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It is indeed a matter of great honor and prestige that our Maharishi Law School is coming up with Volume 3 Issue 2 of the Maharishi Journal of Law & Society which is related to research encompassing various contemporary issues pertaining to law. Maharishi University of Information Technology (MUIT) was established under MUIT Uttar Pradesh Act No. 31 of 2001 Notification no. 573 dated 06 October, 2001. The University is reputed to disseminate quality education. His Holiness Maharishi Mahesh Yogi Ji was the first Chancellor of the University. MUIT has been recognized and included in the list of Universities, maintained by the UGC under section 2 (f) of the UGC Act,1956. Further we believe that, 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 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.

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 & bestow my wishes for the upcoming issue.

## FROM VICE CHANCELLOR'S DESK



### **Prof. (Dr.) Bhanu Pratap Singh**

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I am very happy to announce the publication of a Journal of Maharishi Journal of Law & Society is coming up with Volume 3 Issue 2. University education system particularly Law department requires a platform to encourage budding researcher for publishing their research output in the form of Journal Articles. MLS department would like to create a platform for its fraternity for publishing their important research works by instituting a high quality law journal covering all branches of Law and legal system.

As we all know that law is dynamic in nature and undergoes various changes with the passing of time which results in the change of outlook of the society towards the legal system. With this journal, we are trying to take a step towards contributing to the law jurisprudence and helping the readers enhance their knowledge and develop their opinions regarding several contemporary issues.

This issue of our 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 all the Maharishi University Team along with a special mention 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



### Prof Group Captain OP Sharma

National Awardee for Excellence in Education & Training Rajrishi,  
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It is a great pride, enthusiasm and anticipation that we invite you to read the Maharishi Journal of Law and Society Volume 3 Issue 2 which is a peer reviewed journal. The aim of this journal is to promote plethora of research in the areas of law. This issue is special and strives to understand the fundamental utility of Life and Law in contemporary society. It is heartening to see that so many mature and budding writers find their place in the topic related to law and society.

I am delighted to write the message for the journal which contains topics ranging from juridical to topical. I enjoyed while scanning contents. Surely, the readers will enjoy the scholarly presentation i.e. highly stimulating for new insights on related subjects with contractual reference. Quite a few articles are so selective as to find place in personal reference library. Yet another distinguishing feature of the journal is that the contributory team of authors include faculty and students as well as scholars from India and abroad.

The journal has wider reach and acceptance across the country & focuses on presenting new frontiers of knowledge and realizes the goal of the law school of creating intellectual capital. The journal sensitizes 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 editorial 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 and I extend my good wishes for this issue and for future endeavour.

Good Luck and God speed!

## FROM THE DESK OF DEAN ACADEMICS



**Prof. Ajay Kumar**

Dean Academics

Maharishi University of Information Technology, Noida

This is a great opportunity to introduce this issue of Maharishi Law Journal to all the readers and contributing authors. The major goal of curating this journal was to provide a platform for the exchange of ideas reflecting every sphere of legal studies as 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 as well as multi-cultural backgrounds, which provide a very vibrant and stimulating classroom environment. It is crucial to shed some light on the problems in a nation where the rule of law prevails for those who should be interested in these studies. The advancement of higher research can be greatly aided by academicians, and it is necessary to inspire the participation of young minds in the creation of studies that are based on the demands of a rapidly changing society and technological advancements. This journal offers a fantastic platform for all academics and research scholars to contribute to the growth of reliable research for the nation.

Contributing to this publication enables authors to conduct in-depth analyses in specific areas of the law while also improving their legal research composition and analytical skills. Many professors, intellectuals, lawyers, and students contributed to this publication, all of whom are concerned with current issues. It's an honour to be a part of this Journal, which provides all relevant data to the legal community. 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.

I hope you find this edition of the Law Journal both useful and interesting. Your response will determine the success of this journal. We would appreciate it if you could provide us with your valuable feedback.

## 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

The III Volume of the Maharishi Law Journal and Society presents the readers with a new corpus of legal research which explores a variety of issues, both of international and domestic relevance. 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. Our goal is to provide a publication that will benefit practitioners, judges, professors, students, and others that use our journal in their practice, on the bench, in the classroom, or in their legal research

The purpose of bringing out a Law Journal is to share knowledge with all the people concerned with legal fraternity. The journal welcomes the articles which broadly cover the topics and concepts in field of Political Science, other Social Sciences, Law, Humanities, and Ethics etc.

I would like to congratulate the higher management of MUIT along with our Dean Academics Prof. Ajay Kumar and 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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# WHETHER THE DOCTRINE OF SEALED COVER JURISPRUDENCE FOLLOWED IN INDIA AS AN ANTITHESIS OF THE PRINCIPLE OF NATURAL JUSTICE?

Mr. Ajay Kumar\*  
Ms. Ishika Kedwal\*\*

## Abstract

*Beyond a shadow of doubt, the principle of natural justice is the most basic right enjoyed in all civilized societies. The aforementioned right could be curtailed by the protectors of the Constitution of India, the Supreme Court of India and subordinate courts, by invoking Section 123 of the Indian Evidence Act or Rule 7 of Order XIII of Supreme Court Rules to call for information or documents in sealed covers. The implication of these sealed cover documents lies in the fact that they are tagged as 'Confidential Information' which is beyond the reach of parties. Only judges are privileged to access the information called for under sealed covers. In a way, sealed cover jurisprudence could be said to be antithesis of the principle of natural justice and right of the accused to defend his case. The present research is to address the practice in the common parlance of the counsels to suffice documents in sealed covers. Whether the sealed cover privilege is a violation of the principle of natural justice or whether the practice of sealed cover violates the constitutional right to know and defend?*

**Keywords:** Sealed Cover Jurisprudence, Confidential Information, Antithesis, Section 123 of Indian Evidence Act, principle of Natural Justice

## Introduction

"Why sealed cover?" beseached the Chief Justice of India, NV Ramana to State Counsel for Bihar during the court proceedings of the Muzaffarpur Shelter Home Case.<sup>1</sup> Nonetheless, a mere remark is a strong condemnation of the popular 'sealed cover practice'. Remarkable is the paradigm shift in the court's attitude towards the practice which has been resorted to most often by state counsels. The truth be told, this practice exists since the day existence of the court is marked. Time and again the government counsels have exercised this practice in numerous cases before high courts and the supreme court considering the confidentiality and secrecy of the matter. The jurisprudential approach behind the sealed cover practice is public policy, public interest and national security. The very principle is

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<sup>1</sup> *Nivedita Jha v. State of Bihar*, SLP (C) 24978 OF 2018.

embedded in the maxim *Solus populi suprema lex esto*<sup>2</sup>. The welfare of people of the country is the supreme purpose that needs to be protected. On the contrary, the basic practice of supplementing documents in sealed cover denies the other party to know the charges, allegations or evidence tendered against himself. Whether the evidence, document, charges or allegations are levelled by government counsel or prosecution, it outrightly violates the principle of natural justice of the other party or accused. The research paper will further intricately and painstakingly discuss the concept of “sealed cover”.

### Definition Clause

Considerably, the terminology “sealed cover” has never been defined by any legislative document. Nor any authority has ever attempted to define the term. Yet, certain epigraphs as ‘Executive privilege’ as used in the USA, ‘common interest privilege’ used in the UK, ‘crown privilege’ or ‘state privilege’ are the other terminologies that has been used time and again. The term “privilege”<sup>3</sup> as used in evidence law means freedom from the compulsion to give evidence or to discover material, or a right to prevent or bar information from other sources during or in connection with litigation, but on grounds extrinsic to the goals of litigation.<sup>4</sup> Alternatively, sealed cover terminology is more popular in India. It is a practice used by the Supreme Court and sometimes lower courts, of asking for or accepting information from government agencies in sealed envelopes that can only be accessed by judges.<sup>5</sup>

### Legal Viability

Courts derive essential authority to call for sealed cover documents under two heads, one is under Section 123 of the Indian Evidence Act, 1872<sup>6</sup> {hereinafter referred to as IEA,1872} and two, Rule 7 of Order XIII of Supreme Court Rules, 2013<sup>7</sup> {hereinafter referred to as SCR}.

### Section 123 of IEA, 1872 States that

*“123. Evidence as to affairs of State. —No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit”.*

The interpretation of the abovementioned provision enables the head of the department to keep official unpublished records essentially related to the affairs of the state out of the public domain on account of public interest. It is emphasized that the principle laid down under S. 123 of IEA, 1872 does not provide umbrella protection to all sorts of the affairs of State that are privileged, but only those the disclosure of which would result in an injury to public interest.<sup>8</sup> The foundation of the principle is injury to the public interest.<sup>9</sup> Therefore, it is understood that not every case fits for the protection under s. 123 of IEA,

<sup>2</sup> John Locke, Two Treatise of Government, P. 289 Interpretation: the welfare of the people is supreme law.

<sup>3</sup> The Indian Evidence Act, 1872, s.123, Act No. 1, Acts of Parliament, India.

<sup>4</sup> Law Commission of India, 88<sup>th</sup> Report on Governmental Privilege in Evidence: Sections 123-124 and 162, Indian Evidence Act, 1872 and Articles 74 and 163 of the Constitution, 1983 (January 1983).

<sup>5</sup> Diksha Munjal, Explained | What is sealed cover jurisprudence and why is it being opposed?, THE HINDU (Feb. 18, 2022, 13:43 IST) URL:<https://www.thehindu.com/news/national/explained-what-is-sealed-cover-jurisprudence-and-why-is-it-being-opposed/article65056013.ece> (accessed on May 3, 2022).

<sup>6</sup> The Indian Evidence Act, 1872, Act No. 1, Acts of Parliament, India.

<sup>7</sup> See, Rule 7 of Order XIII of Supreme Court Rules, 2013.

<sup>8</sup> *Dinbai v. The Dominion of India*, AIR 1951 Bom 72 (P).

<sup>9</sup> *State of U.P. v. Raj Narain*, AIR 1975 SC 865

1872. The law commission 88<sup>th</sup> report<sup>10</sup> identifies s.124 of the IEA, 1872 overlapping with s.123 of IEA, 1872 yet they differ. While it also emphasized the importance of s.162 of IEA, 1872 in connection with the aforementioned provision. Section 162 of IEA, 1872 is not confined to state privilege as such but concerns itself with the procedure for determination of all questions of privilege, whether the privilege is claimed under the head of State privilege or under any other head.<sup>11</sup> The supreme court often invokes the supreme court rules as well for the same purpose.

### **Rule 7 of Order XIII of SCR states that;**

*“Notwithstanding anything contained in this order, no party or person shall be entitled as of right to receive copies or extracts from any minutes, letter or document of any confidential nature or any paper sent, filed or produced, which the Chief Justice or the Court directs to keep in sealed cover or considers to be of confidential nature or the publication of which is considered to be not in the interest of the public, except under and in accordance with an order specially made by the Chief Justice or by the Court.”*

Sealed cover enjoys legal identification but there are no specific and stringent guidelines for the usage of this particular practice.

### ***Minimize sealing, maximize transparency and enhance independence***

*“Exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”*<sup>12</sup> While the administration is responsible for handling matters of national security, it is up to the courts to make a distinction between private information that might jeopardize national security and the justifications offered by the government.

It is evident that courts believe that some considerations take precedence over fair trials, natural justice, and public access to court documents. In order to promote judicial openness, it is important to reduce the sealing of evidence and provide legal guidelines for its use.

A court must meet the following requirements in order to seal a document or procedure, according to a comparison of the sealed cover doctrine’s current framework:

- (1) public notice of the intended sealing must be provided along with the opportunity to object to it should be given to interested parties;
- (2) proper reasoning for sealing must be provided; and
- (3) reasoning for the inadequacy of alternatives must be furnished.

Another such model exists in the United Kingdom in the form of Closed Material Proceedings, under which judges may not share sensitive material with defendants only when it is established that public interest would be harmed. The provision requires appointment of a Special Attorney who shall be

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<sup>10</sup> Supra 5 at 2.

<sup>11</sup> Ibid.

<sup>12</sup> U.S. v. Nixon, 418 U.S. 683 (1974).

bound by duty of confidentiality to not disclose material to the client but would still represent the party in their best interest.<sup>13</sup>

### **Need for a Standard Test**

In India, the common practice for use of sealed cover protection is through submitting an affidavit to the court without mandating any requisite conditions to be fulfilled by the party/parties. It is purely an ad hoc decision. The 'test of need standard' was developed by the U.S. Supreme Court in *U.S. v. Nixon*<sup>14</sup>, in which the court propounded that in order to pray for sealing, it is necessary for the pleading party to lay down the following two essentials: that the evidence holds importance with respect to the central issue at hand, and that there exists no other source to access evidence or any equivalent evidence.

The party praying for the seal must establish a connection between the reason for such prayer and the kind of document it seeks to seal. Merely stating the general category of privilege without proper specification does not satisfy the essentials to allow the production of a sealed document. Our Supreme Court has itself remarked in a judgment that "though it is held that it would be open for the Court to peruse the documents, it would be against the concept of a fair trial if in every case the prosecution presents documents in a sealed cover and the findings on the same are recorded as if the offence is committed and the same is treated as having a bearing for denial or grant of bail".

**Conclusion:** The strict commitment to natural justice principle provides equality and justice for the parties involved and improves decision-making while also increasing trust in the integrity of the decision-maker. If challenged in a court of law, our lack of knowledge of the law and due process will not be a recognized defence. To comprehend and implement the concepts of natural justice in the performance of our administrative duties, we do not necessarily require a professional legal degree. It is both a legal and moral need. It is not a virtue to adhere to natural justice ideals. It is morally required. The application of natural justice principles goes beyond the purview of official investigation procedures. Their intellectual significance and moral foundation are of utmost importance in therapeutic practice as well.

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<sup>13</sup> Neha Rani, Sealed cover jurisprudence is without a rationale, THE LEAFLET (May 30, 2022) URL: <https://theleaflet.in/sealed-cover-jurisprudence-is-without-a-rationale/> (accessed on June 7, 2022)

<sup>14</sup> Supra Note 14.

# MANAGEMENT OF “DOCTRINE OF RENVOI” IN PRIVATE INTERNATIONAL LAW

Dr. K.B. Asthana\*  
Snehal\*\*

## Abstract

*Conflict of Laws is another name for Private International Law mainly composed of conventions, Model Laws, National Laws, etc. It creates an impeccable balance between the international consensus and domestic recognition along with implementation. Despite of the fact that Private International Law bases its roots on jurisdiction, application of foreign judgements and choice of law, the Doctrine of Renvoi is a fundamental weapon for the implementation of Private International Law. This doctrine to some extent resolves the issue of conflict of laws between two nations. When a potential conflict of laws emerges, the Court will follow the doctrine of renvoi and accept the laws of the other country. This doctrine aims to avoid "forum shopping," because regardless of where the matter is actually handled, the same legislation is applied to produce the same result.*

*The doctrine applies to the friction which arises when any foreign element is attached to the cases in any country. In some circumstances, it might have an unexpected result when a country's law is referred to as a whole, including its conflict of laws rules. This is especially true when that system's conflict of laws rules diverges significantly from the 'lexfori' norms. The renvoi doctrine dilemma, on the other hand, cannot arise if it is consciously determined to apply foreign law in a unique set of conditions because that decision must involve the implementation of the international national law. This occurs when several nations determine that a particular sort of conflict between parties will be handled by a particular legal system, pursuant to an international agreement.*

*The paper throws light upon the evolution and working on doctrine of renvoi throughout various nations and at the same time suggestions for removing the loopholes in the application of the doctrine.*

**Key Words:** *Private International Law, Doctrine of Renvoi, Forum Shopping, Foreign Law, Conflict of Law, Lexfori norms.*

## Introduction

The word *renvoi* is taken from the French word *renvoyer*, which means “to send back open” and therefore, it gives the liberty to other nations to decide the cases which are outside their jurisdiction. Private International Law is different in nature as compared to Public International Law as it deals with the conflicts involving private individuals and sovereign nations or includes some foreign element in

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them.<sup>1</sup> Moreover, it mostly comes into picture when the private affairs overlay the international matters as the law of two different nations are different in nature combined with application. The term of "conflict of laws" sometimes leads to a misconception that it initiates conflicts between two laws, while it is meant to pacify the tug of war that arise in the periphery of international law.

However, the jurisdiction of the court of a particular nation is mainly defined in the given territorial laws and they are refrained from exercising the powers outside the purview. But, the doctrine of renvoi empowers the judges to decide the cases which include foreign element or to refer that particular case to the country to which it belongs.<sup>2</sup> The jurisdiction is declined by the courts in three situations, namely, first, Forum non convenience, second, Pendency and last but not the least, austere clauses. The law also includes the recognition of foreign rules and enforcement of their judgements and arbitral awards, the reflecting the elements of when and why the courts having particular jurisdiction can take cognizance of a case of another State. Whenever a case with foreign element is introduced in the court, there are three natures of references, namely, the personal, local or material, wherein, even if the case contains the element of foreign transaction, it can be taken into consideration as a foreign case from the outset where the area of law becomes irrelevant.

Contrary to the norms of law of contracts, tort, or family, the application of conflicts law (option of law) does not by itself determine the outcome of a case. It doesn't resolve a case in the sense that the rules it contains don't directly address the core issue at hand. Until a specific area of law is selected to resolve the dispute with a substantive remedy, it only moves the case halfway. After deciding on the applicable legal system, we are unable to discuss conflict of law regulations. Only up to that point do the regulations serve any use.<sup>3</sup> This body of law is merely a set of guidelines that specify the circumstances under which a particular court is evaluated to determine whether it has the necessary competence to hear a case, what local or foreign legal system will be applied to decide the case, or whether a foreign court's judgement will be recognized and upheld by a state's courts.

## The Concept of Raison D'etre

All conflict thinking is predicated on the fact that some legal transactions are somehow linked to more than one legal community, whether it be because the parties to the transaction are citizens, domiciliary, or residents of different jurisdictions, or because the event that gave rise to their legal relationship occurred in another state and/or their own, or because the subject of their relationship is located somewhere else.<sup>4</sup> Additionally, the laws of various legal communities vary. There is no defined legislation that applies to all private parties' interactions. In other words, the two basic aspects of contemporary culture, integration and diversity, combine to create conflict situations.

People relocate or travel from state to state or from jurisdiction to jurisdiction due to economic, social, political, natural disasters, societal, such as marriage, and even war, factors, among other connected events. This is made worse by the "constantly better methods of transportation and communication". As

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<sup>1</sup> Chesheri and North, *Private International Law*, 13th edition, Oxford University Press, 2004, (p.51-53).

<sup>2</sup> J. Georges Sauveplanne, *international encyclopedia on comparative law*, chapter 2 , page 3-4, Vol. 2, J.C.B , LANCASTER, 1990.

<sup>3</sup> C.M.V. Clarkson & Jonathan Hill, *The Conflict of Laws*, 2011, p 9.

<sup>4</sup> Gisela Rühl, 'Choice of Law by the Parties' in Jürgen Basedow, Klaus Hopt & Rein Zimmermann (eds), *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012.

a result of this fact, transactions involving multiple jurisdictions must be created. As with any legal transaction, this inevitably results in disagreements.<sup>5</sup> The nature of the argument, however, is interprovincial or international, which makes this disagreement special. Many states are plainly involved in the transactions and conflicts that ensue from them, which means multiple legal systems are also involved.

According to the traditional method of choosing laws, this goal should typically be accomplished through the effective application of carefully selected laws that are pertinent or appropriate, are also thought to have a significant sense of justice incorporated into them, and are structured based on a sufficient or genuine connection.<sup>6</sup> The regulations to this effect are carefully constructed, which implies that in order to produce, in the end, a just conclusion, the choice-of-law criteria used should not only be more subtle, more sensitive to actual fact patterns, but they should also reflect the law's overall concern for substantive justice.<sup>7</sup>

### **What is Forum Shopping?**

The act of selecting the court or jurisdiction with the most favorable rules or laws for the cause being argued is known as "forum shopping." When more than one court has jurisdiction over the dispute, a side may "forum shop," selecting the court that will give it the upper hand over the other party. The venue most appropriate to the disagreement may not always be the one most favorable to the party's case. For a variety of reasons, party's forum shop.<sup>8</sup> A plaintiff will frequently choose to file in his or her own home. Jurisdiction due to lower travel costs and the possibility of the fact-finder sympathizing with a local plaintiff.

When the laws, procedures, or tendencies of one jurisdiction are more favorable than those of another, a party will choose the jurisdiction that will apply the more favorable law or protocols to the case. Because remedies differ between jurisdictions, a party may select a forum<sup>9</sup> that provides the highest damage awards, injunctive relief, or monetary damages. Courts also handle cases at varying speeds, so a plaintiff may prefer one court over another because cases move more quickly in that court, whereas a defendant may try the opposite tactic to stall proceedings.

### **Ways to stop Forum Shopping**

In addition to applying local law indiscriminately, the following example demonstrates how injustice can occur when the forum court assumes jurisdiction over any case referred to it. A great injustice may be done to a foreigner who is abroad and has not agreed to submit to a forum's court a dispute arising from a transaction unrelated to the forum by summoning him before that court and thus putting him in the dilemma<sup>10</sup> that either he must incur the inconvenience and expense of coming to the forum to defend his interests or he must risk default judgement, putting assets he may have here in jeopardy.

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<sup>5</sup> Bentwich, *Tile Law of Domicile in its Relation to Succession and tile Doctrine of Renvoi* (1911) 184.

<sup>6</sup> Ibid.

<sup>7</sup> Supra c. 2.

<sup>8</sup> Adrian Briggs, 'The Meaning of Law: Renvoi' in *The Conflict of Laws*, 2002, p 15.

<sup>9</sup> *Boys v. Chaplin*, (1971) AC 356.

<sup>10</sup> Supra c. 4.

This goal could be achieved in two ways: first, by delineating the boundaries of a court's jurisdiction in multistate cases so that the plaintiff can only bring suit in one state and there is no opportunity for forum shopping. This is possible in the presence of the federation-wide conflicts law, cases involving interstate conflicts.<sup>11</sup> Second, even if the plaintiff has a choice between several laws for a given case, a unilateral choice of forum would not affect the outcome of the case, which is also possible with federal choice-of-law rules. The important point here is to have a single choice-of-law rule that points to a single applicable law.

Finally, the recognition and enforcement of foreign judgments and arbitral awards can either promote or prevent injustice. The following example can provide justification for recognizing and enforcing a foreign decision. If the rendition forum has exclusive jurisdiction but the judgement can only be enforced in the recognition or enforcing forum; or, in other words, if the person is unable to bring a *de novo* action in the recognition forum<sup>12</sup> because the latter lacks judicial jurisdiction and the person is unable to demand enforcement in that forum, he will be left without any remedy. The only way to end this heinous injustice is to lend a helping hand, i.e., to recognize and/or enforce the judgement.

### The Gradual Development of Conflict Theories

Since centuries, one can learn from conflict literature that conflict theories and approaches have evolved in order to address problems that inevitably arise due to differences in laws. The emphasis was primarily on problem-solving with regard to choice of law, with little attention paid to issues of jurisdiction and recognition and enforcement of foreign judgments. In Northern Italy and Southern France, scholars in the 11<sup>th</sup> and 13<sup>th</sup> centuries preferred to approach the problem of legal choice conceptually rather than teleologically,<sup>13</sup> in the sense that they theorized about the spatial reach of local laws rather than looking for substantive solutions. It is widely assumed that conflicts of laws as we know them today first emerged in the early 13th century in Italy, when local rules *statuta* differed from city to city and the need arose to make choices in their application because a transaction or relationship had a connection to more than one locality.<sup>14</sup>

Scholars began to debate whether local *statuta* could be applied extraterritorially to citizens living abroad, and whether foreign citizens living within the forum's territory<sup>15</sup> were subject to its laws. In other words, *statutists* attempting to determine which law governs transactions involving residents of other city-states classified the laws as "real" and "personal" in a more formalistic manner.

First of all, it should be observed that, contrary to what might have been implied above<sup>16</sup>, *renvoi* is most frequently applied after classification of, and therefore limited to, specific issues of a case, such as the question of the limits of claimable damages. Having stated that, rather than attempting to reach this conclusion on its own, the court may have simply instructed parties to commence the action in another court since it is "probably the closest to the facts of the dispute" rather than applying *renvoi* to the aforementioned hypothetical situation.

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<sup>11</sup> Adrian Briggs, 'In Praise and Defence of Renvoi', 47 Int'l & Comp. L.Q. 877, 878 (1998).

<sup>12</sup> Sharpe, R 'The Multiple Uses of Renvoi in Rule and Interest Analysis-Based Choice-of-Law Rules', 2010.

<sup>13</sup> *Ibid.*

<sup>14</sup> The Law of Domicile, 183.

<sup>15</sup> Dicey, *Conflict of Laws* (2d ed.) Rule 149, exception 1, p. 538.

<sup>16</sup> *Supra* c. 7.

## Types of Renvoi

There is a response to the employment of internal law specifically when using the renvoi principle under the careful observation of a judge. In any case, if there was no room to apply internal law, the court may then adopt the best type of renvoi.<sup>17</sup> Moreover, some nations, including Greece, the US, and Denmark, do not recognize double renvoi. According to this, there are two types of renvoi, namely,

- Single Renvoi
- Double Renvoi

In a single renvoi, a judge from one nation sends a matter to another due to conflicting national laws, but that nation's law refers the case back to the original nation, which accepts the sub reference and applies its own national laws. Nations that use this framework include Spain, Italy, and Luxembourg.<sup>18</sup> For instance, the Court may need to assess whose authoritative discussion will apply to manage the property under progression laws where a deceased benefactor, who was a French national, was an inhabitant in England but domiciled in Spain and left moveable property in Spain.

In the landmark case of *re Ross*<sup>19</sup>, here the Court had applied the law in relation to the location of the property. The movables are in Italy as the testatrix, the person who draughts the will, has a domicile there. Due of this, the judge had applied Italian law to the immovable property that was located in Italy. The renvoi-based dispute was resolved in line with English law because Italy refused to accept it. Similarly, in the *Forgo case*,<sup>20</sup> while the State argued that the Bavarian Courts would adopt French law and that the French Courts should take a different approach, the French Court concluded that it would decide the investigation by applying Bavarian law. The case was decided in favor of the French state, and the Bavarian rules of contention were mentioned here.

Countries that practice double renvoi include Spain, England, and France. Take the example of the benefactor in the preceding case, an Irish national who resided in Spain but had his or her primary residence in Italy. This philanthropist passed away and left some real estate in France. As the law of the gathering, France will examine the law of the deceased. The Italian nationality of the dead is taken into consideration by Spanish law.<sup>21</sup> Italy, a ward that only uses a single renvoi framework, won't recognize the Double Renvoi and, most likely, will continue to apply Italian law as of right now.

As in the case of *Re Annesley*,<sup>22</sup> the concerned person possessed a French abode at the time of her death, the court claimed that French law had been applied. Based on it, the English Courts refer the subject to French law as the law of domicile, and French law similarly refers the same back to England as single renvoi is accepted in France. The French Court would therefore recognise the Remission and have applied the Internal law.

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<sup>17</sup> Cheng, *Rules of Private International Law Determining Capacity to Contract*, 70-72.

<sup>18</sup> Bate, Th.: *Notes on the Doctrine of Renvoi in Private International Law* (London, 1904).

<sup>19</sup> 140 U.S. 453 (1891).

<sup>20</sup> A. Fuerea, *Private international law*, 2nd revised and enlarged edition, Universul Juridic Publishing House, Bucharest, 2005, pp. 19.

<sup>21</sup> *Supra* c. 17.

<sup>22</sup> (1926) Ch. 692 (21 May 1926).

## The Relationship of Brussels I Regulation with the Doctrine

The Brussels I Regulation precludes a court of a Contracting State from refusing the authority granted to it by Article 2 on the justification that a court of a non-Contracting state would be a more suitable venue. One begs to differ on this point because, most notably in the case of *Choudhary v. Bhattar*<sup>23</sup>, English courts were seen to still be finding ways to circumvent the ruling of the European Court. In any case, the courts shouldn't take the indirect road of using *renvoi* to try to make up for the lack of justice in this contentious matter and instead should call for change of the law on the applicability of *Forum Non Conveniens*, if at all possible.

According to the uniformity argument in the case of *MacMillan Inc. v. Bishopgate Investment Trust Plc (No. 3)*<sup>24</sup>, like matters being treated equally wherever they are resolved "cannot be attained by judicial mental gymnastics but only by international conventions." Against this assertion, there are two issues, where, first of all, it should be observed that, contrary to what might have been implied above, *renvoi* is most frequently applied after classification of, and therefore limited to, specific issues of a case, such as the question of the limits of claimable damages. Having stated that, rather than attempting to reach this conclusion on its own,<sup>25</sup> the court may have simply instructed parties to commence the action in another court since it is "probably the closest to the facts of the dispute" rather than applying *renvoi* to the aforementioned hypothetical situation. To suggest that an English court ever "truly" implements foreign law is naive, as stated by Clarkson and Hill.<sup>26</sup>

This new EU succession regulation, which went into force on August 17, 2015, aims to harmonize the succession laws of all member states when selecting the appropriate forum. Ireland, the United Kingdom, and Denmark have chosen not to abide by this regulation, but strangely, the legislation will still have an impact on how these nations interact with signatory states and non-signatory states.

The rule makes an effort to stipulate that, with the exception of Ireland, the United Kingdom, and Denmark, the Doctrine of *Renvoi* is abolished in all EU Member States, barring third party States. It also allows testators to specify that the entire scope of their inheritance will be governed by the law of their country of citizenship.<sup>27</sup> The regulation only applies to deaths occurring on or after August 17, 2015, although a person may choose to have it take effect after that date by specifying it in their will.

## Conclusion

After it has been concluded that the *renvoi* doctrine cannot be accepted as a general rule governing conflicts of laws, we may briefly consider some exceptional situations where it may be necessary or advantageous to acknowledge that the *lex fori* should incorporate the foreign law, including its conflict of law rules.<sup>28</sup> The only way to bring together countries with differing norms in the conflict of laws has been discovered to be to recognize the *renvoi* theory when formulating international accords.

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<sup>23</sup> (2009) EWCA Civ 1176.

<sup>24</sup> (1995) 3 All E.R. 747.

<sup>25</sup> O. Ungureanu, C. Jugastru, and A. Circă, *Companion of international private law*, Publishing company Hamangiu, Bucharest, 2008, pp. 7.

<sup>26</sup> *The Renvoi Theory and the Application of Foreign Law* (1910) 10 CoLUMBIA L. REv. 327, 344.

<sup>27</sup> T. Prescure and C.N. Savu, *Private international law*, Lumina Lex, Bucharest, 2005, pp. 24.

<sup>28</sup> T. R. Popescu, *Private international law*, Romfel Publishing House, Bucharest, 1995, pp. 71.

After learning about the origins, types, and interesting aspects of renvoi, it is important to keep in mind that not every situation will be affected by it. Renvoi applies to questions of interstate succession and the fundamental legitimacy of wills, as Abla Mayss said about it.<sup>29</sup> There is some authority such that it should apply in circumstances involving title to both movable and immovable property as well as to marriage. It is a procedure by which, in the event of a resulting conflict of laws, the Court adopts the laws of a foreign jurisdiction. However, Renvoi does not find a place in the areas of contract or tort. And the court will use internal law if there is no renvoi.

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<sup>29</sup> I. P. Filipescu, *Private international law*, vol. I, Actami Publishing House, Bucharest, 1995, pp. 114.

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# MINORITY RIGHTS VERSUS RIGHT TO EDUCATION: CHALLENGES & ACCESSIBILITY

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## Abstract

*Education is a key to improvement of humankind. Indian Legal framework, in Unni Krishnan case, has attempted to peruse right to education as a component of right to life, and which was similarly answered by Indian parliament, through 86<sup>th</sup> Constitutional Amendment. Other significant piece of Indian Constitution is minority privileges. Right to Education turned into a piece of Constitution of India in most recent 25 years in particular, yet minority's on the right track to lay out instructive organizations voluntarily was available in unique constitution moreover. It is essential to examine whether there is any contention between Articles 21A and Article 30 (1) of Constitution of India. Whether significance, degree and nature of education under both these articles is same? Is it a contention between the singular privileges of a kid and aggregate right of a strict or semantic minority or a contention between right to fundamental education and right to specialised education? This paper will endeavour to zero in on these places of contention. This study is considerably more significant when there are charges that instructive establishments of strict nature are rearing fundamentalism in youthful personalities. As of late, Maharashtra government has additionally derecognised some madrassahs as instructive foundations. Yet, the greatest inquiry which author is attempting to stress is; whether these privileges can be agreeably built, which could be gainful for the kid's right as well as society's right overall and minority's privileges in unambiguous?*

**Keywords:** *Right to Education, Indian Constitution, Case, Society*

## Introduction

Education is a progressive discovery of our ignorance.

- Will Durant<sup>1</sup>

Education is a key to improvement of humankind. Fate of any nation relies upon the idea of education system of the country. However, individuals from constituent gathering knew the significance of all-inclusive instruction yet and, after its all said and done, because of scarcity of assets they proved it unable to give it as a major right, however it was referenced in Directive Principle of State Policy. In 1993, Indian Legal framework, in *Unni Krishnan v. State of Andhra Pradesh* case,<sup>2</sup> court

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<sup>1</sup> U.S. Author and Historian ,<http://www.lhup.edu/~dsimanek/eduquote.html>.

<sup>2</sup> AIR 1993 SC 2178.

has attempted to proclaim right to education as a feature of right to life. In 2002 Indian parliament moreover given the right to education to its sprouting residents through a sacred amendment,<sup>3</sup> and then right to education act was additionally passed.<sup>4</sup> Whether, announcement of High Court that right to education is important for Article 21 and expansion of this new right to education alongside right to life has given this right any superseding status on other related freedoms? These open doors were missed by both legal executive as well as council. High Court has a few events to examine the idea of privileges given by Article 30 (1), like in *Re Kerala Education Bill*,<sup>5</sup> *Saint Xavier College v. State of Gujarat*<sup>6</sup> *Saint Stephen's College v. University of Delhi*,<sup>7</sup> *T.M.A. Pai Foundation v. State of Karnataka*,<sup>8</sup> *Islamic Academy of Education v. State of Karnataka*.<sup>9</sup> However, each time the issue was connected exclusively to the degree to which different unofficial laws may enter in to one side to 'manage' minority instructive foundations; even in *Pramati Educational and Cultural Trust v. Union of India*,<sup>10</sup> constitutional seat of peak court focused exclusively on the inquiry that whether supported or independent minority schooling foundations are under commitment to give "free" and mandatory education to "all", i.e., free education to 25% youngsters even from non-minority instructive foundations. However, other part of this right was not contacted i.e., right to 'lay out' minority instruction organization. This matter has never got helpful consideration, that what sort of instructive foundations can be laid out by minorities.

This paper is an endeavour to examine this perspective that whether minorities can lay out any sort of instructive foundations of 'their decision' or the considerable idea of the establishments can be controlled by the public arrangement and protected objectives.

### Right to Education: A Fundamental Right

Article 19 (1) (a) of the Constitution of India provides that all citizens have the right to freedom of speech and expression. Freedom of speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode.<sup>11</sup> Only the educated person can exercise the right to freedom of speech and expression in an aimed way. A bench of Chief Justice S.H. Kapadia and Justice Swatanter Kumar likewise held that a kid who is denied on the right track to access education isn't just denied of his entitlement to live with poise, he is additionally denied of his right to speak freely of discourse and articulation revered in Article 19(1) (a).<sup>12</sup> Right to education is additionally important for Article 21 of the Constitution of India. Article 21 of the Constitution of India says regarding right to life, however it can't be finished without giving the Right to Education. The Supreme Court of India has impliedly proclaimed the right to education as a key right. The Supreme Court of India on account of *Mohini Jain v. State of Karnataka*<sup>13</sup> held that the Right to Education straightforwardly moves from Right to Life and each resident has an 'Option to Education'. The State Government is under a commitment to make try to give instructive offices at all

<sup>3</sup> The Constitution (Eighty-sixth Amendment) Act, 2002.

<sup>4</sup> The Right of Children to Free and Compulsory Education Act, 2009.

<sup>5</sup> AIR 1958 SC 956.

<sup>6</sup> AIR 1974 SC 1389.

<sup>7</sup> AIR 1992 SC 1630.

<sup>8</sup> AIR 1994 SC 2772.

<sup>9</sup> AIR 2003 SC 697.

<sup>10</sup> WRIT PETITION (C) No.136 OF 2014.

<sup>11</sup> Refer to: <http://www.goforthelaw.com/articles/fromlawstu/article16.html> (accessed on: 20<sup>th</sup> May 2022)

<sup>12</sup> Refer to: <http://www.thehindu.com/todays-paper/article3309124.ece> (accessed on: 20<sup>th</sup> May 2022)

<sup>13</sup> AIR 1992 SC 1858, JT 1992 (4) SC 292, 1992 (2) SCALE 90, (1992) 3 SCC 666, [1992] 3 SCR 658, 1993 (1) SCT 377 (SC), 1992 (5) SLR 1 (SC), 1992 (2) UJ 331, (1992) 2 UPL BEC 1198

levels to its residents to partake in the said right. The State might release its commitment through state-possessed or state-perceived instructive foundations.

On account of *Unni Krishnan, J.P. v. State of Andhra Pradesh*<sup>14</sup>, Supreme Court restricted the right to education age wise and held that each youngster/resident has a privilege to free education up to the age of 14 years and from there on it is likely to cutoff points of financial limit and development of the State. Article 21 A was embedded in the Constitution of India by 86th Constitutional Amendment Act, 2002 which made the education of the kids an essential right. It gives that the State will give free and mandatory education to all offspring of the age of 6 to 14 years in such way as the State may by regulation decide.

Passing the Right to Education Act, 2009 for the child between the age of 6 to 14 is a milestone in the field of education. Presently in India, all youngsters between the ages of 6 and 14 will reserve the option to free and mandatory rudimentary education at a local school. There is no immediate (school charges) or aberrant expense (regalia, reading material, early afternoon meals, transportation) to be borne by the youngster or the guardians to get rudimentary education. The public authority will give tutoring liberated from cost until youngster's rudimentary education is finished. It was the authentic second to the youngsters in India.<sup>15</sup> The new regulation makes it required on piece of the State Legislatures and nearby bodies to guarantee that each youngster gets education in a school in the area.<sup>16</sup>

### **Marks of Contention between Article 21 & Article 30 (1)**

Basically, Article 21A and Article 30 (1) are both connected with right to education, yet there is a distinction of approach in them. Previous is the singular right of each and every kid & later is local area right just of minorities. It is appropriate to examine that where the two articles are corresponding to one another and where these are cutthroat or contradictive, and how much. This examination should be possible under two fundamental headings i.e., struggle of essential education versus specific schooling and nature and extent of the expression 'instructive organizations of their decision', as utilized in Article 30 (1) of the Constitution of India.

### **Essential Education versus Specific Schooling**

Article 21A of Constitution of India is a positive right to have rudimentary education given to all child of India, independent of rank, class or belief or religion and so forth. Each child has a right which can't be waved off, as tenet of waiver doesn't make a difference on essential freedoms overall. Be that as it may, in the event of Article 21A, target residents are minor youngsters between the age of 6 to 14 years, subsequently state has much more certain obligation to uphold child's on the right track to have education. Most significant part of Article 21A is the idea of education guaranteed in this is fundamental instruction of rudimentary level. It shouldn't be any strict instruction or any sort of specific education.

<sup>14</sup> AIR1993SC2178, 1993(91) ALJ 341, JT1993(1)SC474, 1993(1)SCALE290, (1993)1SCC645, [1993]1SCR594, 1993(2)SCT511(SC), 1993(1)SLR743(SC)

<sup>15</sup> [http://www.unicef.org/india/education\\_6144.html](http://www.unicef.org/india/education_6144.html)

<sup>16</sup> [http://lib.ohchr.org/HRBodies/UPR/Documents/session13/IN/JS6\\_UPR\\_IND\\_S13\\_2012\\_JointSubmission6\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/session13/IN/JS6_UPR_IND_S13_2012_JointSubmission6_E.pdf)

While, education ventured to be conferred by instructive foundations laid out under Article 30(1) of the Constitution of India, incorporates any kind of education which a minority of a local area needs to bestow. Perusing in seclusion there is no protected impulse that organizations created under Article 30(1) ought to bestow fundamental rudimentary instruction too. On the off chance that a few instincts laid out by etymological or strict minorities decided to give just specific training of just a single language or just a single religion, then basically such foundations have every one of the privileges to do so. However Supreme Court as a rule has made sense of that Article 30 (1) doesn't intend that minorities will lay out and oversee foundations just for their strict instruction yet additionally for the conventional school education. Both the reasons ought to be served. In *Re Kerala Education Bill*<sup>17</sup> Supreme Court has given as under:

“What the article say and means is that the religious and the linguistic minorities should have the right to establish educational institutions of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities, will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will necessarily include institutions imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving a thorough, good general education to their children. The next thing to note is that the Article, in terms, gives all minorities, whether based on religion or language, two rights, namely, the right to establish and the right to administer educational institutions of their choice.”

It is exceptionally certain that as indicated by the constitution there is no express limitations except for its legal translation has likewise not given any limiting request that minorities should open such foundations which could fill both the needs. The apex court has assumed that customarily all minorities would themselves wish that their kids ought to be given current training alongside strict education to make them good residents. Yet, these comments were not in that frame of mind of legitimate rules. This is the explanation that why these rules given by Supreme Court have not been executed at the ground level. Request of Maharashtra government to announce 'Madrassahs not showing ordinary subjects' as non-schools, itself is proof that so far, such Madrassahs were considered as instructive foundations in the Province of Maharashtra. Comparative circumstance wins in numerous different states like Uttar Pradesh, Bihar what's more, West Bengal too. Acknowledgment of such instructive organizations as schools by the state sums to infringement of crucial right of youngsters to get fundamental education, as wanted by Article 21A. Each youngster has an option to get fundamental education for no less than 12 years with the goal that an underpinning of his character and mind is set down. This right has been flawlessly made sense of by a Pakistani scholar Moiz Amjad in following words:<sup>18</sup>

“...[W]hether a child wants to become a Doctor or an Engineer, a Scientist or a Lawyer, up till class twelve all the students study the same courses with the exception of a few specialized ones. It is because of this common ground that masters of these different faculties share common intellect, thinking process, language and way of living. They can talk to each other and explain their thoughts easily. They

<sup>17</sup> AIR 1958 SC 956

<sup>18</sup> Moiz Amjad, Schools of Religious Education, Renaissance Monthly Journal (Online Edition), Sep. 1997. Available at: <http://www.javedahmadghamidi.com/renaissance/view/schools-of-religious-education> (last visited on June 23, 2022).

can comprehend each other's problems and share happiness. They actually seem to be people of the same society.

..... masters in the field of religious education are also an important need of the society. ... But the method adopted for producing religious scholars is the one in which a student is admitted to a totally different system of education from the beginning. He lives in a different atmosphere, speaks a different language. In fact, he becomes totally different from the society in his style of living, appearance, dress code, ideals and emotions. It is because of this separation that the doctors, engineers, lawyers etc. can talk to each other freely but these religious scholars can neither convey their message nor understand what the society says. In their eyes the whole society is on the wrong track while in the sight of the society these scholars are incapable of understanding the realities of the world. In this way, these religious scholars cannot perform the important task of guiding people.<sup>19</sup>”

According to Moiz, providing specialized religious education to tender aged children is not only a violation of their basic human rights, but also such treatment plants in their young minds a hatred towards the people of other religion.

Supreme Court has not contacted this issue. This essayist feels that such establishments which give just strict schooling are neither great for the youngsters reading up there or for the society in general. Such establishments run by minority local area as well as by non-minority, where solely religion is instructed to delicate matured kids ought not be permitted.

From above analysis, a situation of conflict is appearing that whether a minority community's right based on religious consciousness can curtail a child's individual, right? Whether state has a justiciable positive duty that no child should go to such schools where only religious education is imparted.

There are many, factions of Islam in India which are running such Madrassahs where ordinary schooling is additionally bestowed alongside strict lessons and understudies from other networks are additionally enlisted. Yet, a few strict groups of Islam in India trust that Madrassahs are not open for the understudies from different networks, in light of the fact that these establishments are expected to be just for delivering Islamic strict researchers. These establishments are likewise getting a charge out of the situation with minority-run education establishments and subsequently are profiting financial guide from the state. Such establishments are working plainly disregarding Article 29 (2) of the Constitution of India, which gives that any resident of India can't be denied affirmation in instructive foundations show to the state or are getting help from the state reserves. In *T.M.A. Pai v. State of Kerala*,<sup>20</sup> Supreme Court under an established seat has likewise explained the situation in such manner as under:<sup>21</sup>

“It would be anomalous to say that an educational institute set up to teach religion or to conserve a distinct language, script or culture does not have to comply with Article 29(2) but an educational institute set up to give general secular education has to comply with Article 29(2). It must again be remembered that Article 30 was not framed to create a special or privileged class of citizens. It was framed only for purposes of ensuring that the politically powerful majority did not prevent the minority

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<sup>19</sup> Ibid.

<sup>20</sup> AIR 1994 SC 2772.

<sup>21</sup> Ibid.

from having their educational institute. We cannot give to Article 30(1) a meaning which would result in making the minorities, whether religious or linguistic, a special or privileged class of citizens.”<sup>22</sup>

It is obvious from previously mentioned judgment that assuming some minority run education establishment are not furnishing typical education alongside the lessons of language and religion or then again are not open for the understudies from different networks then such foundations can't be held as instructive establishments in essence in first case and can't be held as minority run-instructive establishments with the end goal of Article 30 (1) in the subsequent case.

## Conclusion & Suggestions

Minorities' more right than wrong to lay out and oversee instructive foundation was given in the unique Constitution of India. Up to this point Supreme Court has, fundamentally resolved the issues connected with 'organization' of minority instructive foundations. Where state's more right than wrong to control was acknowledged however, just to that degree with which minority character of these organizations isn't upset. In present times when numerous fear monger associations are confounding Islam and attempting to misinform youthful personalities. In Indian, State of Odisha have a model where a fear-based oppressor was running a Madrassah.<sup>23</sup> In such occasions, it is fundamental that initial segment of right given in Article 30 (1) i.e., right to 'establish educational institutions' ought to likewise be directed. The author suggests following measures which can find solution for such problems:

1. Institutions, of all religions which are giving just strict education to youngsters under 14 years ought to be completely restricted, as it is infringement of youngsters' more right than wrong to have fundamental education as referenced in Article 21A.
2. Just those Educational Establishments ought to be permitted whether connected with minority or non-minority, which are showing typical essential subjects additionally alongside strict education.
3. In such institutions, strict substance to be taught ought to be supported by a panel working heavily influenced by government.
4. Such council ought to have 7 academic individuals, having strict information, from the concerned religion and 3 individuals from different religions too. Thus, that there might be a twofold subjective check. In the first place, the schedule is really taken a look at by the significant strict researchers of the religion. Second, the researchers of different religions have likewise seen that content is inside the standards of public approach and sacred qualities. Such measures might be helpful in propelling the objectives of secularism and advancing grasping between the various religions.

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<sup>22</sup> *Ibid*

<sup>23</sup> Editorial, Odisha: Suspected terrorist Rahman's illegal madarsa shutdown, students sent back home, India Today, Dec. 19, 2015. Available at: [intoday.in/story/suspected-terrorist-rahmans-illegal-madrassa-shutdown-students-sentback-home/1/551508.html](http://intoday.in/story/suspected-terrorist-rahmans-illegal-madrassa-shutdown-students-sentback-home/1/551508.html).

# MEDIA TRIAL: AN ANTI-THESIS TO FAIR TRIAL

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## Abstract

*Nowadays, media is a means for exchanging ideas and also for informing about what is going on in the world. The relevance of media can be accessed by examining how dependent we are on it to investigate areas affecting the general public. With the growth in the popularity of media, the people's reliance on it also grows. As a result, media becomes more powerful in its arena, and it begins to abuse that authority. Whenever a crime is committed or something happens in society, the media begins to report it without required exploration and even render a conclusion on the matter without conducting the desired investigation into an incident, which is actually detrimental to society's interests. It results in the breach of the natural rule of justice i.e. fair trial. The research paper is founded and focuses on the dictum of criminal justice which says that even if hundreds offenders are left unpunished; one innocent person should not be punished. Unfortunately, prior to the matter reaching to court, the media begins trial and brings a conclusion, convincing the public to believe it. This is an anti-thesis to the fair trial in particular and against the basic fabric of law in general.*

**Key Words:** Administration of Justice, Fair Trial, Freedom of Press, Media Trial, Fundamental Rights.

## INTRODUCTION

“The media is the most powerful entity on the Earth. They have the power to make the innocent guilty and to make the guilty innocent, and that is the power. This is because that they control the minds of the masses.”<sup>1</sup>

The most prominent right of a person is the freedom of speech and expression. It is fundamental as well as a natural right that one can enjoy by birth. Today, one can express views, ideas, opinion and communicate with other just because of right of freedom of speech and expression. But it should be kept in mind that the exercise of right by one does not create inconvenience to others. Every person should enjoy the rights in such a way that it does not jeopardise the right of others. Media also has the same freedom but conducting trials without concerning its impact on judicial pronouncements is dangerous proposition. According to the Constitution of India (*hereinafter* referred to as the Constitution), the freedom of speech and expression is not an absolute right and has restrictions on it. Therefore, media should exercise it with proper care and caution.

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<sup>1</sup> <http://www.goodreads.com/quotes/74430-the-media-s-the-most-powerful-entity-on-earth-they-have>  
(Last Visited on September 18, 2021).

In the Constitution, under Part III, the freedom of speech and expression is provided as a fundamental right. Article 19 of the Constitution states that all the citizens of India shall have the freedom of speech and expression but this right is not absolute. The State is empowered to impose reasonable restrictions. According to Article 19(2), the State can impose reasonable restrictions on the freedom of speech and expression in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

In a democratic nation, it is very essential to protect the freedom of speech and expression. The abuse of the freedom of speech and expression is protected to maintain the social order in the society. The clause 2 of Article 19 of the Constitution, impose some obligations and impose some restrictions on the respective freedom of speech and expression that is actually a matter of great concern to maintain the security and protection of the State. Article 19 Clause 3 of the International Covenant on the Civil and Political Rights (ICCPR)<sup>2</sup> explained that when a person exercises the right, he also bears some duties. Making any right or freedom without the restrictions means giving immense power to violate the law. Therefore, it is actually necessary to impose the restrictions in order to exercise the freedom justly.

The press is considered as the fourth pillar of the democracy in India. The importance of the role of media can be reflected from the view that it proves to be a medium for exchanging the thoughts or exchanging the opinion among others through any of the way that includes news, television, broadcast and so on. Regardless of this fact, media without analysing the importance of such a big platform, in spite of providing truthful information about any issue, it began to pass judgments on the particular issue without knowing the authenticity of the matter. On actual point, the motive of media should be to provide the information to the public after scrutinising the truth because it affects the minds of the public at large. The media needs to behave in a responsible manner. It is not good for media to render biased or such kind of skewed information that shakes the emotions of the people. As we know that the society gets information only by means of media; so, the onus on media escalates manifold.

### **Sensational Media: Impact and Effect**

Further, there is a need to look at the reason why media is delivering or presenting news or any information with the sensational effects. While finding the reason, a very clear view appears that it is a matter of being the first choice in the viewers for Television Rating Point (*hereinafter* referred to as the TRP).<sup>3</sup> As we look at the past data, we have seen that the TRP is the sole agenda of every media house. Each of the media house works like in a competition of being first or to remain on the top in rating. For this, media start passing judgment on the little facts available with them. They forget their duty of providing or delivering fair news, ignoring the 'Rule of Law'. Not only media goes beyond its right to freedom of speech and expression, it also infringes the right of others of getting fair trial before judgment which is otherwise truly imperative for the proper administration of justice. Every person has a right of fair trial. This problem needs to be addressed first. The Broadcast Audience Research Council that determines the TRP must analyse the news material on the basis of being fair presentation and not on the sole basis of the viewers of any particular news.

<sup>2</sup> It was adopted by United Nations General Assembly Resolution 2200A (XXI) on December 16, 1966 and entered into force March 23, 1976 after its thirty-fifth ratification or accession.

<sup>3</sup> Target Rating Point is the metric used by the marketing and advertising agencies to evaluate this viewership. TRP or Television Rating Point is the tool to judge which programmes are watched the most and to index the viewers' choices.

Media is regarded as a main organ of the democracy. Media should exercise its legal right in accordance with the best interest of the society. This will necessitate certain curbs on the journalistic freedom. The restrictions on the media are not intended to restrict the media but to intend media to act reasonably. Freedom or liberty does not mean that one should act in any way, ignoring the consequences and harming the other's interest.

In recent years, we have seen a number of high profile cases (*including* corruption related, rape cases, murder cases, terrorist activities and many others) which shows that how media had a direct impact on the administration of justice. A very first and responsive duty of the media is to provide a kind of atmosphere for the proper administration of justice while making the decision. We cannot expect media to work in an irresponsible manner and use its power in an unrestricted way. By doing so, media plays with the future of a person for the sake of being on the top on the people's choice. Sometimes, media only shows one side of the story and completely ignores the other part of the story and this is actually discriminatory in context of the 'administration of justice'. The real responsibility of the media is to present all available information from both sides, impartially.

Resulting, media has a huge responsibility over it to reveal the truth and to exercise its freedom of speech and expression, without any fear or favouritism. The first thing that needs to be addressed is media trial. Media trial is a serious issue that demands immediate concern. We need such kind of journalism that is fair, just and accountable to the public at large. Media is not empowered to conduct trial without having authentic information. Media can report the facts but not the judgment.

### **Media Trial and Fair Trial**

Media trial is a serious issue that leads to the conflict between the freedom of speech and expression and the right of fair trial. The act of media can be justified only when a free press provides the authentic information that makes the people aware about the happenings in the society. But by making a news sensation and highlighting an issue to such an extent that everyone who hears the information assumes the accused guilty, is totally undesirable. That way, media begins to play the role of a judge. By doing so, media trial badly affects the legal system and snatches the right of the accused to be tried fairly. There is a very thin line difference between the freedom of speech and expression and right of fair trial. If it is ignored or undermined, it is going to be blatant violation. Fair trial needs proper care and caution, if it appears that the decision of the court is biased or partial, the criminal justice system gets jeopardised and the truth is shattered.

The United Nations basic principles on judicial independence declare that the concept of judicial independence entitles and requires the judiciary to ensure that judicial processes are conducted fairly and that the rights of the parties are protected. The International Covenant on Civil and Political Rights also stipulates the right to a fair trial.<sup>4</sup>

There is a new trend of media showing news with the title 'exclusive' that refers to a person who has been accused with any crime. The way of showing news of a person accused with criminal charge is completely different from that of the person who is convicted for any such kind of offences. Media

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<sup>4</sup> K.C. Joshi, *International Law & Human Rights*, (EBC Publications, 2020).

needs to understand the difference between these two. The reason behind this is that when a case is tried in a court, then any information or fact that is related to the innocence of the accused or his complicity in the crime may leave an impact on the verdict. Therefore, the media should act in an impartial way and should lead in a responsible manner.

Also, it is the natural duty of the media to carry out unbiased news. On numerous occasions, the Supreme Court of India has stated that when an accused is under trial in the court, it follows the method established by law but when an accused is tried by media in its own way, it completely ignores everything that is necessary and media encroaches upon the domain of judiciary.

The ability of the media to influence the judges is a serious concern. The judgment rendered by a judge should not be affected by any kind of biased news and should adhere to the rule of law. Many times, media with their reports tried to influence the judges to act in its own whims and fancies. On this point, the opinion of American and Anglo-Saxons are just opposite to each other. As per the Law Commission report, in view of American jurists, it is expressed that media trial does not reflect much strong influence on the judges to affect judgment, whereas the latter asserts that the trial by media somehow influence the judges unconsciously, rather than consciously, to look at the findings by the media in their broadcast. It compels the judges to look at the media reports before making a decision because media trial somewhere has an impact on the minds of the people of the society by conducting parallel trial until the trial is completed by the court of law.<sup>5</sup>

As we all know, the right to privacy is a fundamental right under Article 21 of the Constitution. The right to privacy and the right to freedom of speech and expression are related to each other. For instance, when a person exercises his right to freedom of speech and expression, he should not violate the right to privacy of the other person. But with the passage of time, it is observed that media interferes with the private life of a person which is complete violation of the person's right to privacy. We cannot say that someone's privacy is infringed only when the other person exercises its right to freedom of speech and expression but it can also be infringed by the interference of the media into the lives of the people.

In *R. Rajagopal v. State of Tamil Nadu*,<sup>6</sup> the newspaper was packed with copies of the deceased girl's correspondence in a well-known double murder case, which diminished the dignity of the parties involved. The Supreme Court stated that every citizen has a right to defend his own family, education, marriage and personal life without any interference. Without the consent of the person, no one is allowed to say or write anything on the matters related to his personal life, either it is true or false. And if anyone tries to do so, he violates the right to privacy of that person and such person should be held liable. But if the situation is completely opposite, means, if anyone voluntarily allowed the other to do such thing then the situation is completely different from the former.

At times, the trial by media has adverse effect on the right to privacy of a person. Besides that, media trial has a negative impact on various people including general public, lawyers, judges and on the

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<sup>5</sup> 200<sup>th</sup> Report of the Law Commission on "Trial by Media: Free Speech vs. Fair Trial under Criminal Procedure (Amendments to the Contempt of Courts Act, 1971)".

<sup>6</sup> AIR 1994 (6) SCC 632.

administration of justice, right to fair trial, right to privacy. Thus, media trial can never be justified, even not on the pretext of fairness.

### Media Trial and the Repercussions

Media trial creates a hindrance in the administration of justice and causes blatant miscarriage of justice. “No Judge fit to be one likely to be influenced consciously, except by what he sees or hears in court and by what is judicially appropriate for his deliberations,” Justice Frankfurter remarked in *John D. Pennekamp v. State of Florida*.<sup>7</sup> However, judges are human, and we know better than our forefathers how powerful the unconscious pull is, and how treacherous the rational process can be – and because Judges, no matter how stalwart, are human, the delicate task of administering justice should not be made unduly difficult by irresponsible print.

