disputes, complaints and offences pertaining to tax, foreign exchange, import, export, industrial and labour disputes, land reforms, ceiling on urban property, elections to Parliament or state legislatures (except the matters dealt under articles 329 and 329), production, procurement, supply and distribution of foodstuffs and offences relating thereto*”³⁴. Thus, it is possible for the Parliament to add ‘press and media’ to the list of subjects included in Article 323B through an amendment to the Constitution in order to establish a ‘Media Tribunal’.

PROCEDURE ESTABLISHED FOR THE WORKING OF TRIBUNALS

Article 22 of the Administrative Tribunals Act, 1985 provides for the procedure to be followed by Tribunals. It is stated:

*“(1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and decided whether to sit in public or in private”.*³⁵

Whereas, clause 2 of the same article states that the tribunal must decide each application on the basis of perusal of documents and written submissions and after the hearing of oral arguments as advanced by each party.³⁶

Furthermore, the Central Administrative as well as State Administrative Tribunals also have the power to punish for contempt of the court. Article 17³⁷ of the said Act states that such Administrative Tribunals shall have the same the powers, jurisdiction and authority as the High Court in respect of contempt of itself. For this purpose, the Tribunals will be subject to Contempt of Courts Act, 1971.³⁸

³² LAW COMMISSION OF INDIA, Report No.272 “Assessment of Statutory Frameworks of Tribunals in India” October 2017.

³³ INDIA CONST. art. 323, cl. A.

³⁴ INDIA CONST. art. 323, cl. B.

³⁵ Administrative Tribunal Act, 1985 No. 13 art. 22, cl. 1 Acts of Parliament, 1985 (India).

³⁶ Administrative Tribunal Act, 1985 No. 13 art. 22, cl. 2 Acts of Parliament, 1985 (India) .

³⁷ Administrative Tribunal Act, 1985 No. 13 art. 17, Acts of Parliament, 1985 (India) .

³⁸ Contempt of Courts Act, 1971 No. 70 art. 12, (India)..

Lastly Article 26³⁹ of the Act provides that judgments of the Tribunals will be issued on the basis of majority. If there is no demarcated majority on a issue or multiple issues, then the point or points on which there are differing opinions will be analysed by the Chairman of the Tribunal who might decide it on his own, or refer it to one or more members of the Tribunal whose majority decision shall be final.

Thus, it can be reasonably understood that the procedure established for working of existing Tribunals in India is well-suited for timely and expedient disposal of complaints related to working of mainstream media. Therefore, if a 'Media Tribunal' is established, disputes arising out of *disinformation* by the media can be resolved effectively without increasing the case load on Supreme Court and High Courts of the country.

PERUSING THE RIGHT TO FREEDOM OF SPEECH OF MEDIA

In order to safeguard the democratic way of life, it is of absolute importance that citizens of the country must have sufficient freedom and liberty to propagate their views and thoughts to masses of people. The media or the press plays a vital role in building a strong and viable society. If the media or the press of the nation are denied the freedom to speech and expression, it will undermine the power of public opinion and thus democracy of the nation will erode.

CONSTITUTIONAL STATUS OF RIGHT TO FREEDOM OF SPEECH AND EXRESSION IN REPSECT TO PRESS AND MEDIA

In Article 19(1)(A) of the Indian Constitution, there is no mention of freedom of media and press. Only 'Freedom of Speech and Expression' is mentioned in there.

Dr Bhim Rao Ambedkar, the Chairman of Drafting Committee stated in the Constituent Assembly that there was no need for special mention of press and media in Article 19 as the press and media ought to be considered identical to an individual citizen as far as their freedom of expression was concerned.

In *Romesh Thapar v/s State of Madras*⁴⁰, a journal titled "Cross Road", printed and published in Bombay was banned in the State of Madras. While deciding the case, Chief Justice Patanjali Shastri signified the sanctity of Freedom of Speech of the press. He noted that such freedom lay at the foundation of a democracy that is India and in lack of freedom of speech and expression, the process of popular government is not possible. In this case it was held that the ban of "Cross Roads" by the Madras Government was violative of freedom of speech and expression as without the freedom of circulation, the publication would mean nothing.

The Supreme Court of India in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*⁴¹ noted that freedom of media and press has become the heart of political and social way on life in today's world. Furthermore, the role of a public educator is also fulfilled by the press especially in developing world, where television and other kinds of modern communication are not available for certain sections of the society.

³⁹ Administrative Tribunal Act, 1985 No. 13 art. 26, Acts of Parliament, 1985 (India).

⁴⁰ *Romesh Thapar v. State of Madras* AIR 1950 SC 124.

⁴¹ *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* (1985) 1 SCC 641.

On top it the Court noted that the aims and objectives of press included disseminating facts and opinions in lack of which, the elected Government cannot take decisions and judgments. The press and newspapers being carriers of views and thoughts, having a bearing on public administration more often than not carry matter that is not palatable to the State authorities.⁴²

Thus, after perusing the decisions of the Hon'ble Supreme Court and the views of the distinguished jurists therein, it has become crystal clear that the right to freedom of speech and expression of media and press in the country flows from Article 19(1)(A) of the Constitution and is of paramount importance which ought to be guaranteed to all citizens.

It is understood that the press and media stand *at par* with respect to any citizen of the country and therefore, they cannot claim any special privileges, which are different from those awarded to an ordinary citizen of the country. On the same note, the media cannot be regulated on the basis of any extraneous restriction other than those exercised on normal citizens.⁴³

Article 19(2)⁴⁴ enlists the subjects regarding which certain restrictions can be placed on the Right to Freedom of Speech and Expression vis-à-vis media and press.

It expounds that freedom of expression can be curtailed or restricted by a law enacted by the State in the interests of sovereignty and integrity of the nation, its security, amicable relations with other countries with respect to India, public order in the society, decency and morality of the people and in relation to contempt of court.⁴⁵

Therefore, it can be safely concluded that since the freedom of speech is subject to certain restrictions for the Indian citizens and can be curtailed therein, it is only reasonable that the freedom of media and press should be restricted and checked at least in the matters in which *disinformation* and hate speech negates the interests of the nation in respect to sovereignty and integrity of the state⁴⁶, defamation⁴⁷, decency or morality or in relation to contempt of court⁴⁸, amicable relations with foreign nations⁴⁹, incitement to violence⁵⁰, public order⁵¹ among others.

This is another reason which solidifies the need of a media tribunal in the country.

⁴² *Id.* At 39.

⁴³ Manmit Singh, *Freedom of Press: Article 19 (1)(A)*, Legal Services India [DEC 12, 2020, 7:54 PM] <[http://www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19\(1\)\(a\).html](http://www.legalservicesindia.com/article/1847/Freedom-of-Press---Article-19(1)(a).html)>

⁴⁴ INDIA CONST. art. 19, cl. 2.

⁴⁵ *Id.* at 40.

⁴⁶ Dilip Unnikrishnan, *2013 Photo Of Pro-Khalistan Banners Linked To Farmers' Protest*, Boomlive [DEC 12, 2020, 11:23 PM] <<https://www.boomlive.in/fake-news/2013-photo-of-pro-khalistan-banners-linked-to-farmers-protest-10989>>.

⁴⁷ Sumit Usha, *Did BJP MP Ramesh Bidhuri Use A Derogatory Word For Farmers? A Fact Check*, Boomlive [DEC 12, 2020, 3:34 PM] <<https://www.boomlive.in/fake-news/aam-aadmi-party-claims-bjp-mp-ramesh-bidhuri-abused-farmers-farmers-protest-delhi-borders-11276>>.

⁴⁸ Anmol Alphonso, *2011 Video of Prashant Bhushan Being Beaten Revived After Contempt Case*, Boomlive [DEC 11, 2020, 2:12 PM] <<https://www.boomlive.in/fake-news/2011-video-of-prashant-bhushan-being-beaten-revived-after-contempt-case-9482>>.

⁴⁹ Anmol Alphonso, *Did Donald Trump Declare Martial Law To Prevent A Coup? A Fact Check*, Boomlive [DEC 21, 2020, 4:23 PM] <<https://www.boomlive.in/world/fake-news-donald-trump-martial-law-11342>>.

⁵⁰ Sumit Usha, Mohd. Salman, *Old Poster Demanding Release Of Sharjeel Imam Shared As Recent*, Boomlive [DEC 23, 2020, 6:23 PM] <<https://www.boomlive.in/fake-news/farmers-protest-release-sharjeel-imam-posters-11217>>.

⁵¹ Karen Rebelo, *2019 Photo of Protest Against Article 370 Linked To Farmers' March*, Boomlive [DEC 11, 2020, 2:12 PM] <<https://www.boomlive.in/fake-news/2019-photo-of-protest-against-article-370-linked-to-farmers-march-10908>>.

Thus, after analysing the Constitutional status of the Right to Freedom of Speech of Press and Media, it can be concluded that the Right can be restricted in accordance to the restrictions enumerated in Article 19(2)⁵²

IS IT PRACTICAL FOR PRESS AND MEDIA TO BE SUBJECTED TO SELF-REGULATION?

When we discuss whether freedom of speech vis-à-vis media and press is subject of self-regulation there comes a dilemma as to who should maintain checks and balances vis-à-vis what is published and circulated in accordance to 'self-regulation'. Theoretically speaking, there is a high chance of press and media to subjugate regulatory objectives to their own business goals.⁵³

'News Broadcasting Standard Authority' [NBSA] is the only 'self-regulatory' mechanism associated with television media. NBSA fails to address and control various concerns like publication of false and inaccurate news, communal or hate speech targeting a specific minority, violation of privacy of individuals and other entities, violation of journalistic ethics, cross-media ownership, sensational and redundant news pieces on celebrities, paid news, and unethical sting operations conducted for publicity and the like.

On top of this, if we authenticate self-regulation for media and press, it would be tantamount to equating media and press to the Judiciary. This is so, because the only institution of the country which is subject to self-regulation is the Judiciary of the country [Appeals against decisions, Overruling of lower court decisions etc].

This shakes the very foundation of the Constitution of India is against the idea of constitutional and democratic setup existing in the country as has been stated in the petition of Nilesh Navlakha⁵⁴.

CONCLUSION AND SUGGESTIONS

After reading, analysing and discussing various articles, statutes and judgments it can be safely assumed that the Constitutionality of Freedom of Speech and Expression of media is subject to certain restrictions enlisted in Article 19(2) and such checks and restrictions can be pragmatically exercised by establishment and operation of 'Media Tribunals'.

As per Robson, "... tribunals do their work more rapidly, more cheaply, more efficiently than the ordinary courts possess greater technical knowledge and fewer prejudices against government; give greater heed to the social interests involved decide disputes with conscious effort at furthering the social policy embodied in the legislation"⁵⁵

On this note, the author would like to conclude that the Government of India should constitute a 'Media Tribunal' in the country in order to expeditiously solve and dispose matters to problems enlisted in this paper. Such Media Tribunal should also act as a support system for reporters who are

⁵² INDIA CONST. art 19, cl. 1.

⁵³ Meera Mathew *MEDIA SELF- REGULATION IN INDIA: A CRITICAL ANALYSIS* ILJ Law Review [2016] <http://www.ili.ac.in/pdf/p3_meera.pdf>.

⁵⁴ Akshita Saxena, "Media Shall Be Made Accountable for Hate Speech, Fake News, Breach of Privacy": Plea In Supreme Court Seeks Establishment Of Media Tribunal. *Supra* Note at9.