Any kind of publication that reflects the minds of the judges is unwanted and unwarranted. In judicial system, the judges are placed at high value and considered as knowledgeable besides unbiased, yet it can also have an unconscious influence on their attitudes. Therefore, it is very essential to control the influence of the media to ensure fair trial and proper administration of the justice. The judgment by the court should be published in media only after the conclusion of the trial not before that.

The influence of the media on the minds of the judges cannot be ignored as this influence makes the otherwise independent opinion of the judges biased. In, *Re: P.C. Sen*,<sup>8</sup> it was stated that the main risk of pre-trial publication in the media reports, newspapers and other sources which must be guarded against the ‘impression that such comments might have on the Judge’s mind or even on the minds of witnesses for a litigant.’<sup>9</sup>

The legal system’s brittleness stems from the reality that judges are human beings who can be influenced by media trials. In *Rao Harnarain v. Gumani Ram*,<sup>10</sup> the court stated that the journalists are not authorised to play the role of an investigating agency during the trial of the case as it can influence the Court. Most of the time, the judicial system ignores the fact about the influence of the media on the judges. Sometimes such influence affects the minds of the people of the society to that extent that they assume the accused as the real convict. The Supreme Court observed that “the grievance relating to trial by press would stand on a different footing. The judges do not get influenced by the propaganda or the adverse publicity by the media”. The judiciary does not accept the direct influence on the judges of the media trial but it has been concluded from many instances that the media successfully influence the judges on the cases that are pending in the court of law.<sup>11</sup>

### Media Trial and Contempt of Court

‘Rule of Law’ is the basic structure of the Constitution. The judiciary has extremely important duty to protect and promote the rule of law. In order to make it easy to perform the duties and functions by the judiciary, the dignity of the court must be respected. The judiciary has all the power to punish the person who does the Contempt of the Court.

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<sup>7</sup> 328 U.S. 331 (1946).

<sup>8</sup> AIR 1970 SC 1821.

<sup>9</sup> *Ibid.*

<sup>10</sup> AIR 1958 P&H 273.

<sup>11</sup> *Ibid.*

In the year 1926, the earliest effort made by the legislature in regards to the Contempt of courts in India was the passing of the Contempt of Courts Act. The provisions of the Contempt of Courts Act, 1926 were not fair enough to deal with such kind of cases, so it was replaced by the Contempt of Courts Act, 1952. The later enactment was also not comprehensive in nature as it also did not contain the definition of 'contempt' in it. Both the laws were weak at the point that they did not mention about the civil and criminal contempt. Therefore, to make the law more apparent on these provisions, another law was brought *i.e.*, the Contempt of Courts Act, 1971;<sup>12</sup> which had the provisions regarding the civil and criminal contempt besides the related procedure.

The freedom of speech and expression is guaranteed to all the citizens under Article 19(1)(a) of the Constitution of India. Article 19(2) imposes necessary restrictions in the interests of India's sovereignty and integrity, the state's security, friendly relations with other nations, public order, decency or morality, or contempt of court, defamation, or incitement to offence.<sup>13</sup> These restrictions also have reflections on the basis of the Contempt of Court law. As the Constitution under Articles 129 and 215 empower the Supreme Court and the High Court's respectively to punish for the Contempt of Court.

The constitutional democracy envisages freedom to media as the fourth pillar but with reasonable restrictions on the basis of morality, decency, security of state and so on. The Contempt of Court Act, 1971 provides that if media publishes any kind of material that interferes with the administration of justice then it may be called as the contempt of court. The legislation does not mean to immune the courts by keeping them above the law but to provide protection to the administration of justice. Likewise, the punishment for Contempt of Court is not provided to protect the Judges but to protect the administration of justice.

In general, contempt can be defined as any act of disgrace, intentional disobedience, or any conduct in defiance of a court's direct order that degrades the court's dignity.<sup>14</sup> Section 2(c) of the Contempt of Courts Act, 1971 provides that the criminal contempt means the publication whether by words spoken or written or by visible representation of any matter or doing of an act:

- a) To lowers the authority of the court or tends to lowers the authority of the Court;
- b) To interfere with the course of judicial proceedings or tends to interferes with the due course of judicial proceedings;
- c) To interfere or obstruct or tends to interfere or obstruct with the administration of justice.

A person is not guilty of criminal contempt of court if he or she publishes any form of material innocently, according to Section 3 of the Contempt of Courts Act. It was decided that if no criminal or civil proceedings are pending, the publication of any issue pertinent to the case by media companies does not constitute criminal contempt. Prior to the start of the judicial proceedings, it offers immunity to media publications.<sup>15</sup> The explanation in the Section 3 of the Contempt of Courts Act provides that when the charge sheet or challan is filed or summon or warrant is issued then it is considered that the

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<sup>12</sup> Act No. 70 of 1971.

<sup>13</sup> P.M. Bakshi, *Press Law: An Introduction*, (BTFRI Publications, 1985).

<sup>14</sup> Justice Tek Chand, *The law of Contempt of Court & of Legislature*, (University Book Agency, Allahabad 4<sup>th</sup> Ed; 1997).

<sup>15</sup> The Sanyal Committee Report, 1963.

proceeding is pending and at that time any publication will be considered as the Contempt. Further, truth is included as a defence in Section 13(b) of the Contempt of Courts Act, if it is in the public good and there is a genuine desire to seek defence.<sup>16</sup>

The contempt provisions have two limitations *i.e.* the rule applies only to publications that pose a significant risk or prejudice, and the rule only applies to active proceedings. Also, the term “publication” means ‘any kind of communication aimed to the general public or a segment of the general public.’<sup>17</sup>

In our criminal justice system, there are very few limitations on the media. The law immunises the media from pre-judicial publications *i.e.* before the trial. It provides that the media can publish anything before the trial begins. With the advancement of technology and the heated competition among networks for breaking news, the accused are being labelled even before an inquiry is conducted, obstructing the administration of justice and having a detrimental impact on an individual’s right to a fair trial.<sup>18</sup>

The publications of media need not to create hindrances in the administration of justice. The need of Contempt of Court Act is to regulate the working of the media and to punish for the Contempt resulting in the miscarriage of justice. The intention of the law is very clear that it wants to prevent the media trial; as media may pass the verdict by only considering the facts of the incident without devolving upon the evidences related to the issue.

### **Media Trial and the Norms**

Unfortunately, the trial by media undermines the larger public interest. It creates uproar in conducting the judicial trial and somehow bulldozes the judges to decide the matters in a way. When the decision of the court goes against the media verdict, then media blames the courts, as biased.

The issue of media trial is just creating a brawl between the ‘free speech’ and ‘fair trial’. Media justifies the freedom of press in the way that the free media can only make the people aware of the matters going in the society. It is important to note that the balance between the right of the accused for fair trial and the right of the freedom of speech and expression is maintained. An utmost care is to be given to fair trial.

The media has a large audience; accordingly, freedom of the press should not deteriorate and seal the door to justice. In modern democracy, the press is an important tool for disseminating ideas and information, but it must be limited, as no right can be unlimited. Along with freedom, media bears a responsibility, and any full freedom leads to chaos. When there is a confrontation between the public, the free press, and another competing interest, a balance between the two competing rights is required. The desire for breaking news has reached dangerous levels, resulting in unhealthy rivalry that

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<sup>16</sup> Indian Law Institute, *Restatement of Indian Law Contempt of Court*, (Saurabh Printers Pvt. Ltd. 1<sup>st</sup> Ed; 2011).

<sup>17</sup> Duncan Bloy & Sara Hadwin, *Law and the Media*, (Sweet & Maxwell 2<sup>nd</sup> Ed., 2011).

<sup>18</sup> 200<sup>th</sup> Report of the Law Commission on “Trial by Media: Free Speech v Fair Trial under Criminal Procedure (Amendments to the Contempt of Courts Act, 1971)”.

jeopardises truth, reputation, and public interest, hijacking trials, and leaving judges and lawyers crippled.<sup>19</sup>

While administering justice in a criminal case it is very much important to keep in mind that when a person brought before the court as an accused, it is presumed that he is innocent by the criminal court until the court declare him guilty. As per the general rule of the criminal jurisprudence, the burden is on the prosecution to prove the accused guilty in such way that it does not left any scope for doubt, that mean it is to be proved beyond reasonable doubt. But the media does not follow such rules and start trial of the person on the basis of hearsay evidences, data from unauthentic sources and also consider the confession of the accused that is sometimes made by him in police custody, ignoring that such confession is not admissible in the court of law.

The contents of media can have a negative impact on the outcome of a fair trial because it could erode the crucial gap between the accused, suspect, and convict, which is one of the key components of a fair trial. A suspect is someone who has been accused of committing a crime and has been charged with it. Someone who has been charged with a crime is referred to as an accused, while someone who has been found guilty is referred to as a convict. As a result, dismantling and undermining the chasm is crucial. Pre-trial, actual-trial, and post-trial stages of a trial must be classified because they have chain limitations and violating rights at one level may have a detrimental influence on the course of the trial at a later stage, contaminating due process of law.<sup>20</sup>

The Supreme Court of India on many occasions stated that the trial by the court of the accused is a procedure established by the law but the trial by media is neglecting everything that needs to be concerned legally and the trial by media is contradictory to the rule of law. It leads to the miscarriage of justice. A judge is not to be influenced by such kinds of news and only follow the principle of rule of law. In *State of Maharashtra v. Rajendra Jawanmal Gandhi*,<sup>21</sup> it was held that when a judge finds a person is guilty of the offence then the sentence is awarded to that person by the judge himself according to the prescribed penal law.

Therefore, for fortification of the right of fair trial, there are many provisions included in the Contempt of Courts Act, 1971 besides under the Constitution that empowers the Supreme Court and the High Court, to punish those who commit contempt of the court.

Further, the right to be represented, by a lawyer of choice, in the court of law is the essential element of the fair trial. It is a constitutional right of the person and denial is the violation of the natural right too. No one can prevent the accused from being represented. Media trial sometimes creates an impediment in this direction also. There are many instances in which the lawyers of the high profile cases criticised by the society. As we have seen in the Jessica Lal case where the morality was questioned in the court, the renowned lawyer Ram Jethmalani represented the accused Manu Sharma. One of the media houses went on to declare that Jethmalani was trying to defend the accused that does not deserve to be defended.<sup>22</sup> Also, in 26/11 attack case, in which the principal suspect Ajmal Kasab was represented by

<sup>19</sup> Ram Jethmalani & D.S. Chopra, *Media Law*, (Thomson Reuters, Vol. 1, 2<sup>nd</sup> Ed; 2014).

<sup>20</sup> *Consultation Paper of Media Law*, Government of India, Law Commission of India, 2014 May.

<sup>21</sup> AIR 1997 (8) SCC 386.

<sup>22</sup> <https://www.liveindia.com/news/1c.html> (Last Visited April 1, 2022).

the lawyer named Abbas Kazmi. Kazmi at one point expressed that he had gone through the trauma by the media and also from public prosecutor that distressed him. This brings a question in the mind that is the Indian judiciary so weak to administer justice...?

Article 14 reinforces that any action that is unjustified or arbitrary is a violation of Article 21. As a result, the right to equality before the law is a fundamental right that not only prohibits State from discriminatory actions, but also requires that the procedures used be just, fair, and reasonable.<sup>23</sup> What matters most is that the right to freedom of expression and an unbiased trial have the potential to elicit positive emotions; therefore, clouding the right to know. The independence of the judiciary is another public interest in a free society. While the media offers access to information, it must ensure that it does not obstruct or improperly influence the judiciary, which could result in the violation of the rights of accused.<sup>24</sup>

### Contemporary Instances of Trial by Media

Recently, Sarvjeet Singh was falsely accused of harassing one Jasleen Kaur after she posted a picture of him on Facebook that went viral, leading to his arrest. After an investigation, it was discovered that Sarvjeet Singh was innocent, but due to media coverage and hype, the media branded him as a harasser, and Sarvjeet Singh was publicly humiliated. This instance exemplifies how the media may devastate an innocent person's life by reporting on occurrences without verifying the facts.<sup>25</sup>

In another instance, Mr. Valson Thampu, the Principal of St. Stephen Institution, asserted that the media has targeted his institution because it is a minority institution, and that they have been the victims of a media trial. In this case, a professor at St. Stephen Institution was accused of molesting a student, and the allegation against Mr. Thampu was that he pressured the student. Mr. Thampu claims that he has been falsely implicated by the media and that this is not the first time he has been targeted; he has been targeted twice before and both times it has proved to be false, and this is the third attack on him. Mr. Thampu claimed that he has been falsely implicated by the media.<sup>26</sup>

Further, the All India Majlis-e-Ittehadul Muslimeen (AIMIM) recently condemned the media trial of controversial Islamic preacher Zakir Naik. AIMIM legislator from Aurangabad Intiaz Jaleel, in a statement said that his party respects and follows the rule of the land and feels nobody could be pronounced guilty unless the court gives its judgement by following the due process of law. By hounding Zakir Naik, the media, particularly some national television channels, have already pronounced their judgement even when a formal case is yet to be registered against him. On mere hearsay, the media cannot pronounce anybody as supporter of terrorism. This media trial of Naik should end. If any individual, whosoever it may be, breaks the rule of the land, the law should take its own course. He further said that if there is concrete proof of violation of any law by anyone, strict action should be initiated. The AIMIM legislator said that the right to practice religion and the right to free expression are fundamental rights of every Indian as enshrined in the Constitution. This means any

<sup>23</sup> H.M. Seervai, *Constitutional Law of India* 723 (Universal Law Publishing Co Vol 1, 4<sup>th</sup> Ed; 1991).

<sup>24</sup> Madhavi Diwan Goradia, *Facets of Media laws and Indian Constitution*, (Anmol Publications Pvt. Ltd, New Delhi 2005).

<sup>25</sup> <https://www.google.com/amp/s/www.indiatimes.com/amp/news/india/sarvjeet-singh-might-have-been-acquitted-but-verdict-shows-how-false-cases-ruins-one-s-life-500960.html> (Last Visited on March 2, 2022).

<sup>26</sup> <https://www.google.com/amp/s/www.ndtv.com/delhi-news/my-support-to-professor-accused-of-molestation-heroic-valson-thampu-1263657%3famp=1&akamai-rum=off> (Last Visited on March 12, 2022).

individual can practice, profess and propagate his religion without hurting the religious beliefs and sentiments of other religions. The general trend in recent days is that the investigating agencies charge someone with wrongdoing and the media pronounces the accused as guilty even before the court delivers its judgement. This poses a grave threat to the social fabric and democratic set up of the country and could prove to be detrimental to communal harmony, so the legislator has expressed his opinion that the media trial on Zakir Khan should end and media should stop labelling him as terrorist.

Also, Indira Jaising, a senior advocate, once stated that the police disclose the information to the media before charges were presented before a competent court, which constitutes as the interference with the administration of justice. In cases of crime against women, the Supreme Court stated that a balance must be struck between freedom of press and the victim's right to a fair trial. Indira Jaising argued, as an amicus curiae, before a panel of judges Madan B Lokur, S Abdul Nazeer, and Deepak Gupta that the media had conducted a parallel trial on sub-judgment issues and that the court should draught guidelines on how to report cases of violence against women. Ms. Jaising also stated that before filing charges, authorities released information to the media. The main question is whether it is obstructing the administration of justice. Reporting on court proceedings is one thing; running a parallel trial is quite another. Parallel trial is the term for interfering with the administration of justice in cases that are now under appeal. She made a reference to the high-profile case of gang rape and murder in Kathua, Jammu, stating that the media had already concluded that some of the accused were innocent and not guilty of the crimes before the charges were even brought before the court. In Kathua, in January 2017, an eight-year-old girl from a nomadic minority clan was allegedly raped and murdered. A week later, her body was located in the same location. During her arguments, Ms Jaising alluded to the Indian Penal Code, 1860 (the IPC) and the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act), which prohibits revealing the identities of victims of such crimes and the procedure to be followed by the media in reporting such cases especially in the light of the Contempt of Courts Act.

## Conclusion

It is an open secret that the media plays an important role in today's society as a means of disseminating information and presenting balanced perspectives on current events. It is equally vital in terms of publicizing latest updates and making the general public aware of social, political, and economic actions. The need of the hour is that the media should provide neutral news or information rather than passing judgement on unproven facts. Inversely and unfortunately, the media is acting in an unexpected manner. It begins with determining if an action is right or wrong, whether an incident is a crime or not, whether an individual is guilty or innocent. The caution is that it is neither the job nor the mandate of media's responsibility. By doing so, media interferes with the administration of justice. As in *R.K. Anand v. Delhi High Court*,<sup>27</sup> the court stated the view that the excessive use of power by media makes it difficult to administer free and fair trial to the person. Further, in *Express Newspaper v. Union of India*,<sup>28</sup> the court stated that the absolute freedom to media increases the chances of disorder. So, the verdict that came out from media trial creates hurdles in administration of justice.

The fundamental rule of law premised in the criminal justice system is that a person who is tried as an accused in a court of law is deemed innocent until proven otherwise. However, the media ignores all the

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<sup>27</sup> AIR 2009 (8) SCC 106.

<sup>28</sup> AIR 1985 (2) SCR 287.

basic concepts that underpin criminal justice system and starts passing judgement in either way. Certain procedures have been established in the criminal justice system that every court must follow when conducting a trial, but the media fails to follow these procedures. The Supreme Court's decision in *State of Maharashtra v. Rajendra Jawanmal Gandhi* expressed a similar viewpoint on the role of the media in conducting trials, stating that conducting trials in this manner is absolutely contrary to the rule of law.<sup>29</sup>

The media trial has a significant impact on the subconscious of judges, which may adversely impact on the administration of justice. In *Re: P.C. Sen*, it was said that there is a possibility of failure of justice as a result of the media trial's prejudicial remarks, as well as grave concern about the impact of such remarks on the minds of the judges. This type of behaviour cannot be tolerated in our court system.<sup>30</sup> In another case, *Rao Harnarain v. Gumori Ram*, the court criticised this type of media trial practise and expressed concern that the media should not attempt to influence the judges.<sup>31</sup> However, the judges have not explicitly approved to the media's impact on their thinking, and they believe that the media has no bearing on the judiciary's efficiency in administering justice to society. But never the less, the possible pressure cannot be ruled out.

The media trial has ramifications for both the 'administration of justice' and the 'right to privacy'. When conducting a trial, the media frequently interrogates a person's private life and publishes it in the public domain, which is plainly a breach of that person's right to privacy. It is not permissible for one fundamental right to be infringed upon by another fundamental right. The impact of a media trial is felt not only by the persons involved in the incident, but also by their families and other concerned. Another effect of the media trial, that is not readily apparent to everyone, is that it pressures learned lawyers who present the case of an accused in a court of law to drop the case. If they even present the case, the lawyer's reputation is on the line of fire. It occurs solely as a result of the media's impact on minds, causing many to doubt the credibility of lawyers. In a court of law, everyone has the right to be represented by a lawyer. By doing so, the accused's right to be represented by a lawyer is infringed, which is in direct violation of the fundamental concept of fair trial.

In a democratic nation, one cannot overlook the positive side of media. Media is a means of raising public awareness and caution. On the one hand, the media plays a critical role in holding government accountable to the people for their actions and policies, and on the other hand, it keeps the public informed about government policies that are designed to benefit society as a whole. It heralds transparency between the government and the people of the society, as well as representing the public's thoughts on the most pressing concerns of the day. A powerful and independent media is responsible for significant societal improvements. It is expected of the media not to stray from its course, not to become preoccupied with making an incident a public sensation, not to twist facts, not to smear a person's reputation, and, most importantly, not to pass judgement. Because of this, the media's authority cannot be absolute, as it undermines the administration and rule of law.

The media is expected to provide the public with neutral information. It is not appropriate to conduct media trial. Article 19(2) of the Constitution envisages various restrictions on freedom of speech and

<sup>29</sup> (1997) 8 SCC 386.

<sup>30</sup> AIR 1970 SC 1821.

<sup>31</sup> AIR 1958 Punjab 273.

expression. Because freedom of speech and expression includes freedom of the press; accordingly, it also applies to freedom of the press. Besides, the Constitution empowers the Supreme Court and High Courts with broad authority to penalise for contempt of court under Articles 129 and 215 respectively. On these reasons, the freedom of the press is also limited in its power, as media, whether print or electronic, is held liable for contempt if it attempts to interfere with or obstruct justice delivery mechanism, thereby lowering the court's prestige and authority. In this regard, the Contempt of Courts Act, 1971 states that any sort of pre-judicial publishing on a case pending before a court of law can be limited by the court. Furthermore, the 17th Law Commission offered many proposals to improve the effectiveness of the Contempt Act. These recommendations state that there is an urgent need to limit the authority of the media to prevent pre-judicial dissemination since it interferes with the administration of justice.

As the fourth pillar of democracy, the deeds of media should be fair and reasonable. And also, the freedom of the press is crucial in a democratic set-up, for the benefit of society. Media must uncover or demonstrate the flaws and gaps in the democratic system. In certain ways, it aids the government in identifying these flaws and making the government function better for society and accountable to the general population. Furthermore, by conducting trials, the media interferes with the judiciary's functions and encroaches on the administration of justice. It creates a dicey situation in which judges need to travel an extra mile to ponder before passing judgement. Although, it cannot be denied that freedom of press is helpful in functioning and regulation of the society, yet from the perspective of media outlets, they interpret it differently. They believe they have the authority to try anyone who has been accused of anything. It is a reflection of societal dysfunction. Behind the duty of reporting the truth, the media overlooks the fact that it harms the legal system. The demand for responsive journalism has never been greater. The freedom of the press should be used in such a way that every government organ may simply carry out its duties without interruption or interference.

Finally, it is apt to state that on the act that truly affects the nation's democratic set up, media restraint should be implemented. The media cannot be permitted to compromise and degrade the nation's dignity. Media should investigate significant topics and report on them in a manner that does not reflect judgement and does not jeopardise the reputation of anyone who is accused, ignoring the evidence. It is the duty of the media to exercise its freedom with reasonable manner without violating the other's right to freedom of speech and expression; or just for the sake of publicity and making sensational news. The media need not to create gossip for the matter by completely ignoring the public welfare. There is need to realise the responsibilities that imposes on the media as a fourth pillar of the democracy that helps in the administration of justice, else it will sum up as an anti-thesis!

# RIGHT TO INFORMATION SEEKER AND RIGHT TO PRIVACY OF THIRD PARTY UNDER RTI ACT, 2005

Dr. Swapnil Pandey\*

## Introduction

Right to information and right to privacy, in Indian context, are the two most important rights of the person/ citizen to ensure that people/ citizens can live their lives with dignity and integrity. These two rights, i.e., right to privacy and right to information, are fundamental in maintaining the quality of life of an individual. Right to privacy allows people privacy to their personal issues/affairs, while the latter allows citizens to hold various government departments accountable towards citizens. The right to privacy, in one hand, is considered to be inherent in the right to life guaranteed to all people under Article 21<sup>1</sup> and on the other hand, the right to information<sup>2</sup> acquires the constitutional status as a facet of freedom of expression guaranteed to all citizens under Article 19(1) (a)<sup>3</sup>. Both rights became fundamental rights by the pronouncement of the Apex Court of India. The direct mention of the both is nowhere in the Constitution. Right to Information Act, 2005, has been made, to establish machinery or a process for access to the information, by the Parliament of India and came into force on 12<sup>th</sup> October, 2005 replacing the former Freedom of Information Act, 2002. Any citizen can get information, by an application, from the Public Authority. All central, state and local institutions come under the Public Authority, as defined in Section 2 (h) of the said Act. This Act has proved to be very beneficial for the people and many corruption cases have also been detected by it.

Right to Privacy<sup>4</sup> is not defined nowhere in India, but generally it means the condition or state of being free from public attention to intrusion inter or interference with one's acts or decisions. In other words we can say that Right to personal autonomy and the right of a person and a person's property to be free from unwarranted public scrutiny or exposure. Invasion of privacy means an unjustified interference of one's personality and intrusion into one's personal activities. Privacy is also considered as a synonym to "right to be alone; it doesn't mean that one is withdrawing from society; it is an expectation that society will not interfere in the choices made by the person so long as they do not cause harm to others. It would be appropriate to discuss even a little bit of Right to be Forgotten (hereinafter referred to as the RTBF). RTBF is the right to have publicly available personal information removed from the internet, search, databases, websites or any other public platforms, once the personal information in question is no longer necessary, or relevant.<sup>5</sup> The Supreme Court of India, in the case of Justice K. S.

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<sup>1</sup> Constitution of India, 1950.

<sup>2</sup> Right to Information is, as a part of Right to Know, became an integral part of Right to Freedom of Speech and Expression under Article 19 (1) (a) of the Indian Constitution after the decisions of the Top Court of India in the cases of *Raj Narayan v. State of Uttar Pradesh* (the seed of Right to Information fell in this case) and *S. P. Gupta v. Union of India* (where the Supreme Court expressly held).

<sup>3</sup> Supra Note 1.

<sup>4</sup> The seed of Right to Privacy fell in the case of *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295, but in the case of *People's Union for Civil Liberties (PUCL) v. Union of India*, where the Supreme Court expressly held that right to life and personal liberty includes the right to privacy.

<sup>5</sup> Daily Updates, 'Right to Privacy & Right to be Forgotten' <https://www.drishtiiias.com/daily-updates/daily-news-analysis/right-to-privacy-right-to-be-forgotten>, Retrieved on 02/03/2022.

*Puttaswamy (Retd.) v. Union of India*,<sup>6</sup> held that RTBF is a facet of the right of privacy and partly from the right to dignity under Article 14.

But there is a conflict between these two rights when there is a demand for access to personal information of any third person, held by government authorities/ bodies, by any applicant/ citizen under the Right to Information Act, 2005. The relationship between right to privacy and right to information is currently considered the important subject of debate around the whole of India as well as the entire world. The public authorities are the custodians of numerous non-public records/ personal belongings of various citizens, such as the income-tax returns, clinical records, biometric facts, educational qualification, criminal records, bank loans, credits and so forth. If such records are made subject to RTI, it is an invasion with respect to the privacy of an individual. On the other hand, the aim of the right to information is to ensure that no one puts on a facade of safety or privacy with the intention to protect himself against the disclosure of data which can be mandated through RTI. Under Article 8 (1) (j), if the Public Information Officer is satisfied that the disclosure of information is in public interest, he can supply the personal data/ information to the applicant. Here, the general public interest surges in advance of the right to privacy of the individual. Thus, there is a likely paradox among these rights. Many efforts have been made to harmonize these provisions and it has met with a fair amount of success.

**Objective of Study-** The objectives/ aims of this research paper is to analyze the scope/ horizon of the Right to Information Seeker and Right to Privacy of Third Party under RTI Act, 2005.

**Scope / Limitations/ Universe of the study-** This research paper will cover the right to information and the right to privacy of a third party under Right to Information Act, 2005.

**Method of Study-** This paper adopts the Doctrinal Method and for this purpose, various statutes, books, journals, commentaries, reports, magazines, newspapers, websites etc. have been consulted and referred, where needed. In preparing this paper, analytical, critical, historical, evaluative and socio-legal approaches are also applied to examine the existing education policies, laws and their effects. The actions of governments/ enforcement agencies are also examined.

**Importance/ Significance of the Study-** Through this research paper, we will be able to decide the scope/ sphere of the right to information and right to privacy of the people in India. So that the dispute between the two will be reduced.

**Keywords-** Right to Information, Right to Privacy, Personal Information, Public Interest, India.

The relevant sections of the RTI Act, 2005, relating to the right to information of a information seeker/ applicant about third party and right to privacy of third party, which are protected, are: Sections 2 (n), Clauses of Section 8,<sup>7</sup> i.e., 8 (1) (d), 8 (1) (e), 8 (1) (g), 8 (1) (h), 8 (1) (j), 9 and 11. Firstly, it will be

<sup>6</sup> AIR 2017 SC 4161.

<sup>7</sup> Section 8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

- (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
- (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
- (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature; (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
- (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
- (f) information received in confidence from foreign Government;

pertinent to analyze all these sections to observe the scope/ horizon of the Right to Information Seeker and Right to Privacy.

Section 2 (n) defines the Third Party saying that “third party” means a person other than the citizen making a request for information and includes a public authority. It means a third party has to be someone apart from the applicant and the Public authority, from whom the information is sought. However, another public authority, from whom the information is sought, would also be considered as a third party.

Section 8 (1) (d) says that there shall be no obligation to give any citizen,— “information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.” and Section 8 (1) (e) states that there shall be no obligation to give any citizen,— “information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.” According to both clauses, i.e., Clauses (d) & (e) of Sub-section 1 of the Section 8, if disclosure of information is outweighed in larger public interest, in the comparison of harm or injury to the protected interest of third party, the information shall be provided to the applicant. Discussion about larger public interest has been made further in this paper.

**Fiduciary Relationship-** The phrase ‘fiduciary relationship’ is used in Clause (e) of Sub-section (1) of Section 8. Fiduciary relationship means one party having confidence in the other party with regards to his affairs, business, transactions etc. In the case of *Central Board of Sec. Education & Ors. v. Aditya Bandopadhyay & Ors.*,<sup>8</sup> which was decided by the Supreme Court on 9 August, 2011, the issue was whether a student’s right to information under the RTI Act involves the right to request and evaluate his answer sheets and take certified copies with him? The Central Board of Secondary Education stated that the information existed as a fiduciary relationship and hence, came under the exemption of Section 8 (1) (e) of the RTI Act. The Court held that ‘Fiduciary Relation’ means one party having confidence in the other party with regards to his affairs, business, transactions etc. An examining body/ Board cannot be in a fiduciary relationship with reference to students who take the exam. Therefore, there existed no exemption under the Section, and answer books had to be provided to the student.

Section 8 (1) (g) pronounces that there shall be no obligation to give any citizen, — “information, the disclosure of which would endanger the life or physical safety of any person or identify the source of

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- (g) information, the disclosure of which would endanger the life or physical safety of any person or identify' the source of information or assistance given in confidence for law enforcement or security purposes;
  - (h) information which would impede the process of investigation or apprehension or prosecution of offenders;
  - (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:  
Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:  
Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;
  - (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:  
Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.
- (2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.
- (3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:  
Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

<sup>8</sup> <https://indiankanoon.org/doc/1519371/>, Retrieved on 07/03/2022.

information or assistance given in confidence for law enforcement or security purposes.” and Section 8 (1) (h) declares that there shall be no obligation to give any citizen, — “information which would impede the process of investigation or apprehension or prosecution of offenders.” Both clauses, i.e., Clauses (g) & (h) of Sub-section (1) of the Section 8 are self explanatory.

Section 8 (1) (j) laid down that, there shall be no obligation to give any citizen,— “information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.” It means, if i) any personal information of a third person/ party which has no relationship to any public activity or interest, or ii) the information, which would cause unwarranted invasion of the privacy of the individual; there is no obligation upon Public Information Officer (hereinafter referred to as the PIO) to provide the information to any citizen/ applicant.

Now it is necessary to know the meaning of some of the phrases, which are used in Section 8 (1) (j).

- i) There is no obligation- The phrase ‘there is no obligation’, which is used at the very beginning of the Section 8 (1), means the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, has no obligation to provide information if he has to determine that the information is exempted, i.e., if the information has to meet two condition, firstly- information is personal information or information would cause unwarranted invasion of the privacy of third party, and secondly, the concerned PIO/ appellate authority is satisfied that information disclosure is not in the larger public interest. But, if Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information, i.e., personal information or information would cause unwarranted invasion of the privacy of the individual, then the Officer/ Authority is bound to provide information.

Here, the conclusion is that if the information is protected, i.e., information is personal information or information would cause unwarranted invasion of the privacy of third party, and the PIO/ appellate authority is satisfied that information disclosure is not in the larger public interest, then PIO has no obligation to provide information. It means in this situation PIO has no obligation according to the text of Section 8 (1), but what, in this situation, does PIO get the discretionary power to closure or disclosure of the information? Here, this one question remains unanswered. And if, the PIO has the discretionary power to closure or disclosure of the information, in this situation, then, here the responsibility cones on him to establish a balance between right to information and right to privacy.

- ii) Personal Information- In common language we would ascribe the adjective 'personal' to an attribute which applies to an individual and not to an institution or a corporate, it means 'personal' cannot be related to institutions, organizations or corporate.<sup>9</sup> Hence, Section 8 (1) (j) cannot be applied when the information concerns institutions, organisations or corporate. In the case of *Girish Ramchandra Deshpande v. Central Information Commr. & Ors.*,<sup>10</sup> which was decided by the Supreme Court on 3 October, 2012, the fact were that the petitioner requested copies of all memos, show cause notices, details of investments, credit & loans from banks, details of gifts received at the marriage of son, penalizations etc. of a third party, i.e., a public officer, from his employer. The issue was whether the information sought comes under the

<sup>9</sup> Arvind Kejriwal v. Central Public Information decided on 30 July, 2010, by Delhi Court, <https://indiankanoon.org/doc/81824586/>, Retrieved on 16/03/2022.

<sup>10</sup> <https://indiankanoon.org/doc/160205361/>, Retrieved on 08/03/2022.

criteria of 'personal information' as stipulated in Section 8(1) (j)? The Court held that all the details sought by the petitioner came under the ambit of the 'personal information' of the said Section. The view of the Court was that the acts and performance of an employee in an organisation (between him and his employer) are under the phrase 'personal information'.

- iii) Public Activity or Interest- The phrase 'public activity' or 'interest' means that the information must have been given in the course of a public activity. Various public authorities, in performing their functions, routinely ask for 'personal' information from citizens, and this is clearly a public activity. When a person applies for a job, or gives information about himself to a public authority as an employee, or asks for a permission, license or authorization or passport, all these are public activities. Also when a citizen provides information in discharge of a statutory obligation this too is a public activity. Where the State routinely obtains information from citizens, this information is in relation to a public activity.<sup>11</sup>
- iv) Larger public interest<sup>12</sup> - There is no clear definition to the 'larger public interest'. In the case of *Ms. Pinki Ganerwal v. Union Public Service Commission*, which was decided by the Central Information Commission on 7 June, 2010,<sup>13</sup> information was sought by the petitioner about the selection list of eleven Deputy Directors of Mines Safety by the Service Commission. The information was released with the seniority-cum-merit list but the personal information, such as, year of graduating, institution, caste, and date of birth of the selected candidates, was rejected on the grounds of 'personal information'. The Court held that the Selection/ Service Commission had committed an error in ordering to not provide the information as requested. It held that the information sought is necessary for the larger public interest. The Court directed that information regarding the year of graduation, institution, caste, and date of birth can be released in the greater public interest as the benefits outweigh the harms.

Now we can observe that a son or daughter naturally inherits his/her father's wealth, land or other possessions; they do not obtain information of his parents, if information is 'personal information' unless the public information officer sees a 'larger public interest' in disclosure of such information. Similar holds true for access to information of a deceased kin, it cannot be revealed even to the deceased's wife, husband or children.

This brings us to the question of 'larger public interest'. While the RTI Act, 2005, clearly states that the appellant needs not a reason to ask for any information. It is largely based on the public information officer's inference as to what the appellant may do or not with the data and hence, may be deemed as acting in public interest or for personal gains. This also produces positions of potential criminality.

- v) Privacy- The concept of privacy is incorporated in Section 8(1) (j) of the RTI Act. This provision would be a defense available to a person about whom information is being sought. Such defense could be taken by a third party in a proceeding under Section 11(1) when upon being issued notice such third party might want to resist disclosure on the grounds of privacy. This is a valuable right of a third party that encapsulates the principle of natural justice inasmuch as the statute mandates that there cannot be a disclosure of information pertaining to or which 'relates' to such third party without affording such third party an opportunity of being heard on whether such disclosure should be ordered. This is a procedural safeguard that has

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<sup>11</sup> Supra Note 8.

<sup>12</sup> This phrase used in Clauses (d), (e) and (j) of Section 8 (1) of the RTI Act, 2005.

<sup>13</sup> <https://indiankanoon.org/doc/1091976/>, Retrieved on 10/03/2022.

been inserted in the RTI Act to balance the rights of privacy and the public interest involved in disclosure of such information.

Privacy is a fundamental right, essential to autonomy and the protection of human dignity. But there is no clear definition to the 'invasion of privacy'. Privacy enables people to create barriers to protect themselves from unwarranted interference in their lives. Under the Right to Privacy we establish boundaries to limit who has access to our bodies, places, things, our communications and information etc. Privacy is an essential way by which we seek to protect ourselves from unnecessary interference of the other person or Government.

Here, it is also pertinent to mention data protection/ privacy and it, generally, means the ability of a person to determine for themselves when, how, and to what extent personal information about them is shared with or communicated to others. This personal information can be one's name, location, contact information, or online or real-world behavior. Just as someone may wish to exclude people from a private conversation, many online users want to control or prevent certain types of personal data collection.<sup>14</sup> According to the Personal Data Protection Bill, 2019, "data" includes a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by humans or by automated means.<sup>15</sup> Till now, the data of individuals in India is governed by the Information Technology Act, 2000. In the case of *Arvind Kejriwal v. Central Public Information*, decided on 30 July, 2010, by Delhi Court, the court said that "Certain human rights such as liberty, freedom of expression or right to life are universal and therefore would apply uniformly to all human beings worldwide. However, the concept of 'privacy' is a cultural notion, related to social norms, and different societies would look at these differently. Therefore, referring to the UK Data Protection Act or the laws of other countries to define 'privacy' cannot be considered a valid exercise to constrain the citizen's fundamental right to information in India."<sup>16</sup>

It means Citizens' right to information is given priority with regard to privacy. The Apex Court in a landmark judgment delivered in *U.O.I. v. Association for Democratic Reforms and another*<sup>17</sup> has held that a voter has a fundamental right under Art. 19(1) (a) of the Constitution to know the antecedents of a candidate, i.e., citizens have a right to know about charges against candidates for elections as well as details of their assets, since they desire to offer themselves for public service. It is obvious then that those who are public servants cannot claim exemption from disclosure of charges against them or details of their assets. Given our dismal record of mis-governance and rampant corruption which colludes to deny citizens their essential rights and dignity, it is in the fitness of things that the citizen's right to information is given greater primacy with regard to privacy.

In *Shri Rajender Kumar Arya v. Dy. Commissioner of Police (DCP)*,<sup>18</sup> Central Information Commissioner (the hereinafter referred to as the CIC) ruled that they now have the decision of the Madras High Court in the context of right to privacy in light of the RTI Act. The Madras High Court observed that even personal information or information, which may otherwise amount to an invasion of privacy, may also be disclosed if the larger public interest so warrants. The court in fact came to the

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<sup>14</sup> Cloud flare, What is data privacy?, <https://www.cloudflare.com/en-in/learning/privacy/what-is-data-privacy/>

<sup>15</sup> Section 3 (11).

<sup>16</sup> Supra Note 8.

<sup>17</sup> AIR 2002 SC 2112

<sup>18</sup> Decided by CIC on 4<sup>th</sup> March, 2009, <https://indiankanoon.org/doc/150597101/>, Retrieved on 13/03/2022.

conclusion that the right to privacy virtually fades out in front of the 'Right to Information' and 'larger public interest'.<sup>19</sup>

Information submitted to public authorities at any point in time, such as, to get admission in school, to get a license, to sit in a public services examination or even file a divorce; all qualify for access to other people because they have been knowingly submitted to the public domain. A lot of sensitive information like passport details, telephone call records and medical records that can map intimate interactions of a person's daily life can also be obtained if larger public interest is proven if all these are submitted in public domain knowingly.<sup>20</sup>

Hence, it becomes important to revise and rethink the commonly accepted notions of privacy, when information gains through RTI.

Section 9 laid down that any information, whose copyright is not held by the state, cannot be provided by it under any circumstances. This exemption is not a qualified exemption, but rather an absolute one. It is primarily intended to prevent misuse of the RTI Act by the Governmental agencies, especially in matters of infringement of copyright and the like.

Section 11(1) of the RTI Act<sup>21</sup> provides the Procedure of disclosing information of third party, where the PIO intends to disclose to an applicant any information which relates to or has been supplied by a third party and has been treated as confidential by that third party. The PIO cannot disclose such information unless the procedure prescribed in Section 11 is completed. Is it a statutory requirement, non-compliance of which may make the PIO liable to action.<sup>22</sup> If any information sought by the applicant about the third party, the PIO shall follow the procedure of serving a notice to the third party for seeking objections whether such information shall be disclosed or not. On receipt of the submissions of the third party, the PIO shall keep the submissions in view and then decide whether the information sought shall be disclosed or not. If the PIO does not find any merit in the submissions of the third party, he shall disclose the information sought to the applicant. On the other hand, where the PIO decides that the information sought shall not be disclosed then the basis for denial of information must be in

<sup>19</sup><https://indiankanoon.org/docfragment/150597101/?big=3&formInput=%22public%20authority%22%20%20%20doctype:%20cic>, Retrieved on 16/03/2022.

<sup>20</sup> As upheld in, which was decided by the CIC on 4 February 2009, *M. Rajamannar v. PIO, AC Division, Indira Gandhi National Open University*, which was decided by the CIC on 18 February 2009 and *A.V.Subrahmanyam v. BSNL, Hyderabad* which was decided by the CIC on 16 February 2009, <https://indiankanoon.org/doc/1835611/>, <https://indiankanoon.org/doc/1312655/>, <https://indiankanoon.org/doc/822207/>, respectively, Retrieved on 20/03/2022.

<sup>21</sup> Section 11. Third party information.—(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section b, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal under section 19 against the decision.

<sup>22</sup> *Reliance Industries Ltd. v. Gujarat State Information*, AIR 2007 Guj. 203.

accordance with Sections 8 and 9 of the RTI Act only. However (except in the case of trade or commercial secrets protected by law) even where the PIO is of the view that there is possible harm or injury to the interests of the third party, but public interest in disclosure outweighs in importance any such harm or injury, he may disclose the information.<sup>23</sup> Section 11 does not give the third party a right of veto in giving information, i.e., Section 11 does not give a third party an unrestrained veto to refuse disclosing information. It only gives the third party an opportunity to voice its objections to disclosing information. The PIO will keep these in mind and denial of information can only be on the basis of exemption under Section 8 (1) of the RTI act.

If the PIO wants to follow the procedure of Section 11 when he intends to disclose any information or record of a third party, it means that the PIO has come to the conclusion that the information is not exempted as per the provisions of Sections 8 (1) of the RTI Act. When the PIO puts in motion the third party reference, he is of a view that the information is not exempted, and is giving the chance to the third party to voice any objections which could be based on the exemptions under the Act. Only if the third party's objection is in line with one of the exemptions under Section 8 (1) or Section 9, the PIO will again examine the issue. If he is convinced that an exemption applies, he must change his earlier position to disclose. It must be stressed that the issue of a larger public interest needs to be invoked only if the exemption is established. Otherwise, no public interest in disclosure needs to be established. It is also evident that if there is no response from the third party, the information has to be disclosed since the PIO has come to the conclusion that the information is not exempt.

As per Section 11 (3),<sup>24</sup> the PIO has to determine whether the information is exempted or not and inform the applicant as well as third party of his decision. If the applicant and third party,<sup>25</sup> as the case may be, wish to appeal against the decision of the PIO, he can file an appeal under Section 19 of the RTI Act.

The test of public interest is to be applied to give information, only if any of the exemptions of Section 8 apply. Even if the exemptions apply, the Act enjoins that if there is a larger Public interest, the information would still have to be given. There is no requirement in the Act of establishing any public interest for information to be obtained by the sovereign Citizen; nor is there any requirement to establish larger Public interest, unless an exemption is held to be valid. The RTI Act, 2005, clearly states that the appellant needs not a reason to ask for any information, it is largely based on the public information officer's inference as to what the appellant may do with the data and hence, may be deemed as acting in public interest or for personal gains. This also produces positions of potential criminality and the need for State subjects to prove themselves as ideal information seekers, void of malice in order for the public information officer to rule in their favour. However, it is not the information bearer (third party) who holds the key to disclosure. The power, by the RTI Act, 2005, is vested in the public information officer who will then, either see a 'larger public interest', or otherwise allow disclosure based on the merits of the case.

Credentials of the Applicant- According to Section 6 (2), An applicant making a request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him. Therefore, we can say that, insofar as looking at the credentials of the applicant are concerned, the lawmaker has categorically stated that no information shall be supplied by the applicant except those that may be necessary for contacting him. So, it is clear that the credentials of the applicant are of no relevance, and are not to be taken into account at all when giving the information. It is not important who accesses it, i.e., information. The Citizen needs to give no reasons nor are his credentials to be checked for giving the information. If the third party objects to

<sup>23</sup> Proviso of Section 11 (1) of Right to Information Act, 2005.

<sup>24</sup> Right to Information Act, 2005.

<sup>25</sup> Third party can file an appeal under Section 19 of the Act. as per the provision of Section 11 (4).

giving the information, the Public Information Officer must take his objections and see if any of the exemption clauses of Section 8 (1) apply. If any of the exemption clauses apply, the PIO is then obliged to see if there is a larger Public interest in disclosure. If none of the exemption clauses apply, information has to be given.

### **Conclusion**

Right to privacy and right to information both are recognized as fundamental rights in India and are interpreted in a way that provides protection to the citizens of India. The controversy, between both rights, has evolved in the era of technological advancements. Till now personal information/ data of the citizen, are governed/ protected by Article 21 of the Constitution and the Information Technology Act, 2000 and right to information by RTI ACT, 2005. The horizons of both rights need to be clear-cut, because a lot of disputes have been rising and pending before the courts about them. There is no clear definition to the 'larger public interest' or 'privacy' under RTI Act or anywhere. Deciding whether there is any information in public interest or not, is entirely at the discretion of the PIO. If the information is protected, i.e., information is personal information or information would cause unwarranted invasion of the privacy of third party, and the PIO is satisfied that information disclosure is not in the larger public interest, then PIO has no obligation to provide information, but what, in this situation, does PIO get the discretionary power to closure or disclosure of the information? Here, this one question remains unanswered. And if, the PIO has the discretionary power to closure or disclosure of the information, in this situation, then, the responsibility comes on him to establish a balance between right to information and right to privacy. It becomes also important to revise and rethink the commonly accepted notions of privacy, when information gains through RTI. Further, a son or daughter naturally inherits his/her father's wealth, land or other possessions; they do not obtain information of his parents, if information is 'personal information' unless the public information officer sees a 'larger public interest' in disclosure of such information. Similar holds true for access to information of a deceased kin, it cannot be revealed even to the deceased's wife, husband or children. Next, personal information knowingly submitted to public authorities at any point in time, such as, for admission in any institution, to get a license, to sit in a public services examination, medical records etc; all qualify for access to other people, even if they are sensitive. All these facts have laid down the need for a separate law in regards to personal data protection as well as amendments in the RTI Act. However, the Data Protection Bill remains which has not yet taken the form of a law.

### **Suggestions**

1. The RTI Act should be amended to empower the successor to obtain the personal information of their ancestors without any condition.
2. It should be implemented by making a separate law at the earliest to protect the personal data of citizens, which is sensitive for the citizens.



# NEGATING THE FREEDOM TO REFUSE SEXUAL INTERCOURSE: ANALYSING THE INDIAN LEGAL LANDSCAPE ON MARITAL RAPE

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## Abstract

*“Never force yourself on another. If you do this, then this is you trampling on your own dignity without the external help”*

*-Omoakhuana Anthonia<sup>1</sup>*

*Marriage is considered as a sacramental union between spouses. The institution meant for love, compassion and support is becoming entangled in violence. It is ironical that woman who is considered the creator of mankind is exploited the most. The crimes within the turf of the institution of marriage get enmeshed with the family pressure, cultural beliefs and societal pressure. Marriage is usually adjudged from the prism of sexual relations. Indisputably, sex holds significance in successful married life. But it must be consensual sex. The means to attain the end of deriving sexual pleasure cannot be forceful. This results in tagging the relationship of marriage as something solely revolving around the idea of sex without being mindful of the feelings of other spouse. The sanctified institution of marriage is venerated so much so that the rights of women have been cut dead. The glorification of culture has brushed the autonomy of women under the carpet. The ghastly act has its origins due to the stereotypical nature of society which assign gender roles to each person affixing the values of primacy and supremacy to men further downgrading women. The remedies presently available consider a serious act of rape as an abuse or cruelty. Undoubtedly, rape is a cruel and abusive act. But not labelling the act as rape due to the intimate relationship existing between the spouses underplays the impact caused by it upon the victim-wife. So, it can be concurred that marital rape must be criminalised. The Article aims at drawing attention towards the existing legal framework with regard to marital rape.*

**Keywords:** *Marriage, cruelty, sexual abuse, victim-wife, sexual intercourse, marital rape, consent.*

## Introduction

Manu Smriti provides women must be honoured by their husbands, fathers, brothers, brothers-in-law. It places women in a great position of respect. It attaches great importance to women providing if women are respected, God get pleased and if a female isn't happy, the family will not stay happy or prosper.<sup>2</sup>

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<sup>1</sup> Kenyan author, poet.

<sup>2</sup> Available at: [https://ia801301.us.archive.org/23/items/ManuSmriti\\_201601/Manu-Smriti.pdf](https://ia801301.us.archive.org/23/items/ManuSmriti_201601/Manu-Smriti.pdf) Para 3.55-3.57 (Last visited on Jan 23, 2021).

However, the instances of marital rape show that wives are not living their life with dignity. Adequate law is absent on marital rape which leads to degradation of the status of women. The doctrine of Hale<sup>3</sup> was followed in the common law of England.

Concerning the Indian position, it must be noted that Lord Macaulay codified IPC and it is said that the IPC reflects the outlook of Victorians in sexual offences.<sup>4</sup> Earlier clause 359 of the Draft Penal code provided complete exemption to husband in the offence of rape. The Select committee provided an exception to it by providing that the wife should be above 10 years.<sup>5</sup> Presently, exemption exists by virtue of Section 375 Exception 2 IPC. The marital rape exception clause derogates from the various provisions of Constitution. It goes against Articles 14, 15(3), (19)(1)(a), 21. Thus, it must be declared null and void. Justice Verma Committee report is the pivotal one where the issue of marital rape garnered attention or provoked thought amongst the legal luminaries. The Government's stand against the criminalisation reflects disinclination to bring change in law. There is a need to punish rape without reading the word 'marriage' with it.

### Significance of the Study

The present study is pertinent in bringing awareness of the various legal provisions to deal with marital rape. The study assesses the laws or remedies presently available to victim-wife. The importance of the study lies in bringing awareness of the issue of marital rape and making a call for to uphold the dignity of wives.

### Objectives of the Study

- To analyse the legislative framework of India with reference to marital rape
- To comprehensively evaluate the various provisions and assess the lacunae.
- To consider the marital rape exemption from the Constitutional lens.
- To provide suggestions and conclusions to address the problem of women in the context of marital rape

### Research Methodology

The present study employs doctrinal method of research. The primary and secondary sources are used for the completion of the study. The legislative and Constitutional provisions, various reports of law commission, case laws form part of the primary sources for the study. The secondary sources include books, articles, newspapers and websites.

### The Indian Penal Code, 1860<sup>6</sup>

#### ***Section 354 IPC: Assault or criminal force to woman with intent to outrage her modesty***

<sup>3</sup> Sir Matthew Hale proclaimed "[b]ut the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract".

<sup>4</sup> Deborah Kim, "Marital rape immunity in India: historical anomaly or cultural defence?" 69 *Crime, Law and Social Change* 94 (2018).

<sup>5</sup> K.I. Vibhute, "'Rape' and the Indian Penal Code at the crossroads of the new millennium: Between Patriarchist and Gender Neutralist Approach", 43(1) *Journal of the Indian Law Institute* 27 (Jan-Mar 2001).

<sup>6</sup> The Indian Penal Code, 1860 (Act 45 of 1860).

It makes assault or use of criminal force to any woman with the intention to outrage her modesty punishable. Section 10 IPC provides 'woman' means female of any age. Modesty is ascribed to a female due to her sex. Anything indecent is considered as immodest. Punishment provided under Section 354 IPC is imprisonment of description for a term not less than one year. Punishment can extend to five years. The offence is punishable in addition to fine.

In *Nimeshbhai Bharatbhai Desai v. State of Gujarat*<sup>7</sup>, Court held that the usage of words "any woman" under Section 354 IPC indicates inclusion of wife also. Thus, the Court made certain observations when a husband can be held guilty under Section 354 IPC for 'outraging the modesty of wife'. Court said when the husband commits certain indecent acts expressing his love for her wife in the public in a way that such acts amount to unacceptable conduct to the wife and may not be even accepted by her in private, it will amount to outraging the modesty. Court held any sort of pervert conduct unacceptable to wife will make the husband guilty under this Section.

So, husband can be held liable under this Section where marital rape is committed as all the essentials get fulfilled.

### **Section 375 IPC: Rape**

This Section is gender-specific in nature. It provides four clauses falling within which act of rape is committed. Clause (a) provides penetration of penis into the vagina, mouth, urethra or anus of a woman or making her to do so with the man committing such act or any other person as rape. Clause (b) provides insertion of any object or body part other than penis into the vagina, urethra or anus as rape. Clause (c) and (d) provide for manipulation of any body part of woman to cause penetration and application of mouth to vagina, anus, urethra respectively as rape. This definition was widened after 2013 Amendment. Earlier, only the penile-vaginal forceful intercourse was taken into account. Thus, the amended Section is not limited to penile-vaginal penetration rather extended to all kinds of forceful penetration thereby amplifying the scope of Section. Further, the Section provides seven descriptions<sup>8</sup>.

Explanation 2 of this Section provides the meaning of consent. It makes usage of words "unequivocal voluntary agreement" which implies consent must be a clear and unambiguous one that cannot be disputed. Proviso appended to the Explanation lays that if physical resistance to the act is not offered, it would not imply consent has been given. However, by virtue of providing exception<sup>9</sup>, consent of wife has been completely ignored or excluded resulting into unjustness. The patriarchal belief exists that she need not be asked before engaging in sexual act owing to the tag of "wife" attached to her.

#### ➤ *Age of Consent under clause six*

Upon perusal of the descriptions, the sixth kind of description is relevant to our study. It provides consensual or non-consensual sex with a woman below eighteen years of age as rape.

<sup>7</sup> 2018 SCC OnLine Guj 732.

<sup>8</sup> Section 375 IPC provides the circumstances under which rape is said to be committed. It includes against will, without consent, consent obtained under fear of hurt or death to the victim or to anyone in whom she is interested, with consent when she gives consent believing that the person to whom she is consenting is the one with whom she is married lawfully, consent given when she is not aware of nature and consequences due to intoxication or unsoundness of mind, when she is under eighteen years of age, when she is not able to communicate consent.

<sup>9</sup> Section 375 IPC, Exception 2 lays "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

The words ‘to any extent’ signify even slightest penetration is sufficient to constitute an act of sexual intercourse.<sup>10</sup>

➤ *Analysis of the Exception 2 to Section 375 IPC*

Exception 2 provides when forceful sexual intercourse by a man with his wife is done in case she is above 15 years of age, it will not be termed as rape. This points to the fact that forceful sexual intercourse in no case be called rape despite the fulfilment of the requirements laid in the provision if it is a case between husband and wife where the wife is above 15 years of age. The only logic or reason behind the exemption to man in this case is the marital status thereby reinforcing the ‘gender and power dynamics’. So, the general rule of fulfilling clause sixth will not be applicable as the woman herein is wife.

However, in *Independent Thought v. Union of India*,<sup>11</sup> Section 375 Exception 2 was held unconstitutional with respect to wives aged between 15-18 years. The Court in this case refrained from commenting upon the issue of sex with wife above 18 years of age as this issue was not before the Court.<sup>12</sup> The Court even pointed out that the issue of sex with wife above 18 years should not be considered even incidentally in this judgment.

This case considered the anomalies with respect to the age of consent. POCSO, 2012<sup>13</sup> clearly provides regarding sexual intercourse with a female below 18 years as sexual assault. Thus, the judgment resolved the conflict in consonance to Articles 14, 15, 21 of Constitution and the provisions of POCSO, 2012.

➤ *Lacunae of Section 375 IPC*

- Gender-specific nature of the offence- The starting words “a man is said to commit rape” shows the perpetrator is always a man and victim always a woman. This excludes the victims like transgender community, men in case of homosexual sex or where woman is perpetrator. Also, Justice Verma Committee report recommended to alter the nature of rape law by making it gender inclusive in nature so far the victim is concerned.<sup>14</sup>
- Also, judgment has been passed making the sexual intercourse by man with wife aged between 15-18 years unconstitutional but no amendment has been done in the Section.
- Further, the existence of Exception is major drawback which gives validation to marital rape. The time is ripe for considering the issue of marital rape.

➤ *Summarising the legislative position under Section 375 IPC with respect to marital rape*

- *Wife below 15 years*

<sup>10</sup> *Wahid Khan v. State Of M.P.*, [2009] INSC 1766

<sup>11</sup> (2017) 10 SCC 800.

<sup>12</sup> T. Bhattacharya, *The Indian Penal Code 690* (Central Law Agency, Allahabad, 10th edn., 2019).

<sup>13</sup> The Protection of Children from Sexual offences Act, 2012 (Act 32 of 2012).

<sup>14</sup> Sumita B. Ade and M. B Jameel, “Gender equality: Constitutional mandate with reference to Justice Verma Committee Report on criminal law amendments”, 9(4) *The Lex-Warrior: Online Law Journal* 190 (April 2018), Available at: <http://www.lex-warrior.in/wp-content/uploads/2019/02/Gender-equality-Constitutional-mandate-with-reference-to-Justice-Verma-Committee-Report-on-criminal-law-amendments.pdf> (Last visited on Jan 14, 2021).

With respect to wife below 15 years, the position is explicitly clear as Exception 2 to Section 375 does not prevail where wife is aged below 15 years. The age for the application of exception is above 15 years. Clause six provides age of consent as 18 years. So, general rule will be applicable in this case and sexual intercourse in any case will amount to rape.

- *Wife between 15-18 years*

The Exception provides “*not being above 15 years*”. Therefore, as per legislative mandate, wife cannot prosecute her husband if she is aged above 15 years. The 2017 ruling<sup>15</sup> has altered the position and now it is considered rape.

- *Wife above 18 years*

Law does not take into consideration the sexual autonomy of wives above 18 years. The existence of exception explains this position well.