⁵⁵ Kagzi, M.C.J, *The Indian Administrative Law*, Metropolitan Book Co. Pvt. Ltd., Delhi, 3rd edn., 1973 at pp. 276 and 279.

ordered to refrain from covering certain surreptitious yet important matters, and for readers and viewers to lodge complaints against *disinformation*.

In summation, it is suggested that the Supreme Court must find it expedient to issue advisory guidelines under Article 32 and Article 142 of the Constitution of India to the Centre to initiate and enact specific amendment to the Constitution [Article 323B]. Furthermore, a High-powered Committee headed by the Chief Justice of India or judges of Supreme Court/High Court and consisting of experienced persons and concerned stakeholders of the Central Government should be formed. Its aims should include reviewing the entire structure of legal framework relating to media-business regulations. After such review, it must issue reasonable and appropriate guidelines which are to be laid down by the Supreme Court which will endorse the working of Media Tribunals. On the basis of said guidelines, the Parliament should enact a legislation forming the statutory basis of existence of Media Tribunals in the country.

IRON CURTAIN ON INTERNET FREEDOM IN INDIA: ANALYSING THE INTERMEDIARY RULES 2021

Tithi Neogi

B.A.LL.B. (Taxation Hons.)
KIIT School of Law, Bhubaneswar
Mobile number: 7381903630
Email ID: tneogijune@gmail.com

ABSTRACT:-

On 25th February 2021, the Government of India released the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules 2021, in exercise of its powers under Section 87(2) of the Information Technology Act, 2000 (henceforth IT Act, 2000) and in supersession of the previous Information Technology (Intermediary Guidelines) Rules, 2011. Part I of the new Rules deals with definitions, Part II deals with the compliances that the intermediaries are expected to meet, and Part III lays down the Code of Ethics to be followed by the digital media. This paper attempts to prove that the Intermediary Rules of 2021 do more harm than good and go against the tenets of democratic traditions. Provisions such as the one related to traceability of originator by removing end to end encryption of text messages slowly but surely create a Big Brother like environment. The intention behind the Intermediary Rules of 2021 is vague and do not bode well. Many of its provisions, as will be subsequently elaborated in the paper, are ultra vires the statutory law, or vague, or arbitrary, or even downright unconstitutional, along with being a result of excessive delegation of legislative powers. This paper will also study how the effects of ‘checks and balances’ in our democracy would be eroded through these Rules, and how media, the fourth pillar of democracy, stands in danger of being brought down. Further, the Rules burden the intermediaries with the responsibility to take action against breach of ‘public order’, which is a wide term and can be made malleable to suit the interests of those in power, and hinder peaceful protest.

INTRODUCTION

The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (henceforth referred to as 2021 Rules) go a step ahead of the Intermediary Guidelines Rules Of 2011, in the sense that apart from its application to intermediaries as defined under Section 2(1)(w) of the Information Technology Act, 2000, the 2021 Rules will also apply to Social Media Intermediaries (SMIs), Significant Social Media Intermediaries (SSMIs), Digital Media Platforms (DMPs) and Original Curated Content Platforms (OCCPs).

A press release by the Press Information Bureau, Government of India, on its website, suggests that the 2021 Rules “empower *ordinary users* of social media, embodying a mechanism for redressal and

timely resolution of their grievance.”¹ As one progresses through this paper and looks at the myriad problems potentially creeping up for different parties, one might wonder who these *ordinary users* are whom the 2021 Rules seek to *empower*.

Intermediaries and Intermediary Liability

What’s an intermediary?

Section 2(1)(w) of the Information Technology Act defines intermediary as “with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes”. To this, the 2021 Rules add “websites, apps and portals of social media networks, media sharing websites, blogs, online discussion forums and other such functionally similar intermediaries.” Hence, it would be safe to say that now, not only enablers of internet will be held liable, but even the content that is generated online will be taken to task by the government. This means that where initially intermediaries could be only classified into information carriers, information publishers or information sellers depending on their roles², they have now an additional category- content/information generators. This significantly widens the government’s ambit and scope to regulate conversation-setters on the internet.

Intermediary Liability in the West

In an increasingly globalized world where internet acts like a huge leveller of access to information, intermediary liability has been, for the major part, on a downward trajectory. A good example of a statutory emphasis on protecting intermediaries business models would be the Communications Decency Act of 1996, enacted by the US Congress, which ordains the authority to treat interactive computer services differently than other information providers like newspapers, television, radio stations e.t.c all of which can be held liable for the publication or distribution of obscene or defamatory material prepared by others. This Act did not hold interactive computer services liable for failing to edit, withhold or restrict access to any material disseminated through them that might be offensive in nature.

The U.K. Defamation Act of 1996 provides the defence of innocent dissemination- it protects the defendant intermediary from liability only when it took reasonable care, and did not know, nor had any reason to believe, that he was publishing a defamatory statement. Further, in *Bunt v. Tilley*³ Eady J., held that an Internet service provider, performing only a passive role of enabling postings on the internet, could not be said to be a publisher under common law.

IT Act 2000: Section 79, 2021 Rules and Burden of Proof

Regulation must come after a sound understanding of the technology in question. Intermediaries are like a power engine to the internet- without intermediaries, the internet cannot function. Intermediaries are symbolic of technological innovation, and like the flip side every innovation has, they can be used

¹ Government notifies Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, PRESS INFORMATION BUREAU, <https://www.pib.gov.in/PressReleseDetailm.aspx?PRID=1700749> (last visited Mar 15, 2021).

² Vakul Sharma & Seema Sharma, *in* INFORMATION TECHNOLOGY: LAW AND PRACTICE: LAW & EMERGING TECHNOLOGY, CYBER LAW AND E-COMMERCE (2016).

³ *Bunt v. Tilley*, (2006) EWHC 407 (QB).

in a lawful or unlawful manner. Thus, the Indian lawmakers, at the time of codification of the Information Technology Act of 2000, wanted to place the rights of the intermediaries within a legal framework, so that any limit on the function of intermediaries does not have a negative impact on growth of technology and innovation. Hence, Section 79 of the IT Act, 2000 gets the juggle right between technology necessity and legal necessity.⁴ Section 79 provides that intermediaries will not be liable for any third party information, data or communication link that they have made available or hosted, if and only if, the role of the intermediary is restricted to providing access to communication system transmission or temporary storage of information made available by third parties occurs, or if the intermediary has no hand in initiating, selecting the receiver or selecting/modifying the information in the transmission.

A significant factor in this provision lies in its amendment. This provision, prior to its amendment, read as such “no person providing any service as a network service provider shall be liable.....if he proves”. The amended Section 79 of the IT Act as we have today removes this burden of proof from the shoulders of the intermediaries and places it on the prosecution to establish intermediary liability. However, if we look at the 2021 Rules, Part-II dealing with Due Diligence to be observed by intermediaries significantly increases a burden of compliance on the intermediaries. The intermediaries have been given by the 2021 Rules the huge responsibility of periodically reminding the users of what can and cannot be hosted on the platform, and have to take active steps in appointing compliance officers and complaint tracking mechanisms, which will consequently translate into indirectly shifting the burden of proof back to the shoulder of the intermediaries; because henceforth in a court of law they will have to prove that they took active steps in observing strict compliance.

Another interesting observation is that Section 79, with its exemption rule, recognizes intermediaries primarily as “storage and transmission medium.” However, the 2021 Rules have massively increased the ambit of intermediary, to include blogs and online discussion forum etc., meaning that now, the category of intermediaries will encompass much more than mere storage and transmission medium. What further makes the definition of intermediaries dangerously inclusive is the phrase “other such functionally similar intermediaries” in the definition of intermediaries in the 2021 Rules, thus leaving open the opportunity to bring in almost any platform within the ambit of intermediary liability.

Traceability of Originator: Anti-Encryption Rules

Section 5(2) of the 2021 Rules stipulate that as part of due diligence, a significant social media intermediary that primary delivers services related to messaging must facilitate the identification of first originator of information on its computer resource, as and when directed by an order of a court of competent jurisdiction under Section 69 of the IT Act, 2000. Further, it has been provided that such order shall only be passed for the “prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years, and such order shall not be passed in cases where less intrusive means are effective in identifying the originator”. This provision basically allows for decryption of

⁴ Vakul Sharma & Seema Sharma, *in* INFORMATION TECHNOLOGY: LAW AND PRACTICE: LAW & EMERGING TECHNOLOGY, CYBER LAW AND E-COMMERCE (2016).

encrypted messages on networks such as WhatsApp, for the above mentioned circumstances. This adds fuel to the long standing debate of privacy versus security. However, before we explore the privacy versus security debate, we must look into the problems specific to Section 5(2) of the Rules.

If we look at the language of the provision, it becomes clear that this section does not necessitate decryption for identification of first originator of information, where “less intrusive means” can be used for the same. However, the Rules do not elaborate what these less intrusive means could be. Further, the Rules do not specify the situations or the degree of severity of situations in which less intrusive means are to be used. The Rules also do not provide any guidelines for law enforcement agencies with regards to observing privacy related measures or precautions during identification of the first originator, or while handling the information obtained.

What's encryption?

To understand the ramifications of this provision, it is important to understand what encryption means. Encryption is basically a means of taking plaintext, or data which is readable, and scrambling into ciphertext which becomes unreadable.⁵ Encryption needs a key, which facilitates the scrambling of data. Decryption basically means the unscrambling of data and putting it back into readable form. While the idea of providing encryption is to keep the messages between two persons protected, exceptional access to the encryption key and plaintext can be made available to third parties, particularly the government, as has been done in legislations like that of Australia, and now India.

Privacy versus Sovereignty

An example of the tussle between privacy and sovereignty of a nation, leading to questions of a law being overly-broad and excessive in nature, would be the draft legislation of the USA named The Compliance with Court Orders Act of 2016. This Bill stipulated that companies provide information or data in an intelligible format to the government or grant technical assistance to the government to procure such information or data. This legislation was resisted by both industries and advocacy groups, on the grounds that it did not differentiate between different kinds of encryption, making it overly broad, excessive and unrealistic to implement.

The battle between intermediaries/ technology and innovation enthusiasts, and the State, is primarily of capabilities of both parties. Intermediaries stand for technological innovation; the internet would cease to exist without them, and intermediaries thrive because there are no physical borders in cyberspace. Since tech-enthusiasts strive for innovation, computer codes being secure and bug free is of prime importance to them. Hence, any vulnerability in code like granting a key to encrypted texts to a third party stands as a failure of innovation. Thus, while intermediaries may not want to give their users a product which is less secure, on the other hand, the government or law enforcement believes primarily in managing risk and not eliminating risk.⁶ Law enforcement agencies would prefer a balance, wherein users sacrifice some security over their personal texts for the national security, so that government agents have an idea of what and how to manage in case of an emergency.

⁵ Serge Vaudenay, *From Cryptography to Communication Security*, A CLASSICAL INTRODUCTION TO CRYPTOGRAPHY 295–312.

⁶ Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, B.U.L. REVIEW 171–178. (“Insofar as it involves risk to alleged criminals, convicted criminals, the public, and law enforcement officers, criminal law enforcement raises a host of risk-related issues.”).

Encryption is a saviour for vulnerable groups such as journalists, social workers, whistle-blowers, or victims of abuse, particularly when these victims have taken a stand against their abusers who maintain a position of power, or enjoy some authority bestowed by the government itself. However, in jurisdictions across the world, governments tend to believe that encryption is only necessary for persons with very specific privacy concerns, and that “those who have nothing to hide do not need or benefit from strong encryption.” However, this statement is not true. Every person who interacts with technology and the internet needs encryption.