It can be observed that the Section distinguishes women on the basis of marriage and then the age. Distinction on the basis of marriage can be observed from the fact that if the female is unmarried, the case would fall under general rule. In such case, man does not enjoy immunity. Secondly, if she is married then further sub-division takes place on the basis of age by virtue of exception and then on the basis of requirement of ‘separation’ with respect to Section 376B. Thus, if she is below 15 years, immunity conferred upon husband is least.<sup>16</sup> If she is between 15-18 years, then the judgment will come forth to save wives between 15-18 years and where she is above 18 years, least protection to wife is offered by exempting husband from the charge of rape as the Exception would prevail subject to 2017 ruling.

### ***Section 376B of IPC: Sexual Intercourse by husband upon his wife during separation***

- The 42<sup>nd</sup> Commission report acknowledged that intercourse without consent by the husband upon his wife during separation is rape.<sup>17</sup>
- Earlier Section 376A IPC provided punishment up to two years in the rape cases of judicially separated wife.
- The 172<sup>nd</sup> Commission report also recommended retention of this provision. However, it recommended increase in the punishment.<sup>18</sup>
- By virtue of 2013 Amendment<sup>19</sup>, it is now provided under Section 376 B IPC.

<sup>15</sup> *Supra* note 11.

<sup>16</sup> Saptarshi Mandal, “The Impossibility of Marital Rape- Contestations around Marriage, Sex, Violence and the Law in Contemporary India”, 29(81) *Australian Feminist Studies* 258 (2014).

<sup>17</sup> Law Commission of India, “42<sup>nd</sup> Report on IPC” 277 Para 16.115 (June 1971), Available at: <https://lawcommissionofindia.nic.in/1-50/Report42.pdf> (Last visited on Jan 28, 2022).

<sup>18</sup> Law Commission of India, “172<sup>nd</sup> Report on Review of Rape Laws” 29 Para 3.3.1 (March 2000), Available at: [https://lawcommissionofindia.nic.in/old\\_reports/rpt172.pdf](https://lawcommissionofindia.nic.in/old_reports/rpt172.pdf) (Last visited on Jan 28, 2022).

<sup>19</sup> The Criminal Law (Amendment) Act, 2013 (Act 13 of 2013).

- Presently, the Section provides punishment of imprisonment of for two years; it may extend to seven years along with fine to husband who without the consent of wife while they are living separately under a separation decree or otherwise has sexual intercourse<sup>20</sup> with her.

In *Sreekumar v. Pearly Karun*,<sup>21</sup> a petition to quash the FIR was filed in Kerala HC by the husband and mother-in-law of the respondent filed against them. Earlier a divorce petition was filed by the husband against the wife. The dispute between them was settled. Therefore, they agreed to stay together. After that wife was taken to husband's place with the child and they stayed together for two days. Wife alleged sexual intercourse was performed against her will. She also alleged harassment for dowry against her mother in law and husband. She filed an FIR alleging offences under Section 376A, 498A read with Section 34 IPC. The Court held that case under Section 376A IPC is not made out as they were not living separately under the decree of separation or separation by virtue of custom or usage. So, charge under Section 498A read with Section 34 IPC on account of dowry allegations was retained.

Thus, the Court did not make observation on the issue of marital rape. It only made observation on the provision of sexual intercourse during judicial separation. The facts of the case show a case of marital rape. Since, it is not recognised as an offence, no comment was made regarding it. It must also be noted that the registration of FIR under Section 498A IPC was retained on the ground of dowry harassment. The fact of marital rape was not taken into account while retaining the registration of FIR under Section 498A. Rather only dowry harassment accounted for cruelty during that time.

➤ *Comparative Analysis of Punishments relating to the offence of Rape under IPC*

Section 376(1) IPC provides punishment for rape if the case does not fall under sub-section 2 which is rigorous imprisonment of either description for 10 years and which may extend to life imprisonment and it is punishable with fine. Section 376(2) (f) IPC provides if the perpetrator is 'relative', 'guardian' or 'teacher' or a person enjoying a "position of trust or authority" then the punishment is not less than 10 years but which may extend to life imprisonment and fine.

Also, clause (k) provides that where the perpetrator is in a position of control or dominance upon woman, the punishment shall be rigorous imprisonment for not less than 10 years but which may extend to life imprisonment and fine. Also, Section 376B IPC provides punishment for rape on a judicially separated wife by husband which shall be not less than 2 years. It may extend to 7 years and it is always punishable with fine. Section 376C IPC also provides that if sexual intercourse is performed by a person upon woman by abusing position of authority or fiduciary relationship then punishment shall be not less than five years and may extend to ten years along with fine.

Perusing the punishments, it could be witnessed that Section 376B IPC provides milder punishment as compared to other punishments relating to the offence of rape and no sound or logical reason could be found behind it. Also, it must be questioned that husband-wife also share relationship of trust and confidence as a couple i.e. their relationship also falls within the ambit of fiduciary relationship, then why she has been denied the protection by virtue of exception. On one hand, the justification of implied consent for the impunity to marital rape is offered because she is considered to be under the 'control' or

<sup>20</sup> Explanation to s.376B IPC provides sexual intercourse has the meaning according to s.375 (a)-(d) IPC.

<sup>21</sup> 1999 (2) ALT Cri 77: II (1999) DMC 174.

'dominion' of her husband implying husband need not ask her prior to the engagement of sexual relations with her due to the notion of considering it as her duty to submit to him. On the flip side, she is denied protection of law by disabling her to prosecute her husband when that 'dominion' or 'control' is abused. The reason seems the same i.e. private sphere of marriage cannot be interfered with. This calls for adopting a sound approach to redress the injustice and shield her from abusive husbands.

### ***Section 498A IPC: Cruelty to Woman***

It was added with an aim to protect wife from the harassment by her husband or his relatives. This Section is often resorted when it comes to marital rape. It can be resorted in case of rape of wife as an additional offence when the wife is aged below 18 years whereas when the wife is aged above 18 years, she can seek protection under this Section and DVA, 2005.

Rape is itself a form of grave cruelty inflicted upon women. But when the mandate of Section 375 IPC cannot be satisfied due to the age limit or the existence of Exception, Section 498A IPC is resorted. Section 498A IPC provides punishment to husband or his relative for inflicting cruelty upon woman. Explanation appended to this Section defines cruelty as any wilful conduct which can drive the woman to commit suicide or cause injury of grave nature or danger to life, limb or mental or physical health of woman or harassment with regard to demand for property. One of the reasons often given to counter the criminalisation is the punishment of cruelty which can be meted out to the husbands to redress the issue of marital rape coupled with the remedies under DVA, 2005.

#### **➤ *Analysis of Section 498A IPC***

The distinct provision for rape although being itself a kind or subset of cruelty indicates that the offence being a heinous one has to be distinctly specified and punished rigorously. Marital rape causes injury to the mental or physical health of woman. So, husband can be punished under this Section. However, it is not a reasonable relief because 'rape' is distinctly punishable where the perpetrator is stranger. Hence, it is necessary that criteria for making such distinction must be based upon some rationale and not upon any unreasonable considerations. Time calls for providing justice to adult wives.

## **1. Constitutionality of the marital rape exemption**

### ***(a) Preamble of the Indian Constitution***

The Preamble provides the aims and objectives which the legislation is intended to achieve. All legislations have a Preamble which acts as an introduction to the statute. Similarly, the Preamble of the Constitution provides the main idea of enacting the Constitution. The legislation so enacted has to be in the letter and spirit of Constitutional objectives. If any legislation goes against the spirit of the Constitution or any provision contained in the legislation does not align with the Constitutional principles, it must be struck out and declared null or void. Similarly, if any provision necessitates change, Amendment must be done following the Constitutional goals.

The Supreme Court in *Independent Thought v. Union of India*<sup>22</sup> while declaring that Exception 2 to Sec. 375 is unconstitutional as regards the child wives between 15 and 18 years held that the spirit of "social justice" embodied by the Preamble can only be safeguarded if the Exception is now read by excluding

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<sup>22</sup> (2017) 10 SCC 800.

wives between 15-18 years. Thus, the Court relied upon the Preamble as well while giving its interpretation.

Therefore, the marital rape exemption goes against the very spirit of Constitutional goals as it violates the main objectives enshrined in the Preamble.

### ***(b) Fundamental rights under the Constitution of India, 1950***

This head contains a reference to certain Fundamental Rights relevant to the study. It provides how the act of marital rape violates the Fundamental Rights embodied in the Constitution. It can be studied by drawing reference to Articles 13, 14, 15, 19 and 21 of the Constitution.

- *Article 13 of the Indian Constitution*

Article 13(1) provides that the laws inconsistent with the Fundamental Rights provided under Part III shall be void to the extent of the inconsistency which existed before the commencement of the Constitution. Clause (2) states that any law made by the State which is against the provisions of Part III shall be void.

This Article provides for the power of judicial review of all legislations. Article 32 provides power of judicial review to the Supreme Court and Article 226 confers such power upon High Court. In *Keshavananda Bharati v. State of Kerala*,<sup>23</sup> it was held that power of judicial review forms part of the basic structure of the Constitution.

The Court has the power to declare a law null and void in case infringement of Fundamental Rights is caused. Court has used the power to declare the Exception 2 to Section 375 under the IPC unconstitutional with respect to child wives between 15 to 18 years. Marital rape in case of adult wives also derogates from the various provisions of Constitution. It goes against Articles 14, 15(1), (19) (1) (a), 21. Thus, it must also be declared unconstitutional with respect to adult wives.

- *Article 14 of the Indian Constitution*

State shall provide to all persons equality before law and equal protection of law. The concept of 'equality before law' was borrowed from UK Constitution and the concept of 'equal protection of law' was borrowed from US Constitution. 'Equality before Law' is a negative concept. It implies non-granting of any special privilege to individuals and subjecting all classes equally to law. 'Equal Protection of Law' is a concept of positive nature which implies treating equally in equal circumstances.<sup>24</sup>

Reasonable Classification must exist under Article 14 of the Indian Constitution. Two conditions are required to be fulfilled<sup>25</sup>:

- 1) It must be based on intelligible differentia which creates distinction between the ones outside group and the ones inside group.
- 2) There must be existence of rational nexus with the object so intended.

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<sup>23</sup> AIR 1973 SC 1461.

<sup>24</sup> JN Pandey, *Constitutional Law of India* 77 (Central Law Agency, Allahabad, 52<sup>nd</sup> edn., 2015).

<sup>25</sup> *Id.* at 82-83.

Article 14 is applicable to 'any person'. This includes both citizens and non-citizens. It is equally applicable to natural and legal persons. Any person includes company, association or body of persons in its ambit.<sup>26</sup> The Court in *NALSA v. UOI*<sup>27</sup> viewed that equality includes complete enjoyment of all rights and freedoms. The concept of equality forms the fundamental base of the Constitution. Article 14 obligates the State to make requisite changes in economic and social policies. Article 14 does not confine the word person to male or female. Transgender people too fall within this expression. The Court in this case gave a wider meaning of the word 'person'. The Court in this case held discrimination on the ground of gender identity is antithesis to the right to equality.

The question here arises that whether wives cease to fall under the expression 'person' as they have been denied the protection from marital rape thus violating the principle of equality.

#### *Analysing Exception 2 of Sec. 375 IPC in the light of Article 14 under the Indian Constitution*

The significant ruling of 2017<sup>28</sup> pertaining to Exception 2 to Sec. 375 was passed keeping in mind the constitutional safeguards. But when it comes to the case of marital rape when the wife is above 18 years, the exception prevails. There is no reasonable nexus as to the existence of such distinction. The question arises whether this grave act should not actually be considered an offence. No intelligible differentia exists for creating distinction due to marital status. The intent of the framers of Constitution should be respected and every law against the principles of Constitution should be immediately discarded or at least amended in the light and spirit of Constitution. Thus, the position can be summed up as:

- No intelligible differentia exists for bringing distinction between married woman and unmarried victim to protect from the grave offence of rape.
  - The purpose of the Article is to bring equality. But the distinction so made creates and deepens the roots of inequality portraying women as weaker sex in comparison to men.
  - Also, the distinction as to 'separated' women who are entitled to prosecute husband under Sec. 376B is unjust. Every woman irrespective of marital status and separation is entitled to be treated equally. Thus, the offence must be punished under Section 375 IPC itself without creating any classification as to marital status or the separation status. This would help in achieving the principle of equality. There is no valid reason for imposition of lesser punishment by compartmentalising the offence of rape by husband during judicial separation into distinct offence.
- *Article 15 of the Indian Constitution*

#### *Article 15(1)*

Article 15(1) prohibits state from discriminating on grounds of religion, race, caste, sex, place of birth or any of them. This Article applies to only citizens. Art. 15(2) prohibits discrimination on the same grounds mentioned in clause (1) with respect to access to hotels, shops etc. and other places of public

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<sup>26</sup> *Id.* at 79.

<sup>27</sup> AIR 2014 SC 1863.

<sup>28</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

entertainment. Also, no restriction can be attached with respect to access to bathing ghats, wells, public resort etc. This clause prohibits state and citizens both from making such discrimination.<sup>29</sup>

The ground of 'sex' in the Article clearly indicates that gender discrimination is against the Constitutional principles. The marital rape exception is based on the presumption of implied consent on the part of wife. This subjugates her status as a woman. Hence, the exception is clearly an infringement of Article 15(1). The discrimination on the basis of sex because of marital status violates the principle of gender equality and invites discrimination. Therefore, the rape exception does not show any reasonable classification for creating discrimination as to marital rape victims.

#### *Article 15(3) Special provisions for women and children*

Article 15(3) acts as an exception to the above stated clauses as it allows the State to make special provisions with regard to women and children. Discussion of Article 15(3) is necessary in the light of marital rape as it shows that women need special protection. Provision of special exception recognizes that women are treated indifferently as compared to men. On one hand, the Constitution makers felt the need to provide special exceptions for uplifting the degrading status of women; on the contrary the exception in IPC provides inferior position to women. This requires that the exemption provided to men on the ground of marriage be not granted. The law should aid women in the best possible way as women hardly speak up especially when it is about an abuse caused in the relationship of marriage. If certain exceptions can be made in other laws to safeguard the status of women, then IPC in consonance with Constitutional provisions must introduce the much needed change by doing away with the immunity granted to husband with respect to rape of wife. The spirit and object of creation of this clause in the Article must be kept in mind while framing legislations which are likely to affect women.

- *Article 19(1) (a) of the Indian Constitution*

This Article gives freedom of speech and expression. It is applicable to all citizens. Woman has the right to express her opinion freely as to when she is willing to engage in sexual relations. Robbing her of this right to express trenches on the domain of her freedom of speech and expression. The right to express "no" cannot be encroached upon. Else, it results in intrusion with her integrity.

- *Article 21 of the Indian Constitution*

It provides protection to life and personal liberty. It is applicable to all persons i.e. citizens and non-citizens. The only way by which protection can be denied is the procedure established by law.

In *State of Punjab v. Gurmit Singh & Ors*,<sup>30</sup> the Court observed while dealing with rape case that on one hand, rights of women are celebrated and on the other hand, there is utter disregard on the part of society when it comes to the honour of women. Rape does not only involve physical abuse but affects her psychologically and hampers her personality completely. A rapist causes intense harm to not only her person but her personal integrity.

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<sup>29</sup> The Constitution of India, 1950, art.15.

<sup>30</sup> 1996 SCC (2) 384.

In *K.S. Puttaswamy v. UOI*<sup>31</sup> the right to privacy as a fundamental right was recognized. It was observed that privacy permits individual autonomy where the people are able to make choices freely and control their person. The Court identified three distinct features surrounding the right to privacy which include “*privacy of choice, informational privacy, and intrusion with individual’s physical body*”.

Also, right to health has been regarded as a fundamental right in various judgments. Marital rape leads to a violation of the right to health. In addition to the psychological trauma that can lead to anxiety, shock, intense fear, depression, suicidal ideas, and post-traumatic stress, marital rape can have consequences such as miscarriages.<sup>32</sup>

In *Joseph Shine v. Union of India*,<sup>33</sup> the Court while deciding upon the constitutionality of Section 497 IPC observed that it cannot be expected that a woman must think according to the wishes of the society or man. It reiterated that woman must be treated equally and at par with man. The Court said husband is not the master of wife. Thus, if she is treated unequally, it goes against the realms of Constitution. The Court mentioned that legal subordination of one sex to another is not acceptable and the development of society is affected. The position must not be in such a way that power should be held at one side and disability on the other side as contemplated by John Stuart Mill. It was viewed that the offence of adultery dated back to the time when woman was considered the property of husband and offence of adultery was considered as an injury caused to the husband or theft of his property.

Therefore, the Court in this case recognized the right of women to be treated independent of men. The provision of adultery was declared unconstitutional as it violated Articles 14, 15 and 21 of the Constitution. Court’s observation that husband is not the master of wife is relevant enough for considering the issue of criminalisation of marital rape in case of adult wife as the subordination of wife is the major reason for acceptance and normalisation of rape in marriage.

### ***(c) Directive Principles of the State Policy***<sup>34</sup>

Article 38(1) provides that a social order must be attained where justice runs as a thread in all the institutions of national life. It talks about social, economic and political justice aimed at achieving welfare of people. This requires that law should be enacted to dispense the justice to women by saving them from the degrading and dehumanizing act of marital rape.

### ***(d) Fundamental Duties***<sup>35</sup>

Article 51A (e) provides that every citizen of India must renounce or abandon the practices derogatory to women. In the light and spirit of this Article, it can be said that marital rape being a practice against the dignity of women must be forgone.

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<sup>31</sup> (2017) 10 SCC 1.

<sup>32</sup> Melanie Randall and Vasanthi Venkatesh “The Right to No: The Crime of Marital Rape, Women’s Human Rights, and International Law”, 41(1) *Brooklyn Journal of International Law* 194 (2015).

<sup>33</sup> (2019) 3 SCC 39, AIR 2018 SC 4898.

<sup>34</sup> The Constitution of India, 1950, Part IV

<sup>35</sup> The Constitution of India, 1950, Part IV-A. This Part was added by 42<sup>nd</sup> Amendment, 1976.

## The Protection of Women from Domestic Violence Act, 2005<sup>36</sup>

The Act acts as a substitute when there is no specific provision for the offence of marital rape. The Preamble sets out the objective the Act seeks to achieve- to protect and safeguard the rights of women provided under the Constitution who suffer or undergo violence of any sort within the family and other incidental matters.

Domestic violence means any act, commission or omission or conduct of the respondent which causes harm, injury or endangers the safety, health, life, limb or mental or physical well-being. It includes physical, sexual, emotional, economic and verbal abuse.<sup>37</sup> The definition of sexual abuse is inclusive in nature. It includes any conduct which is sexual in nature and abuses, causes humiliation, degradation or violation of dignity of woman.<sup>38</sup> This Act is civil in nature. When it comes to abuse of any kind, certain reliefs are provided in this Act. The aggrieved woman can at most obtain protection orders<sup>39</sup>, monetary reliefs<sup>40</sup>, residence orders<sup>41</sup>, custody orders<sup>42</sup> and compensation orders<sup>43</sup>.

### ➤ *Analysis of the remedy under DVA, 2005.*

Thus, a woman under DVA, 2005 can get separated from her husband when he commits sexual assault upon her. However, this remedy has not proved effective when it comes to marital rape. Hardly any woman comes forth to report the sexual abuse inflicted upon her because they are hesitant enough when it comes to rape by her own husband due to the traditional notion of confining marriage related matters within the four walls of room. In such cases, question arises whether the criminal law is serving its purpose of punishing offenders.

Providing only civil remedy 'adds insult to the injury'. It is grave injustice to the woman who suffers sexual assault at the hands of her husband but cannot get the perpetrator punished. The Act does not include marital rape as a ground of sexual abuse specifically. A grave violation of human right i.e. rape has been sought to be redressed by providing civil remedy. It is only within the term 'sexual abuse' that marital rape can be redressed and it only provides a sort of temporary relief to enable women to get away from a situation of abuse. Providing civil remedy implies a private dispute. Since, the civil law is aimed at settling the disputes between the opposite parties, attributing sexual abuse as a civil wrong ignores the intensity of a violent crime thereby reinforcing the idea of private realm dissuading the criminal law's intervention.

## The Hindu Marriage Act, 1955<sup>44</sup>

### *Section 9 HMA, 1955: Restitution of Conjugal Rights*

The provision of Restitution of Conjugal Rights<sup>45</sup> is necessary to be discussed in the light of marital rape as there have been conflicting judgments with regard to enforcing the decree of RCR. The remedy

<sup>36</sup> The Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005).

<sup>37</sup> *Id.*, s. 3

<sup>38</sup> *Id.*, s. 3, Explanation I clause (ii)

<sup>39</sup> *Id.*, s. 18

<sup>40</sup> *Id.*, s. 20

<sup>41</sup> *Id.*, s. 19

<sup>42</sup> *Id.*, s. 21

<sup>43</sup> *Id.*, s. 22

<sup>44</sup> The Hindu Marriage Act, 1955 (Act 25 of 1955), hereinafter referred to as HMA, 1955.

<sup>45</sup> Hereinafter referred as RCR.

has its roots in Jewish law. Then it was adopted in English Common Law. After this, the provision was adopted in Indian Law from English Common Law.<sup>46</sup> The provision provides where the husband/wife has without a reasonable excuse withdrawn from the society of other, the other spouse can file a petition for restitution of conjugal rights.

The burden to prove reasonable excuse rests on the spouse withdrawing from the society of other spouse.<sup>47</sup> Withdrawal from society denotes withdrawal from the company or association of other spouse whereby parties do not cohabit with each other. Various cases came before the Court on the issue of place of matrimonial home. With the increased trend of working women and their empowerment, conflicts started to arise in the families. The husband thought it as of right to compel woman to leave the job and reside at his place where places of work differed.

➤ *Analysis of Section 9 of HMA, 1955 with reference to marital rape*

In *Tirath Kaur v. Kirpal Singh*,<sup>48</sup> question arose before the Court whether wife's refusal to give up her job amounts to withdrawal from society. The Court relied on Mulla's Hindu Law which laid that a wife's foremost duty is to submit to the control of husband and she is expected to live under his roof and protection.<sup>49</sup>

Also, in *N.R. Radhakrishnan v. N. Dhanalakshmi*<sup>50</sup>, the case pertained to conflict of matrimonial home. These cases were decided based upon the common notion of 'dharmapatani' under Hindu Law thus mandating wife to live under the roof and protection of husband and the husband's right to choose matrimonial home which the wife has to comply accordingly.<sup>51</sup>

The cases cited above show women being regarded as inferior in power to men. The decision favourable to husband was always pronounced. At last, in *Swaraj Garg v. K.M. Garg*,<sup>52</sup> the Court viewed it would be wrong to say that husband has the whole sole authority to decide matrimonial home. Granting this right to husband and excluding wife from having any say in it violates the principle of equality embodied under Article 14. Court said no such provision in Hindu Law exists which grants this sort of right to husband. Thus, the matrimonial home has to be decided according to the parties' convenience and their benefit. These cases led to the controversy that Section 9 HMA, 1955 violates Article 21.

In *T. Sareetha v. T. Venkata Subbaiah*,<sup>53</sup> the AP HC held that since sexual cohabitation forms part of decree of RCR, it impedes right of woman giving the decree holder right to have sex with her in addition to the right to enjoy her company. Justice Choudary viewed it as the gravest form of violation of right to life as it takes away choice from woman and her body becomes the vehicle for procreation implying no legitimate purpose is being served by Section 9. The Court said that when the wife is asked

<sup>46</sup> Paras Diwan, *Modern Hindu Law* 187 (Allahabad Law Agency, Faridabad, 22<sup>nd</sup> edn., 2013)

<sup>47</sup> *Supra* note 44, s.9 Explanation.

<sup>48</sup> AIR 1964 Punjab 28.

<sup>49</sup> *Supra* note 46 at 189.

<sup>50</sup> AIR 1975 Mad 331.

<sup>51</sup> Paras Diwan, "Week-end Marriages and Restitution of Conjugal Rights", 20(1) *Journal of the Indian Law Institute* 5 (Jan-Mar 1978).

<sup>52</sup> AIR 1978 Delhi 296.

<sup>53</sup> AIR 1983 AP 356.

to live with her husband, she could be subjected to sexual molestation or asked to bear children unwillingly thereby going against the principle of equality. The Court observed that Section 9 is used to force sexual cohabitation and it is violative of the Constitution. Court pointed out that the decree leads to complete exclusion of woman to human dignity impinging Article 21. The Court in this case laid emphasis on marital privacy.

The view of Andhra Pradesh High Court seems to be a correct one as it recognized individual rights of women. The marital privacy and the dignity of woman which the Court sought to protect are laudable.

Further, in *Harvinder Kaur v. Harmander Singh Choudhry*,<sup>54</sup> Justice Rohtagi observed that introducing Constitutional provisions in the domain of marriage is equivalent to invitation of bull in a china shop which will lead to the destruction of the institution of marriage. The Court viewed Articles 14, 21 do not have any place in matrimonial life and the privacy of home.

Justice Rohtagi in the Delhi High Court case viewed marital privacy in a way that even Constitution cannot intervene in it. The Court rather pointed out that cohabitation is not dependent on sexual relations between the parties but Justice Choudary has confined the provision or viewed it only from the prism of 'sexual intercourse' which is erring. The Court instead said that the decree aims at saving marriage by making a reasonable inquiry on reasonable case.

This decision of Delhi HC was reiterated by SC in the same year in *Saroj Rani v. Sudarshan Kumar Chadha*.<sup>55</sup> The Court in this case laid down- the restitution decree is aimed at restoring cohabitation so that parties can lead a peaceful and happy married life together. It does not aim at compelling sexual intercourse.

After *K.S.Puttaswamy v. Union of India* case,<sup>56</sup> this Section was again challenged by two students of Gujarat NLU contending that it violates privacy and sexual autonomy of woman and should be reconsidered.<sup>57</sup>

The judiciary has tried to safeguard the rights of women by passing judgments like *Saroj Rani v. Sudarshan Kumar Chadha*<sup>58</sup>, *Swaraj Garg v. K.M. Garg*.<sup>59</sup> But it can be seen that the rights are still plagued where submitting to husband has been regarded as the duty of wife and the Court fails to take account of the fact that cohabitation definitely involves invoking sexual intercourse. Thus, there is a need to recognize marital rape as a crime to uphold the rights of women which are getting plagued by notions of patriarchy.

Undoubtedly, Hindu religion gives right to have sex with wife and a happy conjugal life. But Hindu literature also talks about invoking the values of "*purity, cleanliness and behaviour of good faith in*

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<sup>54</sup> AIR 1984 Delhi 66.

<sup>55</sup> 1985 SCR (1) 303.

<sup>56</sup> (2017) 10 SCC 1.

<sup>57</sup> Satya Prakash, "Post Privacy verdict, restitution of conjugal rights challenged in SC", *The Tribune*, Mar 18, 2019, Available at: <https://www.tribuneindia.com/news/archive/nation/post-privacy-verdict-restitution-of-conjugal-rights-challenged-in-sc-745160> (Last visited on Jan 25, 2022).

<sup>58</sup> *Supra* note 55.

<sup>59</sup> *Supra* note 52.

*conjugal life*” which means that the grave violations of individual dignity cannot be absolved by permitting marital rape and no religion aims at allowing such practices which can injure someone’s mind or body or cause hatred.<sup>60</sup> The petition on RCR issue is pending in SC. It was last heard in 2021 on July 8. It is a crucial issue amid the issue of marital rape.<sup>61</sup> Court must hold Section 9 HMA, 1955 unconstitutional on the lines of the observations made by Andhra Pradesh HC because it comes in conflict with the right of woman to engage in sex according to her wishes, as already she cannot raise voice against it because marital rape has not been criminalised.

### ***Judicial Separation and Divorce on the ground of cruelty***

In *Savitri Pandey v. Prem Chandra Pandey*,<sup>62</sup> the Court held that cruelty has not been defined but when it comes to matrimonial matters, it consists of conduct of such a type where it is dangerous for one spouse to live with the other spouse. It comprises of acts which are of dangerous nature to life, limb and health of person. It is distinct from the normal wear and tear of family. Sensitivity of petitioner is not the criterion to decide whether the conduct falls within the ambit of cruelty. Cruelty can be mental or physical in nature. Mental cruelty contemplates such conduct of one spouse which causes mental pain or suffering to the other spouse. Intention<sup>63</sup>, motive or insanity cannot be taken as defence.<sup>64</sup>

Marital rape can form a ground of divorce and judicial separation being a cruel act.<sup>65</sup> It forms the case of mental cruelty and if any harm is also accompanied then it forms the base for physical cruelty as well. In *NG Dastane v. S. Dastane*,<sup>66</sup> Court came up with the concept of mental cruelty.

In *Dr. (Mrs.) Malathi Ravi, M.D v. Dr. B.V. Ravi M.D.*,<sup>67</sup> Court held there cannot be a strait jacket formula and fixed parameters to determine mental cruelty. There can be no arithmetical calculations to define mental cruelty. What may be mental cruelty for one person may not form a case of mental cruelty for the other person.

In a judgment pronounced by Karnataka High Court<sup>68</sup>, where the husband moved to Family Court seeking decree of divorce on the grounds of cruelty as wife refused to share bed with him and marriage could not be consummated despite many efforts to reform their relationship. The Family Court decreed divorce. Wife went for appeal in the High Court. High Court refused to interfere with the order granted by Family Court. High Court viewed that husband could not be allowed to suffer and it was a case of cruelty. The Court pointed out that even if she was having any medical problem, evidence in support of it must be given to prove that “*she was ready to discharge her duties as a wife*”. Undoubtedly, conjugal happiness or happy sexual life is the prominent feature of marriage. Also, the husband made efforts and

<sup>60</sup> Mukesh Garg and Nareshlata Singla, “Marital Rape Under Indian Law: A study”, 1(2) *International Journal in Management and Social Science* 64 (June 2013)

<sup>61</sup> Krishnadas Rajagopal, “Petition on conjugal rights pending for months in SC”, *The Hindu*, Jan 24, 2022.

<sup>62</sup> (2002) 2 SCC 73.

<sup>63</sup> *William v. William*, (1963) All ER 994.

<sup>64</sup> *Bhagwat v. Bhagwat*, AIR 1967 Bom 80.

<sup>65</sup> Cruelty forms a ground of divorce and judicial separation under Section 13(i) and Section 10 HMA, 1955 respectively.

<sup>66</sup> AIR 1975 SC 1534.

<sup>67</sup> (2014) 7 SCC 640.

<sup>68</sup> Hetal Vyas, “Denying Sex a ground of divorce: Karnataka High Court”, *The Times of India*, April 20, 2012, Available at: <https://timesofindia.indiatimes.com/india/Denying-sex-a-ground-for-divorce-Karnataka-HC/articleshow/12739949.cms#:~:text=BANGALORE%3A%20Denying%20sex%20to%20husband%20without%20any%20specific,for%20divorce%2C%20the%20Karnataka%20high%20Court%20has%20ruled> (Last visited on Feb 18, 2022).

sought aid of specialist doctors but viewing it as a “duty” gives rise to the supposition that wife has an obligation to submit to her husband which is untenable.

In a case<sup>69</sup>, Kerala HC held that merely because the law does not recognise marital rape, women cannot be refrained from approaching the Court and Court cannot be restrained from recognizing it as a form of cruelty. The division bench acknowledged the wider application of the concept of arranged marriages wherein women do not have diverse options and are obligated to comply as per the wishes of parents. The appeal was filed from the judgment wherein petition for divorce on the ground of cruelty was decreed and petition for RCR was dismissed. In this case marital rape as a ground of divorce was talked about. The respondent alleged while she was pregnant, her husband abused her and also forcibly had sexual intercourse with her despite her sickness. She deposed that he even had unnatural sex against her will and his conduct was sexually perverse. She alleged even on the day when her mother expired, he forced her to have sex. She deposed that she was even subjected to force to engage in sexual intercourse in front of their daughter.

The bench opined that husband disregarded wife’s autonomy and dignity which could be termed as marital rape. The Court pointed out though his conduct could not be penalized but it forms part of cruelty in physical and mental form. The bench even made certain suggestions to make necessary changes. The Court suggested that the law relating to divorce must be framed in a manner which subserves the individual well-being whereby parties are allowed to take decision on their own which is best suited to their needs. The Court also suggested that modern-day medication, medical assistance, engaging friends and family can also aid parties to decide. The Court also viewed that law should also provide for compensation, damages in marital affairs and both marriage and divorce must be under the secular law. The Court pointed out that “insatiable urge for wealth and sex” amount to cruelty.

In another case,<sup>70</sup> Justice NK Chandravanshi of the Chhattisgarh HC laid that sexual intercourse by husband despite the usage of force cannot fall within the ambit of rape. Wife alleged physical cruelty and demands of dowry on the part of husband. She also alleged abuse and unnatural sex by husband on various occasions despite her resistance. She alleged that her husband inserted his fingers and radish in her vagina. Thereafter, charges were filed on the grounds of Secs. 498A, 376, 377, 34 of IPC. The High Court stated that the Trial Court was rightful in framing charges under Sections 498A, 377 and 34 of IPC. However, the Court discharged the man on the accusation of rape on the basis of Exception II to Section 375 IPC.

These cases reflect that existence of exception dissuaded from acting in favour of wives. It becomes necessary that marital rape must be criminalised as it transgresses the rights of wives.

## **The Criminal Procedure Code, 1973<sup>71</sup>**

### ***Section 198B Cr.P.C.***

Court shall take cognizance of offence under Section 376B IPC only when it is prima-facie satisfied as to the facts of offence. The Court can take cognizance upon complaint by the victim-wife. Section 376B

<sup>69</sup> *Xxxxxx v. Xxxxxx*, 2021 (4) KCC 159; 2021 (4) KHC 457 ; 2021 (4) KLT 694.

<sup>70</sup> *Dilip Pandey v. State of Chhattisgarh*, CRR No. 177 of 2021, Chhattisgarh HC decided on Aug 23, 2021.

<sup>71</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974).

IPC has been carved out separately which creates distinction upon unreasonable and unjust classification distinguishing between unmarried woman and the married woman where perpetrator is her husband and they are living separately. Section 198B Cr.P.C. has been enacted in furtherance to Section 376B IPC for providing procedure. So, Section 198B Cr.P.C. also warrants unequal treatment accorded under Section 376B IPC. The existence of prima-facie satisfaction leads to scope of discretion. This can hamper rights of wives.

### **POCSO and Marital Rape Conflict**

POCSO Act, 2012<sup>72</sup> was enacted to provide protection to children from sexual harassment, sexual assault and pornography. The Act provides definition of child<sup>73</sup> as a person aged below eighteen years. The Act provides punishment for different offences<sup>74</sup>.

- It does not provide any exception with respect to child wives under the offences embodied under it. Exception under IPC provides if the wife is above 15 years, it will not come under the definition of rape. This goes against the provisions of POCSO Act.
- Section 42A of POCSO Act provides special law will prevail over general law thereby implying POCSO will prevail over IPC. Undoubtedly, the passing of judgment of *Independent Thought v. Union of India*<sup>75</sup> has provided protection to child wives between 15-18 years. Thus, marital rape is criminalised in case of child wives.
- Section 5(n), POCSO Act provides that if any person who is related to the child through marriage or living in shared household commits 'penetrative sexual assault', he is said to commit 'aggravated penetrative sexual assault' and shall be punished with imprisonment for a term not less than ten years with fine. It may extend to imprisonment for life and fine.

The judgment is in consonance with this Act. However, it becomes important that conflict with respect to age must be resolved to avoid any further ambiguities.

### **Women's Sexual, Reproductive and Menstrual Rights Bill, 2018**<sup>76</sup>

A private member bill was introduced in Lok Sabha by Congress MP, Shashi Tharoor in 2019. This bill proposes to recognize marital rape as a crime by proposing to omit Section 375 Exception 2. It also proposes to provide certain amendments to MTPA, 1971.<sup>77</sup> It also proposes to provide amendment in clause 4 of Section 375IPC. As per the language of the Section presently, clause 4 provides when the consent is given by woman where she believes that the man is her husband. The proposed amendment seeks to provide that where the consent is given by woman thinking that the man is one with whom she is ready to have sexual intercourse. Also, the bill proposes addition of proviso which recognizes that factors such as ethnicity, caste, education, past sexual conduct, religion or some other related grounds cannot be said to raise presumption of consent.

<sup>72</sup> The Protection of Children from Sexual offences Act, 2012 (Act 32 of 2012).

<sup>73</sup> *Id.*, s. 2(d)

<sup>74</sup> The offences are: penetrative sexual assault aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, sexual harassment, use of child for pornographic purposes, abetment and attempt.

<sup>75</sup> (2017) 10 SCC 800.

<sup>76</sup> Women's Sexual, Reproductive and Menstrual Rights Bill, 2018 (No. 255 of 2018).

<sup>77</sup> The Medical Termination of Pregnancy Act, 1971 (Act 34 of 1971).

The bill is a step in right direction to recognize sexual autonomy of women. The proposal to insert the proviso acts as an 'icing on the cake' as it completely wipes out the chances of raising presumption of consent. The proposed Amendment in clause 4 also recognizes that her belief as to the willingness of engaging in sexual intercourse is necessary. The intention reflected in the bill is good but it has not been enacted into an Act.

### ***RIT Foundation v. The Union of India & AIDWA v. Union of India***<sup>78</sup>

RIT foundation filed a PIL in the Delhi High Court whereby the exemption under Section 375 IPC and two other sections which were added by Criminal Law Amendment Act, 2013 i.e. Section 376B IPC and Section 198B Cr.P.C. were challenged. The petitioners have submitted that the provision of law providing exemption to marital rape is unconstitutional as the Fundamental Rights under Article 14 because of the classification of rape victims into married, unmarried, married but separated lacking intelligible differentia, Article 15 keeping into account usage of word 'sex' as the impugned provisions lead to reinforcing the stereotypical attitude, Article 19(1)(a) as it deprives wife her right to express 'No' & Article 21 as it violates dignity of woman are infringed thus making is null and void as per Article 13 of the Constitution. The misuse reason is not tenable as person can be prosecuted for malicious prosecution when cheating is falsely alleged thus implying possible chances of false case of cheating does not mean the offence of cheating must be done away with.

The Respondents have submitted that blatant misuse of 498A is already being observed. Thus, criminalizing marital rape can distort the institution of marriage and the problems prevalent in the country must not be ignored while deciding to provide for criminalisation. The case is pending in the Court. It can only be expected that the decision is laid in favour of women. It can only be hoped for the best that the decision ends the discrimination which adult wives are subject due to the existence of exemption with respect to them.

### **Conclusion and Suggestions**

The provisions in IPC are insufficient to redress the act of marital rape, offence being a heinous one. Rape shouldn't be substituted with cruelty rather punished in addition to cruelty or insulting the modesty. Moreover, husband is punishable in case of other offences where the victim is wife and he is the perpetrator. No such exception exists in other offences. The only exception of granting immunity to husband exists in case of the offence of rape without any just reason. The Court must decide the constitutionality of RCR taking into account the judgment of AP HC. The ambiguities with respect to age of marriage and POCSO must be resolved at the earliest. The argument of misuse usually given to counter criminalisation does not stand good. Even it was dismissed by Court with respect to Section 498A IPC when its constitutionality was challenged.<sup>79</sup> Moreover, Court in *Lalita Kumari v. Govt. of UP*<sup>80</sup> pointed out that if false FIRs are registered, various safety nets are provided in Cr.P.C. which preserve and protect the liberty of person. Hence, FIRs do not violate Article 21 of Constitution and Section 154 Cr.P.C. protects the interest of victim and society. Justice Verma Committee report and Pam Rajput committee report even recommended that the exception must not prevail.

<sup>78</sup> Writ Petition (C) No. 284/2015, Delhi High Court.

<sup>79</sup> *Satish Kumar Batra v. State of Haryana*, (2009) 2 Cri. LJ 2447 (SC).

<sup>80</sup> (2014) 2 SCC 1.

### *Suggestions*

- Exception 2 to Section 375 IPC must be removed. The object of introducing the offence of rape to protect bodily integrity must be called to mind. Even under the offence of adultery, wife was not able to prosecute her husband in case he performs sexual intercourse outside wedlock. It has been decriminalised and the Court observed that wife is not property of the husband. Therefore, a contradiction arises because the exemption to marital rape is permissible which considers wife as the property of husband.
- To dispense complete justice, certain recommendations of Justice Verma Committee must be implemented. The Committee rightly recommended that marriage should not be the defense for rape. The presumption of consent exists in marriage which leads to the impunity from the act of marital rape. Therefore, mentioning that marriage is no defense explicitly will remove any sort of discrepancies or ambiguities thereby leaving no room for raising presumption of implied consent in marriage.
- Section 376B IPC also widens the inequality by providing lower punishment. It provides mild punishment due to the existence of husband-wife relationship. This Section clearly distinguishes between stranger rape and the marital rape. The only consideration for providing lower punishment seems to be the marriage. Further, Section 198B Cr.P.C. enacted on the lines of this Section will obviously require change.
- The Domestic Violence Act, 2005 does not specifically include marital rape within 'sexual abuse'. Marital rape must be specifically mentioned under DVA, 2005.
- Marital rape must be specifically provided as a ground of divorce and judicial separation to advance justice. Including it within the ambit of the ground of cruelty provides room for discretion.
- Victims do not perceive forceful sex as rape. The ethos of patriarchy acts as a barrier in the headway of justice. It is very important to break free from traditional and stereotypical attitude which obstruct the trajectory to justice.
- Economic dependence acts as a barrier in marital disputes. Education is a vital step to make them realize their rights and attaining economic independence.



# GENETIC DOPING: A LEGAL AND PHILOSOPHICAL PERSPECTIVE

*“We used to think that our fate was in our stars, but now we know that, in large measure, our fate is in our genes.” James Watson*

**Michelle Dias\***  
**Dr. Shampa Dev\*\***

## Abstract

*Sports signify the pursuit of excellence, in the attainment of highest achievable limits; the human body is capable of, through determination and rigorous training. Depending on the sport, it celebrates efforts designed towards attaining perfection in coordination, balance, agility of the mind and body, strength, concentration, etc. This is at stake when athletes indulge in doping. The World anti-doping agency has recently added gene doping as one of the prohibited methods. CRISPR-Cas9 technology may be used for medical and non-medical purposes in the form of enhancements. Parents would claim a liberty to use available technology to create child with sharper eyesight, better hearing capacities, enhanced height and other features that would give the child a competitive edge over others. Laws regulating genetic technology are still at a very nascent stage. Since laws do not prohibit use of genetic technology for creating enhancements, it would be interpreted in favour of liberty of the parents. This raises some questions - If gene editing were permissible in the first place, can it serve as a disqualification for entering competitive sports? If instead of gene editing, all the above traits were consciously selected for the future child through eugenics, should it still be a disqualification? Most importantly should the future child/athlete face disqualification for a decision made by his parents, to which he had no say? This research paper seeks to analyse these questions and examine the competing and the conflicting claims of all the stakeholders, namely parents, children, society and the regulatory authorities. It examines the validity of the arguments from a just, moral and ethical standpoint. It suggests a comprehensive law on the use of genetic engineering for designing super beings and in this case super athletes.*

**Keywords:** *Gene-doping, Genetic engineering, Regulation of gene editing technology, Anti-doping laws.*

## Introduction

Sports is an official means to show ones strength and capabilities where everyone strives hard to gain an advantage over the other. In the early days, during ancient Greek Olympics and Roman gladiator games, man relied on diet and “secret herbs” to beat the opponent. The concept of doping started early

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on. Spectator sports with paying audience and non-spectator participatory sports, involve huge investments. Wherever there was fierce competition or a matter of life or death, introduction of performance enhancements into the body was inevitable. As the years progressed we moved towards more sophisticated ways of doping through blood by injecting synthetic performance enhancing proteins<sup>1</sup>. Instances of doping are on the rise making headlines at the Olympics and other major sporting events. Athletes seeking to improve their personal performance and better their past records look beyond nutrition and training. Most performance enhancing drugs were banned, but the problem of some is that they cannot be detected or are yet to be categorized as a banned drug remains. Meanwhile there is no clear consensus over what actions should be punished or what chemicals should be included in the list of prohibited substances. While the debate continues, new problems with respect to gene doping stands in the side-lines.

Genetic technologies hold immense therapeutic promise, there is potential for their misuse, including attempts at the enhancement of athletic performance<sup>2</sup>. Concerns with respect to genetic interventions arise mainly in the domains – muscle function, increasing red blood cells, production and utilization of muscle energy, sharper vision, and enhanced heights or in the building of core strength<sup>3</sup>. Most competitive sports require an exhibit of muscle coordination that involves controlled contraction, release, optimal energy utilization and removal of metabolic wastes. Endurance sports such as bicycling require erythropoietin (EPO) in red blood cells result in markedly improved performance. Good utilization of metabolic energy benefits muscle and tissue functions and thereby athletic performance. As this is similar to the genetic model for treatment of obesity, which is of burning accumulated fat from muscles, athletes find this of immense use.

With advance developments in science and biotechnology at a fast pace, in the 21<sup>st</sup> century we have “genetic doping” as a way of natural enhancement. We call it natural because it is undetectable by regular testing methods. Through genetic engineering, the cells in the body are made to naturally produce more of a substance that helps in gaining an advantage during a competition. International sports authorities saw it as a toughest challenge ever faced and thought it important to restrict and monitor such an abuse during competitions and thus, imposed a ban on gene doping in 2003 under a list of banned substances. International Olympic Committee and the World Anti-Doping Agency in WADA Code 2003, Article 4.3.2, have included genetic technology to enhance performance in their list of prohibited items<sup>4</sup>. Till 2021, we only see a brief mention and no concrete rules or regulations developed in furtherance of such technology<sup>5</sup>.

## Philosophical Debate

The debate ranges from appeals for moral values<sup>6</sup>, clean sports and a halt of employment of unfair practices to liberal viewpoints<sup>7</sup>. In cases of doping one does not physically harm themselves or another.

<sup>1</sup> Paul Dimeo (ed), ‘A History of Drug Use in Sport 1876-1976: Beyond Good and Evil’ (2007) 6 Journal of Sports Science & Medicine 382 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3787291/>>.

<sup>2</sup> Angela J Schneider and Theodore Friedmann, ‘International Cooperation and Regulation: The Banbury Workshop (2002)’ (2006) 51 Advances in Genetics 65.

<sup>3</sup> Jeffery C Hall and Jay C Dunlap, *Gene Doping in Sports* (Elsevier Academia Press 2006).

<sup>4</sup> World Anti-Doping Code 2003 2003 (WADA).

<sup>5</sup> World-Anti Doping Agency, ‘The 2021 WADA Prohibited List’ [2021] World Anti-Doping 1 <[https://www.wada-ama.org/sites/default/files/resources/files/2021list\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2021list_en.pdf)>.

<sup>6</sup> Sandel Michael J., *The Case Against Perfection: Ethics in the Age of Genetic Engineering* (Harvard University Press 2007).

Hence, law should not interfere in a person choosing to adopt artificial means of performance enhancement. While the debate over the moral uprightness continues, sports authorities are having a tough time deciding on the list of prohibited substances and the quantities of their presence in the bloodstream of the athlete in an attempt to have ‘clean sports’.

Further challenges posed by the advancements in medical science especially genetic engineering made it possible to have taller, sharper and healthier kids, especially designed for a career in sports. The ‘ethos of sport’ is at stake. Michael Sandel has further objections that he clearly lays out in his book<sup>8</sup>. As Posner summarizes<sup>9</sup> –

*“Sandel opposes the use of drugs to enhance athletic performance. He thinks such use detracts from the athlete’s achievement; what seems the athlete’s achievement is actually the achievement of the drug’s inventor. Even worse, in Sandel’s view, the use of drugs to enhance athletic performance represents a Promethean aspiration to remake nature, including human nature, to serve our purposes and satisfy our desires. It is not, however, the “drive to mastery” per se that troubles him but the effect of that drive in obliterating what he calls “the gifted character of human powers and achievements”—the recognition that “not everything in the world is open to any use we may desire or devise.”*

Sports signify the pursuit of excellence in the attainment of highest achievable limits. Depending on the sport, it celebrates efforts designed towards attaining perfection in coordination, balance, agility of the mind and body, strength, concentration, etc. With respect to societal values, the WADA definition hints at the requirement and expectation “from competitive sport, a ‘naturalness’ meaning ‘authenticity’ both of performance and of the athlete.”<sup>10</sup>

Posner has an objection, which he meticulously puts out in his work. He points out that human beings take an innate delight in the natural hierarchies that they portray, in terms of height, strength, whether consciously or unconsciously built and in agility, beauty, and coordination in movement in them as well as in animals. Hence, sports are designed to highlight these hierarchies in an isolated or a combined manner. In other words, it is a test of ‘biological potential’. If doping were employed sport would become a mere spectacle (a spectacle of how chemical induced humans would outperform themselves raising awe) rather than a matter of appreciation of the athletes’ grit and determination leading to an achievement. Arguing teleologically, Posner points out that as long as all activities are designed towards the promotion and display of the highest levels of coordination and display of the hierarchies, it cannot be wrong. Posner adds that if the sport is a showcase of muscle coordination doping that in not directed towards the end of muscle coordination should not be doping at all<sup>11</sup>.

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<sup>7</sup> Richard A Posner, ‘In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping’ [2007] Duke Law Journal 1725 <[https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)> accessed 23 November 2021.

<sup>8</sup> J. (n 6).

<sup>9</sup> Posner (n 7).

<sup>10</sup> Swen Körner and others, *Gene Doping – The Future of Doping?* (Peter Lang 2016).

<sup>11</sup> Posner (n 7).

The moral and ethical deliberations<sup>12</sup> on these issues seem to point at two competing views. One view is of future parents, whose claim to the use of genetic technology arises from an assertion of free choice. The same view is also resonated in the views of persons assert an innate choice vested within themselves to the use or rejection of any technological development. For if genetic technology use is available for the repair of injured muscle or tissues, i.e. medical issue, then it will be used for enhancement reasons as well. Enhancements for non-disease human traits, like say enhanced eyesight, intelligence are acceptable advances of science; the problem stems from the morality of such efforts. Even if the safety of the use of such procedures to the person is mitigated, or to the future generations the problem remains. The problem is about the articulation of the extent to which we allow uninhibited biotechnology to rule our lives and define striving for individual achievement.

### **Can it be a reality?**

Many feel that genetic enhancement is a waste of resources and this would be a main reason for lack of funding. Implications of this issue is however attracting a lot of debate. In 2008, there was a report of a Chinese scientist He Jiankui alleged to having attempted to make genetically edited babies. They were edited with an ability to resist HIV infection in future<sup>13</sup>. Even in the absence of a definitive evidence of his success, it has sparked a lot of controversy. By acting in contravention to the Chinese laws which prevent genetic modifications in humans, He was fired from his position and criminal trial was initiated. This leads us to the conclusion that by having a proper legislation in place, gene doping is not a fiction, it can very well be possible. This was a germline modification where the sperm or egg cells are used and the genetic modification is irreversible and passed on for generations. There is also somatic cell modification which can be done in minors or adults and is not passed on to other generations. Here a problem of consent arises on the types of health decisions that minors should be allowed to make and those that their guardians should be allowed to make on their behalf. For example, there is no medical consensus on the use of hormone treatment intervention for children who have been diagnosed as transgender. They would not develop secondary sexual traits if such treatment was given to them at a young age<sup>14</sup>.

There are various arguments raised. One argument is that it violates autonomy. But where genetic engineering is employed to design a child who would be tall and having sporting genes, the child is at that point not exercising autonomy. In fact, the argument that it violates autonomy will not apply in case of unborn children as they are incapable of exercising autonomy. Another argument that has been raised is that it violates the child's right to an open future. But open future is nothing but a natural lottery that everyone gets which may or may not be in favour. By interfering with the natural processes and shaping it in a direction that the commissioning parents want, they design the child for a sporting career and thereby interfere with the right of the child to an open future.

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<sup>12</sup> The President's Council on Bioethics, 'Beyond Therapy: Biotechnology and the Pursuit of Happiness' (2003) <[https://biotech.law.lsu.edu/research/pbc/reports/beyondtherapy/beyond\\_therapy\\_final\\_report\\_pcbe.pdf](https://biotech.law.lsu.edu/research/pbc/reports/beyondtherapy/beyond_therapy_final_report_pcbe.pdf)> accessed 23 November 2021.

<sup>13</sup> Marilyn Marchione, 'Chinese Researcher Claims First Gene-Edited Babies' *AP News* (Hong Kong, 26 November 2018) <<https://apnews.com/article/ap-top-news-international-news-ca-state-wire-genetic-frontiers-health-4997bb7aa36c45449b488e19ac83e86d>> accessed 29 September 2021.

<sup>14</sup> Sarah Polcz and Anna Lewis, 'CRISPR-Cas9 and the Non-Germline Non-Controversy' (2016) 3 *Journal of Law and the Biosciences* 413.

It would be interesting to note a few instances here<sup>15</sup>. On one occasion the parents “shopped” for a gene that would result in above average height for the child and also demanded that the gene should come from a family of sports persons. Instances like this not only depreciate the persons of short stature, but also interferes with the child’s right to an open future. In another instance the sperm bank claimed that they did not spread such views, but it was found that the bank collected its samples from students of Ivy League institutes. They later claimed that they were merely catering to the demands of their customers. The problem is that if technology is available, can law prohibit people from the use of it? If so, on what grounds? Choice of characteristics of an unborn is an exercise of free choice for the parent, and unless it interferes with the liberty/right of another it cannot be restricted. But the exercise of choice in favour of certain characteristics like height, fair skin, intelligence, etc. denigrates the other. More than that the problem is also about attempting to obtain a mastery over the process of birth.

As William May pointed out that there is some learning in the ‘openness to the unbidden.’ It teaches humans humility, empathy and sympathy. Appreciating children as gifts, in whatever characteristics they bring teaches acceptance. It nurtures a value that is crucial for humans. Sandel states that the problem lies in the hubris of the designing parents in their drive to attain mastery over birth, leading to desecrate nature. The same when used to rectify a medical problem does not, because in such cases it is to support life, and in so doing actually honouring life. Nurturing a child and ensuring a flourishing life does not encompass within itself a duty to employ genetic engineering for choosing characteristics for a desirable career for the child. He states - “Parents give children two kinds of love. Accepting love affirms the being of a child, whereas transforming love seeks the wellbeing of the child. Each of these corrects the excesses of the other. Accepting love without transforming love, slides into indulgence and finally neglect. Transforming love, without accepting love, badgers and finally rejects.”

## Laws on Genetic Enhancement

The World Anti-Doping Agency has added gene doping in the list of prohibited methods. But it remains to be seen how such would be implemented. If enhancements were permitted for medical use it would also be open for non-medical use. While the former is used for curing and prevention of ailments the latter would be used to reach beyond and facilitate better outcomes. Further if muscle enhancements by way of genetic engineering are safer than doing so by the use of steroids, would it be justified to use genetic technology instead?

In India, ICMR has published guidelines in 2019 that explicitly prohibit germline modifications viz. designer babies. Gene therapy for rare genetic disorders like thalassemia, cancer, sickle cell disease and haemophilia is allowed in clinical trial phase. Only somatic cell therapy using various vectors for a targeted delivery is allowed. All kinds of genetic modifications are allowed in somatic cell therapy. In Schedule V there is a list for which any gene drug developed cannot claim to cure it<sup>16</sup>. This list is a part of Schedule J of the Drugs and Cosmetics Rules, 1945 of India. Nowhere in the list is there anything mentioned about enhancement of growth of bones, muscles, proteins, etc. that is needed for better performance in sports. Law is silent in this matter. The possibility of the fact that there may be genetic modifications carried out by bio hackers, out of the surveillance of government, cannot be ruled out. We

<sup>15</sup> DJ Epstein, *The Sports Gene : What Makes the Perfect Athlete* (15th edn, 2013).

<sup>16</sup> ‘National Guidelines for Gene Therapy Product Development & Clinical Trials (2019) National Guidelines for Gene Therapy Product Development & Clinical Trials (2019)’ (*Guidelines | Indian Council of Medical Research | Government of India*, 2019) <<https://main.icmr.nic.in/content/guidelines-0>> accessed 1 October 2021.

already have examples of using EPO gene doping to enhance competition in sports. Studies have shown that gene doping in humans is a possible reality<sup>17</sup>. Although WADA and IOC have banned gene doping, there is absolutely no way of detecting it in a non-invasive manner. Till date has only been a muscle biopsy technique to detect genetic doping which cannot be used during competitions.

The fairness objection has been raised time and again. The problem that the fairness argument does not answer is this – if all players doped would it be fair? Would we then be able to ensure a level playing field? But since natural talents are different for every person and since the rigorous training and grit is different for different persons ensuring a level play field is neither possible nor warranted. Since men and women are considered separate they occupy different playfields. If it is conclusively found the Jamaican players have specific genes different from all others, would we have a separate competition for Jamaican players? Similarly for all players who involved in doping a separate play field for them or all those who gene doped a separate play field for them would be preferable? If gene doping was permissible and readily available and accessible would the argument of fairness still be used? If players from a certain genetic background were found to have sharper hearing and eyesight, to ensure fairness, would it not be necessary to put them on a separate playfield?

But the argument of fairness does not hold ground. For the assumption is that all human beings of different genetic makeup compete together. We want to believe that success in sports comes not from the genetic makeup but from the training and focused hard work and that is why winners are much appreciated. Enhancements are against this in enlisting the help of artificial genetic technology to make a shortcut to the top. That is where the unfairness argument is placed. The anti-doping regulations thus create a strict liability making the athlete accountable for all substances in his body.

### **Issues and Challenges**

The introduction of foreign genes into the genome can result in a slew of previously unknown interactions between genes and their internal and external regulators. Gene doping, unlike gene therapy, does not require the employment of security or protection measures. Gene transfer vectors created in unregulated laboratory circumstances can be polluted with chemical and/or biological substances, putting athletes' health and lives in jeopardy. Some athletes, however, disregard safety concerns despite the well-documented and unforeseen risks involved with gene doping. We humans, always fear the unknown and are resistant to change. Nature is keeps us humble and it is not something to be tampered with. Due the ban on genetic modification, we do not have enough data and funding to characterize this as safe. Genetic interventions should only be utilised to alleviate extreme suffering, that is, they should be limited to diseases that wreak havoc on humans. These treatments should only be used on genes that are definitely linked to diseases, not on genes with a questionable or hypothetical link to illness, and particularly not on genes that profess to influence height or intelligence, about which little is known. The interventions should not be carried out without the permission or supervision of the government.