Cybersecurity: Something to ponder upon

Law agencies often tend to forget that besides privacy and national security, there is a third angle to the debate- cybersecurity. A weaker encryption, like that advocated by the government, would mean that personal data, including sensitive codes related to bank accounts, etc., would be vulnerable to attacks by spies, cybercriminals, phishers, etc. Hence, it is very difficult to maintain a delicate balance between privacy, public safety and national security; and national security cannot come at the cost of public safety, for that would create ‘an out of the fire and into the frying pan’ kind of situation.

It needs to be understood that the government’s concerns about security are not the only aspect of security. Security can mean many things. For some, it can be national security, for others, it could be public safety, and for yet others, it could be privacy and cybersecurity, or further still, security could mean protection from hostile or oppressive state-actors.⁷ Encryption, in fact, is necessary for protecting and uplifting both- the speech and communications of individuals and communities, and national security and law enforcement operations. Hence, a reconciliation could be found in comparing competing security risks through factual analysis and cost/benefit assessment.

Public Order

For a nation with a federal structure like India which also has a multi-party electoral system, there’s a lot of clashing of opinions and dissent on policies of national importance. Things particularly have a tendency to get messy before and during the elections. Imagine if in such a sensitive time frame in India, the ruling party pitches a policy in one state and it is met with dissent by a strong minority group which might be a stable vote bank for a party of the opposition, the use of decryption to reveal the first originator in matters of “public order” or “national security” may do more harm than good. This is because the meaning of “public order” is not concrete- its meaning can be malleable to suit the needs of the ruling party wishing to maintain “public order” through intimidation, direct or indirect.

Importance of Freedom of Speech and Expression

Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Under Art.21, right to privacy is a fundamental right, as held in *Justice K.S. Puttaswamy v. Union of India*.⁸ Now, coming to the restriction on privacy in the form of procedure of law, intrusion in privacy can be made by legislative provision, executive order or judicial order. However, such provision or order must be reasonable and the act of intrusion must be proportionate to the purpose being sought. This was precisely what was

⁷ Pursuing a More Constructive Dialogue on Encryption and Law Enforcement Access from Moving the Encryption Policy Conversation Forward on JSTOR, <http://www.jstor.com/stable/resrep20994.5> (last visited Mar 15, 2021).

⁸ *K.S. Puttaswamy v. Union of India*, WRIT PETITION (CIVIL) NO 494 OF 2012.

explained by the Supreme Court in *Chintaman Rao v. The State of Madhya Pradesh*.⁹ The Court said, “The phrase reasonable restriction connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word reasonable implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art.19(1)(g) and the social control permitted by clause 6 of Art.19, it must be held to be wanting in that quality.”

When the 2021 Rules speak of identification of first originator, it is not clear if such identification will be complete by means of full decryption, or whether there will be partial decryption. How much of the identity needs to be protected and how much needs to be unearthed, cannot be determined by one umbrella provision, and must depend on factual analysis. Further, as elaborated earlier, the idea of public order, national security etc. that are to form the basis of any order mandating identification of first originator, are extremely vague and can be used arbitrarily to further vested political interests, against those who have dissenting opinions.

Therefore, the provision on traceability in the 2021 Rules can do more harm than good, since they are prone to being used as a tool of intimidation. In *S. Khushboo v. Kanniamal*,¹⁰ the court stated that “the importance of freedom of speech and expression though not absolute was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is of great societal importance.”

Turnaround to Section 66A Of It Act, 2000

In 2015, *Shreya Singhal v. Union of India*¹¹ struck down Section 66A of the IT Act, 2000 and rendered it unconstitutional. Section 66A read as follows:

“any person who by means of a computer or communication device sends any information that is:

1. grossly offensive;
2. false and meant for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will;
3. meant to deceive or mislead the recipient about the origin of such messages, etc, shall be punishable with imprisonment up to three years and with fine.”

This section is very similar to Section 4(1)(b) of the 2021 Rules, which reads as follows:

“The rules and regulations, privacy policy or user agreement of the intermediary shall inform the user of computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that:

- (i) belongs to another person and to which the user does not have any right;

⁹ *Chintaman Rao v. The State of Madhya Pradesh*, (1950) SCR 759.

¹⁰ *S. Khushboo v. Kanniamal*, (2010) 5 SCC 600.

¹¹ *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73.

- (ii) is defamatory, obscene, pornographic, paedophilic, invasive of another's privacy, including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws of India;
- (iii) is harmful to minors,
- (iv) infringes any patent, trademark, copyright or other proprietary rights:
- (v) violates any law for the time being in force;
- (vi) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact;
- (vii) impersonates another person;
- (viii) threatens the unity, integrity, defence, security or Sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognizable offence or prevents investigation of any offence or is insulting any foreign States:
- (ix) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;
- (x) is patently false and untrue, and is written or published in any form, with the intent to mislead or harass a person, entity or agency for financial gain or to cause any injury to any person”

Perhaps the major difference between the two sections is that Section 4 of the 2021 Rules has merely expanded the terms “grossly offensive” and “annoyance” by a multitude of more vague acts, such as “harmful to minors”. Further, the Code of Ethics in Part-III of the Rules make provisions related to similar words to “grossly offensive” and “annoyance”, such as “decency”. The judgment of *Shreya Singhal v. Union of India* stated that “Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech.....It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or maybe grossly offensive to some.....Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.”

The above mentioned reasons in the judgement that struck down Section 66A can also be applied to the current 2021 Rules. Hence, it makes no sense for the government to turnaround to a repealed provision, unless it is trying to exercise excessive powers indirectly, something which it could not do directly, earlier.

Exercising Power On Digital Media: How Fair?

Derivative power of the 2021 Rules

The 2021 Rules derive their power from Section 79(2)(c), Section 69A(2) and sub-sections of Section 87 of the IT Act, 2020. Section 69A lists the subject matters on which access by public can be blocked

by an agency of the Government of any intermediary. These subject matters specifically pertain to “sovereignty, integrity and defence of India, security of State, friendly relations with foreign states, public order or incitement to commission of cognizable offence”. The IT Act specifically and primarily deals with transactions enabled by electronic data interchange; media is not its forte. Neither does Section 69A make mention of media. While the government has resorted to the IT Act, 2008 and Section 69A to curb access to any content on media that seemed inappropriate, technically, it is the Ministry of Information and Broadcasting (MIB) that should frame rules pertaining to news media and OTT. Creating a Code of Ethics for digital media as part of some Rules that derive power from a parent Act which might not be authorised to pass orders administering media, is ultra vires the statute, and is excessive delegation of power.

Who governs the media?

Media in India is mostly self-regulated. The Press Council of India regulates print media through mostly guidelines. The Cable Networks Regulation Act of 2005 regulates content on television. With the Code of Ethics introduced in the 2021 Rules, everything ranging from online current affairs pages to OTT platforms will be subject to these rules. However, as mentioned above, not only is this regulation on digital media excessive, but as per past judgments, this regulation on OTT platforms is also unnecessary. In *Justice for Rights Foundation v. Union of India*¹² the petitioner had raised a point as to when cable and DTH operators were subject to censorship on the content they aired, why OTT platforms were exempted from the same. In response, MIB stated that the Information Technology Act of 2000 had sufficient provisions as safeguards in case a person got aggrieved by any content shown by these OTT Platforms. The Supreme Court agreed and held that there was no need of a regulatory law on OTT Platforms. Hence, it is an accepted stance that the Information Technology Act has the authority to grant safeguards/remedial measures to persons aggrieved by digital content, however, it lacks the authority to regulate digital media and OTT. In fact, in a Central Government Notification dated 9th November 2020, it was stated that the MIB has jurisdiction over OTT and online news.

This power distribution of regulating digital media is even more confusing because in the three-level regulatory structure of digital media as provided in the 2021 Rules, the third level will be constituted by an inter-departmental governmental committee established by the MIB.

And yet, it is not the MIB, but the Ministry of Electronics and Information Technology which decides through its principle Act upon the Code of Ethics for digital media. While the Press Council Act, 1978 contains express provisions which regulate newspapers without any government interference, and the Cable Television Networks (Regulation) Act, 1995 has specific clauses empowering it to impose a programme code for the regulation cable TV content by the Central Government; the IT Act, 2000, has no provisions related to implementation of any programme code or regulation of news media. And yet, where the IT Act happens to be the parent act and does not mention control over media, the 2021 Rules which are subordinate legislation, seek to regulate digital media. This invokes the Doctrine of Ultra Vires, since the 2021 Rules are Ultra Vires the parent Act. In *Agricultural Market Committee v. Shalimar Chemical Works*, the Supreme Court stated that “The delegate which has been authorized to

¹² Justice for Rights Foundation v. Union of India, WP(C) 11164/2018.

make subsidiary rules and regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder.”¹³

Threat to Media

Such restrictions on news media and OTT go much beyond what was envisioned in the restrictions on freedom of speech in Art.19 of the Constitution of India. Even with the existing laws, digital news publishers have been subjected to defamation lawsuits and other criminal charges. Such wide-reaching powers as have been bestowed on the 2021 Rules will erode the parity created by the doctrine of checks and balances, for the 2021 Rules show a typical instance of executive powers surpassing legislative authority.

Media is said to be the fourth pillar of democracy. Imposing such severe restrictions on media creates an imbalance in the equilibrium of powers. In 2020, the World Press Freedom Index ranked India 142nd which is two places down from 2019. This in a way implies that the weakening of media is correlated to excessive power imposition by the State. The provisions of the Code of Ethics in the 2021 Rules are likely to hit at several independent journalism portals that are dependent on the digital forum for their reporting to reach the masses.

A Threat to Business and India's Soft Power?

The 2021 Rules significantly increase the burden of compliance on intermediaries. This will undoubtedly lead to a surge in the operating cost of such intermediaries in India. Since the definition of intermediaries has been made more inclusive to bring a wider range of entities within the ambit of 2021 Rules, many corporations, from tech-start ups building apps to web hosting services, will be wary of opening base in India, since the costs associated with high-level compliance might be higher than any returns such entity brings in the initial phase of operations.

Earlier, India's soft power was recognized by a dominating entity which overshadowed all other aspects- Bollywood. Post pandemic, even commercial films produced by big-shot studios had to be released completely online, on OTT. Hence, the Indian OTT scenario offered a gamut of content driven web shows, realistic low-budget parallel cinema, regional films and a levelling ground for creators of all backgrounds, with or without much financial clout or industrial backing. Web shows like 'A Suitable Boy' which had an Indian cast and creator were supported by BBC Studios and subsequently aired by Netflix. With the strict regulations imposed by 2021 Rules on OTT, the freedom of expression Indian creators had on OTT which allowed them to bring something unique to the international table, will be lost; and it will be increasingly difficult for Indian content to find its voice among the ocean of Western content that is relatively unfettered by regulations on creativity.

Conclusion

In light of the discussions so far, it would be safe to conclude that the Intermediary Liability Rules of 2021, which includes the Code of Ethics for digital media, do not bode well in a democracy. Not only the Rules set out to achieve what was struck down by the Court in the *Shreya Singhal v. Union of India* case, but they also depict excessive delegation to subordinate legislation. The Rules are stuck on vague concepts of public order, shifting the power dynamics excessively in favour of the Government.

¹³ *Agricultural Market Committee v. Shalimar Chemical Works*, [1997] AIR 2502 (SC).

The 2021 Rules might ring the death knell for independent journalistic outfits working diligently to bring out non-partisan news, unsupported by big corporations.

TRIPS AGREEMENT AND ITS IMPACT ON THE INDIAN PHARMACEUTICAL INDUSTRY

Swati Vishan & E Abhay Krishna

PhD Research Scholars, TERI SAS, Vasant Kunj,

Email id: swativishan@gmail.com; abhaykrishna1297@yahoo.com;

Contact No. :- 9871610390., 9652818070.

ABSTRACT:

Right to health expressly not guaranteed in Indian Constitution but judiciary by interpretation of the Article 21 held that “Right to life and personal liberty” includes Right to Health. Even various provisions of Part IV of Constitution of India and various conventions on Human rights imposed a duty on State to ensure the good health. However, even after various schemes and policies “Health” is yet a significant worry for India and there are various reasons for this likes accessibility of medicines, technologies and research etc. In this paper, I will discuss about the role of medicine in ensuring the right to health and the impact of the TRIPs Agreement 1994 on the right to access to medicines and on competition in Indian Pharmaceuticals industries.

Key Words: Health, Medicine and Role of TRIPs Agreement.

INTRODUCTION

Health as a global issue

Various innovations taken place in world which helped to improve the lifestyle of individuals. In medical sector also innovation and technology played a vital role to guarantee the good health. Even after so many improvements and efforts, health is a still a significant concern at global level specially in developing and least developed nations. In 2016 worldwide almost *56.9 million of people died out of which 54% was due to ten common diseases.*¹

Role of Drugs in Health Care System

The WHO defines the health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.² The Ottawa Charter for Health Promotion 1986, in the prerequisites for health includes peace, shelter, education, food, income, a stable ecosystem, sustainable resources, social justice and equity as fundamental conditions and resources for health.³ The words social justice and equality that are fundamental condition for health include the right to access to medicines, because without adequate medicines the ill-body cannot restore health and

¹ World Health Organization on “The top 10 causes of death, 2018”. Last accessed on 18.11.2020 Available at <https://www.who.int/news-room/fact-sheets/detail/the-top-10-causes-of-death>.

² World Health Organization. Constitution of WHO: principles. 2014, Last accessed on 18.11.2020 Available at <http://www.who.int/about/mission/en>.

³ *Ibid.*

perform the functions properly; medicine plays an important role in preserving life.⁴ However, due to various laws and policies there is no free access to medicines by public at large. The exclusive rights over innovations isolated these medical and scientific successes in one corner.

Indian Scenario in Pharmaceutical Sector

Pharmacy Industry in India

Pharma industry is one of the fastest growing industries in India. India is the 3rd largest country in the world in terms of volume (10 % of the global industry) and 14th in terms of value.⁵ As per the Indian Pharmaceuticals Industry Report⁶ India supply 40 percent of global demand for various generic drugs in US and 25 percent of all medicine in UK. However as per the WHO report in 2004, there are an estimated 499–649 million people (50% to 65% of the population) in India do not have regular access to essential medicines.⁷

Constitutional provisions related to health

In the Constitution of India, expressly the right to health is not provided, but the judiciary through the interpretation of the Article 21⁸ held in the case of Bandhua Mukti Morcha v. Union of India⁹ that the “right to life” include “right to health”. However the provisions related to the health included in the Constitution through the DPSP¹⁰ and Schedule 11th and 12th.¹¹

Role of International Conventions and Treaty in Health

Under Article 253 of Constitution of India it is a duty of State to make the legislation for giving effect to international agreements.¹² India being the signatory of various treaties and conventions on human right like the International Covenant on Economic Social and Cultural Rights¹³ and Universal Declaration of Human Rights¹⁴ had a duty to ensure the good health under its principles.

IMPACT OF TRIPS AGREEMENT ON THE INDIAN PHARMACEUTICAL INDUSTRY

In year of 1991, the new economy policies were introduced in India i.e. Globalization, Privatization and Liberalization. In order to promote the investment, innovation and trade etc. the government need

⁴ Ottawa Charter for Health Promotion, 1986 by WHO, Last accessed on 18.11.2020 Available at http://www.euro.who.int/__data/assets/pdf_file/0004/129532/Ottawa_Charter.pdf.

⁵ Rosamond Rhodes, Margaret Battin, and Anita Silvers, *Medicine and Social Justice: Essays on the Distribution of Health Care*, (Published to Oxford Scholarship Online: May 2015), Print ISBN-13: 9780199744206.

⁶ Government of Guajrat on Pharmaceuticals Sector Profile, Last accessed on 18.11.2020 Available at http://indexbt.com/documents/VG%202019_Pharmaceuticals_Sector%20Profile.pdf.

⁷ Indian Pharmaceuticals Industry Report (September, 2019) Last accessed on 18.11.2020 Available at <https://www.ibef.org/industry/indian-pharmaceuticals-industry-analysis-presentation>.

⁸ The World Medicines Situation. Geneva: WHO; 2004 Chapter 7, Access to essential medicines; Last accessed on 18.03.2020 Available at <http://apps.who.int/medicinedocs/pdf/s6160e/s6160e.pdf>.

⁹ Article 21, Constitution of India.

¹⁰ AIR 1984 SC 802.

¹¹ Part IV of Constitution are DPSP, Article 38, 39(e), 41, 42, 47 and 48 A imposed an duty on the state to secure a public welfare and promotion of the good health. Last accessed on 20.11.2020 Available at https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

¹² The schedule 11th and 12th which divide the subjects between the Panchayat and Municipalities respectively also emphasis on duty to provide the drinking water, health and sanitation, family welfare, women and child development, social welfare etc. Last accessed on 18.11.2020 Available at https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

¹³ Article 253 Constitution of India, Last accessed on 20.11.2020 Available at

https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

¹⁴ Article 7 (b) International Covenant on Economic, Social and Cultural Rights, Last accessed on 20.11.2020 Available at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

to change its present legal framework so that it can comply with international regimes. To advance the trade, innovations and technologies in India, the government signed an international document in 1994, agreement related to Trade Related Intellectual Property rights (TRIPs).

TRIPs Agreement was giving protection to various innovation and technologies through different rights on it like Copyright, Trademark, Patent and so on. There were uniform standards set up for protection of rights and duty of enforcement of rights was put on member nations. TRIPs Agreement was also included the right of innovator over pharmaceutical products under Patent right. Through it Article 27.1¹⁵ Patent was not given only to Product but to Process also.

Pre-TRIPs Regime in Pharmaceutical Sector in India:

The Patent Act 2005 which was introduced with the purpose to comply with TRIPs Agreement establishes the strong IPRs regime in India. Before the Patent Act, 2005 the 1970 Patent Act use to govern the Intellectual properties right. Through different provisions of the Act inventions were protected, patent was also granted to the pharmaceutical products but then patent was given to process only and merely for five years to the product.¹⁶

Due to weak IPRs protection during 1980s the Indian pharmaceutical sector through the method of reverse engineering able to capture the significant portion in pharmaceutical sector at global level and became a major drug exporter. During 1980s it became 17th largest drug exporter by exporting about 40% of its production. That time the annual rate of export has been growing about 20 percent.¹⁷The Patent Act, 1970 was giving only the process patent therefore the development of alternative process for product was possible through indigenous research and development.

The Drug Price Control Order in 1970 was introduced with the purpose to fix ceiling price on drugs in India which also contributed on keeping drugs prices among the lowest in the world¹⁸ and to ensure access of medicine. However after TRIPs Agreement, availability and accessibility of drugs at lowest price became a major challenge.

Post-TRIPs Regime in Pharmaceutical Sector in India:

TRIPs Agreement by WTO was more emphasized on the promotion of global competition in trade. It introduced strong IPR regime at global level and given exclusive right to the patentee over process as well as on product patent.¹⁹ Due to which gradually the growth of the pharmaceutical industry of India slow down. As now the Indian pharmaceutical industry cannot manufacture the drugs by method of reverse engineering and development of alternative process for product and monopoly of the leading pharmaceutical industries can be ensure by granting patent rights for prolonged period of time.

¹⁵ Article 27.1 TRIPs Agreement, Last accessed on 26.11.2020 Available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

¹⁶ Sec.3(i) Indian Patent Act, 1970, Last accessed on 26.11.2020 Available at http://www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_31_1_patent-act-1970-11march2015.pdf.

¹⁷ Atsuko Kamiike and Takahiro Sato, "The TRIPs Agreement and the Pharmaceutical Industry: The Indian Experience" last accessed on 26.11.2020 Available at http://srch.slav.hokudai.ac.jp/rp/publications/no11/11-07_Kamiike&Sato.pdf.

¹⁸ Process Development of Some Bioactive Molecules : Chapter I Introduction: History of Indian Pharmaceutical Industry: Requirement of Process Development, Last accessed on 26.11.2020 Available at https://shodhganga.inflibnet.ac.in/bitstream/10603/74158/7/07_chapter%20i.pdf.

¹⁹ *Supra* note 15.

The Drug Price Control Order in 1970 also affected by TRIPRs agreement and most of the drugs covered under it, was getting protection under the TRIPs agreement. Due to which there was declined in the number of drugs. In year 1987 there was 347 drugs covered under the Drug Price Control Order which reduce by 1994 and only 163 were protected, by 1995 only 74 drugs was covered under Drug Price Control Order, 1970.²⁰

In year 2019 the government made some amendment in Drug Price Control Order 2013, as per the new amendment the new drugs that are registered for patent, shall be except from the price control for five years from the date of their marketing and the drugs that treat rare diseases are also exempted.²¹

RIGHT TO ACCESS TO MEDICINE AND TRIPRs AGREEMENT-

In 1994 when the TRIPs Agreement was signed many of the developing and least developed nations had the significant concern that the developed nations due to their advance research and technologies, going to capture the local markets and the availability of the products at affordable price as per their social and economic status will be a significant challenge before them. Therefore the developing countries and least developed nations were given transition time to implement TRIPS agreement by 2005 i.e. ten years of transition period.

In 2001, the WTO in order to ensure that member nations implement the TRIPs Agreement had Doha Declaration. In which they made some of the amendments and clarifications with regard to TRIPs Agreement, the concept of Compulsory licences was introduced, as per the Article 31²² of the agreement the member nations were allowed to issue compulsory licences to their local manufacturing units to manufacture the drugs, which are patented in other country. Nevertheless there are specific conditions that essentially to be satisfied; otherwise the compulsory licences cannot be issued by the State and it will violation of patentee rights.

Indian Competition law

The New Economic Policy in year 1991 bring some major challenges before present legal framework w.r.t to competition i.e. Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) in tackling the competition in market in India. Therefore it was a need of an hour to introduced new provisions that elimination of quantitative restrictions and made the Indian industry open to competition from abroad.²³ In the year 2002, India come up with a new piece of legislation called the Indian Competition Act, 2002. The main purpose of the Act was to promote the competition in the market, consumers interests. To ensure the freedom of trade by establishing the Commission, that will have a responsibility to prevent practices that can effect the competition.²⁴

²⁰ *Supra* note 17.

²¹ Niharika Sanadhya, *India: Drugs (Prices Control) Amendment Order, 2019 To Soothe The Price Control Wound?* 20 February 2019, accessed on 26.11.2020 Available at <https://www.mondaq.com/india/food-and-drugs-law/783224/drugs-prices-control-amendment-order-2019-to-soothe-the-price-control-wound>.