Genetic doping although a new scientific concept, is not actually new. We have long been practicing eugenics to eliminate an undesirable genetic character from line of hereditary. Genetic enhancement would be introduction of a desirable character in the line of inheritance. Scientific methods that are now

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<sup>17</sup> E Brzeziańska, D Domańska and A Jegier, 'Gene Doping in Sports – Perspectives and Risks' (2014) 31 *Biology of Sport* 251 <[pmc/articles/PMC4203840/](https://pubmed.ncbi.nlm.nih.gov/34203840/)> accessed 1 October 2021.

allowed are only to cure a disease. Does this mean that we are open and acceptable to things that only make other people at a level playing field to us? Once they get an opportunity of being better, we draw a line invoking ethics and morality. Right to choose and live is an inherent human right. State can intervene only in matters when there is harm to others' welfare and life. Is a right to be better at something being denied to us?

Another questions of level playing field is invoked. Only the rich and elitist having an advantage. CRISPR technology is now available at a relatively cheaper rate. If the technology is made available to all, the question of unfairness can be eliminated. If CRISPRCas9 technology were readily accessible for all to use, in the absence of any regulating law on date, parents would be free to use the benefits of technology for designing their children in the desired manner, except may be to the extent laws prohibit. So a parent cannot use genetic technology to make sex selection. Or it may be outrageous to imagine using technology to create impairments. But it will certainly be within parents' rights and free choice to use available technology to have a child of the desired makeup. Therefore, if gene editing were permissible in the first place, it cannot serve as a disqualification for entering competitive sports at a later point. There is no law as yet that prohibits use of genetic technology for designing babies and no law as yet that disqualifies children born out of genetic engineering to play competitive sports.

Consider a situation wherein instead of opting for gene editing, all the above traits are consciously chosen. This procedure also employs technological interventions, but not gene editing techniques. This would not qualify to be interpreted as gene doping. Furthermore, for the exercise of free choice that the parent makes should the child be disqualified from competitive sports. Most importantly should the future child/ athlete face disqualification for a decision made by his parents, to which he had no say? Our reason points to the negative.

In cases of genetic doping, the challenge is the establishing of guilt. If used as therapy and not for doping the athlete should not be accountable. The burden of proof lies in the person who asserts the existence of a fact. In cases of sports doping, the anti-doping organization ensures that the athlete submits to the test procedures. Not submitting to the tests is a violation of the regulations. If the test results show traces of prohibited chemicals in the samples of the athlete, doping is proved. The regulations thus provide a complete procedure for the evidentiary procedure of doping<sup>18</sup>. But since cases of genetic doping engineers the cells of the person's body, it is not so much of a question of presence of chemicals that is provable by tests.

## **Conclusion**

A lot of jurisprudence remains to be developed to keep up with the fast pacing technology. Genetic enhancement is inevitable. It might have already been put into practice. Necessary regulations and laws need to be in place before it turns chaotic and out of control. Such issues and challenges can only be answered after serious informed deliberations on genetic engineering and the implications arising out of it. The only contingent is that, can a law on doping be comprehensively made.

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<sup>18</sup> Andy Miah, 'Genetically Modified Athletes: Biomedical Ethics, Gene Doping and Sport' (2004) 3 *Journal of Sports Science & Medicine* 197 </pmc/articles/PMC3905303/> accessed 23 November 2021.



# INSOLVENCY RESOLUTION: EVALUATING THE IBC JOURNEY SO FAR

Dr.(CA) Prashant V. Munot\*

## Abstract

*The Insolvency and Bankruptcy Code, 2016 has reformed the entire architecture of insolvency and bankruptcy laws in India. Prior to the enactment of IBC, 2016 the legal provisions and the mechanism dealing with the restructuring of ailing corporate entities as well as for non-corporate entities like partnership firms, proprietary concerns and individuals was largely characterised to be very complex, ineffective and time consuming – often leading to abnormal delays. The complexity was further more increased due to interplay between multiple laws, multiple judicial forums and the inherent complexities involved therein, all cumulatively resulting in abnormal delays often failing in resolution of ailing entities in a time bound manner, which ultimately lead to erosion in potential value of the assets of the ailing entity, in a way making the resolution process redundant.*

*The IBC, 2016, a complete code in itself provides a comprehensive legislative framework to govern the insolvency resolution proceedings of the Corporate entities as well as that of partnership firms, proprietary concerns and individuals. The core focus of IBC, 2016 has been towards maximising the value of assets, encourage entrepreneurship, facilitate availability of optimum credit at the same time, striving to balance the interests of various stakeholders in line with the ‘ease of doing business’ initiative of the government.*

*The new legal framework lays emphasises on “resolving the stress’ ensuring the entity remains a going concern along-with overall maximisation of the economic value of the business enterprise and its assets. According to the IBBI, the IBC framework has been successful in resolving some of the major cases during the past five years, while some were in their advanced stages of resolution. The IBC framework has helped India in considerably improving its ranking to 52 from earlier 108 in the ‘resolving insolvency’ parameter of Ease of Doing Business Survey conducted by the World Bank for the year 2019. The present paper attempts to delve upon the journey and performance of insolvency resolution under IBC, 2016 so far.*

**Keywords :** Corporate Insolvency ; Insolvency and Bankruptcy ; IBC ; Liquidation.

## Introduction

The Insolvency and Bankruptcy Code, 2016 (“IBC, 2016”) is India's bankruptcy law ; it was enacted with a view to consolidate multiple enactments and create a single code for insolvency and bankruptcy in India. The legislation with its introduction replaced the legal framework for insolvency that was

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largely felt ineffective and was inadequate, leading to abnormal delays.<sup>1</sup> The IBC, 2016 in its preamble, spells out the objectives of the Code as being aimed at maximising the value of assets, encouraging entrepreneurship, facilitate availability of optimum credit at the same time, striving to balance the interests of various stakeholders.

Conventionally, prior to the enactment of IBC, 2016, while winding up of Companies was governed by the provision in the Companies Act, 2013, that for individuals was provided under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The Presidency Towns Insolvency Act, 1909 was applicable only to the erstwhile presidency towns of Kolkata, Mumbai and Chennai and the Provincial Insolvency Act, 1920 governed the field in rest of India.

Being struck with piling defaults in debt, rising non-performing assets (NPAs) in the banking sector and the debt restructuring mechanism and recovery laws in vogue appearing to be failing badly, a pressing need was felt for having a pragmatic and long-term solution which could address the NPA problem, ensure timely revival of viable businesses and facilitate a healthy credit flow within the economy. It was in this background the Insolvency and Bankruptcy Code, 2016 was enacted as a complete code in itself to provide a comprehensive legislative framework and govern the insolvency resolution proceedings of the Corporate entities as well as that of partnership firms, proprietary concerns and individuals.<sup>2</sup> However, as the Code was made applicable in phases, presently only the provisions as applicable to Corporate entities have been brought into force while the provisions relating to non-corporate persons viz., partnership firms, proprietary concerns and individuals are yet to be notified and implemented. Thus, the earlier enactments - Provincial Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1909 continue to apply in case of insolvency of individuals, partnership firms or proprietary concerns<sup>3</sup>. However, the proceedings for insolvency against personal guarantors to Corporates can be instituted under IBC<sup>4</sup>.

IBC by providing a comprehensive mechanism for dealing with insolvency resolution, seeks to tackle the incidence of failure in meeting debt obligations in two ways. Firstly, it ensures sound business decision-making on part of the corporates preventing potential business failures. Secondly it provides for a sound mechanism under which the financially ailing corporate entities are put through a rehabilitation process in the very initial stages of default and relieved of their stress and revived in a timely manner.

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<sup>1</sup> Insolvency and Bankruptcy Board of India “*Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India*”(Mar 2018)<[https://ibbi.gov.in/uploads/resources/ILRRreport2603\\_03042018.pdf](https://ibbi.gov.in/uploads/resources/ILRRreport2603_03042018.pdf)> retrieved on 12.03.2022

<sup>2</sup> Margaret D'souza, “The Insolvency Review” (Oct, 2021) <https://thelawreviews.co.uk/title/the-insolvency-review/india> 7 accessed on 10.03.2022

<sup>3</sup> Section 243 of IBC, 2016 that repeals these enactments has not yet been brought into force. Hence, at present there is a dichotomy of proceedings against a personal guarantor given that there may be proceedings instituted under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 as an individual and also under the Code in his or her capacity as personal guarantor.

<sup>4</sup> *Lalit Kumar Jain v. Union of India & Others*, AIROnline 2021 SC 402 (Supreme Court)

## **Legal Overview of Insolvency Law in Indian**

### **Insolvency framework in India pre-enactment of IBC, 2016**

Prior to the enactment of IBC, 2016 the legal provisions and the mechanism dealing with the restructuring of ailing corporate entities as well as for non-corporate entities like partnership firms, proprietary concerns and individuals was largely characterised to be very complex, ineffective and time consuming – often leading to abnormal delays. The complexity was further more increased due to interplay between multiple laws including Companies Act, 2013, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), Recovery of Debts due to Banks and Financial Institutions Act (RDDBFI Act), 1993, Sick Industrial Companies (Special Provisions) Act, 1985 etc. The presence of multiple laws, multiple judicial forums and the inherent complexities involved therein all cumulatively resulted in abnormal delays often failing in resolution of ailing entities in a time bound manner, which ultimately lead to erosion in potential value of the assets of the ailing entity, in a way making the resolution process redundant.

### **Insolvency and Bankruptcy Code, 2016**

Insolvency reforms in India with the enactment of the Insolvency and Bankruptcy Code, 2016 paved a way for legislative framework and ecosystem for Corporate Insolvency Process (“CIRP”) w.e.f 1<sup>st</sup> December, 2016<sup>5</sup>. IBC, 2016 with its enactment, amended almost 11 existing laws besides providing for repeal of two legislations - the Provincial Insolvency Act, 1920 and the Presidency Towns Insolvency Act, 1909. The core focus of IBC, 2016 as reflected from the objectives spelt out in its preamble has been towards maximising the value of assets, encouraging entrepreneurship, facilitate availability of optimum credit at the same time, striving to balance the interests of various stakeholders in line with the ‘ease of doing business’ initiative of the government.

The Insolvency framework in India is formally regulated by a separate statutory authority viz., The Insolvency and Bankruptcy Board of India (IBBI).

### **Overriding Powers of IBC, 2016**

Sec.238 of the Insolvency and Bankruptcy Code, 2016 provides for overriding effect to the provisions of the Code over any other law in force, notwithstanding anything inconsistent therewith.

### **Jurisdiction**

The Jurisdiction in case of Corporate entities vest with the National Company Law Tribunal (“NCLT”) and that in the case of individuals or partnership firms it vests with the Debt Recovery Tribunal (“DRT”) which are formally termed as Adjudicating Authority (“AA”)<sup>6</sup> under the IBC.

As of now, since the Code was made applicable in phases, presently only the provisions as applicable to Corporate entities have been brought into force while the provisions relating to non-corporate persons viz., partnership firms, proprietary concerns and individuals are yet to be notified and implemented<sup>7</sup>.

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<sup>5</sup> Insolvency and Bankruptcy Board of India, “*Insolvency and Bankruptcy Regime in India: A Narrative*”, (2020) ISBN: 978-81-947537-0-4

<sup>6</sup> Section 5(1) and Section 79(1) of the Insolvency and Bankruptcy Code, 2016

### The Corporate Insolvency Resolution Process

The new legal framework lays emphasises on “resolving the stress’ ensuring the entity remains a going concern along-with overall maximisation of the economic value of the business enterprise and its assets. The Hon’ble Supreme Court has held that the core focus of the new legal framework is ensuring revival and continuation as a going concern of the CD<sup>8</sup>. The resolution process in case of Corporates typically begins with admission of a Petition by the National Company Law Tribunal in the event of default<sup>9</sup> over a threshold amount by the Corporate.

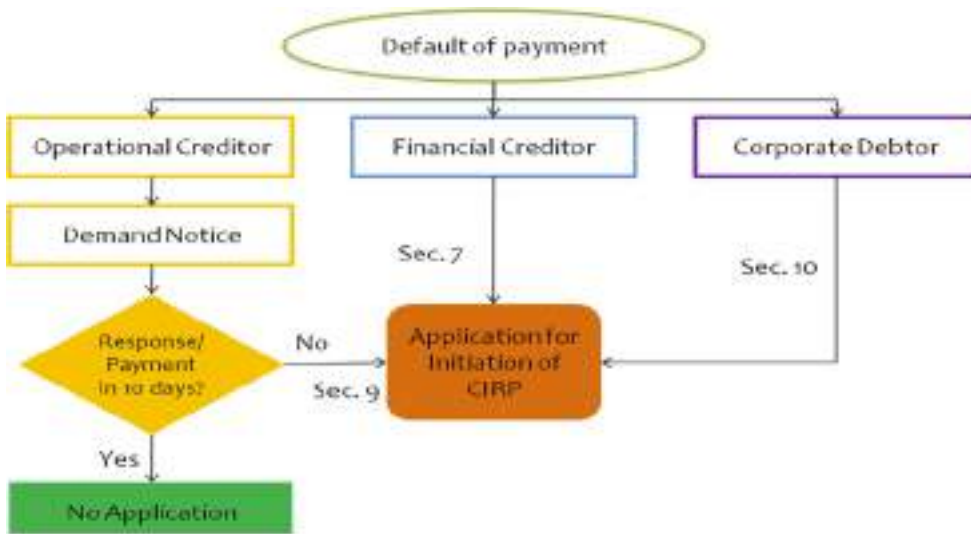


Figure 1 : Initiation of CIRP

IBC, 2016 contemplates a fixed statutory period during which active efforts are initiated for resolution of the stress faced by the Corporate Debtors, without any fear of recovery or enforcement actions. The code contemplates the Committee of Creditors (“CoC”)<sup>10</sup> to assess the viability of the Corporate Debtor (“CD”) during the resolution process. Typically, the stress resolution exercise of the Corporate involves two broad processes :

- (A) Corporate insolvency resolution process (“CIRP”) endeavour’s resolving the stress faced by the Corporate Debtor by means of a Resolution Plan or in case of failure to so resolve the stress ultimately resulting in liquidation of the CD; and

<sup>7</sup> Insolvency and Bankruptcy Board of India “Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India”(Mar 2018)<[https://ibbi.gov.in/uploads/resources/ILRReport2603\\_03042018.pdf](https://ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf)> retrieved on 12.03.2022

<sup>8</sup> *Swiss Ribbons Private Limited v. Union of India* (2019) 4 SSC 17 (Supreme Court)

<sup>9</sup> Section 7, 9 and 10 of IBC, 2016 empowers any creditor of a Corporate Debtor (“CD”), be it Financial Creditor (“FC”) or Operational Creditor (“OC”) irrespective of whether it is secured or unsecured creditor, or even the Corporate Debtor itself, to make an application to the Adjudicating Authority (AA) to initiate Corporate Insolvency Resolution Process (“CIRP”) against the Corporate Debtor, in the event of there being a default by the Corporate Debtor in payment of their dues for an amount of Rs. 1 crore\* or more. [\*The threshold of default under section 4 if IBC was increased from Rs.1 Lakh to Rs.1 Crore vide notification S.O.1205(E), dated March 24, 2020].

<sup>10</sup> Committee of Creditors (“CoC”) comprises of Financial Creditors (“FC”) who constitute a Committee on admission of the petition by the AA. The provisions of IBC, 2016 stipulate, the decisions concerning the resolution to be taken by the CoC at their meeting with 2/3<sup>rd</sup> majority for critical decisions and simple majority for routine decisions concerning the affairs of the CD.

- (B) Pre-packaged Insolvency Resolution Process (“PPIRP”) - which is applicable only to Micro, Small & Medium Enterprises (“MSMEs”) – that endeavour’s either to resolve the stress by means of a pre-structured Resolution Plan or closes without resolution.

The entire CIRP process is conducted under the Supervision of Adjudicating Authority through an Insolvency Professional (“IP”)<sup>11</sup> who controls and operates the Company until a proper and feasible resolution plan in conformity with the provisions of the Code is received and approved by the Adjudicating Authority<sup>12</sup>.

In sum and substance, when a default in repayment to creditors occurs, the resolution process under the IBC can be triggered with creditors gaining control over the Corporate Debtor’s assets empowering the CoC to take decisions to resolve the stress faced by the Corporate in a strictly time bound manner, at the same time offering a protective shield to the CD from any coercive recovery.

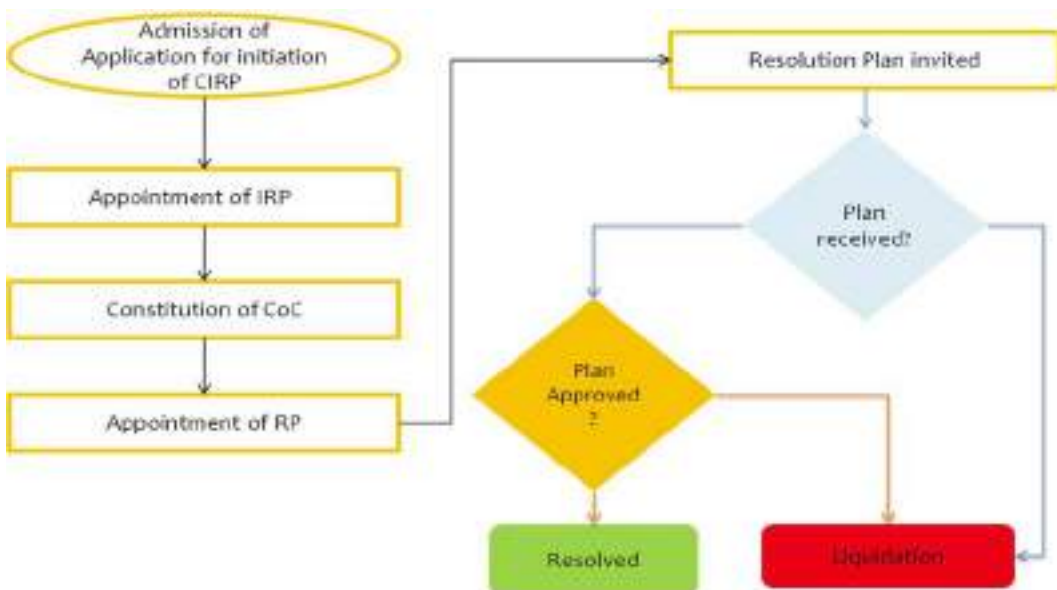


Figure 2 : Corporate Insolvency Resolution Process

### Compulsory Moratorium

On admission of an insolvency petition by the AA, a compulsory moratorium is introduced<sup>13</sup>. Sec.14 of IBC, 2016 bars any fresh institution of suit or legal proceedings against the ailing Corporate Debtor as well as enforcement of security interest under the SARFAESI Act, 2002 or any transfer or sale of its assets during the CIRP<sup>14</sup>. The object of introducing moratorium is to prevent further depletion in economic value of the corporate debtor. Moratorium acts as a protective shield to the corporate debtor against any pecuniary attacks during the CIRP.

<sup>11</sup> Insolvency Professional (“IP”) appointed on admission of the petition by the AA is termed as Interim Resolution Professional (“IRP”) and that appointed by the CoC in its first meeting is termed as Resolution Professional (“RP”).

<sup>12</sup> According to Sec. 17 of IBC on admission of the CD to CIRP, the Board of Directors of the CD stands suspended and control over the affairs of CD passes on to the IRP.

<sup>13</sup> Section 14 of the Insolvency and Bankruptcy Code, 2016

<sup>14</sup> P. Mohanraj v. Shah Brothers Ispat 2021 SCC OnLine SC 152 (Supreme Court)

### Timelines under IBC, 2016

IBC, while emphasising on resolution rather than recovery, recognises the fact that stricter timelines are very crucial to preserve asset value of the Corporate Debtor. The most important aspect under the IBC is the timeliness of insolvency resolution<sup>15</sup>. In line with its prime objective, IBC stipulates a insolvency resolution process period of 180 days<sup>16</sup>, subject to one extension upto a maximum 90 days on satisfaction of the AA<sup>17</sup>. In any case the insolvency process under the CIRP, including the time consumed in legal proceedings, if any, has to be mandatorily completed within a maximum statutory time frame of 330 days<sup>18</sup>. If the resolution process could not be completed within the aforesaid timelines the Company goes for liquidation.

Journey so far :

The core objective of enactment of IBC, 2016 was to provide a mechanism for time bound resolution of the ailing Corporate Debtor. The sheer number of cases that have been successfully resolved through the Corporate Insolvency process (CIRP) reflects the fulfillment of the stated objectives. According to the IBBI, the IBC framework has been successful in resolving some of the major cases during the past five years, while some were in their advanced stages of resolution<sup>19</sup>. The Government claims that while the earlier legislative framework required on an average 1500 days for resolution of the Corporate debtors, IBC has helped to cut down the average period to about 380 days besides facilitating over 190% realisation for the financial creditors<sup>20</sup>.

#### Statistical Data of Cases admitted, disposed and under process :

**Table 1 : Data on Corporate Insolvency Resolution Process :**

(Numbers)

<i>Year/ Period</i>	<i>CIRP at the inception of the period</i>	<i>Newly Admitted to CIRP</i>	<i>Successful Closure by Resolution</i>	<i>Closure consequent to Withdrawal u/sec.12A</i>	<i>Closure consequent to Review/ Appeal/ Settlement</i>	<i>Closure consequent to Liquidation</i>	<i>CIRP at the end of the period</i>
2016 - 17	0	37	0	0	1	0	36
2017 - 18	36	706	20	0	94	91	537
2018 - 19	537	1,157	79	97	153	306	1,059
2019 - 20	1,059	1,986	139	216	343	542	1,805
2020 - 21	1,805	537	122	157	83	349	1,631

<sup>15</sup> *Kridhan Infrastructure v. Venketesan Sankaranarayan* (2021) 6 SCC 94 (Supreme Court)

<sup>16</sup> Section 5(14) read with Section 12 of the Insolvency and Bankruptcy Code, 2016.

<sup>17</sup> Section 12(3) of the Insolvency and Bankruptcy Code, 2016

<sup>18</sup> 2<sup>nd</sup> proviso to Section 12(3) of the Insolvency and Bankruptcy Code, 2016

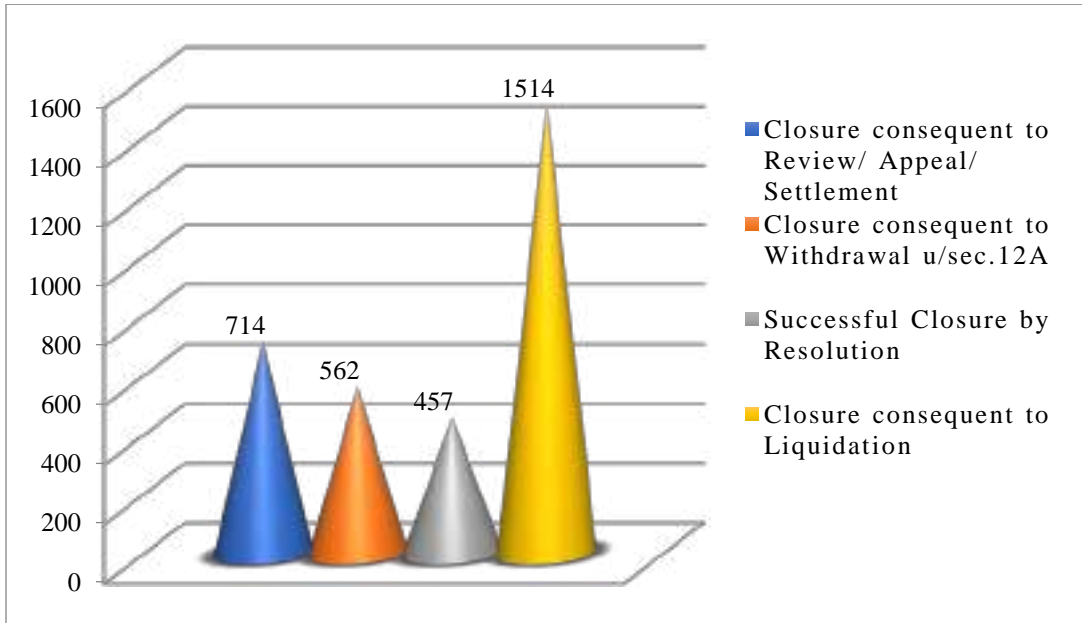
<sup>19</sup> <https://www.business-standard.com/about/what-is-ibc>

<sup>20</sup> <https://www.niti.gov.in/ibc-2016-effective>

April to June, 2021	1,631	141	45	33	9	74	1,611
July to September, 2021	1,611	144	16	24	18	57	1,640
October to December 2021	1,652	195	35	22	7	84	1,699
<b>Total</b>	<b>NA</b>	<b>4,946</b>	<b>457</b>	<b>562</b>	<b>714</b>	<b>1,514</b>	<b>1,699</b>

Source : Data extracted from publications of IBBI

**Figure 3 : Closure of Corporate Insolvency Resolution Process (CIRP)**



Source : Data extracted from publications of IBBI

Table 1 reveals that of the total 3247 CIRP cases closed so far, a whopping about 1514 (46.60%) cases have culminated in liquidation of the CD, while only about 457 (14%) of cases could end up with a resolution plan under the CIRP. The number of cases going for liquidation is more than thrice the number of cases successfully resolved by a resolution plan under the IBC route. However, IBBI argues that about 75% of the CIRPs (1134 cases of total 1514 cases) ending in liquidation were earlier either in BIFR or non-functional or both<sup>21</sup> pointing out that many of such corporate debtors had a significantly less economic value even before their admission under CIRP. The Government on the other hand contends that the resolution plans under CIRP have yielded a realisable value of about Rs 2.5 trillion against the total admitted claims of Rs 7.54 trillion<sup>22</sup> (denoting recovery of only 1/3<sup>rd</sup> of the total admitted claims) for the financial creditors<sup>23</sup>.

<sup>21</sup> IBBI Quarterly Newsletter October-December, 2021

<sup>22</sup> as on December 31, 2021

<sup>23</sup> Written response in Parliament by Minister of State, Ministry of Corporate Affairs, Government of India, <[https://www.business-standard.com/article/companies/financial-creditors-recovered-only-one-third-of-amount-from-ibc-cases-122020900396\\_1.html](https://www.business-standard.com/article/companies/financial-creditors-recovered-only-one-third-of-amount-from-ibc-cases-122020900396_1.html)>

**Timeline status of cases under CIRP**

**Table 2 : Status of CIRPs\***

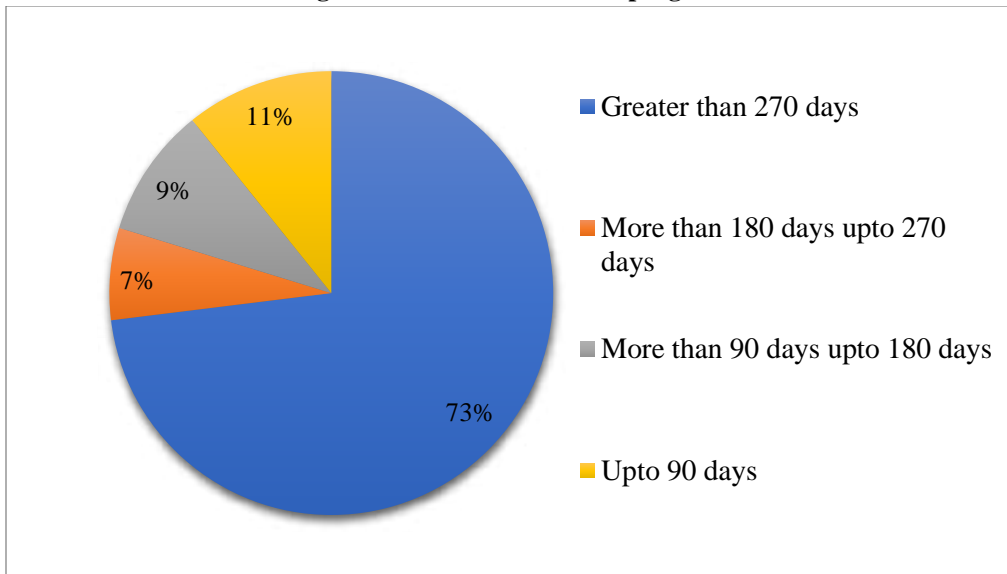
(Numbers)

CIRP Status	Numbers
Admitted to CIRP	4,946
Successful Closure by Resolution	457
CIRP closure consequent to Withdrawal u/sec.12A	562
CIRP closure consequent to Review/ Appeal/ Settlement	714
CIRP closure consequent to Liquidation	1,514
<b>CIRP in progress:</b>	<b>1,699</b>
Upto 90 days	183
More than 90 days upto 180 days	161
More than 180 days upto 270 days	114
Greater than 270 days	1,241

\*Data as of 31<sup>st</sup> December, 2021

Source : Data extracted from publications of IBBI

**Figure 4 : Status of CIRPs in progress**



\*Data as of 31<sup>st</sup> December, 2021

Source : Data extracted from publications of IBBI

Table 2 indicates that of the total on-going 1699 cases under CIRP (as of 31<sup>st</sup> December, 2021) around 73% (1241 cases) had already exceeded the maximum resolution process time specified under the code and were on the verge of facing liquidation for failure to comply with the stipulated timelines for corporate insolvency resolution process. It is seen that another 7% (114 cases) had already exceeded the 180 days timeline under section 5(14) read with section 12 of the Insolvency and Bankruptcy Code, 2016 having been granted the extended period by the AA in terms of section 12(3) of the code.

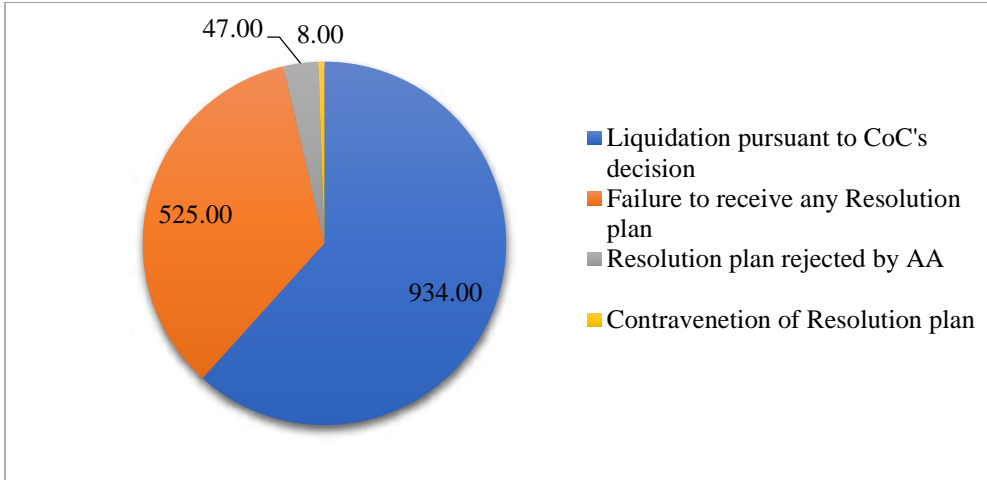
**Reasons for Liquidation**

**Table 3 : Reasons for Liquidation**

Circumstances	No. of CDs
Liquidation pursuant to resolution of CoC <sup>24</sup>	934
Failure to receive any Resolution plan <sup>25</sup>	525
Rejection of the Resolution plan(s) being non-compliant with the legal requirements <sup>26</sup>	47
Liquidation due to contravention of the approved Resolution plan <sup>27</sup>	8
<b>Total</b>	<b>1514</b>

Source : Data extracted from publications of IBBI

**Figure 5 : Reasons for Liquidation**



Source : Data extracted from publications of IBBI

Table 3 highlights that majority around 62% (934 cases out of total 1514) of the Corporate Debtors under CIRP were liquidated based on the decision of CoC to liquidate the Corporate Debtor taking a

<sup>24</sup> Sec.33(2) of IBC, 2016

<sup>25</sup> Sec.33(1)(a) of IBC, 2016

<sup>26</sup> Sec.33(1)(b) of IBC, 2016

<sup>27</sup> Sec.33(3) of IBC, 2016

view that the Business of the Corporate Debtor was no longer viable and that the Corporate Debtor cannot in opinion of the CoC be reasonably continued as a going concern. Another around 35% (525 cases) of Corporate Debtors ended up in liquidation for failure to formulate and/or obtain a viable resolution plan for reviving the ailing business of the Corporate Debtor.

## Way Forward

IBC has reformed the framework of insolvency law in India to a great extent. The fear of losing control of the business enterprises has effectively lead to inculcating higher discipline among the promoters of the borrowing companies. Data available in the public domain indicates that more than eighteen thousand applications before the NCLT involving more the Rs.5.29 Lakh crores have been resolved even prior to their being admitted to CIRP<sup>28</sup>. The IBC framework has helped India in considerably improving its ranking to 52 from earlier 108 in the ‘resolving insolvency’ parameter of Ease of Doing Business Survey conducted by the World Bank for the year 2019<sup>29</sup>. The efforts on the part of the part of the Government to provide a credible exit route to the ailing entities is certainly laudable.. The Economic Survey 2020–2021 points out that recovery of NPA’s by banks during 2016–17 to 2019–20 has been the highest under the IBC route far exceeding the combined recoveries under the conventional framework of Debt Recovery Tribunal, proceedings under the SARFAESI Act and through conciliation proceedings under the Lok Adalat framework<sup>30</sup>. IBC has certainly encouraged the improvement in overall credit culture in the Indian economy, making the corporate resolution process more dynamic<sup>31</sup>.

The new insolvency framework by emphasising on ‘resolution’ rather than ‘recovery’ and allowing viable companies to continue as going concern is largely seen as encouraging entrepreneurial risk-taking and at the same time trying to strike a balance among interest of various stakeholders in the business enterprise including its investors, creditors and the government as well.

Though IBC has positioned as an effective legal framework for timely resolution of the ailing corporate, yet there are certain pitfalls in achieving its objectives. A key challenge faced is the higher number of cases<sup>32</sup> ending up in liquidation. Another concern is the greater number of cases (about 80%) under CIRP being pending for more than the statutory period of 180 days<sup>33</sup>. Reports indicate that the average time taken in completion of CIRP was about 492 days<sup>34</sup>, which indicates a marked deviation from the intent of swift insolvency resolution. The concerns on exceeding timelines in completion of CIRP gains considerable significance as the value of assets of the Corporate debtor tends to erode over time, adversely affecting the keenness of prospective resolution applicants (bidders) interested in taking over the ailing Corporate Debtor. The delays in the completion of CIRP also adversely impacts the operational creditors much more than financial creditors. Reports indicate that over the last five years, OCs have been able to recover only about 13.9% of their total admitted claims having lost more than

<sup>28</sup> <https://www.mondaq.com/india/insolvencybankruptcy/1164034/five-years-of-ibc-a-promising-journey>

<sup>29</sup> Insolvency and Bankruptcy Board of India, “*Insolvency and Bankruptcy Regime in India: A Narrative*”, (2020) ISBN: 978-81-947537-0-4

<sup>30</sup> <https://www.bloomberquint.com/law-and-policy/economic-survey-2021-recoveries-under-ibc-highest-among-all-debt-recovery-methods> accessed on 17.03.2022

<sup>31</sup> <https://www.livemint.com/politics/policy/how-will-another-makeover-help-improve-the-ibc-11636481188377.html> accessed on 12.03.2022

<sup>32</sup> Table 1 : about 47%

<sup>33</sup> Figure 4 : about 73% cases exceeding 270 days with another 7% exceeding 180 days.

<sup>34</sup> <https://indianexpress.com/article/business/economy/ibc-regime-corporate-insolvency-resolution-indian-economy-7423869/> accessed on 12.03.2022

Rs 5.17 lakh crore in all<sup>35</sup>. Thus, completion of the CIRP within the stipulated timelines attains significant importance as it forms a key factor in preserving the economic value of the business enterprise. The completion of the CIRP process within the prescribed timelines would build confidence in prospective resolution applicants (bidders) on the certainty of the process which in turn would facilitate achieving the stated objective of overall maximisation of value for all the stakeholders.

While IBC has successfully chartered a new era in the history of insolvency resolution in India, it needs certain more reforms to address the challenges faced in its effective implementation to make it more gainful for the corporate sector as well as the economy as a whole.

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<sup>35</sup> <https://indianexpress.com/article/business/economy/ibc-regime-corporate-insolvency-resolution-indian-economy-7423869/> accessed on 12.03.2022

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# PENDING AGENDA FOR POST-PANDEMIC SOCIAL PROTECTION. AN INTEGRAL SYSTEMATIC INTERDISCIPLINARY LOOK FROM THE LAW OF EMERGENCY

Jorge Isaac Torres Manrique\*

## Abstract

*The health situation has been taking a heavy toll on the people of the world. We are witnesses of the exception of the astronomical figures of infections, deaths, economies of the countries, loss of employment, increase in poverty rates, among others. The effect of the pandemic is presented in an irrepressible and worrying way in every order.*

*The policies of the different governments have not been successful, since they cannot control or stop the advance of COVID-19. Nevertheless, it should be noted that the additional problem that is coming is the one that will arise after the virus has been overcome.*

*In this installment and in that order of ideas, we explain and develop in a comprehensive, systemic and interdisciplinary way, the challenges that different governments must assume when the health situation of the world has been overcome. Additionally, it is noteworthy that we have developed our proposal in the form of a package of measures to be taken. We do it not only from the world of law but also, from an interdisciplinary approach, in order to find an explanation for the failed policies assumed, as well as, to be able to overcome them. The great value, importance, and significance of our study are based on it.*

**Keywords:** *agenda post-pandemic, post-pandemic protection law, law of emergency, post-covid-19 state policies*

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## **Introduction**

The cost that the arrival of COVID -19 has been generating is very unfortunate. In this sense, it is necessary to begin this work with a basic premise. That is, the urgency of the actions to be taken after overcoming it. This, in accordance with the nature of a health emergency with unfortunate side effects at all levels.

In that order of intelligence, this work establishes and develops a strategy of steps to follow, in order to counteract the consequences caused by the health pandemic.

So, although it is true that currently actions are being carried out in favor of the health and life of the population as a result of the infections, this would continue in the stage subsequent to the overcoming of the virus.

However, the author points out that it is also imperative to urgently address the sectors directly and indirectly related to the health emergency, because they are the ones that have been most affected.

## **Special Attention Social Protection Mechanisms**

We maintain that for the construction of this installment, the basilar premise involves a two-sided nature. This is: i) Strengthening existing social protection mechanisms, and ii) Establishing the necessary social protection mechanisms.

Thus, in order to specify the corresponding guidelines for the same, we propose:

## **Political Will**

Above all, it deserves to ensure that there is real action in consequence, of effectively carrying out a corresponding change in public administration. Otherwise, it will be one more statistic of mere initial intentions with traditionally catastrophic results. The same that we will have at the time, to regret and denounce.

## **Situational Diagnostic**

As a first point, it is essential to determine the consolidated impact of all sectors, left by COVID-19. This, in order to give them the necessary momentum to be able to get out of said crisis.

In that order of understanding, to start the aforementioned company it deserves to make use of prevention, prospecting, disruption.

## **Citizenship**

This section becomes capital, since before starting the materialization of the result of the situational diagnosis, it deserves that it be focused on the effective materialization or strengthening of citizenship. In addition, with the priority and emphasis that corresponds to its nature.

This point is extremely worrying, because strictly speaking Peruvians would not have citizenship, but would only have the quality of inhabitants.

This is clear from what Moisés Naim maintains when he affirms it by noting that at least 75% of the economically active population (EAP) living in informality, it is inevitable to question whether Peruvians understand the difference. The first dwell, enjoy, deal with the day to day. The latter exercise their rights and fulfill their responsibilities; they cooperate and work thinking of their land and their descendants. Just like in the past decade, and the past, and so on. We are a republic in formality, but empty in content (Garrido, 2020: 23).

### **Meritocracy and Specialization**

It is imperative to have as a baseline to have the best and knowledgeable in the field. If you want to be successful, the best, for the product, for the management, undoubtedly you will need resources (human, logistics, among others), which have the same or similar nature.

Consequently. The expected achievement does not turn out to be possible to embrace with the mere intention, improvisation.

### **Health**

The present point turns out to be of the utmost importance. It is that the present health pandemic that is hitting the world has also exposed the long ones as extremely poor deprivation conditions, neglect and neglect of the health sector. This, because of decades of non-existent corresponding management.

Then, it deserves to promote it in the process of materialization and not in "merit" to emotional such as empty political speeches. Thus, the budget must be allocated for the same, adding prevention, training and specialization, on the topic of epidemics.

### **Anti-corruption**

When verifying the effects of the control of corruption in development in the face of different production structures and the non-linearity of the effects of corruption, the need to consider both aspects when implementing public policies, both oriented towards the sophistication of the production structure, is highlighted as to anti-corruption policies (Zanuto, 2020: 84).

Indeed, it becomes imperative to initiate a frontal fight against corruption. Moreover, it is that it has proven to be not only tremendously harmful, but also incredibly resistant to crises and even the effects of the pandemic.

### **Job**

Peru has been in confinement for more than 100 days, and more than 2 million Peruvians have lost their jobs. Informal employment, which until before the health emergency was more than 72% could reach up to 80%, according to some analysts (Zacarías, 2020).

In this sense, we consider that mainly the vulnerable sector of the population is called upon to have due attention and assistance. Let us not forget that it is inconceivable to consider that it could survive the quarantine with a single bond of 760 soles (230 US dollars on average), which did not even cover all the sectors.

In addition, when it is erroneously considered that the mere fact of lifting the quarantine through a progressive return to productive activity ensures an ipso facto economic income.

Thus, for the evaluation of the possible impact of technological transformations on employment, the conditioned contextual approach should be applied, since the compensatory, deterministic and simple contextual approaches would not be able to capture the complexity of the technological, economic and social processes related to these transformations nor would make an adequate contribution to the analysis of public policies that promote the use of its potential for development and limit its potential negative impact (Weller, 2020: 23).

It is difficult to estimate the net impact of technological transformations, both due to the uncertainty regarding the number of jobs that will be eliminated, as well as regarding the number of new jobs that will be generated. However, the challenge of enhancing the interaction between humans and technologies and of adapting the skills and competencies of the workforce to new demands and opportunities, as well as of facing the threat of the deepening of technologies, is well established. existing and emerging inequalities, which implies new challenges for labor institutions (Weller, 2020: 24).

Consequently, the urgent creation of the necessary sources of work has to be accompanied by at least one financial bonus for their re-employment. In that order of intelligence, jobs have to be considered both for those who lost it in the pandemic, and for those who did not have it before it.

## **Education**

The education sector requires urgent attention. This, inasmuch as teachers and students can be left almost abandoned, under the mere ministerial decision that no student will repeat the 2020 school year.

Thus, we have that due to the fact that virtual education takes center stage regarding the epidemic situation, the minimum that corresponds is to make the Internet signal effective as due access for all sectors of the population. To which should be added the strengthening of the capacities of the aforementioned actors in education.

## **New Technologies**

While it is true that what was scheduled to be achieved in at least a decade, due to the pandemic has had to be addressed in a matter of weeks. Obviously, the foregoing does not necessarily ensure that users have had state support, both in terms of training and timely logistics necessary. This is not achieved by the mere issuance of a Decree.

Consequently, the granting of comprehensive, aggressive policies corresponds to ensure that said advance not only stops, but also even regresses.

## **Economy**

We begin by citing that Peru is not only the sixth country in the world with the most cases of coronavirus, it will also become the second nation with the worst economic decline in Latin America, and the third worldwide. This year the Gross Domestic Product is expected to fall to more than 12%

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(Zacarias, 2020). Consequently, the economic reactivation becomes of the first order. Counting for this with the participation of the private sector.

And in this regard, we also support the importance of strengthening the recently approved circular economy (RPP, 2020). That is, the one where each element fulfills a function and is then reused. The circular economy seeks long-term sustainability and rules out short-term consumption; products have more than one life cycle. In this model, the use of resources prevails and the reduction, reuse and recycling of the elements is highlighted. Thus, waste becomes resources (El Peruano, 2020).

### **Institutionalization and Infrastructure**

In a country like ours, where informality and the lack of roads are very marked, their promotion and strengthening becomes essential. These issues are not minor and even go beyond the period of health emergency.

This, while in the report of the World Economic Forum, published in 2017; we appear in position 129 out of 137 countries studied, occupying position 116 in the institutional framework and position 111 in general infrastructure (Garrido, 2019).

### **Ecology**

We cannot stop apostrophizing the rebirth of ecology in the quarantine period, that is, in the quality of the air and water of the rivers. This, because of the non-contamination of the automobile fleet and industrial activities, for example. However, now that the various sectors are reincorporating their work activities, this advance would experience a logical as a worrying setback.

Therefore, we consider that the adoption of palliative measures is pertinent, in order to preserve this ecological rebirth.

### **Social Security**

It is worth re-evaluating the state and private pension system, in order to give an integral emphasis, of clear and forceful benefit to the insured.

### **Agroindustry**

It must be strengthened aggressively, while this sector has become notoriously depressed and its products were not included in a timely manner in favor of popular consumption.

In addition, to eliminate the distortion of prices between the farmer and the consumer, such as potatoes and mandarins, so that they do not return to reach prices below production costs (Rodríguez, 2020).

### **Entrepreneurship**

It should be strengthened with incentives that involve the most vulnerable business sectors, that is, small and medium-sized enterprises.

## **Mining**

The pandemic could be the starting point for a gradual change in the governance of the sector. From the most optimistic scenario, a propitious moment is approaching to suggest a greater awareness of the need to strengthen State intervention (Valle- Riestra, 2020: 7).

This will be conditioned in principle to the balance of powers: the balance between the interests of an elite that is committed to economic reactivation measures that imply relaxing regulations, and social actors that bear the pressure to accelerate strategic projects. What is safe to say is that the immediate demands associated with the pandemic will be the struggles to guarantee the safety and health of workers in the mining camps and resistance from communities and allies in the event of flexible environmental regulations. The degree to which these demands manage to articulate and consolidate a discourse and current of opinion favorable towards greater State intervention and institutional transformation in the extractive sector will be decisive, but it is an uncertain scenario for the time being.

## **Sustainability**

On the other hand, it is necessary to observe the commitment of the present measures to be adopted carefully. This, in order to orient your donation towards permanence and consolidation.

It should be added that they should only remain until their validity warrants, since, after that, State policies should be oriented towards the points or aspects that require it.

## **Prohibition of Egotism and Messianism**

The eventual lightness with which legislative amendments or proposals for the fight against corruption turn out to be assumed is extremely worrying, in the light of the corresponding reform commissions.

This happens when, in principle, the true specialists are not necessarily summoned for it. Then, that the proposals and modifications end up being the product of a conjuncture and not of a real legislative need. The aforementioned lands on the fact that before the creation of a reform commission, it incredibly happened that the respective modifications and proposals simply did not exist.

Separate mention, it deserves to refer to what Mario Castillo Freyre points out as "Academic Temptations". That is, among not a few members of the reform commissions they observe the principle ("I do not oppose your proposals for articles for the law and you do not oppose mine"). Then, they agree that finally the complete package should go without further debate and analysis, in view of the fact that in the Congress of the Republic the legislator will make the corresponding observations and amendments. Which certainly does not always happen.

Consequently, it is that it can appreciate approved laws in which its articles do not present the obligatory internal and external systematization, and where there are some, in which the text presents repeated, incomplete, contradictory content.

In addition, one cannot fail to apostrophize that not a few givers of a legal norm are more concerned about the permanence of validity of a harmful or wrong law because it contains a proposal of their

person, since they cannot conceive that their name leaves to be present in the dation or proposal of the same.

Then, they end up opposing by all possible means to the eventual modification of the supposed enlightened law, that they were authors, managers or promoters. It is the typical case of those who consider themselves predestined to transcend without greater or no merit or sufficient foundation.

### **Principles of the Administration**

Thus, the public value is not observed, the same that constitutes an obligation for those in charge of public management, because they work with public funds, which belong to the population and therefore must be oriented towards it in general and specifically to the most depressed sectors and not for other purposes, even less so when the referred "other purposes" postpone and denature the purpose that the public function embraces (whether it is derived through popular election or not). Thus, the public value, seeks in a committed way, a system that promotes effective, efficient, equitable and sustainable development. Under this perspective, the creation of public value is sought through state management, which has to contribute significantly to four fundamental purposes or principles: i) Reduction of inequality, ii) Reduction of poverty, iii) Strengthening of states democratic, iv) Strengthening of citizenship.

Thus, the public value (Bertucci, 2005: 12), it assumes in short terms that: "(...) people have the capacity and freedom to express their preferences regarding the activities and results of the Public Administration. It also assumes that Public Administrations have the will and capacity to accommodate their objectives to citizen preferences; and more than that, it assumes that by delivering the required public value, the people will be willing to pay for it with money, with the vote, or offering their time to collaborate with the government".

Likewise, it is necessary to record the indissoluble relationship between public management and fundamental rights.

In that order of ideas, the Fund should be seen. 9., of File No. 2939-2004-AA/TC, of the Peruvian Constitutional Court, which legalizes: "(...) the interpretative principle of the vertical efficacy of fundamental rights, which requires that the public powers in the exercise of their competences give fundamental rights the character of true action mandates and special protection duties, also recognizing their ability to radiate in relationships between individuals, acting as true limits to private autonomy".

For its part, the Principle of Good Administration of public management must also be borne in mind.

Then, "It is about the principle of good administration, whose green shoots are beginning to be seen in the jurisprudence and will allow to redefine the model of relationships between the use of discretion by the administration and the justice that controls it. Professor Julio Ponce Solé, who has already proven to be an advance in showing the way of negotiating the rules in previous works, now in his excellent work entitled "Discretion cannot be arbitrariness and must be good administration" (REDA 175, January - March 2016), postulates the advent of "a new paradigm of the Law of the XXI century. The paradigm of good governance and good administration. " And it distinguishes the idea of "good governance" or

the way in which the executive carries out its regulatory and political functions, from the idea of "good administration" which refers to the administrative management mode, which is breached by negligent management or corruption"(Chaves, 2019).

The funny thing is that with two beneficial principles, public management would be irreproachable. The principle of good administration, in the objective aspect of prudence, quality, objectivity and justification of the decisions. Moreover, the principle of good faith, on the subjective side of intentions (Chaves, 2019).

In that order of intelligence, it is shown that the non-positivization of the obligation to resolve violates basic principles of public management, in addition to the aforementioned fundamental rights.

## **Justice**

During the pandemic period, we witnessed the paralysis of the justice administration system. The same one that is gradually being restored as virtual.

Therefore, what corresponds is that it begins the care in a complete, agile, timely manner. This, in order to achieve zero load and recover downtime. In this sense, we consider that the principle of speed should be postponed by the principle of greater speed.

Regarding the principle of greater speed, legalized by the Peruvian Constitutional Court (hereinafter, TC), it should be noted that we are absolutely responsive to its provisions.

Thus, the TC in the Fund. 28., of File No. 02214 2014-PA / TC, dated 05/07/15, in relation to the greater judicial speed in the cases of older adults, it teaches: "(...) considering the aforementioned advanced age of the actor (99 years), the time elapsed since the filing of the amparo claim (12 years, of which 10 correspond to the execution phase) and that in the present case there are already specific settlements of legal interests, the Constitutional Court deems necessary order the execution judge in this case to resolve and ensure that the plaintiff actually collects the amount that corresponds to him for all his pension debts (including the respective interest), within a period of 30 business days (which includes the realization of the new liquidation of legal interests), time that will be computed from the day of notification of this decision and that, once said term has expired, will originate the respective responsibilities, having to send to this Court the resolutions ones that have been adopted on the matter".

Topping off the TC very plausibly, with what is recommended in the Fund. Thirty of the aforementioned file: "(...) it is inadmissible from any point of view that a 99-year-old person has to pass through judicial offices, for more than 10 years, at the stage of execution of sentence, to collect a debt that the state has with her. In this sense, the Constitutional Court must establish the following requirement with binding criteria: all jurisdictional bodies have the obligation to grant greater speed to processes involving the rights of the elderly the older the age of said persons, under responsibility".

Consequently, we consider it important to highlight that the foundation we propose to grant expeditious attention to the administration of justice, lands on the foundation of the present new principle of greater speed, but applied to the effect generated by the forced paralysis of its functions.

Finally, it is imperative that the National Board of Justice, assume its firm challenge against corruption, devoting itself to its pending administration, at the same time marking distance from the unfortunate actions of the defunct National Council of the Magistracy.

### **Fundamental Rights**

It should not be forgotten that the adoption of all the present measures set forth and developed directly influence the safeguarding and realization of the unrestricted fundamental rights of the population.

Moreover, as such we can refer: Right to live in a healthy and healthy environment, to free development of the personality, to work, to health, to education, to peace and tranquility, among others.

### **Implementation of the State of Justice**

We expressly state that it certainly could not satisfactorily achieve its goals, insofar as it conforms to the same nature of the prevailing legal system, that is, the Constitutional State of Law, which cannot be equated with or synonymous with justice. That is, his philosophy is constitutional, but unfair (Torres, 2018). We substantiate what is referred to in the following terms:

In the first place, Legal Justice is usually called that way, due to its embrace in accordance with the provisions of the respective legal norm, that is, when a judicial or administrative seat is decided by adjusting exclusively to what is contemplated in law of matter, for the specific case. Alternatively, that the granting of a right established in the express text of the law is also invoked.

Next, there is a definition in the Constitutional Justice that strictly observes the postulates of the Political Constitution. Therefore, it is clear that this type of justice is not comparable to legal justice.

Next, Conventional Justice is the one that is arrived at; taking as a premise what is legalized in the American Convention on Human Rights: Its scope or proximity to fairness is greater than that offered by legal and constitutional justice.

Then, it is to be seen the meaning of Restorative Justice is related to the spirit that restoration contemplates for offended or aggrieved subjects. Although it restores the totality of those offended or injured, it does not necessarily grant what corresponds to the victim, but rather what the victim considers subjectively to remain or know that it is restored.

Not infrequently, the high emotional content makes what the offended person needs is the granting of sincere apologies as heartfelt apologies and satisfactions of the offender, with the charge of not incurring the corresponding offense or injury again. With this, the victim would be somewhat satisfied. Therefore, restorative justice takes a step higher than legal, constitutional and conventional justice does.

Finally, we have Justice, justice itself, the only one comparable to legitimacy, to fairness. This type of justice is what refers to giving each one what is due. Justiniano pointed out in this regard: "Justice is the constant and perpetual will to give each one his right."

Thus, justice cannot be comparable to restorative justice, since, unlike the latter, the emotional burden or need is not reflected, because if the offender stole ten head of cattle from the offended, then, it will be fair or justice, that the offender receives from the offender the complete number and quality (characteristics) of the stolen and in any extreme, an apology that can act as a balm to reduce the number and nature of the stolen.

Let us not be misunderstood, since we are not against, demonize, demean or demean restorative justice, we only compare it with justice. Then, it is demonstrated that justice is not the same and is at the same time much superior to legal, constitutional, conventional and restorative justice.

However, it must be stated that strictly speaking, the only validly existing justice is justice itself or true justice. Moreover, it is not a question of wrongly trying to grant greater significance or supremacy using bombastic names to "create" various types of justice, when justice is only one, in other words, the last of those analyzed.

By the way, it is worth mentioning the marked ascending gradualism between: legality, constitutionality, conventionality, restorativeness and justice.

To conclude and on the basis of what has been developed, we agree that we should aspire to as the only unbreakable and non-negotiable north; it is to the mention, defense and embodiment of justice itself, that is, to legitimacy, to fairness, that is, to true justice.

However, we maintain that we do not necessarily have to wait for the long-awaited State of Justice to be found one day, since from now on we could embrace it precommunicating ourselves to the principle of legitimacy.

### **Why Points Developed are not Assumed or do not End up Being the Expected?**

This point turns out to be of particular importance and significance, since in principle it has been possible to observe that State policies have been legislated or assumed, with a view or approach only from public or private entities; leaving the administered and defendants in oblivion, but above all the effective safeguarding of the economic order.

Therefore, to begin with, we can reflect on the reason for the insufficient, partial, incomplete decisions, which are manifested by not legislating correctly, for example, the subject matter of this work.

Next, we strike on purpose, taking care of answering the basic questions that deliberately fall when mature: i) Is it solely the responsibility of the legislator? ii) Why does it turn out to be a constant said action in everything we want to carry out? iii) Why so alien and erratic can the company in question be? iv) Why does it have or can take so long to achieve what is supposedly sought and has to be sought, without ending up being achieved? ) Why do the defendants and those administered have to suffer so much so that they can embrace a more equitable treatment in the recognition of their fundamental rights? vi) Why is it not clear to us at the beginning? vii) Why does this not happen in Europe and here yes, for example?

In that order of thought, we can try a resolution to them, attributing to nothing less than reasons of nature of a kind of our Latin DNA.

Thus, the answer seems to point to very deep reasons, to our construction, to something that we simply cannot avoid, since it turns out to be part of our own nature.

Thus, analyzing in depth (or perhaps, really in depth), we have to point out that this inability to reflect that characterizes us as Westerners is not the product of chance, but of causality. Thus, we have to take into account that as Peruvians (for example) we present immense fractures, since we did not have the ages of the "Renaissance", or "Enlightenment" (we skip from the Ancient to the Modern age with a pole). In this sense, we lack the ability to rethink, reflect, relearn to think from their environment and ourselves –or simply to be reborn-, as well as the loss of faith in all kinds of dogmas; that the Renaissance gave to Europe in the 11th and 15th centuries.

That is the explanation of our great defect. To these fractures we have to add (in the words of the prominent philosopher and great teacher Juan Carlos Valdivia Cano, in his revealing and acute essay "the disease of love"), the fact that we are mestizos made or resulting from a kind of *tutti frutti* of an autochthonous culture (Inca), Christian morality, Roman power institutions (Parliament, Judiciary), and Greek mental structure; and Greek is or means (among other things) Platonic. What gives us the tendency to define things by their objective or ideal and not by what they effectively or in a total or complete integral way are (for example: when our western culture defines the word love, it makes it idealistically unique and unanimously as something , noble, sublime and wonderful -platonic love- and not for what it really is in its entirety, thus forgetting jealousy, betrayal, boredom, lies, power, disagreement, slap, scandal, hatred, death.