²² Article 31 The TRIPs Agreement, last accessed on 27.11.2020 Available at https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art31_oth.pdf.

²³ Raju KD, *Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India*, Intel Prop Rights 2: 115. doi:10.4172/2375-4516.1000115(2014).

²⁴ As per the Preamble of Indian Competition Act, 2002.

Introduction of Patent Right under Indian Legal Framework

The patent rights that grant for any innovation that is novel, non-obvious and useful in its nature in India under the India's Patents Act of 1970. In the year 2003 Patent Rules was enacted and some amendments were brought in Patents Rules 2003 in 2016 Patent Amendment Rules that set out the law concerning patents. In India the patent right is granted for 20 years and its non renewable. The patentee has various rights under the Act such as power to grant license, collect royalty so on and so forth. The concept of compulsory license is all introduced in the Act through its provision, which allow to use the innovation without the consent of the inventor and it will not amount to violation of Patent right.

Competition Law and Patent Right under Patent Act

The role of competition related regulations play a vital role in economic growth of any country, especially in the era of globalization. The competition related policies of any nation help it to promote the trade, innovation, technologies so on and so forth. However in past few decades the Intellectual property rights had also gain its popularity and evolved worldwide. In India there are different-different legislation that deal with various kinds of IPR.²⁵

There is a general perception that there is a conflict between the competition law and IPR laws, as the objective of competition law is to promote competition and increase access to the market and the objective of IPR laws is to grant a degree of exclusivity to the owners, necessarily restricting access of others to the same.²⁶ However the two piece of legislation have broadly a common objective to promote innovation and consumer welfare.²⁷

The continues liberalization of economy and competition among nations to prove themselves as most power full among all other nations, the States are encouraging many of the sectors and segments in trade as well as adopting the new trends in order to promote the trade, technology, investment etc. the Intellectual property right is one of them. The IPR play a very important role in growth of world economy and therefore through different schemes and policies the nations and organization such as WTO, WIPO are trying to promote the innovation by granting the exclusive rights on it, however many times it lead to misuse of such rights due to various reasons.

The border objective of IPR was to promote innovation and consumer welfare by granting the protection is left behind and its more focusing on the business model out of such innovation. The shift in the approach many times violates the basic provisions of competition law . Now days the same practices is adopted by the Pharmaceutical industries as well. The big Multinational Companies due to there capacities in terms of Research and development, finance and man power etc. able to capture the Pharmaceutical industries, and practices trends like condition in license agreement fixing prices, the Refusal to supply license and so on.²⁸

²⁵ There are different piece of legislation that deal with types of IPR such as the Copyright Act, 1957; the Patents Act, 1970; the TM Act, 1999 (47 of 1999); the GI of Goods (Registration and Protection) Act, 1999; the Designs Act, 2000; the Semiconductor Integrated Circuits Layout-design Act, 2000.

²⁶ Gitanjali Shankar And Nitika Gupta, *Competition Law: Divergence, Convergence, And Independence*, Nujs Law Review 4 Nujs L.Rev. 113 (2011).

²⁷ *Supra* note 23.

²⁸ Chapter-II The Interface between Intellectual Property Rights and Competition Law: Issues.

Provision of Competition Law related to IPR

The various provisions of the Act restrict any trade practices which are anti-competitive in its nature such as abuse of dominance, anti-competitive agreements, Predatory Pricing etc. According to the section 3(5)(i) of the Act the reasonable restrictions and conditions to protect right on copyright, patents, trademarks, geographical indications, designs and semi-conductor layout designs²⁹ will not covered under the scope of Anti-competitive agreements, but the exception given under S.3(5) of the Act does not explicitly applies to Section 4 cases. However it also tested on the touchstone of reasonability.³⁰

Under the section 18 of the Competition Act³¹ the commission had a power to eliminate any practices that have adverse effect on competition, to protect the interest of consumers and so on.³² The conflict regarding the jurisdiction off CCI in IPR matters is always a matter debate in India. However through various provision of the Competition Law it can be said that IPR is nowhere exempted. The Indian Courts also through its judgement held that suggests that no blanket exemption provided to IPRs when it comes to the jurisdiction of the CCI.³³ The exception provided under the Section 3(5) of the Act, that is the right of the any person to “*impose reasonable conditions, as may benecessary for protecting any of his rights*” won’t be affected. However an IPR holder cannot impose any condition as he deems fit.³⁴

CONCLUSION & SUGGESTIONS International Conventions and treaties play a very important role in development of society; they guarantee the uniform rights and duties and also contribute in ensuring the peace in society. By imposing the equal duties and liabilities on all the conventions and treaties attempt to ensure the equality among the nations. In order to ensure the equality among the nations, the TRIPs Agreement, given transition time to the developing countries and least developed nations to implement TRIPs agreement i.e. ten years of transition period from 1995 to 2005. However through present situation it can be said that there is still a huge gap in research and development capacity between the developed, developing nations and least developed nations. In the developing nations and least developed nations research and development is at its underlying stage and innovations is still a major task for them, therefore access to medicine is ample concern for them. These are some of the other provisions of TRIPs agreement that can be invoked by the developing countries and least developed nations to ensure access to medicine in their State:

Suggestions-

Need to promote the Innovation in Pharmaceutical Industry-

Government need to improve the Research and Development in Pharmaceutical sector in India. State need to take some major initiatives, not only considering pharmaceutical industry as an important sector for increasing the GDP but also to ensure the right to health of public, which one of the primary duty of State being a socialist nation.

²⁹ As per the Section (5) of the Competition Act, 2002.

³⁰ Licensing of IP rights and competition law – Note by India, 6 June 2019, Last accessed on 28.11.2020 Available at <http://www.oecd.org/daf/competition/licensing-of-ip-rights-and-competition-law.htm>.

³¹ As per the Section18 in the Competition Act, 2002.

³² *Supra* note 23.

³³ Telefonaktiebolaget LM Ericsson vs. Competition Commission of India, (W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014).

³⁴ *Supra* note 29.

Article 8(1) read with Article 27 of TRIPs Agreement:

Under these Articles the member nations are allowed to adopt the measures that are necessary to protect Public Health. This provision can be used as an alternative to ensure the public health within India. Even certain amendments can be made in domestic patent policies and the liberal construction of the concept of compulsory licences could be done.

TATA CONSULTANCY SERVICES LIMITED V. CYRUS INVESTMENTS PVT. LTD. AND ORS: A VERDICT ON OPPRESSION & MISMANAGEMENT IN A COMPANY

Antima Mahajan

Advocate, Delhi High Court

Contact No- 8586999213

Email Id- antimamahajan10@gmail.com

Rakhi Tyagi

Ph.D Research Scholar

Contact no- 9871617070

Email Id – rakhi.tyagi@muit.in

ABSTRACT:-

“This judgment is the result of appeals filed by the Tata group against the national company law appellate tribunal wherein the appellate tribunal had reinstated Cyrus Mistry as Executive Director and chairman of the group. The verdict was a closing end to a long drawn corporate battle between the Tata Group & Shapoorji Pallonji Group, the biggest minority shareholder in the group. The judgment laid down in this particular case revolves around the concept of prevention of oppression & mismanagement. The authors also throw light on the varied shift of the legislation related to company law back from 1956 to the 2013 act and how the law relating to oppression and mismanagement has evolved over the eras as elaborated in the apex court’s judgment. The judgment talks about various issues in regard to company law but the authors primarily focus on the question that the court discussed whether removal of Cyrus Mistry from the position of chairman and subsequently from the position of Director was an act of oppression and mismanagement under the Section 241 of Companies Act , 2013 or not.”

Index Words: oppression, mismanagement, majority shareholders, minority shareholders, prejudice, winding up, just and equitable

INTRODUCTION

Corporate democracy forms a quintessential component of corporate governance i.e. the system which regulates, controls and manages the manner in which businesses operate and it’s a popular notion that the corporations having numerous shareholders should be running like democratic nations. It means that the shareholders of a company should be provided with their rights. They should be correct information in regard to their voting rights and apart from this should have the freedom to express

their opinions. The democratic decisions of a company are generally taken while keeping majority shareholders of a company considering the utilitarian principle which sometimes tends to overlook may of the rights and interests of the shareholders. This overshadowing of rights of minority shareholders by the majority shareholders often gives a boost to oppression and mismanagement in the businesses. To quote the words of Palmer, “A proper balance of the rights of majority and minority shareholder’s is essential for the smooth functioning of the company.”¹

The issues of oppression and mismanagement are covered by Chapter XVI of the companies act, 2013 (section 241 to 246) which corresponds to the section 397 & 398 of the old companies act (Companies Act, 1956). Incorporation of the companies act and bringing it into effect was done in order to protect the rights and interests of the shareholders as well as public against any of the activities that violated their particular rights. Section 241 to 246 selectively talk about the meaning of oppression & mismanagement, the powers of tribunal, the power of central Government to suo motu file a petition for claiming relief under section 241. Further it also provides for who can apply for the relief, class action suits and application of certain provisions to the proceedings.

The theory of the rule of majority applies to the administration of corporate relations. The company's shareholders vote on resolutions with a simple majority and in some cases with a three-fourths majority. A requisite resolution becomes binding on all members when it is passed. In most cases, courts do not intervene at the request of shareholders to protect minority shareholders. In most cases, the courts do not intervene at the request of the owners to protect minority shareholders. If the affairs of a corporation are done in a wrong manner, the company will file a lawsuit against the wrongdoer; shareholders do not have the right to do so individually. This is referred to as the supremacy of the majority rule. In *Rajahmundury Electric Supply Corporation Ltd. v. A. Nageshwara Rao*², it was held that the courts cannot intervene in the internal administration of the company generally and when it comes to the management powers of the directors, the courts will not interfere with those powers unless and until the directors have been acting in such a manner that is contradictory to the powers granted to them by the articles of the company. This particular principle came in the most relevant case of *Foss v. Harbottle*³. One such exception of the *Foss v. Harbottle* Rule is oppression & mismanagement in the affairs of the company.

OPPRESSION & MISMANAGEMENT

Since the companies act 2013 does not define the term oppression but it has been understood in the language of the courts used in different authorities that the word has to be given a liberal construction rather than a strict one. A conduct in companies’ affairs can be said to be oppressive not only because it is burdensome, wrongful, harsh, inefficient or negligent but a conduct that is wrong to the plaintiff’s capacity as a member in the company.⁴ A single incident of oppression is not sufficient enough to bring action against the majority shareholders it must be a prolonged one. Oppression is a situation wherein people are governed in an unfair and cruel manner and prevented from having freedom and their set of opportunities.⁵

¹ Clive M. Schmitthoff and Curry (Eds.), *Palmer’s Company Law* (20th Edn 1959) 492 on majority & minority rights.

² AIR 1956 SC 213.

³ (1843) 2 Hare 461:67 ER 189.

⁴ Avtar Singh, *Company Law* (17th ed. 2018).

⁵ *Ibid.*

TATA CONSULTANCY SERVICES LIMITED V. CYRUS INVESTMENTS PVT. LTD. AND ORS.

The hon'ble Supreme Court in its judgment of 280 pages settled the issues between both the parties. The relevancy of this apex court's judgment increases as it adds as an extension to Companies Act 2013 by interpreting the law stated in its provisions regarding oppression & mismanagement.

BACKGROUND

The conflict started when Cyrus Mistry was removed from the post of chairman of Tata Sons Limited by the majority of board of directors and further he was removed from the post of a director in the board of tat sons by the shareholders vote. Cyrus Mistry took this as oppressive conduct and approached the national company law tribunal.⁶ The NCLT rejected the petition ruling that the board of directors had full power to remove Mistry from the post of chairman. Feeling dissatisfied with the NCLT ruling, Mistry approached the NCLAT wherein the order of NCLT was overturned and it held the removal of Cyrus Mistry from the position of chairman as illegal.

Therefore the appeal was filed by the Tata Consultancy Services before the hon'ble Supreme Court against the NCLAT's order wherein it was held that⁷:

- (i) The proceedings of the sixth meeting of the Board of Directors of 'Tata Sons Limited relating to removal and other actions taken against Mr. Cyrus Pallonji Mistry from the position of Executive Chairman of 'Tata Sons Limited' and consequently as Director of the 'Tata Companies' is illegal and ordered reinstatement of Cyrus Mistry.
- (ii) That Mr. Ratan N. Tata and the nominee of the 'Tata Trusts' shall desist from taking any decision in advance which requires majority decision of the Board of Directors or in the Annual General Meeting.
- (iii) In view of 'prejudicial' and 'oppressive' decision taken by the majority shareholders, the power granted to such majority by the Article 75 of articles of association of company shall be exercised only in exceptional circumstances and in the interest of the company and that too after recording of reasons in script and due intimation to the shareholders whose rights would be affected.

GOVERNING LAWS

The hon'ble Supreme Court while delivering a judgment in this case⁸ explored the entire company law jurisprudence of India as well as United Kingdom in relation to provisions governing prevention of oppression and mismanagement. The bench exhaustively traced the development back from the law prevalent in United Kingdom in relation to oppression and mismanagement in legislations like Joint Stock Companies Act, 1844, The UK Bubble Act, 1720, Joint Stock Companies Act 1844, the Companies Act, 1929 and finally the Companies Act, 1948. The court after analysing the English law elaborated the legislative history as per Indian law. The court discussed Regulation of Registered Joint Stock Companies' was Act No. XLIII of 1850 under which the courts could punish the person for

⁶ Data retrieved from <https://www.livemint.com/companies/people/big-win-for-tata-in-mistry-battle-11616781753652.html>.

⁷ Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd., C. A. (AT) No. 133 & 139 of 2017.

⁸ Tata Consultancy Services Ltd. V. Cyrus Investment Private Ltd., 2021 SCC OnLine SC 272.

contempt but the concepts of prevention of oppression and mismanagement were alien to this act. Soon after this came Act No. XIX of 1857, but this again did not cover rights of minority shareholders. After this The Indian Companies' Act, 1866 was passed which is considered a full-fledged legislation dedicated to company law but it also did not have anything to cater the needs of oppression & mismanagement though it had provisions for voluntary windup and all. The next was the Companies Act 1913 which originally did not have provisions for oppression & mismanagement but were subsequently added to it via the amendment in the form of Section 153C. This section talked about powers of court to act when company acts in a prejudicial manner or oppresses any part of its members.

Soon after the country attained the independence, committees were formulated and after receiving the inputs of those committees, the companies Act 1956 was passed. This act included a full chapter, Chapter VI that contained detailed provisions for preventing injustice and mismanagement. The powers of the Court/Tribunal were dealt with in Part A, while the powers of the Central Government were dealt with in Part B. Mainly section 397, 398 and 402 were of importance.

The government agreed to replace the 1956 Act⁹ with a new one after the country's economy opened up and the national and international economic trends changed to great extent. As a result, the Lok Sabha adopted the Companies Bill, 2009. However, this bill was repealed and replaced with the Companies Bill of 2011. The Companies Act of 2013 was born out of this bill. The provisions relating to minority shareholder rights are what are applicable for our purposes among the many changes brought about by the Companies Act 2013. Given the fact that the Companies Act, 1956 includes provisions to safeguard the interests of minority shareholders, the minority has been unable or unwilling to act due to a lack of time, recourse or other capacity. As a result, the minority has to choose between allowing the majority to control and exclude them or being squeezed out of the company's decision-making process. The Companies Act, 2013 has aimed to ensure that minority shareholders' interests are still protected, and this legislation can be considered a step in the right direction in bringing end to the conflicts between majority and minority shareholders. Various provisions have been implemented in Companies Act, 2013 to effectively reduce the gap in relation to minority shareholder rights and welfare.

Sections 242 to 246 specifically talk about laws dealing with issues related to oppression & mismanagement. In India, however, what was inserted in section 210 of the English Companies Act, 1948, inspired the 1951 amendment i.e. inclusion of section 153-C to the Indian Companies Act, 1913. The 1956 Act's sections 397 and 398 were then introduced, with several changes. Sections 241 and 242 of the 2013 Indian Act, modelled after (but not an exact replica of) sections 459 to 461 of the English Companies Act, 1985, and sections 994 to 996 of the English Act of 2006, were enacted.

These changes can be summarised like¹⁰:

1. Although the conduct of the company's affairs in a manner that warrants court's or tribunal's involvement should be "present and continuing" under the 1913 Act and 1956 Act, as outlined by the use of the terms "are being," but under the 2013 Act, the conduct can be "past or present and

⁹ Companies Act, 1956.

¹⁰ Para 15.27 of the judgment.

continuous" as exhibited by the use of the words "have been or are being." (However, the conduct cannot be from a long time ago.)

2. Prejudice to the public interest and prejudice to the interests of any member or members were not among the requirements set out in the 1913 Act, but prejudice to the public interest was included in the 1956 Act under both the oppression and mismanagement provisions. Only the clause relating to mismanagement contained prejudice to the company's interests. However, under the 2013 Act, misconduct that is harmful towards any shareholder, adverse to the public interest, or detrimental to the company's interest is included, along with oppression.
3. Under the 1913 Act, the Court must be convinced that winding up the company under the just and equal clause would not only unfairly cause prejudice, but also "materially prejudice" the interests of the company or any part of its leaders. However, the words "and materially" did not accompany the term "unfairly" in the 1956 Act and the 2013 Act.

CONTENTIONS AS TO OPPRESSION & MISMANAGEMENT BY CYRUS MISTRY

In this particular case, the following activities were claimed to be acts of oppression & mismanagement:¹¹

- i. Abuse of the Articles of Association to enable the trusts and its nominee Directors to exercise control over the Board of Directors;
- ii. Removal of Cyrus Mistry as Executive Chairman without any notice and attempts to remove him from directorship;
- iii. Suspicious transactions in relation to Tata Teleservices Limited
- iv. Treatment of Tata Sons as proprietorship which led to board of directors failing the test of fairness and probity.
- v. Failure of Nano car project suffering from losses which kept on increasing every year and the belief that Ratan Tata had a conflict of interest in supply of Nano car gliders to another company.
- vi. It was alleged that Ratan Tata sold a flat to Mehli Mistry for personal gains. The flat was owned by the company.
- vii. Since Mehli Mistry had a personal relationship with Ratan Tata so his companies were being personally favoured by him.
- viii. The transaction done in pursuance of a deal were said to be transactions financing terrorist activities.

The Hon'ble Supreme Court analyzed the NCLT and NCLAT judgment to a great extent. It observed that many of the acts that have been claimed as acts of mismanagement revolve around the removal of Cyrus Mistry from the directorship.

¹¹ Para 3.2 of the judgment.

APPELLANT'S CONTENTIONS¹²

The appellants contended that the impugned judgment of NCLAT employed erroneous tests to determine oppression under Section 241 of the 2013 Act. Mere unwise or loss making business decisions etc. cannot be construed as acts of mismanagement so as to justify winding up on just and equitable grounds.

For holding the majority guilty (a) there must be a sequential chain of events leading up to the date of filing the petition; (b) the conduct must be burdensome, harsh and wrongful qua the minority; and (c) there must be an element of lack of probity depriving the proprietary rights of the SP group as shareholders. Lastly, it goes against the fundamentals of corporate democracy by taking away basic rights of shareholders.

It was also argued that NCLAT lacked jurisdiction to direct Cyrus Mistry's reinstatement, as Tata Consultancy Services was not party to the original proceedings or appellate proceedings.¹³ Neither the SP Group, nor Cyrus Mistry had prayed for reinstatement to the board of directors of the appellants. Also, due process was followed in the removal of Mistry from the board of Tata Consultancy Services and he was granted opportunity to make a representation against the proposed resolution for his removal in compliance with Section 169 of the Companies Act.

THE COURT'S VERDICT

The court held that despite various modifications in the law relating to oppression and mismanagement, the goal that a Tribunal should bear in mind when giving an order in an application alleging oppression and mismanagement has been the same for decades. The goal is for the Tribunal's order to put an end to the issues that have been raised. Regardless of whether the regime is one of "oppressive behaviour," "unfairly prejudicial conduct," or just "prejudicial conduct," the goal of an order under both English and Indian law is to put a stop to the concerns complained of by offering a solution. The goal cannot be to give a treatment that is more harmful than the sickness.¹⁴ The goal should be to put a stop to the issues that have been raised, rather than to put an end to the company as a whole, disregarding the interests of other stakeholders. It's worth noting that the provisions for relief from oppression and mismanagement were once viewed as weapons in the shareholders' arsenal, which were more potent when brandished in *terrorem* than when actually used. The fact that Cyrus Mistry was only removed from the Executive Chairmanship of the company and not the Directorship at the time the petition was filed, as well as the fact that in law, even removal from the Directorship can never be held to be oppressive or prejudicial conduct, was enough to dismiss the petition under Section 241 especially because the NCLAT elected not to intervene in factual findings on some commercial issues. The court justified the removal of Cyrus Mistry by stating that, "A person who tries to set his own house on fire for not getting what he perceives as legitimately due to him, does not deserve to continue as part of any decision making body (not just the Board of a company)." One thing to keep in mind is that the Tribunal cannot ask whether the removal of a Director was legally valid and/or justified in a petition filed under Section 241. The question is whether such a removal constitutes oppressive or prejudiced behaviour towards some members. Even if the Tribunal concludes

¹² Para 11 of the judgment.

¹³ Para 12.

¹⁴ *Kanika Mukherjee v. Rameshwar Dayal*, (1966) 1 Comp LJ 65 (77) Cal.1.

that a Director's removal was not in line with law or justified on the circumstances, the Tribunal cannot give remedy under Section 242 unless the removal was oppressive or prejudicial.

In other circumstances, the removal of a Director may have been done quite legally, but it may have been part of a bigger scheme to oppress or prejudice the interests of particular members. Only in these circumstances can the Tribunal provide remedy under Section 242. The remedy under section 242 is granted when it is brought to the notice of the court that the oppression and mismanagement in the company's affairs have gone to such a degree that it would be just & equitable to wind up company and as this would result in a great loss to many stakeholders, the remedy under section 242 is to end up the issues complained of and prevent winding up of the company. It was held that these arguments lose sight of the nature of the company that Tata Sons is. It indicated that Tata Sons is a principal investment holding Company, of which the majority shareholding is with philanthropic Trusts.¹⁵ The majority shareholders are not individuals or corporate entities having deep pockets into which the dividends find their way if the Company does well and declares dividends.¹⁶ The dividends that the Trusts get are to find their way eventually to the fulfilment of charitable purposes.¹⁷ Therefore, it was the primary question that NCLAT should have raised whether it would be equitable to wind up the Company and thereby starve to death those charitable Trusts, especially on the basis of uncharitable allegations of oppressive and prejudicial conduct. On this account the court held that the finding of NCLAT that the facts otherwise justify the winding up of the Company under the just and equitable clause, is completely flawed. Lastly, the court upheld the decision of the National Company Law Tribunal, Mumbai which had supported the removal of Cyrus Mistry from the position of executive chairman and thus refused to entertain the concerns of oppression & mismanagement.