Our culture, Valdivia Cano continues, does not understand that love is ultimately a chronological problem; it is only a matter of time. Love is a chronic disease (it is not that the lovers are sick, but that Eros himself is), and thus, sooner or later (the ever diligent jealousy will decipher the disappointing love signs) the lover will taste the vinegary taste of lucidity (such lucidity is paved with disappointments). Someone will say, is there not or is there not pure love (or only that of the beautiful part)? "I am looking for that love, not a few frequently affirm." Fernando Savater responds in the affirmative by the way, but refers that only the love of King Kong (the highest, greatest, who expects everything and gives everything - in exchange for nothing - unique and "true" love that only appeared on the big screen), Thus, not to be Platonic is to go beyond Plato, then, it is to accept that the Danube is not blue, it is dirty, brown, water with mud and oil (to say the least). For this reason, Valdivia Cano also considers that in matters of love better situated than Plato is Zarathustra ("love: in the media war and deep down eternal hatred between the sexes").

Then in light of the shortcomings<sup>1</sup> Western and Peruvian women reviewed, it is unnecessary to quote Ortega y Gasset, "the man is not such, but he and his circumstances" (Guadarrama, 2015), to take into

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<sup>1</sup> Deficiencies (age) and fractures (cultural) that can also be investigated and analyzed by the citizens of each Western State or country, regarding their specific case; in order to really understand his own nature and access the state of lucidity referred to by Juan Carlos Valdivia Cano; and then do the same in this regard.

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account that everything that happened to us as a culture, resulted in what was indicated and which did not it can be saved or ignored just like that.<sup>2</sup>

Finally, we note that we only raised one term as an example, apparently simple (love), with which it was possible to see the disastrous "problem" that it unleashed (platonic love); Thus, let's imagine what happens when one investigates, discusses, analyzes and "reflects" —we reiterate that reflecting comes from being reborn/rethinking/learning from mistakes; that is to say, of the learning granted by the time of the European Renaissance, the same one that we did not have about legal issues such as, for example, the present installment in which we briefly address the stages of the evolution of Peruvian law.

## Final Reflections

In principle, we expressly express the urgent and necessary adoption of all the points considered as a pending comprehensive interdisciplinary agenda, for post-pandemic social protection, in the aforementioned extremes.

Thus, we maintain that its spirit and starting point must have a sufficient justification, which goes beyond a mere conjuncture, be it reform, or close to the arrival of the Bicentennial.

However, each government policy will have to adapt this package of measures, in accordance with its own reality, paying special attention to the interdisciplinary nature of the referred health emergency.

Likewise, it is recorded that it is essential that decision-making is entrusted and assumed in a responsible, formal, professional, specialized manner.

Consequently, it should be noted that a post-COVID-19 scenario may be more painful than the one we are going through. For this reason, it is not advisable to continue with more trials in government decision-making, the same ones that have been charging a very high cost in the health, life and economy of the people and countries of the world.

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<sup>2</sup> By the way, we cannot fail to emphasize that it is always good or healthy to know yourself really (whether as a person, as a citizen, as a national or as part of a culture). Whatever the conclusion or truth we arrive at. The truth (simply), however crude, does not kill, it only stuns a little; but then, from it, we can actually start looking for our own solution or evolution. Thus, it is rightly sentenced "know yourself, accept yourself and overcome yourself" and "to know where to go, you must first have knowledge about where you are", in addition. Consequently, it is false and wrong for someone to try to improve himself or herself without having previously met and accepted, or to want to go or achieve something (improvement or success, for example), without having the slightest idea about where and how they are initially.

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# JUDICIAL IN-ACTIVISM: THE CRITICAL STUDY

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## Abstract

*In the process of changing the nature of law and globalization, all things are greatly changed from top to bottom and this is easily seen in the aspects of society. Courts also changed their nature in respect of performing their duties. And if we looked the function of the apex court we can say that in the beginning, it worked as the guardian of the constitution but due to the many enactments of the various legislation is also changed its work and now in the practical sense it seems to be sometimes the courts works a lot in the aspects and sometimes it seems to be quiet and this silence rises the concepts of the JUDICIAL IN-ACTIVISM. And if we want to give the definition it is “Judicial In-activism is a recognition of the possibility that judges might fail to perform the minimal components of the Judicial function”. And Judicial In-activism means when the judges failed to perform their minimum work which is assigned to them in the respects of Jurisdiction, Review of the cases, and Protection of the right of individuals and society at large. And if we talk about the failure of the duty on the part of the judge we pointed out that the court doesn't perform well. All people who enter the court precincts must have faith in the judges that justice is served here with an even hand in any legal conflict between the State and the citizen, without fear or favor. It has been argued that there is no finer moment for law than when it slashes through abstract ideas and fleeting feelings to defend unpopular citizens from prejudice and retaliation. Judicial interpretation is one of the judges' most significant responsibilities. There is no question that judges can interpret the law to serve a societal goal. When it comes to the judges of the higher courts, their position necessitates that they be both historians and prophets in one, as the law is fashioned not only by the decisions that have been made in the past but also by those that will be made in the future. The courts' role is to interpret the laws and determine their legality; they do not endorse or criticize legislative policy.<sup>1</sup>*

**Keywords-** *Judicial-in-Activism, Democracy, Accountability, Fuller's Participation Thesis, Justice.*

## Introduction

It is often considered that what the work court should do or not and which give two concepts are Judicial In-activism and Judicial Activisms and both are different from one another and if we talk about

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<sup>1</sup> Text of the address delivered by Justice H.R. Khanna at the meeting attended by Gujarat Chief Justice, Judges, and members of the High Court Bar Association, Ahmedabad on November 16, 1978.

the former one which means that when the judges failed to perform their minimal work which is assigned to them and the latter means when the court performed the work for which they are not assigned or in simple words, we can say that Judicial activism is a judicial philosophy that the courts can and should go beyond the applicable law to consider broader societal implications of its decisions. It is sometimes used as an antonym of judicial restraint. So the things at which point or at which level the courts and judges should perform their work so that they should continue to enjoy the confidence of the public at large. And by doing so they should remove the misconception about them from society and they work for the welfare of the public and anybody could easily access the court without any type of restriction and they would succeed in claiming their rights. When appointed, judges swear to uphold the law. The judge's decision would be invalidated if they failed to implement a legal concept that is stated in the written laws. Similar to how applying a principle that is not contained in the laws would invalidate the decision and constitute a breach of the judges' oath to uphold and apply the law. Judges are not permitted to introduce or develop notions that are not already part of the law. A judge must make reference to the wording employed in the legislation before applying any principles.<sup>2</sup>

### **The Problems of In-Activism**

The next question arises why there is Judicial In-activism if we see on a plane surface we will see there are lots of reasons for this and it may be due to the correct interpretation of the law and sometimes judges not understand the true meaning or the object of the implementing any law.

And it is often seen that the doctrine of the biasness also affected them and even in some cases it is to be seen that sometimes due to the political pressure they did not work with the efficiency which they have to and this can be clearly shown from the BHOPAL GAS CASE that it is only due to the political pressure our judiciary failed in its work and whatever the compensation provided to the victims of the case is not adequate and even they did not get the justice till date. And it is not the only case in which the inadequacy and insufficiency of the courts and judges have shown there are lots so many other cases.

The idea that courts must decide the cases that are brought before them is supported by more than just intuition. Justifiability doctrines, which exempt courts from making decisions in particular situations, imply that courts do not have the discretion to decline to make decisions in other situations.<sup>3</sup> A

<sup>2</sup> The State vs Ramprakash P. Puri And Ors , AIR 1964 Guj 223, 1964 Cri.L.J 541.

<sup>3</sup> The extent to which such concepts should be used to absolve courts of their duty to make decisions is a topic for discussion, of course. However, even Alexander Bickel, who supports the widespread application of justifiability doctrines, admits there are boundaries. There are limitations to the situations in which these doctrines and devices may be applied, limitations that are inherent in their intellectual content and essential significance. See BICKEL, at 170. There is also area for discussion as to whether there is any discretion to reject jurisdiction that is not covered by justifiability doctrines. Compare Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 YALE L.J. 71 (1984) (criticizing judicial abstention doctrines as contrary to separation of powers principles), with David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. REV. 543 (1985) (advocating broad judicial discretion to decline to adjudicate cases over which jurisdiction exists). For additional background, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 650-55 (4th ed. 1996) (discussing the issue of whether the Supreme Court enjoyed the discretion under its pre-1988 mandatory jurisdiction to decline adjudication); Daniel J. Meltzer, Jurisdiction and Discretion Revisited, 79 NOTRE DAME L. REV. 1891 (2004) (discussing the themes developed in Shapiro's article). But keep in mind that not even Shapiro supports unrestricted discretion. Instead, he advocates the use of principled jurisdictional discretion, which entails the use of standards derived from the applicable statutory or constitutional grant of jurisdiction or from the culture in which the grant was established to direct the decisions to be made when defining and exercising that jurisdiction.

presumably broad class of cases that have been brought before a court in accordance with all applicable procedural requirements and in which a party has asserted a legally cognizable claim of right are exempt from the application of these concepts. In these situations, where justifiability or a comparable doctrine could not plausibly free the court from what the court perceives to be its adjudicative duties, a ruling would seem to be required.<sup>4</sup> Yet any search for the body of law articulating this assumed mandate would be in vain. This is not to suggest that the entirety of American case law is free of language that could be taken to support the proposition that courts must decide such cases. Indeed, Chief Justice Marshall appeared to speak directly to the question in *Cohens v. Virginia*:

"With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them".<sup>5</sup>

Neither case law nor academic commentary has squarely confronted the propriety of judicial failure to decide in these situations where decision seems required.

On the other hand, an adjudicative duty can include a requirement to resolve disputes brought before the court in accordance with the parties' wishes. With that obligation clearly established, the court would be obligated to resolve the parties' disagreement exactly as they have described it. Failure is inevitable at this end of the spectrum.

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Equally significant, it indicates that these standards can be clearly stated and freely implemented by the courts, analyzed by those who question the work of the courts, and examined by the legislative branch. No less is required under the fundamental standard of candor, which is essential to the efficient discharge of the judicial role. Although the Redish-Shapiro argument's topic and the issues discussed in this article share some similarities, their discussion is focused entirely on the federal courts and how those courts are to use the restricted authority granted to them. Shapiro would concur that a court must decide a case, so my reasoning ignores the jurisdictional issue and explores what a court is required to do".

<sup>4</sup> "Though usually expected, this knowledge is occasionally expressed. For instance, it appears that a dispute must always be decided if a claimant appears before a court of general jurisdiction that also has jurisdiction over the person of the defendant and requests a remedy of a kind that the court is authorized to grant. Either there is or there is not a previously drafted settlement that affirms or denies the right to the remedy. If so, the claimant's correct question can be addressed using conventional judicial deliberation techniques. If not, it is asserted that the only difference is that reasoning must delve deeper into the fundamental tenets of the social order—to the logical ramifications of the members of the society Professor Fuller refers to—to the rational implications of their "shared purposes." There will always be a rational response to the question of whether or not such consequences support the claimed right. In other words, the common law offers a thorough, fundamental body of law sufficient for the settlement of any disputes that may arise within the social order, within the bounds set by established remedies. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 646–47 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *BROOK. L. REV.* 685, 716, 732 (2001) (suggesting that the federal courts of appeal lack a general ability to avoid adjudicating the claims brought to them); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1, 25 (1964) (arguing, in the context of a response to Bickel, that "In some situations, a decision must be made; there is a point beyond which avoidance tactics cannot be used, and constitutional precepts cannot be pressed without impermissibly enervating principle"). In fact, Bickel himself admits that this conclusion is appropriate outside of the context of Supreme Court decisions on constitutional disputes".

<sup>5</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

## The Need to Define the Adjudicative Duty

The case for defining the adjudicative responsibility appears clear at the most fundamental level. We can only evaluate what courts do after we know what they ought to be doing. The perception that judges are fulfilling the requirements of their position in an appropriate manner plays a significant influence in determining the legitimacy of courts.<sup>6</sup> It is imperative to make the effort to more clearly define the adjudicative tasks of courts given the practical challenges involved in determining whether they are carrying them out. The practicing bar believes that adjudicative duty violations—in all of the numerous forms depicted in the accompanying impressionistic sketch—are, at least anecdotally, fairly common.<sup>7</sup> Giving the adjudicative responsibility a clearer description would not only contribute to changing people's perceptions of it, but it will also assist judges better comprehend and carry out their duties as judges.

<sup>6</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1827–33 (2005) (discussing the “sociological legitimacy of courts and their decisions”); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1483–84 (2004) (discussing the relationship between perception and legitimacy in the context of unpublished opinions); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189, 277–81 (2004) (discussing the importance of the perception of legitimacy for the proper functioning of a system of procedure).

<sup>7</sup> “The cases of Plaintiff Y and Defendant X, for instance, are examples of true cases that the attorneys involved in them presented to me. I have spoken about this issue more widely with attorneys who represent clients in a variety of ways before state and federal courts all around the nation, and virtually all of them can recall a situation in which they felt that their case was not fairly decided by the court. No one has disputed the prevalence of adjudicative mistakes. Lawyers are naturally reluctant to level such accusations of attribution. Alan Dershowitz is an exception, which is also not surprising: “It is widely known that many state court judges and some lower court federal judges play favorites among litigants and lawyers. . . . I have seen it with my own eyes in the courts of Boston, New York, and elsewhere.” ALAN M. DERSHOWITZ, *SUPREME INJUSTICE* 116 (2001). I understand that there is some reason for scepticism when it comes to such concerns. In a related situation, Karl Llewellyn made a comment forty-five years ago, “Ever since lawyers began to lawyer, there have been losing counsel aplenty who have so believed in their causes that they have bitterly blamed the court.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 3 (1960). The lawyers I've spoken to might hold opinions moulded by their experience representing a certain point of In Wilkins, the disbarred attorney claimed that an intermediate appellate court's opinion was “so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for his client's opponent and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)”. 777 N.E.2d at 715–16. In Gardner, the disciplined attorney claimed somewhat colourfully, among other things, that an intermediate appellate court had not addressed the core of his client's arguments and that the judges' prior experiences as prosecutors may have been the reason for this. 793 N.E.2d at 427. See also Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 729 (1997), “Not having enough lawyers publicly criticise judges is the issue. Unfortunately, not enough attorneys are prepared to do so, even when a judge has engaged in grave ethical misconduct and needs to be held accountable”.view in court. This might easily prevent them from adopting a neutral viewpoint and impair their ability to recognise the appropriateness of the court's ruling. However, there are also mitigating circumstances. Lawyers have strong incentives to keep their accusations of a court's misconduct from the public. If they are expected to appear before the same court again, lawyers may not only think it prudent to “remain on the court's good side,” but they may also be afraid of punishment if they are too vociferous about claiming that the court has failed in its duties. For examples of lawyers being reprimanded recently for criticizing courts for not upholding requirements falling under the definition of the adjudicative duty in this Article, see *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002); *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 433 (Ohio 2003). In Wilkins, the disbarred attorney claimed that an intermediate appellate court's opinion was “so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for his client's opponent and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)”. 777 N.E.2d at 715–16. In Gardner, the disciplined attorney claimed somewhat colourfully, among other things, that an intermediate appellate court had not addressed the core of his client's arguments and that the judges' prior experiences as prosecutors may have been the reason for this. 793 N.E.2d at 427. See also Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 729 (1997), “Not having enough lawyers publicly criticise judges is the issue. Unfortunately, not enough attorneys are prepared to do so, even when a judge has engaged in grave ethical misconduct and needs to be held accountable”.

In a similar vein, we can only adequately address issues of institutional and procedural design that emerge as society's demands on the judicial system change if we have a thorough understanding of what adjudication is designed to achieve. Because of how quickly and significantly the adjudicative landscape has changed over the past few decades, theory and practice are currently out of step.<sup>8</sup> Therefore, it is possible to explain the absence of a past emphasis on the specifics of the adjudicative duty by noting that historically, the very nature and structure of the courts, along with the characteristics of the claims they were empowered to entertain, operated to ensure that judges worked roughly in accordance with the contours of the duty.<sup>9</sup>

An appeal has long been the main method of policing judicial behavior at the trial court level, and for the majority of the history of the American legal system, litigants could expect that if a judge failed to decide their case, whether partially or entirely, whether intentionally or accidentally, they would be brought back into line through an appeal. However, the advent of "managerial judging" has created a situation in which trial judges are forced to become heavily involved in cases during the pretrial phase, giving them the ability to exercise significant authority in ways that are impervious to review by an appeal court.<sup>10</sup> At the same time, appellate courts have consistently reduced the scope of their review across a number of problems, giving trial courts a lot more latitude and further reducing the restrictions provided by the appeals process.<sup>11</sup> At the appellate level, formal enforcement tools like en banc or discretionary review that may have once been effective have been rendered ineffective. In addition, there has been a lessening of the informal restraints on judicial conduct that resulted from the design of the appellate process as it was previously used, such as oral argument and the opinion writing process.<sup>12</sup> These restrictions have gotten looser while the want to stray has been stronger. Indeed, the tremendous growth in appeal caseloads over the previous 50 years has been the primary source of both occurrences. Whatever one may think about how frequently the adjudicative duty is broken, it is certain that the practical aspects of adjudication have changed to make a breach more likely. In-activist behavior has increased over the past 50 years, which is consistent with the reduction in reversal rates in federal appellate courts and may be at least partially to blame.<sup>13</sup> We may assume that some judges will exploit

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<sup>8</sup> See generally Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003), "claiming that there is a gap between theory and practise that has led to some of the biggest current procedural disputes".

<sup>9</sup> Indeed, Abram Chayes suggested that, "Public law adjudication would be held in check by less tangible institutional reasons, despite the fact that such cases frequently call for judges to operate outside of the norm". See Chayes, at 1315, "In Chad M. Oldfather's unpublished manuscript, *Remedying Judicial In-activism: Opinions as Informational Regulation* (on file with the author), I examine these structural impacts in more detail".

<sup>10</sup> See Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 407 (1982) (emphasising the informal nature and limited public disclosure of pretrial conferences). Resnick observes: As "Judges and managers are now considerably more informed about cases than they were in the past. They bargain with the parties over the structure, timeline, and parameters of both pre- and post-trial litigation. Judges are given more authority as a result of these administrative duties. However, the restrictions that once limited judicial authority are noticeably lacking. Managerial judges frequently conduct their business behind closed doors, off the record, without being required to give written, reasoned opinions, and beyond the purview of appellate review".

<sup>11</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 75 (1996).

<sup>12</sup> THE GEORGETOWN LAW JOURNAL Vol. 94:121.

<sup>13</sup> "The proportion of judgements reversed by the federal courts of appeals has significantly decreased during the previous few decades. The appeals courts reversed 24.5% of the cases that those courts had resolved on the merits in 1960. See DIR. OF THE ADMIN. OFF. OF U.S. CTS., ANNUAL REPORT 210 TBL.B1 (1960), also referred to as the 1960 REPORT. One may detect a reversal rate of 27.9% when looking back to 1945. Observe DIR OF THE ADMIN OFF OF US CTS, ANNUAL REPORT 70 TBL.B1, 1945 However, 1960 is considered as the year that heralded the start of the significant changes in how the lower federal courts functioned. Observe Martha J. Dragich's article, "Once a Century: Time for a Structural Overhaul of

the more opportunity to avoid making decisions that they would like not to because judges are only human. Additionally, it's possible that judges uncover fewer faults as a result of having less time to look for them.<sup>14</sup> According to Judge Posner, "the less time an appeal court spends on a case, the more probable it is simply to affirm the district court or agency, affirmance being the quick fix".<sup>15</sup>

An adjudicative theory has struggled to keep up with these advances, as the following Part examines. Adjudication models are developed only to be deemed "outdated" a few decades later,<sup>16</sup> Additionally, efforts to justify these new adjudication models normatively have lagged behind. With such rapid change, crucial details often get missed. While it may have seemed unnecessary to care about such details in the past since it could be relied upon that the institutional architecture would foster behavior that was roughly in conformity with the adjudicative responsibility, that is no longer the case. The investigation into the elements of the responsibility is crucial for both calibrating institutional design and establishing the theory that underpins the calibrating due to the evolution of adjudication forms and changes to the institutions in which it occurs. Instead of developing a new model, I want to examine the ones that already exist to see if they provide a coherent—or at the very least, reconcilable—set of explanations for the nature and boundaries of the responsibility, which will help us evaluate whether such a duty even exists.

### Lon Fuller's Participation Thesis

Fuller derives a number of findings that are pertinent to our subject. First, since rational reasoning is so essential to the adjudicative process, choices must also "pass the test of reason" in light of them. Second, even while Fuller comes to the conclusion that giving reasons for a decision is not always necessary to uphold the integrity of the adjudicative process, he also makes the case that giving those reasons in opinions strengthens the process's integrity. This is the case because the rendering of an opinion aids in assuring the litigants that their involvement was genuine and that the decision-maker

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the Federal Courts," 1996 Wisconsin Law Review 11, 25, and note 72. The proportion of reversals had decreased to 9.4 by 2003. Federal Judicial Caseload Statistics, Administration Office of the United States Court System, 27 TBLB-5 (2003) [hereinafter 2003 REPORT]. This phenomenon can be partly, if not entirely, explained by changes in the makeup of the appellate caseload during that time period, which included an increase in the proportion of unjustified appeals as well as the courts' deliberate narrowing of the scope of appellate review to leave a greater percentage of issues up to the trial courts' discretion. See POSNER, at 77- (concluding that the portion of difficult cases on the federal appellate docket has been decreasing). However, the decline in the reversal rate coincided with a sharp rise in the total number of cases before the courts of appeal, which heard more than fifteen times as many appeals in 2003 as they had in 1960. This is based on a comparison between the 1960 REPORT at 210 TBLB1 (showing 3,899 cases started in the courts of appeal) and the 2003 REPORT at 23 TBLB-1 (showing 60,661 cases started in the courts of appeal), without a Although the data on appeal caseloads in state courts is less well-developed, a general rising tendency is nevertheless visible. See, e.g., Thomas B. Marvell, Is There an Appeal from the Caseload Deluge?, JUDGES' J., Summer 1985, at 34, 36–37 (noting between 1973 and 1983, appeals in state courts increased at a rate double that of trial court filings)".

<sup>14</sup> See William L. Reynolds & William M. Richman, Studying Deck Chairs on the Titanic, 81 CORNELL L. REV. 1290, 1291 (1996) –"Of course, it is challenging to demonstrate that the results of any appeal would have changed if the judges had given the case more thorough consideration, but there is circumstantial evidence indicating that at least some outcomes would have changed".

<sup>15</sup> "POSNER, supra note 38, at 74–75 Judge Posner is doubtful that this is the main or even a significant factor in the fall in reversal rates, coming to the conclusion that the appellate docket has changed to contain fewer complex cases".

<sup>16</sup> "See Molot, at 29–30 (observing that changes in the practical nature of litigation have outpaced the development of models of adjudication); Richard L. Marcus, Public Law Litigation and Legal Scholarship, 21 U. MICH. J.L. REFORM 647, 692–94 (1988) (discussing how litigation and adjudicative theory have advanced past Chayes's portrayal)".

took into account the arguments and supporting evidence they provided. Finally, he cautions that "this is no excuse for a failure to work toward an achievement of the closest approximation of it," even though he concedes that it is impossible to achieve complete correspondence between the parties' and the decision-makers' views of the issues, with the result that the decision will almost always rest, at least in part, on grounds other than those argued by the parties. If this correspondence is missing, the adjudicative procedure has become a sham because the parties' involvement in the judgment has no longer any meaning. Thus, according to Fuller's concept, the court should play a passive role, limiting judges to only responding to the arguments of the parties. He warns, for example, against the judiciary starting legal processes because just starting them would establish preconceptions, which would then lessen the impact of party participation. More generally, the court must adopt a responsive rather than proactive stance in order to achieve the overall objective of maximizing the significance of party participation.

### **Problem in India**

The judiciary is the most significant of the three pillars of the government, and when a member of the nation is the victim of a wrong, they look to the court to assist them in obtaining justice. Justice can mean different things to different individuals depending on their needs, however it is frequently argued that justice is the goal of the law and the rules that govern society. People dread the law if they do anything illegal because judges play a crucial role in keeping society law and order.

It must be noted that more people now appear in court because the other pillar has fallen short, placing an additional load on the judiciary. Less individuals will go to court if the other two institutions, the Executive and the Legislature, function effectively in their respective domains. The other organ exercises its authority arbitrarily, just as the laws created by the legislature are not those that should be in place because they are ignorant of the underlying social issues. Similarly The majority of the time, police authorities carry out their tasks as they see fit, and as a result, the complainant must go through the court process merely to file their first information report, placing a load on the judicial system.

And as a result of this overload, judges will be unable to complete their minimum duties; this is known as judicial inactivity, and it frequently contributes to the pendency of cases.

### **Conclusion**

As the preceding discussion illustrates, the concept of an adjudicative responsibility is simple in theory but difficult to define in practice. To address the issue of Judicial In-Activism, the courts and judges should work to their best efficiency, without becoming biased in any way, and they should bring the judiciary to a level where all sections of society have a lot of confidence in them, and anyone should be able to access the courts without fear and with the hope of finding justice.

The Judiciary must also operate within its purview and adhere to the reasonable test and earn the confidence of the general public and serve as one of the foundations of democracy. And must be free from any restraints, with their only task being to carry out their intended function.



# **BANKING FRAUDS AND ITS THREAT TO INDIAN ECONOMY THEIR PREVENTIVE MEASURES WITH THE GUIDANCE OF RBI WITH RELEVANT CASE LAWS**

## **Banking Fraud –A Threat To Indian Economy**

**Ms. Prabha Tripathi\***

Banks are the engines that drive the operations in the financial sector, money markets and growth of an economy. With the rapidly growing banking industry in India, frauds in banks are also increasing very fast, and fraudsters have started using innovative methods. It is universally accepted that for the smooth functioning of a money market and economic growth of a country, an efficient and good banking system is a must. The phenomenal spread of branches, growth and diversification in business, large-scale computerization and networking, have collectively increased manifold the operational risks faced by the banks. Unfortunately, it is also true banking industry has to face many types. It is widely accepted that any dishonest employee in a bank can commit frauds without being noticed and caught. The method used by such employees is based on his imagination and past experience. Unfortunately, most of the employees committing frauds get scot free, with award of minor penalties, and the cases pending in courts keep on dragging for many years. The RBI pointed out that “detection of fraud takes very long-time, and banks tend to report an account as fraud only when they exhaust the chances of recovery. Delays in reporting of frauds further delay the alerting of other banks about the modus operandi through caution advices that may result in similar frauds being perpetrated elsewhere.”

As Wells stated, “This shows that a fool-proof system has not been developed and implemented to familiarize bank employees about various types of frauds that take place in banks every year.” Similarly, Meera Sanyal, former CEO and Chairperson of Royal Bank of Scotland in India concluded that “most banks try to put in place robust system and controls to prevent fraud and forgery. Crooks and criminals use sophisticated methods, especially for online fraud, to defraud banks. Noting the increased incidence of loan frauds, the RBI has issued “Red Flagged Account (RFA) framework for banks to prevent, detect and report frauds.” The government and RBI are jointly working together to create a system which ensures timely and coordinated action on the part of law enforcement agencies of frauds and scams. The Reserve Bank of India (RBI) is the central policy making and national-level regulatory body by keeping an eye over the entire banking industry.

The Reserve Bank of India (RBI), a regulator of banks in India, defines fraud as “A deliberate act of omission or commission by any person, carried out in the course of a banking transaction or in the

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books of accounts maintained manually or under computer system in banks, resulting into wrongful gain to any person for a temporary period or otherwise, with or without any monetary loss to the bank”.

In the present day, Global Scenario Banking System has acquired new dimensions. Banking did spread in India. Today, the banking system has entered into competitive markets in areas covering resource mobilization, human resource development, customer services and credit management as well.

Indian's banking system has several outstanding achievements to its credit, the most striking of which is its reach. In fact, Indian banks are now spread out into the remotest areas of our country. Indian banking, which was operating in a highly comfortable and protected environment till the beginning of 1990s, has been pushed into the choppy waters of intense competition.<sup>1</sup>

The edifice of growth and development in modern economies is built on the foundation of a vibrant, resilient and well-functioning financial sector. The core functions of the financial sector in an economy, viz. intermediation, asset price discovery, risk transfer and payments are globally undergoing a process of transformation. This is primarily driven by technological advancements. The Indian financial sector has also been a part of this churning and is adopting and propelling these transformations. Over the past few years, the business of banking has witnessed a shift from traditional branch banking to digital banking. This paradigm shift has been possible due to innovations in information technology (IT), growth in mobile and internet connectivity.. Financial service providers are now devising new products and services and are adopting new business models for reaching out to the target customers. Improvements in technology have also enhanced the cause of financial inclusion and tech-enabled public goods delivery. Direct Benefit Transfer (DBT) through the digital mode is among the best examples of tech-enabled public goods delivery. Digital-mobile-anywhere-anytime banking is becoming the order of the day. The indigenously developed Unified Payments Interface (UPI) and Aadhaar Enabled Payment Service (AePS) have become the backbone of our retail payments system. Alongside these advancements, the Reserve Bank's regulatory approach has been realigned to support and foster such innovations. The regulatory guidelines for account aggregators and peer-to-peer lending operators are indicative of a proactive regulatory approach.<sup>2</sup>

A sound banking system should possess three basic characteristics to protect depositor's interest and public faith. These are (i) a fraud free culture, (ii) a time tested Best Practice Code, and (iii) an in house immediate grievance remedial system. All these conditions are their missing or extremely weak in India. Section 5(b) of the Banking Regulation Act, 1949 defines banking... "Banking is the accepting for the purpose of lending or investment, deposits of money from the purpose of lending or investment, deposits of money from the public, repayable on demand or otherwise and withdraw able by cheque, draft, order or otherwise."<sup>3</sup> But if his money has fraudulently been drawn from the bank the latter is under strict obligation to pay the depositor. The bank therefore has to ensure at all times that the money

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<sup>1</sup> Frauds in Banking Sector - Prevention and Control, by *Juhi Malviya and Apoorva Yadav*, < [maagar.openu.ac.il/opus/static/binaries/edit\\_news/bank1](http://maagar.openu.ac.il/opus/static/binaries/edit_news/bank1) > last accessed on 3<sup>rd</sup> October, 2017, 5:30pm

<sup>2</sup> Disruptions & Opportunities in the Financial Sector (Address by Shri Shaktikanta Das, Governor, Reserve Bank of India - June 17, 2022 - Delivered at the Financial Express Modern BFSI Summit in Mumbai) on Jun 17, 2022

<sup>3</sup> *Banking Regulation Act, 1949*, s.5(b)

of the depositors is not drawn fraudulently. Time has come when the security aspects of the banks have to be dealt with on priority basis.

The banking system in our country has been taking care of all segments of our socio-economic set up. The Article contains a discussion on the rise of banking frauds and various methods that can be used to avoid such frauds. A bank fraud is a deliberate act of omission or commission by any person carried out in the course of banking transactions or in the books of accounts, resulting in wrongful gain to any person for a temporary period or otherwise, with or without any monetary loss to the bank. The relevant provisions of Indian Penal Code, Criminal Procedure Code, Indian Contract Act, and Negotiable Instruments Act relating to banking frauds have been cited in the present Article.

A sound banking system should possess three basic characteristics to protect depositor's interest and public faith. These are-

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- (b) a time tested Best Practice Code, and
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### **Rotomac Case**

Rs 3,700 Rotomac fraud unearthed after the sensational PNB scam. Kanpur based Rotomac Global is being probed by the CBI and Enforcement Directorate (ED) for allegedly cheating a consortium of seven banks of Rs 3,700 crore. The investigation agency filed case against Vikram Kothari and Rahul Kothari, directors of the business group for misusing credit sanctions provided by Bank of Baroda (BoB), the member of consortium banks at its International Business Branch (IBB) at The Mall Kanpur to the tune of Rs 456.63 crore.

"With the increased thrust on financial inclusion and customer protection and considering the recent surge in customer grievances relating to unauthorised transactions resulting in debits to their accounts/cards, the criteria for determining the customer liability in these circumstances have been reviewed," the RBI said in the circular.

There will be "zero liability of a customer" in case of third-party breach where the deficiency lies "neither with the bank nor with the customer but elsewhere in the system."

However, the customer will have to notify the bank within three working days of receiving the communication from the bank regarding the unauthorised transaction.

A customer's entitlement to zero liability will also arise where the unauthorised transaction occurs due to "contributory fraud/negligence/deficiency on the part of the bank (irrespective of whether or not the transaction is reported by the customer)", RBI said.

Mergers of giants in the banking industry gave birth to the concept of "too big to fail", which eventually led to highly risky financial objectives and financial crisis of 2008. In response to the 2008 crisis, Dodd-Frank wall-street reform and consumer protection act (DFA) was enacted in 2010. DFA gave birth to various new agencies to help monitor and prevent fraudulent practices. Volcker rule, a part of DFA, banned banks from engaging in proprietary trading operations for profit. Post crisis, IMF has worked towards making risk and vulnerabilities assessment framework effective, by advocating greater transparency and information sharing, along with empowered supervisory and regulatory bodies, as well as greater international collaboration towards regulation and supervision of financial institutions. Gaps were identified under financial surveillance as well as on the frequency of such surveillance especially in economies with truly systemic financial sectors, whose failure might trigger a financial crisis. According to literature, approximately one in three banking crises followed a credit boom, which shows a correlation between relaxed credit expansion policies by banks and crises. Another major sector distraught with fraudulent practices is the credit card market. However, given that credit card usage in India is predominantly for transactional purposes, the macroeconomic impact of fraudulent practices is less significant and is not considered further in this study. Indian banking system has remained plagued with growth in NPAs during recent years, which resulted in a vicious cycle affecting its sustainability.

They are not getting camouflaged. Because of the moratorium followed by the Supreme Court stay on asset classification, which got lifted in the third week of March, the position was not clear. But by March 31, we had a clear picture of the NPA situation. For restructuring, we had given a time limit till June 30. All the cases, which had to be restructured have been restructured. We have the exact numbers with us and the situation with regard to NPAs is definitely well under control.

### **N.V. Subarao v. State of Andhra Pradesh<sup>4</sup>**

A case was registered against Sh. V.N. Subarao, the then Manager, Central Bank of India and Sh. Attur Prabhakar Hegde, Prop of M/s A.P. Enterprises, Guntur for commission of Offence<sup>5</sup> alleging that Manager has abused his official position as a public servant and entered into a criminal conspiracy with Prop And defrauded the Bank to the tune of Rs.1.168 crores by sanctioning temporary overdrafts and term loans to various individual sponsored by the said proprietor. A charge sheet was filed by CBI. The Manager fraudulently and dishonestly disbursed 494 loans of Rs.10000 each to various railway employees and other organization as he was instructed by his controlling officers to disburse loans only after obtaining undertaking from their employers (borrowers) that the monthly installment of repayment of loan will be deducted from the salaries as primary security and also obtain a mortgage on the plots

<sup>4</sup> Through Inspector of Police, CBI/SPE, A.P. Criminal Appeal No.1688 of 2008 with No.1700 of 2008 decided on December 3, 2012 (2013) 2 SCC 162:

<sup>5</sup> Under Sec.420 of IPC and Sec. 420, 468 and 471 read with Sec.468 IPC and Sec. 13(2) Read with Sec.13 (1) (d) of *Prevention of Corruption Act*, 1988

sold to the borrower through the Prop M/s.A.P. Enterprises. An amounting to Rs.49, 40,000 and credited the proceeds to the account of the Proprietor without obtaining the requisite undertaking from the employers and without proper security of monthly installments to be deducted from their salaries. Out of 494 borrowers, 45 persons have been identified by the prosecution M/s. A.P. Enterprises after having received the proceeds fraudulently and dishonestly did not get 45 plot registered in their names nor the borrowers got the loan amount from the bank. The Special Judge for CBI cases, Vishakhapatnam sentenced them for 1 year rigorous imprisonment<sup>6</sup> and to undergo RI for a period of two years along with a fine of Rs.5000, in default, to further undergo imprisonment for 3 months in lieu of offences punishable<sup>7</sup>. Manager was further sentenced undergo RI for 1 year along with fine of Rs.200, in default, to further undergo simple imprisonment for 2 months for the offences punishable<sup>8</sup> and also ordered that sentences shall run concurrently. N.V. Subarao v. State of Andhra Pradesh<sup>9</sup> Two appeals were filed before the High Court of Andhra Pradesh at Hyderabad. The appeals were dismissed and confirmed the conviction and reduced the sentence of Two years to one year and preferred these appeals by ways of special leave and leave was granted on 20.10.08.

There was wrongful loss to the Bank as well as to the purchasers. No mortgage was created putting loss to bank of Rs. 4,50,000. M/s A.P. Enterprises provided FCNR deposits to the Bank to the tune of Rs.8 crores for a period of 3 years. However the Prop has purchased 60 acres land at Gorantla village near Guntur and 463 plots were registered. The Manager forwarded the proposal of M/s A.P. Enterprises to Regional Office, Vijawadda for sanction of Overdraft facility of Rs.12 lac and sanctioning terms loan to borrowers for purchase of plot from M/s A.P. Enterprises on the basis of FCNR deposits. It was also stated by Bank Manager that for total of 957 borrowers, only 122 letters of undertaking had been obtained. Pre inspection of the borrowers & plot was not conducted as per the Manual of Instructions of the Bank Hence Administrative action. The Manager could not delegate responsibility to someone else thus Debt, Financial and Monetary laws provide Misconduct N.V. Subarao v. State of Andhra Pradesh<sup>10</sup> and. Non delegable duties<sup>11</sup>. No Bank account was opened for the loanees. Bank Manager caused monetary loss to Bank on the presumption<sup>12</sup> without following established procedure and debt, financial and monetary law- Bank Scam/Criminal conspiracy/ embezzlement/ forgery<sup>13</sup>. Preponderance of probabilities-Prosecution established its charges beyond reasonable doubt<sup>14</sup> by adducing acceptable evidence<sup>15</sup>. Criminal conspiracy was held and proved<sup>16</sup> and acceptance of money and transfer of fraudulently sanctioned loans to credit of the account and hence conspiracy established and debt, financial and monetary law.

<sup>6</sup> Under Sec.120B of IPC, 1860 vide judgment & order dt.30.4.2009

<sup>7</sup> Under Sec.420B of IPC, 1860

<sup>8</sup> Under section 13(1) (d) of *Prevention of Corruption Act, 1988*

<sup>9</sup> Criminal Appeal No.602 of 2001 decided on 29.1.08

<sup>10</sup> *Supra*

<sup>11</sup> *K.G.Premashankar v. Inspector of Police* (2002) 8 SCC 87; 2003 SCC (Cr.) 223; *R.Venkatkrishna v. CBI*, (2009) 11 SCC 737; (2010) 1 SCC (Cri) 164 relied on [*State Bank of Hyderabad v. P.Kata Rao* (2008) 15 SCC 657; (2009) ]

<sup>12</sup> Under Indian Evidence Act, 1872 Ss.[*M.Narsimsinga Rao v State of A.P., (2001) 1 SCC 691; 2001 SCC (Cr.) 114 and 4]*

<sup>13</sup> Ss. 20 and 13 of Under Se.120B r/w 420, 468 and 471 in [*M.Narsimsinga Rao v State of A.P., (2001) 1 SCC 691; 2001 SCC (Cr.)* ]

<sup>14</sup> Under Se.120B r/w 420, 468 and 471 in [*M.Narsimsinga Rao v State of A.P., (2001) 1 SCC 691; 2001 SCC (Cr.)*]

<sup>15</sup> [*T.Subramaniam v. State of T.N.*] (2006) 1 sec 401 (2006) 1 SCC (Cri.) 401

<sup>16</sup> S.120 of IPC, 1860.

Bank Scam/Criminal conspiracy/embezzlement/forgery However the several decrees obtained. And few mortgages created but in *K.G.Premshanker v. Inspector of Police*<sup>17</sup> and *R.Venkatkrishnanv.C.B.I*<sup>18</sup>. Departmental Enquiry was conducted against the Bank Manager and accordingly he was dismissed from the services however the attention of the Court was drawn to a decision in *State Bank of Hyderabad.P.Kota Rao*<sup>19</sup> and *State of M.P.v.SheetlaSahai*<sup>18</sup> but was not helpful and court held that offence of criminal conspiracy can also be proved by circumstantial evidence. It was contended that orders be set aside on the basis of decisions including in *Kashinath Mondal v. State of West Bengal*.<sup>20</sup> It was held that in view of the concurrent findings recorded by both the courts based on acceptable evidence in the form of oral and documentary evidence, we are of the opinion that it is not a fit case where we should exercise discretionary jurisdiction<sup>21</sup>, consequently both the appeals fail and are accordingly dismissed.

### **Gurgaon Gramin Bank v.Khazani**<sup>22</sup>

Harassment to the gramian borrower by the bank- Role of Distt. Consumer Forum, State Commission/ National Commission Consumer Protection Act,1986.& Supreme Court.

That Smt. Khazani availed buffalo loan from appellant bank and was insured for Rs.15000/- for period from 6.2.01 to 6.2.04 vide animal tag NIA/03170 WITH New India Assurance Com Ltd 2nd respondents and premium was paid Rs.759/- vide receipt No.170612 dt, 5.0.01. The buffalo was unfortunately died on 27.12.01. She lodged claim for insurance money through bank and supplied them ear tag. No step was taken by the Bank or Insurance Company. She served notice dated 30.07.03 but yielded no result. She filed complaint bearing No.824 before the District Consumer Dispute Redressal Forum<sup>23</sup> the same was allowed vide order dated 26.07.07 with the direction to Insurance Company to pay money of buffalo together with rate of interest @ 9% p.a. from the date of death of buffalo and pay Rs.3000/- as cost of litigation and compensation for harassment to comply within one month. The Bank was dissatisfied and filed an appeal before the State Commission<sup>24</sup>, Haryana, Panchkula, Admittedly tag No 03170 and post mortem report. The Bank and Insurance Company denied. Field Officer reported that when the buffalo died there was no tag and tag was not sent to opposite party. Bank moved to National Commission<sup>25</sup>. New Delhi against the order dated 21.07.09 of State Commission. The National Commission found no error/ irregularity in exercise of jurisdiction and ordered accordingly on 25.11.09 SLP against the order dated. 25.11.09 was filed and Khazani was brought to Supreme Court. May be ill luck of Bank, Bank is caused to worked, how much amount spent till date on this dispute which relate to death of buffalo stake of which is Rs.15000/- and bank will file an affidavit within 4 weeks with regard to amount spent on litigation. The Chief Manager of bank filed an affidavit for expenditure as under:

<sup>17</sup> (2002) 8 SCC 87; 2003 SCC (Cri.) 223

<sup>18</sup> (2009) 11 SCC 737; (2001) 1 SCC (Cri) 164

<sup>19</sup> (2007) 1 SCC 657 (2007) 2 SCC (Cri.) 489

<sup>20</sup> (2012) 7 SCC 669; (2012) 3 (Cri) 463

<sup>21</sup> Under Article 136 of the *Constitution of India*

<sup>22</sup> AIR 2012 SC 2881 .JJ [*K.S.Radha Krishna and DipakMisra*]Civil Appeal No. 6261 of 2012 arising out of SLP© No.8875 of 2010 dt.4.9.12

<sup>23</sup> Under Sec. 11 *Protection of the Consumer Act,1986*

<sup>24</sup> *Ibid* Sec. 15

<sup>25</sup> *Ibid* Sec. 21

Amount spent by Bank: District Forum Rs.2400 State Commission 2650 and Supreme Court 8500/- total Rs. 12950 The Supreme Court has not been told by the bank how much money have been spent by Bank officer for there to and fro journey to lawyers office, the District Forum, State Commission, National Commission and Supreme Court for partly amount of Rs.15000/-. As per affidavit bank spent Rs. 12950/- . District forum awarded Rs. 3000/- towards cost of litigation and compensation for harassment caused to Khazani.The Supreme Court remarked as under-

*'Remember buffalo died 10 years back till litigation is not over. Advocate argued that claim was false as no tag was found on dead buffalo. These types of litigation should be discouraged and message should also go otherwise for all trivial matters. People will rush to this court. Gramin Bank like appellants should stand for benefit of grant- Repayment to large extent depends more they get. Driving poor gamins to various FORUMS should be strongly depreciated because they have to spent large amount for conduct of litigation. We condemn these types of practice unless the stake is very high or matter affects a large number of persons or effects a general policy of the Bank which has for reaching consequence'*

Appeal was dismissed with cost of Rs.10000/- to be paid by bank to first respondent within a period of one month resultantly bank has to spend Rs. 25930/ for claim of Rs. 15000/- spent to and fro traveling of the Bank officer. Let God save the Gramin.

### **M/s Piara Singh Cold Storage v. Canara Bank and Others<sup>26</sup>**

Misuse of Loan by the borrowers, Dishonour of Cheques, Debt Recovery Tribunal, Constitutional Law-

#### ***The facts of the case as under***

That M/s Piara Singh Cold Storage was granted an agricultural loan of Rs.25 lakhs for modernization of cold storage, for which rate of interest was less than the commercial use of loan for commercial purpose. The debtor was in breach of terms and conditions of the agriculture loan as the cold storage was converted into marriage palace. The term loan was granted on 30.3.2000 to be repaid within seven years against mortgage of 18 Kanal of land Village Rehan Jattan, Phagwara Distt. Kapurthala. He repaid Rs. 6 lac up to 7.4.01. The respondent Bank started proceeding under D.R.T26 and proceeding were initiated due to dishonor of cheques<sup>27</sup>. He applied for one time settlement of Agriculture loan. The main dispute was that borrower was granted agriculture term loan but the petitioner stated that there was downfall in market and cold storage was not running in profit. He had filed no application for diversion of funds. It was held that petitioner is guilty of breach of terms and conditions of the agriculture term loan. Therefore, he cannot ask for one time settlement and should not be permitted for equitable relief. The petitioner is devoid of any merit and is frivolous and deserves to be dismissed out rightly<sup>28</sup>. Accordingly petition is dismissed with cost of Rs.5000/- which shall be paid by petitioner to High Court Legal Services Committee within 15 days.

On going through the discussions in all the three decided that how the public and Banks and financial institutions employees and outsiders are playing their vital roles in fraud, forgery and corruption in the

<sup>26</sup> AIR 2012 P&H .H.C.Chd/ *M.M.Kumar&Alok Singh Judges*]. C.W.P. 20/2011

<sup>27</sup> Dt. 3.4.12 Sec.58. *RBI Act, 1934* (Act. 12 of 1934),

<sup>28</sup> Under Section 138 of *Negotiable Instrument Act, 1881*

banking and financial institutions. This tendency must not occur in the banking and financial institutions. However, law is there but implementation is poor. The Public Interest Litigation PIL has proved to be a strong and potent weapon in the hand of Court enabling it to unearth many scams and corruption cases in public life and to punish guilty involved in those Scam. Hawala Scam, Urea Scam, Fodder Scam in Bihar, St.Kit Scam, Ayurvedic Medicine Scam and illegal Allotment of Government Houses and Petrol Pumps has come to light through Public Interest Litigation. The detection of fraud and corruption has become a big problem. This phenomenon surprisingly is not limited to a particular area, city, or country. It is throughout the world. There must be strict law and severe punishment must be there to curb the fraud, forgery and corruption. The judiciary has also played its role through various judgments delivered by the Supreme Court of India, High Courts and District Consumer Redressal Forum, State Consumer Redressal Forum and National Consumer Redressal Commission. Thus analysis on the scrutiny of fraud and forgery and corruption provisions, judicial functioning and to create new provisions for arresting fraud, forgery and corruption in banks and financial institutions. The criminal persons who commit fraud, forgery and corruption in the banks and financial institutions must be given life imprisonment and sent behind the bar so that coming generation may not commit any fraud and forgery which cause huge loss to the government revenue and cause great problems to Banks, Financial Institution because after committing fraud and corruption the role of police department, Central Bureau of Investigation, Central Vigilance Commission started as per the quantum of fraud and forgery. The scope of the Disciplinary action under administrative law has been very vast during the tenure of the services of the employees in the concerned departments. While discharging their duties with sincerity, dedication and devotion, sometimes something wrong may be committed under pressure, coercion and threat, but one should not come under any undue influence and work as per rules, regulations and laws enacted for checking menace of fraud and forgery in the banks. The C.V.C has also played its role and establishment of vigilance Department in all the banks at Head Offices and Regional as well as Zonal Offices in the country for checking the menace of fraud and forgery in the banks. The Reserve Bank of India has also been issuing directions got prevention of fraud and forgery in all the banks and reporting system to Higher Authorities, including C. B. I, C.V.C. and State Police. The judiciary has also played its role through various judgments delivered by the Supreme Court of India, High Courts and District Consumer Redressal Forum, State Consumer Redressal Forum and National Consumer Redressal Commission. Thus analysis on the scrutiny of fraud and forgery and corruption provisions, judicial functioning and to create new provisions for solution of the fraud and corruption in the Banks and financial institutions.

## **Conclusion**

On going through the discussions in all the three decided that how the public and Banks and financial institutions employees and outsiders are playing their vital roles in fraud, forgery and corruption in the banking and financial institutions. This tendency must not occur in the banking and financial institutions. However, law is there but implementation is poor. The Public Interest Litigation PIL has proved to be a strong and potent weapon in the hand of Court enabling it to unearth many scams and corruption cases in public life and to punish guilty involved in those Scam. Hawala Scam, Urea Scam, Fodder Scam in Bihar, St.Kit Scam, Ayurvedic Medicine Scam and illegal Allotment of Government Houses and Petrol Pumps has come to light through Public Interest Litigation. The detection of fraud and corruption has become a big problem. This phenomenon surprisingly is not limited to a particular area, city, or country. It is throughout the world. There must be strict law and severe punishment must

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# PARTICIPATORY NOTES AND GENERAL ANTI AVOIDANCE RULE: AN ANALYSIS IN REFERENCE TO INDIAN STOCK MARKET

Bhavana Rao\*  
Shivam Uniyal\*\*

## Abstract

*General anti-avoidance rule (GAAR), is the very anti-avoidance rule which is prevalent in the country. It was framed by the department of Revenue of India under the said guidance of the Ministry of Finance.*

*The General anti-avoidance rule (GAAR) was introduced with the very basic purpose to avoid the transactions or some arrangements made to avoid the liability of taxes. The GAAR as introduced by the former Finance minister of the country Mr. Pranab Mukherjee on the 16<sup>th</sup> March 2012 in the budget. The introduction of the said concept was considered to be controversial as it was having provisions which lay that the respective government could collect taxes from overseas deals which included the local assets for example Vodafone.*

*It also gave power to the government to target the very participatory notes also known as P-Notes. P-notes are instruments which are used by the investors present the entire world who are not having registered with the Security and Exchange Board of India (SEBI) in order to invest in the Indian securities. The introduction of the General Anti Avoidance Rule lays down the principle that the tax would be imposed by the government on all the registered financial firms which are present in the market who all are indulged in buying of securities on the very behalf of their respective clients.*

*Another power which was given to the tax department which respect to the introduction of the GAAR was that the tax department would be now at power to deny the very benefit of the double taxation treaty which was prevailing between the India and Mauritius as both the nations had signed a Double taxation avoidance treaty.*

*The GAAR is General Anti Avoidance Rule and thus it is also considered as an anti-tax avoidance regulation which will be made into practise in the country in order to target the transactions and the very arrangements which are made for the sole purpose of avoiding the taxes.*

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**Introduction**

General anti-avoidance rule (GAAR), is the anti-avoidance rule which is prevalent in the country. The same was framed by the department of Revenue of India under the said guidance of the Ministry of Finance.

The major aspect of General anti-avoidance rule (GAAR) was introduced with the purpose of avoiding transactions or arrangements made to avoid the liability of taxes. The GAAR as introduced by the former Finance minister of the country Mr. Pranab Mukherjee on the 16th March 2012 in the budget. The introduction of the said concept of General Anti-Avoidance Rule was considered to be controversial as it was having the said provisions which lay that the respective government could collect taxes from the overseas deals which included the local assets for example Vodafone.

It also gave power to the government to target the very participatory notes also known as P-Notes. Taking about the P-notes, they are the instruments which are used by the investors present the entire world who are not having registered with the SEBI in order to invest in the Indian securities. The introduction of the General Anti Avoidance Rule lays down the principle that the tax would be imposed by the government on all the registered financial firms which are present in the market who all are indulged in buying of securities on the very behalf of their respective clients.

Another power which was given to the tax department which respect to the introduction of the GAAR was that the tax department would be now at power to deny the very benefit of the double taxation treaty which was prevailing between the India and Mauritius as both the nations had signed a Double taxation avoidance treaty.

The GAAR is General Anti Avoidance Rule and thus it is also considered as an anti-tax avoidance regulation which will be made into practise in the country in order to target the transactions and the very arrangements which are made for the sole purpose of avoiding the taxes. In the Budget presentation of 2015, the former Finance Minister Mr. Arun Jaitley pronounce that the said GAAR's implementation will take time and will be so delayed by the 2 years.<sup>1</sup>

The GAAR is the very set of rules which are so instituted under the Income Tax Act, 1961<sup>2</sup> and was proposed under the said Direct Tax Code, the same empowers the tax department in with respect to denial of the said tax benefits transactions or the said arrangements which were formed and which were not of a commercial nature or which did not include the consideration other than the one which are achieving the tax benefits. Hence, the concept of GAAR is the one which is having the set of rules and the same are bases on the very basic concept to have a proper check over the potential transactions made or the arrangements which are made in order to avoid the tax liabilities.

India on the other hand has successfully become the global player and is having an important position when it comes to the finance world and this was all possible because of the very initiation of the very economic reforms of 1992 in the country. Though India has acquired the major position in the world

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<sup>1</sup> Reuters, "India shares gain on GAAR delay, plan to reduce corporate tax rate". 28 February 2015. accessed 7 November 2021.

<sup>2</sup> Income Tax Act, 1961.

and in the financial world, still it suffers and is not able to overcome the harmful and disheartening practises which take place in the very Indian Stock market.

Highlighting the very practise is the issuance of the Participatory notes which are known as the P- notes by the foreign investors from all around the world, due to the very reason they are able to anonymously trade and buy Indian securities. Talking about the P- notes, they are the instruments which are used by the investors present the entire world who are not having registered with the SEBI in order to invest in the Indian securities. The introduction of the General Anti Avoidance Rule lays down the principle that the tax would be imposed by the government on all the registered financial firms which are present in the marker who all are indulged in buying of securities on the very behalf of their respective clients.

The same is the offshore derivative kind if instrument which is issued by the foreign institutions/ and investors or which are issued by the sub accounts and are used against the Indian securities.

On the other hand, his very issue was highlighted when the same accounted for almost 50% of all the foreign portfolio investments which were made in the country. To regulate all such activities the very market regulator Securities and Exchange Board of India (SEBI) came forward and with respect to the same it formulated various reforms measures in order to have control over the 'n' numbers of Participatory notes holders, who were indulged in the said activity. Such reforms so formulated by the SEBI helped to mitigate the very volatility which was so caused by the Participatory notes.

In this very study the attempt has been made in order to study the concerns and the conveniences which has been formed due to the very presence of Participatory notes route of the investments and on the other hand an effort has been made to study the impact which is caused by the P notes in our very Indian Stock Market. The present study finds discovered that the Foreign Institutional Investors (FIIs) investments which were being made through the Participatory notes path played an important role with respect to its impact which was affecting the very Indian Stock Market.

## **Participatory Notes**

Participatory notes are also known as the P- notes, or also referred as PNs. Participatory notes are known as the very instrument which is required in terms for the investment in the Indian securities without the registration of the same with the Security and Exchange Board of India (SEBI) and the same were being used by the foreign investors or by the hedge funds in order to invest in the Indian securities.<sup>3</sup>

Talking about the same Participatory notes or the P-notes very well falls amongst the group of investments which are considered as Offshore Derivative Investments (ODIs), on the other hand it is also seen that the Deutsche Bank and the Citigroup were being amongst the major issuers of such kinds of instruments.

Any dividend which is collected or any capital gains which is collected from the said securities goes back to the very investor. On the other hand the Indian regulators are usually do not support the practise of Participatory notes as because of the very reason of fair that hedge funds which are there acting

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<sup>3</sup> Brooks (2011), Mazansky (2009), West (2009) and Elliffe (2011).

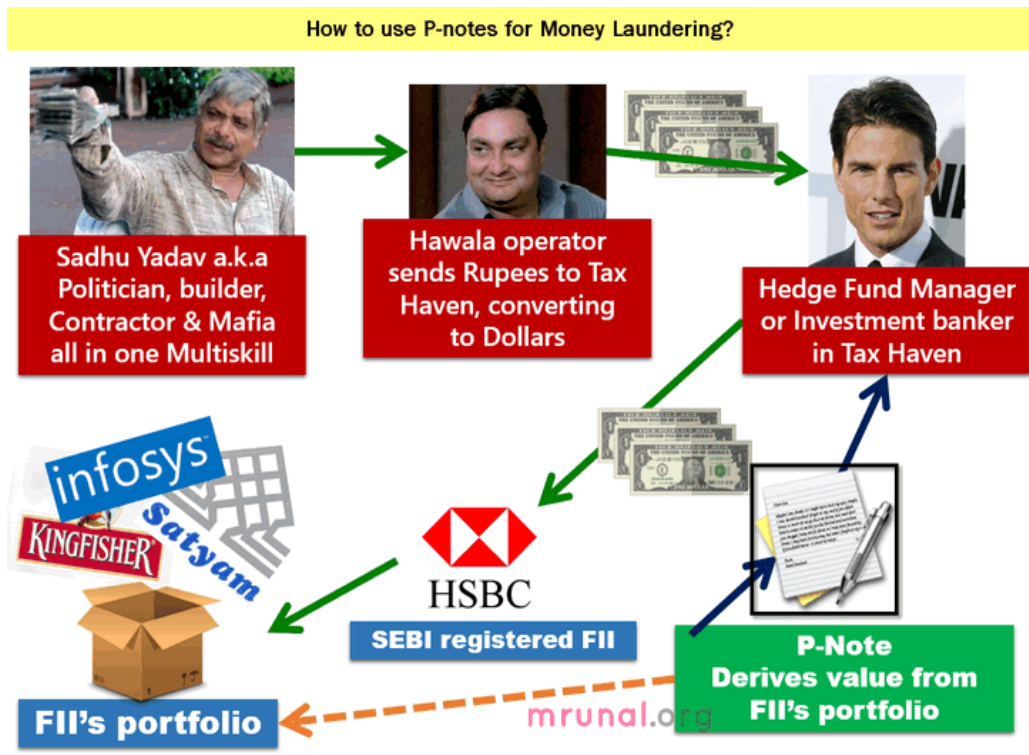
through the P-notes will going to cause or they will cause the economic discomfort in other words will cause economic volatility in the Indian's exchanges.<sup>4</sup>

### Meaning of Participatory Notes

The Foreign Institutional Investors is known as the investor who is the investor or is a investment fund which is registered in one country and the investment is made in some other country. The Foreign Institutional Investment (FIIs) is the one who issues the very financial instruments to all the investors which are present in the other countries and who all want to invest in the Indian securities.

With respect to this arrangement the system allows the overseas investors who are not registered with the very regulatory body of the country to make their investments in the Indian Securities. On the other hand, such investments which are made through are also beneficial to the Capital Market of India as they provide quick money to the same.

As of the very nature of the investments (short- term investments) the regulatory bodies certainly have fewer numbers of guidelines for such sort of foreign investors or institutions. In order to invest in the Indian securities and at the same time to avoid the cumbersome of the various regulatory approvals and its process, the investors trade through the Participatory notes (P-notes) in order to find ease in the whole process.<sup>5</sup>



<sup>4</sup> Dr. Philip Baker, "A manual on the OECD Model Tax Convention on Income and on Capital" p 5.

<sup>5</sup> Global Market Monitor feature, International Capital Markets Department, on Capital flows to India, April 2, 2004

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**Important Points With Respect To Participatory Notes:<sup>6</sup>**

1. The very participatory note allows the non-registered investor, to make an investment in the Indian securities.
2. Taking about the Foreign Institution Investor or the Brokers must register themselves with the Security and Exchange Board of India (SEBI).
3. The participatory notes or also known as P-notes are the kind of popular investments as due the very reason that the investors remain anonymous.
4. The participatory notes or the P-notes or the PN are the ones that are derivative instruments of the very underlying Indian securities or assets.

Taking about the P- notes, they are the instruments which are used by the investors present the entire world who are not having registered with the SEBI in order to invest in the Indian securities. The introduction of the General Anti Avoidance Rule lays down the principle that the tax would be imposed by the government on all the registered financial firms which are present in the marker who all are indulged in buying of securities on the very behalf of their respective clients.

They are the offshore derivatives instrument with the Indian securities as the underlying assets. The Foreign investors on the other hand and the Brokers are registered with the SEBI, the one which issues P-notes and which invests the following amount on the behalf of the overseas foreign investors. With respect to this process the Brokers must necessarily report their P-notes status of issuance to the regulatory body of the country on every quarter.

In exchange the Participatory notes allow the overseas foreign investors and the hedge funds or the other investors or institutions to actively participate in the Indian Stock Market without itself being registered with the Security and Exchange Board of India (SEBI).

The benefits availed by the Investors with respect to such process, the investors save the time and energy, the investors save the money and the scrutiny which are associated with the direct registration. The investor's saves the time with respect to the time consumed in the process of getting oneself registered with the regulatory board of the country.

**Pros and Cons of The Participatory Notes****Positives**

1. Taking about the positive aspect of the P- notes, Participatory notes are the ones which are easily traded overseas through the very endorsement and through delivery.
2. The main reason behind their popularity of P- note is that the overseas foreign investors anonymously take up the position in the very Indian Market and on the other hand the hedge funds can anonymously carries their operations.
3. The entities on the other hand route their respective investments through the very participatory notes in order to take the advantages of the present tax laws which are available in the certain countries<sup>7</sup>.

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<sup>6</sup> Sekar, K.R., & Sidhwa, R. (2011) "GAAR: Drawing the line between tax "mitigation" ad "evasion". Journal of International Taxation, 22(1), 59-60.

<sup>7</sup> Nayak, R. (2012). *Navigating India's proposed GAAR International Tax Review*.

## Negatives

1. On the other hand, the issue which is associated with the same is that the Indian regulatory body often finds it difficult with respect to determine the P- notes authentic and original owner and the very end owner of the same.
2. The result of which a substantial sum of unaccounted transactions are entered in the very country through the P- notes.
3. Such flow of the unaccounted and untracked sum has definitely raised some of bloodshot garlands.<sup>8</sup>

## Participatory Notes Concerns

Security and Exchange Board of India (SEBI) on the other hand has no jurisdiction over the P-note trading. But is made mandatory that all the foreign institutional investors must register them self with the Indian regulatory authority in order to maintain the smooth functioning.

On the other hand the P-notes trading are not recorded when it is done amongst the overseas foreign institutional investors. This whole practise points out the factor of concern in the mind of the officials that this very practise might lead to situation where the Participatory notes are being used for the very purpose of money laundering or involved in the illegal activity in concern.<sup>9</sup>

On the other hand, it is noted that the very inability which is faced with respect to the tracking of the money, Special Investigating Team (SIT) have showed the concern of having a strict compliance and strict measures for the respective trading of the P-notes in the Indian Market. Talking about the SIT, it is the body of official who are trained with respect to solve the crimes which are of serious nature and of much importance and the offences which are required and speedy completion of investigation.

On the other hand, the Government of India has proposed the trade restrictions on the participatory notes in the past time also, the Indian Market became highly volatile as the result of which the Government had imposed the trade restrictions which were associated with the P-notes. In the past that is in October 2007, the Government of India was of the view that the consideration was to be made with respect to curbing of the P-notes trading in the country.

The same announcement made by the Government side caused an impact in the Indian market and the Sensex index of the country plummet to 1,744 points during the day's session and the same was greater than the 8% drop at the very time<sup>10</sup>.

The unrest caused in the Indian Market was due to the very result of the response to the overseas foreign investors and the Government of India with respect to the issue that the curbing of the said Participatory notes would definitely cause a direct hit on the Indian economy. The same was of the result that the overseas foreign investors help to fuel up the growth of the Indian economy, the Indian industries and the Indian capital market.

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<sup>8</sup> Arnold, B.J. *Policy forum: Confusion worse confounded- the Supreme Court's GAAR decisions* (2006)

<sup>9</sup> *GAAR deferral: Impact on Mauritius Investments*. (2013), January 19. Financial Express.

<sup>10</sup> "Draft guidelines out on GAAR: Setting the rules on implementation" 2012, July 01

Increasing the said regulation with respect to such Participatory notes will cause more difficulty and would make it hard for the overseas foreign investors to enter into the Indian market, but at the end the Government of India decided for the time being not to regulate the P-notes.

### **The Very Nature of Participatory Notes**

Talking with respect to the P- notes, they somehow remain at a very vulnerable position when it comes to any regulatory ruling. The same example with respect to this can be drawn from the late 2017, when the regulatory body of the country was of the view that the Participatory notes cannot proclaim any of the derivative position in the very Indian Stock market for the reasons irrespective of hedging.

It was also seen that when the regulatory authority of the country stringent the regulations related through the Participatory notes or the said investments through the P- notes, the same resulted in drop in the very investments made through the Participatory notes and it was the continuous drop throughout the year of 2018.

However, the investment through the P- notes again gained the momentum when the regulatory authority of the country lifted few of the regulation/ ease the regulation with respect to the investment made through Participatory notes<sup>11</sup>.

### **Participatory Notes and the Security Market**

The Foreign Institutional Investors is known as the investor who is the investor or is a investment fund which is registered in one country and the investment is made in some other country. The Foreign Institutional Investment (FIIs) is the one who issues the very financial instruments to all the investors which are present in the other countries and who all want to invest in the Indian securities.

With respect to this arrangement the system allows the overseas investors who are not registered with the very regulatory body of the country to make their investments in the Indian Securities. On the other hand, such investments which are made through are also beneficial to the Capital Market of India as they provide quick money to the same.

Talking about the same, Participatory notes on the other hand can be easily issued when there are securities which are listed in the very Indian market are held as the underlying assets. The brokering houses which are established in foreign, they purchase the securities or the shares on the very behalf of their foreign investors and in the exchange of it they foreign brokering houses provides them with the Participatory notes.

The Foreign Institutional Investors on the other hand hold ups the securities which is described as the very shares of the companies that are present in the country in their very custody and the same thing is done by them in order to hold the Participatory notes on behave of the investors.

If the overseas investor having the Participatory notes with him wants to sell of his said Participatory notes, the same is to be communicated to the brokerage firm who then sells the said number of shares.

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<sup>11</sup> [https://www.indiaonline.com/article/news-sector-others/what-are-participatory-notes-113111501088\\_1.html](https://www.indiaonline.com/article/news-sector-others/what-are-participatory-notes-113111501088_1.html)

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The overseas foreign investor who desires to explore or wants to invest in the securities and in the Indian market and at the same time are not registered with the Security and Exchange Board of India (SEBI), in this very case the overseas foreign investor enters into the Indian Market through Participatory notes. In the said scenario, Participatory notes helps the foreign investors to invest in the Indian market through the FIIs and by way of this they are exempted from getting themselves registered with the Indian regulatory body known as SEBI. Thus, by avoiding the whole process of registration with the SEBI, the foreign investors are able to invest in the Indian market.

As on the very other hand in it reflects few negative impacts with respect to the black money, as this very route might be used in order to trade black money in the market as the Foreign Institutional Investors issues the Participatory notes to the investors or the companies whose identities are not known to the Indian regulatory body.<sup>12</sup>

The very basic risk which is associated with the misuse of such Offshore derivative instruments or the misuse of the Participatory notes with respect to the money laundering, the Security and Exchange Board of India (SEBI) has laid down a few guidelines which needs to be comply with and all the overseas foreign investors need to adhere to such guidelines and should issue the Participatory notes when they are issued in full compliance of such guidelines. As there remains the basic threat of tax avoidance as the person who is the ultimate beneficiary of such transaction is completely unknown to the Indian regulatory authorities and the tax authorities are felt in complete blank. Thus, it also creates a sense of miscues and the negative aspects which are associated with the issuance of the Participatory notes.

### **Factors Associated with Respect to Participatory Notes**

- Talking about the issues which are related with the Participatory notes, that there is often problems faced with respect to the fulfilment of the Financial Action Task Force known as (FTAF) and the very KYC norms which are required for Participatory notes.
- There are often difficulties involved with respect to the tracing the actual identity of the said funds and the issues which involves the concerns related to Anti-Money laundering.
- There are various assumptions which are related to the use of Participatory notes used for the very purpose of money laundering.
- The Foreign Institutional Investors on the other hand issues the Participatory notes to the overseas foreign investor whose identity is not available to the Indian regulatory body. Such funds which lack the basic identification could easily be used for some unlawful or illegal activities.
- With respect to the Participatory notes the system yet again stands silent even with respect to the basic information requirements. The very essential information which are so required such as PAN number, or the residential or the address proof etc. are not required under the very process.
- The scenario of not having the very basic information of the investors creates a sense of frustration, and the Government authorities are left helpless.

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<sup>12</sup> Nishith Desai Associates, "Offshore Derivative Instruments: An investigation into tax related aspects" 2013  
[http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Offshore\\_Derivative\\_Instruments.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Offshore_Derivative_Instruments.pdf)

## Benefactors who are Associated with Participatory Notes

- The foremost aspect which is beneficial and associated with the Participatory notes is that the foreign investors often find them to be more beneficial as they escape the long-time which is wasted in terms of getting themselves registered with the SEBI.
- Another aspect which is associated with the P- notes are that the overseas foreign investors who invests through them often look out for the regular returns and the reason behind choosing the Indian markets is that the same is pretty much loaded with attractive return as it compares to the other foreign markets.
- There are actually a large number of the people like bureaucrats, politicians and various businessmen who on the other hand had accumulated tones of money abroad. This unaccounted wealth so accumulated by the corruption activities in forms of various gifts which are brought from the abroad.
- Another category includes such foreign governments or such foreign entities who all so desires to acquire a significant amount of control in the Indian market and over its entities by the very way of taking it over.
- On the very other hand the category includes the one which is related to terror financiers, who all finds the route way simpler which is associated with less complication.

Now talking with respect to the category of people who fall under the very first category, they are the investors who enter in the Indian market in order to invest their sum and in exchange of that only look out for the maximum returns which could be gained from the market. The sole purpose from their activity is so earn a handful amount of money or return from the Indian market and that to in a sense of ease as they invest in the Indian market through the Participatory notes and without getting themselves registered with the Security and Exchange Board of India (SEBI).

Another factor which brings in the sense of concern is that the only route which is available for the investment purpose is the stock market while on the other hand several so called 'unlisted sectors' which are there in the market such as the transport market, trading and the restaurants market are quite suffering from the shortage of money, investment and funds. In order to include these 'unlisted sectors' in the ambit of investment and in order to build a good and sound investment in these sectors, various steps should be evolved and made in process.

On the other hand, talking about the people who fall under the second category as mentioned are the ones who are quite optimistic about the fact of bringing the money back into the country since the very KYC norms which tends to be working in various countries like Switzerland, the KYC norms are also being made one of the stringent for such transactions.

Talking about the third category, the third category is the one which causes a sense of treat to the domestic companies which are present in the very country, as sense of concern is built in as the unknown entities which are functioning in the international market might cause a treat to the domestic companies present in the country without their knowledge. Thus, this category becomes a dangerous one with respect to the domestic companies<sup>13</sup>, as the very question of damage or harm is raised.

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<sup>13</sup> Chakrabarti, R, "FII Flows to India: Nature and Causes", ICRA Bulletin, Money and Finance, 2001

On the very last, the fourth category which is present is the one who includes the terror financing activities, the people which are included in the same are the terror financiers.

Talking about the Participatory notes, in terms with the universal tax idea there are many aspects which is related to the universal tax concept which are related to the Participatory notes. On the other hand, there are 'n' numbers of rights which are attached with the very nation in order to tax the profit of the very corporation or company which is the resident of the shore's country.

In order to avoid the Double taxation or the aspect of Double taxation, there are various methods and factors which are need to be re-examined, thus for the very composition of the Participatory notes, the very profit allocation method which is used and the taxation setup which are being used for the same.<sup>14</sup>

The investor on the other hand invests their money with the sole purpose of earning some return out of the same, the amount of money which is poured by the investors in the market is basically lies upon the various market forces and factors and many of them are unknown to the investors. There have no absolute number of forces which can be so determined on a prior hand in order to maximise the return, as the economic factors and the social factors can easily vary from time to time and one of the greatest example of it the all new pandemic which is prevalent in the market and it has effected all the stock markets around the world, thus it has reviled the very fact that the factors and the various forces which effects the stock markets are nearly impossible to understand completely all the efforts are made in order to predict such factors and forces in order to maxims the returns, as the forces are completely out of control of the human efforts at time and thus sometimes causes the huge loss and damages to the investors.

There have been many literatures which indicate the factors which affect the stock market, the literature on the other hand talks about the various factors which are important in order to interpret the abnormality in the very stock returns beyond the particular market factor. Speaking of the same the very common theories which are used in order to predict the very relation between the stock market returns and the economic factors which are associated with the same, the first one is the 'Capital Asset Pricing Model (CAPM) and the second one is the Arbitrage Pricing Theory, known as (APT).

Talking with respect to the 'Customary equilibrium-based Capital Asset Pricing Model, which is based upon the very customary practises, there are few new numbers of models have been constructed for example the 'arbitrage-based model under the Arbitrage Pricing Theory.

According to the Opfer and the Bessler (2004) talks about that the models mentioned above have been developed in order to ascertain the returns from the stock market with respect to and considering the economic factors. Talking with respect to the same the multifactor model can be formed through the Arbitral pricing theory (APT) or the other can be through the multi-beta (CAPM) perspective.

These very models are trying to attempt to solve the question with respect to whether the market return and the economic factor are the one which affects the stock market returns or whether there are other factors which affect the stock market return for example the external market factors could also be

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<sup>14</sup> Beadier Christian vs. ITO [1994] 46 ITD 114 (Del).

causing the variations in the stock market returns. The very Arbitral Pricing Theory (APT) is of the view that there is various market and the industries factors or forces which also plays an important role towards the stock market returns. The very model was created with an intent to assume the various factors which affects stock market returns; this indicates that the economic factors and also the external market factors affect the returns from the stock market and the following can also be easily grouped into the industry-based factors and in macroeconomic forces. The same factors which are associated with the return can so easily varies with respect to the company related variables and on the other hand the variable which are related to the company are not identifies as such.

On the other hand, the variables related to the macroeconomics and the industries are as follows: like the exchange rate associated, the money supply, the risk-free rate which is there, the balance of trade is there, the very dividends present, the consumer price index also plays the important role and the very natural thing which is the unexpected events which occurs in the national as well in the international markets, these all factors affect the returns in the stock market. The very same and old phenomenal of the growth, which is required for the emerging market results in the significant implications associated with the corporate investors but at the same time also significant to the individual investors. On the very other hand it was highlighted that these markets cannot be treated as the same as development market.

These opportunities associated with respect to the growth and investment of these emerging markets could not be neglected by the said international investors. Seeing the huge amount of opportunity with respect to the return from the markets, the overseas investors are curious to invest their money in the Indian stock market. On laying the emphasis over the same, the very emerging economics have become a chance of opportunity for the international investors in order to invest their money the economies yield the high returns and at the same time are highly volatile, but at the same time these investments made are beneficial to the said economy and helps it to grow and to be more diversified.

While the point of discussion is that the investors and researchers should able to highlight the factors which are how the emerging economies react and what is the basic reason behind their unpredictable behaviour. While on the other hand there have been a common consensus that the emerging market behaves quite different from the developed market, there have been various reasons and factors which are associated with this.

It has been shown that around 50% of the foreign investment in the Indian stock market is done through the FII are through the Participatory notes, while the Participatory on the other hand also causes a sense of concern in the Indian regulatory authorities as the overseas foreign investor need not to get themselves register with the SEBI in order to invest in the Indian market.

### **Future of General Anti-Avoidance Rule (GAAR):**

The following thing which is so expected from the draft was that the same would be led to a next step towards the more balanced and a more reasonable General Anti- Avoidance rules. On the other hand, there is a need to transform the same in such a manner that it provides a sense of security and a sense of certainty to all the investors. The law –makers on the other hand should ensure that the same (GAAR) is specifically aimed to target all the artificial and all the abusive tax avoidance schemes prevalent.

It is made to form a sense of regulation and to avoid the fraudulent activities, but on the very other hand the GAAR would have a narrow zone of functioning and the same shall not affects or major ground or the Central grounds which are so required for the formulation of the tax planning. The Government is of the view that the FIIs which are not claiming any of the tax reliefs and on the same time their all-non-resident overseas taxpayers whom investing through the P-notes would not be included under the ambit of the provisions of GAAR. The same on the other hand gave the relief to all the Foreign Institutional Investors.

## Conclusion

The General Anti- avoidance rule, the same is the unconventional type of tax statute, which on the other hand has played a major role with respect to bringing the tax avoidance practises under the scrutiny of the tax authorities. Talking about the Anti – Avoidance regulations which are tough to implement as there is difficulty in order to differentiate the various types of the tax avoidances practises which are being followed in the market hence it becomes difficult to implement the Anti-Avoidance regulations, as the line between the permissible avoidance and the one which is objectionable in the eye of the law is very thin.

The aim which flows behind the GAAR is that the same is focused towards the tax advantages. The GAAR was formed by the Government by having a consultative approach and the same is therefore widely accepted and appreciated. The GAAR on the other hand has also worked towards the interest of the shareholders and on the other hand shareholders are also entrusted that the GAAR provisions are not misused. The GAAR in the other hand functions with the objective to ensure that there is a sense of ease in the market and on the same time it also ensures that the same functions towards the goal, that there shall not be any tax avoidance happening in the nation.

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# DEPRIVATION OF LIBERTY IN CRIMINAL JUSTICE SYSTEM: A STUDY OF UNDER TRIAL PRISONERS

Anjali Singh\*

## Abstract

*The Constitution of India guarantees the right to life and liberty under Article 21. The right to life has been interpreted by the Supreme Court every now and then and the right includes not merely an animal existence but a life with dignity. But this liberty provided as a fundamental right to the citizens goes missing when it comes to the under trial prisoners. An under trial prisoner is an accused person who is kept in judicial custody during the time their case is being heard in the court. In this article, the author deals with various constitutional and statutory rights of under trial prisoners which are crucial at the stages of investigation, inquiry and trial at both national and international levels and also deals with the problems faced by the under trial prisoners and the role of ever evolving judiciary in protecting the rights of under trial prisoners.*

**Keywords:** *under-trial, liberty, rights, custodial violence, rehabilitation*

## Introduction

Liberty is derived from the Latin word “liber”, which means “freedom”. A layman would think of liberty as the ability to do anything one desires. Some people believe that law is what limits one’s ability to exercise liberty. They don’t contradict rather, they complement one another. Individual’s freedom and liberty are guaranteed by the law, not the other way around.

Liberty means being free to do things you want to do and live where you want to live. Deprivation of liberty means taking someone’s freedom away. Article 5 of the European convention on human rights provides that everyone has the right to liberty and security of person.

Life and liberty are indispensable freedoms guaranteed by Article 21 of our constitution<sup>1</sup> but they have been hindered by police abuse of the already extensive powers granted to them by the code of criminal procedure 1973. This frequent abuse of personal liberty and constitutional rights has been a much debated and contested subject. The police force, which has been charged as the keepers of our peace and protectors against evil, has been accused of such abuse in the media and in court records.

The criminal justice system is not only responsible for making good to the victim but also for protecting the rights of the accused. They cannot be debarred from exercising their basic, fundamental and human rights only on the sole reason of facing some charges against themselves.

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'Bail, not the jail' should be the norm has been reiterated by the Supreme Court multiple times through its rulings but its applicability is nowhere to be seen on the statistics of the prison population.

### **Under Trial Prisoners**

These are the persons arrested and accused of a crime and waiting to appear before the magistrate. According to the 78<sup>th</sup> Report of the Law Commission of India, under trial is a person who is in a judicial custody or remand during investigation. An under trial prisoner is the one who has been detained in prison during the period of investigation, enquiry or trial for the offence they are accused to have been committed.<sup>ii</sup>

According to NCRB, Uttar Pradesh has reported the maximum number of under trials (21.7%, 80,557 under trials) in the country followed by Bihar (11.9%, 44,187 under trials) and Madhya Pradesh (8.5%, 31,712 under trials) at the end of the year 2020.<sup>iii</sup>

### **Law on protection of under -trial prisoners under Indian statute and international standards**

#### **The Code of Criminal Procedure,1973**

Section 50: Person arrested to be informed of full particulars of the offence for his arrest and a person accused of non- bailable offence has a right to be informed of his right to be released on bail.

Section 54: Examination of arrested person by medical officer in service of central or state government. The medical officer after examining the accused shall prepare a record of such examination, mentioning any injuries or makers of violence and the approximate time when such injuries were inflicted and also to give a copy of the report to the arrested person or the person nominated by such arrested person. This provision was brought up to prevent custodial torture on the arrested person.

Section 57: Person arrested not to be detained more than 24 hours. It was framed with an intention to keep the arrested person away from ill treatment and custodial violence meted out by the police and to keep a check on the arbitrary power of police to arrest and detain any person.

Section 358: Compensation to persons groundlessly arrested and if it appears to the magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the magistrate may award compensation.

Section 428: Period of detention, if any, undergone by the accused during the investigation, inquiry or trial of the same case and before the date of such conviction to be set off against the sentence of imprisonment imposed on him on such conviction.

Section 436: When any person accused of a bailable offence is arrested and detained and is prepared to give bail must be released on bail. Where a person is indigent and unable to furnish surety, he must be discharged on executing a bond without sureties.

Section 436A: Maximum period for which an under trial prisoner can be detained. Where a person has during the period of investigation, inquiry or trial has undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence shall be released by the court on his personal bond with or without sureties.

## **The Constitution of India**

Article 21: Right to life and personal liberty

Article 22: Protection against arrest and detention. An arrested person has a right to know the grounds of his arrest and consult a legal practitioner and be represented by legal practitioner of his choice along with a Right to be produced before the magistrate within 24 hours of his arrest.

But most of the people are poor and unable to afford a lawyer to defend themselves.

Article 39A: Free legal aid. This article ensures that no person should be denied access to justice because of his economic inabilities.

## **International covenants**

### **Universal Declaration of Human Rights**

Article 1: All human beings are born free and equal and should be treated the same way.

Article 2: Freedom from discrimination

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Right to fair trial

### **International Covenant on Civil and Political Rights**

Article 7: Freedom from torture

Article 9: Right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10: Right of detainees. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Accused persons shall, save in exceptional

circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons

### **Deprivation of Liberty in Criminal Justice System: Current Scenario**

Most of the prison population is under trials which has become a reason for overcrowding of prisoners. Attorney general of India, K K Venugopal has quoted that around 76% of inmates are under trials, which is the highest in 25 years. These are poor people, dalits, poverty stricken people who are unable to furnish bail bonds and continue to rot in jails for years without their cases being taken up.<sup>iv</sup>

### **No Separate Prison**

There are no separate prisons or marked area for under trial prisoners. They are kept with hardened criminals increasing the chance of first time or circumstantial offenders to turn into criminals.

### **Discrimination**

Even though Article 14 of the Constitution states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India on grounds of religion, race, caste, sex or place of birth and the conjoint reading of Article 1 and 2 of UDHR provides that all people are equal and must be treated in the same way. Everyone can claim their rights without any distinction, still prisoners are discriminated on the basis of caste. For instance– people belonging to lower caste are asked to clean the toilets, subjected to group violence, beaten up and exploited.

### **Rich and Poor Divide**

Rich people are often seen roaming free from the clutches of state authorities due to them being economically sound and having political influences, bribing the authorities resulting in only poor and under privileged class of prisoners being left in jails.

### **Custodial Violence**

The worst violation of human rights occur at the course of investigation process where police is trying to extract evidences and confession often resorting to methods of third degree torture. It includes torture, death, rape ,excessive beating, harassment, extraction of teeth, electric shocks, brutality in police custody. Any complaint against such violence is not given attention because of ties of brotherhood. No direct evidence is available to substantiate the charge of torture or causing hurt resulting into death, as the police lock- up where generally torture or injury is caused is away from public gaze and the witnesses are either policemen or co-prisoners who are highly reluctant to appear as prosecution witness due to fear of retaliation by the superior officers of the police.<sup>v</sup>

### **Mental Torture**

Awaiting trial for years for petty offences can cause mental trauma. Living in prisons with dangerous criminals and being subjected to exploitation, violence and the pathetic living conditions attack adversely on the cognitive abilities of the prisoner.

### **Health Problems**

Overcrowding has led to shortage of space for inmates and increased the chances of spreading infectious diseases. The prison authorities are finding it difficult to keep the prisoners safe and healthy.

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Father Stan Swamy, 84, who dedicated his life to the rights of the underprivileged, died due to COVID-19 in judicial custody. He had been in jail for over eight months and, despite his age and vulnerable condition as he was suffering from Parkinson disease, was denied medical bail.

## **Bail**

In the most genuine cases, bail is denied to the prisoners. Even though every arrested person has a right to bail still he is left to rot in jail due to high monetary security in bail bonds and as surety which they are unable to afford, being poor.

## **Delay in Investigation**

One of the crucial reason for prisoners languishing in jails is the delay in completing the investigation process by police and prosecution authorities which ultimately delays the whole procedure of trial.

## **Judicial Intervention in Protecting the Rights of Under Trial Prisoners**

Judiciary has come forward every now and then and has interpreted the law in order to protect the rights of the citizens. The under trial prisoners are denied of their basic human right which has led to plethora of petitions in courts to prevent the violation of human rights of prisoners and provide a broader interpretation to the existing statutes in order to fulfill the objective with which the makers drafted the provision in the first place.

The Supreme Court held in *M.H. Hoskot v. State of Maharashtra*<sup>vi</sup> and *Hussainara Khatoon v. State of Bihar*<sup>vii</sup> that a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would have to go through the trial without legal assistance cannot be regarded as reasonable, fair and just under Article 21 of the Constitution of India. It also said that a prisoner who is seeing his liberation through the court process should have legal services made available to him and accused has a right of speedy trial.

The court also gave the direction that government should arrange lawyers for under trial prisoners on their next remand for making an application for bail and opposing remand.

Our criminal justice system believes in the principle that a person is considered innocent unless proven guilty. Therefore, an arrested person or an under trial prisoner shall not be subjected to handcuffing. The Supreme Court has truly retained its position as the 'sentinel on the qui vive' in the context of human rights violations in the jails also.

Supreme Court in case of *Prem Shankar Shukla v. Delhi Administration*<sup>viii</sup> condemned the use of handcuffs in chaining prisoners and held that no prisoner shall be handcuffed routinely or merely for the convenience of the custodian or escort. If, under unavoidable circumstances, handcuffs become necessary, the escorting officer must record the reasons for doing so and ask the presiding judge for approval.

In *Sunil Batra v Delhi Administration*<sup>ix</sup> the court rejected the 'hands-off' doctrine and ruled that fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration. No solitary or punitive cell, no other punishment or denial of privileges or

amenities. The court quoted that “prisoners are persons not animals” and expressed its opinion that solitary confinement has a degrading and dehumanizing effect on the prisoner violating their right provided under article 21 of the constitution.

In *Sheela Barse V. State of Maharashtra*<sup>x</sup> a journalist complained of custodial violence to women prisoners. The court issued various directions in order to improve the conditions of women prisoners in the lock ups and also provided adequate protection to the arrested persons and especially to women confined in the police lockups. The court also held that the police must inform the nearest Legal Aid Committee about the arrest of a person immediately after such arrest.

In *Jagmohan Singh vs State of U.P.*<sup>xi</sup> the court held that prisoners have a right against cruel and unusual punishment.

The supreme court in the landmark judgment of *D.K.Basu vs State of West Bengal*<sup>xii</sup> provided the prisoners with a Right against custodial violence and death in police lock-ups or encounters stating that any form of torture or cruel, inhuman or degrading treatment whether or not it occurs during the investigation, inquiry or trial does come within the ambit of Article 21.

In the case of *Smt. Nilabati Behera Alias Lalita Behera v. State of Odisha and Ors*<sup>xiii</sup> a 22 year old son was taken into custody by police. The next day his body was found on railway track. The death was unnatural and the body had multiple injuries. The petitioner alleged custodial death. The court confirmed the allegation and awarded compensation to the petitioner. The state was directed to ascertain the responsibility of the officials involved in the death and take appropriate actions against them. It upheld the Right to Life of accused under trials and persons in custody and the fact that no police official can deprive someone of their life and liberty without a lawful procedure.<sup>xiv</sup>

In the case of *Yashwant And Others v. State of Maharashtra*<sup>xv</sup>, the Supreme Court upheld the conviction of nine Maharashtra cops in connection with a 1993 custodial death case and extended their jail terms from three to seven years each. Bench of Justices NV Ramana and MM Shantanagoudar upheld the order and said that incidents which involve the police tend to erode people’s confidence in the criminal justice system. While enhancing the prison term of the cops, the apex court said, “With great power comes greater responsibility”. The police personnel were found guilty under Section 330 of the Indian Penal Code which involves voluntarily causing hurt to extort confession or to compel restoration of property.<sup>xvi</sup>

Taking up the case of a Maoist leader charged under UAPA law, Supreme court held that under trial cannot be indefinitely detained in prison if there is delay in concluding the trial. The courts would ordinarily be obligated to grant bail if timely trial is not possible and the accused has been in jail for a very long period of time.<sup>xvii</sup>

## **Way Forward**

While inaugurating the 39<sup>th</sup> conference of chief ministers and chief justices on 30<sup>th</sup> April 2022, PM Modi has shown his concern towards the population of under-trial prisoners in central and state prisons

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waiting for speedy decisions in their respective cases. He said that “sensitivity of people is linked to speedy justice and this should not be forgotten“. He has pitched for early release of 3.5 lakh under-trial prisoners languishing in jails for years. He has emphasized on formation of a committee in every district headed by the district judge to examine such cases and wherever possible to release them on jail.<sup>xviii</sup>

- Separate prisons for under trial prisoners and hardened criminals
- Digitalization of every information regarding handling of criminal cases including arrest, medical examination etc.
- Filling the backlog of vacancies to increase the strength of judges helping in speedier disposal of pending cases.
- Establishment of new and separate courts for certain offences
- Increasing the accountability of police and prison authorities and in cases of any mishappenings, making them personally liable instead of shifting the burden on state.
- Priority to prior instituted suits
- Adopting swifter procedure to dispose off the case within a limited period
- Limited extension of remands
- Separation of police carrying out investigation from the one maintaining law and order.
- Rehabilitation of under trial prisoners back into the society
- Huge amount of compensation to be paid to wrongly detained prisoner by making the police official personally liable who was responsible for such arbitrary arrest to spread out a deterrent effect of making such an unreasonable and unnecessary arrest.
- Implementation of Law Commission of India’s 273rd Report<sup>xix</sup> that suggests that those accused of committing custodial torture – be it, policemen, military and paramilitary personnel – should be criminally prosecuted instead of facing mere administrative action establishing an effective deterrent

## Conclusion

Most of the population in prisons throughout the country is of under trial prisoners. They are kept in prisons to protect the witnesses and evidences from being induced and tampered respectively. The prisoners are also entitled to all his fundamental rights while they are behind the prisons. Indian Constitution does not expressly provides for the prisoners’ rights but Articles 14, 19 and 21 implicitly guaranteed the prisoners’ rights .They are supposed to be suffering in jails till the completion of the trial resulting in acquittal or conviction but sometimes they remain in prisons for more than the term they will be serving, if found guilty. The government and judiciary has admitted the fact that majority of the under trial population belongs to downtrodden strata of society and accused of non serious petty offences and remain behind the bars for an extended period of time .They are poor and they are denied bail due to insufficient security money and the trial takes years. They cannot afford lawyers, lack basic necessities of life, medical aid and more likely on the verge of being exploited. India is a signatory to various international covenants like universal declaration of human rights and international covenant on civil and political rights, still India has been unable to enforce these provisions pragmatically and we continue to witness police atrocities and violation of rights of prisoners.

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**(End Notes)**

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- <sup>xiv</sup> Supra note 1
- <sup>xv</sup> 2018 (2) S.C.Cr.R. 1223
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- <sup>xix</sup> Law Commission of India, “273<sup>rd</sup> Report on Implementation of United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment through legislation” (Oct, 2017)

# AERIAL TORT JURISPRUDENCE IN PRIVATE INTERNATIONAL LAW

Sai Vikranth\*

## Abstract

*The area of law known as "Private International Law" or "The Conflict of Laws" deals with situations when a key fact has a physical relationship to another country or if there is a foreign element present in the case. The dispute may involve a foreign element because the parties may be residents or citizens of another country and it may concern their status or property there. Alternatively, the dispute may be related to a contract between parties residing in different countries, or it may involve a tort that was committed. In case of aerial torts also "The Conflict of Laws" assists courts in deciding the dispute and sometimes using precedents where "The Conflict of Laws" applied. This paper elucidates the precise law which would apply in different situations using case laws, different theories related and further elucidates the concept of aerial torts.*

**Keywords:** *Private International Law, Conflict of laws, Foreign Element, Aerial Tort.*

## Introduction

Firstly, "Tort" means a civil wrong, Aerial torts encompass offences committed while operating an aircraft, airborne collisions between two aircraft, and harm to people or property as a result of an aircraft crash. (Aircrafts means any mechanical devices capable of flight.). If there is no legislation governing aerial torts, the law is being formed either using the analogy of ships or automobiles. The air space over land and territorial waters are also included in a state's territorial authority under international law. This means that the location of a tort committed in or inside of an aircraft on the ground, in or inside of an aircraft in flight over land or over the territorial sea of a state, is the location in or inside of the aircraft at the relevant time and not the location of the aircraft's actual registration. With one exception, flights over high seas<sup>1</sup>.

A plane flies from Germany to Australia. In proceedings in New South Wales, A, a person alleged that, while the aircraft was on the ground at New Delhi airport, India he was defamed and assaulted by a member of the crew. Say, A wants to file a suit. As and when he returns to Australia Say, A wants to file a suit. He files a defamation suit against that airways. The question which would arise in the court as to which law regarding defamation shall be applied here. Whether it should be Indian law, or Germany's law or the Australian law. Private International Law aids courts in answering the question of which law to choose when it comes to cases involving complex set of facts with seemingly overlapping jurisdictions. In such cases law would be the place of commission of the alleged tort. Similar instances

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<sup>1</sup> Neha Bargotra, Sagarika Mishra & Yogita Raj, Maritime and Aerial Torts, 3 Asia Pacific Law & Policy Review (2017).

took place in the case of *Lazarus vs. Deutsche Lufthansa*<sup>2</sup>. The basis of the judgement could be found in the Latin term, *lex loci delicti commissi*, which means the law of the place where the delict or tort has been committed. There is another parallel Latin term that determines the choice of laws viz., *Lex Fori*. It means that the law of the place where the legal action has been initiated. For example, if the tort happens in France and the action is initiated in Portugal, if the court says that it is following *Lex Foci*, it means that the law of Portugal is being followed to deal with the case.

The English Common law case *Phillips v. Eyre* is a pioneer with regards to the choice of law. The court in the case stated that the claim which was brought in front of the court should not only be actionable under *Lex fori*, but also should not be justifiable under *Lex Loci*. This means if an act done by X in France caused damages to Y, while they both were in France, and if a suit gets filed when they come back to England, not only should the act be actionable under English tort law but also not justifiable under the French law. This was called the general rule with regards to the choice of laws. However, in the case of *Chaplin v. Boys*, displacement from the general principle could be seen. Although the general rule was upheld in this case, a special exception was drawn where there was a pre-existing relationship between the parties i.e. before the tortious event occurred. This idea of giving importance to *Lex fori* was heavily criticised because the plaintiff was given extra burden of proving that his claim was actionable under both the jurisdictions and this heavily went against the victims. A singular dependence on any of both doctrines is a little worrisome because sometime *Lex loci* could be of no use either. For example, If A, who is domiciled in England flies to France but due to some technical issues, the flight deviates and crash lands in Turkey at the end. The laws of Turkey have little to do with this. All of these different narratives gave rise to a contemporary system of choice of law which allow the courts to deviate from *lex loci* in some cases i.e. to choose such law which has a significant connection to the tort even it is outside of the *lex loci*. The discussion of torts is an essential one if we are going to discuss, specifically, aerial torts.

### **Review of Literature**

- Neha Bargetra, Sagarika Mishra & Yogita Raj in their manuscript titled “Aerial and Maritime Torts” elucidated the concept of “Aerial Torts” and stated that in the context of cross-border torts, the actual issue here is not which theory to use—*lex fori*, *lex loci delicti*, or appropriate law—as it is how to apply the theory in a way that offers clarity while being adaptable enough to handle complex instances.
- Warsaw Convention (1929): The Warsaw Convention, also known as the Convention for the Unification of Certain Rules Relating to International Carriage by Air, is an international agreement that governs liability for international carriage of passengers, baggage, or cargo.

The original document, which bears the name Warsaw Convention, was signed there (Warsaw) in 1929. It was revised at Hague, Netherlands in 1955 and in Guatemala City in the year 1971. US courts have held that for some purposes convention of Warsaw is different instrument from convention which was amended by the Hague Protocol. Warsaw convention got replaced by The Montreal Convention, which was signed in the year 1999 in countries ratifying it.

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<sup>2</sup> *Lazarus vs. Deutsche Lufthansa* (1985) 1 NSWLR 188

- Montreal Convention (1999) : A diplomatic gathering of ICAO member states in 1999 resulted in the adoption of the multilateral treaty known as the Montreal Convention. It made significant changes to the Warsaw Convention's compensation rules for victims of air mishaps.
- The Carriage by Air Act, 1972 : The Carriage by Air Act 1972 dealing with carriers' liability in India incorporates Warsaw Convention, Hague Protocol and Montreal Convention, the three international instruments ratified by India.
- Sandeepa Bhat in her manuscript titled "Air carrier liability for passenger death or Injury Under carriage by Air Act 1972" discusses the air carrier liability for passengers in India and elucidates the provisions pertaining to the carriage by air act.

### **Research Methodology**

The researcher used secondary data for this research. The researcher used academic resources from the internet, books, blogs, and periodicals. This study solely relies on secondary data. The nature of research is doctrinal. Numerous books, articles from newspapers, and journal articles have been cited. The usage of online journals and internet-based data have been extensively used.

### **Objectives**

- To elucidate the concept of "Aerial Torts".
- To analyse the laws applicable to "Aerial Torts".
- To study the applicable of law in case of "Aerial Torts".
- To study the concept of "Jurisdiction" pertaining to "Aerial Torts".

### **Research Questions**

- What is an "Aerial Tort"?
- What are the different laws applicable in case of "Aerial Torts"?
- What are the laws that govern "Aerial Torts" ?
- Are there any landmark judgements pertaining to "Aerial Torts"?

### **Scope & Limitation**

Overview pertaining to the "Aerial Torts" has been covered in the research paper. Researcher couldn't cover the concept in deep due to lack of reliable resources and time. As the concept comes under the domain of private international law, different countries ratified the conventions pertaining to the concept by passing their own laws so it has become difficult for researcher cover those all. And also the research performed related to the concept is very less.

### **General Principles of Aerial Torts**

As a practical matter, in relation to both jurisdiction and choice of law, the role of private international law in the context of aerial law is limited by the Warsaw Convention on Air Transport or other. If the aircraft is above high seas or above the continent of Antarctica, the choice of law would be that of the place where the aircraft was registered. Likewise, it a tort occurs in the aircraft when it is flying over a

territory of a sovereign nation, or a water which are under the sovereignty of a nation, then the law of such nation will be the choice of law by the courts. The contemporary principle is that *lex loci* is given more importance than the law where the aircraft has been registered. Let us understand the contemporary stand with the help of cases.

### **Lazarus v Deutsche Lufthansa (1985)<sup>3</sup>**

The facts of the case are a passenger was defamed by crew when he landed in New Delhi in an aircraft of Deutsche Lufthansa from Germany to New South Wales. The court held that the action of tort i.e., defamation arose in India and therefore according to the doctrine of *Lex loci*, the choice of law to deal with the suit of Indian Defamation Law.

### **Tidewater Oil Co. v. Waller (1962)<sup>4</sup>**

In this case Waller was an employee of Spartan Aircraft Technologies which works in repairing mobile home of people and Waller also goes on outstation trips to do the repairs. Once he was sent to Turkey to do the repairs and to do the repair of a mobile home of Tidewater Oil & Co, he was transported in a plane owned by the Tidewater Oil & co. However, the plane crashed while attempting to land at the site where drilling work was to be done. With the burden of proving that he was entitled to a reasonable duty of care despite him being a secondary workman of the Tidewater Oil Company, Waller was given an opportunity to get their case heard according to the Turkish Laws i.e. where the tort has occurred.

### **Piper Aircraft Co. v. Reyno (1981)<sup>5</sup>**

In this case a plane owned by British citizens got crashes and 5 British citizens were killed. The representatives brought an action against the plane and propeller manufacturers of America in an American court but the court followed the doctrine of *forum non conveniens*, and dismissed the petition and told that they could go to the Scotland courts as they are more appropriate forum to approach regarding the injury occurred.

### **Roberts v. Piper Aircraft Corporation (1983)<sup>6</sup>**

In a plane crash in New Mexico, the plaintiff was injured and he brought a suit against the faulty repair done by mechanic in Oklahoma and Kansas and a defective fuel supplier from Nevada. In this case, although the defendants to the case resided in Oklahoma, Kansas and Nevada, the cause of action arose in New Mexico at which the plane got crashed. In this case, the court applied the doctrine of *lex loci* and the choice of law was that of New Mexico.

## **Related Conventions & Laws**

- **Warsaw Convention on Air Transport, 1929**
- **The Montreal Convention, 1999 (replaced Warsaw Convention),**

○ *Article 33 – Jurisdiction*

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<sup>3</sup> AG (1985) 1 NSWLR 188

<sup>4</sup> 302 F.2d 638 (10th Cir. 1962)

<sup>5</sup> 454 U.S. 235

<sup>6</sup> 670 P.2d 974

1. A suit for damages should be filed in the territory of one of the States Parties, at the plaintiff's preference, either before the court of the carrier's domicile or of its principal place of business, or where it has a place of business through which the contract was made, or before the court at the place of destination.
  2. An action for damages resulting from a passenger's death or injury may be filed in one of the courts listed in paragraph 1 of this Article or in the territory of a State Party where the passenger is a resident at the time of the accident and where the carrier provides passenger air transportation services, either on its own aircraft or another carrier's aircraft in accordance with a commercial agreement, to or from that State Party.
- Article 21 - Compensation in case of death or injury of passengers
    1. The carrier shall not be entitled to exclude or reduce its liability for losses under paragraph 1 of Article 17 that do not exceed 100,000 Special Drawing Rights for each passenger.
    2. Under paragraph 1 of Article 17 the carrier is not liable for damages to the extent they exceed 1,00,00 SDR (Special Drawing Rights) if in case the carrier proves that:
      - (a) Such loss wasn't caused by the carrier, its employees, or agents acting negligently or in another way violating the law; or
      - (b) Such loss was entirely the result of a third party's negligence or other wrongful act or omission.
  - **The Carriage by Air Act, 1972 (Passed by India as a ratification to the convention)**

The act also contains similar provisions to the above mentioned conventions.

**Note:** Countries which ratified the above conventions has passed their own laws like “The Carriage by Air Act” which was passed by India.

## Suggestions

- There is a need for more clarity as to whether lex loci or lex fori or doctrine of forum non conveniens etc.. apply.
- An act pertaining to the Private International Law should be passed in India in order to clear ambiguity.
- There is even need to make conventions lucid and add-on provisions which are on par with existing situation.
- There is even need to bring awareness about the conventions and laws pertaining to aerial torts in order to bring action.
- Conventions does not cover psychological injuries, which also should be covered.

## Conclusion

It can be noted that the idea of lex loci is being strictly pursued by majority of courts and especially in the United States of America. However, there are instances where the deviation from the lex loci would

have served the purpose of the judicial remedy; it was not done by the courts. There seems to be an advent of the *lex loci* with regards to aerial torts.

When it comes to the choice of law for cross-border torts, the key issue is not whether to use the *lex fori* or *lex loci* theory, but rather how to apply the theory in a way that provides certainty while remaining adaptable to complex instances.

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# DEMYSTIFYING INTELLECTUAL PROPERTY RIGHTS WITH RESPECT TO THE PHARMACEUTICAL INDUSTRY

Prakhar Dubey\*

## Abstract

*Intellectual property rights (IPR) are concepts, discoveries, and artistic works that have the title of property bestowed upon them by the community. It give the innovators of a product some certain rights in order for them to earn profit and get financial benefits from their artistic activity or repute. Intellectual property protection has many forms, which are patents, copyright, trademarks, and many more. A patent is provided to an invention or creation that fulfills the requirements of global uniqueness, non-general, and capable of having to earn some financial value. It is needed for optimal innovation or originality recognition, development, depiction, and hence safeguarding. Each organization should have its own IPR regulations, corporate culture, goals, and so on, based on its field of competence. The pharmaceutical industry's developing IPR initiatives will necessitate more focus and planning in the coming years.*

**Keywords:** Medications, intellectual property, rights, trademarks

## Introduction

Any creative product of the human psyche is considered intellectual property, such as a master piece, Whether it's writing, business, or scientific knowledge, there's something for everyone. These are rights and responsibilities granted to an innovator to safeguard people's innovation for a particular length of time. These basic obligations offer the innovator the exclusive right to employ his discovery for a particular duration of time<sup>1</sup>. It is widely acknowledged that intellectual property (IP) plays a critical role in today's economy. It has also been proven decisively that the intellectual work creativity should be prioritised so that public benefit can be realised.

There has been a significant increment in the number of research and development (R&D), as well as the expenses required to bring a new technology to market. The risks for network operators have risen dramatically, and protecting information from unauthorised use has become necessary, as a minimum for the time being, to guarantee the compensation of R&D and different related costs, in addition to suitable earnings for continued R&D investment. IPR is considered to be a very valuable asset, as it protects the resources, time, wealth and effort of the creator. This happens because the IP law grants the creator with an exclusive license to use his/her creations for a certain period of time. As a result of this

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the IPR is a huge benefactor to the national economy as it promotes good competition, Industrialization and financial prosperity.<sup>1</sup>

### The Different Types of Intellectual Property

Actually, the original, only patents, marks and design patents are protected as Industrial Property, as in recent times the meaning of this title has escalated. Intellectual Property Rights Helps in the advancement of the technology in the following ways :-

- a. It has a method for dealing with copyright, violation and illegal use.
- b. This provides knowledge to the general public at large as all of the IP's save the confidential information which are released in the other world.

Intellectual property (IP) security have a wide range of academic endeavours, including

1. Patents
2. Industrial Design includes features such as shapes, layouts, surface design, line and colour combinations and colour composition attributed to an article, whether two dimensional.<sup>2</sup>
3. Trademarks are any symbols, logo or names which are under any goods and service or products and with this the manufacture can be identified. These trademarks can be bought, sold to other parties or licensed. A trademark has no presence other than the goodwill related to the product and provider it represents.<sup>3</sup>
4. Copyright refers to the physical articulation of innovation which may include music, literature, software, audio, etc.<sup>4</sup>
5. Geographical indications are indications which could determine that a good originated in the geographical territory of the country, where the given number, reputation and other characteristics of the goods which are primarily accessible to the place of origin.<sup>5</sup>
6. A patent is granted for an invention that meets the worldwide novelty, non-obviousness, and commercial or industrial software criteria. Patents can be issued for each merchandise and processes. A patent can be granted to both, goods and services, The tenure of a patent is of 14 years from the date of filling which is in accordance to the India Patent Act, 1970, exceptions and provision are made under this act for drug or food items which have a date of 7 years from the date of filling or 5 years from the date of patent, whichever is the earliest. Product patents are not granted for food items or drugs. Nonetheless the copyright will not be accessible if a nation is not a member of the convention. Because of this copyright are not regarded as strictly territorial, like any IPR they can be bought, sold or transferred or can be gifted.

<sup>1</sup> Singh R. Vol. 1. New Delhi: Universal Law Publishing Co. Pvt. Ltd; 2004. Law relating to intellectual property

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<sup>3</sup> New Delhi: Commercial Law Publisher (India) Pvt. Ltd; 2004. Anonymous. The Trademarks Act 1999 along with trade Marks Rules 2002

<sup>4</sup> New Delhi: Commercial Law Publisher (India) Pvt. Ltd; 2005 Anonymous. The Copyright Act 1957 as amended up to 1999 along with Copyright Rules 1958 and International Copyright Order 1999

<sup>5</sup> New Delhi: Universal Law Publishing Co. Ltd; 2004 Anonymous. The Geographical Indications of Goods (registration and protection) Act, 1999 along with Geographical Indications of Goods (registration and protection) Rules 2002

## Research Questions

- Why is 'compulsory licensing' under the Patents Act of 1970 is onerous task and How Provisions in the TRIPS agreement regarding pharmaceutical industry deal with situations which need urgent attention (like covid-19) and how India is complying with them?

## Why is Patent Protection Essential for Pharmaceuticals Companies?

Medicines are extremely costly to create. During the years of laboratory, animal, and eventually human trials, the majority of experimental medicines fail at some point. When the expenses of those flops are included, it generally costs more than \$1 billion to carry a medicine from discovery to regulatory clearance. Without the promise of years of uninterrupted revenue, there is considerably less motivation to take that risk

Vaccine Patents:- Patents encourage innovation by prohibiting rivals from just duplicating a company's finding and releasing a competing product. In the United States, medication patents normally last 20 years from the time they are filed, which usually occurs when a pharmaceutical believes it has an essential or valuable drug

However, these are not ordinary times. Last autumn, developing countries led by India and South Africa asked to the World Trade Organization (WTO) that vaccine and other Covid-related patents to be repealed. They urged that, given the severity of the epidemic, the recipe for the life-saving vaccines should be freely distributed so that other manufacturers might create them locally in mass There is an ever-increasing call for 'compulsory licensing' under the Patents Act of 1970 to be used as was the case 10 years ago for the treatment of cancer to tackle this difference.

In the case of a patented product, the compulsory licensing law allowed the Indian government, particularly in national emergencies, to bestow mass production privilege to others without the permission of the owner.

India and South Africa forwarded to the WTO a proposition in October 2020 to calm down regulations in an International Agreement regulating intellectual property rights (IPR) for the diagnosis and medication of Covid-19 medicines and vaccines deemed necessary.

## Compulsory Licensing

The obligatory licencing of a patent conditional to the fulfilment of specific requirements is among the most significant parts of the Indian Patents Act 1970. Any real interest in the issue may submit a patent application seeking grant for the mandatory licence, under certain requirements, at any time after the expiry of 3 years from the date on which the patent was sealed, i.e.,

The community has not been pleased with normal criteria in respect of the patented invention; that the proprietary innovation is not publicly easy accessible. The market does not have access to the patented invention at a fair cost; or that the claimed invention does not operate on Indian territory. Furthermore, it is vital to highlight that any individual who is already the property owner under the patent can apply for a compulsory licence.

## Trips Agreement

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TRIPS is the most extensive global Intellectual Property Agreement in effect since 1995. The TRIPS Convention established global baseline criteria for the protection and enforcement of almost all kinds of IPR, including those for patents. In pre-TRIPS international accords, minimum standards for patents were not specified. More than 40 countries worldwide failed to provide pharmaceutical patent protection at the time of the discussions. Now, with few restrictions, the TRIPS Agreement requires all WTO Members to adjust their laws to the baseline IPR requirements.

India modified the Patent Act in March 2005 in full compliance with the TRIPs Agreement of the World Trade Organization (WTO), which requires a minimum international benchmark on patent protection. This TRIPS agreement covers not only royalties, but other IPR forms, such as geographic indications, trade marks, copyright, industrial designs and privacy. World Trade Organization member countries must comply with TRIPS requirements. In accordance with the TRIPS Agreement, both product pharmaceutical patents and a term of at least 20 years in the field of patents were necessary.

This deal has brought new hurdles to the Indian pharmaceutical industry. The establishment of patents on pharmaceutical products was supposed to interfere with the advancement of the Indian pharmaceutical industry. Under the product patent system, reverse-engineering or export medications with in force product patent can no longer be used to produce Indian pharmaceutical industries.

### **Reasons: Why Compulsory Licensing System is Onerous and What can be Solutions to it**

The introduction of the concept of compulsory licencing (CL) in India has led to concerns of public interest. These regulations can be utilised if patent monopolies contradict the interest of the public. The CL provision in India's Patents Act provided that, if extraordinary conditions, like national emergencies or great necessity, cannot be used to justify licencing at an earlier period, the request for the granting of CL can only be submitted after 3 years from the date of grant of the patent.

- In India, due to public interest considerations, the compulsory licencing (CL) system was implemented. As stated in the Proclamation of Doha, the rules for awarding CL are fully consistent with the TRIPS agreement. The WTO Ministers have agreed that 'TRIPS that doesn't exclude countries from adopting public health action, nor should it exclude members
- The adoption of CL rules by India was exceedingly careful. In the post-TRIPS context, only one instance has been used of these provisions. This was the case with the unnecessarily high price imposed by Bayer Corporation, the US subsidiary of the German company Bayer AG who had the patent on the anti-cancer medication sorafenib tosylate (sold under the branded product Nexavar), and even through imports, was not accessible in substantial quantities. However, Compulsory licences for patents can be granted by two different means.

The Patent Act of Indian, 1970

- Much has been argued in the past about how the Act on Indian Patents permits for the obligatory licencing or facilitation of non-commercial use of patented medications in the event of national emergencies. India had given CL in 2011 in respect of a chemical contained by Bayer (sorafenib tosylate).

- The situation was much more troubled than one could have expected in May 2021. The transparency of the point about vaccines should obviously take precedence over the long-term impacts of maintaining the IP system.

Competition Act of India, 2002

Competition law also provides an unlikely support for the award of compulsory licences. Some would argue that no specific company is dominating since several vaccination providers exist in India (Covishield, Covaxin, and now Sputnik V). Unlike in regular times when a single company can be given control in a global marketplace. More than a single company can be found concurrently in turbulent times, since they can act independently. When supply replaces the inelastic demand, companies do not limit the price behaviour of each other.

Therefore, a vaccine manufacturer may be subject to obligatory licences when charging unfairly high rates.

### **Issue**

- Compulsory Licencing (CL) issue: CL is an issue of technology for foreign investors worrying with using CL to reproduce their goods. CL provides technology for foreign investors. It affected the FTA discussions between India and the EU.

The government gives authorisation to entities, without the patent proprietor's consent, to use, produce, import or sell a patented innovation. CL is covered by the Patents Act in India.

In accordance with the WTO TRIPS Agreement (IPR) CL is permissible provided certain requirements such as 'national emergencies, other extremely urgent circumstances and non-competitive conduct' are met.

- One standard complaint in connection with COVID vaccines is that the acquisition of know-how in the production process can be the main hurdle in facilitating mass production. But experience has said several times that several companies have effectively reversed many types of pharmaceutical items even if the know-how of big pharmacists has not been shared voluntarily. In addition, history may also tell us that institutions like the Federal Trade Commission in the USA have compelled the transfer of know-how.

### **Specifications for Certain Aspects of Drug Patent**

A incredibly specialized proficiency which can only be refined over time apparently and incorporates legal, technological, and scientific knowledge is required to write patent necessities. The crux of the patent for that legal ownership is strived is the assertions in a patent specification. The exploration of a novel assets in an old substance cannot be patented. If the assets can be used in a systematic manner, the developer has made a patented creation A breakthrough that a pre-existing component can tolerate mechanical impact would still not be copyrighted, but a train sleeper composed of it may. It is possible that a chemical is not new, but that has been revealed to have a new-assets. It might be possible to patents it in tandem with some other well-known chemicals if the output is new. This seems to be because nobody has ever utilized that combination to make a fertilizer, insecticide, or medication before. It's completely feasible that an innovator invented a novel compound, but its exact form is

undiscovered. In this situation, the molecule's formulation, and even its qualities and manufacturing techniques, will be crucial.<sup>6</sup>

Integrating pre-existing compounds to create new compounds may indeed be copyrighted unless the ingredients have a functional correlation when integrated. Throughout this scenario, there's really no chemical process. It merely offers a sliver of safeguards. The patent forbids anyone else from using specific aspects of the composition. A patent on hydro regia for illustration, will not preclude someone from integrating the constituent acids in other quantities and filing additional patents. People and animals medicinal processes, with the inclusion of the United States, are not patented in several nations since they are not regarded industrially useful. When developing assertions for a novel pharmaceutical need for a well-known drug, employ vigilance because the assertion should not indicate a therapeutic technique. Drugs and pharmaceuticals, which include herbal treatments, account for the bulk of the patents. Chemicals, electronics, and engineering are only a handful of good uses. Chemicals and medicines account for about 62 percent of the patents.<sup>7</sup>

## **Conclusion**

It is self-explanatory that managing IP and IPR is a multifaceted task that necessitates a vast variation of measures and methodologies which should be in accordance with the law of the particular nation and with the international treaties and practices. It is no longer solely motivated by the perspective of the nation at large. Market needs, market responses, cost associated with deciphering IP. Vast business ventures and so on all have a significant impact on Intellectual Property and all of the subordinate legislations. Hence, trade and commercial reflections are essentials in the field of IPR management. Different types of IPR necessitate different treatment, handling, planning, and strategies, as well as the participation of individuals with diverse domain knowledge, such as science, engineering, medicine, law, finance, marketing and economics. Depending on the field of expertise, it should be the responsibility of every company to create their own IP policies, design and strategy. Taking this into consideration all of the pharmaceuticals' companies are now creating Intellectual Property strategy. Given the enhanced likelihood that some IPR are invalid, antitrust law must meddle. Invalid rights aren't unlawfully asserted that allows you to set up and hold illegitimate, albeit limited, monopolies in the pharmaceutical industry.