CONCLUSION

In its judgment, the court declined all the claims of oppression and mismanagement, held reinstatement of Cyrus Mistry as director of the company by NCLT as an order passed in exceeding the powers granted and lastly left the option of valuation of shares with the parties and did not intervene that. The judgment makes it a win-win situation for the majority holders and the court could have dug more and reached the depth of issues to provide support to the interests of majority. It can be said that the rule granted in *Foss v. Harbottle* that the courts should not intervene in the internal management of the company except in some of the situations should not be construed in strict sense. The law still favors the majority holders and the minority shareholders' interests are often overlooked. They have to fulfill a lot of criteria before bringing litigation against the majority shareholders most of which revolves around gathering corporate facts which makes it a complex process altogether. It can be ascertained that the Companies Act, 2013 strives to protect minority rights in a comprehensive and inclusive way. However, it must be ensured that such principles are implemented in an appropriate method to address the contemporary gaps in the implementation of the legislation.

¹⁵ Para 16.54 of the judgment.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

SEX EDUCATION IN INDIA: A TOPIC OF THE RECORDS IN TURN AFFECTING THE Demeanor

Dr. Heena Ghanshyam Patoli

Associate Professor, Alliance School of Law, Bengaluru.

Mr. Avinash Bhagwan Awaghade

Assistant Professor, ABBS School of law, Bengaluru and pursuing Ph.D.in law,
Alliance School of law, Alliance University, Bengaluru.

ABSTRACT:-

A few days ago, I saw the UNICEF advertisement where one teenage girl got her monthly menstruation and unfortunately, she was in school, it was difficult for her to understand what is happening and other students started making fun of her. She must have been devastated not knowing what is happening to her and then other students laughing at her. It is rather surprising that a teenager is not aware of her body and nothing about her body, sex, menstruation is told to her. These kinds of incidents can be avoided when young children especially girls get education about their bodies and sex. Not many in the society in India and elsewhere are open to the idea of sex education. Talking about sex is considered a taboo in India and it's still a hush-hush topic and can't be discussed with parents, elders, teachers among others.

It is astonishing that we shy away from this topic in the 21th century also. The question arises why we have made it a hush-hush topic. We keep this topic top secret, confidential and highly restrictive meaning we discuss it with few only or in restricted groups. It's a natural instinct among human beings to be curious about sex. Amusingly sex education is considered a complete personal matter and is not in the public spheres. It is also believed, sex education is for the west, Indian teenagers or young people need not have knowledge about it.

This paper revamps the understanding of sex education in India and its cultural dimensions, the scope of sex education, its legal implication, and initiatives taken by the government of India and how do we take it ahead.

BACKGROUND OF THE STUDY

A few days ago, I saw the UNICEF advertisement where one teenage girl got her monthly menstruation and unfortunately, she was in school, it was difficult for her to understand what is happening and other students started making fun of her. She must have been devastated not knowing what is happening to her and then other students laughing at her. It is rather surprising that a teenager is not aware of her body and nothing about her body, sex, menstruation is told to her. These kinds of incidents can be avoided when young children especially girls get education about their bodies and sex. Not many in the society in India and elsewhere are open to the idea of sex education. Talking

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This paper revamps the understanding of sex education in India and its cultural dimensions, the scope of sex education, its legal implication, and initiatives taken by the government of India and how do we take it ahead.

There is a growing concern over the teenager, adolescent sexuality and fertility at the international level. The concern extends to teenage pregnancy and child bearing.¹ The lack of sex education in many parts of the world for cultural reasons is the crux of the problem. One of the recommendations that was given in the international conference held at Mexico was in form of advisory recommendation which expected the government policies of the countries should encourage delays in the commencement of childbearing and concerned governments should make efforts to raise the age of first marriage.²

INTRODUCTION

Let's understand the term 'sex', It refers to the biological distinguish between human and other living creatures. It has primarily concern about physical and physiological character of human being. It is usually categorized male or female but due to some hormonal imbalance or you can say genetical/biological attributes transgender is now been recognised as different types of sex which is different than male or female sex.³

Now turning toward the sex education, it is nothing but the teaching human values to the learner with objectives to develop moral and ethical sense towards the sex and sexual behaviour.⁴ Generally, it is expected from the child the good and sensible reaction, who have developed the judgement and conscience relating to sex, personal relation, private parts of human body, sexual intercourse, masturbation, menstruation.

There is a huge misconception and misleading literature available in sex education market which would confuse and develop the misconception and fear about their genital organ/sex organ. Further this wrong understanding could lead in involvement in crime and sexually misbehaviour. The sex

¹ Ruth Roemer and John M. Paxman, Sex Education Laws and Policies, Source: Studies in Family Planning, Jul. - Aug., 1985, Vol. 16, No. 4 (Jul. - Aug., 1985), pp. 219-230 Published by: Population Council
Stable URL: <https://www.jstor.org/stable/1967084>.

² United Nations, Report of the International Conference on Population, 1984 (UN Publication No. E/CONF. 76/19), 1984, p. 17, Recommendations 7 and 8.

³ Meaning and definition of term sex- Canadian Institutes of Health Research available at <https://cihr-irsc.gc.ca/e/48642.html>.

⁴ Anil Kumar, The Singular Standpoint of Sex Education: An Overview, International Journal of Arts, Humanities and Social Studies (IAHSS) ISSN: 2582 – 3647(Online) Volume: 2; Issue: 6; Pages: 24-30|| Nov-Dec. 2020|pp-24-30 .

education and biological education of reproductive system of human should develop concrete connection while imparting sex education at school level.⁵

THE SCOPE OF SEX EDUCATION IN INDIA AND ITS CULTURAL DIMENSIONS

The open discussion on sexual behaviour, sexuality, health issue of genital organ and topic relating to SEX are commonly considered as taboo in Indian cultural society. Therefore, if you tried to discuss or open your mouth on sex related it will be considered as shamelessness, irresponsible and porn-centric behaviour. Therefore, even in 21st century topic of sex education hasn't been openly accepted by society, parents, teachers and policy makers. The political ban of imparting sex education to adolescents, will be supported by argument that promoting sex education in Indian society will corrupt so called 'Indian Values' and 'religious values of youth'.⁶

Some orthodox view will charge sex education by arguing that sex education has no place in Indian culture and rich tradition, this religious insight will kill the very purpose of sex education by limiting the scope and confining it only with reproductive system of human. The health educators, social worker who are devoting their life towards promotion of sex education will patiently gradually build the sex education and its need in Indian society.⁷

A petition was filed by Smt. Asha Sharma and other to Raja Sabha (Upper house of Indian parliament) praying for putting on hold the proposal to introduce sex education in CBSE affiliated Schools was opposed by putting ground in the petition that sex education will corrupt Indian youth and lead to collapse of education system; that sex education will transform student-teacher relation into that of a man and woman that it is an education to sell condoms; and that it will lead to creation of immoral society and also lead to a growth in single parent families.⁸ Sexual health issues like a menstruation are strongly considered as private talk and confined in wall of strict social norm. These cultural and narrow mind approach restricting the right to have sexual education as part of right to health.

The opponent of sex education should know that even though India was and are considered as one of the most conservative countries in the world was extremely liberal and open about the concept of sex education and sexology i.e., Kamasutra even before the 12th century. Sex education and its behavioural study was even taught and openly recognised as a formal subject in human values and education in India. In informal education symbolic representation can be found in literature like Kamasutra and Khajuraho. It was written in ancient time around 400 BCE–200 CE.⁹

⁵ Michael J Reiss, Reproduction and sex education In: Kampourakis, K. & Reiss, M. J. (Eds) Teaching Biology in Schools: Global research, issues, and trends, Routledge, New York, pp. 87-98. available at <https://www.researchgate.net/>.

⁶ Ismail, Shajahan et al. "Adolescent sex education in India: Current perspectives." Indian journal of psychiatry vol. 57,4 (2015): 333-7. doi:10.4103/0019-5545.171843 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4711229/>.

⁷ Dwyer RG, Thornhill JT. Recommendations for teaching sexual health: How to ask and what to do with the answers. Acad Psychiatry. 2010; 34:339–41. available at <https://pubmed.ncbi.nlm.nih.gov/20833901/>.

⁸ Rajya Sabha Hundred and Thirty-fifth Report on Petition praying for national debate and evolving consensus on the implementation of the policy for introduction of sex education in the Schools available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Petitions/135%20Report.htm>.

⁹ Swetha Vijayakumar, The Sacred and the Sensual Experiencing Erotic in Temples of Khajuraho, published on 11/12/2017 available at <https://doi.org/10.4000/viatourism.1792>.

A very limited scope of sex education in existing formal education prevalent the sexual abuse of girl as well as boys. Unfortunately, the child is growing with misunderstanding, misconception and this half-baked knowledge will lead in ignorance of sex related diseases and issues. The situation becomes uglier for the girls, and subjected to sexual abuses.¹⁰

Imparting sex education is now a demand of law and society. It needed to be included in formal education as part of curriculum. Moreover, teaching sex education with scientific approach is important. It is an art and as well as science hence educator/instructor need some special type of training and induction before assigning them the task of imparting sex education. At present the scope of sex education is very limited to basic human anatomy, study of reproductive system and some psychological tenets. In the modernisation and globalisation of culture, human values, and ethics the scope of sex education is required to be extended to sensitize issues relating to sexually transmitted disease particularly HIV AIDSs, Sex hygiene, fertility issues, menstruation, sexual psychology.¹¹

In identification of particular need of sex education to public at large we can classify the age group of targeted learner/students in following ways¹²

- A. children -The child who is below the age of puberty or primary school going children.
- B. adolescents / teens – The child who is in the process of developing physically and psychologically in to adult. The child between 15 to 19 years of age or secondary and higher secondary school going children.
- C. young adults / youths – The youngster, the adult person who has completed the age of 21 or early twenties.
- D. Adults- The person who are fully grown or physically and mentally developed and has conscience of sexuality.

Sexuality education have been an objective like addressing biological, psychological aspect and to develop the approach and belief and values about sexual identity. It helps human being specially youngster people to form values, opinions, about their own sexual behaviour and others too.

SEX EDUCATION AND INDIAN GOVERNMENT INITIATIVE

A per the report for the Universal Periodic Review of India¹³In India there is no comprehensive and universal sexuality education in schools. The lack of compulsory and essential sexuality education in formal as well as informal education curriculum violate the human rights of Indian adolescents and young people. Sexuality education shall be included in formal as well as informal both in and out of the classroom/school.

¹⁰ Papathanasiou I, Lahana E. Adolescence, sexuality and sexual education. Health Sci J 2007; 1:8. available at: http://www.hs.j.gr/volume1/issue1/issue1_review2.pdf.

¹¹ Rashmi Tiwari Shukla, Sex Education at a Crossroads, Indian Institute of Sexology Bhubaneswar (December-2016).

¹² AurelBaharu , Remus Runcan, Sex Education Revisited: School-Based Sex Education, AnaleleUniversității “EftimieMurgu” din Reșița, FASCICOLA DE ȘTIINȚE SOCIAL-UMANISTE ANUL VI, 2018.