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<sup>6</sup> Subbaram NR. Hyderabad: Pharma Books Syndicate; 2003. What everyone should know about patents?

<sup>7</sup> Shukla S. Patents: An Introduction. Indian Pharm. 2004;3:14-7.

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# REVISITING EUTHANASIA- AN ANALYTICAL APPROACH

Adv. Chintu Jain\*

## Abstract

*Euthanasia, as per the Oxford English Dictionary can be defined as the activity of killing a person who is suffering from a disease that cannot be cured in a painless manner through the use of either substances or withdrawal of life support. In essence, the rationale behind euthanasia is to relieve a patient, mostly a terminally ill patient, of their pain and suffering by ending their life. The reason is that the patients are in such a condition that living will cause more suffering than a painless death. The process of Euthanasia and whether it should be held legal is seen in two ways. One way of looking at it is it being a humane step to relieve a patient of suffering. However, the dominant way it is looked is that of the killing of a human being and that life should always be preserved wherever possible. Indeed, that is why the subject of euthanasia draws hot debate about whether it should be legalized or not. Bills dealing with the subject of euthanasia are not easy to pass and come under immense parliamentary debate and even more public scrutiny and criticisms. Physicians and doctors face the living nightmare of having to make these difficult decisions as often patients are in no condition to speak for themselves. Most countries are against the legality of euthanasia and do not recognize the 'right to die' so as to speak. India, until 2018, was among the many countries which did not recognize euthanasia. This was changed after Aruna Shanbaug vs. Union of India case wherein the Supreme Court of India, while rejecting the petition to allow a nurse in a vegetative state to be taken off life support, did recognize passive euthanasia in law. Hence, even in this present day, India only partially recognizes the legality of euthanasia. To see where India stands in the world, this article aims at an analytical view to see whether the Indian attitude is and what are the ground realities faced in the country, in particular the attitude of the doctors and the kind of medical cases they deal with. The comparison with European countries will help in determining what should the approach be going forward about the legal status of euthanasia and whether the Indian courts and parliament are correct in their stance.*

**Keywords:** *Euthanasia, India, European countries, Parliament, Supreme Court, Incurable illness, Reasonable alternative*

## Introduction

Everyone is born with an idea to lead a happy and healthy life but a few of us do not get to die peacefully and painlessly. It can be due to unfortunate accidents or diseases that one has no control over and which happen to severely impact our body and its functions. In these cases people tend to choose death over living partly and painfully. Euthanasia comes as a safe getaway in these situations which tend to relieve a person from the pain of living. From the early childhood one understands the meaning

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of the term 'Right to life' and understands its importance. It is also a fundamental right enshrined in our constitution which can be enforced against other people who try to take away or infringe our right. But the question arises right – does the right to life automatically include right to die? Euthanasia inculcates the basis of 'Right to die' but how far is it beneficial to implement? If implemented, will there be any negative consequences with regard to the same?

### **Classification of Euthanasia**

The term euthanasia is a combination of 2 terms - eu-good and thanatos-death, <sup>1</sup>impliedly meaning 'to die well and having a peaceful death'. It is however divided into various categories based on the person giving consent to die, other grounds which have roughly been categorized as specified below:

#### **Active Euthanasia**

Active euthanasia can simply be understood as the act of taking life of a person by administering any lethal drug or injection on request of the patient. It is done with intent of quickly helping an individual be free from suffering and receive a peaceful death. It is majorly for individuals who are terminally ill, and cannot recover fully in any time of his life. It includes intentionally administering a fatal drug in cases of severe accidents. It implies itself as an act of mercy killing.<sup>2</sup> It is a voluntary act on part of physicians and does not include sitting back and letting the patient die.

#### **Passive Euthanasia**

Passive euthanasia can simply be understood as act of omission to save life or discontinuing any external life sustaining mechanisms like a life support machine, to increase the life of a person. If any person is sustaining on life support instruments and cannot live his life without such instruments, this type of euthanasia is implemented. It includes failure to resuscitate an irretrievably ill patient (e.g. a severely defective newborn child) by procedures like discontinuing a feeding tube, or discontinuing ventilation or not giving life extending<sup>3</sup> treatments. Contrary to active euthanasia, passive euthanasia is "letting a person die". Due to this difference in classification of euthanasia, many countries of the world stand at different footings regarding implementation of the same. Some consider passive euthanasia to be the only type of euthanasia that can be morally justified, but on the other hand active euthanasia is often frowned upon as the liability of carrying out an act taking life of a person is neither moral nor religious<sup>4</sup>.

#### **Voluntary Euthanasia**

Voluntary euthanasia means taking life of a person by way of active euthanasia but only subject to consent of the patient by administering a lethal dose. The supporters of this euthanasia argue that self-determination as a legal principle by extension automatically includes the right to die as well, since the right to choose should be applicable to both – choosing life and choosing death. According to these two principles each human must have the right to choose which is not only a fundamental right but also a

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<sup>1</sup> Finnis, J., "The Rights and Wrongs of Abortion: A Reply to Judith Thomson" in Dworkin, R. M., (ed.), *The Philosophy of Law* 136, London: Oxford University Press, 1977.

<sup>2</sup> <http://njirm.pbworks.com/f/19Euthanasia%20Most%20controversial%20and%20debatable%20topic94-97.pdf>

<sup>3</sup> International Journal of Current Research Vol. 10, Issue, 11, pp.75543-75546, November, 2018 DOI:

<https://doi.org/10.24941/ijcr.32801.11.2018> Euthanasia: Right to live & right to die", International Journal of Current

Research, 10, ( Available online at <http://www.journalcra.com> z , All India Institute of Medical Sciences, Jodhpur (India)

<sup>4</sup> Reddy KSN. The essentials of Forensic medicine & Toxicology, 26th edition. 2007;41

basic human right that is vested in an individual by virtue of him being born as a human being. The condition of a patient must be so irretrievably ill that upon advice of board of physicians and experts, it is considered pertinent to allow his death than to wait for him to recover which is not a possibility in far sight. However, the expressed consent of the patient is an essential ingredient for voluntary euthanasia.

### **Non-Voluntary Euthanasia**

This kind of euthanasia is practiced without the consent of the patient due to his inability to give consent. Here the person is in such a state that he cannot possibly be expected to give any type of consent- implied or expressed. However, any third party responsible for the patient like close relatives, family, immediate friend, guardian etc. can step in to give consent on behalf of such person. For example the cases where:

- a) Any person in coma who is not expected to recover.
- b) Any young infant without any guardian.
- c) Any senile person.
- d) Any person diagnosed with a severe and incurable mental disability.
- e) Brain damaged or brain dead person.
- f) Severe mental damage where the person may attempt to kill himself or others that include fits.

### **Involuntary Euthanasia**

Similar to non-voluntary euthanasia, this is practiced when an individual is not in a medical state to give permission to perform euthanasia or cannot request for such relief. It is however different from non voluntary euthanasia in the way that it does not include any type of consent and is purely based on medical opinion and discretion. In cases of non-voluntary euthanasia, the consent is given by way of implication by any third party and is not completely ignorant to the will of the patient. In involuntary euthanasia, the patient is being relieved against his will taking into consideration his medical state. This is applicable for the patients who are now permanently in a non-responsive, vegetative state, the state in which the patient becomes completely incapable of living his life as a human, but is biologically alive like in the cases of brain death. This is the most controversial type of euthanasia as it can be misused by the medical staff in man ways which will be discussed later.

### **Physician assisted Euthanasia or Assisted Suicide**

when the patient is assisted medically and physically by any physician or medical opinion as to how to take their life, it is called “physician assisted suicide or doctor assisted suicide”<sup>5</sup>. Generally, the right to physician assisted suicide enshrined and supported by the legal system of a country and principles of human rights where any person has a ‘right to privacy’ which includes right to discuss and solve his health issues with his doctor. The physician here is legally protected by health care rules provided by law in almost every country that maintains confidentiality of procedure related to health. Another right is the freedom to choose that has been a long debated topic when it comes to ‘right to die or freedom to choose death’. This is often executed by self administration of life threatening drugs on advice of doctors by the patient unlike active euthanasia where the doctor administers lethal dose to the patient<sup>6</sup>.

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<sup>5</sup> [www.religioustolerance.org/euthanasia](http://www.religioustolerance.org/euthanasia)

<sup>6</sup> *Webster's New World Medical Dictionary*. 3rd ed. Wiley Publishing, Inc; 2008. [Last accessed on 2012 Apr 12]. Definition of physician assisted suicide. <http://www.medterms.com/script/main/art.asp?articlekey=32841>. ISBN-10: 0470189282; ISBN-13: 978.0470189283. [Google Scholar]

The person is required to be competent to understand the nature and consequence of taking the drug otherwise it may invite legal actions against the physicians. This type of euthanasia is risky for medical pupil as burden of proof generally lies on them regarding the issue of consent and undue influence.

### **Legitimate medical Euthanasia**

This form of euthanasia entails providing treatment to the suffering patients but this treatment subsequently reduces the lifespan of such patient thus having dual effect. It concerns the use of fatal substances in lethal doses or terminal form of sedation to any patient with an intention to relieve him of his pain. It secures the doctors from liability of causing death of a patient if it is proven that there was great value of good intention involved and the patient has consented to the treatment knowing its consequences.

### **Trends of Euthanasia Around Globe**

#### **Euthanasia in Belgium**

The legislation passed in the parliament of Belgium established the conditions under which the physicians or qualified doctors are entitled to choose if a patient should receive euthanasia or not on the basis of their illness, and they usually choose patients who cannot be recovered from an unbearable painful illness. The bill also stated minimum age limit of the patient who must request such ending of life repeatedly. The patient has to ideally be capable of entering into a contract and hence must have reached the age of majority, as well as must necessarily be a citizen of Belgium to give qualified consent. Belgium also legalized euthanasia by lethal injection for children that is active euthanasia in 2014 but only with the proper medical guidance and medical aid. This law has now been extended to include all citizens of Belgium without any age restrictions.<sup>7</sup>

In 2002, the Parliament enforced the 'Belgium Act on Euthanasia', which describes euthanasia as "consciously ending life at the demand of the individual concerned by someone other than individual concerned, meaning that such procedure can be carried out by anyone except the patient themselves. Such individual is generally a doctor or general physician. Conditions imposed are strict which includes the competence of the patient, voluntary request or consent given by him and unbearable physical or mental suffering that cannot be cured. The authorities have strict watch on compliance of these conditions."<sup>8</sup>

#### **Euthanasia in the Netherlands**

The Netherlands is the very first nation in the world to concurrently allow euthanasia and assisted suicide. The "Law for the Termination of Life on Request and Assisted Suicide" allowed euthanasia in 2001, and it was eventually implemented in 2002. The law prescribed taking of drugs as means to end life that is self-administered drugs. If an individual suffering from a mental disorder or illness requests euthanasia, conversation with at least one psychiatrist and two physicians is necessary.

In spite of the penalty provisions regarding causing death and aiding in commission of suicide, the law provides a defence to charges of voluntary euthanasia and assisted suicide. The defence of necessity is accepted in several circumstances, which have been outlined as follows:<sup>9</sup>

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<sup>7</sup> (<http://www.patientsrightscouncil.org/site/belgium/>).

<sup>8</sup> Ibid

<sup>9</sup> Ibid

1. Free and voluntary consent of patients.
2. The request must be consistent.
3. The patient must be experiencing extreme bodily or emotional suffering with no hope of improvement.
4. Euthanasia must be the only remaining option after considering alternative remedies.
5. Euthanasia must be conducted by an experienced physician.
6. The physician's advice must be corroborated by fellow expert physician.<sup>10</sup>

### **Euthanasia in Canada**

Patients have the freedom to decline life-sustaining therapies, but they cannot demand death immediately. In the event of assisted suicide, the *Rodriguez v. Attorney* ruling determined that the state's interest will trump the individual's interest in ending their life.<sup>11</sup>

### **Euthanasia in United States**

Five states in the United States permit doctors to administer fatal amounts of medication to terminally sick patients, allowing passive euthanasia under certain situations. Active euthanasia remains illegal till date. Oregon was the first state of in the United States of America to legalize assisted suicide in the states which means passive euthanasia and assisted suicide have legal backing. After more than a decade, Washington State legalised assisted suicide, following in the footsteps of Oregon and Vermont. In the case of Montana and, most recently, in New Mexico, the practice was legalized by judicial precedent<sup>12</sup>.

According to U.S. law, there is a contrast between passive and active euthanasia. While active euthanasia is illegal, physicians are not liable if they withhold or remove life-sustaining care with the patient's agreement or with the request of the patient's authorised representative or family member. The cases of *Washington v. Glucksberg*<sup>13</sup> and *Vacco v. Quil*<sup>14</sup> made euthanasia legal wholly in the states. Oregon, allowed physician-assisted suicide in 1994 under the Death and Dignity Act, followed by California.<sup>15</sup>

### **Euthanasia in Australia**

Active euthanasia is prohibited in Australia, however a bill to legalise assisted suicide in the Australian state of Victoria was presented in 2019<sup>16</sup>. The Rights of the Terminally Ill Act, 1996 was then introduced in Australia making it the first country to legalize euthanasia in the case of *Wake v. Northern Territory of Australia*<sup>17</sup>. Subsequently the Euthanasia Laws Act, 1997<sup>18</sup> was passed to give it legal backing.

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> (<http://english.samajalive.in/the-list-of-countries-where-euthanasia-is-legal/>).

<sup>13</sup> 521 U.S. 702

<sup>14</sup> 521 U.S. 793

<sup>15</sup> Ibid

<sup>16</sup> Euthanasia- the Australian Law in an International Context.

[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/RP9697](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697)

<sup>17</sup> Ibid

<sup>18</sup> Ibid

Although there were cases in Australia that hinted upon criminal punishment for assisted suicide, yet no expressed penalty has been laid down by the abovementioned acts. This caused an immense divide of opinion about decriminalization of euthanasia besides legalizing it.<sup>19</sup>

### **Euthanasia in Albania**

Terminally Ill act of 1995<sup>20</sup> has legalized only voluntary euthanasia. Passive euthanasia can be conducted legally if three or more family members are ready to give their due consent for the procedure.<sup>21</sup>

### **Euthanasia in England**

As part of the patient's autonomy and self-determination, the patient has the freedom to refuse life-sustaining treatment, but does not have the power to consent to euthanasia. However, the Lords have authorised non-voluntary euthanasia for patients in a prolonged vegetative state with no hope of recovery.<sup>22</sup>

### **Euthanasia in Switzerland**

Euthanasia is prohibited in Switzerland, however physician-assisted suicide is permitted. However, decriminalising euthanasia was attempted in 1997, and it was recommended that in cases when a non-medical assistant is charged for assisting in suicide, the physician has no responsibility.<sup>23</sup>

Switzerland has fairly recently licensed a 'suicide machine' called Sarco, which allows users to commit suicide relatively painlessly by creating hypoxia and hypomania, in which the patient's oxygen level lowers to the point of death.

This machine which is shaped like a death capsule or coffin has been introduced in 2021 and will be in operation from next year.<sup>24</sup>

### **Euthanasia in Spain**

This year in June 2021, Spain has joined the parade of legalizing passive euthanasia and physician assisted suicide with certain strict terms and conditions despite being faced with conservative opposition. The terms and conditions<sup>25</sup> mentioned are as follows-

1. The claimant must be a citizen of the country and capable to give free consent which is to be renewed fifteen days later to remove any hint of doubt.

<sup>19</sup> Cambridge Advanced Learner's Dictionary 580, Cambridge: Cambridge University Press, 2003. See, Words and Phrases Legally Defined 1083, Vol. 1, 4th edn., U.K: Lexis Nexis Butterworths, 2007.

<sup>20</sup> Boçari, Gëzim, et al. "The Actuality and the Historical Background of Covert Euthanasia in Albania." *Journal of Medical Ethics*, vol. 36, no. 12, BMJ, 2010, pp. 842–44, <http://www.jstor.org/stable/25764331>.

<sup>21</sup> Rajesh Sethi, 'Euthanasia- Legalising Euthanasia in India' PL 98 [2015]

<sup>22</sup> Ibid

<sup>23</sup> Hemant Kumar, 'Passive Euthanasia, Time to enact Law!' Vol XVII *Magazine for Legal Professionals and Students, Lawyers Update*, (April, 2011) 13

<sup>24</sup> <https://www.hindustantimes.com/world-news/switzerland-approves-euthanasia-device-for-painless-death-101638861581650.html>

<sup>25</sup> Spain legalises euthanasia and assisted suicide despite conservative opposition. By Euronews with AP, AFP • Updated: 18/03/2021

2. Doctors have a power to reject the request if any of the above qualifications are absent in a patient and initiate a conscientious objection motive in case they believe that euthanasia can be avoided in a particular case and hence to refuse to perform the procedure.
3. This decision must be committee approved and other qualified doctors as per the legislation.

## Euthanasia in India

After March 2018, passive euthanasia has now been permitted in India according to strict standards that include the patient's free will and agreement if he is terminally sick or in a vegetative state. The Supreme Court of India allowed passive euthanasia by withdrawing life support from people in a permanent vegetative condition on March 9, 2018. India's euthanasia debate is more difficult to address. Section 309 of the Indian Penal Code (IPC) which deals with the attempt to commit suicide and Section 306 of the IPC which deals with the facilitation of suicide make euthanasia a crime. In such cases, brain death has been deemed an exception.<sup>26</sup>

The term "Right to die" is not elucidated in any of the international agreements and it cannot be treated as a human right per se. Article 3 of the Universal Declaration of Human Rights has reinforced the concept of right to life but did not include right to die. However, the 'common understanding' of UDHR have been observed by legal experts as a system of international customary law and perhaps even Jus Cogens, can be contested within its meaning of 'the right to die' upon interpretation.<sup>27</sup> Religious groups, the legal and medical fraternity, have however have expressed their dissent by calling it "right to kill" rather than "right to die" since it is in violation of medical ethics.<sup>28</sup>

The Supreme Court of India approved 'passive euthanasia' in the matter of Common Cause v. Union of India (2018) when the patient is terminally ill or in a vegetative condition (pervasive vegetative state).<sup>29</sup> It is an option available to patients who suffer from incurable illness or diseases and cannot put up with their life on their own organs, here there is nearly no hope of recovery, and the patient's life is sustained through life support instruments only. This judgment was a step forward for Indian society and indicated that India is gradually going in the direction of recognizing a patient's right to die which was not initially understood to be included in the fundamental right of 'right to life'. The court further elucidated the set of standards for euthanasia to be applied in rarest cases that are as follows-

Responsible and a person in good health must administer the dose.

- Patient must give free and informed consent and must be free from any kind of pressure or duress.
- It must specify the circumstances in which his medical treatment will be discontinued taking into consideration his medical history. It should also specify who is allowed to offer withdrawal of consent on behalf of the patient in cases where patient is unable to give consent.
- Terminally ill patients and no scope of recovery must be proved.

<sup>26</sup> Mckenny, Gerald, P., *To Relieve the Human Condition* 19, Albany: State University of New York Press, 1997.

<sup>27</sup> Catholic Med. Quarterly, "The Sanctity of life, a meaningful concept in modern medicine?" August 2004, [accessed on 10/08/2009]. See, Kevin. WM. Wildes, (ed.), *et.al.*, *Choosing Life* 71, Washington DC: Georgetown University Press, 1997.

<sup>28</sup> Ibid

<sup>29</sup> Ibid

- The document must be signed by the patient or person acting on their behalf in the presence of witnesses by the JMFC, and a Medical Board must then review the patient's condition and offer permission in order to make informed decision.<sup>30</sup>

The Treatment of Terminally Ill Patients though introduced but has never been passed in the Parliament that allowed passive euthanasia thus making it a mere concept without a legal backing. In 2019, the Lok Sabha passed the Euthanasia Regulation Bill, which non penalized for both active and passive euthanasia and exempted the doctor and the patient who chooses euthanasia from criminal liability if the directions of the act has been duly followed.<sup>31</sup>

In the landmark case of Gian Kaur v. State of Punjab, the minority view proposed included the right to die in the ambit of right to life. This was one of the significant rulings in favour of legalising euthanasia in India. This argument was rejected, and it was determined that Article 21's "right to life" does not encompass the "right to die." In its 241st Report, the Law Commission also advocated legalizing euthanasia.<sup>32</sup>

### **Aruna Shanbaug Case**

Aruna Shanbaug was employed as a nurse at the King Edward Memorial Hospital who was then strangled and sodomised by her rapist, employed in the same hospital as a sweeper, with a chain, resulting in oxygen deprivation. Since then, she had been in a vegetative state due to the lack of oxygen. She was kept alive by a feeding tube, which is considered a form of life support. Aruna's friend petitioned the Supreme Court on her behalf, arguing that Aruna's life support infringes her right to live with dignity, and consequently her constitutional right to life. Even though she was granted the right to die because of her prolonged 36 year long suffering, the country still hadn't warmed up to the idea of liberally allowing such procedures. the court still established broad rules for legalising passive euthanasia in India, allowing patients to differentiate between the conditions required to exercise this privilege. The same judgment-law demanded the abolition of Code Section 309, which punishes people who survive suicide attempts. The Indian government expressed its intention to do so in December 2014. However, on February 25, 2014, a three-judge panel of the Supreme Court of India deemed the Aruna Shanbaug ruling to be 'inconsistent within itself' and referred the subject of euthanasia to its 5 judge constitutional bench. On March 9, 2018, the Supreme Court of India legalised passive euthanasia nationwide (Common Cause, 2015).

The Supreme Court clarified that two non-negotiable conditions to were required permit Passive Euthanasia Law in its 2011 Law:

- (I) The brain-death.
- (II) Those in a Persistent Vegetative State (PVS) can avail euthanasia in accordance with international guidelines.

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<sup>30</sup> Ibid

<sup>31</sup> Abhik, Majumdar, "The Right to Die: The Indian Experience" *Asian Law*, vol. 6, 2004, p.160.

<http://www.westlaw.com>, [accessed on 8/12/2021].

<sup>32</sup> Ibid

## Conclusion

Euthanasia is a controversial topic that is faced by ethical and moral issues around the world. It is clear that the legislature worldwide is not unprepared to rethink its previous rigorous stance on the sanctity of life, and those in favor of euthanasia demonstrate a degree of fervor in defending their viewpoints despite harsh resistance. The critics of euthanasia say that nobody has the right to end an individual's life, not even the individual himself or herself, and that legalising euthanasia would give others the power to do so as well. The notion of the sanctity of life is unassailable, and physicians who have taken the Hippocratic Oath to protect life at all costs cannot advocate ending a patient's life in any way on any given day.

On one hand, Euthanasia relieves any person from pain that is unbearable but at same time it is subject to easy misappropriation thus legal rules and propositions are imminent in order to support assisted euthanasia with consultation of experts and must be based on the natural principles of justice. Nevertheless, the outcome of euthanasia's implications must be reevaluated at regular intervals based on social progress in providing medical care to disabled and terminally ill individuals. This would enable the country's rule-making body to change the law as needed or repeal it if necessary.

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# ELECTORAL BONDS SCHEME, 2018 – A DEATH KNEEL FOR DEMOCRATIC PRINCIPLES OF TRANSPARENCY AND PUBLIC DISCLOSURE OF POLITICAL FUNDING’S IN INDIA

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## Abstract

*Free and fair elections are the edifice for a democratic polity and this involves citizens being informed about the political parties and their activities. The political parties influence the governance of the country; therefore there must be transparency in their organization, functions and, more particularly, their means of funding. The political parties who have access to large funds will be able to campaign extensively using their financial resources and will strive to increase their vote shares in the elections. The Political Parties by receiving Funds from Individuals/ Organisations will be compelled to make policies beneficial to the donors, which ultimately hamper the good governance. It is for this reason that the intersection between money and politics has been a contentious issue among all democratic countries and this demands transparency and disclosures regarding the sources of political funding.*

*In an attempt to regulate the Political Funding, the Electoral Bond Scheme was introduced in 2018, wherein electoral bonds, which are bearer instruments, can be purchased by an individual/ entity in the favour of a specified political party for a specified sum of money which is intended to be donated voluntarily. In this Chapter, the regulatory framework of the Electoral Bond Scheme has been analysed to assess its impact on the effective functioning of Democracy and the Constitutional Rights of the citizens. The probable violations of Fundamental Rights are discussed to impose stringent regulations on Electoral Bonds. It is opined that the mandatory disclosure and transparency in Political Funding are to be incorporated and enforced effectively to achieve the Democratic Goals of Free and Fair Elections and Good Governance.*

**Key Words:** Political Funding, Transparency, Informed Public Opinion, Democracy, Constitution

## Introduction

The regulation of Electoral Finance is not of recent origin as there have been numerous legislative attempts made in the past to insist on transparency in political funding been one of the oldest and most trenchant issues in our polity, enduring through a number of attempts to restructure it.<sup>1</sup> The provisions of Companies Act 2013, Representation of People’ Act, 1951 and Income Tax Act mandated

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<sup>1</sup> M V Rajeev Gowda & E Sridharan, *Reforming India’s Party Financing and Election Expenditure Laws*, 11 Election Law Journal (2012).

disclosures relating to Political Funding to assure transparency. The Corporations based in India were permitted to contribute a specified portion of their profits towards Political Parties. However, Corporations which were subsidiary of Foreign Entities or controlled by Foreigners were prohibited from contributing to political parties. The Companies were required to make disclosures in their Financial Statements the details about the contributions towards the Political Parties including the particulars of the total amount contributed and the name of the party to which such amount has been contributed. On receipt of such contributions, the Political Parties had to prepare a report detailing the contributions received from Individuals/ Institutions to be submitted to the Election Commission and for Income Tax purposes<sup>2</sup>. The analysis of these provisions reflect the legislative scheme mandating the disclosure by the Political Parties about the source of funding to assure transparency in their affairs.

### **Electoral Bonds Scheme, 2018 – An overview of the new form of Political Funding**

The introduction of Electoral Bonds Scheme was preceded by slew of legislative changes to enhance the funding of the Political Parties, inter alia includes, lifting of prohibition of contribution to Political Parties by Foreign Sources subject to compliance of the provisions of the Foreign Exchange Management Act, 1991. Indian Corporations are permitted to make unlimited voluntary contributions to Political Parties, which hitherto was limited to a specified portion of their profits. There has been relaxation of the requirement of disclosure of complete details of Donations as received by the Political Parties, a mere declaration of the total amount received during the financial year will suffice.

To facilitate ease of making contributions to Political Parties, Electoral Bond Scheme has been introduced since 2018. A electoral bond, is a bearer banking instrument, similar to a Promissory Note with no details of the buyer or payee mentioned therein. State Bank of India is the sole institution authorized to issue the Electoral Bonds which can be encashed only by a registered Political Party having an account with the State Bank of India<sup>3</sup>. These bonds are tenured for a maximum period of 15 days after which it cannot be encashed by the Political Parties<sup>4</sup>. It is pertinent to note that, Political parties receiving donations in excess of twenty thousand rupees from any person or company by way of an electoral bond is not required to maintain or submit such details of the Election Commission of India. It is argued that these aspects are posing a threat to the raising demand of transparency in Political Funding which mandated full disclosure of Funds received along with their source by the Political Parties. The Electoral Bond Scheme poses following problems to the effective functioning of Democracy.

### **1 Compromise of Transparency and Public Disclosure in Political Funding**

It is stated that the objective of introduction of Electoral Bond Scheme is ‘cleansing up the political funding system’ and bringing about ‘substantial transparency’ into it. The reality stands in stark contrast as visible from the potent and actual threats as caused by these Electoral Bonds in the forms of dilution of the existing provisions regarding the transparency of contributions to political parties. It is argued

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<sup>2</sup> MONEY AND ELECTIONS NECESSARY REFORMS IN ELECTORAL FINANCE, [www.vidhilegalpolicy.in](http://www.vidhilegalpolicy.in) (last visited Nov 1, 2021)

<sup>3</sup> Sale of Electoral Bonds 2018 at Authorised Branches of State Bank of India (SBI) Ministry of Finance, <https://pib.gov.in/PressReleasePage.aspx?PRID=1708520> (last visited Nov 1, 2021)

<sup>4</sup> Introduction of the Scheme of Electoral Bond Government of India, Ministry of Finance, [https://dea.gov.in/sites/default/files/Electoral\\_Bonds\\_Press\\_RELEASE\\_2-1-2018.pdf](https://dea.gov.in/sites/default/files/Electoral_Bonds_Press_RELEASE_2-1-2018.pdf) (last visited Nov 1, 2021)

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that except in instances as mandated by Competent Courts or from any Law Enforcement Agencies the details about the entity buying the bond as well as the beneficiary political party are not available to the public, leading to opaque state in relation to the source of Political funding<sup>5</sup>. It is pertinent to note, The Election Commission of India, has opined that that these amendments will have serious repercussions on the transparency aspect of the funding of political parties. It is believed that the removal of the statutory cap on Political contributions by Corporations would lead to rise in shell companies, being established solely for purpose of making donations to political parties, with no other commercial objectives, thus may remain unregulated from the purview of the Government.<sup>6</sup> Since the Political Parties are not required to file detailed report about the source of Funds as received from Electoral Funds, it becomes difficult for the Election Commission to determine whether the source of Political Funding is from a Foreign Entity or Individual or from a prohibited organisation.

The Electoral Bonds Scheme which permits Political Funding from Foreign Entities and Individuals raises a well founded apprehension of domination by Foreign Corporations, the governance of our country. It is pertinent to note, Reserve Bank of India, the Central Bank of country has raised several concerns in relation to issue of Electoral Bonds and it believes that scheme amounted to tacit approval for money laundering and would result in undermining faith in Indian banknotes, eroding the public faith on the Central Bank of the country<sup>7</sup>. It is relevant to mention herein that across the Globe, there lies no instance of any country permitting Political Funding in the form bearer bonds as prevalent in India.<sup>8</sup>

The Political Funding is to be regulated to ensure there is full disclosure of source of funding and the amounts so received, as this will ensure that no Political Party involves in securing power solely based on their financial resources and also enhances the public awareness about the sources of finances of the Political parties. There lies no embargo on Political Parties seeking contributions or donations for financing their activities as it would enable them to enhance their awareness among the public. However they must not desist from sharing the details of the source of the Funds and amount received so as to ensure that public are assured of the legality of the same which will inspire confidence and transparency. The legal regime in India has never prohibited the Political Parties from seeking funds, instead it has permitted them to seek funding within prescribed limits. The regulations on Political Funding are to secure disclosure from Political Parties so as to help Public at large to make a informed choice during elections. The argument against Electoral Bonds relates to legislative changes made to remove the mandatory disclosures by the Political Parties which pose a threat to the transparency and fairness in Political Funding. It is believed that the Electoral Bonds in their present form promotes Political Funding with a veil of secrecy, completely hidden from the public which is a death kneel on Fair Elections.<sup>9</sup>

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<sup>5</sup> Niranjan Sahoo, *Towards Public Financing of Elections and Political Parties in India: Lessons from Global Experiences* (Cambridge University Press 1) (2017)

<sup>6</sup> K.C. Suri et al., *Democracy, Governance and Political Parties in India: An Introduction*, 4 *Studies in Indian Politics* 1–7, [https://www.academia.edu/25731221/Democracy\\_Governance\\_and\\_Political\\_Parties\\_in\\_India](https://www.academia.edu/25731221/Democracy_Governance_and_Political_Parties_in_India) (last visited Apr 25, 2021)

<sup>7</sup> Anirban Mitra et al., *Cash for Votes: Evidence from India*, 6 *Harvard Law Review* 22–28 (2017)

<sup>8</sup> Rajeev M.V Gowda, *Political Parties And Public Funding*, 26 *Common Cause* 15–51 (2017), [www.commoncause.in](http://www.commoncause.in) (last visited Nov 1, 2021)

<sup>9</sup> Electoral Bonds - Supreme Court Observer, <https://www.scobserver.in/cases/association-for-democratic-reforms-electoral-bonds-case-background/> (last visited Nov 1, 2021)

## 2 Transgression of Right to Know and Discrete Control of Governance

The Freedom of Speech and Expression, a Fundamental Right of the citizens includes within itself, Right to Know and Right to Information, which is apposite in matters relating to Election and in matters of Governance in the country. In Democracy, the rights of Public is not ,limited only in exercising Franchise during elections, it extends further coving all matters relating to Governance and the actives of the Political Parties. The exercise of Franchise by the Public in Elections requires the complete disclosure by the Political Parties the information about their candidates and also about the welfare actives, including past and proposed. In this regard, the requirement of complete disclosure by the Political Parties about their fundings along with their sources can be recognised as a part of Right to Know which is a Fundamental Right<sup>10</sup>. The insistence on disclosure of information by Political Parties about their Fundings along with the sources is a part of exercise of Right of Free Speech which cannot be restricted or abrogated. The source of Political Fundings also are of relevance as they will assist in scrutiny of all Policy and Legislative decisions of the Government, and that of the actions of elected representatives. The introduction of Electoral Bond Schemes, has resulted in rise of Political Fundings in the form anonymous contributions and this is reflected in the tremendous share it holds in the total income obtained by political parties from unknown sources. In 2018-19, 67% of the total income of parties, approximately Rs 2512 Crores, came from unknown sources, of which a whopping 78%, or Rs 1960 Crores, was donated through electoral bonds<sup>11</sup>. The objective of ‘Purity of Elections’ demands of full and complete information regarding the contributions received by political parties, through electoral bonds or otherwise, to be placed in the public domain.<sup>12</sup>

## 3 Parallel Economy of Black Money

The electoral bond concept mostly attracts black money. The unnamed political party donor can dispose of their black money through shell businesses, resulting in a black money inflow. It is used for tax evasion, tax avoidance, and anonymity. These shell firms exist only on paper and allow an influx of black money, which can force the shell corporations to solely work for the purpose of donating to political parties.<sup>13</sup> Donations to political parties opens the door for the development of shady shell businesses that funnel illicit money into political parties<sup>14</sup>. Despite using cheques, there is still a flow of black money due to lack of accountability. The removal of the contribution restriction of 7.5 percent of net average earnings of three preceding financial years from Section 182 of the Act allows shell corporations to donate via electoral bonds. This allows loss-making firms to expedite and package their undeclared money to dispose of it by investing it in the electoral bond scheme. This raises the possibility of shell corporations being set up just to donate to political parties.<sup>15</sup>

<sup>10</sup> Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 Public Administration Review 317 (1998)

<sup>11</sup> Analysis of Sources of Funding of National Parties: FY 2018-19 | Association for Democratic Reforms, <https://adrindia.org/content/analysis-sources-funding-national-parties-fy-2018-19> (last visited Nov 02, 2021)

<sup>12</sup> Iris Marion Young, *Inclusion and Democracy* (Oxford University Press) (2003)

<sup>13</sup> V Bhaskar, *Black money in politics: Why the election commission should seize the day*, Economic and Political Weekly , Nov. 2017,

<sup>14</sup> Lok Sabha polls: Electoral bonds may be exacerbating the problem of black money in politics; here’s why parties are silent- India News , Firstpost, <https://www.firstpost.com/india/lok-sabha-polls-electoral-bonds-may-be-exacerbating-the-problem-of-black-money-in-politics-heres-why-parties-are-silent-6481781.html> (last visited Nov 16, 2021)

<sup>15</sup> J C Sandesara, *Report on Black Money*, Economic and Political Weekly (1985)

#### 4 Legitimising Money Laundering

Money laundering also plays a key part here, as anonymous foreign contributions bring in a lot of unlawful money. Laundering has three steps. Money launderers first put unlawful money on the market, which is stage one. The next stage is layering, where the unlawful funds are deposited into electoral bonds. Final stage is integration, where the black money is circulated<sup>16</sup>. The unexplained money of powerful people is deposited in the electoral bonds system to avoid tax filings and to profit from tax exemptions. Anonymous political donations legalise money laundering. The opaqueness destroys the entire voting process by mixing black and white money into the economy. This technique encourages money laundering by individuals and corporations.<sup>17</sup> Overall, the electoral bond plan is a sham on the voters and the democratic process. So, instead of reducing black money, this approach increases it and diminishes banking system transparency. In other words, the electoral bond structure works against its own ideology and goals.

#### Mandatory Disclosure and Audit of Political Contributions – The way forward for re assurance of Fairness and Transparency in Political Contributions.

There cannot be complete ban or restriction on Political Fundings at the same time it cannot be concealed from Public domain. The regulatory regime on Political Fundings requires an overhaul to assure there is transparency in the Political Fundings. It is requires that, the mandatory disclosure about the Political Contribution and their sources must be insisted on the Political Parties and the Funding Agencies. The declarations must be made available in Public Domain and must be constantly updated at regular intervals in contrast to mere publication during Election times.<sup>18</sup>

Financial Statements reflect the flow of money into an organisations and can be used determine the probable application of the same. The Financial Statements of the Political Parties must be audited at regular intervals and the report thereon must be made available in Public Domain. The access to the record of financial transactions of the Political Party will enable the Public to gain insights about the Funding pattern, sources of Fundings and the manner of their application which will help them to make a informed decision about the concerned political party in times of Elections<sup>19</sup>. The mandatory insistence of Disclosure of Political Fundings and Audit of Financial Statements will be of little relevance in assuring transparency, unless it is enforced effectively with sanctions at times of non-compliances. It is suggested that the Legal Regime must be amended so as to impose heavy penalty on the concerned Political Party, in first instance of noncompliance of Disclosure or non-submission of Audited Financial Statements<sup>20</sup>. In events where there are repeated instances of such non-compliances, the registration of Political Party must be permanently revoked.

<sup>16</sup> Catalina Perdomo et al., *The Global State of Democracy 2017 Exploring Democracy's Resilience Money, influence, corruption and capture: can democracy be protected?* (2017), <http://www.michael-tompsett.pixels.com> (last visited Nov 16, 2021)

<sup>17</sup> 'India must raise the bar on anti-money laundering systems' - *The Hindu*, <https://www.thehindu.com/business/Economy/india-must-raise-the-bar-on-anti-money-laundering-systems/article33466206.ece> (last visited Nov 16, 2021)

<sup>18</sup> Kirk J Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunitites Concerns and Opportunitites*, 56 *American Political Science Review*

<sup>19</sup> B Venkatesh Kumar, *Funding of Elections: Case for Institutionalised Financing*, 34 *Economic & Political Weekly* 1884–1888 (1999), <https://www.jstor.org/stable/4408179> (last visited Nov 1, 2021)

<sup>20</sup> M. V. Rajeev Gowda & E. Sridharan, *Reforming India's Party Financing and Election Expenditure Laws*, 11 *Election Law Journal* 226–240 (2012)

In alternative to the Electoral Bond Scheme, researcher herein suggests that, the Election Commission can establish, Electoral Trust, registered as a Public Trust under relevant Laws. The Individuals/Entities willing to contribute can make the same to the Electoral Trust specifying the concerned Political Party to which it is intended to be made. The Election Commission thereon can credit the donations to the Political Parties Accounts. The records relating to Receipts and Transfers shall be properly maintained, duly audited and should be made available Public at all times. It is opined that this model would assure great degree of Transparency in Political Funding as the details of Funds received, the contributors, and beneficiaries are available in Public domain at all times . It prevents anonymous donations being made to Political Parties by the Corporations solely for their commercial advantages.

## **Conclusion**

The introduction of Electoral Bonds as a means of Political Funding is a fatal blow to the rising demand for Transparency in Political Funding. The legislative changes initiated for the introduction of these Bonds have been criticised for having compromised on Democratic Principles of Right to Information and Fair Elections. Political Fundings by Individuals and Corporations involve discreet control over the Legislative and Policy decisions of the Government. It is a matter of record, Corporations influence the Governance to their advantage by making Political Contributions <sup>21</sup>.

Political parties require funds to function properly and meet the requirements of the country's citizens. While cash funding was criticised for being opaque, the Electoral Bond Scheme proposed by the Finance Bill 2017 modifying multiple acts is not less opaque. It lacks transparency and is prejudiced towards the ruling party, violating democratic ideals. The stated Scheme is unconstitutional and does not replace monetary financing as claimed by the Government. As well as aiding in the influx of black money and encouraging money laundering, Thus, the Electoral Bond Scheme should be declared unconstitutional for the sake of democracy and other reasons.

The global approach towards Political Funding involves Mandatory Disclosure of all Political Donations and it's availability for the Public at all times. The changing times demand reforms in Governance and thus Political Funding needs to be retained as it beneficial for Public and Political Parties . The legal regime over the Political Fundings intends to regulate the contributions solely to deter it's misuse and impact on the Good Governance. The relaxation of Mandatory disclosure and detailed report of Political Contributions is regressive to the effective functioning of Democracy<sup>22</sup>. The issuance of Electoral Bonds must be regulated as suggested above in respect of mandating of disclosure of all contributions. In a radical approach, Electoral Trust as a Public Trust can be established as a Centralised Corpus Fund seeking Political Contributions and disburse them to the concerned Political Parties and maintain a list of all receipts and their beneficiaries. The effective functioning of Democracy and enforcement of Right to Information requires the stringent regulation of Political Funding at all times.

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<sup>21</sup> Devesh Kapur et al., *Quid Pro Quo: Builders, Politicians, and Election Finance in India* Devesh Kapur and Milan Vaishnav *Quid Pro Quo: Builders, Politicians, and Election Finance in India* Center for Global Development 1800 Massachusetts Ave (2003), [www.cgdev.org/content/publications/detail/1425795](http://www.cgdev.org/content/publications/detail/1425795) [www.cgdev.org](http://www.cgdev.org) (last visited Nov 02, 2021)

<sup>22</sup> Sidhant Chandalia & Anirudh Lekhi, *REGULATION OF ELECTION CAMPAIGN FINANCE IN INDIA: MAKING ELECTIONS TRULY FREE AND FAIR* (Springer International Publishing 1)

# CONTRIBUTORY NEGLIGENCE AND CONSEQUENT LIABILITY

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## Abstract

*‘Contributory Negligence’ is plaintiff’s failure to take reasonable care of oneself, thereby the fault is attributed to plaintiff, whereby the person would not be able to get damages from another for the reason that his own negligence has contributed to the injury. This is being invoked as defence by the defendant and then depending the extent of contribution of negligence, apportionment of the damages as remedy is being done. The instant research paper is critical analyzing the extant of apportionment of damages between plaintiff and defendant as per facts and circumstances whenever it is a fit case with reference to various judicial precedents for the application of Contributory Negligence. The parallel analogies have been drawn from foreign countries and wherever, there has been statutes or enactment related to cases of “Contributory Negligence”. In reference to ‘Contributory Negligence’, the evolution and progressive analysis of “Imputed Contributory Negligence”, “Test of Prudent and Reasonable person”, “Doctrine of Alternative Danger”, “The Last Opportunity Rule”, “Doctrine of Apportionment of Damages” in varied facts and circumstances with its apt and efficacious application has also gathered traction. Justice delivery is a dynamic process and touchstone of just, fair, equity and conscience has to be the barometer for the effective application for meeting the ends of justice.*

**Keywords** *Contributory Negligence; Last Opportunity Rule; Doctrine of Apportionment of Damages; Tortfeasors; Imputed Contributory Negligence; Test of Reasonable Person.*

## Introduction

Judicial system is constantly evolving in its journey of delivering quality, efficient and effective delivery of justice. With the passage of time, In India, the ‘uncodified’ Law of Torts have incorporated with its evolution diverse aspects with judicial precedents which have made the justice delivery in the realm of Torts more robust, nimble and supple. In certain circumstances, it becomes possible that a person who suffered any injury would not be privileged to get damages from another for the reason that his or her own negligence has contributed to his injury. This is ‘Contributory Negligence’ as such a person is supposed to take reasonable care of oneself. To instantiate, a pedestrian walking and crossing a road without taking due care on his part, if meets with an accident by a moving vehicle is said to be a case of ‘Contributory Negligence’ in Torts.

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In catena of cases, it is well established time to time that cases of negligence could emanate from the acts and omission of plaintiff's own want of care which contributes in damage caused to the negligence or wrongful conduct of the defendant. Whereby, the plaintiff and defendant are also responsible in varying degree to the ultimate result of the consequences in the form of harm, injury or damages. The extent of fixing of the responsibility for the cause of the action resulting in damage to either or both of the parties, depends on the facts and circumstances associated with the case in point. The apportionment of liabilities of both the plaintiff and defendant in such cases, depends on the degree of their fault. In such cases, the apportionment of the liabilities in form of damages is apportioned between them. The varied possibilities depends on the extent of Contributory negligence on the part of the plaintiff and defendant and that becomes the basis for calculation and fixing the quantum of damages that would be borne by them and in what proportion.

To draw analogy and parallel with other countries in the form of Comparative analysis of implementation and application of Contributory Negligence, it is pertinent to mention that in India, there is no Central Legislation of the same nature as that of Law Reform (Contributory Negligence) Act, 1945 of England. The yardstick of justness, fairness and of equitable justice is the aspired objective of the Law Reform Act, 1945 in England, which is state that it not possible in England and Wales to completely deny the victim of compensation in case of Contributory Negligence, but rather the reduction in the quantum of damages is to the extent as the Court deems fit. Whereas in Australia, Civil Liabilities are mostly governed by Common laws of the country and appropriate statutes of the States and Territories and whereby, Contributory Negligence is applicable where plaintiff's negligence resulted in his or her injuries, a case to cite is *Pennigton v. Norris*<sup>1</sup>, where the Court, while referring to provisions of the Tortfeasors and Contributory Negligence Act 1954 in Australia, observed that, "a fair and reasonable allocation of the responsibility for the damage done is to attribute it, as to eighty per cent to the defendant and, as to twenty per cent to the plaintiff. The appeal should be allowed, and the judgment of the Supreme Court of Tasmania varied so as to give effect to this apportionment..." In United States of America, some of the districts such as District of Columbia follows and applies Contributory Negligence. In a Contributory Negligence case which came up in District of Columbia, *Sinai v. Polinger Co.*<sup>2</sup>, which referred to another case in its judgment as in *Melton v. Crane Rental Co.*<sup>3</sup>, where the Court addressed a similar issue, thereby concluding that, "contributory negligence and not assumption of risk was the proper doctrine to apply. In the instant case (supra), a rescue worker was injured by a third party driving a truck while the worker was inside an ambulance..."

## Review of Literature and Judicial Precedents

Reliance has been placed on varied judicial precedents in judicial system of India and other countries. Comparative Analysis of law and statutes implementation in foreign countries and utility of Common Law and Statutory provisions in form of enactment have been relied upon for analysis. Proper citation and relevance of a case with the topic in question has been referred for explicating the averments and supplicating the arguments and comments posited to exemplify the topic of the paper. In comparative analysis with foreign countries, references have been on extant rules/statutes/laws of the countries of United Kingdom, United States of America and Australia. It is vital to understand that in India, though

<sup>1</sup> *Pennigton v. Norris*, 1956 (96) CLR 10

<sup>2</sup> *Sinai v. Polinger Co.*, 498 A.2d 520 (1985).

<sup>3</sup> *Melton v. Crane Rental Co.*, 742 A.2d 875, 879 (D.C.1999).

the principles and doctrines applicable to Law of Torts is influenced by the statutes of the Common Law countries. In India, the Tort Law is not codified, though The Kerala Torts (Miscellaneous Provisions) Act, 1976 is a statute which has its applicability in the State of Kerala in terms of territorial jurisdiction but, the concept has been extended more in line with judicial rulings and judicial precedents. The review of literature has been primarily based on the judicial precedents from the catena of cases as it has surfaced in the Courts of Law. Interestingly it is pertinent to note that the law in India has been versatile from the perspective of not only the wider and broader interpretations from judicial rulings but also from the point of accessibility and applicability with procedural aspects which has been capacious and robust enough to include the natural justice principles for meeting the ends of justice and arriving at finality of cases in adversarial legal system prevalent in India.

### **Problem Statement**

The instant research paper is trying to vividly and comprehensively address the pertinent questions and problems in the domain of Contributory Negligence and to posit a question on the topic. The problem is more specific to realm of Contributory negligence with the seminal purpose to explicate and to delve into the building correlation between the parameters which are the pivotal grounds for building a case and to draw inferences into the consequent result of liability posed by Contributory negligence and to posit feasibility of remedies on similar facts and circumstances of related judicial precedents on the topic.

The primary aim to frame the problem in this instant analysis as:

To critically analyse the facts and circumstances leading to a fit case of Contributory negligence and to justify to what extent the consequent liabilities could be apportioned?

### **Objective and Research Questions**

The objective of the analysis is to explicate and to delve into the related questions which emanates from the ambit of Contributory Negligence and to interpret and expound on continuum of factors which has a bearing on the result of inferences and analysis of the topic. This is also to examine the context in which Contributory Negligence play a pivot role in the justice delivery in realm of Law of Torts. The objective of the study is to investigate the issues derived from the facts and circumstances posed by the instant cases with its specific scenarios. The problem posited is to delve into the related question which calls into the ratio and basis of considering Contributory Negligence as a domain which help address the grounds and substantiating factors in the parlance of justice delivery system. Some of the questions which could have a bearing in the analysis of any cases includes:

1. Whether Contributory Negligence is a justified ground of defence?
2. Is it applicable in the context of situations and circumstances which involves child of less than 6 years age?
3. Whether the apportionment of liabilities maintainable in the eyes of law?
4. Whether the damages can be apportioned between Plaintiff and Defendant if both are at fault?
5. Whether it is possible to quantify the apportionment of liabilities on basis of extent of damages incurred by parties concerned in the case at hand?
6. Is it possible to sustain the ground that Contributory Negligence is the rationale for claiming damages as remedies?

The answer to the questions are multi-faceted and requires a deeper analysis on the ratio and the rationale posited by a prudent and a reasoned person with reference to facts and circumstances of the cases. The underlying broader ground for any justice delivery system has to observe due-diligence for just, fair and equitable decision in the interpretation and application of mind for the conclusive verdict in judgment of Courts.

## Discussion

To critically analyze some of the pertinent cases related to Contributory Negligence, calls into question the seminal point of how to identify a case of Contributory Negligence, whereby the following rules gathers traction:

1. Test of Prudent and Reasonable person
2. Plaintiff's Negligence is contributory in its essence where absence of due care on his part about his own safety becomes pivotal in that analysis.
3. Plaintiff's negligence is the operative cause of such aforesaid lack of care or very reason for the cause of harm, damage, injury or cause of the resultant accident in such cases to substantiate Contributory negligence.

The dimension of analysis becomes more intricate if the case of Contributory negligence pertains to children, whereby what amounts to contributory negligence for adults is completely different for child as their comprehensive abilities and cognitive development are not alike. In such circumstances, a child may not comprehend; acclimatize to the understanding of what certain dangers could pose to them, to exemplify what a child of 6 years old could think while crossing a road might be in complete contrast to an adult crossing the road. Reference is drawn to a case, *R Srinivasa v. K.M. Parasivamurthy*<sup>4</sup>, "where a child of about 6 years was hit by a lorry and wherefore, the plaintiff, in this case, cannot be blamed for contributory negligence..."

What and how would a prudent person perceive and think in similar circumstances has a pivotal bearing on the analysis of the case. It is vital to note in this context, "If the person in the instant case has taken as much care as a prudent man would have taken in a similar situation, there is no contributory negligence..." This has been seen in *Sushma Mitra v. Madhya Pradesh State Road Transport Corporation*<sup>5</sup>, "the plaintiff while travelling in bus had resting her elbow on a window. The fact of the case mentioned that the plaintiff was injured when hit by a truck which was coming from the opposite direction as the bus was moving in the highway. When sued for the injury, the defendant came forward with the plea that the act of resting elbow on a window sill reflected that of contributory negligence on the part of plaintiff..." The Hon'ble Madhya Pradesh High Court did not allow this defence. The Court held that, "as she acted like a reasonable passenger and that any prudent person would aver that such an act was not unreasonable while the bus was moving on the highway, as such she was entitled to claim compensation". The important thing to note is that Court placed reliance on 'Test of Prudent and Reasonable person' on similar circumstance. It can be averred that decision making process in law is a logical and a very reasoned based subject, which placed the case in prism of rationality and prudence in the touchstone of the stated objects of broader principles of just, fairness and equality.

<sup>4</sup> *R Srinivasa v. K.M. Parasivamurthy* (A.I.R. 1976 Kant. 92)

<sup>5</sup> *Sushma Mitra v. Madhya Pradesh State Road Transport Corporation* (A.I.R. 1974 M.P. 68)

While in another case involving the core contention of Contributory Negligence, In *Rural Transport Service v. Bezlum Bibi*<sup>6</sup>, “there was contributory negligence on part of driver, conductor as well as passengers, who opted to board the bus and sit on the roof. The driver tried to overtake a cart and as a consequence of such act, a passenger was hit by a branch of a tree while sitting atop the roof of the bus. Here in this instant case, argument that passenger assuming the risk of travelling on roof of bus was sustained and compensation payable by the defendants was decreased by 50% and it was held that they have to pay to tune of Rs. 8000 instead of Rs. 16000...” It can be averred though Contributory Negligence is being considered as a valid defence, but the extent is determined to what proportion or rather the extent the plaintiff was at fault.

The ‘Doctrine of Alternative Danger’ has been substantiated and founded in another case, *Sayers v. Harlow Urban District Council*<sup>7</sup>, whereby a lady getting locked in a public lavatory with defective lock and no attendant, it was held that, “she was entitled to seek compensation as she injured herself while trying to figure a way to climb out”.

The ‘Doctrine of Apportionment of Damages’ have been established in another case, *Vidya Devi v M.P. Road Transport Corporation*<sup>8</sup>, a pertinent question was, “Did the driver of the bus in the instant case was vigilant enough to avert a possible collision when a motor cyclist driving negligently dashed against the bus? This had led to fatality in the accident for the motor cyclist. It was held that the driver of the bus was found to be negligent, thereby making it a fit case for apportionment of damages. The apportionment was done in the manner keeping in mind both the deceased motor cyclist and the driver of the bus to the tune of two-third and one-third, whereby the plaintiff was entitled to damages to the tune of one-third of what he would have been entitled to if the deceased was not negligent...”

In Australia, the extent of apportionment and the basis of the decision is also further enumerated in the case *Sibley v Kais*<sup>9</sup>, The plaintiff and the defendant collided at an unprotected junction or point, whereby the plaintiff’s damage was decreased by one-quarter because the plaintiff was late in looking to his left and was not vigilant enough as could be expected of concurrent and coextensive with a duty of care in Torts.

In *Oriental F. & G. Ins. Co. v. Manjit Kaur*<sup>10</sup>, the fact involved in the case was, “a rider in scooter because of his sole negligence, dashed into a car going on the left side of the road, which proved fatal. The Court observed that since there was 100% negligence on the part of the rider, whereby the claim for compensation by his widow and children was dismissed. Here it could be supplicated that in cases of the nature of Contributory Negligence, the Court does examine the Plaintiff’s Negligence as to whether it was contributory in its essence and whereby absence of due care on his part about his own safety becomes pivotal in that analysis. Another vital observation, which was seen in the case (supra) is that Plaintiff’s negligence is the operative cause of such aforesaid lack of care and for the very reason for the cause of harm, damage, injury or cause of the accident in such cases which substantiates a fit case for Contributory negligence...”

<sup>6</sup> *Rural Transport Service v. Bezlum Bibi*, A.I.R. 1980 Cal. 165

<sup>7</sup> *Sayers v. Harlow Urban District Council* (1958) 2 All ER 342

<sup>8</sup> *Vidya Devi v M.P. Road Transport Corporation* (1974 M.P.L.J. 573)

<sup>9</sup> *Sibley v Kais* (1967) 118 CLR 424

<sup>10</sup> *Oriental F. & G. Ins. Co. v. Manjit Kaur*, A.I.R. 1981 P. & H. 60

How far the “The Last Opportunity Rule” be sustained and applied in the context is also a pertinent question which warrants an analysis. According to this rule, “when two persons are negligent, in which case one of them, who had the later opportunity of avoiding the accident by taking ordinary care, is liable for the loss. In similar lines, if the defendant is negligent and the plaintiff having a later opportunity to avoid the consequences of negligence of the defendant does not observe ordinary care, he cannot make the defendant liable for that negligence...” The instant rule can be instantiated in the case of *Davies v. Mann*<sup>11</sup>. In the case in point, “a donkey of the plaintiff was fettered and left on a narrow highway. The defendant while driving his wagon driven by horses hurriedly and negligently ran over the donkey, which was fatal for the plaintiff’s donkey...”<sup>12</sup> In spite of his own negligence, it was observed that plaintiff was entitled to recover, whereby the defendant had the ‘last opportunity’ to avoid the accident.

With respect to Contributory Negligence and its application which involves children, In *D.T.C. v. Lalita*<sup>13</sup>, the Delhi High court explained, “Infants must, it seems, be treated as a category apart... In the case of a child of tender age, conduct on the part of such child contributing to an accident may not preclude it from recovering in circumstances in which similar conduct would preclude a grown-up person from doing so...”

In a similar case, *Kumari Alka vs Union Of India And Others*<sup>14</sup>, The Delhi High Court held that, “The plaintiff herein was a tender girl of six years, when the accident took place and there is no doubt that she has suffered physical injuries, as well as, faced mental agony for all these years and her movement and activity in life is affected. The claim for damages, as claimed in the plaint, cannot, therefore, be held to be unreasonable or arbitrary... The damages have to include for pain and suffering loss of amenities of life and also includes damages on account of disfigurement, especially in the cases of young women, where prospects of her marriage are impaired and for discomfort and inconvenience... a decree in the sum of Rs. 1,50,000 with costs in favor of the plaintiff and against the defendants, who shall be jointly and severally liable...”

With regards to ‘Doctrine of Identification’, that is, ‘Imputed Contributory Negligence’, the defence of Contributory Negligence can be taken not only when the plaintiff is negligent on his part, but also at times, when the negligence is on the part of his servant or agent. In *Oliver V Birmingham and Midland Omnibus Co.*<sup>15</sup>, the issue involved, “a four-year-old child when crossing the road with his grandfather got injured as the grandfather left the child in panic...” The Hon’ble Court held that the child; though he was not identified with his grandfather, was entitled to get compensation from the defendant. In contrast in another case, the doctrine was overruled in *Bernina Mills v. Armstrong*<sup>16</sup>, in which, “an employer did not have any control over independent contractor, whereby the Contributory Negligence of independent Contractor did not apply to the person getting his service...” To exemplify, with Indian case in *Darshani Devi and Others v. Sheo Ram*<sup>17</sup>, it was held by Hon’ble High Court of Rajasthan,

<sup>11</sup> *Davies v. Mann* (1882) 10 M. and W. 546

<sup>12</sup> *Ibid.*

<sup>13</sup> *D.T.C. v. Lalita* ( A.I.R. 1982 Delhi 558)

<sup>14</sup> *Kumari Alka vs Union Of India And Others* AIR 1993 Delhi 267

<sup>15</sup> *Oliver V Birmingham and Midland Omnibus Co.* (1993) 1 KB 35

<sup>16</sup> *Bernina Mills v. Armstrong* (1881) 13 A.C.1

<sup>17</sup> *Darshani Devi and Others v. Sheo Ram* 1987 (2) ACJ 931

Jaipur bench held that, “*In Indian conditions, no passenger can be held liable for contributory negligence for the omission or the commission of the car driver or of the truck driver or the bus driver or the Indian railway driver or aeroplane pilot...*”

## **Conclusion**

This instant research paper discusses about the principle of Contributory Negligence in light of the judicial precedents delivered by different Courts, nationally and internationally, and with the passage of time evolves various tenets to fix the liabilities upon the parties in the context. As the theory of Contributory Negligence emanated from English legal system that is based on equity, justice and good conscience and that reflects in the judicial pronouncements delivered by Courts including Hon’ble Supreme Court of India. The progressive analysis by Courts on ‘Contributory Negligence’ and ‘Doctrine of Apportionment of Damages’ based on reasonableness are dynamic concepts which are evolving with the passage of time for delivery of justice for public wellbeing.



# INDIAN PENAL CODE: NEED FOR A REEVALUATION IN LIGHT OF MODIFIED MORALITIES AND PRACTICAL REALITIES OF 21<sup>ST</sup> CENTURY INDIA

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## Abstract

*Criminal law of the country reflects the social, economic, political set up as well as the moral norms of the country. It has the reflexes of the values of the life and human behavior in the country in general. In the primitive society, there was a rule of jungle. The justice was administered on the rule of violent self-help and private vengeance. With development of civilization and the concept of state, the justice began to be administered by and under the physical force of the state, Police and force.*

*India was administered by the regulations made by the Britishers. Indian Penal Code (IPC) was formalized under the English Rule close to 150 a long time back. It determines violations and their disciplines. Although the Indian Penal Code is supposedly one of the most grounded criminal regulations and is broad in its degree, the changing times have felt the prerequisite of patching up this old regulation and making it more effective for the current society. There have been numerous changes throughout the years in the IPC, however there are numerous regions arrangements in this regulation that actually need rebuilding. Acquainting specific alterations with the Indian Corrective Code will guarantee that the violations that have developed lately are additionally tended to. This ought to be finished by remembering majority rule values and common liberties.*

*This paper deals with the history, background, development, amendments & reformations in the field of Indian Penal Code with the aim to aware the reader about the same in a lucid and effective manner.*

**Keywords:** *Criminal law, Indian Penal Code, Amendments, Reformation, British rule.*

## Introduction

In our country though the criminal law was there since the time of Manu, the law of crimes, we are to study is only the Indian Penal Code.

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During British rule they appointed the 1<sup>st</sup> Indian Law Commission with “Lord Macaulay” as a chairman, who is taken as the main architect of the Indian Penal Code. Our Indian Penal Code has been freely drawn upon English Law of Crimes, then Indian Law Regulations and the Code Napoleon. Mr. Peacock Bethume Milliet, and Anderson have also contributed their own in finalizing the Indian Penal Code.

Indian Penal Code of 1860 has come into the force from 1<sup>st</sup> January 1862. It has 511 sections. The whole of the code can be visualized as follows: General Principle (section 1 to 120) and Specific offences (section 120 A to 511). The code has injected the principle of equality before law, which is also our fundamental right as declared in our constitution.

The IPC is said to be one of the most powerful criminal laws, and although its scope is widespread, changes in the times have revised this ancient law and linked it to modern democratic India. Although the IPC has undergone many changes over the years, the law still has many areas and provisions that need to be restructured. The introduction of certain amendments to the Indian Criminal Code guarantees that recent crimes will also be addressed. This should be done with democratic values and human rights in mind.

The current government amendment to the Indian Criminal Code has been a headline for some time. Recently, the Interior Minister said in a statement that the 1860 Indian Criminal Code, which has been in place since the British era, has many loopholes that need to be amended and defended to make the law more effective.

The ministry also argued that the revision of the code introduced by the United Kingdom in 1860 was necessary because it was primarily based on the spirit of "masters and servants." Many of the serious crimes mentioned in the

IPC do not provide appropriate penalties and lead to inequality. Second, the IPC has not been fully modified since it came into force.

Therefore, it is important to discuss the effectiveness and performance of Indian criminal law in today's scenario, where various new forms of crime emerge and outdated laws appear to be outdated.

### **Background of drafting of IPC<sup>1</sup>**

Thomas Babington Macauley, chairman of the First Law Committee, drafted the Indian Criminal Code in 1837. The same idea was based on British legislation along with the 1825 Napoleonic Code and the Louisiana Civil Code of Edward Livingston.

The draft was very carefully revised by Burns Peacock, who later became the first judge of the Calcutta High Court. Was a court, and a future judge-a member of the Legislative Council and a judge of the Calcutta High Court, enacted on October 6, 1860.

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<sup>1</sup> Visit: <https://www.deccanherald.com/specials/sunday-spotlight/aim-of-bulldozer-politics-is-to-demonise-muslims-brindakarar-1103390.html> (accessed on 20th April 2022)

The Legal Committee revised the IPC in its 42<sup>nd</sup> report in 1971. The proposal was welcomed by the general public and some changes were made accordingly. A questionnaire was prepared and sent with the state government to various Supreme Courts and bar associations and other legal bodies. Each legal section has been reviewed to eliminate inconsistencies.

## **History<sup>2</sup>**

There was no criminal law in the undeveloped society. Everyone can attack their own people or property at any time. “Eye for an eye, eye for an eye, life for life” was a pioneer of criminal justice. Eventually, the injured party agreed to accept compensation instead of killing the other party. As a result, the satisfaction of ordinary crimes was staggering, which gave rise to archaic criminal law.

The history of Indian criminal law can be conveniently studied under the following three headings:

- Ancient Hindu criminal law
- Mohammedan criminal law
- English criminal law.

## **Ancient Hindu Criminal Law**

Historically, the concept of crime and its distinction from civil fault appeared much later than the imperial institution, then the State.

The penal regulation of historical groups isn't always the regulation of crimes, it's far the regulation of wrongs due to the fact in the ones days there has been no such class of wrongs as torts and crime. There turned into now no longer a good deal distinction withinside the nature of punishment for the contemporary-day styles of wrongs. Commenting at the equal factor Federick Pollock and Maitland found that the English society earlier tenth century pressured crimes with civil wrongs i.e., torts due to the fact the bond of own circle of relatives turned into a ways extra more potent than that of the community, therefore, the injured celebration and his kindred ought to avenge the incorrect through non-public vengeance and self-redress.

This view of the historical penal regulation, alevn though in case of virtually all structures withinside the world, isn't always accurate in case of historical Hindu Criminal Law. In the Hindu Law punishment of crimes occuppies a extra distinguished area than repayment for wrongs. Of the main codes of Ancient India, the Code of Manu is the whole digest coping with regulation, religion, custom, and usages then prevalent; assault, battery, defamation, theft, robbery, playing and cheating, trespass had been the primary offences of that point and the punishment prescribed for them turned into primarily based totally on clinical concepts and the very best prescribed punishment turned into the demise sentence. The proper to punish person lay withinside the withinside the arms of the person in western crook jurisprudence and this proper turned into transferred best in the course of center a long time from person to the society and later to the State. But withinside the historical Hindu regulation, it turned into the obligation of the king to punish the offender. The Hindu regulation-givers did now no longer expressly distinguish among civil incorrect and crime, still, the distinction in consequences and system

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<sup>2</sup> Id.

which they've prescribed shows that they truly realised in what manner the crook thing of a differed from its civil respect.

### **Mohammedan Criminal Law**

After the Islamic conquest of the country, the Mohammedan Penal Code was introduced into our country, and Indian courts applied the Mohammedan Penal Code to the judicial administration. Muslims imposed a criminal law, called Sharia, on the conquered Hindus. It was based on the Koran, and they believed it was of divine origin. The Qur'an law was not sufficient to meet all the requirements, so a specific code of conduct called the Sunnah was enacted. Crime was divided into two classes. That is,

- i) Crimes against God (fornication and drunkenness) and
- ii) Crimes against men (murder and robbery).

Sin against God is considered a public mistake and can be punished by the community and society. Crimes against men are privately unjustified and can therefore be punished by individuals. All violations of punishment are classified according to four general principles:

- i) Quisas:

They were specifically applied to crimes against humans, intentional murders and serious physical harm, and the injured had the right to harm the criminals as well.

- ii) Diyut (Blood Money):

In certain cases, where retaliation was not granted, the injured party had the right to demand only blood money known as Diyut.

- iii) Hadd (Specific Penalties):

In the case of Hadd, the law provides and specifies penalties for certain crimes, such as Zina (illegal sexual intercourse), drinking wine, theft, robbery, and framing of married women. Hands were amputated due to theft, and the greatest punishment for fraud and robbery was death.

- iv) Tazir (discretionary punishment):

It was the judge's discretion to impose any kind of punishment if no punishment was provided. This type of Mohammedan criminal law suffered from many shortcomings, as many of its provisions were inconsistent with good government, natural justice, and common sense.

### **English Criminal Law and Development of IPC, 1860**

Mohammedan was a criminal to the criminal when the East India company took over the control of India's control. In 1765, the company acquired Bengal, Orissa and Baiha's Nizamato. After that, we had to manage justice that initially assuming the current policy. Since the defects of Mohan Meda's law were gradually realized, the first step was trying to guarantee these defects. An effort has been made to streamline appropriate fines by crime. The 1832 regulations ensure that the bond sand for criminal crimes under non-slim provisions can request exemption from research under the Mohammedan criminal law. However, the modification introduced this way did not apply to all presidents. Most of them were used alone in Bengal. As a result, this is the next competing, as different rules are spreading

to various presidents. Therefore, the committee was appointed to investigate inconsistent functions and necessary changes.

Later on, it turned into realised that a penal code turned into necessary. A Penal Code, beneath Neath the steering of Governor Elphinstone, turned into enacted which turned into called Elphinstone Code. It consisted of forty-one sections only. In 1844 a separate code turned into drawn for the province of Punjab after its annexation.

An all-India Legislature turned into created with the aid of using the Charter Act of 1833. The workplace of Law member withinside the Council of Governor General turned into created, Provision turned into additionally made for the appointment of a Law Commission.

The first regulation fee turned into appointed in 1834 with Lord Macaulay, the then Law Minister as its chairman, Sarvshri Macleod, Anderson and Millet had been the opposite contributors of the Commission. It organized a draft Penal Code for India which turned into given for attention to Governor General of India in Council on 14<sup>th</sup> October 1837. It turned into revised with the aid of using Sir Barnes Peacock, Sir JW Colville and numerous others. The drafting turned into finished in 1850 and it turned into offered to the legislative council in 1856. The invoice turned into handed on October 6<sup>th</sup>, 1860. It obtained the assent of the Governor General at the identical date and as a consequence have become the Indian Penal Code, 1860. The Code got here into operation on 1<sup>st</sup> January 1862.

### **Is IPC incapable of serving the needs of modern times?**

Laws must evolve as society changes, people's perspectives, and the nature of crime. The IPC, enacted in 1860, is ahead of its time and has existed in India for a century and a half, but has not kept up with the passage of time. The legislation enacted by the United Kingdom to meet their needs and goals has not helped anyone anywhere in the modern era. It is based on the British colonial attitude that dominates India. Therefore, a revision of the IPC is needed to transfer power from the ruler to the people. The reorganization of the IPC is necessary because many provisions have been abolished due to changes in economic development and technological advances. Crime such as mob lynching, financial crimes and white-collar crimes are not well recognized by the IPC. There is also unequal punishment for serious physical harm. For example, a chain snap incident can also be life-threatening, but the IPC does not take this into account and does not provide equivalent penalties. Some police are booked for robbery or theft. Therefore, the IPC needs to be updated in order to standardize the penalties.

There have been many changes to ensure that the IPC evolves over time, but it has not changed completely since the date of adoption. Although certain changes have been made to the IPC's provisions, as evidenced by the court's decision. For example, adultery and homosexual non-criminalization. The IPC is based on the predominant deterrence theory at the time, but criminal law needs to move from deterrence or distribution theory to punishment reform theory.

1. Section – 309: Suicide is a criminal offense in India. In other words, anyone who ends his life and survives can be put in jail. This provision is absurd because it serves no purpose and contradicts Article 21 of the Constitution of India, which guarantees the right to life and the

right to die. However, this section is no more effective after the passing of Mental health Care Bill.

2. Section 294: State that indecent acts in public can result in imprisonment or fines of up to 3 months.

This section gives police broad authority to harass couples sitting in the park or spending time together in public places. The term “obscene” is misused because it is not defined by law. Section 294 can only be worn if others are concerned.

3. Life imprisonment as a penalty is left to the discretion of the court regarding the number of years. It depends more on the type of crime committed. However, when calculating the penalty, it is set to 20 years. This deprives the judge of his discretion and makes a difference in the approach of imposing penalties.
4. We need a gender-neutral definition of rape. Section 375<sup>3</sup> of the IPC does not include men, Hijra, or boys as rape victims, only women are considered rape victims.
5. Sedition under Section 124A<sup>4</sup> was enacted by the United Kingdom in 1898 to curb rebellion against them and curb liberation movements. But lately, this section has been widely used by those who criticize the government.
6. In the case of adultery, liability is entirely placed on men and women are exempt from liability. This structure is also inconsistent with the idea of gender equality and needs appropriate modification.

These are just a few examples that justify the need to change the current code. It is undeniable that the code is beautifully designed. It is divided into different chapters, subdivided into crimes that affect the human body and crimes that affect property.

<sup>3</sup> 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

(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.

<sup>4</sup> **124A Sedition.**—Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, <sup>2\*\*\*</sup> the Government established by law in <sup>3</sup>[India], <sup>4\*\*\*</sup> shall be punished with <sup>5</sup>[imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Marriage provisions are also included, making it a complete act in terms of public health, safety, convenience, dignity and morality. The Law was flawless, but it has arisen with the changing times and now requires more specific and accurate provisions.

### Earlier Amendments<sup>5</sup>

Over the years, the nature and scale of crime has changed. British criminal law was ahead of its time and needed to be changed. The IPC has been modified about 77 times. However, many recommendations from the 1971 Legal Commission's 42nd Report have not yet been adopted. The provisions of the Dowry Prohibition Law and the strict penalties for the Rape Law are some of them. Two of the most important changes were the 2013 Criminal Code Amendment and the 2018 Criminal Code Amendment Act.

### Criminal (Amendment) Act, 2013

The bill, which was introduced before this bill was passed, was also known as the anti-rape bill. This law was introduced to make India's rape law more stringent. This change broadened the definition of rape by including oral sex and inserting other objects into the female body as a crime. This was a big step given the increasing number of rapes in India and the seriousness of violent crime. Stalking was also punished under this law. It also considered it a crime to catch and watch over women in private demonstrations against their will.

### Criminal Amendment Act, 2018

This law was further developed to strengthen the rape law. The verdict has been extended from a minimum of 7 years to 10 years. Also added are penalties for raping girls under the age of 12 and 16.

Sections 153A<sup>6</sup> and 509<sup>7</sup> have been added to combat racist crime. However, this was not supported by all federal states to this extent.

<sup>5</sup> Visit: <https://www.legalbites.in/indian-penal-code-general-introduction-background/> (accessed on 20 April 2022)

<sup>6</sup> 153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.—

(1) Whoever—

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, 2[or] 2[(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,] shall be punished with imprisonment which may extend to three years, or with fine, or with both. Offence committed in place of worship, etc.—(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.]

<sup>7</sup>Word, gesture or act intended to insult the modesty of a woman.

Whoever, intending to insult the modesty of any woman, utters any words, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon

## **Evaluating the political agenda behind restructuring IPC<sup>8</sup>**

The Union Ministry of Home Affairs has proposed the idea of revising the IPC introduced during British rule in India, in the spirit of "servants".

A committee has also been set up under the Police Research and Development Department to consider the changes that will be introduced.

The government's proceedings to revive this long-standing law are to fulfill people's democratic aspirations, ensure swift justice, and simplify legal proceedings. The ministry argues that the real reason for this is to ensure swift justice and simplification of the legal system, but one must wonder if there is a hidden political agenda behind it. I don't get it. IPC is one of the country's basic criminal laws that apply to all people. IPC changes are certainly necessary, but changes can easily be made to suit any political party or politician. Therefore, changes need to be left to public opinion before they can be implemented.

## **Reforming the criminal system<sup>9</sup>**

IPC is a well-written code that has been modified many times over the years to make a difference in the criminal system. However, many scholars believe that revising the IPC alone cannot reform the criminal system. Code implementation must also be efficient to ensure success. IPC cannot be enforced by the same police organization. Successful IPC operations require police reforms to change the IPC. Changes in police attitudes towards the complainant, prompt registration of the First Information Return (FIR), and prompt response to the crime are required. Changing the police's attitude toward the judiciary also requires many internal, external, and structural changes. Police need to improve the talent available, the quality of investigations, and become more efficient. You also need to prevent the police from being exposed to external pressure.

## **Conclusion**

Reforming the criminal justice system is not just a onestep process. Revamping IPC is a major step to modernize the criminal law of India and make it in accordance with the Indian democracy. The Britishers used IPC to their advantage and to put away freedom fighters, it was based on the deterrent theory. But now a shift has to be made from a deterrent to a reformatory system. Revamping IPC will ensure that the criminal system will become more reliable and have the potential to understand and answer the reasons behind today's crimes. It will also ensure that certain provisions of this age-old code that are not relevant today, are repealed. For example, Section 377 of IPC which criminalized homosexuality and was based on the Victorian regime, was decriminalized in accordance with the changes in the modern era. Earlier, amendments made to code were fragmented and failed to bring about a significant change to the IPC as a whole. Fulfilling political agendas should not be the reason behind adding specific provisions. Although revamping IPC will lead to reforming the criminal justice system, additional changes in the police structure are also needed. Even if the IPC is reformed, its implementation will still be an issue for the government to tackle.

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the privacy of such woman, <sup>1</sup> [shall be punished with simple imprisonment for a term which may extend to three years, and also with fine].

<sup>8</sup> Visit: <https://msbrijuniversity.ac.in/assets/uploads/newsupdate/IPC-SCLLB-2.pdf> (accessed on 23rd April 2022)

<sup>9</sup> Visit: <https://theprint.in/opinion/macaulay-ipc-radical-in-19th-century-time-to-shift-power-balance-towards-indians/309374/> (accessed on 23<sup>rd</sup> April 2022)

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# SUSPENSION OF LABOUR LAWS IN INDIA IN THE CONTEXT OF COVID-19: A CRITICAL ANALYSIS

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## Abstract

*The labour market is regulated to protect workers' interests, which is viewed as an external intervention in the market process, resulting in a slew of distortions and inefficiencies, including increased unemployment. India's labour laws are broad and competitive with those of both developed and developing countries, and they are on the more protective end of the spectrum, with measures that are continually strengthened in response to changing circumstances. In 2020, the world economy has been thrown into upheaval as a result of the new Coronavirus. Working-class people have been particularly heavily hit by this pandemic. Many people have not only lost their employment but their pay has also been reduced. Several states in India, where the state government also has the right to suspend labour rules that are part of the concurrent list of the Constitution, have been abusing this power under these unusual circumstances. The suspension of labour laws is a breach of both the ILO agreement and the Indian Constitution. State governments cite the need to stimulate the economy and attract investment as grounds for their actions. In this paper the impact of the suspension of numerous labour laws is examined, as well as the cost of the economic boost.*

**Keywords :** Suspension, Indian Labour Laws, COVID-19, International Labour Organisation (ILO), Constitutionality

## Introduction

Everything we've done to eradicate the virus has had the unintended consequence of decimating the economy. Aside from the deaths caused by Coronavirus and the government-imposed lockdown to combat the pandemic, the virus has also robbed many people of their livelihood. Laborers are one such afflicted population and they were already struggling before the pandemic, but their plight has worsened since the COVID-19 outbreak. Because of unemployment, a shortage of shelter, food, and other necessities of life, migrant workers were severely impacted, and some even died while returning home. Furthermore, in order to jumpstart the economy, the state of Uttar Pradesh has approved ordinances that would repeal a slew of labour restrictions for three years. Gujarat, Madhya Pradesh, Rajasthan, and Punjab have all followed suit. Companies are excused from following labour regulations under such legislation. The government implemented these actions in reaction to the economic disaster that the novel Coronavirus has wreaked on industries and businesses, as well as the financial losses that have occurred. It's also thought to be a tactic to boost the economy by luring more business during the tragedy. The unemployment rate was 6.7 percent before the first lockdown on March 24, 2020, according to statistics from the Centre for Monitoring Indian Economy (CMIE), but it has since

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increased to 26 percent, the highest level ever.<sup>1</sup> India's informal economy employs nearly 400 million people, according to the International Labour Organization (ILO), many of whom are at risk of sinking further into poverty.<sup>2</sup> Various trade unions have criticized the ordinances made by Indian states to suspend labour rules, and their constitutional legitimacy has also been contested before the Supreme Court of India. The case is still ongoing in the courtroom. The government's action is barbaric, as it subjects the labour to slavery-like conditions. With such precautions in place, the pandemic will have a long-term impact on workers, affecting their health and safety.

The fact that Covid-19 has been labeled a pandemic proves that it is more than an infectious disease. It usually has major mental and physical health consequences. The impact of the Covid-19 scenario, when paired with professional hardship, causes not only negative psychological impacts in the workplace but also viral propagation in the community. Conflicts between companies and workers are normal and inevitable; thus, the ultimate goal of this labour regulation is to ensure that these types of stumbling blocks do not obstruct ongoing work and that employers and employees reach a mutual agreement. The labour legislation not only provides a process for resolving disputes but also assures that workers' basic rights are maintained. According to the statements of various Indian state governments, this action will likely improve the economy. But, below it all, there's a need to figure out how much the economic gain is costing. The Labour community, which is already dealing with physical and mental health issues as a result of the Covid era, continues to be one of the most neglected and vulnerable groups of individuals.

### **Regulation of Labour Laws in India**

India is a founding member of the International Labor Organization and one of the world's most labor-intensive countries (ILO). The Concurrent List of the Constitution's Seventh Schedule deals with labour legislation in India. This signifies that the regulation of the same is under the jurisdiction of both Parliament and the State Legislature. Though the State Government has enacted these ordinances, the Central Government has yet to adopt them. The state regulates labour law either by amending central labour laws or by circumventing their own labour regulations to match the state's demands, with the central laws taking precedence where the state and central laws disagree.

There are now around 100 state laws and 40 federal laws, and the Indian government has chosen to codify labour laws into four codes, the first of which, The Code on Wages, 2019, was passed in 2019. The other three are the Industrial Relations Code of 2020, the Social Security Code of 2020, and the Occupational Safety, Health, and Working Conditions Code of 2020. Employers will find it simpler to understand, interpret, and implement the regulations, despite the fact that they appear to be more of a consolidation of requirements under discrete titles than change.

### **Labour Laws Suspended by Different States**

Except for the Bonded Labor Act 1976, Employee Compensation Act 1923, Building and Other Construction Workers Welfare Cess Act 1996, and provisions related to women and children in the Maternity Act, Child Labour Act, Equal Remuneration Act, 1976, and Section 5 of the Payment of

<sup>1</sup> CENTRE FOR MONITORING INDIAN ECONOMY PVT. LTD., <https://www.cmie.com/kommon/bin/sr.php?kall=warticle&dt=2020-04-21%2010:40:01&msec=873> (last visited Feb. 6, 2022)

<sup>2</sup> PTI, *About 400 million workers in India may sink into poverty: UN report*, THE ECONOMIC TIMES, <https://economictimes.indiatimes.com/news/economy/indicators/about-400-million-workers-in-india-may-sink-into-poverty-un-report/articleshow/75041922.cms?from=mdr> (last visited Feb. 6, 2022)

Wages Act, the State Government of Uttar Pradesh appears to have diluted all labour laws for three years.<sup>3</sup> Whereas regulations governing trade unions, contract employees, industrial disputes, and worker safety, health, and working conditions have been delayed, although for a limited time. The Uttar Pradesh government recently passed a controversial bill that increased the regular working hours from 8 to 12 hours each day. The ordinance was revoked when the Allahabad High Court issued a notification.<sup>4</sup> This was in response to a Public Interest Litigation (PIL) brought at the Allahabad High Court.

When it comes to labour legislation, the state of Madhya Pradesh has chosen a more delicate approach. The Madhya Pradesh Labour Laws (Amendment) Ordinance of 2020 amended two state laws. Changes have also been made to the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, which governs working conditions. Previously, the statute only applied to businesses with more than 50 employees; however, it has recently been expanded to include businesses with 100 or more employees.<sup>5</sup> As a result, the Act will no longer apply to businesses employing less than 100 people. As a result, at a business with less than 100 employees, the employer would be excused from taking care of their well-being.

The first ILO agreement, in 1990, established a maximum working time of 8 hours per day and 48 hours per week for industry workers. The Convention, on the other hand, specifically states several exceptions to this norm. India is one of the few countries where the maximum working time in the business has been set at 60 hours per week or 9 hours per day. The Gujarat government, on the other hand, has expanded the work shift from 9 to 12 hours per day, or 72 hours per week. This is a breach of the International Labor Organization Convention, which India has ratified for over a century.<sup>6</sup>

Other states, such as Rajasthan, Haryana, Punjab, and others, have enacted similar ordinances suspending labour laws to lower the protection of workers' rights in order to encourage companies to do business and attract more company/investment to their states.<sup>7</sup>

The question now is how will the suspension of labour regulations affect firms and employees. Is it possible that these actions are anti-labor? Will the business community come in and invest just because the labour laws have been suspended?

## The Impact of Labor Law Suspension

The working and living conditions of workers have already worsened, and the suspension of labour regulations opens up even more opportunities for exploitation. Laws are supposed to protect the weak and destitute, but when anti-labor ordinances are passed to suspend labour laws, the protection offered for workers' rights is reduced. Neither the employer nor the employees will benefit. How can employees

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<sup>3</sup> *The Unconstitutionality of the Suspension of Labour Laws*, B&B ASSOCIATES LLP, <https://bnblegal.com/article/the-unconstitutionality-of-the-suspension-of-labour-laws/> (last visited Feb. 6, 2022)

<sup>4</sup> Yogima Seth Sharma, *Uttar Pradesh govt withdraws order of 12-hours shifts for workers in industrial units*, THE ECONOMIC TIMES, (last visited Feb. 6, 2022) <https://economictimes.indiatimes.com/news/politics-and-nation/uttar-pradesh-govt-withdraws-controversial-order-of-12-hour-shifts-for-workers-in-industrial-units/articleshow/75772375.cms?from=mdr>

<sup>5</sup> Indian states suspend labour laws and increase working hours, INDUSTRIALL GLOBAL UNION <https://www.industrialunion.org/indian-states-suspend-labour-laws-and-increase-working-hours> (last visited Feb. 6, 2022)

<sup>6</sup> Avantika Verma and Swapnil Singh, *Reckless Suspension of Labour Laws Adds to Plight of Indian Workers*, HUMANRIGHTS PULSE (last visited Feb. 6, 2022) <https://www.humanrightspulse.com/mastercontentblog/reckless-suspension-of-labour-laws-adds-to-plight-of-indian-workers>

<sup>7</sup> *Supra* Note 5

and employers expect to resolve an industrial issue if labour rights and dispute resolution procedures are harmed? On the one hand, workers' rights are in jeopardy, and on the other, employer unhappiness may go unaddressed because all of these avenues are likely to be blocked by suspension. As a result, not only will this influence labour productivity and economic efficiency, but it will also lead to unwanted labour market activities with negative effects. It's common sense that a happy worker is more productive.

India's labour laws dating back to 1919 when the International Labour Organization (ILO) was founded. The International Labour Organization (ILO) is a forum where governments, employees, and employers from all over the world join together to promote social justice, human rights, and labour rights. Trade unions rose in power across the country during this time, culminating in the founding of the Indian Trade Union Congress in 1920.<sup>8</sup> The Trade Union Act of 1926 and the Trade Dispute Act of 1929 were both enacted during this time period, and both are still in effect in India today. The Trade Union Act granted to trade unions legal recognition and provided them with protection from criminal prosecution. The Trade Dispute Act of 1929 governs the interaction between a business and its workers. Strikes were also deemed to be a basic right. Both laws will be suspended once the State Government adopts the ordinances.

The Factories Act of 1948 is another piece of labour law that tries to control factory working conditions. It covers working hours of no more than 48 hours per week with a weekly holiday, worker safety, and other labor-related benefits. If this Act is suspended, companies would be able to raise working hours inhumanely up to 12 hours every day.<sup>9</sup> This policy would not only put a strain on employees, but it will also cut into their rest time, affecting the health of the workforce. Employers will now be permitted to give women workers lower rates due to the suspension of the Equal Remuneration Act of 1976, which strives to ensure that there is no discrimination between men and women in terms of the job they do or equal pay for equal effort.<sup>10</sup>

Eliminating these Acts, even if just for a little time, will not only turn the tables on the working people, who have battled for these rights after a revolutionary fight, but will also jeopardise their welfare, health, and safety.

## Perspective of an Employer

Growth and survival are synonymous. During this tragic moment, when the pandemic has claimed the lives of over 3.5 lakh people in India, and the government has enforced a lockdown as a precaution, it is clear that the country's economy is in a tailspin.<sup>11</sup> Businesses and sectors are struggling to stay afloat, and survival appears to be a tall order. Employers now require a break in order to return to their economic activities, and their presence is critical since there would be no employees if they did not exist. The performance and adherence of the formal or organized sector have improved dramatically

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<sup>8</sup> *Supra* Note 6

<sup>9</sup> Tanvi Aggarwal, *Suspension of Labour Laws amid Covid-19: Constitutionality Check*, LEGALSERVICE INDIA <https://www.legalserviceindia.com/legal/article-2598-suspension-of-labour-laws-amid-covid-19-constitutionality-check.html> (last visited Feb. 6, 2022)

<sup>10</sup> Ashima Obhan and Bambi Bhalla, *India: Suspension Of Labour Laws Amidst Covid-19*, MONDAQ <https://www.mondaq.com/india/employment-and-workforce-wellbeing/935398/suspension-of-labour-laws-amidst-covid-19>, (last visited Feb. 6, 2022)

<sup>11</sup> WORLDOMETER, <https://www.worldometers.info/coronavirus/country/india/>, (last visited Feb. 6, 2022)

over time, and if the workforce is more organized, labour rights may be protected to a greater extent. Regrettably, the official sector employs just 8% of the total workforce.<sup>12</sup> Although the utilization of labour as a source of profit has declined, it is impossible to say the same for the unorganized sector. Finally, an employer might choose between exploiting or flourishing their employees. It should not be forgotten, however, that actions must be done to resuscitate economic activity in order for employers to return to work and create new jobs. For everyone involved, it's a win-win situation.

At the end of the day, rational companies do not wish to eliminate labour rights. They are just as vital as the Constitution's fundamental right to every citizen of the country. However, a single labour code that is simple to comprehend, interpret, and follow by businesses is urgently needed.

### **International Labor Organization (ILO) Convention Violations**

India has not acted in accordance with the pledge, despite being one of the founding members of the ILO conventions. This will have an impact on India because it would regress in terms of labour standards, which have already worsened. Many ILO experts have suggested in a joint statement that these suspensions of labour laws are a gross violation of the Right to Freedom of Association (ILO Convention 87), Right to Collective Bargaining (ILO Convention 98), and the C144 - Tripartite Consultation (International Labour Standards) Convention, 1976, which aims to bring governments, employers, and employees together.<sup>13</sup> The ILO Director-General has also written to India's Prime Minister, expressing concern over the modifications made by the state governments and demanding that they be reversed. In response to complaints from numerous labour unions alleging that the State Government had violated their rights, the Director-General took this action.

### **Constitutional Validity of Labor Law Suspension**

Apart from violating international labour standards, various Indian state ordinances suspending labour restrictions infringe on employees' fundamental rights and expose them to exploitation in terms of their health, safety, working hours, and compensation, among other things. In these conditions, where more than half of the Indian people are grieving, the need of the hour is not for the government of India to exacerbate the situation, but for a little compassion. The state's ordinance violates the essential rights of labourers and employees provided by Articles 14, 15, 19, 21, and 23 of the Indian Constitution, and it is unjust, unconstitutional, and arbitrary.<sup>14</sup>

Certain powers have been assigned to state governments when labour delegation of authority is concerned. States, on the other hand, cannot continue to provide exclusions on their own. In light of the unique circumstances surrounding covid, a state government ordinance can be deemed to have the same impact as legislation approved by the legislature. However, every law that is on the concurrent list requires Presidential assent after being vetted by the Centre, pursuant to Article 254(2).<sup>15</sup>

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<sup>12</sup> NITI AAYOG, [https://niti.gov.in/planningcommission.gov.in/docs/reports/genrep/bkppap2020/32\\_bg2020.pdf](https://niti.gov.in/planningcommission.gov.in/docs/reports/genrep/bkppap2020/32_bg2020.pdf), (last visited Feb. 6, 2022)

<sup>13</sup> INTERNATIONAL LABOUR ORGANIZATION, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>, (last visited Feb. 6, 2022)

<sup>14</sup> *Supra* Note 10

<sup>15</sup> Article 254, Cl .2, Indian Constitution

The Factories Act of 1948, the Trade Union Act of 1926, the Industrial Dispute Act of 1947, and several other laws that protect employees have been suspended by the states. It also guarantees that a sufficient system for resolving issues involving employees' rights is in place. With the suspension of labor laws, workers are effectively abandoned at the mercy of their employers.

Suspending labour laws and extending working hours might result in forced labour, which would be a violation of Articles 23 and 21 concerning Articles 39(e), 42, and 43. Employees' strength is not exploited, and people are not forced to work in vocations that are improper for their age or strength due to economic need, according to Article 39(e). The government is required by Article 42 of the Constitution to ensure acceptable and humane working conditions as well as maternity leave. The state is required under Article 43 to provide a decent income, adequate working conditions, and full enjoyment of leisure, social, and cultural opportunities.<sup>16</sup> The suspension is clearly in breach of the Articles listed above.

Citizens have the right to peacefully assemble under Article 19(1)(b), whereas citizens have the right to organise groups and unions under Article 19(1)(c). The Trade Union Act of 1926, on the other hand, has been suspended in Uttar Pradesh, obviously breaching this Article.<sup>17</sup>

Invoking powers under Section 36B, the Industrial Dispute Act of 1947 is suspended.<sup>18</sup> This is ultra-vires because this Section prohibits the State Government from exempting any industrial facility or activity from the Act's obligations unless a sufficient process for dispute investigation and resolution is in place. The State does not have the authority to suspend the entire Act under this section.

Only in the case of a public emergency, the State Government can exempt any factory or class of factories from any or all of the Act's requirements for up to three months at a time, according to Section 5 of the Factories Act, 1948.<sup>19</sup> As defined by this Section, a "public emergency" is "a grave situation in which the security of India or any portion of its territory is threatened, whether by war, external attack, or internal unrest." The epidemic isn't considered a public health disaster. As a result, the State Government lacks the jurisdiction to suspend the Factories Act in the name of a pandemic, and such actions are both unlawful and arbitrary.

With the suspension of the Wage Code and the repeal of the Payment of Wages Act, companies no longer have any legal duties to pay workers on time. This creates a significant opportunity for workers to be exploited and their fundamental rights to be violated.

## **Conclusion**

COVID-19's second wave was much more devastating than the first. In recent years, many people have died or lost loved ones. The Coronavirus has claimed the lives of millions of people. Rather than working against the people, the Indian government is currently working for them. The state government's regulation is not only anti-labor, but it is also a cruel act in this difficult time. The Indian labour market has already deteriorated to the point that, despite the existence of statute Acts and labour

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<sup>16</sup> Article 42 & 43., Indian Constitution

<sup>17</sup> Article 19, Cl .1 Indian Constitution

<sup>18</sup> The Industrial Dispute Act, 1947, S 36B, No. 14, Acts of Parliament, 1947 (India)

<sup>19</sup> Factories Act, 1948, S 5, No. 63, Acts of Parliament, 1948 (India)

regulations, they are not being enforced to the level that they should be, particularly in the unorganised sector.

The state government's suspension of labour regulations is unconstitutional. It has yet to get Presidential consent and, on top of that, it infringes several fundamental rights. It also goes against the International Labor Organization (ILO) norm, to which India is a signatory. Dilution of labour laws that are diluted will not only lead to worker exploitation but will also have a negative impact on the economy as a whole. How can we imagine a happy employer-employee relationship if forced labour is pushed, all avenues of dispute resolution are closed, workers have no right to defend their rights, and laws aimed at empowering them are suspended? What is the sense of having labour rules in the first place if the Indian government is going to take such dramatic measures to suspend them? What good are the revolutionary battles that led to the formation of trade unions and the passing of the Trade Union Act of 1926 if the government suspends it for three years in one fell swoop, oblivious to the negative implications it may have on the people and the economy?

The government has taken this extraordinary step to suspend labour rules to entice Chinese industry, despite the fact that China survives on an authoritarian labour market with a smattering of social security, which is not the case in India. The endeavour by India to grow its economy may fail. To equate economic success with the removal of labour regulations is absurd. In addition, there is little or limited evidence that it has a favourable economic impact.



# ANALYSIS OF 161<sup>ST</sup> PARLIAMENTARY REPORT ON GEOGRAPHICAL INDICATIONS REGIME IN INDIA

Vasundhara Kaushik\*

## Abstract

*The principles of good governance require a continuous or regular refinement of the laws of the country, in order to bring the laws on an equal footing with the emerging societal needs and technological trends.<sup>1</sup> They should be improved and revised in such ways that it can assist the governments in delivering an intellectually sound and flourishing domain for technological advancements as well as for the efforts put into the research and development of the same. Thus, the responsibility to bring about such vital and legitimate modifications rests with the concerned parliamentary committees and departments by organising and carrying out meetings for deliberating the above issues circling the laws of Intellectual Property, the rights of the people associated with it and its role in country's economy.*

*Through the study made in the following paper, the author has made an attempt to summarise and analyse the crucial proposals presented before the parliament by different departments regarding the revision and betterment of the laws on protection and recognition of Geographical Indications in India and recommendations made by the Department Related Parliamentary Standing Committee on Commerce to the respective authorities, following on the same. It discusses in brief the concerns, and the suggestions made to resolve those concerns as put forward by the DPIIT, Ministry of Commerce and Industry, and other prominent law firms in India about all the necessary modernization required in the selective sections and clauses of the respective act or acts governing the practice of, recognition, awareness, registration and protection of the geographical indications in the country.*

## Introduction

Through its One Hundred and Sixty First report, the Department Related Parliamentary Standing Committee on Commerce (hereinafter referred to as the Committee) contributes in the research of Intellectual Properties and provides a 'Review of the Intellectual Property Rights Regime in India'. The report was presented and laid before the Rajya Sabha and Lok Sabha respectively on 23<sup>rd</sup> July 2021. A rigorous review of the different categories of IPR legislations in India was taken up in order to establish a robust, up and coming, technologically enhanced and well-versed IPR statutes in the country. The

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<sup>1</sup> Nik Ahmad Kamal & Nik Mahmud, "Good Governance and the Rule of Law", 2013 *The First International Conference on Law, Business and Government* 2 (2013).

Committee that prepared the 161<sup>st</sup> report was headed by Dr. V.V. Reddy, chairman of the committee, Rajya Sabha.

Various issues were taken up in the IPR policy review. Of the major heads, some of them were the contribution of different categories of intellectual properties in the country's economy, the IPR regime in India as compared to USA and China, lack of awareness about different kinds of IPRs in the country, the amalgamation of IPR and Artificial Intelligence, role played by the DPIITs (Department for Promotion of Industry and Internal Trade), Confederation of Indian Industry (CII); legal associates i.e. Amarjit & Associates, Ajay Sahni & Associates, and Subramaniam & Associates; Department of Pharmaceuticals, Ministry of Chemicals & Fertilizers; Department of Agriculture Research and Education, Ministry of Agriculture and Farmers' Welfare and Federation of Indian Chambers of Commerce and Industry (FICCI), scrutinising the role played by the IPR in the pharmaceutical industries in India, etc. The departments provided an in-depth analysis for the successful examination of the subject matter, i.e., a comprehensive review of the IPR regime in India.<sup>2</sup>

The report discusses the issues regarding the progress and current position of different intellectual properties, including geographical indications in the country. The committee was delivered with a report showing the numbers of registration made for obtaining GI for variety of products and services from different regions of India. The information regarding the current rate of the recognition and registration of geographical indications, suggestions for improvement of legislations relating to GIs in India along with extending assistance to the citizens, and most importantly, the suggestions in light of the compliance of the statutes with respect to the government initiatives of 'Made in India' and 'Atmanirbhar Bharat' were put forward to the committee and through it, to the lawmakers of the country by DPIIT, Ministry of Commerce and Industry and all other organizations, that have invested their operations towards the betterment in the regime of rights of the producers of the geographically indicated products and services.<sup>3</sup>

### **Report of the committee on Geographical Indications**

The Committee was presented with a comparative report by the DPIIT about the position of registration of Geographical Indications in India. The report has provided data on the number registrations that took place through-out the years from 2016 till 31<sup>st</sup> October 2020. Further, complete information and details regarding registration were collected from the Geographical Indications Registry Office, located in Chennai. However, the report submitted before the parliament did not only strictly contain details of the number of registrations made, but it also provided for specifics about the entire process of registration commencing from the filing of the application for registration, examination of the application filed for its veracity and lastly, the final registration. The committee, from the data presented in the report, learnt and noted that the number of registrations of GI has been declining and line of the graph has been following a depressing trend since 2016-17. The committee after taking cognizance of the same, enquired about such declination in India with respect to GI registration. The Department in its reply, informed the committee that, as is the case with the status of registration of patents in the country, on

<sup>2</sup> Review of the Intellectual Property Rights Regime in India: An analysis of the parliamentary committee report, India, available at: <https://www.lexcampus.in/review-of-the-intellectual-property-rights-regime-in-india-an-analysis-of-the-parliamentary-committee-report/> (last visited on June 21, 2022).

<sup>3</sup> Department Related Parliamentary Standing Committee on Commerce 161<sup>st</sup> Report on Review of the Intellectual Property Rights Regime in India (Rajya Sabha 2021, 161) para 1.4.

similar footing, the delay in registrations of GI by the producers and service providers and increase in the pending status of the application is primarily due to the failure or incapability of compliance of the necessary legal requirements and due procedure by the prospective applicants.<sup>4</sup>

The committee, on the subject of Geographical Indication, was apprised by the department that despite following upgraded measures to speed up the process of registration of GIs in India, it has failed to attract the increase of the registrations of the same. The department further informed the committee that there is a clear downtrend in GI registration which is due to the fact that since the applicants do not comply or are not able to comply with all the necessary legal requirements during the process of the registration of a GI. The committee forwarded its recommendation to the department to establish a strong enforceable mechanism by a centralized agency of the country, to keep in check the compliance of products tagged as GI while they are being marketed and commercialised.<sup>5</sup>

Sometimes, the applicants are also not able to understand what documents are compulsorily required to be presented at time of registration and what can be kept as an alternative because it is difficult for them to interpret the legal language used in the procedural requirements under the section of registration. This also accounts for one of the contributing factors as to why the applicants either leave the application procedure in between or do not make an attempt to commence the registration process.

Additionally, the department informed the committee also about the steps it has taken and are being undertaken by the office of GI Registry in order to facilitate and speed up the process of GI registrations in India. The Registry office now has the responsibility of submitting the report of the preliminary examination, in other words, a formality check of the application within 7 days from the receipt of application filed, before the application is forwarded to go undergo a complete detailed examination. The next step is the detailed examination of the application, the report, that is the result of the examination, is formed on the basis of recommendations of the group of GI experts acting as consultants and constituted specifically to evaluate GI application. It is thereafter, delivered to the applicant. It should be complied within 2 months which could be further extended. It, thereafter, proceeds for advertisement within 15 days after the deficiencies in the examination report had been rectified. The Application is electronically notified in the GI Journal and if no objections are filed within 4 months' time, the application proceeds for registration. The whole procedure has reduced the total timeframe of registration from 12 months to 8 or 9 months.<sup>6</sup>

The committee, upon taking a deep survey and analysing the issues put forward by the department regarding registrations of GIs, recommended it to issue advisories from time to time in order to keep the general public updated about the process of registration of GIs, provide the assistance to the applicants

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<sup>4</sup> Department Related Parliamentary Standing Committee on Commerce *161<sup>st</sup> Report on Review of the Intellectual Property Rights Regime in India* (Rajya Sabha 2021, 161) para 15.3.

<sup>5</sup> Recommendations of the parliamentary standing committee on commerce "Review of the Intellectual Property Rights Regime in India", India, available at: <https://conventuslaw.com/report/recommendations-of-the-parliamentary-standing/> (last visited on June 21, 2022).

<sup>6</sup> Department Related Parliamentary Standing Committee on Commerce *161<sup>st</sup> Report on Review of the Intellectual Property Rights Regime in India* (Rajya Sabha 2021, 161) para 15.4.

and also to spread awareness about the GIs, promoting and encouraging the people for recognising the value of their products and its place of origin.<sup>7</sup>

Diligently following the rules laid down by the Geographical Indication Act would ensure that those GI products are not infringed and their image is not compromised in the national as well as international markets. This would also help in preventing economic losses by the GI applicants by saving them from an unfair competition. A stringent and enforceable set of rules would help reduce vague, incomplete and incorrect GI applications.

Advisories are official statements that contain elaborated conditions of a particular process, mostly in the format of light instructions that guides in decision making. It provides a structural and point by point direction for any future issues which they might be interested in indulging in. Different advisories are formed for different services.<sup>8</sup> Forming and releasing important detailed advisories periodically on different levels in states would hopefully navigate not only the citizens, but also the authorities on lower levels by making them knowledgeable and up to date about the latest issues, policies taken up by the central and state governments with respect to GIs. This way, the lower authorities would feel part of the system as well and would put sincere efforts in spreading awareness amongst the people. The lower authorities, thereafter, can be asked to prepare simplified summaries of the same and share it amongst the remotest of the regions of the states, and if and wherever necessary, help the marginalised and illiterate understand these summaries that may lead a few of them to apply for the registration of their product and services, successfully indicating, enhancing and upholding the reputation of the territory from where the products and services originate from.

If we wish to know about what and how much products and services have been registered as a geographical indication in the country, we need to visit the official website of the Office of GI registry, and that too cannot be accessed by everyone in the country. Therefore, the advisories released by the government can provide for details of new and recently registered GI in the country, as well as those registered internationally and belonging to Indian origin, either in the same or different advisory, that can also act as a source of motivation and encouragement to the people for coming forward, learning about this new intellectual property and thereafter, attaining a legally registered GI tag. It can also prevent a lot of infringement issues as the people would be able to check the list provided in the advisory or advisories before they go for the registration of a product of which they hold a misbelief that it originates in their region or territory. Also, the general public can inform of possible infringement cases when they are already aware, for instance, the 'Chikankari Kurtis' is a famous handicraft from Lucknow and not Varanasi and therefore if any seller claims to sell an authentic 'Chikankari Suit' from Varanasi, they would know beforehand about the true source of origin of the product, avoid buying the fake product and inform about the same to the concerned authorities.

For those who aren't able to access the advisories or are not able to understand the language of the advisory report, kiosks or GI counters can be set up at every local level in the state where the different authorities can easily converse with the locals in their native languages and guide them through the

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<sup>7</sup> Department Related Parliamentary Standing Committee on Commerce 161<sup>st</sup> Report on Review of the Intellectual Property Rights Regime in India (Rajya Sabha 2021, 161) para 15.6.

<sup>8</sup> Advisory, USA, available at: <https://www.vocabulary.com/dictionary/advisory#:~:text=An%20advisory%20is%20a%20type,advice%20has%20an%20advisory%20position> (last visited on June 21, 2022).

advisory. They can also occasionally or whenever they find it necessary conduct such workshops for the population seeking information with respect to GI. The government can launch systems for providing certificate courses for basic GI and its registration and the successful students can be the ones vested with the responsibility of offering the services in matters of GI at different such kiosks or counters to others.<sup>9</sup>

The setting up of kiosks (small counter or booth, like the ones set-up during elections), or specific counters dispersing basic and enlightening knowledge about Geographical Indications like its meaning, what can and can't be registered as GI, different kinds of GIs that have been registered in India, the registration process and benefits, the kinds of properties or services that can be protected under the geographical indications, etc.,<sup>10</sup> All of this will not only help in raising awareness of GI but also elevate or push-up the declining number of geographical indications in India. It will further help in decreasing the worrisome status of unemployment in the country since many can be appointed as a boffin or an expert, acting as the dispenser of the knowledge and necessary information about GIs in India, as well as on international levels in these Kiosks and GI counters for easing access of people to the protection provided through GI registration. Also, there exists a huge unclarity between the concepts of Trademark and Geographical Indication, that also adds to the list of reasons of non-registration of GIs since people are not sure whether to proceed for obtaining registration of their products under the laws of Trademark or under the laws of GIs in India.

Earlier, the people used to revolve around the 'babus' and run to the authorities at the GI registry office for every littlest of the things, various confusions they had in their minds and difficulties faced during the filling of the registration application for a GI. The registry office being in Chennai, it was not easy for everyone, especially the people living in the remotest of the areas of the country to reach the office on time or even reach the office at all. This too added as one of the contributing factors for the decline in the number of registration applications for geographical indications.<sup>11</sup>

These would also decrease the burden of the officers inside the registry office as it would make the examination of the precision of the documents submitted quite manageable, and provide sufficient time-frame to the authorities for inspecting efficiently the authenticity of the claims made by the applicants for obtaining the GI through the documents, that would further ensure the smooth running and flow of registration applications. Further, as soon as the adroit and dexterous environment of the registry office of GI comes into light, it would push and automatically invite more applications for registration of GIs, increase the knowledge on GIs and most importantly, bring out such products and services that have been hidden till now and have been deprived from receiving the benefits as one receives upon the award of the title of Geographical Indications.

Commercial potentials of the various or all the GI tagged products and services can be realised through the formation and be taken advantage of by and practical applications of market strategies focusing on

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<sup>9</sup> The value of interactive Kiosks for your business, India, *available at*: <https://www.sam-solutions.com/blog/the-value-of-interactive-kiosks-for-your-business/> (last visited on June 22, 2022).

<sup>10</sup> *Ibid.*

<sup>11</sup> Geographical Indication: Challenges and Suggestions A study in context of Aranmula Kannadi, India, *available at*: <https://www.legalserviceindia.com/legal/article-5698-geographical-indication-challenges-and-suggestions-a-study-in-context-of-aranmula-kannadi.html> (last visited on June 22, 2022).

highlighting the economic benefits of the intellectual property tag. The most profitable and viable strategy for commercially exploit the GI can be the formation of such a marketing strategy that provides for the safest branding policies of the GI products and services.

In a general parlance, marketing can be understood as such game plan devised by the businesses, whether small or well-established that contains blueprint of how the business should proceed to reach to its prospective consumers and product appreciating population. In a much more extensive perspective, the word marketing can be used to present such course of domestic and international trade and exchange of products and services as and when indicated by the requirements and needs of the consumer of different places. Be that as it may, presently the time has changed to making needs and creating market fragments that drives the whole market into the formation of new trends. The marketing strategies makes the brand fabrication reach to such level of living and consumption, that is now essentially related to everyday lives.<sup>12</sup>

Geographical Indications are inseparably linked to places where they are produced and a build-up reputation over a time associated with it. They reflect the unique combination of local natural resources like climate, soil and cultural assets like traditions, know-how and skills often handed from generation to generation, thus establishing a specific link between among the product, local stakeholders.<sup>13</sup> With respect to a tag of Geographical Indication, fostering a brand for a specific product and service will help makers and exporters in successfully taking advantage of the business and commercial abilities of their items they manufacture, produce and sell. A brand assists merchants or business persons with making a novel personality of itself, making it stand separate from the crowd and along these lines gives signals to their prospective clients on such factors that is important and that makes a difference to them, that includes specific characteristic of a product, its origin, its distinguishable or original quality, its utilizations, and so on Brands add an incentive for shoppers as it gives quality confirmation and the advantage of authenticity. They assist with keeping away with the unfair rivalry between competitors engaged in the selling or manufacturing of same or similar products or service in the market from non-certified and counterfeited items. In light of better worth and confirmation generated due to the tag of GI, the purchasers will generally favour these vendors and purchase more from them.<sup>14</sup>

## Conclusion

The significance and need of presenting standard corrections in the systematized regulative rules can be placed on an equivalent platform to an old property that has been anticipating remodelling for quite a while. To keep it in a state where it can have enough strength in it to continue defending itself and the people inside for a reasonable part of future years and endure any blow because of catastrophes or cause even the basic harm to the property because of such calamities, it must have a solid base alongside an advanced, modern recast to it. The house when presented with the most recent overhauls offers more noteworthy strength and vigour to its basic structure whereupon the house has been built and has been standing on till now, while simultaneously reviving the design with the latest ordinary assumptions, as far as innovation bound with advancements, of individuals residing in it. Apart from the above and

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<sup>12</sup> Anson C. J, *Marketing flexibilities in Geographical Indications (GI) and trademark: a Comparative Study*, Vol. 1, International Journal of Marketing, Financial Services & Management Research 100, 101 (2012).

<sup>13</sup> *Ibid.*

<sup>14</sup> Dr. Ruppel W Sharma & Ms. Shraddha Kulhari, *Marketing of GI Products: Unlocking their Commercial Potential*, Centre for WTO Studies, IIFT, (2015).

other the numerous different reasons for remodelling a house, it upgrades the everyday environments for individuals residing inside the house by elevating and helping them build their social status and assists the proprietors with building a respectable impression of themselves in their area of residence.<sup>15</sup> Similarly, if required changes in the legislations governing the provisions of Geographical Indications for instance, providing details about the GI registration in native languages, adopting marketing strategies for maximum commercialisation of GIs, and other such amendments have to be inserted in the statutes in order to save the statute from becoming ineffective and a mere piece of paper. Since GI is regarded as “a poor man’s IPR,” government intervention and regular supervision holds extreme importance to defend the collective rights and interests of the holders of the tag of GI over their services and products.<sup>16</sup> The reach of the government can be achieved through setting up of the Kiosks as suggested in the report. Since the major beneficiaries of the GIs would be the farmers, artisans, it would be very difficult for them to reach to the utmost level of authority of the GI registry office, without any help in between, or of a mediator. There problems could reach directly to the government through the reports prepared by the experts disseminating information through the Kiosks. Respectively, the intention of the government and the authorities can be communicated to prospective applicants through these small counters and they can also be motivated in filing for GI or at-least gaining more information on the same.

Old and outworn regulations, which have been carried out for quite a while in its poor state without an ounce or very minimal amendments, can put the nation, its people, and specifically, its economy in an endangering status and cause the break-down of the long-standing mainstays of good administration. If we were to continue without even the GI act of 1999, series of issues similar to the debacle of ‘Basmati Rice’, would have been a regular news in India<sup>17</sup>. Obsolete laws might prompt a critical resistance of the regulation to work with the at present applicable regulations and guidelines. Further, those antiquated regulations will most likely be unable to toss sufficient spotlight on the new advancements bringing about conflicting and obsolete acts of the country, which might influence away the beneficial foreign investments and investors to take part and look into venture arrangements of that country. While the central or fundamental components of the black and white rule book might remain similar and untouched, the subtleties ought to change as indicated by economical industrial guidelines, hierarchical and institutional necessities, or socio-legal prerequisites. Moreover, the amended policies ought to agree with the nation's central goal, vision, and values.<sup>18</sup>

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<sup>15</sup> Why should you renovate your home and what are the benefits?, India, available at: <https://thearchitectsdiary.com/why-should-you-renovate-your-home-and-what-are-the-benefits/#:~:text=Benefits%20of%20renovating%20your%20home&text=It%20will%20make%20your%20space,you%20will%20generate%20higher%20revenue> (last visited on June 21, 2022).

<sup>16</sup> Ananthu S Hari & Prof. (Dr.) K.D Raju, *Strategies for Geographical Indications Protection: Takeaways from India*, Vol. 3 The NUALS Intellectual Property Law Review 1, 6 (2021).

<sup>17</sup> The protection of Geographical Indications in India- Case study on ‘Darjeeling Tea’, India, available at: <https://www.altacit.com/gi/the-protection-of-geographical-indication-in-india/> (last visited on June 22, 2022).

<sup>18</sup> Kimberly D. Gray, *The importance of reviewing policies and procedures*, Resourcing Edge, (Mar. 12, 2022, 21:27 PM), <https://resourcingedge.com/hr-services/the-importance-of-reviewing-policies-and-procedures/>.





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