¹³ Report to The United Nations Human Rights Council For The Universal Periodic Review of The Republic of India on the Lack of Comprehensive Sexuality Education in India available at https://lib.ohchr.org/HRBodies/UPR/Documents/Session1/IN/YCSRR_IND_UPR_S1_2008_YouthCoalitionforSexualandReproductiveRights_uprsubmission.pdf.

The Central Government has taken positive efforts on promotion and imparting sexuality education at school level. The main focus of central government policy was to control population and awareness of HIV infection through sex education. The initiative has been taken to develop life skills programs and skill development to engage youth energy in productive work. This policy was undertaken since 1993 form National Education Policy-1993. Further, Central government has taken the initiative to develop the Adolescence Education Programme (AEP) through NCERT. It was shaped in 2005 under National Curriculum Framework (NCF) 2005.¹⁴ But the State Governments were opposing and unwilling to set up sex education at school level. The unwelcoming of sexual education policy was later resulted in ban on sex education by 12 State government including Gujarat, Madhya Pradesh, Maharashtra, Karnataka, Kerala, Rajasthan, Chhattisgarh and Goa.¹⁵

A scheme for AEP positively promoted by the National AIDS Control Organization (NACO) and the Ministry of Human Resource Development (MHRD), Government of India, in the school curriculum.¹⁶ The main objectives of the AEP were:

- A. To ensure the adoption of Adolescence Education aspect into formal school curriculum i.e., syllabus and develop teachers training and education courses.
- B. To organize and impart life skill activity and develop the skills of children
- C. To promote and aware students with scientific and adequate knowledge about reproductive system and sexual health care including drugs and sexual abuses issues. Like HIV/AIDS, menstrual issues health related aspect.
- D. To develop responsible behavior towards HIV/AIDS and sexuality behavior.

It was controversial and opposed by the religious people on the ground of that the AEP is corrupting the Indian values and rich customary traditional values. It was argued that sex education is western culture and westernisation of Indian education would lead in irresponsible behaviour and promote sexuality of the youth.

Another initiative of Indian government was coming in form of Adolescent Reproductive and Sexual Health (ARSH),2005. This programme initiative indeed with vision and objective to spotlighted the need of reproductive system education and sexual health. The targeted group of students was adolescents. This program action initiative tried to included sex education messages and content in school curriculum. Further The National Rural Health Mission (NRHM) taken the progressive step in establishment of framework and national guidelines under the authority of Ministry of health and Family Welfare.¹⁷

¹⁴ Jiji Jose, The Need of Sex Education in School Curriculum- A Case Study Research report submitted to the Government of Kerala under State Planning Board Internship Programme 2018-2019 available at <https://spb.kerala.gov.in/sites/default/files/inline-files/17.SEXEDU.pdf>.

¹⁵ Tripathi N, Sekher TV (2013) Youth in India Ready for Sex Education? Emerging Evidence from National Surveys. available at PLoS ONE 8(8): e71584. <https://doi.org/10.1371/journal.pone.0071584>.

¹⁶ The Adolescence Education Programme (AEP), available at <http://aeparc.org/pages.php?id=aboutlse&ln=en>.

¹⁷ Nair MK, Leena ML, Thankachi Y, George B, Russell PS. ARSH 1: Reproductive and sexual health problems of adolescents and young adults: a cross sectional community survey on knowledge, attitude and practice. Indian J Pediatr. 2013 Nov;80Suppl 2:S192-8. doi: 10.1007/s12098-013-1136-2. Epub 2013 Aug 11. PMID: 23934098. available at <https://pubmed.ncbi.nlm.nih.gov/23934098/>.

In 2014, National Adolescent Health Program Central Government Ministry of Health and Family Welfare launched special health care programme for adolescents the objective of said programme were to focus on nutrition development, promotion of reproductive health care education and prevention of sexual abuse by educating younger generation. This programme was also called as the *Rashtriya Kishor Swasthya Karyakram*. In January, 2014. Under this programme government promoted the tagline called as *Saathiyas* (Good Friend) of adolescents, who would help him/her in sexual health problems, HIV/AIDS infection assistance and awareness about reproductive system of human being.¹⁸

School Health Program (SHP) this programme was introduced by central government in 2018 under the National Health Policy Protection scheme called as Ayushman Bharat. It was collective initiative health ministry and human resources development (MHRD). In this programme teacher were encouraged to become part of this scheme. Two teachers from every school would be nominated for further training and this teacher will help and promote students interest in overall development of students in life skill development, engagement of students in productive and substantial work of life skill. The programme also promoted sexuality education among child around 14 years of age.¹⁹

Sex education was and are included in school level but it was made on paper and not really executed by stakeholder of education. The controversy about contents, public dissatisfaction and limited scope of sexuality education were pitfall of sex education policy. Rather these government policies were general guiding principles of health awareness without any particular aspect of need and indeed of sexuality education in school curriculum.

SEX EDUCATION, SEXUALITY RIGHTS AND ITS LEGAL IMPLICATIONS

It is legal as well as social obligation of State and other stake holder to impart sexuality education and to contribute in development of child capacity and sexuality sense of age-appropriate behaviour of child. This itself necessitates an obligation on the State and non-State actors like the family and community to contribute towards developing age-appropriate capacities with respect to sexuality and sexual health. Yet very few legislations have recognised the sexuality health and protection. The protective shield for children rights of sexuality and sexual health is the Protection of Children from Sexual Offences Act, 2012 (POCSO) the purpose of legislation is to protect the children sex autonomy. The main objective of the Act was to give protection of children from numerous types of sexual abuses and offences. It has included the wide range of criminal behaviour and conduct like sexual acts, touching, caressing, and kissing, to penetrative sexual intercourse.²⁰

The important legislation titled the Protection of Women from Domestic Violence Act, 2005 has protected domestic relation and prohibited sexual harassment and violence in domestic relation. However, this Act failed to recognize sexual violence and sexuality rights between same sex marriage.²¹

¹⁸ Ministry of Health and Family Welfare, National Health Mission, available at <http://nhm.gov.in/index1.php?lang=1&level=2&sublinkid=818&lid=221>.

¹⁹ LexQuest Foundation, Policy Brief Sexuality Education in India: Curriculum in the Sheets, Silence in the Streets, (January 2020) available at https://lexquest.in/wp-content/uploads/2020/01/LQF-Policy-Brief-Sexuality-Education-in-India_-Curriculum-in-the-Sheets-Silence-in-the-Streets.pdf.

²⁰ Section-1 of Protection of Children from Sexual Offences Act, 2012.

²¹ Mohan, Sunil. "Towards Gender Inclusivity: A Study on Contemporary Concerns Around Gender".

The Immoral Traffic (Prevention) Act, 1956, which came into force with the objective to prevent sexual harassment and immoral human trafficking of women and children for prostitution and bagging activity.²² Prostitution i.e., sex workers in India are very vulnerable and subjected to greater risk of victimization because of anti-social and violence behaviour. This situation leads to illegality and sexual abuses against women. When any sex worker tries to get access to public health services, hospitals they are often refused the health services or get very poor or quality of treatment. It is a clear violation of the right to health including the right to awareness of sexual health rights.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013²³ not only provides protection against sexual harassment but also ensures the awareness of women and children from various aspects of sexual harassment, discrimination on the ground of gender. It also confirms the women's autonomy on her own body and sexuality. It imposed liability on the employer to provide a safe working place and ensure a gender bias free environment at the working place.

CONSTITUTIONALITY OF SEX EDUCATION AND SEXUAL HEALTH

The Constitution of India has an obligation to ensure equality, protection, and promotion of fundamental rights of Indian citizens. It especially protects the socially vulnerable and marginalized people like women, children.

The right to health or reproductive rights or sexuality has not been expressly provided in fundamental rights. The Supreme Court of India has been recognizing the right to health which will include getting health services without any discrimination. It is part of the right to life under Article 21 of the Indian Constitution, 1950.²⁴ It is the State's obligation to raise the nutritional level and living standard of women. It also includes awareness of sexuality behavior and education about the reproductive system of humans.²⁵ It also ensures the health rights and prohibition of sex abuses and exploitation of workers due to any forced financial need. Further, the Indian constitution imposes on the State the obligation to provide facilities and equal opportunity to develop health.²⁶ The Indian constitution has provided special care and protection to women under the head of maternity benefits and health which include the reproductive rights and sexual awareness.²⁷

In the *Suchita Srivastava v Chandigarh Administration*²⁸ the Supreme Court of India held that the State government shall respect the autonomy of women concerning the decision of termination of her pregnancy because termination of pregnancy without her consent would cause serious health issues mentally as well as physically. Further, the Court observed that reproductive rights and sexual rights are a human dimension of women's personal liberty, right to privacy and corpus integrity.

2013. Alternative Law Forum and LesBiT. available at <http://feministlawarchives.pldindia.org/wp-content/uploads/Gender-Inclusivity-by-Sumathi-and-Sunil.pdf>.

²² Section-1, Statement of aims and objectives, The Immoral Traffic (Prevention) Act, 1956.

²³ Section-1 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

²⁴ *Parmanand Katara v Union of India* 1989 SCC (4) 286.

²⁵ Article 39(e), Indian constitution, 1950.

²⁶ Article 39(f) Indian constitution, 1950.

²⁷ Article 42 Indian constitution, 1950.

²⁸ (2009) 9 SCC 1.

*NALSA v. Union of India*²⁹ has ensured the fundamental rights of Indian citizen to decide gender regardless without any discrimination on ground of sex. Further this judgement protected the transgender rights of sexuality and reproductive rights. In *K.S. Puttaswamy (Retd.) v. Union of India*³⁰ has recognized privacy rights of Indian citizen by extending scope of right to privacy wherein government cannot compel people to disclose private information even sexuality behavior, physical and mental health related information unless it required for legal use. Further supreme court attractively held that sexual orientation is fundamental part of sexuality and privacy right in sexual life of human being. It has been enriched in fundamental right under Article-14 and 21 of Indian Constitution.

In *Devika Biswas v. Union of India*³¹ The Supreme Court of India held that there should not be any restriction or even compulsion on use or non-use of contraceptive methods and birth control methods. It is exclusive rights of woman to decide to use or participation of in any sexual intercourse. Even government cannot force woman for female sterilisation i.e., family planning surgical operation.

CONCLUSION

It is now genuine need of Indian youth to have sex education to be incorporated in secondary and higher secondary school curriculum. Further it should be publicly accepted without any hesitation. The vulnerable group of society especially women's and young peoples are being excluded from basic human rights of sexuality education, reproductive rights and sexual privacy rights are subjected to abuse, assault, illegal discrimination on ground of sexual behavior and matters. Absence of concrete legal frame work badly affecting development rights of individual. As Indian constitution has adopted broadminded approach towards in all development of human life. Not having sexuality education in formal education system leading towards exclusion of the socially and educationally marginalized part of society from public health benefits. It also led increasing sexual assaults, abuses, illegal abortions and sexual exploitation of young youth and women. It is not only human right but fundamental right of every person to have absolute autonomy over sex relation and sexuality matters. It is included in the right of development personally, physically, mentally and sexually as well.

²⁹ National Legal Services Authority v. Union of India. (2014) 5 SCC 438.

³⁰ AIR 2017 SC 4161.

³¹ 2016 WRIT PETITION (CIVIL) NO. 95 OF 2012.

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